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THE CONFLICT BETWEEN STATE TESTS OF TRIBAL ENTITY IMMUNITY AND THE CONGRESSIONAL POLICY OF INDIAN SELF-DETERMINATION

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I. Introduction

Supreme Court and congressional silence have presented state courts with the opportunity to fashion tests to determine the sovereign immunity status of tribal entities. State courts have crafted numerous and varied tests, ranging from Washington's "bright-line rule"[1] to an eleven-factor test recently adopted by the Colorado judiciary.[2] What these state courts fail to recognize is the underlying conflict between the tests they fashion and the self-determination of the Indian tribes the tests affect.

Over the past fifty years, Congress has consistently promoted Indian self-determination and self-government.[3] They have reversed the failed policy of termination and have made numerous enactments promoting the right of tribes to create governments representative of their unique culture and heritage.[4] Because the immunity status of a governmental entity is a reflection of the conceptual and structural makeup of that government,[5] congressional promotion of self-determination necessarily promotes the right and authority of tribes to determine which tribal government entities are entitled to sovereign immunity. Therefore, when states impose their conceptions of the boundaries of sovereign immunity, either in the context of government generally or in the context of how states believe tribal governments should operate, they impinge on tribal self-determination.

When state and federal law conflict, Congress's plenary power over Indian affairs is controlling.[6] Consequently, state courts do not have the power to

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1. Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1279 n.3 (Wash. 2006).
2. State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 405-06 (Colo. App. 2008).
3. *See infra* Part II.A.
4. *See infra* Part II.A.
5. *See infra* Part II.B.
6. *See infra* Part III.B.

make determinations of tribal entity immunity, and any decision that purports to do so is substantially preempted by federal policy.[7]

Part II of this comment recounts Congress's recent history of promoting Indian self-government. Part III sets forth the allocation of power between federal, state, and tribal governments. Part IV examines how various state courts have imposed tests of tribal entity immunity upon tribes. Part V explores the conflict between the state court tests and the balance of power in Indian affairs. Part VI proposes possible solutions to the problem thus revealed. This comment concludes in Part VII.

II. History of Congressional Promotion of Indian Self-Determination

Throughout United States history, Indian law has been subject to the ebb and flow of a fickle Congress. The failure of Indian termination policy ushered in a new era of congressional Indian policy. Over the past fifty years, both democratic and republican congresses have generally united in support of an overarching Indian policy of self-determination and self-government.[8] Supreme Court decisions during this period consistently support this policy,[9] as has every President since 1960.[10] The federal government in its entirety has encouraged tribes to fashion their own forms of government, representative of their unique values and culture.

A. Congressional Promotion of Indian Self-Determination

The new era of self-determination views tribes as the "primary or basic governmental unit of Indian policy" and recognizes the government-to-government relationship between the federal government and Indian tribes.[11] Throughout this era, Congress has sought to treat tribes as capable government units by empowering them to deliver services to their members under federal grant programs.[12] The success of these programs prompted greater Indian involvement in the administration of programs for their benefit.[13] Congress has

7. *See infra* Part V.

8. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 97-113 (Nell Jessup Newton et al. eds., LexisNexis 2005) (citations omitted) [hereinafter COHEN].

9. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

10. COHEN, *supra* note 8, at 98; *see, e.g.*, DOCUMENTS OF UNITED STATES INDIAN POLICY 343-45 (Francis Paul Prucha ed., 3d ed. 2000); 114 CONG. REC. 5518, 5520 (1968).

11. COHEN, *supra* note 8, at 98.

12. *Id.* at 100.

13. *Id.*

also passed numerous statutes empowering tribal governments.[14] These acts of Congress display Congress's desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[15]

The transition to self-determination policy originated when the federal government began allowing tribes to administer federal programs for their own benefit.[16] The first instance of this transition occurred when Congress allowed the Public Works Administration to make grants available to tribes under the Public Works Acceleration Act.[17] Then, during the Great Society, tribes began to receive federal money, which they could use with more freedom because the funding was not tied to the Bureau of Indian Affairs.[18] From these humble beginnings came many far-reaching pieces of congressional legislation enacted with the goal of promoting self-determination. Certain examples of these acts display a special concern for tribes' ability to fashion governments suitable to their unique cultures. A seminal example of this concern is the Indian Civil Rights Act of 1968 (ICRA).[19] ICRA extended many of the provisions of the Bill of Rights to tribes.[20] While Indians sometimes criticized ICRA "as an imposition of Euro-American legal concepts on Indian systems,"[21] Congress passed the law in hopes of advancing Indian self-government.[22] ICRA was careful to exclude certain provisions of the Bill of Rights from incorporation to tribes out of respect for the "unique political, cultural, and economic needs of tribal governments. . . . [F]or example, [ICRA] does not prohibit the establishment of religion, nor does it require jury trials in civil cases."[23]

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14. *See generally id.* at 101; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5 (1987).

15. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

16. Philip S. Deloria, *The Era of Indian Self-Determination: An Overview, in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191, 194 (Kenneth R. Philp ed., 1986).

17. *Id.*

18. *Id.* at 196.

19. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2006).

20. *Id.* § 1302.

21. Deloria, *supra* note 16, at 201; *see also* COHEN, *supra* note 8, at 101-02 (citations omitted).

22. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-64 (1978) (citations omitted).

23. *Id.* at 62-63 (citations omitted).

Congress chose to exclude an Establishment Clause equivalent, in part "to respect the theocratic traditions of some tribes."[24]

ICRA highlighted that many tribal cultures simply cannot be reconciled with European systems of governance. Numerous examples exist of such fundamental differences between European and tribal traditions of governance. For instance, the Hopi traditionally looked to village religious leaders known as Kikmongwi for governance.[25] It would be unthinkable, however, to have such a governmental arrangement in the United States. The profound difference between European and tribal culture is precisely the reason Congress began to give so much deference to tribes' formulations of their own governments.[26]

Congress also explicitly recognized the importance of Native American religion through various enactments. With the passage of the American Indian Religious Freedom Act of 1978,[27] Congress attempted to defend Indian religious practices from federal land use decisions.[28] Later, Congress continued to recognize Indian religions by enacting the Native American Graves Protection and Repatriation Act in 1990.[29]

After ICRA, Congress continued to embrace tribal governments with the passage of the Indian Self-Determination and Education Assistance Act of 1975 (1975 Act),[30] and the Indian Self-Determination Act Amendments of 1994 (1994 Act).[31] The 1975 Act was a prime example of the new faith in Indians' ability to manage their own social programs.[32] This Act was the legislative outcome of President Nixon's pivotal proposal to Congress that they reject the previous policy of termination.[33] The 1975 Act allowed tribal governments to contract to internally manage health, education, economic development, and various other social programs.[34] Congress expressed its commitment to Indian self-determination in the 1975 Act as follows:

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24. COHEN, *supra* note 8, at 953 n.437 (citations omitted).

25. Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 458.

26. *See supra* notes 23-25 and accompanying text.

27. 42 U.S.C. §§ 1996-1996a (2006).

28. *Id.* § 1996.

29. 25 U.S.C. §§ 3001-3013 (2006) (providing federal protection for and recovery of remains and artifacts associated with Indian burial sites).

30. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified in scattered sections of 25 U.S.C.).

31. Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified in scattered sections of 25 U.S.C.).

32. COHEN, *supra* note 8, at 103.

33. H.R. DOC. NO. 91-363 at 2 (1970).

34. COHEN, *supra* note 8, at 103.

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.[35]

Congress reached two important conclusions in the preceding passage. First, it recognized that it is the federal government's special role as guardian to establish Indian policy. Second, in a break from the previous era, Congress also came to realize that the federal government's power to administer tribal programs and economies is often best left unexercised in deference to tribal administration.

The 1994 Act "was the culmination of the successful 1988 Tribal Self-Government Demonstration Project, which had provided selected Indian nations with block grants and far greater budgeting authority."[36] The 1994 Act made the contracts for self-governance of social services available to all tribes that are able to meet certain eligibility criteria.[37] Combined, the 1975 Act and 1994 Act have been referred to as "a declaration of independence for tribal governments."[38]

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35. 25 U.S.C. § 450a(b) (2006).

36. COHEN, *supra* note 8, at 103. The 1988 Tribal Self-Government Demonstration Project, more commonly known as the Indian Self-Determination and Education Assistance Act, is found at Pub. L. No. 100-472, 102 Stat. 2285 (1988).

37. COHEN, *supra* note 8, at 103. To receive contracts, tribes must meet certain reporting and audit requirements and must maintain wage and labor standards. 25 U.S.C. §§ 450c, 450e (2006).

38. COHEN, *supra* note 8, at 103.

Other acts of Congress have also explicitly endorsed tribal self-government.[39] These enactments, in addition to those just described, clearly show the importance of tribal self-determination to Congress. During the self-determination era, even acts seemingly unrelated to anything that could be described as governmental are in fact premised on promoting self-determination.[40] The acts of Congress over the past fifty years evidence the implementation of the explicit policy of Congress to actively promote tribal self-determination.

B. Government Entities as Essential Elements of Tribal Government

If Indian tribes are to be allowed to fashion governments of their choosing, they must necessarily be allowed to enforce their own conception of government entity immunity. Government entities receive immunity because they come under the umbrella of the government itself.[41] Whether these entities are under this umbrella is a determination of governmental structure, which is a question for the political society empowering that government.[42] It is therefore essential that Indian tribes be able to decide what entities are under the umbrella of their governments if they are to be able to fashion the governments they desire.

In *Adams v. Murphy*,[43] the Eighth Circuit explained that "political societies, like private corporations, can only act through agents, and to constrain those agents is to constrain the society."[44] This statement displays the importance of the ability to extend immunity to government agents to ensure the functioning of a government. Indeed, tribes have already shown themselves to be capable of utilizing their inherent sovereign immunity selectively to accomplish their goals. For example, "[s]ome tribes have created separate businesses entities that are not immune from suit. This has been a particularly useful tool for tribes operating off-reservation businesses."[45] Just as American government values have been important to the development of state and federal government entity

39. *E.g.*, Tribally Controlled Schools Act, 25 U.S.C. §§ 2501-2511 (2006); Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (2006) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.").

40. *See infra* notes 192-93 and accompanying text.

41. *See infra* notes 43-44, 168, 170 and accompanying text.

42. *See infra* notes 43-44, 165-70 and accompanying text.

43. 165 F. 304 (8th Cir. 1908).

44. *Id.* at 308.

45. COHEN, *supra* note 8, at 1286.

immunity,[46] so too must Native American cultural values be allowed to control the extent of governmental immunity if tribes are to truly have governments representative of their values.

III. Balance of Power in Indian Affairs

The power of states over tribes has increased in recent years; however, it is well settled that Congress is the supreme arbiter in Indian affairs.[47] Congressional power is exclusive and preemptive, and the inherent power of tribes serves only to increase its potency as against states.[48]

A. Congressional Plenary Power

Congressional power over Indians has been culled from the text of the Constitution – namely, the Treaty Clause[49] and the Indian Commerce Clause[50] – and from the inherent powers of national sovereignty.[51] Combined, these sources provide Congress with what is described as "plenary power" over Indian affairs.[52]

Early in the history of the United States, the Treaty Clause was the primary tool used by Congress to interact with Indian tribes.[53] While the use of treaties has diminished relative to other methods,[54] judicial interpretation of the treaty power sheds light on the vast breadth of congressional power. In *Lone Wolf v. Hitchcock*,[55] the Supreme Court applied a principle from the Chinese Exclusion Case[56] to Indian treaties by finding that Congress could "pass laws in conflict with treaties made with the Indians."[57] Essentially, *Lone Wolf* endowed Congress with the power to unilaterally abrogate Indian treaties. *Lone Wolf*

46. *See infra* notes 151-64 and accompanying text.
47. *See infra* Part III.A-B.
48. *See infra* Part III.A-C.
49. U.S. CONST. art. II, § 2, cl. 2.
50. U.S. CONST. art. I, § 8, cl. 3.
51. United States v. Kagama, 118 U.S. 375, 379 (1886).
52. *E.g.*, United States v. Wheeler, 435 U.S. 313, 331 (1978); Morton v. Mancari, 417 U.S. 535, 551 (1974). *But cf.* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35-36 (1996) (criticizing the theoretical origins of the doctrine of plenary power).
53. COHEN, *supra* note 8, at 393 (citation omitted).
54. *See id.* at 395 (citations omitted).
55. 187 U.S. 553 (1903).
56. Chae Chan Ping v. United States, 130 U.S. 581 (1889).
57. *Lone Wolf*, 187 U.S. at 565-66.

went further still in its ratification of congressional power by holding that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, [and is] not subject to [] control[] by the judicial department of the government."[58] The political question doctrine of *Lone Wolf* has since been limited, largely by *United States v. Sioux Nation of Indians*,[59] but there is still broad deference to the political branch, and *Lone Wolf* remains good law with respect to the enormous power of Congress under the Treaty Clause.[60]

In recent times, the Indian Commerce Clause has assumed a role as the central justification for legislation regarding Indian tribes.[61] The Indian Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[62] Congress's expansive power under the Indian Commerce Clause is consistent with the significant expansion of congressional power under the Interstate Commerce Clause during the twentieth century.[63] Even so, Chief Justice Marshall observed that the Commerce Clause is "divided into three distinct classes – foreign nations, the several states, and Indian Tribes" – and that in forming Article I, section 8, "the convention considered them as entirely distinct."[64] This concept of wholly separate clauses within the Commerce Clause has allowed the Indian portion of the Clause to take on an even broader scope than the Interstate portion in recent years.[65]

Initially, the Indian Commerce Clause gave more limited power than it does today; "[h]istorically, the clause was the basis for the Trade and Intercourse Acts regulating trade" with Indians.[66] But when the constitutionality of the

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58. *Id.* at 565.

59. 448 U.S. 371, 413 (1980) (noting that any suggestion that congressional action is not subject to judicial review is no longer valid).

60. *See* Frickey, *supra* note 52, at 44 (suggesting that Congress's plenary power over Indian affairs is "immune from meaningful scrutiny under other constitutional provisions that ordinarily constrain congressional authority").

61. COHEN, *supra* note 8, at 398 & n.58 (citations omitted).

62. U.S. CONST. art. I, § 8, cl. 3.

63. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

64. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989) (applying Chief Justice Marshall's language from *Cherokee Nation* and finding that "the Interstate Commerce and Indian Commerce Clauses have very different applications").

65. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996).

66. COHEN, *supra* note 8, at 396.

Major Crimes Act[67] – which expanded federal criminal jurisdiction over Indians in Indian Country – was challenged in *United States v. Kagama*, the Supreme Court found no power in the Indian Commerce Clause to pass the Act.[68] The Court held that "it would be a very strained construction of [the Indian Commerce Clause] that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes."[69]

Subsequent cases have questioned this strained conception of Indian Commerce Clause power to the point that *Kagama* no longer appears to be a correct application of the Clause. In *United States v. Lomayaoma*,[70] the Ninth Circuit did not accept *Kagama*'s holding that there was no textual basis for the Major Crimes Act.[71] In direct opposition to *Kagama*, the *Lomayaoma* court found that "Congress did not exceed its powers under the Indian Commerce Clause when it enacted the Indian Major Crimes Act in 1885."[72] The decision in *Lomayaoma* followed shortly after the Supreme Court decided *Seminole Tribe of Florida v. Florida*, where the Court stated that, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."[73] Even after *United States v. Lopez*,[74] the question of "whether the newly re-affirmed limitations of the Interstate Commerce Clause also impose limits on federal power under the Indian Commerce Clause"[75] seems to have been answered by courts in the negative.[76] As a result of the cases following *Kagama*, the Indian Commerce Clause presently enjoys broad applicability, far exceeding the colloquial definition of commerce and even exceeding the post-*Lopez* definition of commerce under the Interstate Commerce Clause. The Indian Commerce Clause is now applied as a basis for regulating commerce,

67. 18 U.S.C. § 1153 (2006).

68. United States v. Kagama, 118 U.S. 375, 378-79 (1886).

69. *Id.*

70. 86 F.3d 142 (9th Cir. 1996).

71. *Id.* at 146.

72. *Id.*

73. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996).

74. 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 and providing the first limitation on Commerce Clause power since the New Deal).

75. United States v. Doherty, 126 F.3d 769, 778 n.2 (6th Cir. 1997) (citing United States v. Lopez, 514 U.S. 549 (1995); *Seminole Tribe*, 517 U.S. 44 (1996)).

76. *See Lomayaoma*, 86 F.3d at 146.

expanding criminal jurisdiction, "protecting tribal cultural resources," and regulating Indian gambling.[77]

One of the earliest bedrock Supreme Court cases on Indian law held that Congress's powers of war and peace, coupled with its powers to treaty and regulate commerce with the Indian tribes, comprehended "all that is required for the regulation of our intercourse with Indian[s]."[78] Despite these wide-ranging textual powers, the Supreme Court still found the need to further expand the power of Congress by recognizing inherent or implied powers. These powers generally emanate from the *Kagama* decision. The *Kagama* Court, in addition to finding no Indian Commerce Clause power to pass the Major Crimes Act, found no other textual basis for the Act.[79] Nevertheless, the Supreme Court found that Congress could enact the Major Crimes Act based on its inherent power as the guardian of the Indians.[80] The *Kagama* decision and inherent power have been criticized in recent years for their condescension and lack of constitutional authority.[81] Consequently, courts have tended to stray from using Congress's inherent power as a basis for upholding legislation and have expanded Indian Commerce Clause powers to fill the void.[82]

The inherent power of Congress has not been definitively disposed, but it is now frequently couched in different terms to give it a more textual justification[83] and erase its patronizing origins. In 1973, the Supreme Court stated that "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[84] More recently, in 2004, the Court "[i]dentified the Indian Commerce Clause and the Treaty Clause as sources of that [plenary] power."[85]

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77. *See generally* COHEN, *supra* note 8, at 397 (citation omitted).

78. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

79. United States v. Kagama, 118 U.S. 375, 378-79 (1886).

80. *Id.* at 383-85.

81. United States v. Doherty, 126 F.3d 769, 778 n.2 (6th Cir. 1997) (citing Frickey, *supra* note 52, at 34-35). *See generally* COHEN, *supra* note 8, at 397 (citation omitted).

82. *Doherty*, 126 F.3d at 778 n.2; *see also* United States v. Lomayaoma, 86 F.3d 142, 146 (9th Cir. 1996).

83. *Cf.* Frickey, *supra* note 52, at 44 (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)) (noting that the plenary power of Congress is routinely assumed to be authorized by Article I); COHEN, *supra* note 8, at 398.

84. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 n.7 (1973).

85. United States v. Lara, 541 U.S. 193, 200 (2004) (citations omitted).

Whatever its source, federal power is clearly comprehensive in the field of Indian affairs. Congress has the power "to legislate on [matters of] health, safety, and morals within Indian country"[86] – even the power to terminate the federal-tribal relationship altogether[87] – and it has in the past imposed its will directly on tribes without necessitating their consent.[88] Furthermore, it remains questionable whether this power is even subject to any meaningful judicial scrutiny.[89]

B. Exclusive Congressional Plenary Power

In addition to its plenary nature, Congress's power is also supreme to all other branches of government.[90] Congress's power is described as "plenary and exclusive"[91] – "[t]he term 'plenary' indicates the breadth of congressional power to legislate in the area of Indian affairs, and the term 'exclusive' refers to the supremacy of federal over state law in this area."[92] Particularly, for the purposes of this comment, it is important to recognize the preemptive power of federal actions over state actions.

The supreme power of Congress relative to states has been an element of Indian law beginning with the first Indian law cases. In *Worcester v. Georgia*,

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86. COHEN, *supra* note 8, at 398; *see, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (2006); Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (codified in 18 U.S.C. § 1170 (2006) and 25 U.S.C. §§ 3001-3013 (2006)) (protecting tribal cultural resources); Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (2006) (applying certain provisions in the Bill of Rights to tribes); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) (noting the power of Congress to unilaterally abrogate treaties with Indian tribes).

87. *E.g.*, Klamath Termination Act, 25 U.S.C. §§ 564 to 564w-2 (2006).

88. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 537-38 (1975) (noting that Public Law 280 was originally imposed on Indian tribes regardless of their preference); *Lone Wolf*, 187 U.S. at 565-66. *But cf.* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 237-46 (2002) (arguing that there is no justifiable basis whatsoever for the exercise of federal power over Indian tribes without their consent).

89. *See* Frickey, *supra* note 52, at 44 (suggesting that Congress's plenary power over Indian affairs is "immune from meaningful scrutiny under other constitutional provisions that ordinarily constrain congressional authority"); *see also* United States v. Sandoval, 231 U.S. 28, 46 (1913) (suggesting that "Congress's power to determine the tribal status of groups of people is merely subject to the requirement that the determination not be arbitrary").

90. U.S. CONST. art. VI, cl. 2.

91. Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470 (1979).

92. COHEN, *supra* note 8, at 398.

Samuel Worcester appealed his conviction for violating a Georgia law requiring him to obtain a license from the state to reside in Indian Country.[93] The Supreme Court overturned the prior Georgia decision and held that the Georgia law in question was invalid because it attempted to govern Indian affairs.[94] In his opinion, Chief Justice Marshall recounted the deadlock that had resulted under the Articles of Confederation.[95] Marshall noted that "[t]he ambiguous phrases which follow the grant of power to the United States, were so construed by the states of North Carolina and Georgia as to annul the power itself."[96] The adoption of the new Constitution eliminated the Articles' purported state-based limitations on federal power.[97] Therefore, the Supreme Court held that state laws – particularly those of Georgia in this case – would have no force within Indian territory.[98] To support this decision, Chief Justice Marshall stated,

> [T]he acts of Georgia are repugnant to the constitution, laws, and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.[99]

After the decision, Georgia refused to obey the Court's order.[100] Despite this insubordination, the Supreme Court in *Williams v. Lee* reiterated that "the basic policy of *Worcester* has remained."[101] The *Williams* Court admitted that courts had modified the principles of *Worcester* over the years, but it still invalidated attempted state court jurisdiction over an action against an Indian on his reservation.[102] The Supreme Court has consistently reaffirmed the essential holding of its foundational decision in *Worcester*.[103]

The finding of supreme federal power in *Worcester* has borne the important doctrine of federal preemption of state power over Indian affairs. Numerous

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93. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538-40.
94. *Id.* at 561-63.
95. *Id.* at 558-59.
96. *Id.*
97. *Id.* at 559.
98. *Id.* at 561.
99. *Id.*
100. Williams v. Lee, 358 U.S. 217, 219 (1959).
101. *Id.*
102. *Id.* at 219, 223.
103. *See, e.g., id.* at 219-20; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 168-69 (1973).

instances of congressional action have indicated that states do not have authority over Indian affairs in Indian Country absent congressional authorization. For example, Public Law 280[104] provides the federal government's consent to states' assumption of jurisdiction, implying that states would not otherwise possess such jurisdiction.[105] Furthermore, *Williams* relied more on the power of tribal preemption than federal preemption, and the case also represents the *Worcester* proposition that states generally do not have power over Indians in Indian Country without authorization from the tribe or Congress. The *Williams* Court stated that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," and "when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied."[106]

Federal preemption, which seemed relatively insignificant compared to tribal preemption in *Worcester* and *Williams*, is now the focus of courts in recent years. Federal preemption analysis, focusing on treaties and statutes, with mere passing reference to inherent tribal power and the infringement test developed in *Williams*, often determines contemporary cases.[107] Two Supreme Court cases involving the Arizona State Tax Commission which followed *Williams* serve to illustrate this point: *Warren Trading Post Co. v. Arizona State Tax Commission*[108] and *McClanahan v. Arizona State Tax Commission*.

Warren Trading Post, the first case decided, involved the question of whether Arizona could tax "the gross proceeds of sales, or gross income" of a non-Indian trading post in Indian Country, specifically the Navajo Indian Reservation.[109] The Court examined the enactments of Congress regulating Indian traders and found that "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[110] The opinion makes no reference to the preemptive power of the

104. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321-1326 (2006); 28 U.S.C. § 1360 (2006)).

105. 25 U.S.C. §§ 1321(a), 1322(a).

106. *Williams*, 358 U.S. at 220-21.

107. *McClanahan*, 411 U.S. at 172.

108. 380 U.S. 685 (1965).

109. *Id.* at 685-86.

110. *Id.* at 690.

tribe. This case demonstrates the ability of the federal government to totally preempt state action by saturating the area with federal regulation.

The question for the Supreme Court in *McClanahan* was whether Arizona could "impose its personal income tax on a reservation Indian whose entire income derives from reservation sources."[111] The Court found the *Williams* infringement test to be inapplicable by characterizing it as primarily useful in situations involving non-Indians, which is not present in *McClanahan* because only Indians were involved.[112] The Court instead focused on the various federal statutes and found that they did not grant Arizona this power to tax reservation Indians and indicated that Congress did not think Arizona had any such residual power.[113] Therefore, in addition to preemption, *McClanahan* demonstrates that certain state acts concerning Indians are not valid without an affirmative grant of power from the federal government.

This final point from *McClanahan* illustrates that the presumption in the preemption analysis in Indian law is the opposite of that used in preemption analysis in other fields of law. Ordinarily, the presumption is that the state will prevail unless contrary federal law is available.[114] In the field of Indian law, the presumption is that state power does not apply in Indian Country without a showing of sufficient congressional intent to grant jurisdiction to the state.[115]

Warren Trading Post and *McClanahan* amply demonstrate the affirmative preemptive power of Congress; however, explicit congressional intent to preempt state action is not a necessary element of federal preemption analysis. In *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, the Supreme Court, using federal preemption analysis, invalidated a tax on a contractor working to build a school for Indians.[116] One argument furnished by the Bureau of Revenue in opposition to federal preemption was that no federal acts specifically expressed an intention to preempt the state's authority to impose the tax in question.[117] The Supreme Court flatly rejected this implication and, as a guiding principle in preemption cases, asserted that "federal pre-emption is not limited to those situations where Congress has

111. *McClanahan*, 411 U.S. at 165.

112. *Id.* at 179-80.

113. *Id.* at 175-77.

114. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1176 (3d ed. 2000).

115. COHEN, *supra* note 8, 526-27 (citations omitted); *see also* Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982) ("The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas.").

116. *Ramah*, 458 U.S. at 846-47.

117. *Id.* at 843.

explicitly announced an intention to pre-empt state activity."[118] Later, the Court seemed to specifically apply this concept to the federal policy of promoting Indian self-government in *Iowa Mutual Insurance Co. v. LaPlante*, stating that "[t]he federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute."[119]

Ramah also stands for the proposition that state action need not specifically interfere with certain provisions of a federal law for the state action to be preempted. The *Ramah* Court essentially based its decision on the fact that the tax could undermine the "clearly-expressed federal interest in promoting" Indian education because the tax would raise the cost to the tribe of building the school.[120] Therefore, federal preemption may be impliedly derived simply from congressional acts promoting a certain policy objective.

Taken as a whole, *Ramah* does not require any explicit congressional pronouncement of intent to preempt the state action in question and does not even require that the state action specifically interfere with any provision of any congressional act. The converse implication is that *Ramah* permits federal preemption in cases where state action is simply inconsistent with the expressed policy of Congress.

The Supreme Court has recognized broad federal powers of preemption in Indian law based on the underlying policy of *Worcester* and contemporary cases such as *Warren Trading Post*, *McClanahan*, and *Ramah*. In these cases – all decisions of the Supreme Court – federal preemption analysis has developed to allow Congress to preempt state action by saturating the area of action with federal regulation, by showing an absence of congressional delegation of power to states, and by showing the action's inconsistency with congressional policy. Furthermore, it is presumed that state action does not apply in Indian Country.[121]

C. Tribal Preemptive Powers

While Congress has plenary and exclusive power over Indians, the inherent power of tribes cannot be discounted. At the same time that the Supreme Court

118. *Id.*
119. 480 U.S. 9, 14 (1987).
120. *See Ramah*, 458 U.S. at 841-42.
121. *See supra* note 115 and accompanying text.

was recognizing the supreme preemptive power of the federal government over Indian affairs, it was also reaffirming the preemptive power of tribes.[122]

The Supreme Court has trended toward emphasizing federal preemption rather than tribal preemption.[123] Indeed, *McClanahan* characterized tribal sovereignty as a mere "backdrop" against which federal preemption must be applied.[124] This explicit statement of Supreme Court policy coincided with similar jurisprudential approaches to resolving preemption cases. For example, in *Warren Trading Post* and *McClanahan*, the Court chose to focus on finding federal preemption rather than tribal preemption.[125]

Despite these assaults, tribal preemption is still a valid approach. Following its decisions in *Warren Trading Post* and *McClanahan*, the Supreme Court confirmed that tribal preemption could still be employed as an entirely independent bar to state action.[126] The Court found that tribal power could invalidate a state law if the law "infringe[d] on the right of reservation Indians to make their own laws and be ruled by them."[127]

IV. State Judicial Interpretation of Tribal Entity Immunity

Similar to foreign nations, "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."[128] Their immunity predates even that of the United States, as they have retained

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122. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561-62 (1832) (finding that the laws of Georgia have no effect in Indian territory unless in conformity with actions of Congress or with the assent of the tribe).

123. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

124. *Id. But see Ramah*, 458 U.S. at 848 (Rehnquist, C.J., dissenting) (suggesting that when a "state tries to interfere with a tribe's ability to govern its members," tribal sovereignty is more than a mere backdrop); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980) (citations omitted) (finding that tribal sovereignty, in addition to operating as an independent bar on state action, is an "important" backdrop to Congressional preemption analysis because "traditional notions of Indian self-government are so deeply ingrained in our jurisprudence").

125. *See supra* notes 107-15 and accompanying text.

126. *Bracker*, 448 U.S. at 142-43 (citations omitted).

127. *Id.* at 142 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) (citing Fisher v. District Court, 424 U.S. 382 (1976)); *Williams*, 358 U.S. at 220) ("If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.").

128. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)); Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

those natural rights of sovereignty not abrogated by Congress.[129] Therefore, "suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."[130]

The growing economic sophistication of Indian tribes has led them to create or recognize increasing numbers of tribal government entities.[131] As with state and federal government entities, tribal government entities have found their way into the legal system, presenting courts with the question of their sovereign immunity status.

A. The State Tests

In 2008, the Colorado Court of Appeals in *State ex. rel. Suthers v. Cash Advance and Preferred Cash Loans* faced the question of whether two companies should be granted tribal immunity.[132] To answer the question, the Court of Appeals decided to fashion a test setting forth certain factors to be considered.[133] In its quest to determine the proper test for Colorado, the Court of Appeals examined the tests in use in several other states, including New York, Minnesota, Arizona, Alaska, Washington, and Wisconsin.[134]

Colorado's examination revealed the truly disparate nature of the approaches taken by the several states that have addressed the issue of tribal entity immunity.[135] The Supreme Court of Washington fashioned the most concise test, which may also be the most objectionable, in *Wright v. Colville Tribal Enterprise Corp.* The plurality in *Wright* created a test, later referred to in *Suthers* as the "bright-line rule,"[136] which simply considered whether the entity was "owned and controlled by a tribe, and created under its own tribal laws."[137] This objective test does not in any way account for tribal intent. Alaska adopted a similarly limited test in *Runyon v. Association of Village Council*

129. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

130. *Citizen Band Potawatomi*, 498 U.S. at 509 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

131. COHEN, *supra* note 8, at 1280-81 (citations omitted).

132. 205 P.3d 389, 394 (Colo. App. 2008).

133. *Id.* at 400, 406.

134. *Id.* at 403-05.

135. *Id.* at 405-06.

136. *Id.* at 405.

137. Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1279 (Wash. 2006).

Presidents,[138] but other courts have not adopted it. The Supreme Court of Alaska was primarily concerned with protecting the tribal treasury.[139] Therefore, Alaska considers the financial relationship between the entity and the tribe to be of paramount importance.[140]

Other states have adopted more encompassing tests. Minnesota employs a three-factor test that asks

> (1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; (2) whether the tribe and business entity are closely linked in governing structure and other characteristics; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.[141]

In *Ransom v. St. Regis Mohawk Education and Community Fund*,[142] New York contended that "no set formula is dispositive," but listed a number of factors that courts should generally consider.[143] Like Minnesota and New York, Arizona and Wisconsin also consider a number of factors in reaching a conclusion.[144] Ironically, the most factor-intensive test was developed by the dissent in *Wright*, and included eleven relevant factors culled from *Ransom*, *Runyon*, *Gavle*, and *Dixon*.[145]

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138. 84 P.3d 437 (Alaska 2004).

139. *Id.* at 440.

140. *Id.*

141. Gavle v. Little Six, Inc., 555 N.W.2d 284, 294-95 (Minn. 1996).

142. 658 N.E.2d 989 (N.Y. 1995).

143. *Id.* at 992.

144. *See, e.g.*, McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 692 N.W.2d 247, 251-52 (Wis. Ct. App. 2004) (listing factors to be applied in Wisconsin as "(1) [w]hether the corporation is organized under the tribe's laws or constitution; (2) [w]hether the corporation's purposes are similar to or serve those of the tribal government; (3) [w]hether the corporation's governing body is comprised mainly or solely of tribal officials; (4) [w]hether the tribe's governing body has the power to dismiss corporate officers; (5) [w]hether the corporate entity generates its own revenue; (6) [w]hether a suit against the corporation will affect the tribe's fiscal resources; (7) [w]hether the corporation has the power to bind or obligate the funds of the tribe; (8) [w]hether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments; and (9) [w]hether the corporation is analogous to a tribal governmental agency or instead more like a commercial enterprise instituted for the purpose of generating profits for its private owners"); Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1109 (Ariz. 1989) (declining to adopt a specific test, but finding that all of the business's activities were unconnected "with tribal self-government or the promotion of tribal interests").

145. Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1288 (Wash. 2006) (Johnson,

Colorado ultimately decided to adopt the eleven-factor test suggested by the dissenters in *Wright*, finding the plurality approach prohibitively restrictive.[146] It is clear from the factors that Colorado intended to broadly consider the aspects of each entity to determine whether it is truly an "arm of a tribe."[147] What is also clear from Colorado's analysis is just how many very different tests are being developed by state courts.

B. Comparison of State Tests for Indian Entities and State Entities

Effectively, the state court tests represent an apparently unconscious application of European values to Indian tribes. The history of European contact with Indian tribes is a history of colonization.[148] Many of the seminal theories in Indian law, including the almost artificial creation of the "domestic dependent nation" status, continue to reflect and perpetuate European influence;[149] however, it has become clear during the era of Indian self-determination that Congress intends to reverse this trend.[150] Unfortunately, it is sometimes challenging for courts to break their ingrained habits. To determine if and to what extent the application of state court tests of sovereign immunity to tribal entities is colored by Anglo-American legal heritage, it is necessary to trace the genesis of the doctrine of sovereign immunity and its perpetuation in American common law after the Revolutionary War.

J., dissenting) (noting the eleven factors to be applied as "(1) whether the entity is organized under the tribe's laws or constitution, (2) whether the entity's purposes are similar to or serve those of the tribal government, (3) whether the entity's governing body is composed mainly of tribal officials, (4) whether the tribe has legal title to or owns property used by the entity, (5) whether tribal officials exercise control over the administration or accounting activities of the organization, (6) whether the tribe's governing body has the power to dismiss members of the organization's governing body, (7) whether the entity generates its own revenue, (8) whether a suit against the entity will affect the tribe's finances and bind or obligate tribal funds, (9) the announced purpose of the business entity, (10) whether the entity manages or exploits tribal resources, and (11) whether protection of Indian assets and tribal autonomy will be furthered by extending immunity to the entity").

146. State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 405-06 (Colo. App. 2008).

147. *Id.*

148. *See generally* COHEN, *supra* note 8, at 10-25 (citations omitted).

149. 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, 683 (2002).

150. *See supra* notes 22-40 and accompanying text.

The doctrine of sovereign immunity originated in English common law from the theory that the king "could do no wrong."[151] It found its initial exposition in the case of *Russell v. Men of Devon*.[152] In this case, Russell sued all males dwelling in the County of Devon for damages to his wagon sustained as a result of a poorly maintained bridge.[153] The Court of King's Bench determined that the County had a duty to maintain the bridge, but found the action not to lie for various reasons that ultimately formed the original common law justification for the doctrine of sovereign immunity.[154] The reasons given by the court were that

> (1) [t]o permit it would lead to "an infinity of actions," (2) there was no precedent for attempting such a suit, (3) only the legislature should impose liability of this kind, (4) even if defendants are to be considered a corporation or quasi-corporation there is no fund out of which to satisfy the claim, (5) neither law nor reason supports the action, (6) there is a strong presumption that what has never been done cannot be done, and (7) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."[155]

This theory was discredited in American law after the Revolutionary War ended the reign of monarchs in America.[156] Yet, despite this apparent break with medieval Old World mores, the doctrine still managed to take hold in America, beginning with the 1812 Massachusetts case *Mower v. Inhabitants of Leicester*.[157] Many other theories have since been advanced in an attempt to justify sovereign immunity's continued existence in American common law;[158] however, sovereign immunity has been widely criticized as irrational and

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151. Denver v. Madison, 351 P.2d 826, 835 (Colo. 1960); Stone v. Ariz. Highway Comm'n, 381 P.2d 107, 109 (Ariz. 1963).

152. (1788) 100 Eng. Rep. 359 (K.B.).

153. *Id.* at 360-61.

154. *See generally Men of Devon*, (1788) 100 E.R. 359 (K.B.).

155. Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795, 796-97 (Minn. 1962); *see also id.*

156. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 95 (1996); Evans v. Bd. of Cnty. Comm'rs of El Paso Cnty, 482 P.2d 968, 969 (Colo. 1971); *Stone*, 381 P.2d at 109; *Madison*, 351 P.2d at 833-34; Edwin M. Borchard, *Government Responsibility in Tort, VI*, 36 YALE L.J. 1, 39 (1926).

157. 9 Mass. (1 Tyng) 247 (1812).

158. *See generally Seminole Tribe*, 517 U.S. at 95-99; *Spanel*, 118 N.W.2d at 799.

unjust,[159] and "[m]ost writers and cases considering this fact have claimed that its only basis of survival has been on grounds of antiquity and intertia."[160] Indeed, some of the very justifications used in *Men of Devon* have since been used as criticism.[161] Practical justifications for the perpetuation of the doctrine typically focus on its utility in "protect[ing] the taxpayers against excessive fiscal burdens."[162] This latter justification has been used, particularly by state legislatures, as a basis for reinstating immunity in jurisdictions where courts have come to reject the doctrine.[163]

Sovereign immunity, to the extent it is still upheld in American jurisdictions, is thus likely based on theories inconsistent with the concept of Indian self-government. One possibility is that sovereign immunity is based on a theory derived from the medieval European concept of monarchy – the same theoretical mindset that lent justification to the doctrine of discovery.[164] The irony of applying such a concept to tribal governments would be profound. Another possibility is that the doctrine could be based on contemporary American concepts of the proper role and liability of government. This basis would hardly be less inconsistent with allowing *Indians* to determine the scope of their own governments than the previous possibility, though certainly less emotionally evocative. The essential point is that if state courts apply the same justifications used to develop American concepts of sovereign immunity to tribes, they are not only interfering with Indian self-determination, but are also likely to be applying Anglo-American notions of the role of government to Indian tribes. A comparison of Colorado's concept of sovereign immunity for state and tribal entities should shed light on how this problem develops in practice.

In Colorado, the state supreme court upheld state sovereign immunity until overruling it in three contemporaneous decisions during the 1971 term.[165] Following these decisions, the Colorado General Assembly enacted the

159. *Stone*, 381 P.2d at 109; *Evans*, 482 P.2d at 972.

160. *Stone*, 381 P.2d at 109; *see also Seminole Tribe*, 517 U.S. at 98.

161. *See* Barker v. City of Santa Fe, 136 P.2d 480, 482 (N.M. 1943).

162. COLO. REV. STAT. § 24-10-102 (2009).

163. *See* Holytz v. City of Milwaukee, 115 N.W.2d 618, 625 (Wis. 1962); *see, e.g.*, COLO. REV. STAT. § 24-10-102.

164. *See generally* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

165. *See* Evans v. Bd. of Cnty Comm'rs of El Paso County, 482 P.2d 968 (Colo. 1971); Fournoy v. Sch. Dist. No. One in Denver, 482 P.2d 966 (Colo. 1971); Proffitt v. Colorado, 482 P.2d 965 (Colo. 1971).

Colorado Governmental Immunity Act (CGIA) in 1973.[166] By this enactment, the General Assembly, essentially for public policy reasons, exercised its power to partially restore the doctrine of sovereign immunity.[167] The General Assembly specifically recognized that "the state and its political subdivisions provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions."[168]

The CGIA restored sovereign immunity by making it applicable to public entities.[169] Section 103 of the CGIA sets forth the definition of a "public entity";[170] however, Colorado state courts are still forced to interpret and apply this term in practice. *Hartman v. Regents of the University of Colorado*[171] asked the Colorado Court of Appeals to determine whether the University of Colorado, as "a state-created entity," was an "arm of the state" entitled to sovereign immunity in Colorado state courts.[172] The *Hartman* court noted that the Colorado Supreme Court had adopted a new test to determine whether an entity was an arm of the state for sovereign immunity purposes in *Simon v. State Compensation Insurance Authority*.[173] The *Simon* test required balancing three factors: "how the entity is characterized by state law; the level of autonomy and independence the entity enjoys from the control of the state; and whether any judgment against the entity will ultimately be paid by the state."[174]

Colorado's eleven-factor test for tribal entities is much more expansive than its three-factor test for state immunity.[175] The final factor in the tribal test, "whether protection of tribal assets and autonomy will be furthered by extending immunity to [the tribal entity]," and the language preceding the tribal test, suggest that the expansiveness of the test represents the state's good-faith effort to protect tribes;[176] however, good faith is not the problem. All state court tests for tribal sovereign immunity go beyond state power, but it is important

166. COLO. REV. STAT. §§ 24-10-101 to -120.

167. Stephen v. City & Cnty. of Denver, 641 P.2d 295, 296 (Colo. App. 1981); COLO. REV. STAT. § 24-10-102.

168. COLO. REV. STAT. § 24-10-102.

169. *Id.* § 24-10-106.

170. *Id.* § 24-10-103(5).

171. 22 P.3d 524 (Colo. App. 2000).

172. *Id.* at 526.

173. 946 P.2d 1298 (Colo. 1997).

174. *Hartman*, 22 P.3d at 527.

175. State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 406 (Colo. App. 2008).

176. *Id.* at 405-06.

to note that state court tests are both exercises of state power on tribes and also effectively applications of European-American legal concepts. It is unsurprising that all three factors in the test for state government entities are among the factors in the test for tribal entities. American judges have been schooled in American legal theories, so state courts can logically be expected to incorporate their deeply ingrained theories of government to tribes.

The difficulty that American judges would encounter in applying tribal governance theories is manifest in the tribal entity immunity context. In *Suthers*, the court noted that an entity is more likely to be shielded by sovereign immunity if the entity furthers a basic governmental objective.[177] Even assuming this to be true from the tribal perspective, Colorado has no way of knowing which objectives tribal members deem worthy of immunity and the weight the tribe would place on particular objectives in an immunity determination. A tribe may find that promoting housing is a much more central duty of tribal government than, say, promoting education. A tribe may even decide to apply an entirely different framework for justifying sovereign immunity than those of European-based legal systems.

The preceding analysis of Colorado's tests for state and tribal immunity shows why the tribal tests are at least in part an application of the state's concept of government to tribes. In other words, they represent state action upon tribal governments. It is unlikely that a state court could suitably apply a tribe's concept of the role of sovereign immunity in its governmental structure and it is nearly impossible for a state court to ignore its traditional European-American legal predispositions.

V. Analysis of the Conflict Between These Bodies of Law

Congress enjoys plenary power over relations with Indian tribes.[178] It has utilized this authority to empower tribes to self-govern.[179] State courts have, perhaps unwittingly, begun to encroach upon congressional policy by authoring the various tests of tribal entity immunity. Ironically, it is perhaps due to Congress's policy of enabling self-determination that tribes have created so many governmental entities. The long and comprehensive history of

177. *Id.* at 405.

178. United States v. Kagama, 118 U.S. 375, 383-84 (1886); Morton v. Mancari, 417 U.S. 535, 551-52 (1974); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

179. *See supra* Part II.

congressional intent to promote Indian self-determination is sufficient to preempt states' imposition of tests on entities that may be elements of the tribal government. Supreme Court decisions applying federal preemption analysis support this assertion.

Ramah, which frequently drew on *Bracker*, sets forth the method for federal preemption analysis. The analysis is not mechanical, but "[r]equires a particularized examination of relevant state, federal, and tribal interests."[180] In *Ramah*, the Court held that "the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development" governed the federal preemption analysis of a state tax that would raise the cost to a tribe of building a school.[181] The Court further held that "[r]elevant federal statutes and treaties must be examined in light of 'the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.'"[182] The *Ramah* Court found the federal policy of promoting Indian education to be "comprehensive and pervasive."[183] In coming to this conclusion, the Court traced the long history of congressional acts supporting Indian education.[184] The Court also described the detailed federal scheme for regulating Indian education.[185] The Court ultimately held that "the express federal policy of encouraging Indian self-sufficiency in the area" coupled with "the comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children" outweighed the interest of the state in increasing state revenues.[186]

The federal interest in the preemption analysis of tribal entity immunity cannot be limited to any particular field of federal policy, such as guaranteeing the benefits of the forest to Indians, as in *Bracker*,[187] or the interest in educating Indian children, as in *Ramah*.[188] Instead, the federal objective at stake in state cases defining tribal entity immunity is the policy of promoting tribal self-determination, because sovereign immunity shields the sovereign – now

180. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).

181. *Id.* (citing *Bracker*, 448 U.S. at 143).

182. *Id.* (quoting *Bracker*, 448 U.S. at 144-45).

183. *Id.* at 840.

184. *Id.* at 839-41.

185. *Id.* at 840-42.

186. *Id.* at 845-47.

187. *Bracker*, 448 U.S. at 149 (quoting 25 C.F.R. § 141.3(a)(3) (1979)).

188. *Ramah*, 458 U.S. at 839-40.

generally the government, rather than a monarch – from suit.[189] Therefore, if a tribal entity is protected by sovereign immunity, it is because it is part of the sovereign. Finally, because it is the nature of the sovereign at stake, the ability of tribes to mold their sovereigns – their ability to self-determine the nature of their government – is the fundamental shortfall of state courts' actions.

Federal promotion of tribal self-determination has been the overarching federal Indian policy for nearly fifty years.[190] During this period, there have been many landmark acts of Congress, repeatedly and explicitly endorsing self-determination. Many of the most significant acts of this kind have been previously noted, including ICRA, the American Indian Religious Freedom Act, the Indian Self-Determination and Education Assistance Act of 1975, and the Tribal Self-Governance Act of 1994.[191] From even a cursory reading of the names of these selected acts, it is apparent that Congress has attempted to promote tribal self-determination from many angles – civil rights, religious freedom, education, and governance. In fact, even the limited federal policies at issue in *Bracker* and *Ramah* can be described as subsets of the overriding policy. Guaranteeing the benefits of the forest to tribes and supporting Indian education are both efforts to empower tribal self-determination by way of monetary profits and knowledge,[192] both of which are crucial to successful self-government.[193] It follows that all the acts of Congress cited in both *Bracker* and *Ramah* to support their respective congressional policies can also be cited to support the broader policy of self-determination. So central is this policy that

189. *See supra* notes 151-57 and accompanying text.

190. *See supra* notes 8-10 and accompanying text.

191. *See supra* notes 19-38 and accompanying text.

192. *Bracker*, 448 U.S. at 147 (quoting 25 C.F.R. § 141.3(a)(3)) ("Among the stated objectives of the regulations is the 'development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.'"); *Ramah*, 458 U.S. at 840 (quoting 25 U.S.C. § 450a(c) (2006)) ("[A] major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.").

193. *See, e.g.*, Letter from Thomas Jefferson to Richard Price, LIBRARY OF CONGRESS (Jan. 8, 1789) ("[W]herever the people are well informed they can be trusted with their own government."), http://www.loc.gov/exhibits/jefferson/60.html (last updated July 22, 2010).

nearly fifty years of changing congresses and presidents have explicitly supported it.[194]

Fifty years of support is not as long as the congressional support for Indian education cited in *Ramah*.[195] Yet, throughout the Indian policy era that continues to this day, Congress's major Indian acts have consistently supported Congress's overarching Indian policy from all angles. If Congress's interest in Indian education was sufficient for preemption in *Ramah*, it must be that Congress's interest in tribal self-determination is sufficient to preempt state interference with tribal entity immunity determinations. When coupled with the obvious interest of tribes in their own self-determination – even if their interest is merely a "backdrop" in the analysis – the state court tests become even more suspect.

The Supreme Court has also recognized congressional intent to maintain tribal entity immunity.[196] Significantly, despite the Rehnquist Court's hostile disposition toward tribal sovereignty, one area that remained protected was tribal immunity.[197] In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, the state argued that no legitimate purpose was served by extending immunity to tribal business ventures.[198] The state suggested that immunity "[s]hould be limited to the tribal courts and the internal affairs of tribal government," or even that the doctrine of tribal sovereign immunity be entirely abandoned.[199] Chief Justice Rehnquist proceeded to examine numerous acts of Congress before determining that the Supreme Court would not modify the doctrine of sovereign immunity.[200] Chief Justice Rehnquist wrote,

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine. These Acts reflect Congress' desire to promote the "goal of Indian self-

194. *See generally* COHEN, *supra* note 8, at 97-113 (citations omitted).
195. 458 U.S. at 839.
196. *See supra* note 9 and accompanying text.
197. Seielstad, *supra* note 149, at 664-65.
198. 498 U.S. 505, 510 (1991).
199. *Id.*
200. *Id.*

> government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.[201]

In this passage, Chief Justice Rehnquist recognizes three central ideas. First, he notes the considerable Supreme Court precedent upholding the doctrine of sovereign immunity for tribes. Further, he notes congressional acquiescence to the doctrine through various legislative enactments. Finally, and perhaps most importantly, he quotes *California v. Cabazon Band of Mission Indians* to explicitly support that the purpose of congressional enactments is to enhance tribal self-determination.

Furthermore, the Supreme Court has cautiously exercised deference to Congress in matters of Indian policy. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Supreme Court re-examined the basic vitality of the doctrine of tribal sovereign immunity. Justice Kennedy criticized the conception and continued utility of the doctrine of tribal immunity. He recounted that the doctrine was built upon an apparent assumption taken from *Turner v. United States*,[202] making it an almost accidental development.[203] Justice Kennedy continued by questioning the practical basis for the doctrine.[204] He found that sovereign immunity "might have been thought necessary to protect nascent tribal governments from encroachments by States, [but] [i]n our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance."[205] Nevertheless, he noted that Congress "acted against the background of [Supreme Court] decisions" establishing tribal immunity.[206] Consequently, Justice Kennedy decided to defer to the apparent congressional acceptance of the doctrine of tribal immunity.[207] The Supreme Court committed to refrain from altering the principle of sovereign immunity as it applies to Indian tribes without prior

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201. *Id.* (citations omitted).

202. 248 U.S. 354 (1919).

203. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756-57 (1998); *Turner*, 248 U.S. at 357-58.

204. *Kiowa*, 523 U.S. at 757-58.

205. *Id.*

206. *Id.*; *see, e.g.*, 25 U.S.C. § 450f(c)(3) (2006) (mandatory liability insurance); 25 U.S.C. § 2710(d)(7)(A)(ii) (2006) (gaming activities).

207. *Kiowa*, 523 U.S. at 760.

congressional action. If the Supreme Court is committed to congressional deference, state courts should be equally so determined. These decisions by a Supreme Court often seemingly hostile to tribal sovereignty appear to indicate just how fundamental tribal sovereign immunity is to the nature and concept of sovereignty.[208]

Despite its deference to Congress on uncertain matters of Indian policy, the Supreme Court has been active in supporting the clear policy of Congress to promote tribal self-determination. The most notable example of this is the birth of the Exhaustion Doctrine.[209] In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, the Supreme Court found that when federal and tribal courts have concurrent subject matter jurisdiction, "the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction" because "Congress is committed to a policy of supporting tribal self-government and self-determination."[210] Later, *Iowa Mutual Insurance Company v. LaPlante* reiterated the focus on promoting self-determination through the exhaustion doctrine while also noting that the preemptive power of federal policy applies even without any specifically preemptive act.[211]

In light of the strong federal interest in promoting tribal self-determination and the concurrent interest of tribes in the same policy, states must demonstrate a substantial interest to uphold their tests. In *National Farmers Union*, the Court suggested that the federal and tribal interest in tribal self-determination – which led the Court to adopt the exhaustion doctrine – would only be outweighed by the state interest if exhaustion were sought in bad faith.[212] Under this standard, it is possible that, in cases involving deplorable facts, the state interest may prevail.[213]

It is clear that states are preempted from infringing on tribal self-determination, and the courts following the Supreme Court's deference to Congress in Indian affairs would be wise to agree. Nevertheless, state courts, like the Colorado Court of Appeals in *Suthers*, have in many cases gone to great lengths to implement tests that consider numerous factors relevant to whether

208. *See* Seielstad, *supra* note 149, at 713-14.

209. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

210. *Id.*

211. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-16 (1987).

212. *Nat'l Farmers Union*, 471 U.S. at 856 n.21.

213. *See, e.g.*, State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 394-95 (Colo. App. 2008). The fact scenario in *Suthers* is one example where the state might prevail.

a tribal entity is an "arm of the tribe."[214] Tests such as these are no doubt fashioned in good faith so that tribal entities are not arbitrarily excluded from immunity based on a bright-line test like the one adopted by the Washington in *Wright*.[215] Yet, it is difficult for state courts to resist at least subconsciously applying European-American notions of how government should operate to tribal tests. These state courts fail to consider that tribes may deem a particular entity to be entitled to sovereign immunity despite that it does not fulfill some of the various factors comprising the jurisdiction's test. Therefore, state court tests of tribal entity immunity are substantially invalid because they conflict with tribal self-determination.

VI. Possible Solutions

Various possible solutions exist to the problem that has been revealed, each with its merits and drawbacks. If Congress takes no action and state courts are allowed to continue creating a framework to define tribal entity immunity, tribes will tacitly cede foundational powers to states without contention. Such acquiescence to continued state power would open an unwelcome avenue for states to regulate the structure of tribal governments. Solutions to this problem can be premised on federal or tribal action. Resolution of this issue has the potential to be a defining factor in circumscribing the contemporary bounds of the policy era.

A. Congressional Action

The federal government, to the exclusion of state and tribal governments, has traditionally held supreme power over Indian affairs.[216] There has been little indication of a shift away from the decades-old foundational cases and treaties that largely established this power structure.[217] Congressional action is therefore likely the most practical way to stop the usurpation of power by state courts. But because federal control over tribal economies has proven disastrous in the past,[218] a resort to federal power should be avoided.

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214. *Suthers*, 205 P.3d at 405.
215. Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1279 (Wash. 2006).
216. *See supra* Part III.A-B.
217. *See supra* Part III.A-B.
218. *See generally* COHEN, *supra* note 8, at 88.

One aspect of Congress's plenary power is "[t]he power to abrogate or waive tribal sovereign immunity."[219] Congress could easily establish a framework of rules to govern the immunity of tribal entities. Indeed, Congress has already done so with respect to Indian gaming facilities.[220] Under the Indian Gaming Regulatory Act (IGRA),[221] gaming facilities must be entirely owned by the tribe to function as an arm of the government and enjoy tribal sovereign immunity.[222] Congress could follow in this vein by creating a general test of tribal entity immunity or by targeted enactments similar to IGRA.

Similarly, Congress could authorize states to make the very determinations of tribal entity immunity the states are currently making. Congress has the authority to confer its powers over Indians on states, even without the Indians' consent.[223] This is considered a delegation of Congress's preemptive power in Indian affairs.[224] The seminal example of this type of action is Public Law 280, which, in its original form, endowed certain states with the ability to assume jurisdiction over Indian tribes without tribal consent.[225] Congress could act in similar fashion to allow states to determine the sovereign immunity status of tribal entities. Recently, unilateral congressional action has fallen out of favor with the switch from the assimilation and termination policy eras to the current era of promoting tribal self-government.[226] Therefore, Congress would likely have to require tribal consent before a grant of jurisdiction would become effective. With so many and varied state court tests failing to consider unique tribal cultural considerations, it seems likely that tribes would object in some jurisdictions. Alternatively, Congress could act to encourage other possible solutions to this dilemma. For instance, the Indian Child Welfare Act has authorized compacts between tribes and states to establish jurisdiction over child welfare proceedings.[227]

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219. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); COHEN, *supra* note 8, at 1285.

220. COHEN, *supra* note 8, at 1286 (Supp. 2009).

221. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 18 U.S.C. §§ 1166-1168 (2006); 25 U.S.C. §§ 2701-2721) (2006)).

222. COHEN, *supra* note 8, at 1286 (Supp. 2009).

223. *E.g.*, Goldberg, *supra* note 88, at 537-38 (noting that Public Law 280 granted jurisdiction over Indian tribes to states regardless of tribal preference).

224. COHEN, *supra* note 8, at 538.

225. Goldberg, *supra* note 88, at 537-38; *see* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 177 n.17 (1973).

226. COHEN, *supra* note 8, at 538.

227. 25 U.S.C. § 1919 (2006).

In any case, some form of congressional action would perhaps be the most authoritative way to resolve the conflict presented. If Congress were to establish a framework for tribal entity immunity, it would certainly qualify as totally preemptive action consistent with federal preemption cases in the vein of *Warren Trading Post* and *McClanahan*. Any inconsistent state rules would therefore be held invalid.

While congressional action may be the most authoritative solution, it may not be the best solution. A resort to federal supremacy has the potential to be just as harmful as state authority. Solutions premised on federal power could potentially lead to increased BIA regulation at a time when the BIA is only just beginning to emerge from the humiliating scandal of the *Cobell* litigation.[228] Congress could also establish a mandatory test, but this would suffer the considerable drawbacks associated with reliance with Supreme Court opinion.[229]

Congressional action would signal a significant limitation upon the current era of self-determination. The direct link between a tribe's ability to define sovereign immunity and the tribe's ability to fashion its own government cannot be overstated. Interference with tribal concepts of sovereign immunity is an imposition and limitation upon tribal self-determination whether the action is taken by state or federal governments. Indeed, federal action could potentially be more detrimental than state action because a federal law affecting tribal sovereign immunity would be a true indication by the holder of plenary power over Indian affairs that the concept of tribal self-determination must be limited.

Perhaps the most compelling reason to oppose federal action is the over two hundred years of evidence of the effect of congressional action upon tribes and tribal economies in particular, which contends strongly against a return to more federal control over tribal businesses. In fact, Congress already attempted to promote tribal economies using a framework based upon federal control during the Indian Reorganization policy era.[230] The Indian Reorganization era saw the creation of a federally chartered corporation available to tribes pursuant to

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228. Patrick Reis, *Obama Admin Strikes $3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES, (Dec. 8, 2009) http://www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-l-92369.html. *See generally* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

229. *See infra* Part VI.B.

230. *See generally* COHEN, *supra* note 8, at 84-89 (citations omitted).

section 17 of the Indian Reorganization Act.[231] This is now one of the three forms of corporations tribes can use, the others being state-chartered corporations and tribally chartered corporations.[232] Indian Reorganization did not prove particularly successful. It created such a sense of hopelessness that it was directly followed by one of the bleakest periods in the history of American Indian relations: the Termination era.[233] Federally chartered corporations have also proven to have considerable drawbacks, which are unsurprisingly related to the procedural obstacles to federal incorporation established by Congress.[234]

In sum, the federal government could put a quick and easy end to states' definitions of tribal entity immunity, but this solution would come with consequences. It would inject federal regulation into an area where the federal government has a tradition of failure.

B. Supreme Court Action

As the Colorado Court of Appeals noted in *Suthers*, "[t]he Supreme Court has yet to establish a test for determining when tribal immunity should be extended to tribal corporations."[235] While a statement like this recognizes that lower courts would no doubt respect a Supreme Court decision on point, the Supreme Court could not defer to Congress any more than could a state court. More importantly, tribes should be quite wary of entrusting their fate to a Supreme Court now led by a protégé of Chief Justice Rehnquist.[236]

The Supreme Court would have to reverse considerable precedent for this fix to be effective. Deference to Congress over the issue of sovereign immunity of tribes has been one of the few aspects of tribal sovereignty that the recent Court has declined to curtail.[237] Nevertheless, the *Kiowa* Court expressed strong disdain for the perpetuation of such broad sovereign immunity powers.[238]

One author has even suggested that, at the time of *Kiowa*, the Court may have relied on extenuating circumstances when they decided to uphold tribal

231. 25 U.S.C. § 477 (2006).

232. COHEN, *supra* note 8, at 1284.

233. *See generally id.* at 89-97 (citations omitted).

234. *Id.* at 1284.

235. State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 403 (Colo. App. 2008).

236. Chief Justice Roberts, the current Chief Justice, clerked for Chief Justice Rehnquist, who is generally not highly respected by the Indian law community. *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 2 (2003).

237. *See supra* notes 86-89, 123-25 and accompanying text.

238. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

sovereignty.[239] At the time of the case, "Congress was actively debating legislation that would effectively eliminate tribal sovereign immunity."[240] The Supreme Court's strong language criticizing tribal immunity may have been its attempt to communicate its concerns to Congress while remaining consistent with precedent upholding the doctrine.[241] Now that such legislation has not come to fruition, it is possible that the Supreme Court may not be so deferential the next time an issue of tribal immunity comes before the Court. All of the nine justices who heard and decided *Kiowa* expressed their hostility toward the concept of tribal immunity.[242] Of those nine justices, five remain on the Court,[243] and the substitution of Chief Justice Roberts for Chief Justice Rehnquist hardly bodes well for tribal interests.[244]

C. Agreements Between Tribes and States

Despite the plenary power of Congress over Indian tribes, states do have the power to enter into cooperative agreements with Indian tribes; only cooperative agreements affecting jurisdictional limits require federal approval.[245] Aside from this rule, authorization of the agreement under the laws of both the Indian tribe and the state is the only requirement.[246] Tribes and states have already exercised their power to come to mutual agreement in many instances.[247]

From the perspective of tribes, the possibility that some alternative solutions might lead to diminished tribal sovereignty without tribal consent may incentivize tribes to endeavor to agree with states as to the nature of tribal entity immunity. Additionally, tribes would benefit from the ability to craft

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239. *See* Seielstad, *supra* note 149, at 711-12.

240. *Id.* at 711.

241. *Id.*

242. *Id.*

243. Justices Scalia, Kennedy, Thomas, Ginsburg, and Breyer remain on the Court. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited Aug. 9, 2010).

244. *See supra* note 236 and accompanying text.

245. *See* COHEN, *supra* note 8, at 590. *See generally* Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1320-28 (1993).

246. See COHEN, *supra* note 8, at 592; Mack & Timms, *supra* note 245, at 1313.

247. COHEN, *supra* note 8, at 589-90 (noting "agreements in a wide array of subject areas, including enforcement of judgments, education, environmental control, child support, law enforcement, taxation, hunting and fishing, and zoning") (citations omitted).

agreements reflecting their unique values.[248] The alternative, of course, may be uniform federal regulation, which would seem to effect the replacement of the theory of Indian self-government in favor of centralization.

States, on the other hand, could use this as an opportunity to legitimize their courts' actions. They would likely also enjoy sufficient bargaining power to be able to reach an acceptable agreement because of the alternative possibility of Supreme Court or congressional action limiting tribal sovereignty.

Clearly, cooperative agreements would be beneficial to both states and tribes.[249] The absence of such agreements often leads to costly and time-consuming litigation. Because states could validate their tests and tribes could avoid the harsh repercussions associated with fickle federal policy, cooperative agreements are worth exploring.

D. Tribal Understanding

The uncertainty surrounding tribal entity immunity has presented tribes with a significant opportunity to take the initiative to establish the scope of the self-determination era for the future. The significance of this opportunity is especially apparent because all of the non-tribal solutions to the problem are accompanied by significant drawbacks for tribal interests.[250]

It is possible to certify the question of an entity's immunity to the tribe under which it claims immunity. This process would offer the best assurance that the intent of the tribe is paramount in the determination. It would be the best way to promote tribal self-determination because the tribe would be solely responsible for defining its governmental boundaries. Indeed, the importance of including tribal intent as a factor in state court tests has already been proposed.[251] Unfortunately, this method may lead to very harmful factual cases creating the worst possible result for tribes. There are certainly numerous instances in Indian law of negative facts leading to damaging legal outcomes for tribes. For instance, the issue in *Suthers* arose because two payday-loan companies claimed sovereign immunity protection against claims that they violated Colorado regulations designed to protect consumers from unfair lending practices.[252] It would seem difficult for the Supreme Court and

248. *See id.* at 589.

249. *See id.* at 589-94 (citations omitted).

250. *See supra* notes 218, 229-34, 236, 238-44 and accompanying text.

251. Gregory J. Wong, Comment, *Intent Matters: Assessing Sovereign Immunity for Tribal Entities*, 82 WASH. L. REV. 205, 222-25 (2007).

252. State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 394-95, 401 (Colo. App. 2008).

Congress to refrain from curtailing tribal authority in the face of likely public outcry if tribes were to lend their immunity to such schemes.[253]

Instead, tribes could show considerable initiative by self-regulating, which would be a meaningful preemptive strike against foreign impositions. Many professional organizations in the United States have been very successful in avoiding state and federal regulation by imposing self-regulation.[254] Tribes have already demonstrated the ability to act in their collective self-interest. For instance, many tribes have adopted provisions of the Uniform Commercial Code.[255] Provided that it is capable of being implemented in a manner consistent with tribal values, adoption of the Uniform Commercial Code can provide tribes with the benefit of an expansive and uniform legal infrastructure.[256] A collective tribal agreement to prohibit tribes from anointing businesses that are simply attempting to skirt legitimate regulation by seeking sovereign immunity would eliminate the need for state or federal imposition and would demonstrate that self-determination is feasible.

VII. Conclusion

Despite many apparent good-faith efforts to fashion tests sensitive to the peculiarities of tribal governments, state courts operate outside their realm when they impose any test on tribal entities. Congress alone is vested with plenary power over relations with Indian tribes. This power is supreme to and preemptive of state power.

Through their enactments reversing many years of failed policy hostile to Indian government, Congress has determined that Indian tribes should be afforded the ability to self-govern. This intent has stood the test of time and even weathered the Supreme Court most hostile to tribal sovereignty. State court tests of tribal entity immunity are therefore entirely incompatible with Congress's long-standing policy of encouraging tribal self-determination and self-government. Where incompatibility exists between state and federal

253. *Cf.* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985) (suggesting that congressional policy supporting tribal self-determination might not justify the exhaustion doctrine where the assertion of initial tribal jurisdiction is made in bad faith).

254. *See* Jeff Storey, Note, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 469-70 (2001).

255. *See* COHEN, *supra* note 8, at 1289-90 (citations omitted).

256. *See id.* (citations omitted).

interests in Indian law, the federal interest prevails.[257] Thus, the state court tests are substantially preempted and invalid. Tribes must take the initiative and internally address the problems associated with tribal entity immunity or they will cede further power and much of the mandate of self-determination.

257. *See supra* Part III.B.