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NATIONS WITHIN A NATION: THE EVOLUTION OF TRIBAL IMMUNITY

Theresa R. Wilson*

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Introduction

American Indians have always had a tenuous relationship within the governmental structure of the United States. Are Indian tribes to be treated as states? Are they to be treated as foreign nations? Are they somewhere in between? This structural dilemma remains uncomfortably prominent in federal-state-tribal relations.

Perhaps most perplexing is the question of what role American judicial systems can play within the sphere of tribal government. Students of the law spend countless hours studying the relationships between state courts and federal courts, state law and federal law. With any luck, and perhaps a little effort, they become somewhat conversant in the doctrine of state sovereign immunity under the Eleventh Amendment.

Rarely, however, do students become as conversant in tribal immunity case law. It is a complex issue, made so in part by the ever-changing status of Indian tribes within American society. Yet the underlying principles supporting tribal immunity are generally the same as those supporting state immunity:

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tribes need to be protected from bankrupting suits and from the distraction to government operations such suits may cause.¹ The issue is perhaps even more important for Indian tribes, considering their limited financial and legal resources.²

This article examines the evolution of tribal immunity and highlights the major cases establishing an immunity that parallels the states' protection under the Eleventh Amendment. Part II discusses the origins of sovereign immunity and the justifications for providing states some protection from suit. It will provide a very basic outline of the immunity protections offered to the states and the federal government, and then consider why tribes should have similar immunity protections.

Part III provides an overview of the historical and constitutional status of Indian tribes within American government and society. The complexities in understanding tribal immunity comes from the fact that the status of Indian tribes within the United States has fluctuated considerably within the last 200 years. At first they were considered foreign nations, capable of making treaties with the United States.³ Then they were considered "domestic dependent nations" in a special protectorate relationship with the United States.⁴ Later, the federal government attempted to "terminate" Indian tribes by breaking up Indian land and forcing citizenship upon Indians.⁵ More recently, Congress has been supportive of tribal sovereignty and has provided tribes some protection from suit.

Part IV studies the exclusive relationship between Congress and the tribes. When the Constitution was adopted in 1787, it provided Congress with authority to regulate Indian affairs, and since that time the courts have recognized Congress' overarching authority in this area.⁶ Modern Congresses, however, have been mindful of their overwhelming power and have generally acted — or not acted as the case may be — to ensure that the tribes are allowed some degree of sovereignty. Instead of making tribes directly liable in suit, Congress has generally provided alternative means of dispute settlement.⁷ Part IV also examines the topic of waivers. Either the tribe or

1. For a discussion of the reasoning behind sovereign immunity, see *infra* Part II.

2. See *infra* notes 25-29 and accompanying text.

3. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 53 (Rennard Strickland et al. eds., 1982).

4. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

5. Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1994). For a discussion of this Act and its ramifications, see *infra* notes 60-70 and accompanying text.

6. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886) (establishing Congress' plenary power over Indian tribes); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding Congress' plenary power so great as to enable it to abrogate treaties with Indian tribes); *Duro v. Reina*, 495 U.S. 676, 698 (1990) (stating that "Congress . . . has the ultimate authority over Indian affairs").

7. See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1994) (providing that persons with claims against tribes must use the Federal Tort Claims Procedures,

Congress can waive tribal immunity, although Congress' ability to do so may now be in question.⁸

Part V examines the development of tribal immunity through case law. Unlike state immunity, which is written directly into the Constitution by the Eleventh Amendment,⁹ tribal immunity is a product of case law. Modern tribal immunity originated in the early 1900s and has grown into a recognized and accepted doctrine — for the most part. This part will consider the major cases influencing tribal immunity and will highlight the contradiction between Congress' and the Supreme Court's attitudes toward the doctrine. It will pay particular attention to *Seminole Tribe of Florida v. Florida*¹⁰ and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,¹¹ two Supreme Court cases that have serious implications for the doctrine of tribal immunity.

The Origins of Sovereign Immunity and Its Applicability to Indian Tribes

Sovereign immunity, or freedom from suit, is not a new concept and is not limited to Indian tribes. It can be traced to the English concept of the divine right of royalty, which held that the monarch could do no wrong and therefore no suit against the monarchy could be legitimate.¹²

The modern interpretation of sovereign immunity in the United States, derives more from the idea that lawsuits should not keep a government from performing its essential functions than it does from any notion of the divine right of monarchs.¹³ Supporters of sovereign immunity argue that a government could be made bankrupt if citizens were allowed to pursue suits against the national or state government.¹⁴

These reasons underlie the development of significant immunity protections for the federal and state governments, as well as for federal and state officials.

28 U.S.C. §§ 2671-2680 (1994), to seek compensation and that any compensation for such claims will come from insurance obtained by the Secretary of the Interior).

8. See *infra* notes 239-45 and accompanying text.

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

10. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

11. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 118 S. Ct. 1700 (1998).

12. For the Supreme Court's most recent consideration of the history of sovereign immunity, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 68-72, 102-14, 130-68 (1996). See also *id.* at 1146-52, 1160-78 (Souter, J., dissenting) (delineating development of the common law doctrine and posing an argument against its acceptance in the United States).

13. Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419, 440 (1993).

14. *Id.* (citing *Nevada v. Hall*, 440 U.S. 410 (1979), which noted that states supported sovereign immunity as a means of protecting themselves against debts due from the American Revolution).

The United States cannot be sued without its consent.¹⁵ As interpreted by the Supreme Court, the Eleventh Amendment prohibits suits against the states¹⁶ — even in state courts.¹⁷ State officials are subject to liability under 42 U.S.C. § 1983,¹⁸ and the doctrine of *Ex parte Young* allows claimants to sue state officials if the only relief sought is prospective injunctive relief, even if its incidental consequence is to impact the state treasury.¹⁹ Federal officials, meanwhile, can be sued for monetary damages in their individual capacities pursuant to an implied caused of action.²⁰

Although claimants may have a cause of action against government officials in theory, the fact is that these officials often enjoy a certain degree of immunity. Federal legislators,²¹ judges,²² prosecutors,²³ and state legislators²⁴ all enjoy absolute immunity. Other state and federal officials enjoy qualified immunity.²⁵

These immunities were developed to address the financial and governmental concerns mentioned earlier. The reasons for state and federal immunity, however, also support sovereign immunity for Indian tribes. First, tribes did not participate in the creation of the constitutional system of government and therefore their interests are in a much more precarious position than those of

15. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

16. *Hans v. Louisiana*, 134 U.S. 1 (1890). Although the text of the Amendment refers to suits by citizens of other states and nations, the Court has read the Amendment to bar virtually all suits against the states. *Id.* Individual members of the Supreme Court have expressed their frustrations with the Court's overly expansive reading of a rather precise constitutional provision. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788-90 (1991) (Blackmun, J., dissenting) (noting his displeasure with the Court's interpretation of the Eleventh Amendment).

17. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that the claimant could not sue a state official in his official capacity in state court because Michigan had not waived its Eleventh Amendment immunity).

18. Section 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983 (1994). For a discussion of 42 U.S.C. § 1983's interplay with the Eleventh Amendment, see generally Debra L. Watanuki, *Federal Civil Rights: Fact or Fiction? A Proposal to Remove Eleventh Amendment Immunity in Section 1983 Actions*, 18 HASTINGS CONST. L.Q. 695 (1991).

19. *Ex parte Young*, 209 U.S. 123 (1908).

20. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971).

21. U.S. CONST. art. I, § 6.

22. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

23. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1973).

24. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

25. State and federal officials are provided with qualified immunity when they could not have reasonably known that their actions would have resulted in a constitutional deprivation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

the states, which are protected by the Eleventh Amendment.²⁶ Second, while states have generally prospered since their inclusion in the Union, such is not the case for Indian tribes.²⁷ Unemployment on reservations usually exceeds 50 percent, and 603,000 of the estimated 1.8 million Indians in the United States live below the poverty line.²⁸ Third, tribes often lack the legal resources states have at their disposal when they need to defend themselves from lawsuits.²⁹ Finally, even the Supreme Court has stated that federal judicial interference in tribal actions can do little more than "unsettle a tribal government's ability to maintain authority."³⁰

The Historical and Constitutional Status of Indian Tribes

Although it is commonly said that Christopher Columbus "discovered" America, numerous Indian tribes already populated the Americas by the time of his arrival.³¹ In fact, Leif Eriksson's brother is said to have encountered Indians, known to Vikings as "Skrellings," when he landed somewhere along the northeast coast of North America in 1006.³²

When the colonists came to America in the 1600s and 1700s, they treated the native tribes as separate nations. The young republic entered into numerous treaties — documents generally reserved for international relations — with the tribes.³³ Many of these treaties were military alliances created to bolster the colonies' strength in the fight against the English.³⁴

26. Wagman, *supra* note 13, at 448, 464-65.

27. *Id.* For a discussion of the problems facing Indian tribes, see YERINGTON PAUTE TRIBE, INTRODUCTION TO TRIBAL GOVERNMENT 86-92 (Michael Hansen ed., 1985) [hereinafter TRIBAL GOVERNMENT].

28. Bill Richardson, *Indian Tribes Should Control Their Own Futures*, DES MOINES REG., July 8, 1993, at A7.

29. Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 ARIZ. ST. L.J. 987, 1023 (1995).

30. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978); *see* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (stating that federal judicial interference would interfere with tribal law-making authority).

31. *See generally* ALVIN M. JOSEPHY, JR., *THE INDIAN HERITAGE OF AMERICA* (1968) (discussing the various Indian groups that existed in the Americas prior to the arrival of Europeans).

32. *Id.* at 294.

33. Joranko, *supra* note 29, at 989. According to Peter Nabokov:

The legal basis for making treaties with the Indians was established as early as the sixteenth century by lawyers for the Spanish Court. Although vast portions of the New World were claimed by the conquistadors, Spain still felt that the Indians enjoyed some vague "aboriginal title" to the country. . . . Other Europeans and Americans also granted Indians a "right of occupancy." Behind these manipulative phrases and contradictory postures lay the white man's vacillation between greed and conscience. He was determined to take possession of the territories he "discovered," but he needed to feel he was acquiring them fairly and legally.

NATIVE AMERICAN TESTIMONY 118 (Peter Nabokov ed., 1991).

34. Joranko, *supra* note 29, at 989. Unfortunately, the new republic would eventually begin

While the colonies may have recognized tribes as nations, they also attempted to control tribes within their sphere of influence. The Articles of Confederation granted power over Indian tribes to both the state and federal governments.³⁵ The federal government was allowed to regulate trade with and manage the affairs of Indians, but could not infringe upon the legislative power of the states.³⁶ As with many other provisions of the Articles of Confederation, this delineation of power proved to be confusing and self-defeating for the federal government.³⁷

When the Constitution was adopted in 1787, it gave Congress the responsibility of managing Indian affairs, apparently to the exclusion of the states.³⁸ It allowed Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian tribes."³⁹ It also excluded "Indians not taxed" from population counts.⁴⁰ Finally, the Supremacy Clause of Article IV elevated "all Treaties made, or which shall be made" as the highest law of the land.⁴¹

This separate status was reflected in the mechanisms the federal government adopted to allow U.S. citizens to recover damages against Indian tribes. Before 1891, persons with claims against Indian tribes had to rely upon "wrongs or depredations" clauses in treaties.⁴² Under the treaties' procedures, claimants would generally file proofs with the Commissioner of Indian Affairs, who would then compensate the claimants from funds due the tribe.⁴³ The tribe

to use treaties as a means of weakening Indian tribes:

At first, the European powers drew up treaties to cement relations with influential tribes, to "bury the tomahawk" — to use the famous phrase found in an early southern Plains treaty — with hostile Indians, and to formalize trading partnerships. During the period of New World colonization, the warring European nations used treaties to bolster their forces with Indian auxiliaries. As the white population grew, however, and Indian power waned, the documents became thinly disguised bills of sale, transferring ancient tribal lands into white hands.

NATIVE AMERICAN TESTIMONY, *supra* note 33, at 118.

35. Wagman, *supra* note 13, at 420 n.5.

36. *Id.*; see also *Dick v. United States*, 208 U.S. 340, 356 (1908) (noting that the Articles of Confederation gave the Congress sole power to regulate trade with and manage the affairs of Indian tribes, provided that the legislative rights of the states were not infringed).

37. See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1155 (2d Cir. 1988) (stating that the Articles of Confederation were obscure and ambiguous).

38. Wagman, *supra* note 13, at 426. Wagman notes that although the Constitution granted the federal government control over Indian affairs, the states maintained some authority through Indian Trade and Intercourse Acts. *Id.* This authority was officially revoked in 1790 with the Nonintercourse Act. Nonintercourse Act, 1 Stat. 329 (1790).

39. U.S. CONST. art. I, § 8, cl. 3.

40. U.S. CONST. art. I, § 2, cl. 3.

41. U.S. CONST. art. IV, cl. 2.

42. Jeranko, *supra* note 29, at 997.

43. *Id.*

was not sued directly. This process was codified in 1891 when Congress passed the Indian Depredation Act.⁴⁴

The judiciary, meanwhile, gave lip service to the sovereign integrity of the Indian tribes. In the Marshall Trilogy,⁴⁵ the Supreme Court recognized Indian nations as separate, but then placed them under the protective control of Congress. *Cherokee Nation v. Georgia*⁴⁶ labeled the tribes as "domestic dependent nations" — not quite states but not quite foreign nations, either.⁴⁷ One year later, the Court held that "Indian nations, their citizens, and their territory remained completely apart from the states in which they were located."⁴⁸ Indians were also separate from the federal government, inasmuch as they were considered citizens of their individual tribes, not citizens of the United States.⁴⁹

The semi-sovereign status of Indians was affirmed repeatedly by the judiciary during the late 1800s. Indians who committed crimes against other Indians on Indian land could not be prosecuted in state or federal courts.⁵⁰ Laws passed by Congress were presumed to exclude Indians unless Congress specifically stated otherwise⁵¹ and tribal governments were not required to obey constitutional provisions.⁵²

During the late 1800s, the tide changed for tribal sovereignty. The Appropriations Act of March 3, 1871,⁵³ ended the practice of treaty-making

44. Indian Depredation Act of Mar. 3, 1891, Ch. 538, 26 Stat. 851-54 (1891). The primary differences between the original mechanism and the Indian Depredation Act are that under the Act, the Court of Claims handles the victims' claims, and the claimants must prove the tribe in question was in amity with the United States and not entitled to belligerent status under international law. *Id.*

45. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823).

46. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

47. *Id.* at 17.

48. *Joranko*, *supra* note 29, at 989 (interpreting the holding of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

49. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) ("The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.").

50. *Ex parte Kan-Gi-Shun-Ca*, 109 U.S. 556 (1883). This case is more commonly known as *Ex parte Crow Dog*, representing the English translation of the petitioner's name. *Id.* *Crow Dog*, a Brule Sioux, assassinated Spotted Tail, a Brule Sioux chief, on the Rosebud reservation. *Id.* at 557. *Crow Dog* was arrested by the federal government and sentenced to hang. *Id.* The Supreme Court reversed *Crow Dog*'s sentence, stating that the federal government should not infringe upon tribal matters. *Id.* at 571, 572. Under tribal orders, *Crow Dog* gave Spotted Tail's family blood money in the form of horses and other goods as payments for his crimes. TRIBAL GOVERNMENT, *supra* note 27, at 17.

51. *Elk v. Wilkins*, 112 U.S. at 100.

52. *Talton v. Mayes*, 163 U.S. 376, 384-85 (1886) (holding that even the Fourteenth Amendment did not apply to tribal government operations).

53. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (1871). Tacked onto the very bottom of the Act was the following passage:

with Indian tribes, although it did nothing to affect the requirement of mutual agreement between Congress and the tribes.⁵⁴ Fourteen years later, Congress passed the Major Crimes Act of 1885,⁵⁵ allowing the federal courts to have jurisdiction over murder, rape, assault with intent to kill, manslaughter, arson, burglary and robbery when they occurred between Indians on Indian land.⁵⁶

Congress began to enact legislation touching upon internal tribal affairs and the Supreme Court adopted the "plenary power" doctrine to legitimize these acts.⁵⁷ Warping Congress' protectorate role to its extreme, the Court held that Congress' power to protect the tribes from their own "weakness and helplessness"⁵⁸ was so magnificent as to encompass the right to abrogate federal-Indian treaties without any judicial standard to govern its exercise.⁵⁹

Respect for tribal integrity disappeared in the early 1900s as Indians were encouraged to sever all ties with their tribes and become U.S. citizens. The Indian General Allotment Act of 1887⁶⁰ precursored this change in U.S.-Indian relations. The Act cut tribal land into 80 or 160-acre allotments, which were to be provided to Indians who renounced their tribal ties in favor of U.S. citizenship.⁶¹ The land was to be completely alienable after 25 years,⁶² thus

Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Id.

54. *Id.* Senator William Stewart of Nevada, arguing on behalf of the Act, stated, "I regard all these Indian treaties as a sham. The idea of thirty or forty thousand men owning in common what will furnish homes for five or ten million American citizens will not be tolerated." TRIBAL GOVERNMENT, *supra* note 27, at 37.

55. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (1885).

56. *Id.* § 9, 23 Stat. at 385. This Act was Congress' response to the Supreme Court's holding in *Ex parte Kan-Gi-Shun-Ca*, which negated any federal jurisdiction over murder on tribal land where both the victim and suspect were members of the tribe. TRIBAL GOVERNMENT, *supra* note 27, at 37.

57. Joranko, *supra* note 29, at 991. The plenary power doctrine was adopted in *United States v. Kagama* and allowed Congress to control the internal affairs between members of Indian tribes. *United States v. Kagama*, 118 U.S. 375, 378-80 (1886).

58. *United States v. Kagama*, 118 U.S. at 384.

59. Joranko, *supra* note 29, at 991.

60. Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1994). This Act is also known as the Dawes Act. TRIBAL GOVERNMENT, *supra* note 27, at 21.

61. Indian General Allotment Act of 1887, 25 U.S.C. § 331 (1994). These guidelines were not always followed:

An example of land loss experience by a tribe would be the Walker River Reservation. In 1906, an agreement was signed by the tribe for the allotment of the reservation. The tribe received 20-acre allotments rather than the 160 acre tracts. Walker Lake was not included in the agreement and tribal members did not understand this when they signed the agreement. The result was a loss of over

posing a significant threat to the continuity of the reservation and the tribe.⁶³ In 1924, U.S. citizenship was forced on all Indians.⁶⁴

The judiciary's approach to Indian tribes changed to keep pace with the legislature. The Supreme Court reversed itself on the issue of citizenship, holding that Indians could legally be made citizens of the United States.⁶⁵ It also reversed its "express intention" rule that had allowed the exclusion of Indians from federal regulation.⁶⁶

While proponents of assimilation legislation had hoped that Indians would desert their tribes and become middle class farmers,⁶⁷ such was not the case. Indians generally maintained their tribal ties, but the assimilation laws ended up costing the tribes more than two-thirds of their land.⁶⁸ The impact of U.S. assimilation practices was not lost on Congress, which in 1934 finally recognized a tribal right to self-determination and sovereignty.⁶⁹

275,000 acres including the lake, which were opened to settlement and mining. The tribe was left with only 50,000 acres.

TRIBAL GOVERNMENT, *supra* note 27, at 37.

62. Indian General Allotment Act of 1887, 25 U.S.C. § 348 (1994).

63. According to Senator Teller of Colorado:

You propose to divide all this land and to give each Indian his quarter section, or whatever he may have, and for twenty-five years he is not to sell it, mortgage it, or dispense of it in any shape, and at the end of that time, he may sell it. It is safe to predict that when that shall have been done, in thirty years thereafter, there will not be an Indian on the continent, or there will be very few at the least, that will have any land.

TRIBAL GOVERNMENT, *supra* note 27, at 37.

64. Act of June 2, 1924, ch. 233, 43 Stat. 253 (repealed 1952).

65. *Winton v. Amos*, 255 U.S. 373, 391 (1921).

66. *See, e.g., Choteau v. Burnet*, 283 U.S. 691, 696 (1931) (holding that Indians were subject to the provisions of the Revenue Act of 1918, even though the Act was silent as to them). The *Elk v. Wilkins* requirement that Congress clearly express an intent to *include* Indian members in legislation was thus replaced by *Choteau's* requirement of a "definitely expressed" intent to *exclude* Indians from such legislation.

67. *See* JOSEPHY, *supra* note 31, at 350 ("The Dawes General Allotment Act, initiated and supported by many persons who were sympathetic to the Indians, was passed with the argument that it would give each Indian his own private plot of land and encourage him to become an industrious farmer"). Needless to say, many Indians had problems with this philosophy. Speaking before the Dawes Commission in 1881, Sitting Bull said:

If the great spirit had desired me to be a white man, he would have made me so in the first place. He put in your heart certain wishes and plans, in my heart he put other and different desires. Each man is good in his sight. It is not necessary for eagles to be crows.

TRIBAL GOVERNMENT, *supra* note 27, at 86.

68. *Joranko*, *supra* note 29, at 995. In 1887, Indian tribes owned 138 million acres; by 1932, 90 million of those acres had been transferred to white owners. JOSEPHY, *supra* note 31, at 350.

69. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1994). For a discussion of the purposes of the Act, see Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955-69 (1972) [hereinafter *Tribal Self-Government*]; see also NATIVE AMERICAN TESTIMONY, *supra* note 33, at 304-10 (discussing Commissioner John

The Indian Reorganization Act of 1934⁷⁰ (IRA) was a significant step in federal-Indian relations. It ended the allotment practices and curtailed the Bureau of Indian Affairs' ability to micromanage tribal matters.⁷¹ At the same time, it espoused the economic and political self-sufficiency of tribes.⁷² Section 16 of the IRA attempted to stabilize tribal political entities by allowing the tribe to adopt a constitution and bylaws.⁷³ Section 17 allowed a tribe to adopt a charter of incorporation so that the tribe could conduct business with entities outside of the reservation.⁷⁴ These two sections are significant in that they allow the tribe to waive its immunity from suit.⁷⁵ The IRA was also significant in that the Secretary of the Interior had to approve the tribe's constitution, thereby forcing the U.S. to recognize tribal actions taken pursuant to the tribal constitution.⁷⁶

Federal-Indian relations soon suffered under Public Law 280,⁷⁷ a 1953 measure aimed at implementing the programs of termination and assimilation, in which reservations would be terminated and Indians would be assimilated into mainstream society.⁷⁸ With tribal consent, the federal government would cut off all health, law enforcement and educational services, leaving such programs to the states.⁷⁹ Reflecting lawmakers' concern with "lawlessness on the reservations and the accompanying threat to Anglos living nearby,"⁸⁰ Public Law 280 provided criminal and civil jurisdiction over Indian land to five states, and allowed other states to obtain such jurisdiction if they wished.⁸¹

Collier's advocacy of the IRA).

70. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1994).

71. *Tribal Self-Government*, *supra* note 69, at 955-69.

72. *Id.* Some tribes, such as the Pueblos and the Iroquois, rejected the IRA because it replaced traditional tribal government with "white models of government." TRIBAL GOVERNMENT, *supra* note 27, at 40.

73. Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1994).

74. *Id.* § 477. The idea was that through its charter the tribe could waive immunity from suit, thereby easing fears of contracting parties. Frank Pommershiem & Thomas Pechota, *Tribal Immunity, Tribal Courts and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553, 559 (1986).

75. There is some question as to whether the tribe can issue a waiver without congressional approval. Wagman, *supra* note 13, at 432 n.94. For a discussion of the waiver doctrine and the interplay between Congress and the tribes, see *infra* notes 101-08 and accompanying text.

76. TRIBAL GOVERNMENT, *supra* note 27, at 40.

77. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-1162) (1994) (criminal jurisdiction), 25 U.S.C. §§ 1321-1322 (1994), 28 U.S.C. § 1360 (1994) (civil jurisdiction)) [hereinafter Public Law 280].

78. Wagman, *supra* note 13, at 434. Public Law 280 implemented the termination program outlined in a 1953 House concurrent resolution. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953). Sixty-one tribes were terminated under the program. TRIBAL GOVERNMENT, *supra* note 27, at 41. Between 1948 and 1957, Indian tribes lost approximately 3.3 million acres. NATIVE AMERICAN TESTIMONY, *supra* note 33, at 356.

79. TRIBAL GOVERNMENT, *supra* note 27, at 41.

80. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 544-46 (1975).

81. Public Law 280, *supra* note 77. The five "mandatory" states were California, Minnesota,

For the first time since the adoption of the Nonintercourse Act of 1790, states were given authority over not just Indians, but Indian land.

Congress reevaluated its stance on tribal sovereignty, or lack thereof, when it passed the Indian Civil Rights Act of 1968 (ICRA).⁸² The Act reinstated tribal sovereignty and provided the basis for the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*,⁸³ perhaps the most celebrated modern case expanding tribal sovereignty and tribal immunity. The Act made the Bill of Rights applicable to tribal governments, which had previously enjoyed exclusion from its provisions.⁸⁴ Further, it provided a model code of Indian offenses for use in tribal courts.⁸⁵ The Act required Indian consent be obtained before a state could assume legal jurisdiction within Indian land, but it provided federal courts a degree of authority to review actions taken by Indian tribes.⁸⁶

Congress and the Tribes: A Mutually Exclusive Relationship

Congressional Supremacy and Respect

Under the Constitution, Congress is the sole organ that may impose restraints upon Indian tribes.⁸⁷ This notion has been recognized repeatedly by the Supreme Court, which stated that "Congress . . . has the ultimate authority over Indian affairs."⁸⁸ Further, Congress has the authority to change the jurisdiction of the federal courts.⁸⁹ Therefore, Congress has the ultimate authority to decide whether, how and where Indian tribes may be sued.

Generally speaking, however, modern Congresses have promoted immunity for Indian tribes and tribal officials.⁹⁰ For example, Congress has repeatedly refused to amend the ICRA to overcome *Santa Clara's* holding that the ICRA does not provide a federal court cause of action.⁹¹ Instead, Congress declared that "Congress and the Federal courts have repeatedly recognized tribal justice

Nebraska, Oregon and Wisconsin. *Id.*

82. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1994).

83. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). For a discussion of this case, see *infra* notes 139-56 and accompanying text.

84. Indian Civil Rights Act, 25 U.S.C. § 1302 (1994).

85. *Id.* § 1311.

86. *Id.* §§ 1321-1325; TRIBAL GOVERNMENT, *supra* note 27, at 41. President Johnson said, "We must affirm the right of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination." *Id.*

87. U.S. CONST. art. I, § 8, cl. 3.

88. *Duro v. Reina*, 495 U.S. 676, 698 (1990).

89. U.S. CONST. art. III, § 2, cl. 1.

90. Joranko, *supra* note 29, at 1017.

91. See, e.g., H.R. REP. NO. 383, 103d Cong., at 13 (1993) (suggesting that federal resources be made available to tribal courts before any attempt to allow federal court review of the tribal justice system); see also Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DEN. L. REV. 359, 387-89 (1993).

systems as the appropriate forums for the adjudication of disputes affecting personal and property rights."⁹²

Congress has also provided alternative means of dispute settlement rather than allow suits to proceed against tribes.⁹³ Instead of allowing suits to be levied against tribal employees, the Indian Self-Determination and Education Assistance Act of 1975⁹⁴ states that claimants must proceed through the Federal Tort Claims mechanism,⁹⁵ and that the Secretary of the Interior is responsible for obtaining insurance for such claims.⁹⁶

Further, tribal governments were excluded from the major piece of legislation that extends liability to state officials. This law, 42 U.S.C. § 1983, is a congressionally-created cause of action against people who "act under color of [state law]."⁹⁷ No mention is made of tribal law, implying that no such cause of action could exist against tribal officials.⁹⁸ The Tenth Circuit has adopted this interpretation,⁹⁹ and thus far Congress has not amended 42 U.S.C. § 1983 to provide any contradictory interpretation.

Waiving Tribal Immunity

While blanket immunity for tribes and tribal actors may at first glance seem advantageous for a tribe, it can also have its disadvantages. If the tribe wishes to conduct business outside of the reservation, it may find itself in a detrimental position because non-Indian businesses could be easily discouraged from interacting with the tribe for fear of sustaining injuries and having no defendant against whom to act.¹⁰⁰ Practical concerns may drive a tribe to waive its sovereign immunity in circumstances such as these.

In this context, *Santa Clara Pueblo v. Martinez*¹⁰¹ is a significant case. It held that a waiver of immunity would be recognized, but only if such a waiver

92. Indian Tribal Justice Support, 25 U.S.C. §§ 3601-3631 (1994).

93. See, e.g., Indian Depredation Act of Mar. 3, 1891, ch. 538, 26 Stat. 851-54 (1891) (providing an intervening mechanism between non-Indian claimants and Indian tribes); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1994) (providing that persons with claims against tribes must use the Federal Tort Claims procedure, 28 U.S.C. §§ 2671-2680 (1994), to seek compensation and that any compensation for such claims will come from insurance obtained by the Secretary of the Interior).

94. *Id.* § 450.

95. *Id.* § 450(d). The Federal Tort Claims procedure allows jurisdiction to persons with claims against the United States. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1994).

96. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(c)(1) (1994).

97. 42 U.S.C. § 1983 (1994). For an extensive look at the Supreme Court's handling of 42 U.S.C. § 1983 cases and the section's interaction with the Eleventh Amendment, see generally PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES (2d ed. Supps. 1994 & 1996).

98. Joranko, *supra* note 29, at 1019.

99. *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980).

100. Joranko, *supra* note 29, at 1017.

101. 436 U.S. 49 (1978). For a discussion of this case, see *infra* notes 139-56 and accompanying text.

The Court then considered the implications created by the act of Congress permitting jurisdiction over Turner's claims. In essence, the Court found the act to be a grant of jurisdiction over a claim that simply did not exist.¹²³ Congress could authorize the Court of Claims to hear whatever cases it wanted, but the act did not remedy the fact that Turner had no substantive right to sue a government for injuries resulting from mob violence.¹²⁴

Even though Brandeis had earlier emphasized that sovereign immunity had nothing to do with the tribe's freedom from liability, his discussion of the act's attempt to authorize a suit against the tribe would lay the foundation for later assertions of a tribal immunity doctrine. After asserting that the act did not impose any liability on the tribe, and after noting that the tribe had been dissolved, Justice Brandeis held that "[w]ithout authorization from Congress, the Nation could not then have been sued in any court; at least without its consent."¹²⁵

Regardless of Justice Brandeis' intent, *Turner's* language regarding tribal consent and immunity from suit would eventually find itself adopted in cases articulating a doctrine of tribal sovereign immunity.¹²⁶ *Turner* would thus become a basis for a judicially-created doctrine — a basis that would be seriously challenged nearly eighty years later.¹²⁷

Championing Tribal Immunity: 1940 to 1980

Any discussion of modern tribal immunity must begin with *United States v. United States Fidelity & Guaranty Co.*¹²⁸ In this 1940 case, the United States filed suit on behalf of Indian tribes that had dissolved but wanted to recover royalties from a mining operation.¹²⁹ The defendant filed a cross-claim against the tribes for a prior judgment.¹³⁰ The tribes agreed to pay part of the claim, but refused to pay in full.¹³¹

Holding for the tribes on the remainder of the cross-claim, the Supreme Court stated that neither the tribes nor tribal officials acting within the scope of their authority could be subjected to nonconsensual suit in any court — tribal, state or federal.¹³² Relying upon *Turner*, the Court held that the public

123. *Id.*

124. *Id.*

125. *Id.*

126. *See, e.g.,* *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940).

127. The Supreme Court would reexamine *Turner's* rationale in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* *See infra* notes 259-65 and accompanying text (discussing *Kiowa's* interpretation of *Turner*).

128. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940).

129. *Id.* at 510.

130. *Id.* at 510-11.

131. *Id.* at 511.

132. *Id.* at 512-13.

policy that supported tribal immunity did not expire with the tribe.¹³³ As to the cross-claim, the Court held that "[t]he sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because the debtor was unavailable except outside the jurisdiction of the sovereign's consent."¹³⁴ This public policy is especially important when dealing with Indian nations and their "unusual governmental organization and peculiar problems."¹³⁵

The Court then considered the argument that the tribes' failure to object to the state court's jurisdiction was a waiver of their immunity. The argument failed to persuade the justices, who held that tribal officials do not have the authority to waive the tribes' immunity.¹³⁶ "If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers."¹³⁷ In effect, the tribes were granted immunity as broad as that given to the federal government.¹³⁸

The Court gave tribal immunity another boost in 1978 with *Santa Clara Pueblo v. Martinez*.¹³⁹ Female members of the pueblo sued both the pueblo and its officials for prospective relief in federal court, alleging constitutional violations under the Indian Civil Rights Act.¹⁴⁰ While the ICRA did indeed provide for the protection of certain rights within the Bill of Rights,¹⁴¹ it provided no clear remedy other than by writ of habeas corpus.¹⁴²

The Court began by paying homage to the independence of tribal governments. Indian tribes, according to the Court, "have the power to make their own substantive law in internal matters and to enforce that law in their own forums."¹⁴³ Although the tribes were not present at the Constitutional Convention and thus are "unconstrained" by the Constitution's provisions, the Court recognized that Congress could make constitutional provisions applicable to tribes and that the ICRA was an exercise of this power.¹⁴⁴

133. *Id.* at 512.

134. *Id.* at 513.

135. *Id.*

136. *Id.*

137. *Id.*

138. Vetter, *supra* note 104, at 171.

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

140. *Id.* at 51. A female member of the pueblo and her daughter sued because a pueblo ordinance denied tribal membership to children of women who married outside of the pueblo, but did not deny membership to children of men who married outside of the tribe. *Id.*

141. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1994). The specific section at issue was section 1302(8), which states that "[no] Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1302(8).

142. *Id.* § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of the Indian tribe").

143. *Martinez*, 436 U.S. at 55-56 (citations omitted).

144. *Id.* at 56.

was "unequivocally and expressly stated."¹⁰² If the waiver made no mention of federal court, a suit against a tribe in federal court would not be allowed.¹⁰³ If a waiver mentioned only one legislative act by which a tribe could be subjected to suit, only an action under that act would be allowed to proceed.¹⁰⁴

The relationship between Congress and Indian tribes is important with respect to the issue of waiver. A waiver can be legitimate only if it comes from either the tribe¹⁰⁵ or Congress through a statute invoking such a waiver.¹⁰⁶ Given the modern Congresses' respect for tribal integrity and sovereignty, this generally means that the tribe alone will be the one to determine when immunity will be waived.¹⁰⁷ Further, the Supreme Court's recent decision in *Seminole Tribe of Florida v. Florida* raises doubts about the power of Congress to freely abrogate tribal immunity.¹⁰⁸

The Evolution of Tribal Immunity

A Muted Beginning: Turner v. United States

Ask students of tribal immunity to identify the case upon which the doctrine was founded and only a few of them might name *Turner v. United States*.¹⁰⁹ *Turner* is often overlooked in analyses of tribal immunity case law, but its role in the development of that case law is integral to understanding the Supreme Court's current attitude toward the doctrine.¹¹⁰

In *Turner*, the five bands of the Creek nation enacted a statute that allowed members to enclose portions of commonly held land and use them for pastures.¹¹¹ Turner and his colleagues purchased some of this land pursuant to the terms of the statute, and began to erect fences.¹¹² Unfortunately for

102. *Id.* at 58.

103. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992) (finding that waiver provision in contract was ambiguous as to all for a but tribal court, thereby prohibiting suit in any forum other than tribal court).

104. William W. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 171 (1994).

105. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (en banc), *aff'd on other grounds*, 455 U.S. 130 (1982).

106. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

107. *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. §§ 1321-1322 (1994) (requiring tribal consent before a state can assume jurisdiction over a tribe).

108. *See generally Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

109. 248 U.S. 354 (1919).

110. The Court's recent decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, focused on *Turner* as the basis for the development of tribal immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Techs. Inc.*, 118 S. Ct. 1700, 1703-04 (1998). For a discussion of the Court's interpretation of *Turner* and the judicial doctrine it created, see *infra* notes 259-65 and accompanying text.

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

112. *Id.* The terms of the statute required the district judges for the tribe to call an election

Turner, some of his neighbors disagreed with his venture and threatened to destroy his fences.¹¹³ Turner received an injunction from a federal court prohibiting tribal officials from interfering with his pasture, but other tribal members eventually destroyed the 80-mile fence.¹¹⁴ Turner sought compensation through the available tribal mechanisms, but the tribe failed to make any payments.¹¹⁵ Shortly thereafter, the tribal organization was dissolved.¹¹⁶ Turner instituted his claim against the Creek nation and the United States as trustee of the nation's funds in the Court of Claims, pursuant to an act of Congress specifically permitting the action.¹¹⁷

The Court denied Turner the relief he sought, based primarily on the premise that a government cannot be held responsible for injuries to property caused by mob violence.¹¹⁸ Justice Brandeis noted that the United States had recognized the Creek nation as "a distinct political community, with which it made treaties and which within its own territory administered its own internal affairs."¹¹⁹ Because the Creek nation was recognized as a distinct government, it was entitled to the same freedom from liability for mob violence that state and municipal governments enjoyed.¹²⁰

The Court emphasized the fact that the Creek's freedom from liability had little to do with sovereign immunity as such. According to Brandeis, "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace."¹²¹ Turner would not be allowed to recover on the theory that the tribe owed him more of a duty than it owed to anyone else.¹²²

if a person wished to establish a pasture of larger than one square mile. *Id.* The election was held and Turner was permitted to establish his pasture. *Id.*

113. *Id.* at 356.

114. *Id.*

115. *Id.* At one point, the tribal council voted to provide compensation, but the tribal chief vetoed the decision. *Id.*

116. *Id.*

117. *Id.* at 357. The act allowing the suit stated:

That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States.

Id. at 356-57 (quoting Act of May 29, 1908, ch. 216, 35 Stat. 444, 457 (1908)).

118. *Id.* at 357-58.

119. *Id.* at 357.

120. *Id.* at 358.

121. *Id.*

122. *Id.*

The Supreme Court then articulated several substantial rules in *Santa Clara*. First, it held that the tribe had sovereign immunity from suit,¹⁴⁵ and that no suit would be allowed to proceed against the tribe because the ICRA contained no express waiver of tribal immunity.¹⁴⁶ For a suit to be allowed against a tribe, Congress must have "unequivocally expressed" its intention to create such a waiver.¹⁴⁷ The Court found that Title I of the ICRA did not give the federal courts jurisdiction, instead limiting relief to a writ of habeas corpus.¹⁴⁸

Second, the Court held that the pueblo's governor did not fall under the umbrella of tribal sovereign immunity,¹⁴⁹ stating that an implied federal cause of action would derive from *Bivens v. Six Unknown Federal Narcotics Agents*.¹⁵⁰ Despite this precedent, the Court used a policy argument to insulate tribal officials from suit. The Court recognized that by forcing Indian tribes to litigate tribal matters in a forum other than their own would "undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves."¹⁵¹ Thus, the Court was hesitant to allow a waiver of tribal immunity without a clear indication from Congress.¹⁵²

The justices conceded that the claimants were the types of persons for whom the ICRA was enacted, and that the courts have inferred a federal cause of action for violations of civil rights.¹⁵³ The Court, however, found that the ICRA's statutory scheme and legislative history evidenced Congress' deliberate decision to avoid a waiver of tribal immunity.¹⁵⁴ Given Congress' deliberate exercise of its plenary power, the Court refrained from holding tribal officials to the same standards as federal and state officials.¹⁵⁵ The purposes of the ICRA — to protect a tribe's "ability to maintain itself as a culturally and politically distinct entity," as well as to protect the tribe's authority and economy — mandated the protection of tribal officials from suit, lest the sovereignty of the tribe itself be affected.¹⁵⁶

145. *Id.* at 58 (citing *Turner v. United States*, 248 U.S. 354, 358 (1919), and *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512-13 (1940)).

146. *Id.*

147. *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

148. *Id.* at 59.

149. *Id.* at 59.

150. *Id.* at 61 (citing *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971) (stating that an implied federal cause of action exists when a federal official violates a person's Fourth Amendment rights)).

151. *Id.* at 59.

152. *Id.* at 60.

153. *Id.* at 61.

154. *Id.* at 61-70 (noting the statute's emphasis on tribal self-government and Congress' use of habeas corpus to balance the competing interests of preventing injustice by tribes and preventing undue interference in tribal matters).

155. *Id.* at 71.

156. *Id.* at 72.

Simply because a tribe and, for all practical purposes, tribal officials are immune from suit in federal and state court does not mean that claimants have no forum in which to argue their cases. Tribal courts are available to persons with grievances against a tribe or its members.¹⁵⁷ In fact, the Supreme Court has determined that going through tribal courts may be the only way claimants will have their wrongs addressed.¹⁵⁸

In *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,¹⁵⁹ the victim of a car accident occurring on the Crow Indian Reservation filed suit in tribal court against the defendant and his insurance company.¹⁶⁰ The defendant defaulted in tribal court.¹⁶¹ The insurer brought suit in federal court to enjoin the tribal action, arguing that the tribal court and tribal judge were acting beyond their jurisdiction.¹⁶² The insurer relied upon the Court's previous holding in *Oliphant v. Suquamish Indian Tribe*,¹⁶³ which held that tribal courts did not have jurisdiction to impose criminal penalties upon non-Indians.¹⁶⁴

The Court found the *Oliphant* rule unconvincing, given that Congress had not restricted tribal jurisdiction over civil actions as it had with criminal actions.¹⁶⁵ Instead, the Court believed the issue required a "careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."¹⁶⁶

The Court preferred to leave the analysis in the hands of the tribal court in order to promote the policy of tribal self-government.¹⁶⁷ The court whose jurisdiction was being challenged should have the first opportunity to evaluate the merits of the challenge.¹⁶⁸ By giving the tribal court the opportunity to develop a complete record, moreover, the "orderly administration of justice in the federal courts would be served."¹⁶⁹ The insurer was thus required to

157. For a discussion of tribal court jurisdiction, see Vetter, *supra* note 105, at 185-88.

158. See, e.g., *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding that persons with claims against tribes must exhaust all tribal remedies prior to bringing suit against the tribe in federal court in federal question cases); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (extending the holding of *National Farmers Union* to diversity cases).

159. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

160. *Id.* at 847.

161. *Id.*

162. *Id.*

163. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

164. *Id.* at 204.

165. *National Farmers Union*, 471 U.S. at 854.

166. *Id.* at 855-56.

167. *Id.* at 856.

168. *Id.*

169. *Id.* The court was referring to both the need for a complete record upon appeal and the

contest tribal court jurisdiction before the tribal court, thereby exhausting all tribal remedies, prior to initiating suit in federal court for a federal question case.¹⁷⁰

*Iowa Mutual Insurance Co. v. LaPlante*¹⁷¹ extended the holding of *National Farmers Union* to diversity cases.¹⁷² *Iowa Mutual* involved an automobile insurer who sought a declaratory judgment that an auto accident being litigated in a Blackfeet Tribal Court action was outside of the insurer's policy.¹⁷³ Noting the federal policy promoting tribal self-government, the Court held that tribal remedies must be exhausted in diversity cases, as well as in federal question cases.¹⁷⁴ Once all tribal remedies had been exhausted, the claimant could bring an action in federal court in order to challenge the tribal court's jurisdiction.¹⁷⁵ The tribal court's rulings on the merits of the dispute, however, would be binding upon the federal court unless the federal court determined that the tribal court was acting outside of its jurisdiction.¹⁷⁶

A Turn for the Worse? 1980 to 1996

The development of tribal immunity case law to this point seemed to suggest a strong presumption in favor of tribal sovereign immunity. Yet several cases after 1980 suggest the judiciary, particularly the lower federal courts, might be more willing to interfere on behalf of claimants than was previously thought.

In 1980, the Tenth Circuit decided *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*¹⁷⁷ and in doing so went above and beyond the call of duty to find tribal sovereign immunity nonexistent. The case involved plaintiffs who owned land within a reservation that contained a significant non-Indian population.¹⁷⁸ The tribe's business council closed an access road to the plaintiffs' hunting lodge after an Indian family complained of the road running through their land.¹⁷⁹ The tribal court refused to hear the plaintiffs' case, so the plaintiffs sued in state and federal courts, with the state case eventually removed to federal court.¹⁸⁰

need for federal courts to gain a better understanding of the workings of the tribal courts. *Id.*

170. *Id.* at 857.

171. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

172. *Id.* at 19.

173. *Id.* at 12-13.

174. *Id.* at 19.

175. *Id.*

176. *Id.*

177. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

178. *Id.* at 683.

179. *Id.* at 684.

180. *Id.*

The Tenth Circuit distinguished the facts of *Dry Creek* from those in *Santa Clara* to deny the tribe's claim of immunity.¹⁸¹ In *Santa Clara*, the Court said, the issue was an internal tribal matter affecting tribal members who had access to their own elected officials and tribal machinery.¹⁸² In *Dry Creek*, however, no tribal forum existed and the issue involved non-Indians.¹⁸³ Hence, the issue did not constitute "internal tribal affairs" and the tribe could not use sovereign immunity as a defense under the ICRA.¹⁸⁴ The Tenth Circuit did not address the issue of whether Congress had granted an express waiver, as was required in *Santa Clara*,¹⁸⁵ nor did it address the issue of the tribal court's jurisdictional rights, as required in *National Farmers Union*.¹⁸⁶ Thus, there is some disagreement as to whether the Tenth Circuit should have even discussed the merits of the plaintiffs' claim.¹⁸⁷

Furthermore, critics have targeted *Dry Creek* because it held that "[t]here has to be a forum where the dispute can be settled."¹⁸⁸ If this argument were legitimate, then sovereign immunity would sometimes have to be waived for states and the federal government because prior case law regarding immunity for these entities summarily disallows a forum for some complaints. For example, the holding of *Seminole Tribe of Florida v. Florida* creates a non-forum dilemma in which federal courts, which have exclusive jurisdiction over patent or copyright cases, may be barred from deciding patent or copyright cases brought against a state.¹⁸⁹ In yet another example, a claimant who wants to sue a state official for monetary damages in federal court for an action taken in the official's official capacity would have his or her claim dismissed because of the official's qualified immunity.¹⁹⁰ The claimant would also be precluded from bringing such an action in state court, however, under *Will v. Michigan Department of State Police*.¹⁹¹ The claimant in *Will* purposely brought suit in state court to avoid the Eleventh Amendment immunities, yet the Supreme

181. *Id.* at 685.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

186. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

187. Wagman, *supra* note 13, at 451.

188. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d at 685.

189. This result would occur because Congress' power to regulate patents comes from Article I, which the *Seminole* Court said was an improper vehicle for abrogating state immunity under the Eleventh Amendment.

190. *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982). In such a case, the claim is considered to be one against the state, with the Eleventh Amendment barring the recovery of monetary damages. *Id.* The suit could proceed if only an injunction were sought. *Id.*

191. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding a suit against state officials acting in their official capacity not allowable in state courts).

Court construed 42 U.S.C. § 1983 so narrowly that, for all practical purposes, it applied the immunity doctrine to the state court anyway.¹⁹²

Dry Creek does not have wide support among other federal circuits, or even the Tenth Circuit anymore. The Tenth Circuit has often refused to apply its holding in *Dry Creek* to other cases involving tribal sovereign immunity under the ICRA.¹⁹³ Other circuit courts have also hesitated to apply *Dry Creek's* reasoning.¹⁹⁴

The Supreme Court reentered the fray in 1991 with *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,¹⁹⁵ a case that both reaffirmed and reassessed tribal immunity.¹⁹⁶ *Oklahoma Tax Commission* involved Oklahoma's attempt to require the tribe to collect state taxes on cigarettes it sold to non-Indians on the reservation.¹⁹⁷ The tribe sought an injunction in federal court and the state counterclaimed to prevent the tribe from selling cigarettes to non-Indians without the tax.¹⁹⁸ Although the overarching purpose of the case was to determine whether states had a right to tax the sale of cigarettes to non-Indians on the reservation,¹⁹⁹ Justice Rehnquist also delved into the issue of tribal immunity.²⁰⁰

While Rehnquist made a blanket statement supporting tribal immunity from counterclaims, he managed to work his way around such immunity. The Court reaffirmed *United States Fidelity's* rule that a "tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe."²⁰¹ Despite this apparent support for tribal immunity, the Court still considered the merits of the counterclaim against the tribe by asserting that the question was "fairly subsumed in the 'questions presented' in the petition for certiori."²⁰²

Oklahoma urged three bases upon which the Court could rule in its favor. First, Oklahoma argued that the Court could find an implied waiver of the tribe's immunity in the tribe's request for an injunction against the state's tax collection plan.²⁰³ Rehnquist rejected this argument, based upon the Court's

192. *Id.*

193. See, e.g., *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) (refusing to apply *Dry Creek*); *Enterprise Management Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989) (*Dry Creek* should be narrowly interpreted).

194. *Limas*, *supra* note 91, at 373 nn.106-07.

195. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

196. See *Wagman*, *supra* note 13, at 465 (discussing how the Court validated tribal immunity, but then suggested ways around it).

197. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 507.

198. *Id.*

199. *Id.* at 506.

200. *Id.* at 509-14.

201. *Id.* at 509.

202. *Id.* at 512.

203. *Id.* at 509.

previous holding in *United States Fidelity*.²⁰⁴ Oklahoma then argued that the Court should either narrow or completely abandon its tribal immunity doctrine.²⁰⁵ Rehnquist found fault with this argument, noting Congress' continued support for the doctrine.²⁰⁶ Finally, Oklahoma asked the Court to distinguish between tribal activities undertaken on tribal trust land and those undertaken on reservations.²⁰⁷ This argument failed on the grounds that the distinction requested by Oklahoma was one that had never been recognized by the Court.²⁰⁸

Although his majority opinion favored the tribe, Rehnquist stated that the Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State."²⁰⁹ This is contrary to *Santa Clara*, which held that although tribal officials do not share the same immunity from suit as does the tribe, they are protected from suit for policy reasons.²¹⁰ Rehnquist even went so far as to suggest that states attempt a legislative reversal of tribal immunity if they were truly adverse to it.²¹¹

While the Court appeared to reaffirm its stance in favor of tribal immunity, it began to poke substantial holes in the protection afforded. Tribal officials were espoused as potential targets for suit,²¹² tribes were discouraged from making broad pleadings lest they should lose their immunity via a counterclaim,²¹³ and states were encouraged to take up legislative arms against the doctrine of tribal immunity.²¹⁴

To Abrogate or Not to Abrogate? 1996 to 1998

*Seminole Tribe of Florida v. Florida*²¹⁵

Until recently, the question of whether Congress has the power to abrogate tribal immunity was easy to answer. As seen in *Santa Clara*, Congress could indeed abrogate a tribe's immunity from suit, as long as such a waiver was unequivocally expressed.²¹⁶ *Santa Clara*'s clear holding, however, became muddled in 1996. While not directly confronting the issue of tribal immunity,

204. *Id.*

205. *Id.* at 510.

206. *Id.*

207. *Id.* at 511. Trust land is held in trust by the United States for the benefit of Indian tribes. *Id.*

208. *Id.*

209. *Id.* at 514.

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

211. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

212. *Id.* at 514.

213. *Id.* at 512.

214. *Id.* at 514.

215. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

216. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

the Supreme Court's holding in *Seminole Tribe of Florida v. Florida* implies that Congress' power to subject Indian tribes to suit may not be as unquestionable as once thought.

The thrust of *Seminole* dealt not with any issue of tribal immunity, but with Congress' ability to abrogate a state's sovereign immunity via the Indian Commerce Clause.²¹⁷ The statute in question was the Indian Gaming Regulatory Act (IGRA),²¹⁸ which allows tribes to conduct certain gaming activities within a state if they enter into a valid gaming compact with that state.²¹⁹ Under the Act, the state is required to negotiate in good faith with the tribes.²²⁰ This duty is judicially enforceable under the Act, which gives the U.S. district courts jurisdiction to hear "causes of action initiated by an Indian tribe arising from the failure of a State to . . . conduct such negotiations in good faith."²²¹ When Florida officials refused to negotiate with the Seminole tribe, the tribe sued the state of Florida and Florida Governor Lawton Chiles.²²²

Justice Rehnquist, writing for the majority, found for the Florida respondents. Rehnquist considered two issues in his analysis: "(1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and (2) Does the doctrine of *Ex parte Young* permit suits against a state's governor for prospective injunctive relief to enforce the good faith bargaining requirement of the Act?"²²³

To analyze the first issue, Rehnquist considered whether Congress had "unequivocally expressed" an intent to waive a state's immunity and whether Congress had acted "pursuant to a valid exercise of power."²²⁴ It was clear to Rehnquist that the IGRA provided an "unmistakably clear" statement of Congress' intent to abrogate.²²⁵ Therefore, the statute was safe on the first factor.

The second factor, however, would sound the statute's deathknell — at least as far as abrogation was concerned. Rehnquist noted that until the Supreme

217. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 65. The Indian Commerce Clause is simply the latter part of the foreign commerce and interstate commerce clauses: "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 2 (emphasis added).

218. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2710 (1994).

219. *Id.* § 2710(d)(1).

220. *Id.* § 2710(d)(3).

221. *Id.* § 2710(d)(7)(A)(i).

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

223. *Id.* at 53.

224. *Id.* at 55.

225. *Id.* at 56 ("In sum, we think that the numerous references to the 'State' in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.").

Court's decision in *Pennsylvania v. Union Gas Co.*,²²⁶ the Court had never held that the Commerce Clause gave Congress any power to abrogate state sovereign immunity.²²⁷ Instead, the only source of congressional abrogation power the Court had been willing to recognize came from section 5 of the Fourteenth Amendment.²²⁸ In that amendment, the language allowing abrogation was unmistakable.²²⁹ The Commerce Clause could provide no such unmistakable intent, and Rehnquist was hesitant to allow Congress to modify the courts' Article III jurisdiction via reference to an Article I power that was not intended for such a purpose.²³⁰ Thus, Congress, in using the Indian Commerce Clause to abrogate state sovereign immunity, was not acting pursuant to a valid exercise of power.²³¹

Just to be safe, the Court buttressed its argument with a bit of constitutional history. The Court noted that its decision in *Fitzpatrick v. Bitzer*²³² allowed section 5 of the Fourteenth Amendment to serve as a mechanism for abrogation based upon the timing of the amendment's adoption.²³³ State sovereign immunity was formally recognized with the passage of the Eleventh Amendment. The Court could assume that later constitutional provisions allowing abrogation — such as section 5 of the Fourteenth Amendment — were adopted with the states' Eleventh Amendment immunity in mind.²³⁴ The Court could not, however, support the "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."²³⁵

The Court then went on to hold that the Florida governor was also immune from suit, despite the doctrine of *Ex parte Young*.²³⁶ While *Ex parte Young* generally allowed suits against state officials as a means of obtaining prospective injunctive relief, the *Seminole* Court held that because the IGRA set forth a complex remedial scheme for the enforcement of its provisions,

226. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

227. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 65.

228. *Id.* Section 5 of the Fourteenth Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

229. *Id.*

230. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 65. Justice Rehnquist wrote: "As the dissent in *Union Gas* recognized, the plurality's conclusion — that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III — contradicted our unanimous approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction." *Id.* (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 39 (1996) (Scalia, J., dissenting)).

231. *Id.*

232. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

233. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 65-66.

234. *Id.*

235. *Id.* at 66.

236. *Ex parte Young*, 209 U.S. 123 (1908).

decision was later sustained by the Oklahoma Court of Appeals.²⁵⁴ The U.S. Supreme Court took the case and reversed the Oklahoma Court of Appeals, but not without some hesitation.²⁵⁵

The Supreme Court winced at Oklahoma's attempt to subject Indians to suit through the doctrine of comity.²⁵⁶ The Court noted that "the immunity possessed by Indian tribes is not coextensive with that of the States."²⁵⁷ Because Indian tribes were not at the Constitutional Convention and were not part of the "mutuality of concession" as were the states, tribal immunity is a matter of federal law and not "subject to diminution by the States."²⁵⁸

The Court noted that although tribal immunity was well settled, its development was purely accidental and purely a creation of the judiciary.²⁵⁹ Writing for the majority, Justice Kennedy pointed out that the decision upon which the doctrine of tribal immunity was based, *Turner v. United States*, did not support the doctrine.²⁶⁰ The Court in *Turner* merely assumed tribal immunity existed for the sake of argument and was not creating a new doctrine.²⁶¹ The unique facts of the case — the tribal unit had dissolved and therefore could not be subjected to suit unless Congress authorized such a suit — governed the *Turner* Court's references to tribal immunity.²⁶² As such, *Turner* was "a slender reed for supporting the principle of tribal sovereign immunity."²⁶³

Kennedy recognized that Supreme Courts of the past had applied the doctrine of tribal immunity despite its weak foundation in *Turner*.²⁶⁴ Kennedy explained this systematic regurgitation of an accidental doctrine by putting the blame on Congress. Kennedy argued that the Supreme Court retained the doctrine because Congress often chose not to abrogate tribal immunity in order to promote tribal economic development and self-sufficiency.²⁶⁵

254. *Id.*

255. *Id.* The Oklahoma Supreme Court declined to review the judgment, so the case went to the U.S. Supreme Court. *Id.*

256. *Id.* at 1703. Comity applies when a sovereign that allows itself to be sued permits its citizens to sue other sovereigns in its courts. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 1704.

262. *Id.* "The tribal government had been dissolved. Without authorization from Congress, the Nation could not have been sued in any court; at least without its consent." *Id.* (quoting *Turner v. United States*, 248 U.S. 354, 358 (1919)).

263. *Id.*

264. *Id.* (mentioning, for example, *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991)).

265. *Turner*, 248 U.S. at 358.

The *Kiowa* Court was clear in its disagreement with the rationale supporting tribal immunity. The Court held that a blanket rule supporting tribal immunity does not take into account the fact that tribal activities have broken into non-traditional commercial enterprises.²⁶⁶ Given the expanding scope of tribal activities, tribal immunity can present a danger to those who are harmed by a tribe's activities yet have no forum in which to argue their claims.²⁶⁷ In other words, tribal immunity has developed into a doctrine that is more than large enough to protect the legitimate interests of tribes, but so large that it unnecessarily harms those who interact with tribes and are injured by them.²⁶⁸

Despite its attitude toward the doctrine of tribal immunity, the Supreme Court adhered to the doctrine in *Kiowa*. Once again, the Court looked to Congress for guidance, and discovered that Congress has maintained its support for tribal immunity.²⁶⁹ The Court likened tribal immunity to foreign sovereign immunity, where Congress had the ultimate power to expand or limit the doctrine.²⁷⁰ Thus, although "the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."²⁷¹

While the ultimate holding of *Kiowa* upheld the tribe's immunity from suit, the Court was clear in its disdain for the doctrine. The Court used the case to send an unambiguous message to Congress. Recognizing the need to defer to Congress, the Court suggested that "Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.'"²⁷²

Conclusion

The status of Indian tribes within the governmental structure of the United States has never been crystal clear. The debate becomes even more confused

266. *Kiowa Tribe of Oklahoma v. Manufacturing Techs. Inc.*, 118 S. Ct. 1700, 1704 (1998).

267. *Id.* (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)).

268. *Id.* According to the Court:

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

Id.

269. *Id.* at 1705.

270. *Id.* The Court noted that foreign sovereign immunity began as a judicial doctrine, but was later codified by Congress with the Foreign Sovereign Immunities Act. *Id.*; see Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1604, 1605, 1607 (1994).

271. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 118 S. Ct. at 1705.

272. *Id.* (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 510 (1991)).

Congress necessarily meant for such a scheme to be the only form of relief.²³⁷ As Rehnquist stated, "it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*."²³⁸

Although *Seminole* is not a tribal immunity case, it has significant implications for the future of tribal immunity. While *Union Gas* allowed Congress to use the Commerce Clause as a means of abrogating state immunity, it was only a plurality opinion and was overruled by *Seminole's* 5-4 majority. This would imply that any attempt to abrogate or waive tribal immunity under the Indian Commerce Clause would also be met with some skepticism by the Court.

While there are arguments for allowing Congress more power to abrogate tribal immunity — i.e., the history of congressional regulation and the tribes' trust relationship with the federal government — there are even stronger arguments for limiting Congress' abrogation power as to tribes. After all, tribes had no say in the making of the Constitution²³⁹ and until recently were not even subject to its provisions.²⁴⁰

The *Seminole* majority clearly stated that the only provision Congress could use to abrogate state immunity under the Eleventh Amendment was section 5 of the Fourteenth Amendment.²⁴¹ If this ruling is extended to tribal immunity, congressional ability to waive tribal immunity will be severely limited. As it currently stands, Congress need merely make an unequivocal expression of intent to abrogate tribal immunity, without any reference to a specific constitutional provision.²⁴²

The question that must be addressed, of course, is whether tribal immunity is comparable to state immunity under the Eleventh Amendment. This is a necessary question, as *Seminole's* holding is based on the states' Eleventh Amendment protections as opposed to tribal immunity case law. It is clear by the text of the Amendment that tribes are not covered by its immunity protections.²⁴³ Yet the Supreme Court has allowed tribal immunity to encompass virtually the same protections as offered states under the Eleventh Amendment.²⁴⁴ In fact, tribes and tribal officials actually have more

237. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 74-75.

238. *Id.* at 75.

239. Joranko, *supra* note 29, at 988.

240. Compare *Talton v. Mayes*, 163 U.S. 376, 384-85 (1886) (holding that the Fourteenth Amendment was not applicable to tribal governments) with *Indian Civil Rights Act*, 25 U.S.C. § 1302 (1994) (making basic constitutional provisions, including the Fourteenth Amendment, applicable to Indian tribes).

241. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 65-66.

242. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

243. U.S. CONST. amend. XI.

244. See, e.g., *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940) (holding that neither the tribe nor its tribal officials could be subjected to nonconsensual suit in

protection from suit than do states and state officials, inasmuch as tribes and tribal officials have not been included within the scope of 42 U.S.C. § 1983. Thus, the status of the immunity afforded to states and tribes is essentially the same.

It would then appear that Congress' ability to waive tribal immunity at will might have been weakened. There are, however, two important caveats. First, the Rehnquist court is well known for its animosity toward tribal immunity²⁴⁵ and therefore reliance on the reasoning behind Rehnquist's disapproval of congressional abrogation in *Seminole* might be misguided. Second, Rehnquist's opinion in *Seminole* alludes to a difference between federal power over states and federal power over tribes.²⁴⁶ He noted 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."²⁴⁷ This suggests that the Rehnquist court might allow congressional abrogation of tribal immunity despite the reasoning in *Seminole*, simply based on the degree to which Congress has retained control over tribal functions to the exclusion of the states.²⁴⁸

*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*²⁴⁹

If *Seminole* hinted at the Supreme Court's disdain for tribal immunity, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* left no doubts. The Kiowa tribe entered into an agreement with Manufacturing Technologies to purchase stocks.²⁵⁰ A tribal official signed a promissory note, which did not specify any governing law but merely asserted the sovereign immunity rights of the tribe.²⁵¹ When the tribe defaulted and a question arose as to whether the note had been signed off the Kiowa reservation, Manufacturing Technologies sued on the note in state court.²⁵² The tribe moved to dismiss, based upon its tribal immunity.²⁵³ The tribe's motion was denied and this

any forum); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (stating tribes and tribal officials are immune from suit, unless such immunity is waived by either Congress or the tribe).

245. See Wagman, *supra* note 13, at 465-70.

246. *Seminole Tribe of Florida v. Florida*, 517 U.S.44, 63 (1996).

247. *Id.*

248. Congressional authority over the tribes is nearly all-encompassing. See *supra* notes 87-89 and accompanying text. Because tribes do not enjoy the same degree of "separateness" from Congress as do the states, the courts may be more likely to find congressional power to abrogate. This possibility is alluded to by the *Seminole* Court: "Indeed, it was in those circumstances where Congress exercised complete authority that Justice Brennan thought the power to abrogate most necessary." *Id.* (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 17 (1989)).

249. *Kiowa Tribe of Oklahoma v. Manufacturing Techs. Inc.*, 118 S. Ct. 1700 (1998).

250. *Id.* at 1702. The stocks at issue were stocks of Clinton-Sherman Aviation, Inc. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

and heated when it touches upon the subject of liability for the consequences of tribal action.

Courts and states have developed a strong argument in favor of sovereign immunity for state actions.²⁷³ The same arguments support tribal immunity, with perhaps even more fervor given tribes' limited financial and legal resources and their precarious position within the governmental structure of the United States.²⁷⁴ While states have been able to prosper since the formation of the Union, the same cannot be said for Indian tribes.²⁷⁵

The situation of Indian tribes has not gone unnoticed. Modern Congresses have attempted to protect the financial and governmental interests of tribes through legislation such as the Indian Civil Rights Act.²⁷⁶ Meanwhile, the courts have provided the tribes with a degree of immunity rivaling that provided to states under the Eleventh Amendment.²⁷⁷

The status of Indian tribes is ever-changing. No one can know where the doctrine of tribal immunity will go from here. It is possible that a future Supreme Court — relying upon *Seminole* — will recognize only a tribal waiver of immunity, and limit the ability of Congress to impose liability upon the tribes. This rationale is especially applicable if the Court chooses to expand its reasoning in *Seminole*. If the Court is unwilling to recognize pre-Eleventh Amendment constitutional provisions as bases for congressional abrogation,²⁷⁸ then one must question whether there is any basis for abrogating tribal immunity when tribes had no part in creating the Constitution.

It is clear from the Court's language in *Seminole* and *Kiowa*, however, that the justices are less than pleased with the doctrine of tribal immunity. Although one might be able to argue that *Seminole's* reasoning could be used to justify a tribe-only waiver of immunity, the Court has repeatedly recognized Congress' plenary power over tribes.²⁷⁹ After all, Indian tribes had no say in the adoption of the Bill of Rights, yet by act of Congress the tribes must abide by its provisions.²⁸⁰

Perhaps even more interesting for the future of tribal immunity, though, is *Kiowa's* focus on the doctrine's unstable judicial beginnings. The *Kiowa* Court was emphatic in its assertion that tribal immunity was little more than a

273. See *supra* notes 13-14 and accompanying text.

274. See *supra* notes 26-30 and accompanying text.

275. See *supra* notes 26-30 and accompanying text.

276. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1994).

277. See *supra* notes 242-43 and accompanying text.

278. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 65-66 (1996) (discussing the rationale behind allowing section 5 of the Fourteenth Amendment to serve as a mechanism for abrogation because it was adopted after the recognition of state sovereign immunity).

279. *Duro v. Reina*, 495 U.S. 676 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886).

280. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1994).

judicial Frankenstein's monster — an interesting theory that once put to practical use proved unmanageable and damaging to those who confronted it.²⁸¹ Although the Court has to this point been hesitant to smite its creation, it is clear the justices are losing their patience.

Whatever the outcome, some degree of tribal immunity should be recognized as a necessary element in promoting the sovereignty and self-sufficiency of Indian tribes. It would be ironic if the federal government were willing to expose tribes to suits under a constitutional system the tribes had no part in making, while failing to expose affluent states to monetary damage suits for the most egregious of constitutional violations.

281. See *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 118 S. Ct. 1700, 1703-04 (1998) (discussing the doctrine's unintended creation and its outdated purposes).