Sovereignty: Indian Sovereignty and Tribal Immunity From Suit

Douglas R. Wright

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

Part of the Indian and Aboriginal Law Commons

Recommended Citation

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
SOVEREIGNTY: INDIAN SOVEREIGNTY AND TRIBAL IMMUNITY FROM SUIT

Douglas R. Wright

All wars have been fought over one word: Sovereignty.—Monroe McKay

Words don't have meaning, only people have meaning.—Stephen Fuller

A discussion of Indian sovereign immunity must begin with definitions. The term "sovereign immunity" is ambiguous. It refers to several interrelated concepts, but it is often used without regard to the differences between them.

Two concepts involve the idea of immunity from suit. This immunity may exist (1) in the courts of the sovereign being sued, and (2) in the courts of other sovereigns, although for different reasons.

In other contexts the term may be used to connote that a sovereign has all governmental powers within its jurisdictional area so that neither the sovereign government nor those it governs can be made subject to the rule of any other sovereign, except by consent or conquest. Thus there is by negative inference an "immunity" from the laws and regulations of other governments. This is not true sovereign immunity but merely an application of the principles of territorial jurisdiction. In this note a sovereign's "immunity" from the legislative acts of other sovereigns will be called autonomy, and the term "sovereignty" will be used to connote the gamut of governmental power. The term "sovereign immunity" will be restricted to mean only immunity from suit. Moreover, because this note concludes that traditional sovereign immunity ought not to be considered part of Indian tribal sovereignty, the term "tribal immunity" will be used instead of "Indian sovereign immunity."

This paper will examine the doctrine of sovereign immunity and compare the application of it to Indian tribes with its application to foreign countries and states. It will also touch upon the nature of tribal sovereignty and contrast the approach courts have taken in resolving conflicts between tribal and state legislative powers with the approach used in the tribal immunity cases.

1. From a lecture attended by author.
2. From a lecture attended by author.
Sovereign Immunity in a Sovereign's Own Courts

A sovereign's immunity from suit in its own courts rests on a different foundation from its immunity in the courts of other sovereigns. The latter form is closely related to the concepts of territorial jurisdiction, autonomy, and sovereignty. The exercise of judicial power by one monarch's courts over another monarch was considered just as much an act of hostility or assertion of superiority as an exercise of legislative power. Therefore, a monarch was "immune" from suit in the courts of other rulers. His immunity from suit in his own courts, though, was based on somewhat different principles. This concept of sovereign immunity will be discussed first.

"The Old Gray Mare Ain't What She Used To Be"

The doctrine that a sovereign is immune from suit in its own courts, as presently understood in America (American sovereign immunity), is very different from the ancient original (Old English sovereign immunity).

Originally, sovereign immunity did not bar recovery from the crown for violations of a subject’s legal rights; it was only a procedural rule compelling the subject to proceed by petition of right rather than by an action at law. If the petition of right stated a proper legal claim, the king endorsed it, "let right be done to the parties," thereby authorizing his court to render judgment. Such "consent" apparently was given as a matter of course. "The King, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects." Indeed, the maxim, "the King can do no wrong," originally connoted that the king was "not entitled to do wrong."

From this it is evident that one of the fundamental principles of the common law before the American Revolution was that the sovereign was subject to the law. If the crown was accountable according to law, and if a subject was entitled to petition the king as a matter of right for redress upon terms ultimately adjudged

---

4. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197 (abridged student ed. 1965) [hereinafter cited as JAFFE].
5. Id. at 197, 199.
6. 9 HOLDsworth, A HistoRY OF ENGLISH LAW 8 (3 ed. 1944) [hereinafter cited as HOLDsworth]. See C. JACOBs, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 6-7 (1972) [hereinafter cited as JACOBs].
7. JAFFE, supra note 4, at 199.
8. HOLDsworth, supra note 6, at 10. See Magna Charta, 1225, 9 Hen. 3, c. 26.
by the king's court, then what was the source of the sovereign's immunity from "suit" in that court?

The answer is courtesy and common sense. The king was "the fountain of justice and equity." It would have been a personal insult to the crown for a subject to seek a writ—a means of compulsion—against it when it was the crown's goodness and grace that guaranteed justice in the first place, especially when the subject had a right to petition the king directly. The petition of right respected the king's theoretically unfailing justice. Likewise, it violated common sense for a subject to seek a writ against the king. The writs were nothing more than documents issued in the king's name exercising his sovereign power to compel redress when rights were violated. Thus, not only was it repugnant to suppose that the king had to be compelled to do right, but it was ridiculous to think his power should be directed against himself in a writ. The petition of right was much more respectful and realistic.

Thus it is apparent that Old English sovereign immunity arose out of respect for the king both as a person and as the source of law, equity, and justice. It was inseparable from the idea that subjects had a right to petition the Crown directly for redress. The doctrine was not founded on any notion that the sovereign was unaccountable to his subjects. On the contrary, it was based on the idea that the king would faithfully fulfill his sovereign duty to render justice when petitioned to do so. Sovereign immunity both supported the petition of right by compelling its use, and was supported by it because the idea that the king would, as a matter of right, redress wrongs upon petition was the source of the inconsistency and insult that the doctrine of sovereign immunity was designed to prevent.

American sovereign immunity is much different. The attempt to transfer the doctrine to the newly independent American states was like trying to put a square peg into a round hole. However, instead of concluding that the peg did not fit and discarding it, the courts figuratively chopped off the corners, turned it upside down, and pounded it in with the heavy hammer of tradition.

In the newly independent states the people were sovereign and the government was their servant. There was no monarch to in-

9. HOLDSWORTH, supra note 6, at 10.
10. JAFFE, supra note 4, at 198.
11. But see Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
12. See Jacobs, supra note 6, at 5.
sult, no king to issue a writ against himself, and no king to sign a petition of right. Moreover, the concept that the king was accountable according to law—which was an implicit recognition that justice actually came from equal accountability under fair laws, and not from the inherent goodness of the king—was carried one step farther. In the United States this became explicit. The people were to be governed by laws, not by men. And the sovereign people were to make the laws through their chosen representatives. It was to be "a government of the people, by the people and for the people."14

Thus, the notion of the inherent goodness and justice of the monarch was abandoned while the concept of the supremacy of law was embraced. Because it was the monarch's supposed inherent justice that spawned the insult and incongruity that Old English sovereign immunity was designed to prevent, abandonment of the former notion would seem to have invited abandonment of the latter. Unfortunately, however, the courts did not respond to the invitation.

This was more a result of misperception than design. The courts failed to perceive in the change from a sovereign ruler with subjects to a sovereign citizenry the fundamental doctrinal changes that made sovereign immunity unsuitable for republican governments. They noted only that the identity of the sovereign had changed, assumed that a suit against the government of a state was a suit against the sovereign people, and tried to apply the familiar rules concerning suit against the sovereign.15 This resulted in retention by the states of the doctrine of sovereign immunity. More important, it also resulted in abolition of the petition of right.16 The courts reasoned that because there was no sovereign capable of personally endorsing such a petition, it simply could not be used.17 As a result, Old English sovereign immunity, which operated merely as a procedural preference for the petition of right and was therefore consistent with, and dependent upon, the ready availability of legal redress from the king, was imperceptibly transformed into American sovereign immunity—a substantive rule barring redress completely.

American sovereign immunity became not only incapable of

13. HOLDSWORTH, supra note 6, at 10.
14. A. Lincoln, Gettysburg Address (1864).
16. JAFFE, supra note 4, at 196-97.
doing the job that Old English sovereign immunity was created to do, but it was violative of two fundamental principles of law upon which the doctrine was originally based and which are still vital principles in America.

Old English sovereign immunity was designed to prevent insult to the monarch and to eliminate the nonsensical possibility that the king would have to compel himself to do right. In America there is no king to insult or compel.

Furthermore, the lifeblood of Old English sovereign immunity was dependent on the basic concept that the sovereign was accountable for violations of the rights of his subjects, coupled with the notion that it was the monarch's sovereign and inescapable duty to render and guarantee justice to them. In contrast, American sovereign immunity disables members of the sovereign citizenry from suing their servant, the government, thereby rendering the government unaccountable even for violations of constitutional rights and discharging it from its delegated duty to administer justice. Whether we say that "the old gray mare ain't what she used to be," or that the peg has been hammered in upside down, it is clear that the results produced by American sovereign immunity are opposed to those achieved under the Old English system which supposedly was simply continued.

American sovereign immunity is a complete misfit in the American scheme of government. The Supreme Court has called it "disfavored," and commentators have called it much worse. The question, then, is whether tribal immunity from suit in tribal courts is related to this "pernicious doctrine."

_Tribal Immunity: You Can't Get There From Here_

The nature of tribal immunity depends partly on its origin, and any analysis of it will be influenced by the label attached to it.

19. Id.
21. See, e.g., U.S. Const., the Preamble: "WE, the people of the United States, in Order to . . . establish Justice . . . do ordain and establish this Constitution."
23. See, e.g., 2 Anteau, _Modern Constitutional Law_ 674 (1969) (referring to "the pernicious doctrine of sovereign immunity" as "a reflection of an immature jurisprudence that thought the political state could be exempted from the ethical code governing the culture.").
First, it is necessary to recognize that tribal immunity from suit in tribal courts may well be a holdover from traditional Indian ways. This is not unrealistic in view of the communal life-style and tribal loyalty of many Indians. Hoebel's work tends to show that among Indians redress of wrongs was often a private matter between individuals. In such a culture it would probably never occur to a tribal member to assert that the tribe had violated his rights, and even if he thought of it there was no means of vindicating those rights other than rebellion. This de facto immunity could be regarded as a part of tribal culture that was retained even after tribal courts modeled on American courts were established.

On the other hand, it is also possible that American sovereign immunity came to the tribes in the same package as the Anglo-American court system. If so, the doctrine would be no more appropriate in tribal courts than it is in state or federal courts, and probably would be less so. Two possibilities exist: Tribes such as the pre-Removal Cherokees adopted the entire constitutional republican form of government, including the judicial system; or, a tribe that desired to continue resolving conflicts as it had ancienly, in order to obtain federal approval, adopted a tribal court system that was patterned closely after the state and federal judicial systems.

In the first instance, the same reasons for rejecting American sovereign immunity would exist under the Cherokee constitution, or one like it, as under the United States Constitution. Moreover, unlike the American colonies, the notions of kingship or sovereignty have been alien to Indian cultures for ages. Old English sovereign immunity would have been unknown to the aboriginal tribes, so there seems little reason why its offspring—American sovereign immunity—should be adopted by any tribe attempting to establish a constitutional form of government. This observation may be pertinent even to tribes that have not copied the United States Constitution because many tribal governments appear to have been originally much more like republics than monarchies.

25. Id. at 132, 133-34, 147.
27. See, e.g., HOEBEL, supra note 24, at 132.
In the second instance, where a tribe might reluctantly adopt an American style court system, it probably got American sovereign immunity along with it, whether this was desirable or not. Suppose such a tribe used the tribal courts to resolve claims against it and never raised the defense of sovereign immunity? The result probably would not be a conclusion by observers that the tribe lacked sovereign immunity, but only that it had given a general consent to suit. If, on the other hand, immunity was asserted, the conclusion of observers would probably be that the tribe had exercised its inherent sovereign immunity—by which would be meant American sovereign immunity.

This brings up another problem in defining the nature of tribal immunity: the name. It is usually called sovereign immunity. Naturally, that conjures up all sorts of images of kings and petitions and so forth, all of which are inappropriate in considering the immunity of an Indian tribe. A tribe claiming immunity is either adopting American sovereign immunity or is claiming an inherent immunity based on de facto immunity arising out of its own nonmonarchical culture.

The obvious questions are: So what? What difference does it make? Those are questions only tribal courts can answer, but which ought not to be ignored. The proper present-day application of ancient tribal de facto immunity and the reconciliation of it with the ethical responsibility of the tribe from a consideration of the principles of American or Old English sovereign immunity cannot be attained. Likewise, the wholesale adoption of American sovereign immunity from a finding of ancient de facto tribal immunity is also impossible. The policy and rationale of any asserted immunity ought to be examined in each case. Surely the tribal courts will recognize this and make reasoned determinations unsullied by Anglican notions of sovereign immunity.

Tribal Immunity in the Courts of Other Sovereigns:
There Is More Than Meets the Eye

An entirely different question is involved when considering tribal immunity from suit in state and federal courts and that is whether the tribe has immunity from suit in the courts of another sovereign. Much of the maze of civil and criminal jurisdiction over Indian country is pertinent here. However, it will be assumed that a suit may be brought against a tribe in either state or federal court which is entirely proper except for the question of tribal immunity. Only that issue will be discussed.

In order to understand the nature of the question whether In-
dian tribes should have such immunity, it will be necessary to examine that strand of the sovereign immunity doctrine which arose from the relations of autonomous sovereigns in the area of international law. Then, because that strand is involved in each of the following instances, a comparison will be made between tribal immunity in federal and state courts and (1) immunity for foreign nations in American courts, (2) immunity for the several states from private suit in federal court, and (3) immunity of one state from suit in the courts of a sister state.

The immunity of foreign sovereigns from the jurisdiction of the courts of the United States was firmly established in 1812 by Chief Justice Marshall's decision in *Schooner Exchange v. McFaddon.* The doctrine originated in an era of personal sovereignty when kings "could do no wrong." The exercise of authority by one sovereign over another under such circumstances indicated hostility or superiority which could create tension and possibly war between the two countries. During that era, sovereign immunity was a means of avoiding international conflict. When the era of kings had passed, the sovereign immunity doctrine was retained by the courts primarily to avoid friction between countries and to promote the nation's foreign relations. However, because of the dramatic changes in the nature and activity of sovereigns, particularly in the first half of this century, the wisdom of retaining the doctrine was seriously questioned.

Gradually there was a shift away from the classical theory of national sovereign immunity toward a newer theory. "According to the classical or absolute theory . . . a sovereign cannot without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory . . . the immunity . . . is recognized with regard to sovereign or public . . . but not with respect to private acts." The Foreign Sovereign Immunities Act of 1976 (FSIA) enacted the restrictive theory into law. It provides that foreign nations do not have sovereign immunity in either federal or state courts from suits based on commercial activity in the United States.

29. 11 U.S. (7 Cranch) 116 (1812).
32. Letter from the Acting Legal Adviser of the Department of State to the Department of Justice, May 19, 1952, 26 U.S. Dep't of State Bull. 984 (1952).
States or based on real property in the United States, or where an *implied* waiver of immunity can be found. It also denies sovereign immunity for tort claims in cases similar to those in which the United States has waived its immunity in the Federal Tort Claims Act.\(^\text{34}\)

Thus, there has been a significant erosion of sovereign immunity as granted in the courts of this country to foreign nations. This must be contrasted with the inability of the courts to limit significantly the immunity of "domestic dependent nations."\(^\text{35}\) In *Morgan v. Colorado River Indian Tribe,*\(^\text{36}\) the Arizona Supreme Court noted that if the defendant in that case had been a foreign nation rather than an Indian tribe, "it would have been amenable to suit in either state or federal courts,"\(^\text{37}\) but held that the tribe was immune from suit "without its consent or the consent of Congress."\(^\text{38}\)

Despite this reference to tribal consent and the traditional reliance on the sovereign's own consent to suit (even to the extent of relying on implied consent in the FSIA) as the sole means of overcoming sovereign immunity, most cases speak of waivers of tribal immunity only in terms of congressional consent.\(^\text{39}\) Moreover, in *Santa Clara Pueblo v. Martinez,*\(^\text{40}\) the United States Supreme Court stated: "It is settled that a [congressional] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"\(^\text{41}\) This seems to indicate that Indian tribes can be sued in federal courts only if Congress expressly authorizes it regardless of tribal consent.

Similar express language has been required for congressional waivers of *state* sovereign immunity to federal court suits as well. Congress has the power under the fourteenth amendment to abrogate a state's sovereign immunity from private suits in federal court despite the eleventh amendment's guarantee of that im-

\(^{35}\) This classification of Indian tribes was announced in *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831).
\(^{36}\) 103 Ariz. 425, 443 P.2d 421 (1968).
\(^{37}\) *Id.*, 443 P.2d at 424 n.1.
\(^{38}\) *Id.*
\(^{40}\) 436 U.S. 49 (1978).
However, the courts will not find such a waiver unless they find clearly that "Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States."\(^\text{43}\)

This would tend to indicate that Indian tribes are on the same footing as states with respect to amenability to suit in federal courts. However, it is clear that a state can consent to such suits.\(^\text{44}\) Indeed, a state may be held to have impliedly consented to suit when it engages in congressionally regulated commercial activities where Congress has made private suit a means of enforcing its regulations.\(^\text{45}\) Why should states and foreign nations be held amenable to suit in federal court on an implied waiver or commercial activity theory, but not tribes?

It is well settled that Indian tribes are neither like foreign nations nor like states,\(^\text{46}\) so perhaps it should not be surprising that they are treated differently from either when it comes to sovereign immunity. There do, however, seem to be some inconsistencies. Since comity with foreign independent nations only required restrictive sovereign immunity, why should comity with dependent nations require near classical sovereign immunity? And why, when Congress has only constitutionally limited power over state governments, can they be deemed to have impliedly waived their sovereign immunity while Indian tribes subject to unlimited federal power\(^\text{47}\) cannot?

The probable answer, at least as far as immunity from suit in federal courts is concerned, is that the immunity does not derive from sovereignty at all. Tribal immunity does not seem to be a matter of comity or avoiding friction as is the case in sovereign immunity of foreign nations.\(^\text{48}\) Nor is it concerned with federalism or a separation of sovereign powers as with the states. Instead, it seems to be founded in the federal trust relationship to the tribes. The federal government, as trustee for tribal land and

\(^{44}\) It has been held that states can consent to suits otherwise barred by the eleventh amendment even though the amendment contains no such exception. Clark v. Barnard, 108 U.S. 436, 447 (1883), is the leading case on this issue although the state in that case, as a voluntary intervenor to obtain money that had been paid into the court, may have been more in the role of a plaintiff than a defendant.
\(^{47}\) United States v. Kagama, 118 U.S. 375 (1886).
\(^{48}\) See Victoria Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964).
having a fiduciary duty to encourage the self-government of the Indian tribes, has chosen to give great deference to the tribal courts.

This may be reasonable and just, but again the question arises: why call it sovereign immunity? That label fixes the analytical framework and raises the question why tribes seem to be unable to consent to suit in federal court on their own behalf. This seems anomalous because the power to withhold consent is the very source of sovereign immunity. It would seem more realistic to speak of the refusal of federal courts to hear suits against Indian tribes in terms of congressional deference to tribal government, consistent with its fiduciary duty to preserve tribal culture and promote tribal self-determination, than to cloud the issue with words like "sovereign immunity." Under this view, it would be irrelevant whether a tribe had consented to suit if Congress had determined that it was in the best interest of the tribe to be immune.

If Santa Clara Pueblo v. Martinez had been decided using this approach, the Court would have had to confront and resolve the conflict between congressional deference to the tribal courts and congressional intent to guarantee civil rights to Indians through the Indian Civil Rights Act of 1968 (ICRA). Both of these purposes would lie within Congress' powers and duties as trustee and would have to be balanced. The approach actually used by the Court accepted the fiction that the tribe had something inherent called sovereign immunity, which was separate from and perhaps threatened by Congress' plenary powers. This approach tended toward the idea that Congress, in exercising its fiduciary duties toward Indian tribes, would not infringe on any of its inherent rights without expressly saying so. Therefore, the Court was able to conclude that there was no "general waiver of the tribe's sovereign immunity" because it found no "unequivocal expression of contrary legislative intent."

Of course, even if the balancing of federal interests approach had been used, it is possible that the Court would have struck the balance in the same way. Nevertheless, it would have been much more enlightening to learn why the federal interest in granting rights under the ICRA was outweighed by the federal interest in

49. See Kennerly v. District Court, 400 U.S. 423 (1971).
deferring to the tribal courts. The present opinion merely states the obvious: There was no express authorization of suit.\textsuperscript{53}

So far, the discussion has centered on tribal immunity in federal courts, using the federal court immunity of both states and foreign nations for comparison. There remains to be considered the immunity of tribes to suit in state court. Since the rules\textsuperscript{54} making foreign nations suable in state courts are the same as for federal courts, the inconsistencies noted above between tribal immunity and the sovereign immunity of foreign nations apply equally here.

However, the rules of state suability in the courts of a sister state are much different. First, there is no constitutional guarantee of a state's immunity from suit in the courts of sister states, as there is in the eleventh amendment for private suits in federal court.\textsuperscript{55} Second, the comity between sister states is based on notions of equal status and mutually exclusive powers, whereas the relationship between the federal government and the states is based not on any notions of mere comity or equality, but on constitutional federalism which limits the powers of the respective sovereigns.\textsuperscript{56}

These differences prompted the United States Supreme Court to decide in \textit{Nevada v. Hall}\textsuperscript{57} that one state's immunity from suit in the courts of another state is nothing more than a matter of comity, that the doctrine that no sovereign may be sued in its own courts without its consent does not support a claim of immunity in another sovereign's courts, and that there is no constitutional bar to one state exercising jurisdiction over another. In short, a state has no sovereign immunity defense in another state's courts unless that other state chooses to honor it!

It appears, then, that foreign countries have only restrictive sovereign immunity in state courts, and other states have only as much sovereign immunity as the forum state chooses to give them. Do similar principles apply to claims of tribal immunity? Before \textit{Nevada v. Hall}, the Arizona Supreme Court had noted in \textit{Morgan}—a wrongful death action against an Indian tribe alleging negligence in the operation of a tribally owned marina near a reservation—that if the defendant had been a state it would have

\begin{footnotes}
\item[53.] Id. at 1677.
\item[56.] National League of Cities v. Usery, 426 U.S. 833 (1976).
\item[57.] 440 U.S. 410 (1979).
\end{footnotes}
been amenable to suit, yet it held that the tribe was not.\textsuperscript{58} If \textit{Morgan} had arisen after \textit{Nevada v. Hall}, could Arizona then have asserted jurisdiction over the unconsenting Colorado River Indian Tribe? If there is no constitutional bar against Arizona asserting judicial jurisdiction over the state of Colorado, can there be one against asserting it over the tribe? And if the doctrine that a sovereign is not suable in its own courts "affords no support for a claim of immunity in another sovereign's courts,"\textsuperscript{59} what support does a tribe have for claiming it is not amenable to suit in state court?

The answer is the preemption doctrine based on the supremacy clause.\textsuperscript{60} In \textit{Worcester v. Georgia},\textsuperscript{61} the United States Supreme Court held invalid Georgia's attempt to exercise authority over the sovereign Cherokee Nation because it violated the federal government's constitutional grant of exclusive power to govern its relationship with the Indian tribes, and also conflicted with treaties as well as federal statutes regulating commerce with the Indians. More than one hundred years later this preemption doctrine was extended in \textit{Williams v. Lee}\textsuperscript{62} where the Court held that a state court lacked subject matter jurisdiction of a suit against a reservation Indian because state jurisdiction would conflict with "the right of reservation Indians to make their own laws and be ruled by them."\textsuperscript{63} These cases provide support for the proposition that an Indian tribe cannot be sued in state court.

Clearly, this solution seems to beg the question. The \textit{Worcester-Williams} rationale is that state courts lack jurisdiction because they are preempted by the tribes' interest in self-government. It is difficult to see why the governmental interest of an Indian tribe should have this effect when the same interest of a sister state does not.

The crux of the matter is how the interest of Indians in self-government can be fitted into the preemption doctrine. Ordinarily, the preemption doctrine applies to bar state legislation (1) "where there is an actual conflict between [state and federal] legislation . . . "\textsuperscript{64} as there was in \textit{Worcester}, or (2) "where Con-

\textsuperscript{58} 443 P.2d 421, 424 n.1 (1968).
\textsuperscript{59} 440 U.S. 410, 416 (1979).
\textsuperscript{61} 31 U.S. (6 Pet.) 515 (1832).
\textsuperscript{62} 358 U.S. 217 (1959).
\textsuperscript{63} Id. at 220.
\textsuperscript{64} E. NOWAK, R. ROTUNDA, J. YOUNG, \textit{CONSTITUTIONAL LAW} 267 (1978).
gress acts pursuant to a plenary power [to] . . . occupy or pre-
empt, the field.”

Tribal interests in self-government do not fit this definition
because both branches of it require a conflict between state and
federal interests. Perhaps what Williams really means is that there
is a federal interest in “the right of reservation Indians” to
govern themselves. This is perfectly logical and consistent with
the trusteeship of the federal government: Congress has plenary
power over Indians and has occupied the field of Indian regula-
tion (except where it has been transferred under Public Law 280).
As trustee, Congress has a fiduciary duty to serve the best in-
terests of the Indian tribes. Therefore, as long as it is in the best
interests of the Indian tribes to govern themselves, Congress has
an interest in providing the “right” to do so, and any conflicting
state authority is preempted.

Again, it is apparent that no good purpose is served by apply-
ing the label “sovereign immunity.” It would seem much more
principled to analyze cases involving conflicts between state and
tribal governments in terms of the federal government’s interest
in guaranteeing the continued opportunity for Indian tribes to
govern themselves.

However, even though the preemption doctrine may properly
bar state interference with tribal self-government, there are still
problems with extending Williams to hold that a tribe, as well as
an individual Indian, is immune from suit. The preemption doc-
trine is based on principles of proper balance of legislative power,
and its purpose is to prevent the application of conflicting rules
simultaneously to the same subject matter. It is possible to read
Williams as holding that the federal interest in applying tribal law
to the individual Indian defendant preempted the state’s attempt
to enforce conflicting state law upon him. This does not explain,
however, why the state court could not have been simply com-
pelled to apply tribal law. It seems that the Supreme Court believed
that the federal interest was not merely to see that tribal law was
applied to tribal members, but to see that wherever reasonably
possible, Indians were subjected to only tribal authority. This
goes far beyond sovereign immunity by effectively granting the
immunity defense to private citizens who happen to belong to an
Indian tribe.

It would appear to follow a fortiori that if the tribal member
has the benefit of sovereign immunity the tribe also has it.

However, that conclusion is influenced by the use of the sovereign immunity label which assumes that the immunity originates from tribal sovereignty. Actually, as we have seen, the immunity stems from the preemption doctrine, which is designed to prevent conflicting legal requirements from being imposed. The federal interest regarding the suability of an individual Indian is different from its interest in the suability of a tribe. As noted above, Williams implies that the federal interest in the individual Indian is that he be subjected only to tribal authority. The question is which law applies. However, in a case like Morgan the question is whether the tribe will be accountable under any law at all. It does not seem that the federal interest shown in Williams has any bearing on the tribal immunity cases, and for that reason the holding should not be extended.

The question then remains as to what interest the federal government has in tribal immunity. It is difficult to see why there should be any greater interest in preventing suits against Indian tribes in state court (especially a state in which a reservation is located) than in preventing suits against states in other states' courts. Nevada v. Hall seems to say there is no such federal interest.

The nature of the federal government's interest in tribal autonomy, and the extent to which that interest requires tribal immunity, should be examined in the next Morgan-type case. Only in that way will it be possible to determine the true extent of any conflicts between the exercise of state jurisdiction and federal interest involved, and only if the conflict can be clearly examined can the full extent of federal preemption be determined.

The issue of preemption has been discussed here in connection with tribal immunity from suit in state courts. It has been noted above that the same federal fiduciary interests in promoting Indian tribal autonomy are responsible for tribal immunity in federal courts. This is not to say that the Indian tribes do not have inherent sovereignty and autonomy. Rather, it is a recognition that immunity from suit in a particular court will be granted or refused according to the laws of that sovereign. The attempt here has been to discover the policies that have motivated the state and federal courts to grant immunity from suit to Indian tribes. In both, the reason seems to be the federal government's fiduciary interest in preserving and encouraging tribal autonomy.

Tribal Sovereignty: The All-Important Backdrop

It is clearly established that a tribe's sovereignty—its power to
govern itself and its territory—is inherent. That is, it is not derived from the federal government nor from any other power. On the other hand, this power continues only at the sufferance of Congress. It may be snuffed out completely or be limited either as to the subject matter or the territory to which it extends. It even appears that Congress can resurrect the sovereign power of a tribe after it has been declared dead.

And so, the existence of tribal autonomy depends upon the continuing willingness of Congress to recognize and protect it. Is there any guarantee that it will do so? There is no constitutional guarantee such as that given to the states in the tenth amendment, which has been held to prohibit the application of some congressional statutes to state governments. Moreover, Congress is not limited to its constitutional powers in regulating Indians. Its trustee status gives it absolute discretion and power over the tribes.

Strangely, this very fact may provide some certainty that Indian tribes will retain their sovereignty. The Supreme Court has held that Congress and the executive branch have a fiduciary duty to act in the best interests of the Indian tribes, and unless there is a drastic reversal of policy—which appears unlikely—the courts will probably continue to hold that it is in the best interests of the tribes to govern themselves. Thus, the only way that Congress could escape its duty to promote tribal self-determination would be to give up its trustee status. However, since its status as trustee is the source of its plenary power, it seems unlikely that this would happen. Governments rarely surrender power voluntarily.

Therefore, at least for the foreseeable future, Indian tribes will continue to exercise sovereign governmental powers. Inevitably there will be conflicts between those powers and state and federal governmental activities. In this area, the federal government has

the advantage of the *Kagama* plenary powers doctrine. Consequently, the federal government will always prevail when its activities conflict with exercises of tribal governmental power.

The conflicts between state and tribal governments, however, present different questions. The principles upon which their inherent interests in self-government should be balanced are still being developed. But the most prominent factor has turned out to be the federal government's interest in promoting tribal autonomy. The trend clearly has been away from the idea of inherent Indian sovereignty as a bar to state power and, toward reliance on federal preemption. Preemption may even be claimed for tribal ordinances where Congress has delegated part of its power to tribal government.

On the other hand, principles for limiting tribal authority have been announced in cases like *Oliphant v. Suquamish Indian Tribe*72, which held that Indian tribes cannot exercise those powers of an autonomous state which have been expressly terminated by Congress, or which are inconsistent with their status. And in *McClanahan v. Arizona Tax Comm’n*,73 the Court stated that tribal sovereignty was relevant only as “a backdrop against which the applicable treaties and federal statutes must be read”74 in determining the extent of tribal power. Since *McClanahan*, the Supreme Court cases have all looked back to its language and reasoning.75

Nevertheless, it is clear from the cases that the “backdrop” view of Indian sovereignty has not weakened the federal interest in preserving tribal autonomy. The preemption limitations on state governmental power have proven much greater than the above mentioned limitations on tribal power. Indeed, since *Williams* was handed down in 1959, the Supreme Court has approved state regulation in Indian country only once.76

Thus, it can be seen that the same fiduciary interest of the federal government in promoting tribal autonomy, which was controlling in the tribal immunity area, is controlling here. The

76. Id. at 172.
most significant difference is that in this area the courts have relegated sovereignty to a consideration—although an important one—rather than a magic word used to conjure up an automatic disposition for every case. It is hoped that this trend will find its way into the tribal immunity cases.

Conclusion

Although Indian tribes have many attributes of sovereignty, their governmental power is not complete and the term “sovereignty” cannot be thrown up as a sufficient means of resolving in the Indians’ favor all conflicts of power with the states.

However, one traditional attribute of sovereignty—sovereign immunity—should not be used as the name for tribal immunity from suit. The American version of sovereign immunity in a sovereign’s own court is an anomaly in the American system of justice and has even less excuse for being adopted by Indian tribes. Furthermore, the tribes would be foolish to claim that their immunity from suit in state and federal courts is based merely on sovereignty, as is the immunity of states and foreign nations, because there would then be no reason to continue granting greater immunity to tribes than to other sovereigns. The extensive immunity from suit granted to Indian tribes actually rests on the federal government’s fiduciary interest in promoting tribal autonomy.

It is ironic that of the two terms—“sovereignty” and “sovereign immunity”—courts have found it easier to set aside the one that has the more legitimate relation to Indian tribes. It is hoped that the courts will recognize that tribal immunity is a result of the federal interest in promoting tribal self-government, and will abandon the use of the magical term “sovereign immunity.” They would then be free to more clearly define the contours of the federal interest in having Indian tribes immune from suit.