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To Sue and Be Sued: Capacity and Immunity of American Indian Nations

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TO SUE AND BE SUED: CAPACITY AND IMMUNITY OF AMERICAN INDIAN NATIONS

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ABSTRACT:

Can American Indian nations sue and be sued in federal and state courts? Specific issues are whether tribes have corporate capacity to sue, whether a Native group has recognized status as a tribe, and whether and to what extent tribes and their officers have governmental immunity from suit. Tribal capacity to sue is now well established, and federal law has well-defined procedures and rules for tribal recognition. But tribal sovereign immunity is actively disputed.

This Article reviews retained tribal sovereignty in general and summarizes past contests over tribal capacity to sue and their resolution into today's settled rule. Next is a concise statement of the law on federal recognition of tribal entities. Most of the Article explains and analyzes ongoing issues about tribal immunity from suit. Tribal immunity has been continuously recognized from the first reported decision, but tribes' commercial activities, modern attacks on immunity generally, and states-rights proclivities of some justices jeopardize its existence. Much active litigation involves suits against tribal officers and possible application of the Ex parte Young *doctrine. For many reasons, tribes are adopting carefully defined consents to suit, particularly in relation to tribal casinos. This Article's essential purpose is to give tribes and their lawyers a full account of the law on tribal immunity and current disputes about it.*

I. INTRODUCTION

Can American Indian nations sue and be sued in federal and state courts? The question is interwoven with tribes' sovereign status, which has been contested from earliest legal disputes. Subsidiary issues are whether tribes have corporate capacity to sue, whether a Native group has recognized status as a tribe, and whether and to what

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extent tribes and their officers have governmental immunity from suit. Capacity to sue is now well established, and federal law has well-defined procedures and rules for tribal recognition.[1] But tribal sovereign immunity is actively disputed.

This Article first reviews retained tribal sovereignty in general. It then summarizes past contests over tribal capacity to sue and their resolution into today's settled rule. Next is a concise statement of the law on federal recognition of tribal entities. Most of the Article explains and analyzes ongoing issues about tribal immunity from suit. These are often defined by their frequent appearance in relation to tribal casinos.

II. SOVEREIGNTY

What entities other than natural persons can sue and be sued in Anglo-American courts? Private organizations acquire capacity to sue from positive law, most commonly by incorporation,[2] and the limited immunities available to private defendants must also be found in affirmative rules.[3] But corporate capacity of sovereign entities is inherent,[4] and American law has treated sovereign immunity as received law.[5] For these reasons, tribes' standing in federal and state courts has often depended on their status as governments.[6]

British and American governments elected to respect Native sovereignty by denominating their agreements with tribes as treaties.[7] However, tribal sovereignty would not likely have survived Jacksonian politics absent the United State Supreme Court's 1831-32 Chero-

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1. *See infra* Sections III-IV.

2. *See* 59 AM. JUR. 2D *Parties* § 23 Westlaw (database updated Nov. 2017).

3. Most important is the privilege against self incrimination. U.S. CONST. amend. V. Other immunities are statutory. *See, e.g.*, 41 AM. JUR. 2D *Husband and Wife* §§ 237-39, Westlaw (database updated Nov. 2017) (inter-spousal immunity).

4. *See, e.g.*, Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850) ("As a corporation or body politic," the United States may bring lawsuits to enforce its contract and property rights."); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 181 (1818) (United States may sue for specific performance or damages); Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405-09 (1792) (state may sue to vindicate its common law proprietary rights); United States v. Maurice, 26 F. Cas. 1211, 1216 (C.C.D. Va. 1823) (No. 15,747) ("The United States is a government, and, consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment."); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406-07 (1995) (discussing states' right to sue to vindicate common law rights).

5. *See infra* Section V.A-B.

6. *See infra passim*. In one instance, tribal sovereignty was invoked to *deny* a legal claim. Inyo Cty. v. Paiute-Shoshone Indians, 538 U.S. 701, 708-12 (2003) (tribe had no right of action under 42 U.S.C. § 1983 (2012) because of its sovereign status; rights under the statute are limited to private parties).

7. *See* NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02-.03 (2012); FRANCIS PAUL PRUCHA, INDIAN TREATIES 2-9 (1994).

kee decisions.[8] The first of these, *Cherokee Nation v. Georgia*,[9] directly contested the issue. Chief Justice Marshall's opinion of the Court concluded:

> Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? . . . So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[10]

The point was strongly restated in the Court's opinion (for a six-to-one majority) in *Worcester v. Georgia*:[11] "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . ."[12]

After the Cherokee decisions, tribal sovereignty was suppressed by government policy for many years but revived in modern times.[13] It is firmly entrenched for authority over tribal members, but the Supreme Court has severely restricted tribal authority over nonmem-

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8. *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality* (1969), 21 STAN. L. REV. 500, 503-08 (1969).

9. 30 U.S. (5 Pet.) 1 (1831). The Cherokees invoked the United States Supreme Court's original jurisdiction to sue Georgia by claiming to be a foreign state. As the text indicates, the Court held the tribe to be a state, but not a foreign state as the latter term is used in Article III, Section 2, and dismissed the suit for want of jurisdiction. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831). Famously, the Court described Indian tribes as "domestic dependent nations." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

10. Marshall's reference to "a majority of the judges" referred to himself, Justice M'Lean who joined his opinion, and Justices Story and Thompson, whose opinion agreed with the quoted language but dissented on the ultimate question of whether the Cherokee Nation was a foreign state as that term appears in Article III. Justices Baldwin and Johnson concurred in the judgment, agreeing with Marshall that the Cherokee Nation was not a foreign state but disagreeing with his quoted language. Justice Duval was absent. Thus, Marshall's majority was a four-to-two vote for the quoted language in a Court of seven.

11. 31 U.S. (6 Pet.) 515 (1832).

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

13. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987).

bers.[14] However, this limit has no bearing on the issues perused in this Article.

III. CAPACITY TO SUE[15]

Since the founding, no reported federal decision has dismissed a suit by an American Indian tribe for lack of capacity to sue.[16] The only reported dismissals were in courts of a single state, New York.[17] However, the political posture adopted by influential persons and organizations in the late nineteenth century and the prestige of New York decisions created doubt about the issue for many years. The New York opinions simply asserted lack of capacity, apparently equating tribes with private, unincorporated associations but without analyzing the question.[18] The political forces, led by Harvard Law Professor James Bradley Thayer, claimed that tribes and their members had no legal rights, so their federal relationship must be ended.[19] Lack of capacity to sue was a necessary part of the claim. Two legal theories were asserted. One was that the *Cherokee Nation v. Georgia*[20] decision had been based on lack of capacity.[21] The other was that tribes were wards of the federal government who had no indepen-

14. *See, e.g.*, Joseph William Singer, *The Role of Jurisdiction in the Quest for Sovereignty: Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 644 (2003); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001).

15. Capacity to sue is, unfortunately, often misunderstood. Legal comments sometimes confuse it with the outcome of a lawsuit decided on other grounds. Notably, the holding in *Cherokee Nation* that the Cherokees were not a foreign state has been called lack of capacity. *See* Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); *infra* notes 26-27 and accompanying text (government lawyers argued that interpretation of the case but were rebuffed by a unanimous Court). Another point of confusion is with racist laws that disadvantaged Indians in nineteenth-century state courts. *See, e.g.*, People v. Hall, 4 Cal. 399 (1854). These were wrong on the merits, not for lack of capacity to sue. Still another confusion is with laws that define federal jurisdiction. *See*, *e.g.*, United States *ex rel*. Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14, 891) (rejecting such a claim).

16. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (three tribal chiefs successfully sued in a representative capacity, but no one raised a question about capacity). The issue of capacity to sue was first presented to the Supreme Court in Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

17. Lack of capacity appeared as dictum in Strong v. Waterman, 11 Paige Ch. 607 (N.Y. Ch. 1845). It became a holding in Montauk Tribe of Indians v. Long Island R.R., 51 N.Y.S. 142, 143 (N.Y. App. Div. 1898); Onondaga Nation v. Thacher, 62 N.E. 1098 (N.Y. 1901), *cert. dismissed*, 189 U.S. 306 (1903); and Johnson v. Long Island R.R., 56 N.E. 992, 993 (N.Y. 1900). In *Johnson*, the court held that tribal rights cannot be enforced in a representative action, either.

18. *See Johnson*, 56 N.E. at 993.

19. *See* Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 INDIGENOUS L.J. 83, 95-101 (2006).

20. 30 U.S. (5 Pet.) 1 (1831)

21. *See* Collins & Miller, *supra* note 19, at 97.

dent juristic capacity, so the United States could sue to vindicate tribal rights, but tribes could not do so on their own.[22] Both claims were part of noisy and determined political support for forced assimilation of Indian people, which dominated federal policy from the 1850s until the late 1920s.[23]

The political clamor and the New York decisions led to hornbook statements that tribes lacked capacity to sue.[24] And a United States Court of Claims judge agreed in a complex ruling about service of process.[25] However, the theory was trounced when a tribe sued the Secretary of the Interior to protect its land, and government lawyers (representing tribes' purported trustee) moved to dismiss for lack of capacity.[26] A unanimous Supreme Court categorically rejected the claim:

> The case of [*Cherokee Nation*], on which the [federal] defendants place some reliance, is not in point. The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense intended, and so could not maintain such a suit.
>
> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws.

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22. *See id.* at 99.

23. *See* NEWTON ET AL., *supra* note 7, at § 1.04.

24. 22 WILLIAM MACK & HOWARD PERVEAR NASH, CYCLOPEDIA OF LAW AND PROCEDURE 120-21 (1906); 31 WILLIAM MACK & WILLIAM BENJAMIN HALE, CORPUS JURIS 488-89 (1923) (repeating verbatim 22 MACK & NASH, *supra*). The only case citations were to the New York decisions.

25. Jaeger v. United States, 27 Ct. Cl. 278, 282-88 (1892). The tribe was not a party to the case, so its capacity to sue was not directly at issue. Collins & Miller, *supra* note 19, at 104-08.

26. Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

> That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court, of which *Lone Wolf v. Hitchcock*, 187 U.S. 553, is an illustration.[27]

Despite that holding, there was continuing doubt about the issue within the legal profession. The compilers of the original (1941) edition of Felix Cohen's Handbook of Federal Indian Law stated that the issue was uncertain.[28] However, legal events after that date either assumed or sustained tribal capacity. In 1946, Congress gave tribes the same general right to sue the United States for damages as other claimants.[29] In 1966 Congress provided original jurisdiction in federal district courts of federal question claims brought by recognized Indian tribes regardless of the amount in controversy.[30] As there has never been any question about the power of Congress to authorize tribes to sue, this removed any remaining doubt in federal courts, and the New York courts had reformed.[31] Two years later, the Supreme Court expressly rejected the argument that individual Indian beneficiaries could not sue to protect property held in trust for them by the United States.[32]

In sum, Congress has consistently upheld tribal capacity to sue, and the Supreme Court has never accepted the claim that tribes or Indians lack capacity. When the issue has been presented to it, the Court has firmly rejected the claim. No state denies tribal capacity, and none save New York has ever done so.

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27. *Lane*, 249 U.S. at 112-14. For later proceedings in this complex matter, see Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927).

28. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 277-79, 283-85 (1941).

29. Act of Aug. 13, 1946, ch. 959, § 24, 60 Stat. 1049, 1055 (codified as amended and re-enacted at 28 U.S.C. § 1505 (2012)). Lack of federal consent to treaty claims had hampered tribes and contributed to the capacity confusion. *See* Collins & Miller, *supra* note 19, at 102, 112-15.

30. Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (2012)). In 1980, the general federal question statute was amended to remove the jurisdictional amount for all plaintiffs. *See* 28 U.S.C. § 1331 (2012) (text and annotations).

31. *See* Oneida Indian Nation v. Burr, 522 N.Y.S.2d 742 (N.Y. Sup. Ct. 1987) (holding that federal and state statutes authorized all tribes to sue in New York courts. The state's highest court has not reviewed the issue, but the former New York rule seems clearly gone).

32. Poafpybitty v. Skelley Oil, 390 U.S. 365, 368-69 (1968). The decision had many precursors that should have settled the issue long before. *See* Choate v. Trapp, 224 U.S. 665 (1912); Tiger v. W. Inv., 221 U.S. 286 (1911); Ray A. Brown, *The Indian Problem and the Law* 39 YALE L.J. 307, 314-15 (1930).

IV. FEDERAL RECOGNITION

Federal recognition as an Indian tribe is necessary for tribes to have rights of self-government protected by federal law and for other distinctive legal rights, notably those that derive from federal trust status of tribal land.[33] Pertinent to issues addressed in this Article, only federally recognized tribes have capacity to sue based on 28 U.S.C. § 1362 and sovereign immunity to suit in external courts.[34]

Following American independence, tribal recognition by the U.S. government was by treaty, an exercise of the Treaty Power.[35] The dominant federal purpose for most treaties was to obtain cessions of tribal land by peaceful means, so the government readily accepted the tribes' corporate capacity to convey.[36] Federal negotiators identified tribal parties with whom to treat. At times this involved consolidating several Native bands that had been independent.[37] At other times tribal factions were chosen to manipulate the process.[38] After tribes ceased to be a security threat to the new nation, treaties were often coerced.[39] Unfairness resulted, but it is now in the distant past.[40]

After treaty making ended, federal power derived from the Indian Commerce Clause, and it continues today.[41] Legal status of tribes thus depends on federal statutes and treaties and on their application by administrators and courts.[42] Former federal policies sought to terminate tribes' federal status, but termination policies have been repu-

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33. *See* Carcieri v. Salazar, 555 U.S. 379 (2009); NEWTON ET AL., *supra* note 7, at § 3.02[3]. Of course, tribes have their own view of the issue, and some tribes were recognized by Eastern state governments. *See* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979).

34. On the statute, see *supra* note 30 and accompanying text. On immunity, see *infra* Section V.

35. *See* NEWTON ET AL., *supra* note 7, § 3.02.

36. *See id.* § 1.03[1]; PRUCHA, *supra* note 7, at 103-04.

37. *See* PRUCHA, *supra* note 7, at 210-13.

38. Most notorious was President Jackson's selection of treaty parties for Cherokee removal. *See* Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 72-73 (2010).

39. *See* PRUCHA, *supra* note 7, at 129; JAY KINNEY, A CONTINENT LOST—A CIVILIZATION WON 37-45, 93-94 (1937).

40. Federal policy addressed many treaty-based grievances by payments in so-called claims cases, most of them pursuant to the Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (codified at various §§ of 25 U.S.C. and 28 U.S.C.). For the most part, payments were woefully inadequate. *See* Richard B. Collins, *Never Construed to Their Prejudice*, 84 COLO. L. REV. 1, 23-41 (2013).

41. NEWTON ET AL., *supra* note 7, at § 3.02[4]. Some academics disagree. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (federal authority should be based on general constitutional structure rather than the Commerce Clause); NEWTON ET AL., *supra* note 7, § 5.01[4].

42. *See* Carcieri v. Salazar, 555 U.S. 379 (2009); NEWTON ET AL., *supra* note 7, at § 3.02[1]-[6].

diated and some terminated tribes restored to federal status.[43] In 1978, the Bureau of Indian Affairs established an elaborate procedure for recognition of tribes that has formalized the process.[44]

V. FEDERAL AND STATE SOVEREIGN IMMUNITY AS BACKGROUND

Tribal sovereign immunity derives from general American immunity doctrine, particularly that of the federal government. Therefore, a grounding in general law is important to a full understanding of tribes' connection to the doctrine.

A. Sovereign Immunity at the Founding

Soon after independence, the doctrine of governmental immunity from suit was subject to significant differences of opinion and conception. The view that immunity was received doctrine was expressed in Hamilton's Federalist No. 81:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.[45]

The issue was less settled than Hamilton claimed. Most states had not yet addressed the issue internally, and of course his essay preceded ratification of the federal Constitution.[46] However, in the decades after ratification of the Constitution, federal courts and those of every state accepted sovereign immunity as domestic law.[47] Theories

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43. Newton et al., *supra* note 7, § 1.06.

44. *See* 25 C.F.R. pt. 83 (2014); Newton et al., *supra* note 7, at § 3.02[7]. For discussion of issues about definition and application of the regulation, see Gerald Carr, *Origins and Development of the Mandatory Criteria Within the Federal Acknowledgement Process*, 14 Rutgers Race & L. Rev. 1 (2013); Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 Akron L. Rev. 867 (2005). The Interior Department recently completed a thorough revision of the rules. *See* Bureau of Indian Affairs, http://www.bia.gov/WhoWeAre/AS-IA/ORM/83revise/index.htm (last visited Jan. 23, 2018.)

45. The Federalist No. 81 (Alexander Hamilton).

46. *See* Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. Sup. Ct. Hist. 73; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1895-99 (1983). During the Confederation period, only one reported case ruled on immunity, Nathan v. Virginia, 1 U.S. (1 Dall.) 77 (Pa. C. 1781). The court sustained Virginia's immunity to suit in a Pennsylvania court. *See* Clyde E. Jacobs, The Eleventh Amendment and Sovereign Immunity 13 (1972).

47. *See* Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857); Thomson/West Civil Actions Against State Governments § 1.6 (2d ed. 1992–2002); Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 6 (1924).

varied, and debates about English precedents on immunity raged.[48] One factor was concern over how money judgments against an un-consenting administration would be enforced.[49]

From the outset, another form of contest about immunity arose when litigants sued government officers rather than governments by name. Established peremptory writs and equitable remedies continued to be recognized.[50] American lawyers take for granted that William Marbury could seek mandamus for his commission save for his mistaken choice of forum.[51] However, all American jurisdictions held that suing an officer for damages based on actions arising within the officer's duties were barred by immunity.[52]

B. State Immunity in Federal Courts: The Eleventh Amendment

Constitutional ratification began a history of legal contests (and academic obsession) over state immunity from federal authority, which continues. At ratification conventions, anti-Federalists claimed that the proposed Constitution would allow money judgments against states in the new federal courts.[53] Madison, Marshall, and other Federalists argued that state immunity would bar them.[54] The anti-Federalist claim raised enough concerns that several conventions sought amendments to forbid such suits.[55] But these pleas were not enough for a proposal to emerge in Madison's draft of the Bill of Rights or in any amendments Congress made to it.[56]

States' Revolutionary War debts spurred creditors' lawyers to explore every avenue for collection.[57] In state courts, their claims con-

48. *See* Louis L. Jaffe, *Suits Against Governments and Officers*, 77 Harv. L. Rev. 1, 2-19 (1963).

49. Hamilton mentioned the point in Federalist No. 81. *See also* Louisiana v. Jumel, 107 U.S. 711, 727-28 (1883); Jacobs, *supra* note 46, at 56-57, 72.

50. *See* Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 1651 (2012) (authorizing writs)); Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. Marshall L. Rev. 481, 501-12 (2004).

51. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-73 (1803) (discussing proper applications of the writ of mandamus).

52. *See* Jaffe, *supra* note 48, at 11-17.

53. *See* Jacobs, *supra* note 46, at 27-40.

54. *See id.* at 34; *see also* 3 J. Elliot, Debates on the Federal Constitution 533, 556 (2d ed. 1836). *But see* Jacobs, *supra* note 46, at 11-14 (Madison letter to Washington on the need for national judicial power).

55. *See* Jacobs, *supra* note 46, at 27-40.

56. *See* 1 Annals of Cong. 451-53 (1789) (Joseph Gales ed., 1834).

57. *See* Jacobs, *supra* note 46, at 8. Federal war debts were affirmed by Section VI ch. 1 of the Constitution. But debate about state debts raged during ratification. *See, e.g.*, The Federalist No. 84 (Alexander Hamilton).

fronted sovereign immunity, relegating the action to legislatures.[58] External plaintiffs were more likely concerned about local hostility and tempted by the new diversity jurisdiction of federal courts.[59] In 1790 the intergovernmental avenue generated suits that started a complex series of events. Alexander Chisholm filed a diversity action against Georgia in the Circuit Court for the District of Georgia seeking judgment on a 1777 debt for war supplies bought by the state.[60] The state pleaded sovereign immunity. The court, anchored by Supreme Court Justice James Iredell, dismissed, and Supreme Court review was not sought.[61] Another 1790 suit was a diversity action against Maryland filed as an original case in the Supreme Court.[62] Dutch financiers sought repayment of their 1782 loan to the state.[63] However, Maryland did not assert sovereign immunity and settled the case.[64]

Rather than appeal the dismissal, Chisholm, represented by Attorney General Edmund Randolph, filed an original action in the Supreme Court.[65] Based on its sovereignty defense in the circuit court, Georgia refused to appear or plead.[66] On motion of Chisholm's counsel, the Court rejected Georgia's defense and ordered the state to appear.[67] Four of five justices voted to allow the action, and their seriatim opinions articulated a strong case, albeit with variations in reasoning.[68] Stronger yet was the political outcry against the decision, manifested by adoption of the Eleventh Amendment to overrule it.[69] Upon its ratification in 1798, all pending actions based on

58. *See* Daniel C. Kramer, *The Governmental Tort Immunity Doctrine in the United States: 1790-1955*, 1966 ILL. L.F. 795, 801-03 (1966) (reviewing early state immunity decisions).

59. U. S. CONST. art. III, § 2, cl. 1.

60. JACOBS, *supra* note 46, at 47 (describing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)). Chisholm was the executor.

61. *See id.*

62. *See id.* at 43-44 (describing Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791)).

63. *See id.*

64. *See id.* at 44.

65. *See id.* at 47-48.

66. *See id.* at 48.

67. *Chisholm*, 2 U.S. (2 Dall.) 419.

68. *See id.*; JACOBS, *supra* note 46, at 50-55; JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 13-16 (1987); Gibbons, *supra* note 46, at 1923-26. Justice Iredell, who had sustained immunity in the circuit court, was the lone dissenter.

69. *See* JACOBS, *supra* note 46, at 64-68; ORTH, *supra* note 68, at 20-21; Gibbons, *supra* note 46, at 1926-34. Jacobs makes the intriguing argument that Hamilton's 1790 success in persuading Congress to assume most of the states' war debts much reduced importance of the amendment and aided its passage by easing opposition of strong nationalists. *See* JACOBS, *supra* note 46, at 69-72.

Chisholm v. Georgia,[70] were dismissed.[71] But the Amendment's narrow wording—forbidding only diversity cases against a state[72]—fueled legal maneuvers and arguments that continue today.

C. State Immunity in Federal Courts Since 1798

The Marshall Court reviewed four claims of state immunity based on the Eleventh Amendment. Only one involved a state by name as litigant; the Court correctly held that the Eleventh Amendment was not intended to affect federal appellate jurisdiction.[73]

The other three decisions involved suits against state officers rather than states by name. Most Eleventh Amendment decisions since ratification have revolved around the question whether and when the Amendment is avoided by suing an officer. The progression started innocently enough in a case in which the Court rejected the defense because no state property was at issue.[74] The next case arose from state seizure at gunpoint of money from the Ohio branch of the Bank of the United States in 1819.[75] In anticipation of the attack, the Bank had obtained a federal court injunction against the state officers authorized to do it.[76] The seizure violated the injunction and generated court orders to return what was taken, which the Supreme Court affirmed. Defendants' Eleventh Amendment claim was rejected by reading its terms literally to apply only when the State by name is a party.[77] But the decision accorded with later rulings allowing prospective relief in suits against officials.[78]

The Governor of Georgia v. Madrazo,[79] the fourth Marshall Court decision, was the only one to enforce the Amendment.[80] It arose from a complex series of events that the Court's majority interpreted as a

70. 2 U.S. (2 Dall.) 419 (1793).

71. *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381-82 (1798). Congress's referral of the Eleventh Amendment did not need the President's signature; based on the amendment's wording, all pending suits dismissed except one in which a plaintiff was a foreign state, and thus not within the amendment's specific terms. For details on other contemporary suits against states, see Jacobs, *supra* note 46, at 57-64 (discussing an example).

72. "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.

73. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393-94 (1821).

74. United States v. Peters, 9 U.S. (5 Cranch) 115, 139-40 (1809). For details, see Jacobs, *supra* note 46, at 77-81; Orth, *supra* note 68, at 35-36.

75. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

76. *Osborn*, 22 U.S. (9 Wheat.) at 840.

77. *Id.* at 857-58.

78. *See infra* notes 95-100 and accompanying text.

79. 26 U.S. (1 Pet.) 110 (1828).

80. Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

diversity claim against the Governor of Georgia to contest ownership of slaves illegally imported into the state.[81] The Court concluded that the State had lawful ownership. Thus, though nominally a case against the Governor, the State was the real party in interest.[82] That brought the case indirectly within the Eleventh Amendment's terms.

The Taney Court made no change in federal law on state immunity. The Panic of 1837 caused state defaults that induced creditors to look for federal remedies, but nothing came of their efforts.[83] However, major changes emerged from the Civil War's aftermath. Confederate states' war debts were voided by the Fourteenth Amendment, but sizeable debts were incurred before and after the war.[84] The states were impoverished and defaulted, often deliberately.[85] Of course creditors sought remedies. Encountering immunity or anticipating hostility in state courts, they turned to federal forums.

Resulting cases brought the Eleventh Amendment into direct conflict with the Contracts Clause[86] for the first time since *Chisholm v. Georgia*[87]-era suits. The main device to try to avoid Eleventh Amendment immunity was again to sue an officer instead of a state by name, relying on the Amendment's explicit terms.[88] In cases that reached the Court during the 1870s, Contracts Clause supremacy coupled with formal rejection of immunity prevailed.[89] But in 1883 the Court flipped and began to sustain immunity when it determined that a state was the real party in interest.[90] Although not all cases are consistent, state immunity to damages in suits against officers acting within their authority became, and remains, the governing rule.[91]

Another attempt to avoid the Amendment relied on its explicit terms forbidding only diversity cases.[92] Bernard Hans, a Louisiana

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81. *Madrazo*, 26 U.S. (1 Pet.) at 121-22.

82. *Id.* at 122-24.

83. *See* ORTH, *supra* note 68, at 41-46.

84. *See id.* at 53, 58-59; Gibbons, *supra* note 46, at 1976-77; U.S. CONST. amend. XIV, § 4.

85. Gibbons, *supra* note 46, at 1976-77.

86. U. S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Law . . . impairing the Obligation of Contracts . . . .").

87. 2 U.S. (2 Dall.) 419 (1793).

88. *See* JACOBS, *supra* note 46, at 107.

89. *See* ORTH, *supra* note 68, at 58-65. During this period, the Court also strictly enforced the Contracts Clause to overturn Southern state laws granting relief from private debts. *See* James W. Ely Jr, *The Contract Clause During the Civil War and Reconstruction*, 41 J. SUP. CT. HIST. 257 (2016).

90. *See* ORTH, *supra* note 68, at 66-71; *see also* Gibbons, *supra* note 46, at 1978-98 (extensive argument that the Court's switch was caused by the political changes that ended Reconstruction).

91. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.11(c) (8th ed. 2010).

92. *See supra* note 70 and accompanying text.

citizen, sued his State for defaulting on its bonds, alleged to violate the Contracts Clause, and thus to be under federal question jurisdiction.[93] The case was not within the Eleventh Amendment's terms, but the Court rejected his claim in an opinion that rewrote state sovereign immunity. It decided that the Eleventh Amendment merely restored immunity implicit in the original constitutional structure, so that immunity bars all unconsented suits against states by name save cases when the plaintiff is the United States or a sister state.[94] The Court in the same year went the other direction on immunity of cities, counties, and other local governments.[95] They were denied any immunity defense on grounds hard to reconcile with the rule for states.[96] However, both rules continue in force today.[97] Another consequence of the *Hans v. Louisiana*[98] revision was to allow federal jurisdiction when a state consents, also contrary to the Eleventh Amendment's wording.[99]

The next phase in the state immunity wars arose from decisions in the 1890s in which suits sought to enjoin state officers from taking actions alleged to be unconstitutional but did not seek money judgments that would run against the state.[100] One context was railroad rate disputes; railroads or their investors sued state rate makers to enjoin rate schemes alleged to violate the Fourteenth Amendment.[101] Defendants' Eleventh Amendment pleas were rejected by distinguishing between a state's interest "in a governmental sense" from its pecuniary or property interest; immunity forbade only the latter.[102] These cases culminated in *Ex parte Young*,[103] the famous 1908 decision that has denominated the doctrine since its publication.[104] This matched intergovernmental cases to the rule for internal immunity within the federal system: to recover damages or other retroactive relief, there

93. Hans v. Louisiana, 134 U.S. 1 (1890).

94. *Hans*, 134 U.S. at 10-21. The Court later held that foreign nations' suits against states are barred. Monaco v. Mississippi, 292 U.S. 313 (1934).

95. Lincoln County v. Luning, 133 U.S. 529 (1890).

96. *Luning*, 133 U.S. 529 (1890). *See* ORTH, *supra* note 68, at 119-20 (using the phrase "bizarre results"). As a consequence, courts must differentiate between suits against local governments and suits against arms of a state government. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984). Other decisions added a third category, state instrumentalities, that are sufficiently distinct from the state to lack immunity. *E.g.*, United States *ex rel*. Oberg v. Pa. Higher Educ. Assistance Agency, 804 F.3d 646 (4th Cir. 2015).

97. *See* NOWAK & ROTUNDA, *supra* note 91, § 2.11(c)-(e).

98. 134 U.S. 1 (1890).

99. *Hans*, 134 U.S. at 17-18.

100. *See* JACOBS, *supra* note 46, at 131-38.

101. *See id.* at 132-35.

102. Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 390 (1894). *See* Edelman v. Jordan, 415 U.S. 651 (1974) (modern application of the distinction).

103. 209 U.S. 123 (1908).

104. *Ex parte* Young, 209 U.S. 123 (1908). *See* JACOBS, *supra* note 46, at 138-49; ORTH, *supra* note 68, at 128-35.

must be legislative consent.[105] But a litigant can seek equitable relief against future violations of law by suing an officer based on official actions.[106]

The companion rules of *Hans* and *Young* governed state immunity in federal court until a new question arose in 1964. Prior Supreme Court decisions had not involved a federal statute intended to override state immunity. In that year, the Court held that the Federal Employers' Liability Act[107] ("FELA") intended to allow damages suits against a state government that operated a common carrier, and that Congress had authority under the Commerce Clause to authorize damages actions against states.[108] Twelve years later, the Court reached a like decision for damages claims arising under the Civil Rights Act of 1964,[109] based on Congress's power to enforce the Fourteenth Amendment.[110] Later decisions overruled the FELA case and established the current rule that Congress can override state immunity to claims for damages or other retroactive relief only when it properly invokes its powers to enforce one of the Civil War amendments.[111] Other modern decisions held that Indian tribes' suits for retroactive relief against a state are barred by the immunity rule of *Hans*.[112]

D. Federal and State Consents and Reforms

The alternative to suits looking for judicially-crafted ways to avoid immunity is to seek legislative consent and to sue pursuant to a consent statute. In early years, claimants sought special bills in Congress or state legislatures.[113] Tiring of special bills, Congress created the Court of Claims in 1855 and gave it power to enter judgments against the Government in 1863.[114] However, jurisdiction was limited to claims based on contract, statute, or regulation.[115] Claims

105. United States v. Testan, 424 U.S. 392, 424 (1976).

106. *Testan*, 424 U.S. at 424. For cases arising under the Administrative Procedure Act, an action for prospective relief can be filed against the United States by name. Administrative Procedure Act § 10, 5 U.S.C. § 702 (2012).

107. 34 Stat. 232 (1906).

108. Parden v. Terminal Ry., 377 U.S. 184 (1964).

109. Pub. L. No. 88-352, 78 Stat. 241 (1964).

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

111. College Sav. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd., 527. U.S. 666, 680 (1999). *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78-80 (2000).

112. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

113. *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 643-47 (1985).

114. *See id.* at 652, 656-68.

115. *See id.* at 663.

based on treaties were expressly excepted, and those based on tort were excepted by omission.[116]

Sovereign immunity to tort liability has long been the most actively contested field. Anti-immunity reformers stress that those who enter business deals with government entities have advance notice of limits on their remedies and can plan accordingly, but tort victims have no like opportunity, so that immunity is particularly unfair to them.[117] The randomness of torts has an opposing effect on legislators contemplating immunity waivers: effects of waivers are harder to anticipate and plan for and risk larger money judgments. Thus, Congress had fully waived immunity to suit based on contracts and statutes by 1863 but did not enact a general tort waiver until 1946.[118] State legislatures lagged even more until spurred by a wave of state court invalidations of tort immunity that Florida began in 1957.[119]

VI. SOVEREIGN IMMUNITY OF INDIAN NATIONS

A. Tribal Immunity in Federal and State Courts

1. Tribal Sovereign Immunity Recognized by Federal Courts in Pari Materia with Federal and State Immunity[120]

Indian tribes were brought under the doctrine of sovereign immunity as soon as the issue reached federal courts. Tribes were seldom sued until modern times, but in the few instances in which they were, courts consistently held that governmental immunity protected them

116. *See* Collins & Miller, *supra* note 19, at 102. Federal sovereign immunity has long been a huge barrier to redress of Indian claims for mishandling tribal property. No federal statute consents to claims for breach of federal trust control of Indian land. The omission continues to be an injustice to Native people. *See Collins*, *supra* note 40, at 32-44.

117. *See, e.g.*, Edwin M. Borchard, *Governmental Responsibility in Tort—A Proposed Reform*, 11 Va. L. Reg. 330, 332 (1925) ("The doctrine of State immunity in tort survives by virtue of its antiquity alone. It rests upon a historical error; and it is neither sound, just nor responsive to the demands of modern social engineering.").

118. *Compare* Act of Mar. 3, 1863, ch. 92 § 9, 12 Stat. 765 (codified as amended at 28 U.S.C. § 1491 (2012)), *with* Act of June 25, 1946, ch. 646, tit. IV, 60 Stat. 812 (codified as amended at 28 U.S.C. § 1346(b) (2012)).

119. *See* Note, *The Role of The Courts in Abolishing Governmental Immunity*, 1964 Duke L.J. 888 (1964); Kramer, *supra* note 58, at 801-26 (state tort immunity to 1955).

120. This part of the Article benefited from William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587 (2013); Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 Wake Forest L. Rev. 765 (2008); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137 (2004); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661 (2002).

from unconsented lawsuits. The courts from an early date also opined that immunity can be overridden by federal statute.[121]

Parks v. Ross[122] was the first reported decision. Parks sued John Ross, Principal Chief of the Cherokee Nation, for debts allegedly incurred for services during Cherokee removal in the late 1830s, the event commonly called the Trail of Tears.[123] The Court affirmed the circuit court's directed verdict against him. Ross had acted as an officer of the Cherokee Nation, which precluded personal liability against him, a standard immunity rule.[124] The opinion invoked language traditionally used to describe state sovereign immunity, and it paralleled principles in the 1789 Judiciary Act,[125] which prohibited federal court jurisdiction over foreign diplomats even though jurisdiction seemingly exists under Article III.[126]

Chadick v. Duncan[127] in 1894 was the first recorded instance of a direct decision on tribal immunity, although argument in the case referred to three earlier, unrecorded rulings dismissing suits against a tribe based on immunity from suit.[128] Chadick alleged that the Cherokee Nation breached its contract with him to sell its bonds. He sought an injunction to compel the Cherokee Nation, its principal chief and treasurer, and its delegates in Washington, D.C., to deliver the bonds to him.[129] The federal court dismissed based on tribal immunity.[130] The court relied on state and foreign sovereign immunity jurisprudence, which had developed substantially in the years after *Parks*. The cited cases held that sovereign immunity applied to claims for injunctive relief as well as those seeking damages. The court concluded that tribes "are not amenable to suit anywhere at the instance of any private individual."[131] The court cited and relied on the Su-

121. *See, e.g.*, Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375 (8th Cir. 1895).

122. 52 U.S. (11 How.) 362 (1851).

123. Parks v. Ross, 52 U.S. (11 How.) 362, 373-74 (1851). For the classic story, see ANGIE DEBO, AND STILL THE WATERS RUN: BETRAYAL OF THE FIVE CIVILIZED TRIBES (1973).

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

125. 1 Stat. 73 (1789).

126. *Parks*, 52 U.S. (11 How.) at 374. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1568, 1590 (2002).

127. No. 15,317 (D.C. Mar. 3, 1894).

128. Chadick v. Duncan, No. 15,317 (D.C. Mar. 3, 1894) (available at National Archives & Records Administration Record Group No. 376, Case File No. 314). The D.C. Supreme Court's decision is not printed in the law reports but is recorded as cited in the National Archives. The reference to earlier, unreported rulings in the argument is in the slip opinion at pages 70-71. References to this case depend on Wood, *supra* note 120.

129. *Chadick*, slip op. at 73-74.

130. *Id.*

131. *Id.* at 78.

preme Court's contemporaneous immunity cases regarding actions against states and their officials arising out of bond defaults.[132]

The first reported decision in a suit against a tribe by name was decided in 1895.[133] George Thebo sued the Choctaw Nation and its principal chief and treasurer to recover attorney's fees allegedly owed him.[134] The court upheld dismissal of the claim, citing the Supreme Court's decision in *Beers v. Arkansas*[135] for the "well-established" principle that a sovereign cannot be sued without its consent.[136] The *Thebo*[137] court also relied on a public policy reason for the doctrine: protecting the government's fisc. For these reasons Congress had "sparingly exercised" its power to authorize suits against tribes, reflecting "the settled policy of the United States not to authorize . . . suits [against tribes] except in a few cases."[138] Moreover, the "settled policy" of tribal immunity extended not just to suits on contracts but as well to "other causes of action."[139] Because Congress had not authorized suits against the Choctaw Nation or its officials in the legislation establishing the U.S. court in Indian Territory or otherwise, the Choctaws' immunity barred Thebo's lawsuit.[140]

In *Adams v. Murphy*,[141] the Court of Appeals for the Eighth Circuit held that the Creek Nation and its principal chief were exempt from suit on a contract.[142] The court explained that tribal immunity, like state immunity, barred both actions for damages and actions seeking prospective relief.[143] The court cited its earlier decision in *Thebo*, noting that this rule "has been the settled doctrine of the government from the beginning."[144] As in *Thebo*, the court relied on the policy of protecting the tribal treasury, arguing that without immu-

132. *Id.* at 90-91 (quoting *In re* Ayers, 123 U.S. 443 (1887)). Chadick appealed to the United States Court of Appeals for the District of Columbia. A few days later, a bill to abrogate the Cherokees' immunity was introduced in the House of Representatives. 26 CONG. REC. 2662 (1894). It did not become law, however, and Chadick's appeal was dismissed for failure to print the transcript of record. *See Chadick*, No. 15,317. But the case garnered media attention: the Washington Post wrote about it at least four times. WASH. POST, Feb. 22, 1894, at 4; WASH. POST, Feb. 25, 1894, at 7; WASH. POST, Feb. 28, 1894, at 3; WASH. POST, Mar. 15, 1894, at 2. *See also* CHI. TRIB., Feb. 4, 1894, at 1.

133. *See Thebo*, 66 F. 372.

134. *See id.*

135. 61 U.S. (20 How.) 527 (1857).

136. *Thebo*, 66 F. at 375.

137. 66 F. 342 (8th Cir. 1895).

138. *Thebo*, 66 F. at 375-76.

139. *Id.* at 376.

140. *Id.* at 373.

141. 165 F. 304 (8th Cir. 1908).

142. Adams v. Murphy, 165 F. 304 (8th Cir. 1908).

143. *Adams*, 165 F. at 310-11 (citing *In re* Ayers, 123 U.S. at 502, 504).

144. *Id.* at 308-09.

nity, the tribes would be "overwhelmed" by litigation, with "disastrous consequences."[145]

In 1908 Congress showed its recognition of tribal immunity by expressly authorizing specific suits against six Indian tribes.[146] Section twenty-six of that act allowed Clarence Turner to sue the Creek Nation for damages resulting from an 1890 incident in which a group of Creek citizens destroyed his fence. However, the Court of Claims held against Turner, and the Supreme Court affirmed.[147] The Court recognized that the statute had overridden the tribe's immunity but affirmed for lack of a cause of action. It noted that under general law, like "other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace."[148] Although the 1908 legislation overrode immunity, it did not create any right for him to recover damages for mob violence since "no such liability existed by the general law."[149] Turner thus failed to allege a cause of action.

In *United States v. U.S. Fidelity & Guaranty Co.*,[150] the Supreme Court first squarely relied on tribal immunity as a rule of decision. The Court stated, "These Indian Nations are exempt from suit without Congressional authorization," citing the Eighth Circuit decisions in

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145. *Id.*

146. Appropriations Act of May 29, 1908, ch. 216, § 2 (Menominee), § 5 (Choctaw), § 16 (Choctaw & Chickasaw), § 26 (Creek), § 27 (Mississippi Choctaw), 35 Stat. 444 (1908). For a partially successful claim under § 5, see Heirs of Garland v. Choctaw Nation, 272 U.S. 728 (1927). For a failed claim based on § 2, see Green v. Menominee Tribe, 233 U.S. 558 (1914). This statute is notable because of its authorization of the *Turner* case *infra* note 147. It was not unique; consents appeared regularly in Indian appropriation acts. *See, e.g.*, Appropriations Act of May 25, 1918, ch. 86, § 18 (Choctaw), 40 Stat. 561, 583; Appropriations Act of June 20, 1906, ch. 3449, 34 Stat. 325, 344 (Quapaw enrollment), 345 (Choctaw), 365-66 (Osage). For a successful claim based on the 1918 statute, see McMurray v. Choctaw Tribe of Indians, 62 Ct. Cl. 458 (1926), *cert. denied*, 275 U.S. 524 (1927).

147. Turner v. United States, 51 Ct. Cl. 125 (1916), *aff'd*, 248 U.S. 354 (1919). *See also* Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 756-58 (1998) (sustaining tribal immunity from suit but in dictum declared a policy screed against the doctrine). Included was the assertion that its own prior decisions had mistakenly opined that tribal immunity originated in *Turner*. *Kiowa*, 523 U.S. at 756. That was true, but not for the reason the Court stated. As the *Kiowa* Court noted, the *Turner* Court assumed without discussion that tribes had immunity. *Id.* at 757. However, immunity was not at issue because Congress had overridden it by statute. Based on the consistent and uncontradicted decisions of federal courts and actions of Congress, tribal immunity was a settled rule by the time of *Turner*, so it was natural for the Court to assume it. However, the basis for holding against Turner, that he had no cause of action, depended on the governmental character of the Creeks. To that extent, the *Turner* Court expressly recognized tribal sovereignty. *Kiowa* is further discussed *infra* notes 162, 187, 200-201 and accompanying text.

148. *Turner*, 248 U.S. at 357-58.

149. *Id.* at 357.

150. 309 U.S. 506 (1940).

Thebo v. Choctaw Tribe and *Adams v. Murphy*,[151] as well as *Turner v. United States*.[152] The Court did not discuss the immunity issue, but the reason for that is apparent from the argument for the respondent, which did not contest tribal immunity (as noted, all the precedent supported immunity) but argued that "Congress has consented to an affirmative judgment against the Tribes," and that the immunity defense had been waived by failure to assert it in a former action that had gone to judgment without assertion of the defense.[153]

Whether tribal immunity could be waived in that manner was a novel issue in the case; it had not been determined in any reported decision. The Court held that the prior judgment was

> void in so far as it undertakes to fix a credit against the Indian Nations . . . . The Congress has made provision for cross-suits against the Indian Nations by defendants. This provision, however, is applicable only to "any United States court in the Indian Territory." Against this conclusion respondents urge that as the right to file the claim against the debtor [in Missouri] was transitory, the right to set up the cross-claim properly followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity.[154]

In other words, the Court held tribal immunity to be jurisdictional, as is the immunity of the United States and the states.[155]

The review above covers all known decisions on tribal immunity prior to World War II, and as noted, it was sustained in all of them. It may be useful to pause briefly to consider the theoretical basis for the immunity rule. As described above, immunity of the federal government was treated as received law, essentially as an inherent aspect of sovereign status and separation of powers.[156] Tribal immunity depended on federal recognition of retained tribal sovereignty, which arose from the treaties between tribes and the United States.[157] Like other attributes of tribal sovereignty, immunity is subject to alteration by Congress.[158] Given this history, tribal immunity can be said to be grounded in federal treaty and statutory law or in federal common law. The choice matters only insofar as it affects the Supreme Court's

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151. *See supra* notes 133, 141.
152. United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940).
153. 248 U.S. 354 (1919). *See U.S. Fid. & Guar. Co.*, 309 U.S. at 508-09.
154. *Id.* at 512-13.
155. *See* Sarah L. Brinton, *Three-Dimensional Sovereign Immunity*, 54 SANTA CLARA L. REV. 237 (2014).
156. *See supra* notes 45-47 and accompanying text.
157. *See supra* notes 7, 10-11 and accompanying text.
158. *See* NEWTON ET AL., *supra* note 7, §§ 5.02, 5.04 (reciting Court's rule of plenary federal power and academic claims that the power ought to be limited).

self-defined freedom to overturn immunity without action by Congress.[159]

2. Tribal Immunity in the Modern Era

In modern times, tribes have undertaken all manner of activities that have provoked lawsuits against them, which have proliferated. Since 1977, the Court has upheld immunity seven times.[160] However, the doctrine of governmental immunity has been under continuing attack in legal discourse,[161] and tribal immunity has received its share of criticism.[162]

All the immunity decisions related in the prior section arose from activities of the Cherokee and Choctaw, two of the five powerful tribes that the government removed from the Southeast and granted substantial holdings in Indian Territory.[163] However, commercial activities of those tribes were curbed by forced federal actions leading to liquidation of tribal land holdings and Oklahoma statehood.[164] Those moves were a major part of the long-term federal policy to assimilate Native people by ending the importance of tribal governments and property.[165] That policy was discredited in the 1920s, and the Indian Reorganization Act of 1934[166] passed by Congress formally reversed it.[167] However, the policy shift had not revived enough tribal involvement in commerce to generate any new contest over tribal immunity by 1953, when federal policy reverted to termination of tribes' federal status.[168]

The termination scheme generated tribal resistance, augmented by inspiration from the Civil Rights Movement.[169] Federal policy shifted solidly in favor of tribal sovereignty, marked by President

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159. *See infra* note 245 and accompanying text.

160. *See infra* notes 173-197 and accompanying text.

161. Almost every academic commentary on governmental immunity criticizes the doctrine and calls for its abolition, in terms of varying vehemence. *See, e.g.*, ORTH, *supra* note 68, at 149-59; JACOBS, *supra* note 46, at 150-64; Brinton, *supra* note 155 *passim*; Gibbons, *supra* note 46, at 1890-95, 2003-04; Borchard, *supra* note 47. So also do some judicial opinions. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (Frankfurter, J., dissenting).

162. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045-56 (2014) (dissenting ops.); Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 756-58 (1998); *see also Kiowa*, 523 U.S. at 760-66 (dissenting op.).

163. *See* DEBO, *supra* note 123.

164. *See* NEWTON ET AL., *supra* note 7, at § 4.07.

165. *See id.* § 1.04.

166. 48 Stat. 984 (1934).

167. *See* NEWTON ET AL., *supra* note 7, at § 1.05.

168. *See id.* § 1.06.

169. *See id.* § 1.07.

Nixon's 1971 declaration.[170] Thereafter tribal commercial activity gradually increased. Inevitably, suits against tribes, and the issue of immunity, returned to the courts. The *Unived States v. U.S. Fid. & Guar. Co.*[171] decision[172] had made judicial recognition of tribal immunity a Supreme Court precedent. Challengers had to distinguish it, seek its modification, or ask Congress to override it.

Tribal immunity returned to the Court in a dispute over treaty fishing rights in Washington. The State Department of Game sued the Puyallup Tribe and forty-one of its members for a declaratory judgment and injunction to restrict tribal treaty fishing rights.[173] The suit was in state court, the first reported tribal immunity case in a state forum. The litigation spanned fourteen years and was reviewed no less than three times by the Supreme Court.[174] It was a protracted battle over interpretation of the tribe's treaty, and the final judgment bound the tribal fishermen individually.[175] But the Court held that tribal immunity barred jurisdiction over the tribe.[176]

A year after the *Puyallup Tribe*[177] immunity decision, the Court held that immunity barred federal court jurisdiction over the Santa Clara Pueblo tribe.[178] The case involved the Indian Civil Rights Act of 1968,[179] a federal statute that imposed most provisions of the Bill of Rights and Fourteenth Amendment on tribal governments.[180]

A 1986 decision held that a state statute denying tribes access to the state's courts, unless the tribe waived its immunity was preempted by federal law.[181] Five years later, a tribe sued state officials to enjoin the defendants' efforts to collect the state's cigarette tax on sales by a tribally-owned business.[182] Defendants counterclaimed against the tribe seeking a judgment for back taxes and an injunction

170. *See id.*
171. 309 U.S. 506 (1940).
172. *See supra* notes 150-155 and accompanying text.
173. Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165, 168 (1977).
174. *Puyallup*, 433 U.S. at 167.
175. *Id.* at 172-73.
176. *Id.* at 178.
177. 433 U.S. 165 (1977).
178. Santa Clara Pueblo v. Martinez, 436 U.S. 49*,* 58 (1978).
179. Pub. L. No. 90-284, 82 Stat. 77 (1968).
180. *Santa Clara Pueblo*, 436 U.S. at 51-52, 56-58 (citing and discussing 25 U.S.C. §§ 1301-1303 (1976)). Prior to the decision, lower federal courts had found an implied federal cause of action to enforce the statute. Some cases named tribes as defendants, and some tribes argued immunity as a defense, but courts held that the statute overrode immunity. *See, e.g.*, Crowe v. E. Band of Cherokee Indians, 506 F.2d 1231, 1233 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Cmty., 484 F.2d 200, 203 (9th Cir. 1973). All decisions that had found a federal cause of action were, of course, overruled by *Santa Clara Pueblo*.
181. Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890-91 (1986).
182. Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe, 498 U.S. 505, 507 (1991).

to collect taxes in the future.[183] The tribe asserted sovereign immunity against the counterclaim, and the Court held that the tribe's suit for injunctive relief did not waive its immunity to claims for damages.[184] However, in a 2001 decision, the Court held that a tribal contract that provided for arbitration of disputes had waived its immunity to suit in a state court.[185] The Court's opinion recognized tribal immunity yet again and said a tribal waiver must be "clear" but held that the contract in question had met that standard.[186]

A 1998 decision directly confronted the question whether tribes enjoy immunity for activities outside Indian country.[187] A tribe defaulted on a promissory note made to a corporation, and the corporation sued for enforcement in state court, alleging that the note was made outside Indian country.[188] The Supreme Court held that tribal immunity barred the claim.[189] A number of prior decisions had involved events outside Indian country, but the question whether immunity was limited to tribal territory had been raised only in one decision, where the Court determined that the dispute had arisen within Indian country.[190] The 1998 case generated a significant dissent, and the majority opinion questioned whether immunity should continue for tribal business activities.[191]

The issue returned to the Court in 2014. The Bay Mills Indian Community had a gaming compact with the State of Michigan authorizing a casino on its reservation near Sault Ste. Marie.[192] To increase its income, the tribe bought land to the south near Traverse City and opened another gaming facility.[193] The tribe claimed the move was lawful, but Michigan disagreed and sued in U.S. district court, seeking to enjoin the new casino. The tribe pleaded sovereign immunity, but the trial court ruled for the State.[194] The Court of Appeals reversed based on immunity, and the Supreme Court affirmed.[195] Based on

183. *Okla. Tax Comm'n*, 498 U.S. at 507-08.
184. *Id.* at 509.
185. C & L Enters. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001).
186. *C & L Enters*., 532 U.S. at 418-20. The Court expressly agreed with lower court decisions enforcing tribal waivers. *Id.* at 417, 420-21. *See, e.g.*, Sokaogan Gaming Enter. Corp. v. Tushe-Montgomery Assocs., 86 F.3d 656 (7th Cir. 1996).
187. *Kiowa*, 523 U.S. at 754 (1998).
188. *Id.* at 753-54.
189. *Id.* at 754-57.
190. *See Okla. Tax Comm'n*, 498 U.S. at 511. Other decisions that appear to have involved activities outside Indian country include *Puyallup Tribe*, 433 U.S. at 168; *U.S. Fid. & Guar. Co*., 309 U.S. at 508-09; *Thebo*, 66 F. at 375.
191. *See Kiowa*, 523 U.S. at 756-58, 760-68.
192. *Bay Mills*, 134 S. Ct. at 2029.
193. *Id.*
194. *Id.*
195. *Id.* at 2028-30.

Michigan's claim that the dispute arose outside Indian country, the 1998 issue was presented again.[196] The Court affirmed off-reservation immunity, but only by a five-to-four vote.[197]

The split votes in the 1998 and 2014 cases shed an unusually clear light on judicial leanings—or perhaps biases? In divided cases, conservative justices are less likely to sustain Indian rights against states, but they normally vote to uphold sovereign immunity.[198] Liberal justices oppose sovereign immunity but are more likely to side with tribes.[199] Tribal immunity issues force each justice to decide what policy is the more important, immunity or Indian rights. The 1998 *Kiowa Tribe*[200] majority comprised Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, Souter, and Breyer. Justices Stevens, Thomas, and Ginsburg dissented.[201] Justices Stevens and Ginsburg were and are ardent opponents of immunity, and their records on Indian rights are mixed at best.[202]

The 2014 decision involved four new justices.[203] Of the five who sat in both cases, four voted the same way; Justice Scalia changed sides.[204] Therefore to retain immunity, Bay Mills needed the votes of three of the four replacements, and it obtained just that. Chief Justice Roberts and Justices Sotomayor and Kagan voted to retain tribal immunity, and Justice Alito joined the dissenters.[205] Tribal immunity

196. *See id.* at 2032.

197. *Id. passim*.

198. The point is straightforward for state immunity. See the divided votes in Seminole Tribe v. Florida, 517 U.S. 44 (1996) (five-to-four); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (five-to-four, no majority); Welch v. Tex. Dep't of Hwys & Pub. Transp., 483 U.S. 468 (1987) (five-to-four, no majority); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (five-to-four); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (five-to-four); Edelman v. Jordan, 415 U.S. 651 (1974) (five-to-three). On Indian rights, see the extended discussion in Getches, *supra* note 14.

199. *See infra* note 202. The other relevant policy, *stare decisis*, appears important to some justices who have supported tribal immunity based on precedent. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2036-39.

200. 523 U.S. 751 (1998).

201. *See Kiowa*, 523 U.S. at 756-57.

202. Justice Ginsburg voted against state immunity in *Seminole Tribe* and Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997). She voted against tribal immunity in *Bay Mills* and *Kiowa*. On her overall record in Indian rights cases, see Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1014-15 (2009). Justice Stevens voted against immunity in every divided decision on the issue after his 1975 appointment, and his recent book, *Six Amendments: How We Should Change the Constitution*, would abolish state sovereign immunity from federal law. SIX AMENDMENTS: HOW WE SHOULD CHANGE THE CONSTITUTION (2014). On his record in Indian law cases, see Matthew L.M. Fletcher, *The Indian Law Legacy of Justice Stevens*, TURTLE TALK (April 9, 2010), https://turtletalk.wordpress.com/2010/04/09/the-indian-law-legacy-of-justice-stevens/.

203. *Bay Mills*, 134 S. Ct. at 2036-39.

204. *See id.*

205. *See id.*

made it past another test in 2017. The Court held that an off-reservation tort case against a Connecticut tribe's employee personally was not shielded by tribal immunity.[206] Will tribal immunity survive President Trump appointments to the Court?

B. Immunity in Suits Against Tribal Officers

Given the abundant history of suing officers as a way around sovereign immunity, those who want to sue tribes have, of course, tried that method. In all pre-World War II cases in which tribal officers were sued, plaintiffs sought money judgments or similar relief that would have run against the tribal defendant, and federal courts readily rejected the attempt.[207] There were no complexities arising from the Contracts Clause or the Eleventh Amendment.[208] The courts sustained immunity together with the occasional remark that Congress had power to override it.[209]

The 1977 Puyallup Tribe fishing rights decision was the first to present the distinct question of prospective equitable relief against individuals.[210] Washington sued the tribe and forty-one fisherman-members in state court. It could have sought retroactive relief for past actions but did not.[211] The Supreme Court ordered dismissal of the tribe based on immunity but allowed a prospective judgment against individual members (to the limited extent that Washington's claims were sustained).[212] To be sure, the individuals were not officers representing a defendant government, but the effect was the same—the tribe was bound prospectively.

The next year the Court heard *Santa Clara Pueblo v. Martinez*,[213] a federal court action seeking prospective relief against a tribe.[214]

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206. Lewis v. Clarke, 137 S. Ct. 1285 (2017). The case involved a knotty mix of state-federal issues. A tribal casino's on-duty limousine rear-ended the plaintiffs' car. The tribe had consented to tort claims, but subject to a one-year statute of limitations that the plaintiffs missed. They sued the limousine driver personally in state court but lost based on immunity. Argument in the Court renewed the basic issue of tribal immunity outside Indian country, but the Court's majority simply ruled that immunity shielded only the tribe, not the driver personally. On remand, the state courts will decide if state law immunizes the driver. Justices Thomas and Ginsburg renewed their view that tribal immunity outside Indian country should be overruled. Justice Alito joined the Court. Justice Gorsuch did not sit.

207. *See supra* notes 123-125, 127-132, 141-143 and accompanying text.

208. Neither provision applies to tribes. U.S. Const. art. I, § 10, cl.1; U.S. Const. amend. XI. On application to states, see *supra* Section IV.B.

209. *See supra* Section VI.A.1 and notes 128, 134, 137 and accompanying text.

210. *See* Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165, 168 (1977); *see also supra* note 173 and accompanying text.

211. *See Puyallup Tribe*, 433 U.S. at 168-72.

212. *See id.* at 172-73.

213. 436 U.S. 49 (1978).

214. *See supra* note 178 and accompanying text.

The action named the Pueblo and its governor as defendants.[215] The Court held that immunity barred suit against the Pueblo by name, but it sustained jurisdiction over its governor, relying on *Ex parte Young*[216] by analogy.[217] The Court held that plaintiffs' case failed for lack of a federal cause of action, so the case was dismissed without a judgment against the Governor.[218]

In 1982, an insurer who had been subjected to a default judgment in Crow Tribal Court sued the tribe and its officers in federal district court to contest tribal court jurisdiction over the case.[219] The tribe pleaded sovereign immunity as a defense, and when the case reached the Supreme Court, tribal immunity was a question presented in briefing to the Court.[220] However, the Court's unanimous opinion said nothing about the issue. There were several possible reasons. The Court held that no immediate order against defendants was justified.[221] To the extent that the ruling allowed later relief for the insurer, officers were named and prospective relief was sought, so any order could be made against them by analogy to *Ex parte Young*.[222] And silence avoided revealing internal differences within the Court on tribal immunity.

In 1988, South Dakota sued the Cheyenne River Sioux Tribe and two of its officers for prospective equitable relief to determine rights to govern non-Indian hunting and fishing on land within the tribal reservation but not owned by the tribe.[223] The tribe successfully pleaded sovereign immunity, but the District Court upheld authority to proceed against tribal officers.[224] The action ended with a 1993 Supreme Court judgment against the tribal chairman.[225]

In the 1991 decision that dismissed the Oklahoma Tax Commission's counterclaim for tobacco taxes, the Commission lamented its in-

215. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

216. 209 U.S. 123 (1908).

217. *Santa Clara*, 436 U.S. at 58.

218. *Id.* at 59-72. *See* Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 n.3 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (dictum) ("The Tribe's immunity from suit does not extend to tribal officials.").

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

220. Brief for Crow Respondents at 1, Nat'l Farmers' Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (No. 84-320).

221. *Crow Tribe of Indians*, 471 U.S. at 853-57.

222. *Id.* at 848.

223. South Dakota v. Ducheneaux, No. 88-3049, 1990 U.S. Dist. LEXIS 20834 (D.S.D. Aug. 21, 1990), *rev'd*, 949 F.2d 984 (8th Cir. 1991), *rev'd sub nom*. South Dakota v. Bourland, 508 U.S. 679 (1993).

224. *Duchenaux,* 1990 U.S. Dist. LEXIS 20834, at *1-2.

225. *See Bourland*, 508 U.S. 679. This was the first straightforward Supreme Court judgment on the merits against a tribal official that bound the tribe by analogy to *Ex parte Young*, 209 U.S. 123 (1908), and its federal counterparts.

ability to enforce its laws against a tribal smoke shop.[226] The Court responded with a list of remedies that included suit against tribal officers or members, citing *Ex parte Young*.[227]

In 1992, a non-Indian firm that was sued in a tribal court filed a federal action to contest jurisdiction of the tribal court.[228] It named only tribal officers, lost in U.S. District Court, but won on appeal, eventually obtaining a Supreme Court judgment against tribal judges.[229]

In 1993, a non-Indian business operating within the Navajo Reservation sued the tribe in federal court to contest validity of a tribal tax.[230] The tribe moved to dismiss based on sovereign immunity. While the motion was pending, plaintiff amended its complaint to add a tribal tax commissioner as defendant.[231] The District Court dismissed the tribe but proceeded to judgment with the tax commissioner as defendant, dismissing for failure to exhaust tribal remedies.[232] The ruling was affirmed by the Court of Appeals, but the Supreme Court unanimously reversed and ruled against the tribal officials on the merits.[233]

The latest word from the Court is its dictum in *Michigan v. Bay Mills Indian Community*,[234] opining that suit against tribal officials is a remedy that may be available to Michigan.[235] Given this history, it is reasonably clear that while tribes are immune from any suit against them by name, and tribal officers cannot be sued for damages or other retroactive relief that would run against the tribe, suits against officers for prospective relief are not barred by tribal immunity.[236]

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226. *Okla. Tax Comm'n*, 498 U.S. at 511-12.

227. *See id.* at 512-14. In Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992), two Montana tribes imposed taxes on the railroad's rights-of-way crossing their reservations. The railroad sued the tribes and their officials to contest legality of the taxes, and the tribes pleaded sovereign immunity. The court held that immunity barred suit against the tribes, but an action for prospective relief lay against tribal officials, and the Court cited *Santa Clara*. *Id.* at 901-02. On the merits, the court held that the taxes were valid.

228. A-1 Contractors v. Strate, No. CIV. A1-92-24, 1992 WL 696330, at *1 (D.N.D. Sept. 16, 1992), *rev'd*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997).

229. *See* A-1 Contractors v. Strate, 520 U.S. 438 (1997).

230. Atkinson Trading Co. v. Navajo Nation, 866 F. Supp. 506, 508 (D.N.M. 1994), *aff'd sub nom*. Atkinson Trading Co. v. Shirley, 210 F.3d 1247 (10th Cir. 2000), *rev'd*, 532 U.S. 645 (2001).

231. *Navajo Nation*, 866 F. Supp. at 508.

232. *Id. passim*. At some point before judgment, the other tribal tax commissioners were added as defendants.

233. *See Shirley*, 532 U.S. 645.

234. 134 S. Ct. 2024 (2014).

235. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2035 (2014).

236. For an interesting variant, see Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226 (10th Cir. 2014). Jurisdiction was upheld under *Ex parte Young* in action by one tribe against another.

Lawyers for tribes may continue to contest the *Ex parte Young* question, arguing that Supreme Court statements approving jurisdiction are mostly dicta.[237] To date it is unclear what alternative theory they will proffer. One possibility is to claim that tribal officials are immune unless Congress expressly overrides immunity or a particular tribe waives its immunity. That is the governing rule for suits against tribes by name, so it is a logical extension.[238] The main difficulty is that this would seem to preclude any remedy against a tribe's action outside Indian country. That was the issue that inspired the grant of certiorari in *Bay Mills*, the dissent's four votes to overturn immunity, and the majority's reply that Michigan may have a remedy akin to *Ex parte Young*.[239] The latter was technically dictum but in context a nudge away from a holding. Moreover, were a court to sustain a tribal claim to immunity from any legal remedy, Congress would likely act to override and might limit tribal immunity more extensively.

C. Scope of Jurisdiction to Grant Prospective Relief Against Tribal Officers

If tribal immunity does not categorically bar suits against tribal officers in federal and state courts, what are the limits of judicial power? The most frequently successful defense in reported cases is part of standard immunity doctrine: the claim that retroactive relief is sought so that the real party in interest is the tribe, requiring dismissal based on immunity.[240]

There is the usual array of other defenses. If relief against a tribe is sought based on an alleged waiver, the waiver must be lawfully adopted, usually based on legislative authority; consent in a contract lacking proper authority is invalid.[241] Any federal civil action re-

237. As the review above shows, no Supreme Court decision against a tribal official on the merits expressly addressed the *Ex parte Young* immunity question. *See supra* note 225 and accompanying text.

238. *See supra* Section VI.A.

239. *See Bay Mills*, 134 S. Ct. at 2030, 2035, 2045-56.

240. *E.g.*, Cook v. AVI Casino Enters., Inc., 548 F.3d 718, 726-27 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009); Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288 (10th Cir. 2008); Chayoon v. Chao, 355 F.3d 141 (2d Cir. 2004), *cert. denied*, 543 U.S. 966 (2004); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 177 F.3d 1212 (11th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269 (9th Cir. 1991). *See* Alltel Commc'ns, LLC, v. DeJordy, 675 F.3d 1100 (8th Cir. 2012) (immunity barred subpoena duces tecum served on tribe and tribal official). The defense is sometimes raised indirectly by claiming that tribes are indispensable parties and immune. *E.g.*, Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993). *See also* Vann v. U.S. Dep't of the Interior, 701 F.3d 927 (D.C. Cir. 2012) (sustaining jurisdiction over official based on *Ex parte Young*; tribe not indispensable).

241. *See* Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684 (7th Cir. 2011) (waiver in void indenture also void).

quires a proper basis for district court jurisdiction, standing, and a federal cause of action.[242] State courts often lack jurisdiction over Indians in Indian country.[243] A federal statutory remedy or arbitration agreement may provide an exclusive remedy.[244]

A conceptual question so far not addressed by any court is illustrated by frequent invocations of *Ex parte Young*[245] as the purported model for equitable actions against tribal officers.[246] However, the internal federal rule may be a more apt and predictable model. *Ex parte Young* emerged from the turmoil of the Eleventh Amendment and its expansion in *Hans v Louisiana*[247] in 1890.[248] State immunity from federal law has been the subject of nearly continuous attacks from both sides.[249] State sovereignty advocates claim that interpretations of the *Ex parte Young* exception are overbroad.[250] Advocates for state accountability to federal law regularly assail state immunity root and branch.[251] Assertions that the governing rules are settled are risky at best.

By contrast, despite past inconsistencies,[252] the internal federal rule seems stable and is seldom questioned. The Administrative Procedure Act[253] expressly consents to suits for prospective relief within

242. Peabody Coal Co. v. Navajo Nation, 373 F.3d 945 (9th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005) (federal district court lacked subject matter jurisdiction to enforce arbitration award despite tribe's waiver of immunity); Jefferson State Bank v. White Mountain Apache Tribe, No. CV 11-8100-PCT-PGR, 2011 U.S. Dist. LEXIS 134499 (D. Ariz. Nov. 21, 2011) (no subject matter jurisdiction); Harris v. Sycuan Band of Diegueno Mission Indians, No. 08cv2111-WQH-AJB, 2009 U.S. Dist. LEXIS 119226 (S.D. Cal. Dec. 18, 2009) (same). *See* Michigan v. Sault Ste. Marie Tribe of Chippewa Indians, 737 F.3d 1075 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 1151 (2014) (case dismissed based on ripeness defense); Florida v. Seminole Tribe, 181 F.3d 1237, 1245-50 (11th Cir. 1999) (no federal cause of action).

243. Williams v. Lee, 358 U.S. 217 (1959).

244. Oklahoma v. Hobia, 775 F.3d 1204 (10th Cir. 2014), *cert. denied*, 136 S. Ct. 33 (2015).

245. 209 U.S. 123 (1908).

246. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2035 (2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

247. 134 U.S. 1 (1890).

248. *See supra* notes 92-106 and accompanying text.

249. *See supra* Section V.B-C.

250. *See, e.g.*, John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989 (2008). *Cf.* David L. Shapiro, *Ex Parte* Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011) (reviewing Harrison and discussing other scholars). Moreover, another modern sovereignty defense against federal authority to command states would bar use of the *Ex parte Young* to enforce the unconstitutional command. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). Tribes have no such immunity.

251. *See, e.g.*, *supra* note 109 and accompanying text.

252. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

253. 60 Stat. 237 (1946).

its scope; actions can name the United States as a party defendant.[254] One might object that suing tribes in state or federal court involves intergovernmental immunity, as did *Ex parte Young*, but this is misleading. According to the Court, tribal immunity is entirely a matter of federal law and of federal preemption of state law.[255] It is subject to alteration by Congress but not to the vicissitudes of judicial interpretations of the Eleventh Amendment. State sovereignty nips at its heels, but that is true for all aspects of tribal sovereignty.[256]

The unique aspect of tribal sovereign immunity is its applicability outside Indian country.[257] As the *Bay Mills*[258] dissent stressed, tribes and their members outside Indian country are subject to substantive state laws absent specific federal preemption.[259] In a leading case, a tribal ski resort was held subject to state tax.[260] Tribal immunity complicates states' efforts to enforce their laws directly against tribes, which barred Michigan's suit against the Bay Mills tribe.[261] But the *Bay Mills* Court stated that suits against tribal officials for prospective relief are a valid remedy. It cited *Santa Clara Pueblo*,[262] which upheld *Ex parte Young*-style prospective relief against a tribal officer.[263]

What if a state took other actions against tribal officers or members, such as arrest? The 1998 *Kiowa Tribe*[264] case involved a private debt in which jurisdiction over the tribe was the only possible form of enforcement other than a tribal forum.[265] But the 2014 *Bay Mills* case illustrates the broader problem. The Bay Mills tribe bought land and opened a casino over the state's opposition.[266] The state sued the tribe to enjoin the operation, and the courts dismissed based on immunity but said the state could reach the merits by suing a tribal officer, citing *Santa Clara*.[267] What if instead the state had arrested the tribal employees who operated the southern casino? The *Bay Mills* Court said it could do so "to the extent civil remedies proved inade-

254. Administrative Procedure Act § 10, 5 U.S.C. § 702.
255. *See Bay Mills*, 134 S. Ct. at 2030-31, 2037-39.
256. *See* Getches, *supra* note 14, at 320-21.
257. *See Bay Mills*, 134 S. Ct. at 2047-48 (Thomas, J., dissenting).
258. 134 S. Ct. 2024 (2014).
259. *Bay Mills*, 134 S. Ct. at 2047 (Thomas, J., dissenting).
260. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). The tribe had sued the State; thus, like any sovereign plaintiff, it consented to lose the case it filed.
261. *See Bay Mills*, 134 S. Ct. at 2034; *see also* Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe, 498 U.S. 505, 511-14 (1991).
262. 436 U.S. 49 (1978).
263. *See Bay Mills*, 134 S. Ct. at 2034-35.
264. 523 U.S. 751 (1998).
265. *See* Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998).
266. *See Bay Mills*, 134 S. Ct. at 2029.
267. *Id.* at 2035.

quate."[268] The fair implication is that the employees would be shielded from arrest by tribal immunity and the state's remedy limited to injunction so long as that remedy were adequate. In other words, tribal immunity in this circumstance shields tribal members acting for the tribe from state authority other than suit for injunction. However, based on the 1977 *Puyallup Tribe*[269] decision, the state could seek the injunction in its own courts as well as in federal court.[270]

D. Tribal Consent to Be Sued: Uses and Abuses of Tribal Immunity

Tribal governments face the same array of issues as their state and federal counterparts to establish policy for immunity. Calls for waivers are loudest over tort and consumer immunity, when aggrieved persons lack a realistic chance to decide on immunity risks in advance. Tribes are involved in today's commercial world, most dramatically in operating casinos.[271] For any retail activity, tort waivers are crucial for fairness and efficient business operations. Customers expect redress. Most tribes with commercial enterprises have acted accordingly and provide remedies.[272]

Tribes also have incentives not shared by state and federal government. When a tribe seeks to add to its land base by asking the Interior Department to take land into trust, opponents cite immunity as a reason to deny the request. More dramatically, the *Bay Mills*[273] Court threatened to overturn immunity judicially if tribes do not waive appropriately.[274] Tribes must also consider possible policy changes by the Trump Administration or Congress. When courts have been asked to imply federal override of tribal immunity, they have

268. *Id.*

269. 433 U.S. 165 (1977).

270. *See* Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165, 168 (1977); *see also* C & L Enters. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001) (suit in state court based on waiver).

271. *See* Nat'l Indian Gaming Comm'n, https://www.nigc.gov/ (last visited Jan. 27, 2018). On waivers in casino compacts, see *infra* note 289.

272. Newton et al., *supra* note 7, §§ 6.05, 12.05[2], 21.02[2]. Casino compacts include waivers for enforcement claims, most consent to tort claims, and some consent to adjudication of prize disputes. *See, e.g.*, state statutory compacts: Cal. Gov't Code § 12012.25 (West 2017); N.M. Stat. Ann. § 11-13-1 (West 2017); Okla. Stat. Ann. tit. 3A, § 281 (West 2017); Wash. Rev. Code Ann. § 9.46.360 (West 2017). Most of these compacts also waive immunity for claims that dispute gaming prizes.

273. 134 S. Ct. 2024 (2014).

274. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036-37 n.8 (2014). (The Court has never addressed whether immunity would apply "if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation conduct")

been remarkably resistant.[275] But an explicit override by Congress will be sustained.[276]

A few tribes have deployed their immunity in a unique way by renting it out to payday lenders.[277] Federal law allows these lenders to operate freely, but a number of states have restricted their practices to protect borrowers.[278] Tribal immunity has defeated attempts to sue lenders under such laws.[279] This in turn has led to criticism of this deployment of immunity.[280]

In formulating immunity policy, tribes need to consider the range of legislative choices involved. Immunity waivers by state and federal governments seldom consent to treat the government as the legal equivalent of a private defendant. For a major example, the Federal Tort Claims Act[281] consents to liability like that applicable to private

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275. *See, e.g.*, Meyers v. Oneida Tribe of Indians, 836 F.3d 818 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017) (no implied override per Fair & Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003)); Fla. Paraplegic Ass'n Inc. v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999) (no implied override per Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990)); Muller v. Morongo Casino, Resort, & Spa, No. EDCV 14-02308-VAP (KKx), 2015 U.S. Dist. LEXIS 79457 (C.D. Cal. June 17, 2015) (no implied override per Americans with Disabilities Act or Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993)); Williams v. Poarch Band of Creek Indians, No. 14-594-CG-M, 2015 U.S. Dist. LEXIS 88247 (S.D. Ala. June 10, 2015) (no implied override per Age Discrimination in Employment Act); *In re* Greektown Holdings LLC, 532 B.R. 680 (E.D. Mich. June 9, 2015) (no implied override per bankruptcy statute). Congress has at times expressly negated implied override. *See, e.g.*, 25 U.S.C. § 3746 (2012). Courts have also refused to imply waiver of immunity when a tribe sued in state court removes to federal court, contrary to the rule for states. *See, e.g.*, Contour Spa at the Hard Rock, Inc. v. Seminole Tribe, 692 F.3d 1200 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013).

276. Osage Tribal Council v. U.S. Dep't of Labor, 187 F.3d 1174 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000) (tribal immunity overridden by text and history of Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974)); Blue Leg v. U.S. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989) (same for Resource Conservation & Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976)).

277. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751 (2012).

278. Eighteen states forbid high-interest payday loans; thirty-one states allow them. *See Legal Status of Payday Loans by State*, PAYDAY LOAN CONSUMER INFO., www.paydayloaninfo.org/state-information (last visited Jan. 27, 2018). The FTC does police fraudulent practices in the industry. *See, e.g.*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/1123215-x120020/broadway-global-master-inc. (last visited Jan. 27, 2018)

279. *See, e.g.*, Bynon v. Mansfield, No. 15-00206, 2016 U.S. Dist. LEXIS 100754 (E.D. Pa. Aug. 1, 2016); Cash Advance & Preferred Cash Loans v. State *ex rel*. Suthers, 242 P.3d 1099 (Colo. 2010); Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 575-76 (Cal. Ct. App. 2008).

280. *See* Martin & Schwartz, *supra* note 277; Adam Mayle, Note, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053 (2012); Heather L. Petrovich, Comment, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326 (2012).

281. 60 Stat. 842 (1946).

defendants, but it denies trial by civil jury.[282] A tort jury can readily become an instrument of political protest—imagine a Tea Party jury in a suit against the federal government. Many state consents allow juries but impose damages caps for torts cases not applicable to private defendants.[283] A common form is to limit damages according to applicable insurance limits.[284] Licensing laws may require tribal enterprises to obtain insurance for motor vehicles and alcohol sales,[285] but coverage for all activities should be sought. Punitive damages are forbidden or available on restricted terms.[286] Shorter statutes of limitations, or special notice rules, sometimes apply.[287]

For tribes, a major question is choice of forum. Consent to suit in tribal courts is an obvious choice, and it can work for such matters as tort claims by casino customers.[288] But contracting parties may insist on an external forum. For many historical reasons, tribes are wary of state courts and juries.[289] One wonders whether a tribe can consent to suit in state court but not to civil juries, which state constitutions often guarantee.[290] The question is one of state law that could go ei-

282. 28 U.S.C. §§ 1346(b), 2402 (2012). The Seventh Amendment jury right does not apply to actions against the United States. Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981).

283. *See* 1 THOMSON/WEST, *supra* note 47, § 6.12.

284. *See id.*

285. For alcohol sales, tribes need a state license with whatever insurance coverage the state requires. Rice v. Rehner, 463 U.S. 713 (1983). For motor vehicles, tribes electing to obtain state registration, and tribal members choosing to obtain state driving licenses, must comply with state insurance requirements.

286. 1 THOMSON/WEST, *supra* note 47, § 6.10.

287. *See id.* at ch. 5.

288. Tribes must, of course, decide whether their courts should entertain suits against the tribe. *See* Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153 (1984).

289. This is evident in the protracted dispute contesting state court jurisdiction over tribal casino tort claims in New Mexico. The New Mexico Supreme Court held that legislative consent is required for casino compacts. State *ex rel*. Clark v. Johnson, 904 P.2d 11, 15 (N.M. 1995). The state legislature then modified and approved compacts that had been negotiated with six tribes, including a provision for tort claims that consented to state court jurisdiction "unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court," a proviso sought by the tribes. The legislature formalized state law in a 2001 statute that included the same provision. *See* Doe v. Santa Clara Pueblo, 154 P.3d 644 (N.M. 2007) (citing N.M. STAT. ANN. §§ 11-13A-1-5 (West 2017)). The state supreme court held that the federal statute did not preclude tribal consent to state court jurisdiction. *Santa Clara Pueblo*, 154 P.3d 644. But the tribes contested the issue in federal court and prevailed in Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254 (D.N.M. 2013). For a like contest in Oklahoma, see Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945 (W.D. Okla. Oct. 27, 2010 (waivers lawful, but Oklahoma compact statute did not consent to state court jurisdiction over casino tort claims).

290. *See* Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963) (most state constitutions guarantee jury trial in civil cases, although it is unclear if the guarantees apply to consented suits against governments).

ther way in a given state. Tribes' view of federal courts is usually more favorable, but one cannot create federal court jurisdiction by consent.[291] For these reasons, many tribes have chosen instead to agree to arbitration, which of course avoids the civil jury question.[292] On the other hand, tribes could consider matching at least some aspects of the immunity law of the states in which tribal territory is found, to reduce the confusion of differing rules.[293]

These considerations have been tested in practice by casino-owning tribes across the country. The Federal Indian Gaming Regulation Act[294] ("IGRA") governs casinos.[295] IGRA requires a negotiated compact between state and tribal governments, and lawful casinos must be tribally owned.[296] Thus, immunity issues are built into IGRA's structure. The statute explicitly authorizes federal court jurisdiction to enforce compact terms by injunction or declaratory judgment, but other issues are left to tribes' discretion or negotiated terms.[297] Tribal-state compacts now exist in twenty-six states.[298] In eighteen of them, published compact terms address enforcement of compact terms and tort remedies for patrons who claim injury.[299]

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291. Peabody Coal Co. v. Navajo Nation, 373 F.3d 945 (9th Cir. 2004) (although tribe consented to be sued in federal district court, the court lacked subject matter jurisdiction).

292. *See, e.g.*, C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001); Wisconsin v. Ho-Chunk Nation, 512 F.3d 921 (7th Cir. 2008), *cert. denied*, 554 U.S. 944 (2008); New York v. Oneida Indian Nation, 90 F.3d 58 (2d Cir. 1996); Feather Smoke Shops, LLC v. Okla. Tax Comm'n, 236 P.3d 54 (Okla. 2009).

293. Three casino tribes have done so to some extent. *See infra* note 298.

294. Pub. L. No. 100-497, 102 Stat. 2467 (1988).

295. 25 U.S.C. §§ 2701-2721 (2012); 18 U.S.C. § 1166-1168 (2012).

296. 25 U.S.C. § 2710(d). In other contexts, issues arise over immunity claimed by tribally-chartered corporations or other entities. *See, e.g.*, Alabama v. PCI Gaming Auth., 801 F.3d 1278 (11th Cir. 2015).

297. 25 U.S.C. § 2710(d)(7)(A)(2). This provision gives federal district courts jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." *Id.* The text does not literally override tribal immunity, and Congress has no power to override state immunity. Seminole Tribe v. Florida, 517 U.S. 44 (1996). However, the Court held that the provision waives tribal immunity. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2032 (2014). And with or without a specific waiver, enforcement by injunction is available against officers of either government. *See supra* notes 104-106 and accompanying text; Section V.B-C.

298. *See* BUREAU OF INDIAN AFFAIRS, http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm (last visited Feb. 4, 2017). The site includes links to all existing compacts.

299. *See id.* Some compact provisions waive immunity explicitly, others imply that tribal laws include waivers. Compact enforcement waivers are limited to injunctive relief and often specify arbitration as a method of enforcement. Some tort provisions have explicit caps on damages. In ten states, waivers extend to patrons' claims that they were unfairly denied prizes. In seven, explicit provisions protect casino employees.

VII. CONCLUSION

Tribal capacity to sue was once contested but no longer. Tribes have the inherent capacity of sovereign entities under federal law. For that status, a tribe must gain federal recognition, but the governing rules and procedures are by now well settled. And all states now respect governmental status of federally-recognized tribes.

Today's unsettled law and practice involve tribal sovereign immunity to suit. Based in federal law, it can be altered by Congress, but that does not appear to be a major concern. More threatening is the Court's *Bay Mills*[300] decision, raising the specter of judicial abolition. It provides a powerful incentive for tribes to adopt modern forms of consent to suit, taking into consideration limits in federal and state consents. Threats aside, so long as tribes have immunity, the remedy of prospective relief against tribal officers will be important. Courts will be asked to sort out the remedy's scope.

300. 134 S. Ct. 2024 (2014).