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TRIBAL SOVEREIGN IMMUNITY AND THE NEED FOR CONGRESSIONAL ACTION

Abstract: Native American Indian tribal sovereign immunity is a judicially created doctrine that provides immunity from suit for Indian tribes in the United States. Although judicially created, the United States' courts have repeatedly emphasized that only Congress has the power to limit Indian tribal immunity. As a result, tribal sovereign immunity has become a seemingly boundless means of avoiding lawsuits and liability. Moreover, tribal sovereign immunity has created a gap in the United States judicial system in which an individual may avoid certain lawsuits by entering into a favorable transaction with an Indian tribe. In these transactions, an individual may transfer property rights to an Indian tribe, thereby allowing the tribe to assert immunity in a suit concerning the property. Without congressional action, tribal sovereign immunity and the judicial loophole it creates will continue to be exploited.

INTRODUCTION

In September 2017, the pharmaceutical company Allergan made an unprecedented deal with a Native American Indian tribe.[1] Allergan negotiated to transfer ownership of its six patents for the dry-eye drug Restasis to the St. Regis Mohawk Tribe in upstate New York.[2] As part of the transaction, Allergan paid the St. Regis Mohawk Tribe a large sum of money, and in return, Allergan received an exclusive license to practice the patents.[3] When the logistics of this deal were explained in court, the United States District Court for the Eastern District of Texas stated that it believed Allergan only entered into the deal be-

[1] *See* Adam Davidson, *Patently Odd*, NEW YORKER, Nov. 20, 2017, at 36 (describing the deal made between Allergan and the St. Regis Mohawk tribe); Katie Thomas, *How to Protect a Drug Patent? Give It to a Native American Tribe*, N.Y. TIMES (Sept. 8, 2017), https://www.nytimes.com/2017/09/08/health/allergan-patent-tribe.html?_r=0 [http://perma.cc/3SV2-2F9X] (describing the Allergan deal as "surprising" and "unusual"). Allergan is a global pharmaceutical company that develops and manufactures pharmaceuticals, medical devices, and biologic devices. *Company Profile*, ALLERGAN, https://www.allergan.com/about/company-profile.aspx [http://perma.cc/7JP8-Z4BP]. The St. Regis Mohawk Tribe is a federally-recognized Native American Indian tribe located in New York. *About the Tribe*, SAINT REGIS MOHAWK TRIBE, https://www.srmt-nsn.gov/about-the-tribe [http://perma.cc/X3UA-BZ7U].

[2] *See* Davidson, *supra* note 1, at 36 (stating that the St. Regis Mohawk tribe agreed to let Allergan practice the patents exclusively); Thomas, *supra* note 1 (describing how Allergan sold six patents to the St. Regis Mohawk Tribe). Restasis is a pharmaceutical eye drop that helps the eye produce tears in order to prevent dry eye. RESTASIS, https://www.restasis.com/ [http://perma.cc/Y6JW-X7LB].

[3] Allergan, Inc. v. Teva Pharm. USA, Inc., No. 2:15-cv-1455-WCB, 2017 WL 4619790, at *1 (E.D. Tex. Oct. 16, 2017) (providing background on Allergan's deal to sell the Restasis patents to the St. Regis Mohawk Tribe with an exclusive license back to Allergan); *see also* Thomas, *supra* note 1 (providing details of the transaction between Allergan and the St. Regis Mohawk Tribe of New York).

cause Allergan believed the St. Regis Mohawk Tribe could assert tribal sovereign immunity and avoid an *inter partes review* (IPR) at the Patent Trial and Appeal Board.[4] Although this specific transaction focuses on the transfer of intellectual property and an administrative proceeding, it highlights a more extensive problem.[5] Tribal sovereign immunity can provide an effective means by which both Native Indian tribes and non-tribe members can avoid a lawsuit and escape liability, even when there is clear evidence of culpability or wrongdoing.[6]

The judicially created doctrine of Indian sovereign immunity dates back to the late 1700s as the United States government entered into treaties with the Indian tribes, implicitly recognizing the tribes as sovereign entities.[7] With few limits placed on Indian sovereign immunity since its creation, there seem to be

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[4] *Allergan*, 2017 WL 4619790, at *2 (stating that Allergan transferred the patents seemingly to exploit the tribe's sovereign immunity in order to avoid an *inter partes review*); *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (stating that Indian tribes are sovereign entities, granting them sovereign immunity from suit); Thomas, *supra* note 1 (describing the Allergan deal as "perhaps the most novel attempt to avoid a patent-review process" at the Patent Trial and Appeal Board). The *Allergan* case only concerned whether the St. Regis Mohawk Tribe should be joined as a party to a separate civil suit and therefore did not address the exploitation of the tribe's sovereign immunity issue. *Allergan*, 2017 WL 4619790, at *4. *Inter partes review* (IPR) is a proceeding that occurs in front of the Patent Trial and Appeal Board that allows an individual to challenge the validity of a patent. *See* Gene Quinn, *Inter Partes Review: Overview and Statistics*, IPWATCHDOG (Feb 9, 2014), http://www.ipwatchdog.com/2014/02/09/inter-partes-review-overview-and-statistics/id=47894/ [http://perma.cc/FH5W-2N6V] (providing a brief overview of IPR and the process for invalidating a patent through IPR). The Patent Trial and Appeal Board is a board created by statute that includes Administrative Patent Judges, who may hear and render decisions concerning patent appeals and challenges to patent validity. *See* 35 U.S.C. § 6(a) (2012) (establishing the Patent Trial and Appeal Board); *About PTAB*, UNITED STATES PATENT AND TRADEMARK OFFICE (Mar. 18, 2018), https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/resources/about-ptab [http://perma.cc/4942-M32Y] (giving an overview of the Patent Trial and Appeal Board).

[5] *See* Gabriel S. Galanda, *Getting Commercial in Indian Country*, BUS. L. TODAY, July–Aug. 2003, at 49–50, 52, http://apps.americanbar.org/buslaw/blt/2003-07-08/galanda.html [http://perma.cc/KT3B-899G] (highlighting the extensive nature of tribal sovereign immunity, stating that Indian tribes are generally found immune from suit because of tribal sovereign immunity, and advising lawyers to understand such implications prior to doing business with an Indian tribe); Thomas, *supra* note 1 (describing the sale of six patents from Allergan to the St. Regis Mohawk Tribe).

[6] *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2037 (2014) (finding that the Bay Mills Indian Community could not be sued because of tribal immunity); *Santa Clara Pueblo*, 436 U.S. at 58 (finding that a tribe is exempt from suit because of tribal sovereign immunity); Seneca Tel. Co. v. Miami Tribe, 253 P.3d 53, 55–57 (Okla. 2011) (dismissing a lawsuit against the Miami Tribe on grounds of tribal immunity despite clear evidence that the tribe was negligent in causing damage).

[7] *See* RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS (AM. LAW INST., Tentative Draft No. 1, 2015) (describing American Indian tribes as sovereign entities with federally recognized sovereign immunity); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 619–22 (2010) (explaining the origins of tribal sovereign immunity as a judicially created doctrine that has been limited over the years yet still remains largely unchanged); William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1624 (2013) (describing that the United States recognized tribal sovereignty by enacting treaties with the tribes).

numerous ways in which one can abuse tribal immunity, including entering into a transaction similar to that in the *Allergan* case.[8] By entering into such a transaction in which property is transferred to an Indian tribe, the individual may avoid lawsuits concerning the property by allowing the Indian tribe to assert immunity.[9] With the courts reserving all power to abrogate Indian sovereign immunity to Congress, Congress must act to limit the scope of tribal immunity and close the loophole that allows individuals to exploit Native American Indian tribal immunity.[10]

Part I of this Note provides a brief history of tribal sovereign immunity, the types of immunity that are generally recognized by United States courts, and discusses modern cases testing the limits of tribal sovereign immunity.[11] Part II provides an analysis of the scope of tribal sovereign immunity and how tribal sovereign immunity can be abused by non-tribe members to escape lawsuits.[12] Part III argues that Congress needs to enact new legislation limiting the permissible uses of tribal sovereign immunity and discusses other theories that can help narrow the scope of tribal immunity.[13]

I. An Overview of American Indian Tribal Sovereign Immunity

The history and development of Native American Indian law in the United States is distinct from other types of American law, resulting in a unique

[8] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2037 (dismissing a case concerning a tribe because the tribe had sovereign immunity); Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998) (finding that tribal sovereign immunity necessitated dismissal of the case); Three Affiliated Tribes of the Fort Berthold Reservation v. World Eng'g, 476 U.S. 877, 890–91 (1986) (stating that without congressional limitation of tribal sovereign immunity, the tribe could not be sued); *Santa Clara Pueblo*, 436 U.S. at 58 (finding that Native American tribes have long enjoyed tribal sovereign immunity, which protects a tribe from being sued); Foxworthy v. Puyallup Tribe of Indians Ass'n, 169 P.3d 53, 55 (Wash. Ct. App. 2007) (describing tribal sovereign immunity as a broad protection conferring immunity from suit that extends to activities both on and off tribal lands); Wood, *supra* note 7, at 1663 (stating that the Supreme Court continues to uphold tribal immunity); Galanda, *supra* note 5, at 50 (describing that tribal immunity can protect tribes in business enterprises both on and off tribal land, and with respect to contracts, a tribe usually can only be sued if there is a waiver of the tribe's immunity or explicit authorization from Congress).

[9] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2037 (dismissing a case concerning a transaction with a tribe because the tribe properly asserted immunity); *Kiowa*, 523 U.S. at 75 (finding that despite the tribe breaching a contract, the tribe could not be sued because of tribal immunity); Galanda, *supra* note 5, at 50 (stating that tribal immunity often extends to business transactions of a tribe).

[10] *See World Eng'g*, 476 U.S. at 890–91 (stating that without congressional limitation of tribal sovereign immunity, the tribe could not be sued); Wood, *supra* note 7, at 1662 (describing that most court cases involving tribal immunity recognize Congress's power to limit it); Davidson, *supra* note 1, at 36 (alluding to the idea that one can "gam[e] the system" of sovereign immunity).

[11] *See infra* notes 14–123 and accompanying text.

[12] *See infra* notes 124–178 and accompanying text.

[13] *See infra* notes 179–215 and accompanying text.

semi-sovereign system of government.[14] The recognition of tribal sovereignty resulted in the creation of Native American Indian sovereign immunity by the United States Supreme Court, granting immunity from suit to Indian tribes with very few limitations.[15] Though some limitations have been imposed through statute over the years, the doctrine of tribal sovereign immunity continues to protect Indian tribes even when the tribe is clearly culpable.[16] Despite the frequent injustices caused by Indian sovereign immunity, United States courts have repeatedly emphasized that only Congress has the ability to limit the scope of the immunity, leaving the judicial system powerless to protect injured parties.[17] Section A discusses the origins and creation of American Indian Law in the United States.[18] Section B provides background information on immunity and the types of immunity commonly recognized in the United States legal system.[19] Section C then discusses tribal sovereign immunity, how it is commonly used in a lawsuit and examines the scope of tribal immunity.[20]

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[14] *See* RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS (AM. LAW INST., Tentative Draft No. 1, 2015) (describing that the Constitution ascribes specific duties in relation to the United States and state governments but treats Indian tribes separately). *See generally* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 19–21 (2004) (describing the United States' westward expansion in the early 1800s, particularly with the respect to the Louisiana Purchase in 1803, necessitating the unique formation of Indian law).

[15] *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940) (*Fidelity*) (recognizing that the sovereignty of Indian tribes confers an immunity from suit without authorization from Congress); Worcester v. Georgia, 31 U.S. (6. Pet.) 515, 559 (1832) (recognizing American Indian tribes as sovereign independent communities); CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 482–83 (7th ed. 2015) (describing that tribal immunity may only be waived by the tribes themselves or with express authorization from Congress, presenting the few limitations on the exercise of tribal immunity).

[16] *See* 25 U.S.C. § 2710(d)(7)(A)(ii) (2012) (illustrating a limitation on tribal sovereign immunity by allowing a state to sue a tribe that violates a tribal-state compact regarding certain gaming activities); *Seneca*, 253 P.3d 53, 55–57 (finding that the Seneca Indian tribe could not be sued because of sovereign immunity despite clear evidence that the tribe was negligent).

[17] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2037 (stating that the Indian tribe cannot be sued unless Congress expressly limits the scope of tribal immunity); *Kiowa*, 523 U.S. at 760 (finding that because no statute limited tribal immunity, the Kiowa Tribe properly asserted immunity from suit); *World Eng'g*, 476 U.S. at 892 (stating that the Indian tribes could not be sued because of tribal sovereign immunity); *Santa Clara Pueblo*, 436 U.S. at 72 (finding that the Santa Clara Pueblo tribe could not be sued); *Seneca,* 253 P.3d at 55–57 (concluding that in spite of the negligence of the tribe, the case must be dismissed, leaving the plaintiff without a legal remedy); Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1245 (11th Cir. 1999) (finding that the Seminole Tribe of Florida properly asserted tribal sovereign immunity and thus could not be sued). Congress's ability to regulate Indian affairs stems from the plenary power of Congress, which effectively grants Congress broad power to legislate Indian affairs so long as the Constitution is not violated. *See* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 680–82 (2016) (explaining the plenary power of Congress as it relates to the Indian tribes, which grants Congress the ability to regulate Indian affairs).

[18] *See infra* notes 23–36 and accompanying text.

[19] *See infra* notes 37–47 and accompanying text.

[20] *See infra* notes 48–84 and accompanying text.

Section D explores how tribal sovereign immunity can be limited in light of the precedent set by the court system.[21] Finally, Section E provides a discussion of a court's jurisdiction to hear cases involving Native American tribes.[22]

A. The Origins of American Indian Law

As the United States continued to expand West in the 1800s, the United States government had to create and understand law concerning the American Indians.[23] One major concern facing the federal government was whether the Native Indian tribes were sovereign at all, or merely ad hoc members of the United States.[24] In *Cherokee Nation v. Georgia*, the Supreme Court reasoned that the Indian tribes could not file suit in federal court because federal courts lacked original jurisdiction over cases involving tribes.[25] The Court recognized

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[21] *See infra* notes 85–112 and accompanying text.

[22] *See infra* notes 113–123 and accompanying text.

[23] *See* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 50–52 (2008) (explaining that the expansion of the United States caused the government to pass several new treaties concerning the Indian tribes, predominantly to force the tribes off of their native lands); LAWSON & SEIDMAN, *supra* note 14 (describing the United States' westward expansion). Three cases decided by the United States Supreme Court under Chief Justice John Marshall in the 1800s concerning American Indian law, often referred to as the "Marshall Trilogy," largely laid the foundation for Indian law in America. *See Worcester*, 31 U.S. (6 Pet.) at 559 (stating that American Indians are recognized to be sovereign independent communities); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) (resolving the question of whether the Indian tribes are considered "foreign nations" as used in the Constitution, or something different altogether); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 604 (1823) (reasoning that private citizens may not purchase land from Native Americans; only the Federal Government may acquire such lands through treaties); CONFERENCE OF WESTERN ATT'YS GEN., AM. INDIAN L. DESKBOOK § 1.1 (2017) (referring to the three aforementioned cases as the "Marshall Trilogy"). The question whether the Indian tribes were foreign nations, for example like France or Germany, was important as it would define what rights the tribes would have as sovereigns, independent of the United States. *See* CONFERENCE OF WESTERN ATT'YS GEN., *supra* (explaining that the nature of the relationship between the United States and the Indian tribes would depend upon whether the Indian tribes were foreign nations or something different).

[24] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 20 (concluding that the Indian tribes are not "foreign nations," but something different). When the United States government was established, it was not clear whether the Indian tribes should be considered foreign nations, part of the United States by virtue of their land being within the boundary of the United States, or something different. *See id.* at 18–20 (describing the Native American Indian tribes as "domestic dependent nations," that are not members of the United States as are the states, nor are they foreign nations).

[25] *See id.* at 20 (finding that the Supreme Court does not have jurisdiction over the lawsuit). In the case, the Court reasoned that federal jurisdiction stems from article III, § 2 of the United States Constitution. *See* U.S. CONST. art. III, § 2, cl. 1; *Cherokee Nation,* 30 U.S. (5 Pet.) at 18–19. The question addressed by the Court was thus whether an Indian tribe can properly be considered a "foreign state" as used in Article III, Section 2 thereby granting the court jurisdiction to hear the case. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 19–20 (reasoning that "foreign state" was akin to "foreign nation," and as such does not include Indian tribes in its definition). The Court concluded that Indian tribes are not "foreign states," but instead they are separate dependent entities of the United States, and therefore federal jurisdiction may not be exercised over the tribes in accordance with Article III, Section 2. *See* U.S. CONST. art. III, § 2, cl. 1 (allowing judicial power over "foreign states"); *see Cherokee Nation*, 30 U.S. (5 Pet.) at 19–20 (finding that Indian tribes were not included in the contemplated meaning of

that the tribes are not equivalent to the states of the United States, instead the tribes have a unique relationship with the United States that the court described as a "ward to his guardian."[26] In concluding this, the Court considered whether the tribes could properly be classified as foreign nations subject to the jurisdiction of federal courts.[27]

The Court drew its conclusion by turning to Article I, Section Eight of the United States Constitution.[28] The Court reasoned that because the United States Constitution expressly delineated foreign nations and Indian tribes, the two must be distinct.[29] Ultimately, the Court declined to assert its jurisdiction over the case, stating that federal court was not the proper forum to decide the rights of the Cherokee Nation tribe.[30]

In 1832, the Supreme Court heard *Worcester v. Georgia*, which laid the foundation for much of modern American Indian law.[31] The Court ruled that Indian tribes are separate sovereign entities, yet still subject to federal law.[32] As a result, no state-made law can be enforced against an Indian tribe.[33] The

"foreign states"). Note that more recent statutes enacted by Congress have granted courts jurisdiction to hear certain cases involving Native American Indians and tribes. *See infra* notes 85–112 and accompanying text.

[26] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 16–17 (describing the unique relationship that exists between the Native Indian tribes and the United States).

[27] *See id.* at 20 (stating that the question before the Court was whether the Native tribes can properly be considered foreign nations).

[28] *See* U.S. CONST. art. I, § 8, cl. 3 (stating that Congress has the power to regulate commerce with foreign nations and Indian tribes, implying that the two entities should be treated separately); *Cherokee Nation*, 30 U.S. (5 Pet.) at 19–20 (questioning whether Indian tribes are considered foreign nations for purposes of finding jurisdiction over the case).

[29] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 19–20 (reasoning that the distinction made between foreign nations and Indian tribes in the Constitution must mean that Indian tribes are not foreign nations).

[30] *See id.* at 20 (concluding that although the Cherokee Nation has rights, United States federal court is not a forum that can judicial rulings on those rights).

[31] *See generally Worcester*, 31 U.S. (6 Pet.) at 561 (declaring that matters relating to the relationship between Native American Indian tribes and the United States belongs solely to the United States government); CONFERENCE OF WESTERN ATT'YS GEN., *supra* note 23, § 1.1 (highlighting the principles of tribal sovereign immunity and emphasizing how *Worcester* implements these principles).

[32] *See Worcester*, 31 U.S. (6 Pet.) at 561 (stating that Indian tribes are recognized as independent political communities, yet treaties and acts of Congress still have full effect over the tribes).

[33] *See id.* (concluding that state-law has no force over Indian tribes except when the tribes assent to the laws or the laws comport with federal treaties or acts). In *Worcester*, the Court made clear that the United States federal government retains the exclusive power to regulate affairs with the Indian tribes. *See id.* (noting that the relationship with the Cherokee Nation was "vested in the government of the United States"). This power comes from the United States Constitution, which provides that Congress has the authority to regulate commerce with Indian tribes. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with Indian tribes); *Worcester,* 31 U.S. (6 Pet.) at 559 (stating that the Constitution grants Congress the power to regulate affairs with the Indian tribes). The decision in *Worcester* was partially abrogated in the late 1800s, allowing state criminal laws to apply to non-Indians on Indian lands. *See* United States v. McBratney, 104 U.S. 621, 624 (1881)

Court further reasoned that the United States Congress has the sole power to manage affairs with the Indian tribes.[34] By establishing that the Indian tribes are sovereign entities, and that only Congress may enter into treaties with the Indians, the Court first hinted at the idea of tribal sovereign immunity and how such immunity could be abrogated.[35] This broad decision by the Supreme Court thus set the boundaries of tribal sovereign immunity, providing a powerful means to escape lawsuits.[36]

B. A Brief Introduction to Immunity

Immunity refers to the concept of being judgment proof either through immunity from suit or immunity from liability.[37] Although both immunity from suit and immunity from liability will exempt a party from liability, immunity from suit provides a stronger protection because it completely prevents a party from being sued.[38] In contrast, immunity from liability serves as a defense in a

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(concluding that although the federal government did not have jurisdiction over the murder of a non-Indian by a non-Indian on an Indian reservation, the state court did have jurisdiction).

[34] *See Worcester*, 31 U.S. (6 Pet.) at 558–59 (stating that the United States Congress maintains exclusive rights to manage Indian affairs). The Court's reasoning stems from the historical background that only the British Crown initially had the power to create agreements with the Indians as the new colonies were being formed. *See id.* at 558 (describing how the power to make treaties initially "reside[d] in the crown"). Once the United States government was setup, this power passed from the Crown to Congress. *See id.* (noting how Congress assumed those powers).

[35] *See id.* at 558–59, 561 (holding that Indian tribes were their own "nation," and that only the United States federal government could interact with the Indian tribes). The *Worcester* decision itself did not recognize tribal immunity, but the decision is largely regarded as the case that led to the doctrine. *See Santa Clara Pueblo*, 436 U.S. at 55 (quoting *Worcester* as the basis for tribal sovereignty); *Worcester*, 31 U.S. (6 Pet.) at 558–59 (recognizing treaties as the primary method of regulating affairs with the tribes); *Foxworthy*, 169 P.3d at 226 (citing *Worcester* as the first Supreme Court decision officially recognizing tribal sovereignty); WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 36.7 (3d ed. 2011) (citing *Worcester* as first recognizing tribal sovereignty and the relationship between state law and federal law with respect to Indian tribes). Notably in 1871, Congress passed the Indian Appropriations Act stating that the United States will no longer enter into treaties with the Indian tribes and instead, Congress will pass statutes. *See* 25 U.S.C. § 71 (2012) (stating that no new treaties will be entered into with the Indian tribes); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 115 (6th ed. 2015) (stating that prior to the passage of the Indian Appropriations Act, the federal government largely regulated Indian affairs through treaty, though statutes were also used).

[36] *See Worcester*, 31 U.S. (6 Pet.) at 559–61 (stating that Indian tribes are sovereign independent communities, yet Congress has authority to regulate affairs with the tribes); CANBY, *supra* note 35, at 75–76 (explaining that in the wake of the *Worcester* decision, the Indian tribes enjoy sovereignty free from state abrogation and few limitations from Congress); *see also* Davidson, *supra* note 1, at 36 (highlighting the potential power of tribal sovereign immunity to avoid lawsuits not only by American Indians but also those who enter into contracts with the Indian tribes).

[37] *Immunity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining immunity as an exemption from liability or even a lawsuit altogether).

[38] *See* David K. Jaffe, *Distinctions Between Sovereign Immunity & Governmental Immunity*, BPSLAWYERS (Aug. 13, 2009), https://www.bpslawyers.com/Articles/Distinction-between-Sovereign-Immunity-Governmental-Immunity.shtml [http://perma.cc/99KN-ZGGD] (recognizing immunity from suit as a right not to be tried whereas immunity from liability solely protects a party from poten-

lawsuit where a party must argue a case on the merits, yet the party may ultimately be exempt from liability.[39] The distinction between immunity from suit and immunity from liability is thus important with respect to understanding Indian sovereign immunity because the type of immunity conferred determines whether the party may be sued at all.[40] If tribal immunity confers an immunity from suit, then the Indian tribes will not have to argue the case on the merits and may seek to immediately dismiss the lawsuit.[41] If, however, tribal immunity confers an immunity from liability, the tribe would only be able to assert immunity as an affirmative defense to any potential liability and damages.[42] This distinction is particularly relevant depending on the type of relief sought in a lawsuit because although both types of immunity can prevent the payment of money damages, immunity from suit will always protect against declarations, injunctions, and other equitable relief, but immunity from liability may not.[43]

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tial liability); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (finding that immunity from suit protects a party from the burdens of trial because the lawsuit may be immediately dismissed when immunity from suit applies); Huron Valley Hosp., Inc., v. City of Pontiac, 792 F.3d 563, 566 (6th Cir. 1986) (stating that immunity from suit provides complete protection from a lawsuit, not merely immunity from liability).

[39] *See* Jeffery S. Boyd, *Where Sovereign Immunity and Water Development Issues Collide*, 39 TEX. ENVTL. L. J. 95, 98 (2009) (reasoning that where immunity from suit completely bars a lawsuit, immunity from liability does not prevent a court from hearing the case); *see also* Nunag-Tanedo v. E. Baton Rouge Parish Sch., 711 F.3d 1136, 1140 (9th Cir. 2013) (finding that immunity from liability only acts as an affirmative defense in a lawsuit, not as a means of avoiding a lawsuit altogether). The Federal Rules of Civil Procedure provide that an affirmative defense, such as immunity from liability, may be asserted in a responsive pleading to a lawsuit. *See* FED. R. CIV. P. 8(c) (enumerating a list of affirmative defenses). The Federal Rules of Civil Procedure also provide that certain defenses may be asserted prior to a responsive pleading, such as Rule 12(b)(6) failure to state a claim upon which relief can be granted, which may reasonably include an assertion of immunity from suit. FED. R. CIV. P. 12(b)(6). Consequently, an assertion of immunity from suit may cause a case to be dismissed prior to any argument on the merits where as a claim of immunity from liability may only provide an exemption from liability at the conclusion of trial. *See* FED. R. CIV. P. 8(c) (providing a list of affirmative defenses); FED. R. CIV. P. 12(b)(6) (providing that cases may be dismissed for "failure to state a claim").

[40] *See* Boyd, *supra* note 39, at 98 (stating that although immunity from suit deprives a court jurisdiction to hear a claim, immunity from liability does not).

[41] *See Mitchell*, 472 U.S. at 526 (stating that a lawsuit may be immediately dismissed if immunity from suit is properly asserted).

[42] *See* Boyd*, supra* note 39, at 98 (explaining that immunity from liability does not bar a court from hearing a case); *Nunag-Tanedo*, 711 F.3d at 1140 (stating that immunity from liability only provides a defense, and therefore it is not a right to not stand trial).

[43] *Compare* Hamaatsa v. Pueblo of San Felipe, 388 P.3d 977, 988 (2016) (holding that the Pueblo tribe properly asserted tribal immunity from suit in a lawsuit seeking a declaration as to the owner of a road, resulting in dismissal of the lawsuit), *with* Young v. Lynch, 846 F.2d 960, 962 (4th Cir. 1988) (finding that a government official with immunity from liability may still be subject to equitable remedies). A declaration, also called a declaratory judgment, is an adjudication by a court that determines the rights and responsibilities of the parties to a lawsuit. *Declaratory Judgment*, BLACK'S LAW DICTIONARY (10th ed. 2014). An injunction is a binding court order to perform an action or stop an action. *Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014). Equitable relief or equitable remedy is a

Generally, the type of immunity asserted determines the specific type of immunity conferred.[44] Frequently cited types of immunity such as absolute immunity, qualified immunity, and sovereign immunity traditionally confer immunity from suit.[45] Comparatively, immunity from liability can be created by statute, expressly relieving a party from liability under certain circumstances.[46] Despite the general scheme of immunities presented, Indian tribal sovereign immunity largely originates outside of these standard types of immunity, instead coming from the judicial recognition of inherent tribal sovereignty.[47]

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remedy sought under the law of equity, i.e. nonmonetary, and often takes the form of an injunction or specific performance. *Equitable Remedy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[44] *Mitchell*, 472 U.S. at 526 (finding that qualified immunity grants the same immunity as absolute immunity, that is, immunity from suit). Sovereign immunity originates from the Eleventh Amendment to the United States Constitution, which does not allow a citizen of one state to sue another State, thereby granting each State immunity from suit. U.S. CONST. amend. XI; *see also* Hans v. Louisiana, 134 U.S. 1, 20 (1890) (expanding state sovereign immunity by finding that a state cannot be sued by citizens of that state unless the state consents to suit). Sovereign immunity as an important doctrine in the history of the United States government is also considered in the Federalist Papers, in which Hamilton stated that sovereigns cannot be sued without consent. *See* THE FEDERALIST No. 81 (Alexander Hamilton) (stating that an inherent characteristic of a sovereign is the right not to be sued without consent). Note also that although immunity from suit most often takes the form of absolute immunity, qualified immunity, or sovereign immunity, this is not an exhaustive list of the types of immunity from suit. *See* Abney v. U.S., 431 U.S. 651, 660–61 (1977) (finding that the 5th Amendment Double Jeopardy Clause guarantees that an individual will not be tried twice for the same crime, effectively granting a type of immunity from suit).

[45] *See supra* note 44 (providing examples of frequently cited types of immunity). Absolute immunity is based upon public policy and is most often invoked by executive federal officials such as the President of the United States. *See* Nixon v. Fitzgerald, 457 U.S. 731, 744–45 (1982) (stating that the President is afforded absolute immunity conferring immunity from suit in order to ease the pressures of the high office and encourage decision making). Similarly, qualified immunity is typically afforded to lower-level government officials such as governors, but it requires certain conditions to be met. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (finding that qualified immunity rather than absolute immunity is granted to executive officials such as governors). The Eleventh Amendment grants states sovereign immunity, affording states immunity from suit. *See* U.S. CONST. Amend. XI (stating that lawsuits by a citizen of one state against another state are prohibited); *Hans*, 134 U.S. at 20 (expanding the understanding of the Eleventh Amendment to prohibit a citizen of a state to sue that state).

[46] *See* HAW. REV. STAT. § 663-1.5 (2018) (granting immunity from liability when an individual provides medical assistance to a person in need but fails in rendering aid, causing injury). As an illustration of immunity from liability, Hawaii's Good Samaritan statute provides protection from civil damages to individuals who provide emergency care in good faith to a person in need of such aid. *Id.* Although the individual rendering aid will have to stand trial if he or she causes injury, the statute provides immunity from liability, allowing the defendant to assert immunity as an affirmative defense and consequently be immune from civil damages. *See id.*

[47] *See Santa Clara Pueblo*, 436 U.S. at 58 (stating that tribal immunity confers immunity from suit); Turner v. United States, 248 U.S. 354, 358 (1919) (recognizing the existence of tribal sovereign immunity as an inherent characteristic of a tribe's sovereignty); GOLDBERG ET AL., *supra* note 15, at 471 (stating that tribal immunity comes from the sovereign nature of the tribes).

C. Indian Tribal Sovereign Immunity

1. The Creation of Tribal Immunity

Although the decision in *Worcester v. Georgia* clarified that the Indian tribes are independent political communities, it was not made immediately clear what rights the tribes enjoy as an independent community.[48] In 1895, the Eighth Circuit Court of Appeals in *Thebo v. Choctaw Tribe of Indians* further elucidated the rights of Indian tribes as political sovereigns.[49] The court stated that although the Indian tribes are separate independent communities with their own laws, the tribes are "domestic and dependent" and thus subject to the jurisdiction of the United States.[50] The tribes are therefore treated similarly to the states, with the court ruling that a tribe cannot be sued without the tribe's consent or without the consent of Congress.[51] The court further noted that Congress has never consented to tribes being sued generally by private parties.[52] *Thebo* thus presented an early framework for tribal sovereignty.[53] The Supreme Court adopted and reiterated this decision in *Turner v. United States*, stating that without authorization from Congress, a tribe could not be sued.[54]

Having established that a sovereign immunity right exists for Indian tribes, courts had yet to identify the limitations of that right and how a tribe may exercise it.[55] In *United States v. United States Fidelity Guaranty Co.*, the

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[48] *See Worcester*, 31 U.S. (6 Pet.) at 559 (stating that the Indian tribes are politically independent yet subject to treaties entered into by the United States, but not explicitly clarifying what rights the tribes have as independent communities).

[49] *See* Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375 (8th Cir. 1895) (holding that Indian tribes enjoy a right not to be sued without consent as do the sovereign states of the United States).

[50] *See id.* (stating that although the Indian tribes enjoy some rights as sovereigns, they are still subject to the jurisdiction of the United States federal government).

[51] *See id.* (reasoning that the sovereignty of the tribes is similar to that of that states, and therefore the tribes cannot be sued without consent).

[52] *See id.* (finding that tribes may not be sued by private parties without consent just as a State may not be sued without consent).

[53] *See id.* (concluding that tribal immunity confers a right not to be sued without consent of the tribe or consent from Congress); Wood, *supra* note 7, at 1645–46 (stating that *Thebo* was the first federal court case to expressly use the doctrine of tribal sovereign immunity).

[54] *See Turner*, 248 U.S. at 358 (finding that the Creek Nation Tribe could not be sued without authorization from Congress). In *Turner*, the Creek Nation Tribe was sued by a private individual seeking damages for destruction of property. *Id.* at 357. Although the court stated that *Turner* was not a case about tribal sovereign immunity, the court did re-affirm the principle that a tribe cannot be sued without consent from Congress. *Id.* at 358

[55] *See id.* at 358 (implicitly recognizing sovereign immunity of a tribe but failing to define its contours). In a much later Supreme Court case, the Court admits that the decision in *Turner* created sovereign immunity "almost by accident," and consequently the case did not clearly define the right conferred by tribal immunity. *See Kiowa*, 523 U.S. at 756–57 (explaining that although *Turner* recognized the doctrine of sovereign immunity, the decision did not expand upon the meaning of the doctrine). *But see* Wood, *supra* note 7, at 1590 (arguing that the doctrine of tribal immunity was not created by accident). Later Supreme Court cases would thus determine the scope and meaning of tribal sovereign immunity. *See* Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 172 (1977)

Supreme Court specifically held that Indian tribes enjoy sovereign immunity as an immunity from suit.[56] The Court reasoned that as sovereigns, the Indian tribes enjoy a right not to be sued just as the United States enjoys a right not to be sued.[57] Although the Court concluded that the tribes have a right to assert sovereign immunity from suit, that right is subject to certain limitations.[58] As with other claims of immunity from suit, tribal immunity may be waived by the party being sued, creating one limitation.[59] Dissimilar from other types of immunity from suit, however, Congress may also authorize a suit against an Indian tribe by specifically allowing the suit, providing another significant limitation to tribal immunity.[60]

(stating that Indian tribes enjoy immunity from suit, but individual members of the tribe do not); *Fidelity*, 309 U.S. at 512 (finding that the Indian tribes possess sovereign immunity as an immunity from suit without authorization from Congress); Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 94 (8th Cir. 1956) (finding that Indian tribes enjoy immunity from suit unless Congress authorizes the suit or the tribe waives its immunity).

[56] *See Fidelity*, 309 U.S. at 512–13 (finding that Indian tribes have immunity from direct suits as well as cross-suits). *Fidelity* was the first Supreme Court case to expressly recognize the doctrine of tribal sovereign immunity. *See* Wood, *supra* note 7, at 1594 (stating that the Supreme Court first explicitly recognized tribal immunity in *Fidelity*).

[57] *See Fidelity*, 309 U.S. at 512–13 (explaining that sovereigns enjoy a right not to be sued without consent, and Indian nations enjoy this right). The Court notes, however, that Congress can authorize a suit against an Indian tribe. *Id.* at 512 (stating that Congress may authorize a lawsuit against a tribe despite the tribe's immunity).

[58] *See Fidelity*, 309 U.S. at 512–13 (stating that a tribe may be sued despite immunity if the lawsuit is consented to by the tribe or authorized by Congress).

[59] *See id.* (finding that an Indian tribe may waive its immunity from suit by consenting to the suit). Other types of immunity from suit, such as absolute immunity and Eleventh Amendment immunity, may be waived by consenting to the suit. *See* 28 U.S.C. § 2680 (2012) (illustrating Congress waiving its immunity from suit in certain damages claims); *Hans*, 134 U.S. at 17 (stating that a state may be sued if it consents, despite a state's Eleventh Amendment sovereign immunity). A waiver of immunity may occur in a contract, in which a party agrees to waive their immunity in exchange for other favorable provisions. *See* Pettigrew v. Dep't. of Pub. Safety, 722 F.3d 1209, 1213 (10th Cir. 2013) (finding that a State may consent to suit through contract, waiving its Eleventh Amendment immunity); Blair v. Anderson, 325 A.2d 94, 96 (Del. 1974) (stating that the State implicitly waives its immunity to suit for breach of contract when the State enters into a contract).

[60] *See Fidelity*, 309 U.S. at 512 (stating that an Indian tribe may be sued with congressional authorization); *Thebo*, 66 F. at 375 (finding that Congress may authorize suits against Indian tribes because the tribes are subject to the authority and jurisdiction of the U.S.). Because Indian tribes are subject to treaties and statutes enacted by Congress, Congress may authorize suits against tribes, further illustrating the "domestic and dependent" relationship between the Indian tribes and United States government. *See Thebo*, 66 F. at 375 (stating that an Indian tribe may be sued if Congress authorizes the suit); *see also* CANBY, *supra* note 35, at 97, 107 (stating that Congress has authority to limit tribal sovereignty, including the ability to waive a tribe's immunity from suit). One way in which Congress can authorize a lawsuit against a tribe is by passing a statute that expressly states that tribes are subject to suit in certain conditions. *See* CANBY, *supra* note 35, at 97, 107 (explaining that Congress has authority to limit a tribe's immunity); *see also* Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012) (providing a statute enacted by Congress that allows a tribe to be sued under certain conditions related to gaming).

2. Testing Tribal Sovereign Immunity and Modern Immunity Cases

Although there are limitations to tribal immunity, asserting tribal sovereign immunity is often an effective means of avoiding a lawsuit.[61] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.* provides a powerful illustration in which Manufacturing Technologies sued the Kiowa Tribe for defaulting on a promissory note.[62] Manufacturing Technologies subsequently sued the Tribe in Oklahoma state court for breach of contract.[63] The state court determined that despite tribal immunity, the Tribe could be sued in state court for breaches of contract involving commercial activity that took place off the Indian reservation.[64] Following the judgment against the Tribe, the Tribe appealed to the United States Supreme Court.[65] The Supreme Court reversed, stating that regardless of the nature of the activity, the location of the activity, and cause of action, the Tribe has a right to assert immunity from suit.[66] The Court reasoned that tribal immunity extends to breaches of contract and similar civil cases because tribal immunity is a matter of federal law, and therefore only Congress can limit the Tribe's immunity.[67] Since Congress had not passed any legislation restricting tribal immunity in civil matters involving breaches of contract, the Tribe properly asserted immunity from suit.[68]

Articulating a concern that tribal sovereign immunity is overly broad, Justice Stevens dissented, stating that tribal immunity should not be extended in

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[61] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that the Bay Mills tribe could not be sued because they have tribal immunity); *Kiowa*, 523 U.S. at 760 (finding that the Kiowa Tribe properly asserted immunity from suit and thus the lawsuit against them warranted dismissal); *World Eng'g*, 476 U.S. at 892 (stating that the Indian tribes could not be sued because of tribal sovereign immunity); *Santa Clara Pueblo*, 436 U.S. at 72 (finding that the Santa Clara Pueblo tribe could not be sued); *Puyallup Tribe*, 433 U.S. at 167–68 (finding that tribal sovereign immunity excuses the Puyallup Tribe from suit in an action seeking an injunction to prevent the Tribe from fishing); *Seminole Tribe*, 181 F.3d at 1245 (finding that the Seminole Tribe of Florida properly asserted tribal sovereign immunity and thus could not be sued).

[62] *Kiowa*, 523 U.S. at 753–54. A promissory note is an absolute promise by a party to pay back the issuer of the note or other designee. *Promissory Note*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[63] *Kiowa*, 523 U.S. at 754.

[64] *Id.* The trial court decision was affirmed by the Oklahoma Court of Civil Appeals, and the Oklahoma Supreme Court declined to review the case further. *Id.* The United States Supreme Court then granted certiorari. *Id.*

[65] *Id.*

[66] *See id.* at 760 (stating that Indian tribes are immune from suit even on breach of contract claims unless the tribe consents to suit or Congress authorizes the suit).

[67] *See id.* at 759 (reasoning that tribal immunity can only be limited by Congress, and therefore a court has no authority to place a limit on tribal immunity).

[68] *See id.* at 760 (finding that Congress has not abrogated tribal immunity with respect to lawsuits involving private breaches of contract).

such a sizeable manner.[69] Justice Stevens in particular focused on the harm to plaintiffs that necessarily results from the *Kiowa* decision.[70] Because plaintiffs typically do not know that they can contract or negotiate away tribal immunity, plaintiffs are put in a position in which they cannot recover damages despite their injury and the tribe's culpability.[71] Moreover, Justice Stevens called attention to the fact that the judicially created doctrine of tribal immunity has little precedent and sparse reasoning, and thus argued that the Court should decline to extend sovereign immunity to transactions that occur off reservation lands.[72]

Despite Justice Stevens' strong dissent, the Supreme Court has continued to uphold that tribal immunity affords tribes immunity from suit.[73] In 2014, in *Michigan v. Bay Mills Indian Community*, Michigan sued the Bay Mills Indian Community for opening a casino off of reservation lands in violation of a tribal-state compact and the Indian Gaming Regulatory Act (IGRA).[74] In *Bay Mills Indian Community*, the Court reiterated the doctrine of tribal sovereign immunity and emphasized that without Congressional authorization or consent to suit, an Indian tribe cannot be sued.[75] Moreover, the Court expressly declined to revisit precedent on tribal immunity, upholding the decision in *Kiowa*.[76]

Importantly, the ruling in *Bay Mills Indian Community* further clarified that tribal sovereign immunity can be asserted in cases involving all types of

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[69] *See Kiowa*, 523 U.S. at 760 (Stevens, J., dissenting) (stating that tribal immunity should not be extended to off-reservation commercial activity and in such cases, state courts should have the authority to deny assertions of tribal immunity).

[70] *See id.* at 766 (reasoning that tort victims are especially vulnerable in situations where the victim is seeking relief from an Indian tribe).

[71] *See id.* (finding that plaintiffs are often unaware of tribal immunity, and therefore will they will not seek to negotiate a waiver of immunity).

[72] *See id.* at 761–62, 764 (stating that tribal sovereign immunity was created accidentally by the Court assuming such immunity existed without providing much reasoning). Justice Stevens further argued that the doctrine of tribal immunity suffers from flawed rationale in that the Court attempts to justify the doctrine by asserting that the Indians did not have an opportunity to bargain with the United States in joining the Union as opposed to the states, which did. *Id.* at 765.

[73] *See id.* at 760 (explaining that the doctrine of sovereign immunity should not have been extended so broadly); CANBY, *supra* note 35, at 99 (explaining that the doctrine of tribal sovereign immunity is "well established," and the Supreme Court reaffirmed the doctrine in *Bay Mills Indian Community*, refusing to overturn the decision in *Kiowa*).

[74] *Bay Mills Indian Cmty.*, 134 S. Ct. at 2028. The IGRA is a federal act that provides for the operation of Indian gaming activities when allowed by State law. *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012) (providing a statute under which Indian tribes may operate gaming casinos when permissible under State law).

[75] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2030–31 (stating that tribal immunity grants immunity from suit even when a state sues a tribe).

[76] *See id.* at 2031, 2036 (declining to overturn *Kiowa* or reverse past precedent concerning tribal immunity); *see also Kiowa*, 523 U.S. at 760 (finding that Indian tribes are immune from suits that concern off-reservation commercial activity unless there is authorization from Congress or a waiver of immunity).

off-reservation commercial transactions.[77] Although *Kiowa* established that tribal immunity can be asserted in contract cases arising out of transactions that take place on or off Indian lands, the decision in *Bay Mills Indian Community* expanded the scope of tribal immunity to apply in any commercial transaction regardless of location.[78] In *Bay Mills Indian Community*, the Court reiterated that tribal immunity is a matter of federal law and without express abrogation of immunity from Congress, the Court will not find a limitation to immunity.[79] Thus, from the ruling in *Bay Mills Indian Community*, it seems that tribal immunity can preempt any lawsuit involving a commercial transaction unless Congress has clearly abrogated the immunity or the tribe has waived its immunity.[80]

Perhaps unsurprisingly, the majority decision in *Bay Mills Indian Community* resulted in four justices dissenting, with dissenting opinions penned by Justice Scalia, Justice Thomas, and Justice Ginsburg.[81] In the longest of the dissents, Justice Thomas points out the overly broad protection that tribal immunity provides and bluntly asserts that granting such an extensive immunity from suit was a mistake that the Court wrongly refuses to rectify.[82] Although Justice Thomas does support the idea of allowing assertions of tribal immunity in tribal courts located within tribal reservations, any extension of tribal immunity beyond that is without a rational basis.[83] Thus, although the Supreme

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[77] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (stating that the Court will not itself limit tribal immunity for off-reservation lands without express intent to do so from Congress).

[78] *See id.* (finding that tribal immunity can be properly asserted even in a lawsuit that arises from a transaction off Indian land); *Kiowa*, 523 U.S. at 760 (finding that the Tribe could not be sued over the commercial transaction that took place on Indian lands because of tribal immunity).

[79] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (stating that only Congress has authority to abrogate tribal immunity).

[80] *See id.* (finding that tribal immunity from suit protected the Bay Mills Indian Community even though the lawsuit concerned a commercial transaction that took place off the Indian reservation); CANBY, *supra* note 35, at 99, 107 (explaining that tribal immunity applies to commercial activities of a tribe, even if the activity occurs off reservation land).

[81] *Bay Mills Indian Cmty.*, 134 S. Ct. at 2045 (5-4 decision) (Thomas, J., dissenting, joined by Scalia, Ginsburg, & Alito, JJ.). Justice Scalia joined Justice Thomas's dissent but also wrote a short dissenting opinion stating that the Court's decision in *Kiowa*, which he joined in, was wrongly decided and should have been reversed in *Bay Mills Indian Cmty. Id.* at 2045 (Scalia, J., dissenting). Note that Justices Scalia, Ginsburg, and Alito all joined Justice Thomas's dissent, but Justices Scalia and Ginsburg also wrote separate dissenting opinions. *Id.* at 2045 (Scalia, J. dissenting); *id.* at 2055 (Ginsburg, J., dissenting).

[82] *See id.* at 134 S. Ct. at 2045–46 (Thomas, J., dissenting) (describing the expansion of tribal immunity since *Kiowa* as wrong and made increasingly worse as more cases are decided by the Court).

[83] *Id.* In a lengthy dissent, Justice Thomas analyzed the historical arguments underlying the judicially created doctrine of tribal immunity and why it should exist in relation to tribal courts on tribal land. *Id.* at 2046–49. However, Justice Thomas respectfully asserted that the extension of tribal immunity to off-reservation commercial activity was an overstep. *See id.* at 2047 (arguing that upholding tribal immunity in cases involving commercial transactions that take place in a state impedes upon the sovereignty of that state, and therefore, such assertions of immunity violate the Constitution). Moreo-

Court has continued to uphold tribal immunity as a powerful means of avoiding lawsuits, there is substantial disagreement as to the limits of tribal immunity and how tribal immunity should be abrogated.[84]

D. Abrogating Tribal Sovereign Immunity: A Power Reserved for Congress

Although tribal immunity is judicially created, the courts have stated that only Congress has the power to abrogate it.[85] In abrogating tribal immunity, Congress may limit the cases in which immunity can be asserted or even eliminate the doctrine altogether.[86] Consequently, in cases brought to court in which an Indian tribe is sued, the court must determine whether tribal immunity has been abrogated or if Congress authorized the suit through a statute.[87] Alternatively, the suit may proceed if the tribe consents to the suit, constituting a waiver of immunity.[88] This gives rise to the question of how Congress can abrogate tribal immunity and in what circumstances, if any, immunity has been eliminated or limited.[89]

In passing the Indian Appropriations Act of 1871, Congress stated that it would no longer enter into treaties with tribes, which was the original means

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ver, Justice Thomas reasoned that the Court and Congress should have the authority to abrogate tribal immunity given that tribal immunity is a judicially created doctrine already shaped by the decisions of the Supreme Court. *Id.* at 2049–50.

[84] *See id.* at 2045 (upholding the right of the tribe to assert tribal immunity, but drawing a strong dissent from four justices of the Court); *Kiowa*, 523 U.S. at 760 (Stevens, J., dissenting) (declining to impose limitations on tribal sovereign immunity, causing three justices to dissent); CANBY, *supra* note 35, at 99 (explaining that the Supreme Court has continued to uphold tribal immunity).

[85] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (stating that Congress has the power to limit tribal immunity); *Kiowa*, 523 U.S. at 759 (finding that Congress may limit tribal immunity by enacting legislation); *Santa Clara Pueblo*, 436 U.S. at 72 (stating that Congress's power to regulate tribal immunity is broad, especially compared to a court's power, which is restrained).

[86] *See* CANBY, *supra* note 35, at 107 (explaining that Congress has the authority to waive a tribe's sovereign immunity, allowing a tribe to be sued).

[87] *See* GOLDBERG ET AL., *supra* note 15, at 482 (describing cases in which courts must determine whether the tribe waived its immunity or Congress expressly authorized a waiver of a tribe's immunity); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that Congress did not limit tribal immunity); *Kiowa*, 523 U.S. at 760 (finding that Congress did not limit tribal immunity); *Santa Clara Pueblo*, 436 U.S. at 55 (questioning whether Congress has abrogated tribal immunity allowing suits in IGRA cases); *Puyallup Tribe*, 433 U.S. at 167–68 (finding that the suit was not authorized by Congress and therefore the Tribe was protected by tribal immunity); *Seminole Tribe*, 181 F.3d at 1242 (reasoning that Congress did not abrogate tribal immunity in the IGRA case at bar, nor did the Tribe consent to suit).

[88] *See Seminole Tribe*, 181 F.3d at 1242 (reasoning that there was no abrogation of tribal immunity in the case at bar, nor did the Tribe consent to suit). Recall that tribal sovereign immunity may not be asserted if Congress has authorized the suit or if the tribe waives immunity by consenting to the suit. *See* CANBY, *supra* note 35, at 107, 109 (stating that a tribe's sovereign immunity can be waived by Congress or by the tribe itself).

[89] *See* GOLDBERG ET AL., *supra* note 15, at 482–83 (illustrating cases in which courts must examine whether Congress waived a tribe's sovereign immunity and to what extent the immunity was waived).

by which the federal government predominantly effected Indian law.[90] Instead, Congress can now pass statutes that affect the laws governing the tribes.[91] As a result, the primary way in which Congress can abrogate or limit tribal immunity is through statute.[92] Tribal immunity can therefore continue to provide a means for Indian tribes to avoid liability unless Congress acts to pass a statute limiting the scope of the immunity.[93]

Several cases highlight the difficulty of limiting tribal immunity through federal statute due to the narrow view with which courts read such statutes.[94] One of the major federal statutes that has spurred litigation with Indian tribes is the Indian Gaming Regulatory Act (IGRA), originally enacted in 1988.[95] The IGRA provides that Indian tribes may regulate gaming on Indian lands subject

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[90] *See* Indian Appropriations Act, 25 U.S.C. § 71 (2012) (stating that Congress will no longer create treaties with tribes); CONG. GLOBE 41st Cong., 3rd Sess. 1812 (1871) (stating that one of the primary purposes of the Indian Appropriations Act is to stop Congress from entering into new treaties with Indian tribes); CANBY, *supra* note 35, at 115 (explaining that the United States entered into "hundreds" of treaties with Indian tribes up until treaty making ceased in 1871, the year the Indian Appropriations Act was passed).

[91] *See* ANDERSON ET AL., *supra* note 23, at 346 (stating that Congress can waive a tribe's immunity through congressional action); *Native American Treaties*, NATIONAL ARCHIVES (Apr. 16, 2018), https://www.archives.gov/research/native-americans/treaties [http://perma.cc/8C83-YQGE] (explaining that in 1871, the United States government would no longer interact with the Indian tribes through treaty-making); *see also Worcester*, 31 U.S. (6 Pet.) at 562 (stating that the Indian tribes are subject to federal law as separate yet dependent sovereigns of the United States). One of the primary reasons for ending treaty-making and instead favoring the enactment of statutes was that Congress wanted more of a role in shaping policy towards the Native Indians, which could be done with statute, but not with treaties because the power to enact treaties is reserved for the President with consent from the Senate. *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President has the power to enact treaties, with consent from the Senate); CONG. GLOBE 41st Cong., 3rd Sess. 1812 (1871) (stating that one reason for the Indian Appropriations Act is to give Congress more control in enacting legislation pertaining to the Native tribes); CANBY, *supra* note 35, at 121 (describing the power to make treaties as belonging largely to the president).

[92] *See* CONFERENCE OF WESTERN ATT'YS GEN., *supra* note 23, § 7.2 (stating that the abrogation of tribal immunity largely stems from federal statutes that provide specific instances under which tribal immunity cannot be asserted).

[93] *See Seneca*, 253 P.3d at 55–56 (stating that Congress should act to abrogate tribal immunity so as to provide injured plaintiffs with a remedy); CONFERENCE OF WESTERN ATT'YS GEN., *supra* note 23, § 7.2 (providing an overview of some federal statutes that have abrogated tribal immunity, particularly in criminal cases); CANBY, *supra* note 35, at 99–100 (explaining that tribal sovereign immunity can protect Indian tribes in commercial and governmental activities in both state and federal court, and in lawsuits for monetary damages as well as declaratory and injunctive relief).

[94] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2032 (finding that the IGRA partially abrogated tribal immunity, but the statute did not limit tribal immunity in the case); *Seminole Tribe*, 181 F.3d at 1242 (reasoning that the IGRA does abrogate tribal immunity in certain circumstances, but not in the case at bar); CANBY, *supra* note 35, at 107 (stating that where Congress acts to limit tribal immunity, any such limitation must be clearly expressed by Congress).

[95] *See* 25 U.S.C. § 2701 (stating that Indian tribes may regulate gaming if not barred by Federal statute, and the gaming takes place in a state that does not prohibit it); *Bay Mills Indian Cmty.*, 134 S. Ct. at 2032 (examining whether the IGRA abrogated tribal immunity); *Seminole Tribe*, 181 F.3d at 1242 (finding that the IGRA did not abrogate tribal immunity).

to state laws prohibiting such gaming.[96] In accordance with the IGRA, many states have chosen to enter into tribal-state compacts concerning specific gaming activities in an effort to regulate gaming.[97]

In *Florida v. Seminole Tribe of Florida*, the State of Florida sued the Seminole Tribe claiming a violation of class III gaming under the IGRA.[98] In response, the Seminole Tribe asserted sovereign immunity, claiming that the IGRA did not abrogate the Tribe's immunity and therefore the Tribe could not be sued.[99] The court thus had to determine whether the IGRA limited tribal immunity, and if so, to what extent.[100] The court reasoned that tribal immunity is only abrogated or limited when Congress has clear intent to do so; without express language limiting tribal immunity, the court will not infer any limitation.[101] For example, Congress expressly limited tribal sovereignty in a provision of the IGRA by allowing a state to sue a tribe if the tribe violates a tribal-state compact.[102] In light of this IGRA provision, the court in *Seminole Tribe* reasoned that because Florida did not enter into any tribal-state compact with the Seminole Tribe, the Tribe could properly assert immunity from suit and avoid litigation.[103] This case thus illustrates Congress' ability to abrogate tribal

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[96] 25 U.S.C. § 2701 (asserting that Indian gaming is permissible provided that the gaming does not violate Federal law nor the laws of the State in which the gaming occurs). For an extensive background and overview of the IGRA, see generally Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99 (2010) (providing an in-depth introduction to the IGRA, its history, and several provisions).

[97] *See* CANBY, *supra* note 35, at 344 (explaining that tribal-state compacts are required under the IGRA in order to govern Indian gaming within a state). Tribal-state compacts are contracts entered into by the tribe and the state to regulate certain types of gaming activities in accordance with the IGRA. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2028–29 (describing a tribal-state compact that may be entered into in accordance with the IGRA); *Seminole Tribe*, 181 F.3d at 1239 (describing an attempt create a compact between the State of Florida and the Seminole Tribe concerning certain gaming activities).

[98] *Seminole Tribe*, 181 F.3d at 1239. Class III gaming is a type of gaming under the IGRA such as slot machines or blackjack, which are more strictly regulated than other types of gaming. *See* 25 U.S.C. § 2703(8) (defining class III gaming as not class I or class II); Rob Capriccioso, *Legal Distinction Between Class II and III Gaming Causes Innovation, Anguish,* INDIAN COUNTRY TODAY, (Oct. 4, 2011), https://indiancountrymedianetwork.com/travel/casinos-and-resorts/legal-distinction-between-class-ii-and-iii-gaming-causes-innovation-anguish/ [http://perma.cc/ELB9-R6V5] (explaining that Class III gaming includes games such as blackjack, craps, and slot machines).

[99] *Seminole Tribe*, 181 F.3d at 1239 (stating that the Seminole Tribe asserted tribal immunity and argued that the lawsuit should be dismissed).

[100] *See id.* at 1241–42 (examining the IGRA and determining that the IGRA does not abrogate tribal immunity in the case).

[101] *See id.* at 1242 (stating that only Congress has the power to abrogate tribal immunity and must do so with clear intent in a statute).

[102] *See* 25 U.S.C. § 2710(d)(7)(A)(ii) (providing that a state may sue a tribe that violates a tribal-state compact regarding certain gaming activities); *Seminole Tribe,* 181 F.3d at 1242 (finding that Congress intentionally abrogated tribal immunity in cases where a tribe violates a tribal-state compact, allowing the state to sue the tribe).

[103] *See Seminole Tribe*, 181 F.3d at 1242 (stating that the Seminole Tribe cannot be sued by Florida because the Tribe's immunity was not limited by the IGRA under the circumstances). In *Seminole*

immunity, as well as the very narrow scope with which a court will read such abrogation, requiring clear intent and express language to find a limitation of a tribe's immunity.[104]

In 2014, the Supreme Court addressed the question of abrogating tribal immunity under the IGRA in *Michigan v. Bay Mills Indian Community*.[105] In *Bay Mills Indian Community*, the State of Michigan sued the Bay Mills Indian Community for operating certain gaming activities off reservation lands.[106] Similar to the plaintiff in *Seminole Tribe*, Michigan argued that the gaming activities were in violation of the IGRA, which allowed Michigan to sue the tribe.[107] Nevertheless, the Supreme Court rejected Michigan's argument, reasoning that the IGRA only abrogated tribal immunity for violations of the IGRA that occurred on Indian reservation land, not off reservation land.[108] Because the Bay Mills Indian Community was conducting activity off reservation land, the IGRA provision limiting tribal immunity did not apply and therefore Bay Mills could properly assert immunity from suit.[109] Furthermore, the Court reiterated that only Congress has the authority to limit tribal immunity and must do so with clear intent through statute.[110]

Tribe, the court found that the limitation of tribal immunity in the relevant section of the IGRA only applied if there was a tribal-state compact. *Id.* Since no compact existed, the state had no authority to sue the Tribe because there was no abrogation of the Tribe's immunity from suit. *Id.* Notably, the court also found that tribal immunity can be asserted in lawsuits seeking equitable relief, further illustrating the broad protection afforded by tribal immunity. *Id.* at 1244–45.

[104] *See id.* at 1245 (finding that only Congress has the ability to limit the scope of tribal immunity and that any such abrogation must be clearly expressed); CANBY, *supra* note 35, at 107 (explaining that although Congress can waive tribal immunity, any such limitation must be plainly communicated).

[105] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2028 (finding that the IGRA did not limit the tribe's ability to assert immunity in the case). The Bay Mills Indian Community is a tribal organization located in Michigan. *Bay Mills Indian Community: Who We Are*, BAY MILLS INDIAN COMMUNITY, http://www.Baymills.org/about-us.php [http://perma.cc/3F4T-DWAU] (providing a brief overview of the Bay Mills Indian Community).

[106] *Bay Mills Indian Cmty.*, 134 S. Ct. at 2029.

[107] *See* 25 U.S.C. § 2710(d)(7)(A)(ii) (granting federal courts jurisdiction over lawsuits alleging violations of class III gaming regulations and tribal-state compacts); *Bay Mills Indian Cmty.,* 134 S. Ct. at 2032 (stating that Michigan attempted to sue the tribe for violating the IGRA); *Seminole Tribe*, 81 F.3d at 1242 (stating that Florida sued the Seminole Tribe, citing a violation of the IGRA). Recall that in *Seminole Tribe*, the state of Florida argued that the IGRA abrogated tribal immunity from suit even in the absence of a tribal-state compact under the IGRA. *See* 81 F.3d at 1239 (describing the state of Florida's attempt to sue the Seminole Tribe for violating the IGRA despite the lack of a tribal-state compact). In *Bay Mills Indian Community*, there was a tribal-state compact, so Michigan argued that the IGRA abrogated tribal immunity under the circumstances and thus allowed Michigan to sue the tribe. *See* 134 S. Ct. at 2029 (stating that Michigan entered into a tribal-state compact with Bay Mills pursuant to the IGRA).

[108] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that the IGRA only expressly limits sovereign immunity for activities on Indian reservations).

[109] *See id.* (finding that the IGRA did not abrogate the tribe's ability to assert tribal immunity in an action arising off Indian land).

[110] *See id.* (stating that Congress can limit tribal immunity through statute, but any such limitation must be made clearly in the statute).

These cases demonstrate that only Congress may limit the judicially created doctrine of tribal immunity and courts are only willing to find such a limitation when it is made expressly clear by statute.[111] Moreover, although Congress has the authority to abrogate tribal immunity, Congress has only done so in a few limited circumstances.[112]

E. Jurisdiction to Hear Cases Involving American Indian Tribes

Given that Indian tribes are independent political communities with tribal governments, it is unclear when a tribe may be sued in state or federal court and whether those courts have jurisdiction to even hear cases involving tribes.[113] Even when a court seemingly has jurisdiction to hear a case based on the subject matter of the case or the location of the cause of action, the court may still lack jurisdiction because of tribal sovereign immunity.[114]

Over time, Congress has enacted several statutes that specifically grant state or federal courts jurisdiction to hear causes of action that arise on Indian

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[111] *See id.* (reasoning that Congress may limit a tribe's immunity); *Seminole Tribe*, 181 F.3d at 1242 (stating that Congress can limit tribal immunity, but Congress's intent to create such a limitation must be clear); GOLDBERG ET AL., *supra* note 15, at 482 (explaining that Congressional waiver of tribal immunity must be clearly expressed).

[112] *See* GOLDBERG ET AL., *supra* note 15, at 483 (stating that congressional waivers of tribal immunity are rare); *see also* 25 U.S.C. § 2710(d)(7)(A)(ii) (abrogating tribal immunity only for certain on-reservation gaming activities that are also in violation of tribal-state compacts); *Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that the IGRA only limits tribal immunity in a narrow sense and reaffirming that without express intent from Congress, tribal immunity is not limited); *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting) (stating that the current precedent concerning tribal sovereign immunity allows immunity to be asserted against a tort victim, protecting the Tribe from suit even if the Tribe is culpable); *Seminole Tribe*, 81 F.3d at 1244–45 (reasoning that tribal immunity can be asserted in lawsuits pertaining to commercial activities as well as lawsuits seeking injunctions and other equitable relief).

[113] *See* RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS (AM. LAW INST., Tentative Draft No. 1, 2015) (describing American Indian tribes as sovereign entities with federally recognized sovereign immunity); CANBY, *supra* note 35, at 139 (describing jurisdictional issues in the field of Indian law as one of the most "complex problems" in the field). *See generally* Honorable William C. Canby, Jr., *Tribal Court, Federal Court, State Court: A Jurisdictional Primer*, ARIZ. ATT'Y, July 1993, at 24 (providing a brief overview of the jurisdictional landscape concerning lawsuits involving Indian tribes).

[114] *See* CANBY, *supra* note 35, at 140 (explaining that jurisdiction largely depends upon whether Indians are involved and the location in which the cause of action arises); *see also Foxworthy*, 169 P.3d at 235 (finding that state court lacked jurisdiction to hear a case involving a private tort action against a tribe that occurred on an Indian reservation). Jurisdiction concerning lawsuits involving American Indians is a complex topic that largely turns on the specific cause of action alleged in the suit, the geographic region in which the lawsuit arises, and whether a tribal court has original jurisdiction over the suit. *See generally* Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 AM. INDIAN L. REV. 71, 72–74 (1992) (providing a brief overview of the differences between federal jurisdiction, tribal jurisdiction, and state jurisdiction).

reservations.[115] Congress has largely granted federal courts jurisdiction to adjudicate criminal offenses involving Indian tribes, and state courts have been given jurisdiction over criminal offenses that occur off Indian lands.[116] In contrast, civil jurisdiction is more limited, as a state may only assume civil jurisdiction if the tribe expressly consents to it.[117] Thus, depending on the nature of the claim and geographic region in which the suit arises, either a state court or federal court can be a proper forum.[118]

Importantly however, tribal immunity from suit may still warrant dismissal of a civil action against Indian tribes.[119] For example, in *Bay Mills Indian Community*, the state of Michigan properly filed suit in federal court against the Bay Mills Indian Community claiming a violation of the IGRA under federal law.[120] Although the IGRA does grant federal courts jurisdiction to hear

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[115] *See* 18 U.S.C. § 1153 (2012) (extending major United States criminal laws to offenses committed by or against American Indians and subjecting such criminal offenses to federal court jurisdiction); *Id.* § 1162 (granting certain state courts jurisdiction over criminal offenses committed by or against Indians on reservations); 25 U.S.C. § 1322 (granting state courts jurisdiction to hear civil causes of action arising on Indian reservations and involving American Indians when agreed to by the Indian tribe); 28 U.S.C. § 1360 (granting specific state courts jurisdiction to hear civil actions that arise on Indian reservations and concern individual American Indians). *But see* Williams v. Lee, 358 U.S. 217, 223 (1959) (finding that Arizona State Court may not exercise jurisdiction over a civil action that arose on Indian territory concerning a non-Indian and an Indian). These statutes use the term "Indian country" to denote Indian reservation land. *See* 18 U.S.C. § 1151 (providing the definition of "Indian country" as used in the statute); *see also* CANBY, *supra* note 35, at 149–69 (providing a historical overview of the development of American Indian jurisdiction and the relationship to United States federal and state governments).

[116] *See* 18 U.S.C. § 1153 (granting United States courts jurisdiction over criminal offenses that occur on Indian territory); 25 U.S.C. § 1321 (granting state courts jurisdiction over criminal cases concerning tribes when the tribe consents to suit in the state); CANBY, *supra* note 35, at 170, 198–99 (stating that there are several federal criminal statutes that apply to all persons regardless of location within the United States, and state courts can exert jurisdiction over anyone for criminal offenses that occur within the state, but not in causes of action that arise between Indians on Indian lands).

[117] *See* 25 U.S.C. § 1322 (granting state courts jurisdiction to hear civil actions arising in the state only when the tribe agrees to state jurisdiction). *But see* 28 U.S.C. § 1360 (granting specific states jurisdiction over civil causes of action that arise on Indian land); CANBY, *supra* note 35, at 207–08, 271 (explaining that generally, a state cannot assume civil jurisdiction in actions arising on Indian lands except under 28 U.S.C. § 1360, commonly referred to as Public Law 280, which provides certain states the ability to assume civil jurisdiction in actions against Indians on Indian lands).

[118] CANBY, *supra* note 35, at 140 (asserting that a court's ability to exercise jurisdiction in Indian affairs largely depends upon whether Indians are involved and the location in which the cause of action arises); *see Bay Mills Indian Cmty.*, 134 S. Ct. at 2029 (showing that Michigan sued the Indian tribe in federal court for a claim arising out of federal law); *Foxworthy*, 169 P.3d at 54 (illustrating a case in which an Indian tribe was sued in state court under a state law).

[119] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that the Indian tribe could not be sued in the action involving an off-reservation transaction because of tribal immunity); *Foxworthy*, 169 P.3d at 54 (reasoning that an Indian tribe could not be sued in the civil action that arose out of an incident that occurred off the Indian reservation).

[120] *See* 25 U.S.C. § 2710(d)(7)(A)(ii) (granting a state the right to sue an Indian tribe under specific circumstances); *Bay Mills Indian Cmty.*, 134 S. Ct. at 2028 (illustrating Michigan suing the Bay Mills Indian Community in federal court in accordance with the IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii)).

cases involving Indian tribes and the IGRA, such jurisdiction is still subject to tribal immunity and therefore the lawsuit must be dismissed when appropriate.[121] In interpreting the IGRA, the court in *Bay Mills Indian Community* concluded that although the IGRA provides jurisdiction to federal courts to hear certain claims, the court did not have jurisdiction to hear the particular claim alleged in *Bay Mills Indian Community* because tribal immunity was not abrogated.[122] Understanding where a Native American Indian tribe may be sued is thus an important and complicated issue, but even when one thinks a suit is properly filed, tribal immunity can result in immediate dismissal of a lawsuit against a tribe even when the tribe is culpable.[123]

II. TRIBAL SOVEREIGN IMMUNITY AND ESCAPING LITIGATION

The law governing American Indian tribal sovereign immunity has created a powerful means of avoiding lawsuits when an American Indian tribe is a party to the lawsuit.[124] Furthermore, given an almost unlimited ability to assert immunity from suit, the American Indian tribes have become a means by which an individual can avoid a lawsuit by engaging in an agreement with a tribe.[125] Although originally created almost accidentally by defining a court's

[121] 25 U.S.C. § 2710(d)(7)(A)(ii); *see Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that tribal immunity was properly asserted and therefore the federal court lacked jurisdiction to hear the lawsuit); Lynn H. Slade et al., *Supreme Court Affirms Indian Gaming Regulatory Act Does Not Abrogate Sovereign Immunity for Suit Alleging Illegal Gaming Occurring on Non-Indian Lands,* LEXOLOGY (June 17, 2014), https://www.lexology.com/library/detail.aspx?g=7ea354ad-b36a-4ea6-948d-27a82c8aaeb5 [http://perma.cc/8UMS-JADC] (stating that the IGRA did not limit the tribe's ability to assert tribal immunity, and therefore the lawsuit against the tribe was dismissed).

[122] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that the IGRA did not abrogate tribal immunity where the action involved off-reservation gaming activity).

[123] *See* CANBY, *supra* note 35, at 100 (explaining that tribal immunity may be properly asserted in state and federal court, resulting in dismissal of a case); *see also Bay Mills Indian Cmty.*, 134 S. Ct. 2039 (stating that Michigan must find alternative means to settle the dispute with the Bay Mills Indian Community, implying that federal courts have no jurisdiction to render a judgment in the case).

[124] *See* CANBY, *supra* note 35, at 100 (stating that tribal immunity may be asserted in state and federal courts, in actions seeking monetary damages, and in actions seeking declaratory and injunctive relief).

[125] *See* Davidson, *supra* note 1, at 36 (describing a situation in which tribal immunity can be used to "gam[e] the system"); Thomas, *supra* note 1 (describing a way in which one could avoid a lawsuit by entering into an agreement with an American Indian tribe); *see also* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2039 (2014) (finding that the Bay Mills Indian tribe could not be sued having properly asserted sovereign immunity); Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998) (stating that the Kiowa Tribe had sovereign immunity from suit, and therefore the lawsuit against the tribe was dismissed); Three Affiliated Tribes of the Fort Berthold Reservation v. World Eng'g, 476 U.S. 877, 890–91 (1986) (concluding that the Indian tribes could not be sued because of tribal sovereign immunity); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (finding that the Santa Clara Pueblo tribe could not be sued because of tribal sovereign immunity); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 172 (1977) (finding that tribal sovereign immunity grants the Tribe immunity from suit in an action seeking an injunction to prevent the tribe from fishing);

jurisdiction over American Indian tribes, tribal sovereign immunity has grown to provide a shelter for both the Indian tribes and other individuals seeking to escape litigation.[126]

A. The Unreasonable Scope of Tribal Sovereign Immunity

Tribal sovereign immunity affords tribes broad protection.[127] Although Congress has placed some limits on the use of tribal immunity by passing specific statutes, there has been no extensive reform in the law limiting the scope of protection.[128] Given the broad application of tribal sovereign immunity, tribal governments can avoid lawsuits in numerous cases in which others would likely be found liable, particularly in civil actions.[129]

Justice Stevens drew attention to this problem in his dissent in *Kiowa*.[130] There, Justice Stevens highlighted the inequality that the law provides to Indian tribes by providing a means of escaping liability.[131] Even when a tribe is clearly at fault in the matter, such as defaulting on a promissory note in the

Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1245 (11th Cir. 1999) (finding that the Seminole Tribe of Florida properly asserted tribal sovereign immunity and thus could not be sued).

[126] *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, Accident, and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 779 (2008) (describing tribal sovereign immunity as broad); *see also Kiowa*, 523 U.S. at 756 (stating that the doctrine of tribal sovereign immunity was created "almost by accident"); Turner v. United States, 248 U.S. 354, 358 (1919) (reasoning that an Indian tribe cannot be sued without consent); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (finding that American Indian tribes are recognized to be sovereign independent communities yet still subject to American federal law). *But see* Wood, *supra* note 7, at 1588–89 (arguing that the creation of tribal sovereign immunity was not merely an accident).

[127] Florey, *supra* note 126, at 779.

[128] *See* 18 U.S.C. § 1162 (2012) (granting certain states jurisdiction over criminal offenses that take place on Indian reservations); Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012) ("IGRA") (illustrating a federal statute that limits tribal immunity in very specific instances related to gaming activity); GOLDBERG ET AL., *supra* note 15, at 483 (stating that Congress has rarely placed limits on tribal immunity).

[129] *See Kiowa*, 523 U.S. at 760 (reversing the decision of the lower court by finding that the Tribe's failure to pay a promissory note could not be litigated in court because of tribal sovereign immunity); *Puyallup Tribe, Inc.*, 433 U.S. at 167–68 (finding that state law limiting the amount of fishing did not apply to the Tribe because the Tribe exercised sovereign immunity); Navajo Nation v. Dalley, 896 F.3d 1196, 1218 (10th Cir. 2018) (concluding that the Navajo Nation tribe cannot be sued for tort liability following a slip-and-fall that resulted in injury at the tribe's casino); Seneca Tel. Co. v. Miami Tribe, 253 P.3d 53, 55-57 (Okla. 2011) (finding that despite the negligent conduct of the Tribe, the Tribe could not be sued because of tribal immunity).

[130] *See Kiowa*, 523 U.S. at 766 (Stevens, J. dissenting) (stating that the doctrine of tribal sovereign immunity is "unjust," and Indian tribes should be held accountable when they are at fault).

[131] *See id.* (describing how tribal immunity tends to leave a plaintiff asserting actions against a tribe worse off as the plaintiff often has no means to attain a remedy, particularly in the context of civil tort actions).

case of *Kiowa*, the tribe is able to escape judgment by invoking immunity.[132] Such a decision sends a message of caution to those seeking to enter into agreements with tribes as well as anyone who may file a civil action against a tribe.[133]

To illustrate the strong protection of tribal immunity as it currently exists, consider the case of *Seneca Telephone Company v. Miami Tribe*.[134] In *Seneca*, the Miami Tribe was conducting excavation work on Indian land when they damaged underground telephone lines owned by Seneca Telephone Company.[135] Seneca sued the Tribe in state court for negligence seeking monetary damages for the repairs as well as attorney's fees.[136] It was undisputed that the Miami Tribe was negligent and directly caused the damage done to the Seneca telephone lines, resulting in necessary repair costs.[137] Despite this, the court reasoned that the Miami Tribe properly asserted tribal immunity, and therefore the lawsuit must be dismissed leaving Seneca without a remedy.[138]

In addition to *Seneca*, which highlights the injustice caused by tribal immunity in a commercial context, consider the tragic events leading to the wrongful death claim in *Furry v. Miccosukee Tribe of Indians*.[139] In *Furry*, Tatiana Furry was served copious amounts of alcohol at the Miccosukee Resort

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[132] *See id.* at 760 (finding that the Kiowa Tribe was immune from suit in an action against them for defaulting on a promissory note); *see also Seneca*, 253 P.3d at 55–56 (dismissing an action against a tribe because of tribal immunity despite evidence that the tribe was culpable).

[133] *See* Galanda, *supra* note 5, at 50, 52 (highlighting the extensive nature of tribal sovereign immunity and advising lawyers to understand such implications prior to doing business with an Indian tribe); *see also Kiowa*, 523 U.S. at 766 (implying that without an express waiver of immunity, those seeking civil remedies against an Indian tribe will not be successful as the tribe may assert immunity from suit); *Seminole Tribe*, 181 F.3d at 1242 (finding that a civil action to enjoin a tribe from partaking in certain gaming activities could not be brought without express waiver of tribal sovereign immunity); *Seneca*, 253 P.3d at 55–56 (explaining that tribal sovereign immunity can often leave an injured innocent plaintiff without a means to obtain a remedy).

[134] *See Seneca*, 253 P.3d at 56–57 (reversing the lower court's finding of fault on behalf of the Miami Tribe and remanding the case with instructions to dismiss the lawsuit because of tribal immunity despite evidence of the Tribe's negligence in causing damage).

[135] *Id.* at 54.

[136] *Id.*

[137] *See id.* at 55 (acknowledging that the company's assertions of negligence against the Tribe have merit).

[138] *See id.* (finding that there was no waiver of tribal immunity and therefore the lawsuit against the Tribe must be dismissed). The court in *Seneca* expressly recognized the unjust position that the Seneca company was in, having no means to recover from the negligence of the Tribe. *See id.* (stating that although the allegations of negligence against the Tribe were appropriate, tribal immunity protected the Tribe from liability). The court even expressly called on Congress to pass legislation allowing the state court to hold the Tribe liable in such cases. *Id.* at 56.

[139] *See* Furry v. Miccosukee Tribe of Indians, 685 F.3d 1224, 1226 (11th Cir. 2013) (highlighting a case in which a plaintiff sought relief in a wrongful death action that arose out of events that occurred on Indian land); *Seneca*, 253 P.3d at 56 (illustrating a case where a tribe was immune from suit even though the tribe was clearly negligent in causing damage to a company's property).

& Gaming facility located in Miami, Florida.[140] Employees of the resort then witnessed Furry get into her car while she was visibly intoxicated.[141] Furry subsequently got into a car accident resulting in her death.[142] Furry's father filed suit against the Miccosukee Tribe citing various negligence claims and a violation of Florida's Dram Shop laws.[143] Although any non-Indian owned bar would likely have to litigate this case and potentially face liability, the court found that the lawsuit against the Miccosukee Tribe could not be maintained because of tribal sovereign immunity.[144]

Not only does tribal sovereign immunity pose a problem for those seeking relief for actions that occurred on Indian reservations, but the doctrine also protects tribes in lawsuits that arise completely independent of tribal lands following the Supreme Court's ruling in *Kiowa*.[145] The precedent set by *Kiowa*

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[140] *See Furry,* 685 F.3d at 1226–27 (stating that Furry was served copious amounts of alcohol by servers of the Miccosukee Resort).

[141] *See id.* at 1226–27, 1226 n.2 (reciting the facts of the case and finding the facts true as alleged). The facts also state that defendant Miccosukee knew Furry had an alcohol abuse problem, having served Furry alcohol numerous times prior to the night of the incident. *Id.* at 1227.

[142] *Id.* at 1227. Furry was involved in a fatal car accident likely due to her intoxication, where she had a blood alcohol of .32, four times the legal limit of .08 in Florida. *Id.*

[143] *Id.*; *see* FLA. STAT. § 768.125 (2017) (stating that anyone who knowingly sells alcohol to a person habitually addicted to alcohol may be held liable for any resulting injury or damage caused by that person while intoxicated).

[144] Jon Tayler, *Miccosukee Tribe Again Avoids Lawsuit Over Fatal 2009 Car Crash*, MIAMI NEW TIMES (Jul. 20, 2012), http://www.miaminewtimes.com/news/miccosukee-tribe-again-avoids-lawsuit-over-fatal-2009-car-crash-6520502 [http://perma.cc/9BK8-8NDV]; *see Furry*, 685 F.3d at 1236–37 (finding that tribal sovereign immunity was properly asserted by the Miccosukee Tribe because there was no waiver or abrogation of tribal immunity, yet stating the facts of the case weighed heavily against the Tribe). The court bases much of its reasoning on *Kiowa*, finding that without express waiver or congressional action, the Indian tribe cannot be sued in the state court under state civil law. *See Kiowa*, 523 U.S. at 760 (stating that a limitation of tribal immunity through statute must be express and clear); *Furry*, 685 F.3d at 1236 (finding no express limitation of tribal immunity and therefore tribal immunity could properly be asserted). It is likely that if the bar in *Furry* was not operated by an Indian tribe, and thus could not assert tribal immunity, the court may have found the bar liable for Furry's death. *Compare Furry*, 685 F.3d at 1227 (reciting facts that suggest the Miccosukee Tribe knew that the deceased was a habitual drinker and therefore the Tribe could be liable under §768.125 of the Florida Statutes), *with* Peoples Restaurant v. Sabo, 591 So.2d 907, 908 (1991) (affirming a denial of summary judgment because, based on the evidence, a reasonable jury could conclude that a bar violated section 768.125 of the Florida Statutes by over-serving alcohol to a known habitual alcohol drinker, and therefore a question of material fact existed). Moreover, in *Furry*, the court states that tribal sovereign immunity is outdated and overbroad, especially given the complex and sophisticated business of Indian gaming. *See* 685 F.3d at 1237 (calling tribal sovereign immunity "anachronistic"). Yet without new direction from the Supreme Court or congressional action, the court upheld precedent, dismissing the claim against the Miccosukee Tribe. *Id.*

[145] CANBY, *supra* note 35, at 99 (explaining that tribal immunity can be properly asserted in lawsuits concerning actions that occur off Indian lands); *see Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (upholding the decision in *Kiowa*); *Kiowa*, 523 U.S. at 758 (finding that tribal sovereign immunity is not limited to cases involving off-reservation commercial transactions); *Furry*, 685 F.3d at 1237 (illustrating a case in which a plaintiff sought damages against a tribe for activities that took place on the Indian reservation).

thus has an immense impact on one's ability to recover in actions against an Indian tribe even when the lawsuit arises from a dispute entirely separate from an Indian reservation.[146]

To illustrate this, consider *Bassett v. Mashantucket Pequot Tribe* in which a plaintiff filed a lawsuit against the Mashantucket Tribe for copyright infringement.[147] In *Bassett*, the plaintiff filed an action alleging copyright infringement for the Tribe's use of a movie that the plaintiff originally helped create.[148] Regardless of the merits of the action, the court determined that the Mashantucket Tribe could not be sued under federal copyright law because of tribal sovereign immunity.[149] Consequently, the plaintiff had no course of action against the tribe, unable to even litigate the merits of the claim.[150] The *Bassett* copyright infringement suit demonstrates the broad protection of tribal immunity and how it can be asserted in cases that do not relate to tribal lands, yet still result in dismissal of a case.[151]

B. Questions Remain: Can Tribal Immunity Become Even Broader?

Although numerous cases have been decided with respect to tribal sovereign immunity, many of which have resulted in dismissal, there are still unsettled questions surrounding tribal immunity and when it can be properly asserted.[152] In *Lundgren v. Upper Skagit Indian Tribe*, the plaintiff sued the Upper

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[146] *See Kiowa*, 523 U.S. at 754 (finding that even though the Kiowa Tribe defaulted on a promissory note involving off-reservation land, plaintiffs still could not recover because the Tribe asserted immunity from suit); CANBY, *supra* note 35, at 99 (stating that tribal immunity can be properly asserted in actions arising on and off Indian lands).

[147] *See* Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 346 (2d Cir. 2000) (finding that the Tribe could not be sued under federal copyright law because of tribal immunity).

[148] *Id.*

[149] *See id.* at 357–58 (finding that tribes cannot be sued under copyright law because there is no congressional intent to abrogate tribal immunity in copyright infringement actions); s*ee also* 17 U.S.C. ch. 5 (2012) (providing remedies a plaintiff can seek under federal copyright law). The court reasoned that nothing in the federal Copyright Act limited tribal immunity, and there was no tribal waiver of immunity in this case. *See Bassett*, 204 F.3d at 357–58 (concluding no abrogation of tribal immunity in federal copyright statutes).

[150] *Bassett*, 204 F.3d at 357–58. Since the plaintiff could not bring a copyright action against the Tribe because of tribal immunity, the case was dismissed. *See id.* (affirming the lower court's dismissal but due to tribal immunity, as opposed to the lower court's reasoning).

[151] *See id.* (dismissing a lawsuit based on the copyright act, which involved actions of the Tribe independent of tribal lands); *see also* CANBY, *supra* note 35, at 99 (stating that tribal immunity can be properly asserted in commercial or non-commercial activities on or off reservation lands).

[152] *See Kiowa*, 523 U.S. at 754 (dismissing a lawsuit because tribal immunity granted immunity from suit); *Furry*, 685 F.3d at 1237 (finding that tribal sovereign immunity required dismissal of the case). *But see* Lundgren v. Upper Skagit Indian Tribe, 389 P.3d 569, 576 (Wash. 2017) (finding that tribal sovereign immunity could not be properly asserted and therefore did not warrant dismissal in favor of the Upper Skagit Indian Tribe), *vacated*, 138 S. Ct. 1649, 1655 (2018) (vacating and remanding to the Washington State Supreme Court); CANBY, *supra* note 35, at 100–01 (explaining that there is disagreement as to whether a tribe can assert immunity if subpoenaed in a federal criminal case, and

Skagit Tribe seeking to quiet title, claiming adverse possession of property.[153] The land dispute involved a plot of land owned by the plaintiff's family, which invaded upon a portion of land more recently purchased by the Upper Skagit Tribe.[154] The plaintiffs properly asserted that adverse possession had ripened under Washington State law, and therefore the Upper Skagit Tribe could no longer claim property rights to the land in question.[155] The Upper Skagit Tribe filed a motion to dismiss, however, arguing that the Tribe enjoyed tribal sovereign immunity and therefore the court did not have jurisdiction to rule on the adverse possession claim.[156] Although the plaintiffs admitted that there is no clear abrogation of tribal immunity or waiver of immunity, they argued that the court may exercise jurisdiction in this case because jurisdiction is only sought over the land itself, not the Tribe.[157]

The Washington State Supreme Court concluded that the court need not have personal jurisdiction over the Tribe; *in rem* jurisdiction over the land was sufficient for the court to exercise jurisdiction in the case and make a ruling.[158] In other words, the court did not need to exercise jurisdiction over the Tribe in order to make a ruling concerning the disputed land within the state's borders.[159] Following this decision, the Upper Skagit Tribe appealed to the United

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it is unclear whether immunity can be asserted in an *in rem* action concerning tribe-owned land not located on an Indian reservation). A subpoena is an order directing an individual to appear before a judge or tribunal, and one's failure to comply can result in a penalty. *Subpoena*, BLACK'S LAW DICTIONARY (10th ed. 2014). *In rem* jurisdiction is jurisdiction over pieces of property, as opposed to jurisdiction over the persons party to the suit. *In Rem Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[153] *Lundgren*, 389 P.3d at 571. An action to quiet title is a proceeding in which a plaintiff seeks to establish rights to land by compelling an adverse claimant to either file claims against the land imminently or forfeit any possible future claims. *Action to Quiet Title*, BLACK'S LAW DICTIONARY (10th ed. 2014). Adverse possession is a doctrine that allows an individual to assert property rights against a true owner of property when the adverse possessor make use of the land in a "continuous, exclusive, hostile, open, and notorious" way after a requisite period of time. *Adverse Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[154] *Lundgren*, 389 P.3d at 571–72.

[155] *Id.* at 576. In Washington State, adverse possession of land succeeds when there is "(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile" use of the land for ten years. *Id.* at 575. The trial judge stated the plaintiffs successfully made out adverse possession, noting that the facts of the case were "as clear as a case" as the judge had seen. *Id.* at 576.

[156] *Id.* at 572.

[157] *Id.*

[158] *See id.* at 572–73 (finding that the court wasn't seeking to exercise personal jurisdiction over the Tribe; the court was only exercising jurisdiction over the land itself). *In rem* jurisdiction is a court's jurisdiction over pieces of property. *In Rem Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014). The court delved further into the issues presented in this case, including whether the court necessarily had to exercise jurisdiction over the Tribe in order to make a ruling on the land owned by the Tribe. *See Lundgren*, 389 P.3d at 576 (finding that the Tribe was not an essential party in the case because adverse possession ripened, and therefore the court was not exercising jurisdiction over the Tribe).

[159] *See Lundgren*, 389 P.3d at 576 (reasoning that *in rem* jurisdiction was sufficient to make a ruling over the tribal owned land).

State Supreme Court to determine whether a state may exercise jurisdiction over *in rem* property despite tribal sovereign immunity.[160]

At the Supreme Court the parties raised a new argument, which the Court chose not to rule on, resulting in the Court vacating and remanding the case to the Washington State Supreme Court.[161] The new argument centered upon the theory that a tribe may not assert immunity over "immovable property" that exists in the territory of another sovereign, in this case the United States.[162] Although the Supreme Court could have decided the case on this issue, the Court instead chose to remand it, skirting another opportunity to examine the boundaries of tribal sovereign immunity and potentially limit its scope.[163]

C. Outsiders Can Exploit Tribal Immunity Too

Although tribal sovereign immunity is specifically conferred to Native American Indian tribes, it is possible for outsiders to take advantage of tribal immunity and immunity from suit.[164] To best illustrate this, consider facts similar to the Allergan deal, where a pharmaceutical company sold its patents to a Native American Indian tribe.[165]

In patent law, parties may file civil actions against patent owners in order to invalidate a patent, thereby allowing anyone to practice the patent.[166] In

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[160] *See generally Upper Skagit Indian Tribe*, 138 S. Ct. 1649 (reviewing the Washington State Supreme Court decision on appeal).

[161] *See id.* at 1653, 1655 (vacating and remanding the case because new grounds were raised on appeal, which the Court left for consideration by the Washington State Supreme Court).

[162] *See id.* 1653–54 (stating that the plaintiffs sought to have the Court rule in their favor based upon the theory that the Upper Skagit Tribe may not assert immunity over immovable property that is found within the boundaries of another sovereign).

[163] *See generally id.* (providing a case in which the Supreme Court had an opportunity to review the scope of tribal sovereign immunity yet declined to do so); *Kiowa*, 523 U.S. at 760 (reviewing the scope of tribal immunity); *Puyallup Tribe, Inc.*, 433 U.S. at 167–68 (analyzing the boundaries of tribal sovereign immunity).

[164] *See* Davidson, *supra* note 1, at 36 (describing a deal between the St. Regis Mohawk Tribe of New York and Allergan that theoretically would allow Allergan to escape a lawsuit over their patented drug and a way to "gam[e] the system"). The Allergan deal did not actually prevent a lawsuit because the agreement between Allergan and the Tribe occurred after a lawsuit was already filed, but had the agreement been completed before the lawsuit started, it may have prevented the lawsuit altogether. *See* Allergan, Inc., v. Teva Pharm. USA, Inc., No. 2:15-cv-1455-WCB, 2017 WL 4619790, at *4 (E.D. Tex. Oct. 16, 2017) (declining to address the issue of Allergan's agreement with the St. Regis Mohawk Tribe because the agreement occurred after the lawsuit had been filed). For the purposes of this Note, the term "outsiders" refers to individuals who are not part of a Native American Indian tribe.

[165] *See Allergan*, 2017 WL 4619790, at *1 (describing how Allergan sold their patent to the St. Regis Mohawk Tribe presumably in an attempt to invoke sovereign immunity in the pending litigation); Davidson, *supra* note 1, at 36 (describing a scenario in which an outsider made a deal with a tribe to avoid a lawsuit).

[166] *See* John M. Augustyn, *Two Paths to Invalidate a U.S. Patent*, 159 CHI. DAILY L. BULL. 236 (2013) (describing two ways to invalidate a patent, one of which is to file an action in federal court). A patent may also be invalidated through an *inter partes review* (IPR) proceeding at the Patent Trial

light of this, one can imagine a scenario similar to the *Allergan* case in which a pharmaceutical company is aware that a competing company is going to file an action seeking to invalidate a competitor's patents.[167] Because such actions are filed against the patent owner, one might ask what would happen if prior to the patent invalidity lawsuit, the patent owner sold the patents to a Native American Indian tribe, thus making the tribe the owner of the patents.[168] If a third-party then seeks to file a patent invalidity action in federal court, the party would have to file suit against the tribe.[169]

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and Appeal Board, part of the United States Patent and Trademark Office. *See Inter Partes Review*, USPTO, https://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review [http://perma.cc/A7A3-E794] (describing the *inter partes review* trial proceeding). Patents may be found invalid for numerous reasons, such as obviousness or lack of utility. *See* JOHN GLADSTONE MILLS III ET AL., PATENT LAW BASICS § 8.1 (2017) (stating that in order to have a valid patent, the patent must be nonobvious and must demonstrate utility); *see also* Bristol-Myers Squibb Co. v. Teva Pharm., Inc., 752 F.3d 967, 969 (Fed. Cir. 2014) (finding that a patent was invalid because it was obvious); Streck, Inc. v. Research & Diagnostic Sys., Inc., 665 F.3d 1269, 1275 (Fed. Cir. 2012) (stating that Research & Diagnostics filed a claim seeking to invalidate Streck patents). The complexities of patent law are beyond the scope of this Note. *See generally* MILLS *supra* (providing a primer on patent law).

[167] *See Bristol-Myers Squibb*, 752 F.3d at 969 (illustrating a case in which a competing pharmaceutical company seeks to invalidate a competitor's patent); Ron Zapata, *Circuit Reaffirms Invalidity of Pfizer's Norvasc Patent*, LAW360 (June 5, 2007) https://www.law360.com/articles/26192/circuit-reaffirms-invalidity-of-pfizer-s-norvasc-patent [http://perma.cc/LTE8-NKFM] (describing a lawsuit filed against a pharmaceutical company by a competing pharmaceutical company seeking to invalidate a patent). The Allergan case also involved an IPR proceeding at the United States Patent Office, in which the Saint Regis Mohawk Tribe sought dismissal of the IPR citing tribal sovereign immunity. *See generally* St. Regis Mohawk Tribe v. Mylan Pharm., 896 F.3d 1322 (Fed. Cir. 2018) (reviewing the decision of the Patent Trial and Appeal Board's decision to deny dismissal of the IPR following the transfer of Allergan's patents to the Tribe). The United States Court of Appeals for the Federal Circuit determined that because an IPR is an administrative proceeding, tribal immunity cannot be asserted. *See Allergan*, 2017 WL 4619790, at *2 (finding that tribal immunity cannot be used as a means to dismiss an IPR proceeding). Note that although this decision addresses the use of tribal immunity in an IPR proceeding, it does not address whether tribal immunity will result in dismissal of a civil action to invalidate a patent, which is the scenario highlighted in the presented hypothetical. *See id.* (stating that tribal immunity cannot be asserted in an IPR to dismiss an IPR proceeding).

[168] *See Allergan*, 2017 WL 4619790, at *1 (describing how Allergan sold their patent to the St. Regis Mohawk Tribe presumably in an attempt to invoke sovereign immunity in the pending litigation); MILLS, *supra* note 166, § 17.4 (explaining that a patent owner must be party to a lawsuit seeking to invalidate its patent). In such a transaction, one can imagine that the deal between the original patent owner and the tribe is mutually beneficial, giving an exclusive right to the original patent owner to practice the patent, but also giving substantial revenue from the patent to the tribe. *See Allergan*, 2017 WL 4619790, at *1 (describing the *Allergan* deal in which Allergan sold their patents to the Tribe and in return was granted an exclusive right to practice the patents). An exclusive license grants the licensee the right to perform the licensed act and excludes all others from performing the licensed act, including the licensor. *Exclusive License*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[169] *See* MILLS, *supra* note 166, § 17.4 (stating that a patent owner must be part of a lawsuit seeking to render its patent invalid); *see also Kiowa*, 523 U.S. at 754 (finding that although it would be proper to bring suit against the Kiowa Tribe as party to the contract, the Tribe could not be sued because of tribal sovereign immunity); *Bristol-Myers Squibb*, 752 F.3d at 969 (illustrating that a party must sue the patent owner in a claim alleging patent invalidity).

Based on the precedent of tribal sovereign immunity and recent court decisions, one would expect that the tribe would be able to assert tribal immunity in the patent invalidity lawsuit.[170] There is currently no limitation of tribal sovereign immunity concerning civil patent invalidity actions, and presumably the tribe would not waive their immunity in such a case.[171] As a result, the patent action would most likely be dismissed because of tribal immunity.[172] The scenario thus illustrates how the original patent holder, a complete outsider, could leverage tribal sovereign immunity and avoid a lawsuit.[173]

Although the patent case provides a good illustration of how an outsider can take advantage of tribal sovereign immunity, one can imagine other lawsuits in which a similar transaction could provide an escape from litigation.[174] As a simple illustration using property law, a hypothetical situation could consist of an outsider running into a major issue building a new commercial building.[175] For example in *Ware v. Polk*, a builder failed to obtain the requisite

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[170] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (stating that the court will not limit tribal immunity without express intent to do so from Congress); *Kiowa*, 523 U.S. at 760 (finding that Indian tribes are immune from suits that concern off-reservation commercial activity unless there is authorization from Congress or a waiver of immunity); *Bassett*, 204 F.3d at 358 (finding that a tribe could not be sued under federal copyright law having properly asserted tribal sovereign immunity); *see also* CANBY, *supra* note 35, at 99–100 (explaining that tribal sovereign immunity extends to actions in federal and state court concerning commercial or non-commercial activities on or off tribal lands).

[171] *See* 35 U.S.C. § 282 (2012) (listing defenses available in a patent invalidity action, with no language mentioning Native American Indians or tribal immunity); *Kiowa*, 523 U.S. at 760 (stating that a tribe may consent to suit, waiving tribal immunity); John P. Ahlers, *Protecting Your Interests While Contracting with Sovereign Nations,* AHLERS, CRESSMAN, & SLEIGHT (Aug. 23, 2011), https://www.acslawyers.com/protecting-your-interests-while-contracting-with-sovereign-nations/ [http://perma.cc/L4CB-56ZA] (stating that tribal immunity affords strong protection from suit to Indian tribes, and such immunity can only be abrogated by Congress or waived by the tribe itself).

[172] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (explaining that a court will not limit the scope of tribal immunity without express intent from Congress); *Kiowa*, 523 U.S. at 760 (finding proper assertion of tribal immunity in cases concerning off-reservation commercial activity unless there is express authorization from Congress or the tribe waives immunity); *Bassett*, 204 F.3d at 358 (finding that tribal immunity afforded a tribe immunity from suit in an action under federal copyright law).

[173] *See* Davidson, *supra* note 1, at 36 (implying that tribal immunity can be used to effectively avoid a lawsuit). In *Allergan*, the judge expressed doubts that such a tactic would prove effective; however, the issue was not adjudicated, leaving open the door that the strategy could work. *See Allergan*, 2017 WL 4619790, at *3. In such a transaction, one would expect the original patent holder to receive an exclusive right to practice the patent from the tribe so that the original owner could still profit from the patent. *See id.* at *1 (describing that Allergan received an exclusive license to practice the patents from the St. Regis Mohawk Tribe). In the event that a civil action did result in dismissal because of tribal immunity, the filing party could instead file for an IPR proceeding at the USPTO, which is not subject to tribal immunity concerns. *See Mylan*, 896 F.3d at 1326 (finding that tribal immunity cannot be asserted in an IPR proceeding).

[174] *See Kiowa*, 523 U.S. at 754 (finding that tribal sovereign immunity prevented a lawsuit concerning a breach of contract); CANBY, *supra* note 35, at 99–100 (stating that tribal immunity extends to a broad range of commercial activities on or off Indian reservation lands, and it can protect a tribe from monetary damages as well as injunctive and declaratory relief in a variety of circumstances).

[175] *See* Ware v. Polk Cty., 918 So.2d 977, 978 (describing a situation in which an individual began building a structure without first securing the requisite permits, violating the local building codes).

building permits, violating the local building codes.[176] Hypothetically the builder, knowing that the city is going to file a lawsuit against him or her concerning the property, can enter into a favorable deal with a native tribe granting all rights in the property to the tribe.[177] In light of *Bay Mills Indian Community* and *Kiowa*, it seems that the city would have little recourse against the tribe as the new owners of the property, now able to assert tribal sovereign immunity.[178]

III. Fixing a Broken System

Given these troubling cases and seemingly unjust outcomes, it is worthwhile to look back at the foundation of tribal sovereign immunity and why there have been few limitations to it.[179] The doctrine of tribal sovereign immunity was founded upon the idea that unlike the states of the United States, the Native American Indian tribes did not have an opportunity to negotiate the formation of the United States or play any role in the creation of the Union.[180]

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[176] *Id.*

[177] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (finding that tribal immunity may be asserted in causes of action arising off Indian reservations); Davidson, *supra* note 1, at 36 (describing a transaction between an outsider and a tribe, which tried to leverage the tribe's sovereign immunity). The specifics of such a transaction and the relevant law concerning such a transaction are beyond the scope of this Note, but the described hypothetical merely presents a possible scenario in which an individual could sell property prior to a lawsuit in order to escape the lawsuit. *See* CANBY, *supra* note 35, at 100–01 (noting that tribal immunity can extend to commercial actions arising on or off Indian reservation land, however it is unclear whether a state court can assert *in rem* jurisdiction over land outside of an Indian reservation, preventing a tribe from asserting immunity); *see also Upper Skagit Indian Tribe*, 138 S. Ct. at 1654 (suggesting that immovable property located on the territory of another sovereign may not be subject to tribal immunity concerns).

[178] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2038 (stating that tribal immunity can only be abrogated by statute from Congress); *Kiowa*, 523 U.S. at 754 (finding that tribal immunity was properly asserted and therefore warranted dismissal of the case); *see also* CANBY, *supra* note 35, at 100–01 (illustrating the numerous instances in which tribal immunity could be asserted, thus leaving a plaintiff without a remedy).

[179] *See* Furry v. Miccosukee Tribe of Indians, 685 F.3d 1224, 1227 (11th Cir. 2012) (finding that tribal immunity precluded suit against a tribe for possibly over serving a habitual alcohol drinker, leading to the drinker's death); Seneca Tel. Co. v. Miami Tribe, 253 P.3d 53, 57 (Okla. 2011) (finding that a tribe could not be sued despite its clear negligence in causing damage to a company's underground telephone wires); GOLDBERG ET AL., *supra* note 15, at 483 (stating that Congress has rarely acted to limit tribal sovereign immunity, resulting in few limitations on tribal immunity).

[180] *See* MICHAEL L. OBERG, NATIVE AMERICA: A HISTORY 133 (2d. ed. 2018) (describing the Constitutional Convention and lack of discussion concerning the Native American Indians, affirming the idea that the new federal government would regulate Indian affairs); Wood, *supra* note 7, at 1597 (explaining that tribes were not party to the formation of the union, having been absent from the creation of the Constitution); *see also* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031 (2014) (rationalizing tribal immunity by asserting that the tribes did not have an opportunity to partake in the formation of the United States, and therefore the tribes could not have waived their immunity as did the states); Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 756 (1998) (stating that the native tribes were "not at the Constitutional Convention" as were the states, implying that the tribes had no say in the formation of the United States). As is well known in United States history, the Native American Indian tribes were repeatedly treated as lesser-individuals in the formation of the United

Since the native tribes did not have an opportunity to waive sovereignty and join the Union as the states did, courts have held that tribal sovereign immunity exists until waived by the tribes or abrogated by Congress.[181] Because the courts are seemingly unwilling to disturb the precedent of tribal immunity and limit its scope, all focus turns to Congress to pass legislation limiting tribal immunity.[182]

A. A Bipartisan Issue: Congress Needs to Limit Tribal Immunity

In the wake of the media frenzy surrounding the Allergan patent deal with the St. Regis Mohawk Tribe, some members of Congress took notice of the issues surrounding tribal sovereign immunity.[183] Senator Claire McCaskill introduced a bill on October 5, 2017 to specifically limit a tribe's ability to assert sovereign immunity in an *inter partes review* proceeding concerning the validity of a patent.[184] While this bill has yet to become law, introduction of this bill

States, and excluded from discussions concerning the formation of the United States. *See Kiowa*, 523 U.S. at 756 (explaining that because the tribes were not at the Constitutional Convention, the tribes could not relinquish their sovereignty as did the states); OBERG, *supra* (describing the hate that early American settlers had for native Indians, leading to war and significant Indian population decline). Native Americans played a major role in the formation of the United States, and recieved horrendous treatment during the rise of the United States. *See generally* OBERG, *supra* (providing an extensive overview of Native American history).

[181] *See Kiowa*, 523 U.S. at 756 (rationalizing tribal immunity by finding that the Native tribes could not waive their sovereignty as did the states, and therefore the tribes must still retain their sovereignty); CANBY, *supra* note 35, at 107, 109 (explaining that Congress can waive a tribe's immunity, or a tribe can waive its own immunity); Wood, *supra* note 7, at 1597 (stating that tribes were not parties to the formation of the Constitution, and therefore did not waive their sovereignty).

[182] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (stating that only Congress has authority to abrogate tribal immunity); CANBY, *supra* note 35, at 99, 107 (explaining that the Supreme Court reaffirmed the doctrine of tribal immunity in *Bay Mills Indian Community*, and Congress can act to limit a tribe's ability to assert immunity).

[183] *See* S. 1948, 115th Cong. § 1 (2017) (proposing a bill to abrogate tribal immunity in patent claims); Davidson, *supra* note 1, at 36 (illustrating that a popular news magazine took notice of the Allergan transaction); Thomas, *supra* note 1 (showing that a prominent newspaper covered the Allergan patent deal).

[184] *See* S. 1948, 115th Cong. § 1 (proposing a bill to limit tribal sovereign immunity in certain patent claims). The bill specifically abrogates a tribe's ability to assert sovereign immunity as a defense to IPR conducted under 35 U.S.C. chapter 31. *See* 35 U.S.C. §§ 311–319 (2012) (providing the relevant law concerning IPR, which Senator McCaskill's proposed bill seeks to amend by prohibiting assertions of tribal immunity); S. 1948, 115th Cong. § 1 (proposing a bill that would no longer allow a tribe to assert sovereign immunity). Because the bill extends to proceedings under 35 U.S.C. chapter 31, which allows for an appeal to federal court, the bill would likely also limit the ability of a tribe to assert immunity in federal court claims. *See* 35 U.S.C. § 141 (stating that a party unsatisfied with the decision of the Patent Trial and Appeal Board may appeal to federal court). Senator Claire McCaskill is a democratic senator who has represented Missouri since 2006. *About Claire*, UNITED STATES SENATOR CLAIRE MCCASKILL (Mar. 6, 2018), https://www.mccaskill.senate.gov/about-claire [http://perma.cc/PY8B-KJHS] (providing biographical information on Sen. Claire McCaskill).

in the Senate demonstrates that Congress has taken notice of the injustice that can be caused by tribal sovereign immunity.[185]

A bill only seeking to limit tribal sovereign immunity in patent cases, however, is not enough.[186] Courts throughout the United States have repeatedly stated that there is a need for change in the law with respect to tribal immunity, calling on Congress to narrow its scope.[187] Unfortunately, Congress has yet to heed the advice of the courts, allowing tribal sovereign immunity to continue to serve as a powerful immunity from suit.[188] In following the words of numerous courts, it would be in the interest of the United States judicial system for Congress to enact legislation severely limiting cases in which tribal sovereign immunity may be asserted, particularly tort causes of action that arise on or off Indian lands.[189] Where non-tribe members are involved, the United

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[185] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2028 (finding that tribal immunity protected the tribe in a lawsuit involving off-reservation gaming); *Kiowa*, 523 U.S. at 754 (finding that tribal immunity granted immunity from suit in an action for breach of contract); *Furry*, 685 F.3d at 1226 (highlighting a case in which a plaintiff sought relief for events that occurred on Indian owned land); Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 346 (2d Cir. 2000) (finding that the Tribe could not be sued under copyright law because of tribal immunity); S. 1948, 115th Cong. § 1 (providing the text of the bill introduced in the Senate to limit tribal immunity); *McCaskill to PhRMA: Are You Comfortable with Allergan's Action with Saint Regis Mohawk Tribe?*, UNITED STATES SENATOR CLAIRE MCCASKILL (Oct. 3, 2017), https://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-to-phrma-are-you-comfortable-with-allergans-action-with-saint-regis-mohawk-tribe [http://perma.cc/XH3H-DMWR] (describing the Allergan patent deal as a loophole and something that should be made illegal).

[186] *See* S. 1948, 115th Cong. § 1 (providing the text of a bill proposed in the United States Senate to limit tribal immunity patent actions arising under 35 U.S.C. chapter 31); CANBY, *supra* note 35, at 99 (describing that tribal immunity can be used to prevent a lawsuit arising out of commercial and governmental activities that occur both on and off Indian reservations, showing that the scope of tribal immunity extends beyond just patent actions).

[187] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2050–51 (5-4 decision) (Thomas, J., dissenting) (stating that the extension of tribal sovereign immunity to off-reservation activities is unfounded, resulting in inequities under the law); *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting) (stating that the current precedent of tribal sovereign immunity allows Native American tribes to escape liability where others would be found liable). In his dissent in *Kiowa*, Justice Stevens highlights the issue of tort actions, where a tort victim will be unable to recover damages when tribal immunity is asserted. *See Kiowa*, 523 U.S. at 766 (noting that tort victims are not able to negotiate in such where tribal immunity is asserted); *see also Furry*, 685 F.3d at 1236–37 (stating that the current boundaries of tribal sovereign immunity are "anachronistic," yet the law of tribal immunity will remain as such until Congress passes legislation to limit it).

[188] *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012) (IGRA) (illustrating a significant limitation to tribal sovereign immunity enacted by Congress, but only in the context of certain commercial gaming activity); S. 1948, 115th Cong. § 1 (illustrating a recent bill proposal in the Senate to limit tribal immunity, but only to patent claims); GOLDBERG ET AL., *supra* note 15, at 483 (finding that Congress has rarely acted to limit tribal immunity); Davidson, *supra* note 1, at 36 (showing that without some limitation of tribal immunity from Congress, individuals can continue to "gam[e] the system" by exploiting tribal immunity).

[189] *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2050–51 (5-4 decision) (Thomas, J., dissenting) (finding that tribal sovereign immunity created injustice under the law); *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting) (stating that tribal sovereign immunity can impose significant harm to injured tort

States courts must be able to exercise jurisdiction in order to adjudicate claims.[190] Congress should therefore exercise its authority to enact a new statute that significantly narrows the scope of tribal sovereign immunity.[191] Such a statute could read as follows:

> Notwithstanding any provision of law to the contrary, an Indian tribe may not assert sovereign immunity as a defense in any action arising under the laws of the United States, or any State thereof, involving an individual who is not legally recognized as a member of said Indian tribe.[192]

Although there remain arguments in favor of tribal immunity for use in limited circumstances such as when civil actions arise amongst members of Indian tribes, in the modern world tribal immunity no longer serves a purpose and instead acts to obstruct justice.[193] No doubt the Native American Indian tribes have had a long and arduous history with the United States, but today, many tribes are economic powerhouses running complex million dollar commercial businesses.[194] Without new legislation from Congress limiting the

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victims); *Furry*, 685 F.3d at 1236–37 (stating that the doctrine of tribal immunity today is "anachronistic"); *Seneca*, 253 P.3d at 57 (illustrating the inequity of tribal immunity, barring recovery of an injured plaintiff despite clear culpability of a tribe).

[190] *See Furry*, 685 F.3d at 1237 (illustrating a case where tribal immunity resulted in dismissal of a wrongful death action largely, yet the court noted that on the facts, the Tribe appeared culpable); *Seneca*, 253 P.3d at 55–56 (illustrating a case where the court determined the Tribe was negligent, but the court could not render a judgment against the Tribe because of tribal immunity).

[191] *See* CANBY, *supra* note 35, at 107 (stating that Congress has the authority to waive tribal sovereign immunity, but any such waiver must be clearly expressed); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2038 (stating that tribal immunity can only be limited by statute from Congress); *Kiowa*, 523 U.S. at 754 (finding that tribal immunity is a matter of federal law and therefore only Congress may change the scope of tribal immunity).

[192] *See* CANBY, *supra* note 35, at 107 (explaining that Congress can waive tribal sovereign immunity with express, unambiguous intent).

[193] *Compare* Florey, *supra* note 126, at 826 (stating that there are justifications for tribal immunity), *and* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1109 (explaining that tribal immunity provides an important protection for Native American Indian tribes that are often poverty-stricken and seeking to protect their tribal communities), *with Bay Mills Indian Cmty.*, 134 S. Ct. at 2031 (rationalizing tribal immunity by asserting that the tribes did not have an opportunity to partake in the formation of the United States, and therefore the tribes could not have waived their immunity as did the states), *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting) (arguing that tribal immunity creates unjust outcomes), *and Furry*, 685 F.3d at 1236–37 (explaining that the current application of tribal immunity is not appropriate in the modern world).

[194] *See* Nick Sortal, *Seminole Hard Rock Collects $579 Million-More Than Eight Racetrack Casinos Combined*, MIAMI HERALD (Aug. 11, 2017) http://www.miamiherald.com/entertainment/article166085722.html [http://perma.cc/XH5X-KBEA] (finding that the Seminole Hard Rock Casino, owned by the Seminole Tribe, made $579 million for the 2016 fiscal year); *Foxwoods Resort Casino Report May 2017 Slot Revenue*, BUSINESS WIRE (Apr. 26, 2018), https://www.businesswire.com/news/home/20170615005675/en/Foxwoods-Resort-Casino-Reports-2017-Slot-Revenue [http://perma.cc/4HVY-8SSU] (stating that the Foxwoods Casino, owned by the Mashantucket Pequot Tribe, brought in $38.1

scope of tribal immunity, tribes that are otherwise liable will continue to escape judgment leaving injured parties without a remedy.[195]

B. Some Good News: "Arm of the Tribe" Doctrine and Stopping Outsider Deals

The issue raised regarding outsider deals to leverage a tribe's immunity is concerning; however, some jurisdictions have started to place limits on assertions of tribal immunity that significantly reduce the possibility of such a deal being successful.[196] Some states have adopted the "arm of the tribe" doctrine, limiting when a tribe may properly assert tribal sovereign immunity.[197] In general, the arm of the tribe doctrine is a test used to determine whether a corporate affiliate or subagent of a Native American tribe is entitled to sovereign immunity as part of the tribe.[198]

Because "arm of the tribe" doctrines have arisen out of state courts, the precise factors used to determine whether a corporate affiliate is an arm of the tribe varies by state.[199] Though the tests differ, the factors used to determine whether an entity is an arm of the tribe tend to focus on the method of creation

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million on slot revenue alone for the month of May 2017). *See generally* OBERG, *supra* note 180, at 133 (describing the painful history of the Native Americans throughout the history of the United States).

[195] *See Furry*, 685 F.3d at 1237 (implying that tribal immunity can leave a tort victim without a remedy despite the Tribe being a sophisticated business enterprise); *Seneca*, 253 P.3d at 55–56 (stating that tribal sovereign immunity left a party without remedy in a negligence action against a tribe); *McCaskill to PhRMA: Are You Comfortable with Allergan's Action with Saint Regis Mohawk Tribe?*, *supra* note 185 (describing a need for congressional action as tribal immunity can create an "absurd loophole[]").

[196] *See* People *ex rel.* Owen v. Miami Nation Enter., 386 P.3d 357, 361 (Cal. 2016) (stating that in order to assert tribal sovereign immunity, the tribe-owned business must be an "arm of the tribe"); Sue/Perior Concrete & Paving, Inc. v. Lewiston Gold Course Corp., 25 N.E.3d 928, 929 (N.Y. 2014) (denying an assertion of tribal sovereign immunity because the business was not an "arm of the tribe"); CANBY, *supra* note 35, at 100 (implying that when a tribal business is not found to be an "arm of the tribe," the business may not assert tribal immunity as a defense).

[197] *See* Dixon v. Picopa Const. Co., 772 P.2d 1104, 1107 (Ariz. 1989) (utilizing an arm of the tribe analysis in Arizona); *Owen*, 386 P.3d at 366 (using the arm of the tribe doctrine in California); *Sue/Perior Concrete*, 25 N.E.3d at 935 (using an arm of the tribe test in New York); Brian L. Pierson, *The Precarious Sovereign Immunity of Tribal Business Corporations*, THE FED. L., Apr. 2015, at 58, 59 (explaining different jurisdictional approaches to the "arm of the tribe" doctrine).

[198] *See* CONFERENCE OF WESTERN ATT'YS GEN., *supra* note 23, § 7.3 (explaining that some courts will consider whether an entity is an arm of the tribe such that the entity can assert tribal immunity); *see also Owen*, 386 P.3d at 366 (stating that various jurisdictions have adopted arm of the tribe tests to determine when a subagent of a Native tribe is entitled to sovereign immunity); *Sue/Perior Concrete*, 25 N.E.3d at 935 (using an arm of the tribe test to determine whether a subentity of an Indian tribe is entitled to sovereign immunity).

[199] *See Owen*, 386 P.3d at 365 (using a five-factor arm of the tribe test); *Sue/Perior Concrete*, 25 N.E.3d at 935 (applying a nine-factor test to determine if an entity was an arm of the tribe); Pierson, *supra* note 197, at 59 (explaining that although some jurisdictions use the "arm of the tribe" doctrine, the factors used by a court to determine "arm" status differ by jurisdiction).

of the entity, the entity's purpose, the tribe's control over the entity, and the financial relationship between the entity and the tribe.[200]

The arm of the tribe doctrine can thus prevent unreasonable agreements between private entities and Native tribes where the entity seems to do business with the tribe solely for the purpose of asserting the tribe's sovereign immunity.[201] For example, an outsider would not simply be able to sell part of a business to a Native tribe and gain the right to assert sovereign immunity.[202] Rather, the tribe would most likely have to own the entirety of the business as well as establish considerable financial connections between the tribe and the business.[203] Although the arm of the tribe doctrine does not limit assertions of tribal immunity in all cases, it is one significant limitation and an important means to protect against abuses of tribal sovereign immunity.[204]

C. Another Possible Solution: Public Policy

Another possible solution to prevent outsider deals with tribes seeking to take advantage of tribal immunity was alluded to by the court in the *Allergan*

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[200] *See Owen,* 386 P.3d at 365 (stating that it is important to consider the scope of the relationship between the tribe and the entity, including the entity's purpose and financial tie to the tribe); *Sue/Perior Concrete*, 25 N.E.3d at 932 (stating that both financial factors and non-financial factors should be considered in using the arm of the tribe test); Pierson, *supra* note 197, at 59 (describing similar factors considered by a court in exercising the arm of the tribe doctrine, yet explaining that the precise factors can differ).

[201] *Sue/Perior Concrete*, 25 N.E.3d at 937 (finding that a golf course owned by an Indian tribe but operated as a separate entity did not qualify for sovereign immunity under the "arm of the tribe" test in a foreclosure lawsuit); Pierson, *supra* note 197, at 59 (stating that tribal entities may not always be able to assert tribal immunity based upon how tenuous a connection the entity has to the actual tribe).

[202] *See Sue/Perior Concrete*, 25 N.E.3d at 935, 937 (illustrating that more than a mere monetary interest in a company is required to assert tribal immunity). Given the factors considered in applying arm of the tribe doctrines, merely selling a part of a business would not seem to satisfy enough factors, and therefore the doctrine would prevent a party in such a case from asserting sovereign immunity as if it were a tribe. *See id.* at 932 (stating that both financial and nonfinancial factors are important in determining whether an entity is considered a part of a tribe for the purposes of sovereign immunity); Pierson, *supra* note 197, at 59 (explaining that tribal sovereign immunity cannot always be asserted, depending on the connection between the business entity and the tribe).

[203] *See Owen,* 386 P.3d at 365–66 (finding that a relationship between a tribe and a business does not automatically grant the business the ability to assert sovereign immunity; to do so, the business must be considered an arm of the tribe); *Sue/Perior Concrete*, 25 N.E.3d at 932 (finding that an entity must have sufficient connections to the tribe in order to assert immunity as if it were the tribe).

[204] *See Owen*, 386 P.3d at 365 (applying a five-factor test to determine whether a tribe-affiliated entity can assert tribal immunity); *Sue/Perior Concrete*, 25 N.E.3d at 935 (using an arm of the tribe test to determine whether a tribe-affiliated entity is entitled to assert sovereign immunity); CONFERENCE OF WESTERN ATT'YS GEN., *supra* note 23, § 7.3 (stating that the arm of the tribe doctrine is used in some jurisdictions to determine whether an entity is can assert tribal immunity, and failure to be classified as an "arm of the tribe" will bar the entity from claiming immunity).

case.[205] There, the court implied that the Allergan deal is contrary to public policy.[206] If an agreement is contrary to public policy, a court can invalidate the agreement, or render any terms that are contrary to public policy invalid.[207] The Restatement (Second) of Contracts provides that an agreement may be unenforceable as against public policy if the interests of the public are outweighed by the interests furthered in enforcing the agreement and the harm that would result if the agreement was found to be unenforceable.[208]

In *Allergan*, the court briefly stated that the agreement between Allergan and the St. Regis Mohawk Tribe was an attempt to monetize the Tribe's sovereign immunity, essentially renting immunity solely for the purpose of avoiding litigation.[209] Because the underlying purpose of the transaction between the parties is seemingly to avoid legal responsibility, the transaction could be classified as contrary to public policy.[210] That is, making an agreement purely for the purpose of avoiding legal action would be contrary to the public policy of having an effective judicial system in which individuals can seek a remedy.[211] If a court were to determine that the transaction was contrary to public policy and therefore unenforceable, the transaction could be reversed, preventing the private party from asserting tribal sovereign immunity as a defense.[212] Alt-

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[205] *See* Allergan, Inc. v. Teva Pharm. USA, Inc., No. 2:15-cv-1455-WCB, 2017 WL 4619790, at *3 (E.D. Tex. Oct. 16, 2017) (stating that the deal between Allergan and the St. Regis Mohawk Tribe may be against public policy and therefore void).

[206] *Id.*

[207] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (stating that a court may invalidate provisions of an agreement when enforcing the provisions would be contrary to public policy); Mark Petit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 298 (1999) (explaining that a court can declare a contract or a provision of a contract invalid because it is against public policy); *see also* Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) (stating that an agreement is not enforceable if enforcing it runs contrary to the interests of the public); Lang McLaughery Spera Real Estate, LLC. v. Hinsdale, 35 A.3d 100, 109 (Vt. 2011) (refusing to enforce certain provisions of a contract because the provisions were against public policy).

[208] RESTATEMENT (SECOND) OF CONTRACTS § 178. The *Restatement (Second) of Contracts* provides other factors that should also be weighed when determining if a court should find an agreement unenforceable, including whether the parties to the agreement engaged in any misconduct. *Id.*

[209] *See Allergan*, 2017 WL 4619790, at *3 (stating that Allergan's deal appears to be an attempt to rent the Tribe's sovereign immunity as a means to escape review by the Patent Trial and Appeal Board).

[210] *See Lang*, 35 A.3d at 109 (finding that a provision of a contract was unenforceable because enforcing the provision would be contrary to public policy); *Allergan*, 2017 WL 4619790, at *3 (stating that the underlying purpose of the Allergan transaction was seemingly to avoid any legal responsibility).

[211] *See* Hollingsworth v. Perry, 570 U.S. 693, 714–15 (2013) (stating that the role of the judiciary is to provide relief to individuals with personal and particularized grievances); Neary v. Regents of Univ. of Cal., 834 P.2d 119, 124 (Cal. 1992) (stating that the purpose of the judicial system is to resolve disputes).

[212] *See Allergan*, 2017 WL 4619790, at *3 (implying that if the Allergan deal was found to be contrary to public policy, then any attempt by Allergan to assert tribal immunity in a lawsuit over the patents would not succeed). If an agreement as in the *Allergan* case was contrary to public policy, then a court could find the agreement unenforceable, revert ownership of the property to the original owner, and strip the party of any means to assert tribal immunity. *See id*; RESTATEMENT (SECOND) OF

hough it may often times be difficult Reo determine the underlying purpose of an agreement, finding an agreement unenforceable on grounds of public policy provides another means by which a court can prevent outsiders from asserting tribal immunity.[213]

If outsider deals continue to be used as a means to exploit tribal immunity, courts should feel comfortable invalidating these deals as a matter of public policy.[214] Courts should not hesitate to determine that the interest to the public in compensating injured parties outweighs the interest in enforcing a mutually agreed upon contract that exploits tribal immunity.[215]

CONCLUSION

The United States Supreme Court created the doctrine of tribal sovereign immunity in which a Native Indian tribe can assert immunity from suit. Although tribal immunity was created by the Supreme Court, the Court has repeatedly maintained that only Congress has the power to limit tribal immunity by enacting statutes. Although Congress has limited tribal immunity in certain circumstances, most notably in criminal cases, there remain numerous instances in which tribal immunity may be properly asserted, requiring that the claim against the tribe be dismissed even if the tribe is culpable.

Allowing tribal sovereign immunity to exist in its current state has negatively impacted the United States judicial system by relieving tribes from liability even when the tribe would otherwise be liable. Consequently, injured parties are left without a remedy or any recourse in the United States judicial system.

CONTRACTS § 178 (stating that an agreement may be unenforceable if the agreement runs contrary to public policy).

[213] *See Rumery*, 480 U.S. at 392 (finding that an agreement may be unenforceable when it runs contrary to public policy but failing to find that the agreement at issue was against public policy); *Lang*, 35 A.3d at 109 (refusing to enforce a provision in a contract because the provision was against public policy); *Allergan*, 2017 WL 4619790, at *3 (implying that a transaction between a non-tribal entity and a tribe as a means to assert tribal immunity would be contrary to public policy); RICHARD A. LORD, WILLISTON ON CONTRACTS § 12.1 (4th ed. 1990 & Supp. 2017) (stating that courts may invalidate contracts as against public policy, but there is uncertainty as to what constitutes an agreement against public policy).

[214] *See* RESTATEMENT (SECOND) OF CONTRACTS, § 178 (stating that a contract may be invalid as a matter of public policy); Petit, *supra* note 207, at 298 (stating that courts can invalidate contracts if the contracts are contrary to public policy).

[215] *See* Mayor & City Council v. Clark, 944 A.2d 1122, 1126 (Md. 2008) (asserting that courts are often reluctant to invalidate voluntary contracts); Miller v. Cotter, 863 N.E.2d 537, 547 (Mass. 2007) (stating that courts are often hesitant to invalidate contracts because of public policy); Van Voris v. Team Chop Shop, LLC, 402 S.W.3d 915, 922 (Tex. App. 2013) (stating that when determining if a contract is unenforceable as against public policy, a court must weigh the interests of enforcing the contract against the interests of the public); *Lang*, 35 A.3d at 109 (finding that public policy weighed in favor of finding the contract invalid); LORD, *supra* note 213, § 12.2 (explaining that it is unclear what types of agreements are against public policy, and courts can find new agreements to be against public policy when warranted).

Moreover, non-tribe members are capable of exploiting tribal sovereign immunity. By entering into favorable property transactions with a tribe, an individual can effectively rent a tribe's immunity and avoid a lawsuit. In order to protect injured parties and close this loophole in the United States judicial system, Congress needs to enact new legislation limiting tribal sovereign immunity.

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