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INDIAN COUNTRY'S BORDERS: TERRITORIALITY, IMMUNITY, AND THE CONSTRUCTION OF TRIBAL SOVEREIGNTY

KATHERINE J. FLOREY*

Abstract: This Article explores the consequences of an anomaly in the Supreme Court's Indian law jurisprudence. In the past few decades, the Court has sharply limited the regulatory powers of tribal governments and the jurisdiction of tribal courts while leaving intact the sovereign immunity that tribes have traditionally enjoyed. The result has been that tribes can avoid the effects of otherwise-applicable state and federal law, while at the same time they lack any affirmative powers to regulate events within their territory. This Article argues that this state of affairs is untenable. This Article first suggests that for tribes to exist as effective governments, their sovereign authority must have a territorial component. The Article then discusses the undesirable consequences of tribal sovereign immunity, including a lack of government accountability, increased uncertainty about the law's reach, and inadequate compensation for tort victims. Ultimately, this Article concludes that, although it may be tempting for tribal advocates to embrace tribal sovereign immunity when the Supreme Court seems disinclined to preserve other elements of tribal sovereignty, relying on immunity as the cornerstone of sovereignty would be a mistake. Instead, tribes should take steps to strengthen the territorial component of their sovereign status.

INTRODUCTION

This Article takes as its starting point two commonly told narratives about outsiders in Indian country. The first—perhaps the most familiar—is the story of the blameless tourist who visits a tribal casino and, as a result of the casino's negligent conduct, suffers a terrible injury. Facing lost work time and steep medical bills, she seeks to sue the casino

* © 2010, Katherine J. Florey, Acting Professor of Law, University of California, Davis, School of Law. I would like to thank Afra Afsharipour, Chris Elmendorf, John Patrick Hunt, John Jeffries, Courtney Joslin, Shannon McCormack, and participants in the 2009 Junior Faculty Federal Courts Workshop for helpful suggestions, and David Finkelstein and Nichole Rapier for superb research assistance.

for redress. To her astonishment, however, she learns that the casino is shielded by the doctrine of tribal sovereign immunity. Basic tort protections are entirely unavailable. Instead, she is left with only a makeshift proceeding before an unfriendly tribal court or, perhaps, no remedy at all.¹

The second story, though less frequently heard by the general public, is well known to those who live and work in Indian country. This is the story of the non-Indian troublemaker—someone who is not a member of the tribe, but has family members or property on the reservation, or has simply found the reservation a convenient place to engage in criminal activities.² This person poses a serious threat to the safety and security of tribe members. He might sell methamphetamine, drive while intoxicated, assault tribal police officers—perhaps all of the above.³ Even though all of these activities take place on tribal land, the tribe is powerless because it lacks criminal jurisdiction over nonmembers, and federal authorities may be uninterested in filling the void.⁴ Thus, the tribe has little choice but to allow its territory to be used as a haven for criminal activity.

These stories—both told repeatedly in the media, in courts, and at congressional hearings—encapsulate the perplexities of modern tribal sovereignty.⁵ Of course, as Justice Marshall's famously contradictory description of tribes as "domestic dependent nations" might suggest,⁶ the precise definition of the sovereignty tribes enjoy within the United States has long been an uneasy matter. In the past few decades, however, the contradictions surrounding the meaning of tribal sovereignty have become more acute.

¹ See *infra* notes 282–297 and accompanying text.

² See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978) (describing non-Indians arrested on tribal territory); see also Gary Fields, *Tattered Justice: On U.S. Indian Reservations, Criminals Slip Through Gaps—Limited Legal Powers Hobble Tribal Nations; Feds Take Few Cases*, WALL ST. J., June 12, 2007, at A1.

³ See, e.g., *Oliphant*, 435 U.S. at 194 (noting the arrest of one non-Indian petitioner for assaulting a police officer and of another for engaging in a high-speed car race).

⁴ See Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 691 (2009) (discussing plight of tribes relying on federal prosecutors for crime control and noting that "U.S. Attorneys decline to prosecute approximately 85% of felony cases referred to them by tribal prosecutors").

⁵ See Andrea M. Scielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 TULSA L. REV. 661, 731–33 (2002) (discussing the testimony at congressional hearings); *infra* notes 283–301 and accompanying text (discussing media accounts of lawsuits involving Indian reservations).

⁶ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (suggesting that tribes "may, more correctly, perhaps, be denominated domestic dependent nations").

On the one hand, the U.S. Supreme Court has systematically stripped tribes of the one attribute that is—perhaps above all else—associated with sovereign status: the power to assert control over events that take place on one's own territory.⁷ The territorial element of tribal sovereignty has never been simple, largely because courts have long employed a strikingly narrow conception of what constitutes tribal territory.⁸ For tribes, the power to regulate has long been based not on traditional geopolitical boundaries but on the tribal ownership status of particular parcels of land—a highly unorthodox way to conceive of sovereign power over territory.⁹ Moreover, tribal land holdings themselves have, over the years, been reduced from their historical levels by ill-conceived government programs and financial pressures.¹⁰

But even setting aside these long-standing problems, tribes' ability to govern their own territory has come under renewed assault in the past few decades. Increasingly, the Court has shifted the basis of tribal powers from tribal land ownership to tribal membership, meaning that tribes effectively lack power to regulate the activities of nonmembers—including nonmembers who live on the reservation and strangers within tribal territory—even when those activities take place on tribal land.¹¹ Thus, tribes are largely unable to perform the most basic functions of government: policing their borders and keeping their citizens safe from harm. The safety and security of tribal lands are instead at the mercy of federal and state courts and police.

This judicial erosion of tribal sovereignty in recent years is a well-known development, and the shift it represents in the Supreme Court's jurisprudence has been much debated and criticized.¹² Somewhat less discussed, however, is the increasing importance of a parallel facet of tribal sovereignty: the immunity tribes enjoy from suit in state and federal courts. In sharp contrast to the aggressive curbs it has placed on tribal territorial powers, the Court has left the traditionally robust doc-

⁷ See *Oliphant*, 435 U.S. at 195.

⁸ See *infra* notes 44–68 and accompanying text.

⁹ See *infra* notes 44–68 and accompanying text. To conceptualize the plight of tribes, imagine a world in which state laws—from prohibitions on murder to environmental regulations—applied only within the boundaries of state parks and government buildings and could be freely ignored by citizens on privately owned land.

¹⁰ See *infra* notes 116–131 and accompanying text.

¹¹ See Philip Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999).

¹² See, e.g., *id.*; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

trine of tribal immunity more or less intact,¹³ and Congress has likewise rejected calls to use its plenary power over Indian affairs to narrow the doctrine.¹⁴ As a result, tribal immunity is one of the few traditional sovereign prerogatives that tribes retain with full force.

To put it this way, however, understates the importance immunity has to modern tribal sovereignty. That is, though tribal immunity has a long history, it has evolved from being a peripheral feature of tribal sovereignty to a central one—perhaps *the* central one when it comes to tribal relationships with nonmembers. This is true in part because tribal gaming and other enterprises, which often share in the tribe's immunity, have expanded into multimillion-dollar operations with the usual legal problems of large businesses, making tribal immunity a more potent and widely useful tool than it has ever been.¹⁵ Perhaps an even more important reason for the increasing importance of tribal immunity, however, is the shrinking of tribal territorial powers. As tribes' ability to exercise sovereign control in other arenas has decreased, the natural tendency has been for tribes to assert their sovereign immunity as forcefully as possible.¹⁶ Because tribal immunity essentially permits tribes to avoid suit entirely if they so choose, this immunity can be useful leverage in transactions over which tribes normally have little regulatory power. Further, there are relatively few constraints on tribes' ability to make broad assertions of the immunity they possess.¹⁷ Where states and other sovereigns may be subject to political pressure to waive

¹³ See *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1988).

¹⁴ See *id.*; Seielstad, *supra* note 5, at 666 (describing failure of legislation that would have limited tribal immunity).

¹⁵ See, e.g., *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (“[T]ribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.”).

¹⁶ *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056 (N.D. Okla. 2007) (providing an example of this phenomenon).

¹⁷ See *Cook*, 548 F.3d at 725. It has sometimes been argued that market pressures also serve to limit contractual assertions of immunity by any sovereign, because contracting partners will often demand a waiver of sovereign immunity as a condition of entering into a deal; this may be true to some extent in the tribal context as well. See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.02[2] (rev. ed. 2005) (“Tribes, like governments generally, have used limited waivers of tribal immunity as means of stimulating economic development.”). In other circumstances, however, those entering into contracts with tribes may be less familiar with the contours of tribal sovereign immunity—particularly when the immunity status of a tribal corporation is unclear—and are therefore less likely to demand complete and effective waivers. See Patrice H. Kunesch, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 404 (2009) (noting that, in the tribal context, “the rules of sovereign immunity can be difficult to discern because sovereign entities necessarily must act through individual officers and agents”).

sovereign immunity to permit at least some suits by their own citizens, tribal immunity may be most useful when it is asserted against outsiders who have little political influence with the tribe.¹⁸ Moreover, state and federal courts have sometimes been sympathetic to broad assertions of tribal sovereign immunity.¹⁹ Indeed, for judges who would prefer not to intervene in delicate issues of state-tribal relations or to decide complicated questions of tribal law, tribal immunity may be a welcome avoidance tactic.²⁰

These two directions in the judicial approach to tribal power, though much remarked-upon individually, have rarely been considered together.²¹ This Article argues that the trends of reduced territoriality and increased immunity are best understood in tandem, because both have served to change the underlying meaning of tribal sovereignty. The shift from territoriality to immunity has resulted in a construction of tribal sovereignty that is almost entirely negative—conferring the ability to avoid the effects of otherwise-applicable state and federal law, while at the same time denying affirmative powers to regulate events within tribal territory. Furthermore, the changing role of tribal territoriality has changed perceptions of tribal immunity (and vice versa). For example, the diminution of tribal sovereignty in its more traditionally territorial aspects has increased the controversy surrounding the assertion of tribal immunity.²² Because nonmembers who deal with tribes may see few outward indications that tribes possess the traditional trappings of

¹⁸ For example, to the extent tribal immunity is used as a forum-shifting device by the tribe to ensure that disputes may be heard in tribal court, it is most useful in suits involving nonmembers, over whom the tribal courts would normally otherwise lack jurisdiction. Tribes may also acutely desire to avoid suits by nonmembers, who may have more resources to invest in litigation than tribe members and who may be less amenable to non-judicial forms of redress.

¹⁹ See *Cook*, 548 F.3d at 725–26 (citing cases).

²⁰ For one example of this phenomenon, see *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002) (dismissing a difficult case involving the legality of state-tribal gaming compacts in light of the importance of respecting tribal immunity).

²¹ See, e.g., Scielstad, *supra* note 5, at 704 (“While a full analysis of this incongruence in the Court’s jurisprudence [between its treatment of immunity and other aspects of tribal sovereignty] goes beyond the scope of this Article, the Court’s preservation of the doctrine of tribal immunity is noteworthy.”). But see Catherine Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 137 (2004) (“One of the ironies of federal Indian law is that the Supreme Court has stripped tribes of many of the positive aspects of governmental authority . . . while leaving intact a negative power: the power to avoid liability through the assertion of sovereign immunity from suit.”).

²² For a discussion of the public controversy that often attends assertions of tribal immunity, see *infra* notes 264–322 and accompanying text.

sovereignty, they are likely to be unpleasantly surprised at the knowledge that tribes nonetheless enjoy immunity from suit.

On one level, it is logical for tribal advocates to embrace tribal sovereign immunity in an era when the Court seems disinclined to preserve other elements of tribal sovereignty. In some circumstances, it is almost certainly desirable. At the same time, reliance on immunity as the cornerstone of sovereignty may be perilous for tribes. This Article argues that the shift from territory to immunity is fundamentally undesirable, for tribes as well as for nonmembers who have dealings with them. First, immunity is not a substitute for territorial power. Although immunity may protect tribes in certain dealings with nonmembers, it does not allow tribes to maintain fully effective governments or to prescribe the law that will apply to their communities. Moreover, territorial power represents a stand in favor of tribal autonomy and against the colonialist and assimilationist policies that have, throughout U.S. history, attempted to separate tribes from their land.²³ To relinquish all territorial aspects of tribal power would be, in many ways, to abandon the most important facets of tribal sovereignty.

Second, excessive reliance on sovereign immunity has disadvantages in itself. Tribal immunity, though exceptional in certain ways, is, at least to some extent, subject to the many criticisms that have been leveled against sovereign immunity in other contexts. For example, it diminishes accountability, fosters uncertainty about the law's reach, and inadequately compensates genuinely injured tort victims.²⁴

In most ways, the fact that tribes have come to rely increasingly on immunity is a matter of necessity, not choice. Tribes did not decide to cash in their traditional sovereign prerogatives in exchange for preservation of their sovereign immunity; they have simply made the best of a bad hand. Recent cases give not the slightest indication that the Supreme Court would be willing to reconsider its membership-based conception of tribal sovereignty to permit tribes more territorial control.²⁵ Thus, the current territoriality/immunity balance is, as a matter of doctrine, likely to remain with tribes at least for the immediate future.

Nonetheless, this Article argues that there are ways in which tribes can strengthen the territorial component of their sovereign status in

²³ Katherine Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1635–37 (2006) (discussing the policies of allotment and termination).

²⁴ See *infra* notes 268–272 and accompanying text.

²⁵ See *e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

ways compatible with existing law. These steps, many of them quite modest, include everything from devices that call greater attention to the physical borders of reservations to increased use of tribes' power to expel undesirables from tribal lands through banishment or exclusion orders. For example, tribes can strengthen territorial sovereignty by using sovereign immunity as a bargaining chip to secure tribal jurisdiction over on-reservation disputes. Increased emphasis on tribal control of tribal territory could, in turn, have the beneficial side effect of mitigating some of the harsher aspects of tribal sovereign immunity. Informing nonmembers that tribal borders are significant, for example, will diminish the surprise when they realize that different legal rules apply to their dealings in Indian country.²⁶ Thus, even within the severe constraints of the Supreme Court's current jurisprudence, mechanisms exist to enhance the territorial footing of current tribal sovereignty.

In making this argument, this Article proceeds in three parts. Part I describes the ongoing loss of tribes' control over their territories.²⁷ Part II then details the parallel increase in sovereign immunity's importance.²⁸ Part III explores the consequences of these developments.²⁹ In criticizing the status quo, this Part looks first to the literature of territoriality and sovereignty to suggest that for tribes to exist as effective governments, their sovereign authority must have a territorial component. This Part then draws on various critiques of sovereign immunity in other contexts to argue that tribal sovereign immunity has some similarly undesirable consequences. Finally, Part IV concludes by arguing that tribal immunity is not a substitute for territorial control, and explores ways in which tribes can work to strengthen the territorial dimension of their sovereignty.³⁰

I. THE EROSION OF THE BORDER: OWNERSHIP, MEMBERSHIP, AND SOVEREIGNTY

For the most part, tribal borders are unobtrusive. A visitor crossing onto a reservation is most likely to encounter something like the faded, arrowhead-shaped sign that reads, "Entering San Carlos Apache Indian

²⁶ The protections of tribal sovereign immunity are not limited to tribes' on-reservation activities. Nonetheless, many more occasions exist for nonmember disputes with tribes to arise on the reservation rather than off of it.

²⁷ See *infra* notes 31–111 and accompanying text.

²⁸ See *infra* notes 112–215 and accompanying text.

²⁹ See *infra* notes 216–322 and accompanying text.

³⁰ See *infra* notes 323–436 and accompanying text.

Reservation.”³¹ A few signs provide detailed historical or cultural information.³² A handful of tribes make passing reference to tribal sovereignty or tribal law in their border markers, such as “Entering the Sovereign Nation of the Morongo Band of Mission Indians.”³³ The sign marking the entrance to the Pala Indian Reservation welcomes visitors to the reservation while counseling them that “[b]y entering this reservation you agree to abide by Federal, State, Tribal, and County Laws.”³⁴ For the most part, however, reservation border signs do little to alert a visitor to the fact that she is entering what is, under some views, a foreign nation. Tribal casinos and resorts—even though sometimes highlighting tribal culture or history—may likewise have few reminders for visitors of the separate, sovereign status of the land on which they are located.³⁵

In many ways, this inattention to border markers reflects the reality of current law. The unobtrusiveness of reservation borders is both an explanation for and a corollary to the U.S. Supreme Court’s Indian law jurisprudence of the last fifty years, which has made identity of *parties*, rather than *location*, the basis for tribal jurisdiction in both its adjudicative and regulatory aspects. In other words, crossing a tribal border, particularly for a nonmember, is only rarely a legally significant act.³⁶

This de-emphasis on tribal borders has a long history. For many years, the question of the territorial scope of tribal authority has been a perplexing one, in which the issues of governmental control over terri-

³¹ See Regeneration Reservation, <http://www.regenerationreservation.org/images/reg/culture/sign.jpg> (last visited Apr. 29, 2010); see also Human Rights Now, http://blog.amnestyusa.org/wp-content/uploads/2009/04/img_6852.jpg (last visited Apr. 29, 2010) (sign reading simply “Entering Standing Rock Indian Reservation”). Some border markers are even more modest; a small sign reading “Crow Indian Reservation Boundary” attached to a fencepost would scarcely be noticeable by a driver without sharp eyesight. See Posting of sheridangal to <http://outdoors.webshots.com/photo/1017021902026266494tRuxLGDhSs> (July 8, 2001).

³² See Posting of I used to be a coyote to <http://www.flickr.com/photos/45637686@N00/1882933242> (Nov. 2, 2007) (Fort Belknap reservation sign providing detailed historical background).

³³ See Electronic Educational Environment, <https://eee.uci.edu/clients/tcthorne/Hist15/quasisovereignty.htm> (last visited May 3, 2010).

³⁴ See Photograph (on file with author); see also Posting of Robin Beck to <http://tiny.cc/z58Ag> (2009) (Quileute Indian Reservation sign stating “Please obey all Laws, Ordinances, and Customs”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.2 (1978) (“Notices were placed in prominent places at the entrances to the Port Madison Reservation informing the public that entry onto the Reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court”).

³⁵ This conclusion is drawn from the author’s personal observations of tribal casinos and casino advertising.

³⁶ See *infra* notes 323–340 and accompanying text (detailing the few exceptions to this principle).

tory and land ownership status have been intertwined.³⁷ Normally, the ownership status of land bears little relationship to the ability of the relevant sovereign to assert its authority. A homeowner in California certainly cannot claim exemption from state tax or freedom from the jurisdiction of California courts simply because she owns her land in fee simple. In the case of tribes, however, the fact of initial colonization—and subsequent waves of state and federal hostility toward the idea of reservations as autonomous governments—has complicated from the start the relationship between political territory and ownership.³⁸

Moreover, in the past several decades, the Court has compounded this problem by shifting away from land as a basis of tribal jurisdiction altogether. Instead, the Court increasingly looks at tribal sovereignty through the lens of consent.³⁹ For the most part, therefore, tribes currently possess jurisdiction over those who have agreed to it, either implicitly through tribal membership or explicitly through contract. Although the Court has occasionally recognized a minor continuing role for tribal land status, even tribal ownership of land generally does not confer jurisdiction itself.⁴⁰ Both of these trends have been highly detrimental to tribal territorial control. The following section explores these developments and their consequences.

A. *Beginnings: Sovereignty as Possession*

Despite many unusual attributes of tribal lands, the notion of tribal control over discrete geographical areas is well-entrenched. From the earliest days of the United States, tribes were considered to occupy distinct areas of land, the boundaries of which were set by treaty.⁴¹ During the first half of the nineteenth century, tribes were forcibly resettled in the area west of the Mississippi River, which was not organized into U.S. states at that time.⁴² In the 1850s, the federal government began to set aside reservations for tribes within the boundaries of existing states.⁴³

For many years, exactly what rights tribes retained to land they occupied was unclear. The foundational 1823 Supreme Court case of *John-*

³⁷ See *infra* notes 41–74 and accompanying text.

³⁸ This hostility is reflected in the U.S. government's policy of allotment. See *infra* notes 49–55 and accompanying text.

³⁹ See *infra* notes 75–101 and accompanying text.

⁴⁰ See *infra* notes 75–101 and accompanying text.

⁴¹ See WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW* 106 (2004).

⁴² See *id.* at 14. The area then called the Indian Territory now constitutes the states of Oklahoma and Kansas.

⁴³ See *id.* at 18.

son v. McIntosh was the first to clarify the unique status of tribal lands, holding that although tribes had the right to possess and occupy lands they had traditionally asserted sovereignty over, the United States retained “absolute ultimate title.”⁴⁴ Subsequently, in its 1831 decision, *Cherokee Nation v. Georgia*, the Court clarified that the relationship of the United States to tribes in the administration of trust land was essentially that of ward to trustee.⁴⁵ Many subsequent cases have greatly fleshed out the notion of the trust relationship that exists between the United States and tribes with respect to management of tribal land, as well as the remedies tribes have for breaches of trust duties.⁴⁶ The existence of the trust relationship means that tribes receive some benefits from the United States in exchange for a relationship of formal dependency; tribes remain, nonetheless, the beneficial owners of the land.⁴⁷ It should also be noted that not all tribal land is trust land; some tribes have purchased lands in fee simple, while others (such as the Pueblos of New Mexico) have fee simple title acquired from Spain.⁴⁸

The land status of reservations became more complicated with the policy of allotment, instituted in the late nineteenth century, not long after the reservations had been established.⁴⁹ Under the policy of allotment, reservations were, by a series of federal statutes, carved into individual parcels apportioned to individual tribe members, to be held in trust for a period of twenty-five years before becoming fee land.⁵⁰ Non-allotted reservation lands were sometimes opened for settlement by non-Indians.⁵¹ Allotment was an assimilationist policy, designed to

⁴⁴ See 21 U.S. (8 Wheat.) 543, 587–88 (1823).

⁴⁵ See 30 U.S. (5 Pet.) 1, 17 (1831). The Court observed:

[Tribes] may, . . . perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

Id.

⁴⁶ See, e.g., *United States v. Mitchell*, 463 U.S. 206, 228 (1983); *United States v. Mitchell*, 445 U.S. 535, 546 (1980); *Seminole Nation v. United States*, 316 U.S. 286, 308 (1942); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 1944 WL 3683, at *7 (1944).

⁴⁷ See COHEN, *supra* note 17, § 5.04[4][a] (describing the modern trust relationship).

⁴⁸ See *id.* § 15.04[5].

⁴⁹ See CANBY, *supra* note 41, at 21–22 (noting that the first within-state reservations were established in 1851 and the first efforts at allotment began in 1854).

⁵⁰ See General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 348 (2006)); Frickey, *supra* note 11, at 15.

⁵¹ See *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).

break up reservations and turn tribe members into farmers.⁵² The program was, however, a famous and spectacular failure, resulting in many allotments ending up in non-Indian hands (often involuntarily through foreclosures), and the policy was ended by the Indian Reorganization Act of 1934.⁵³

In the years since allotment, tribes have sought to regain title to some allotted land through repurchase by the tribe or the Department of the Interior, but much of it remains alienated from tribal control.⁵⁴ To enter a reservation is thus frequently to encounter a mixture of never-alienated Indian trust land, Indian-owned allotments, and former allotted land now owned by nonmembers who may have little or no connection with—or sympathy for—the tribe.⁵⁵

The fact that not all land on reservations is owned by tribes or their members has led to a second problem: what is the relationship between tribal ownership of land (or the lack thereof) and tribal political control over territory? That is, can tribes assert jurisdiction over land they do not possess? For many years, this was something of an open question.⁵⁶ The term “Indian country” has long been used to denote territories under tribal control, but its meaning has changed over time. “Indian country” was first used in the nineteenth century to refer to the western territories to which tribes were consigned;⁵⁷ this definition was later expanded by a series of judicial decisions clarifying that Indian country could include, for example, land within the boundaries of the state and land that was not held pursuant to aboriginal title.⁵⁸ In general, however, it was the case that Indian lands consisted primarily of “lands in which the Indians held some form of property interest:

⁵² See Frickey, *supra* note 11, at 15.

⁵³ See Indian Reorganization Act of 1934, Pub. L. No. 383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2006)); Frickey, *supra* note 11, at 15..

⁵⁴ See Nell Jessup Newton, *Compensation, Reparations, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 476–77 (1994) (describing tribal land-acquisition programs).

⁵⁵ See Frickey, *supra* note 11, at 15.

⁵⁶ See COHEN, *supra* note 17, § 3.04[2][b].

⁵⁷ See Trade and Intercourse Act of 1834, ch. 151, § 1, 4 Stat. 729 (1834). The Act defined “Indian country” as:

[A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi [R]iver, and not within any state to which the Indian title has not been extinguished

Id.

⁵⁸ See COHEN, *supra* note 17, § 3.04[2][b] (discussing *Donnelly v. United States*, 228 U.S. 243 (1913), and *United States v. Sandoval*, 231 U.S. 28 (1913), among other cases).

trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.”⁵⁹

In 1948, however, Congress clarified the somewhat muddled case law on the subject by providing a more expansive statutory definition of Indian country.⁶⁰ Under this controlling law, “Indian country” includes all land within the borders of Indian reservations as well as Indian allotments with continuing Indian titles and “dependent Indian communities.”⁶¹ The 1948 statute is not the last word on the subject; Congress defines “Indian country” somewhat more narrowly for purposes of liquor possession and sales.⁶² This definition was cited by the U.S. Supreme Court in 1997, in *Strate v. A-1 Contractors*, despite the fact that the case involved no issues related to intoxicants.⁶³ Nonetheless, the 1948 definition is widely accepted and used in almost all other contexts.⁶⁴

The statutory definition of Indian country would appear to suggest that tribal political jurisdiction can be conferred *either* by presence within reservation boundaries *or* by tribal land ownership.⁶⁵ In reality, however, tribal jurisdiction has in almost all circumstances been closely tied to tribal ownership. As the Court recently put it, “[b]y definition, fee land owned by nonmembers has already been removed from the tribe’s immediate control[;]” thus “[o]ur cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.”⁶⁶ Perhaps the most direct way that land ownership has been linked to political control is through the “diminishment” cases, in which the Supreme Court has confronted, and occasionally accepted,⁶⁷

⁵⁹ *Solem*, 465 U.S. at 468.

⁶⁰ See 18 U.S.C. § 1151 (2006).

⁶¹ See *id.* The last category refers primarily to the New Mexico Pueblos, whose land was held in fee simple pursuant to titles acquired from the Spanish. See CANBY, *supra* note 41, at 131.

⁶² See 18 U.S.C. §§ 1154(c), 1156 (providing that “Indian country” does not include “fee-patented lands in non-Indian communities” and “rights-of-way through Indian reservations”).

⁶³ See 520 U.S. 438, 454 (1997); see also Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 1012 (2000) (discussing the Court’s incongruous mention of § 1154(c) and § 1156 in *Strate*, 520 U.S. at 454).

⁶⁴ See Thorington, *supra* note 63, at 1012 (describing the widespread use of the § 1151 definition in both civil and criminal contexts).

⁶⁵ See 18 U.S.C. § 1151.

⁶⁶ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2719, 2723 (2008).

⁶⁷ See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) (finding congressional intent to diminish a Yankton Sioux Reservation by approximately forty percent, and noting that predominantly non-Indian “demographics signify a diminished reservation”).

the argument that certain acts of allotment were designed to effect changes in the reservation's political boundaries and not merely the ownership status of the land involved.⁶⁸

At the same time, tribal ownership is not in itself enough to confer jurisdiction, as the Court made clear by adopting a restrictive interpretation of the meaning of "Indian country" in the 2005 case *City of Sherrill v. Oneida Indian Nation*. In *City of Sherrill*, the Oneida Nation purchased parcels of land within the reservation's historical borders—borders that, although recognized by treaty and protected by federal statute, had long been ignored by New York State.⁶⁹ The Oneida, who ran various businesses on the land, argued that the parcels constituted Indian country and were therefore not subject to property tax.⁷⁰ Reversing the U.S. Court of Appeals for the Second Circuit, the Supreme Court disagreed, relying on principles of laches to find that the long tradition of governance of the parcels by New York State created "justifiable expectations" that trumped both the Indian country statute and the Oneida's ancestral claims on the land.⁷¹ *City of Sherrill* is notable for extinguishing a potential upside of the ownership requirement: the idea that tribes could expand their jurisdiction by purchasing lands they had once inhabited.

After *City of Sherrill*, therefore, tribes are subject in effect to a joint requirement of ownership and traditional political control. The effect of this requirement is to create a somewhat restrictive form of sovereignty, particularly in light of the manifold policies pursued by the United States at various times aimed at divesting tribes of their land. It is also an unusual interpretation of sovereignty as we normally understand it. We assume that California will have some ability to regulate, for example, events taking place on a parcel of land owned by an Oregonian, so long as that parcel is located within California. Likewise, perhaps even more obviously, the sale of state-owned lands to an out-of-state private citizen would not have the effect of shrinking California's borders. But as the previous discussion has suggested, at various times both of these principles have been in doubt when it comes to tribal au-

⁶⁸ See, e.g., *Solem*, 465 U.S. at 471–72 (explaining that the Court may be more likely to find diminishment "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character," but holding that, in the absence of clear congressional intent, the portion of the Cheyenne River Sioux Reservation opened to non-Indian settlement had not been diminished).

⁶⁹ See 544 U.S. 197, 202, 204–05 (2005).

⁷⁰ See *id.* at 211.

⁷¹ See *id.* at 214–17.

thority and reservation borders. The jurisdictional problems created by this interpretation are said to stem from the “checkerboard” nature of reservations—the fact that most reservations incorporate pockets of non-Indian fee land in the midst of tribal trust or Indian-owned land.⁷² This “checkerboard” status, however, is significant only if one attaches importance to the ownership status of land in the first instance.⁷³

Nonetheless, although hardly an ideal basis on which to establish sovereignty, the linkage of ownership and political control at least retains for tribes some elements of traditional territorial sovereignty. As long as a large part of the reservation does consist of tribal land—particularly significant areas such as roads, civic buildings, and community gathering places—the tribe can claim meaningful authority over the geographical areas that are most important to it. Further, even after *City of Sherrill*, there remains the hope that the tribe can ultimately expand its jurisdictional reach by, for example, seeking to have new land placed into trust under 25 U.S.C. § 465 or by intensifying the tribal character of certain areas by limiting access to nonmembers.⁷⁴ Thus, despite the severe limits of the ownership-based view of tribal control, it is in many

⁷² *Id.* at 211, 219.

⁷³ Although the Court has been unreceptive to arguments that checkerboard jurisdiction deprives tribes of effective political control, it has recognized this effect in other contexts. The Court in *City of Sherrill* noted that a negative consequence of permitting tribes to gain jurisdiction over land by purchasing it was that permitting such tribal control had the potential to create checkerboard jurisdictional status in what was formerly state-controlled land. *See id.* at 219–20 (“A checkerboard of alternating state and tribal jurisdiction in New York State . . . would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.”) (internal quotations omitted). In a broader sense, it is difficult to say that the fact that areas of many reservations are occupied predominantly by non-Indians who do not identify with the tribe is not legally relevant; the existence of enclaves ethnically and culturally distinct from the ostensibly governing sovereign is frequently a source of tension. What is unique to Indian country, however, is that the identification and resolution of such tensions is frequently couched primarily in terms of land ownership. *See, e.g., supra* notes 65–68 and accompanying text.

⁷⁴ Section 465, part of the Indian Reorganization Act, was aimed at helping tribes undo the effects of allotment by increasing their land base. *See* Padriac I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 450–51 (2003). It authorizes the Secretary of the Interior “to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians.” 25 U.S.C. § 465 (2006). In *City of Sherrill*, the Court indicated that the § 465 process was the proper route for tribes to expand their political borders, noting that “Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area’s governance and well-being.” *See* 544 U.S. at 220. The significance of this latter practice is described later in this Article. *See infra* notes 341–427 and accompanying text.

ways at least compatible with certain traditional trappings of territorial sovereignty.

B. *The Shift to Consent and Membership Rationales*

In the past few decades, however, the U.S. Supreme Court has shifted the ground once again. In a series of cases, the Court has limited the geographical dimension of tribal sovereignty still further by relying primarily on membership status within a tribe rather than the ownership status of land in determining who tribes can regulate. Thus, the Court has—in an unprecedented act of judicial involvement in an area historically left to Congress—notoriously limited tribal sovereignty over nonmembers, even those who voluntarily enter tribal lands, in an ever-increasing variety of circumstances.

This progression began when the U.S. Supreme Court held, in *Oliphant v. Suquamish Indian Tribe*, that the tribes lacked criminal jurisdiction over non-Indians, resting on the logic that tribes, following their incorporation into the “overriding sovereignty” of the United States, possessed only “quasi-sovereign” authority and were prohibited from exercising powers “inconsistent with [this] status.”⁷⁵ Subsequently, in *Montana v. United States*, the Court extended *Oliphant*’s holding to the civil regulatory context, holding that, with only minor exceptions, tribes lacked the power to regulate the activities of nonmembers acting on private lands within the reservation.⁷⁶ In *Strate*, the Court reached the same conclusion with respect to civil adjudication, holding that the

⁷⁵ See 435 U.S. at 208, 209. In 1990, in *Duro v. Reina*, the U.S. Supreme Court held that tribal sovereignty did not extend to criminal prosecutions against Indians who were not members of the tribe. See 495 U.S. 676, 688 (1990). Because of the enormous problems this decision created for tribal law enforcement—as many reservations have a large population of Indian residents who are not technically members of the tribe—Congress responded by passing the so-called “*Duro* fix,” an amendment to the Indian Civil Rights Act providing that tribal “powers of self-government” include the “inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” 25 U.S.C. § 1301(2) (2006); accord Samuel E. Ennis, Note, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 563 (2009). The Supreme Court has upheld this provision. See *United States v. Lara*, 541 U.S. 193, 210 (2004).

⁷⁶ See *Montana v. United States*, 450 U.S. 544, 564–66 (1981). Legislative (or regulatory) jurisdiction is jurisdiction to regulate someone’s activities directly. See, e.g., *Hartford Fire Ins. v. California*, 509 U.S. 764, 813 (1992) (Scalia, J., dissenting) (quoting 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 231 (1987)). Adjudicatory jurisdiction (also called judicial jurisdiction) is the jurisdiction to hale someone into court.

Three Affiliated Tribes lacked adjudicatory jurisdiction over a non-member defendant acting on a state right-of-way over tribal lands.⁷⁷

Although the reasoning on which these cases initially rested is notoriously unclear,⁷⁸ later cases have justified their results by suggesting that tribal jurisdiction over any given individual requires at least some manifestation of consent.⁷⁹ For example, in *Duro v. Reina*, a 1990 case denying tribes criminal jurisdiction over nonmember Indians—a result later reversed by statute⁸⁰—the Court explained that “[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.”⁸¹ In criminal proceedings, the Court suggested, the no-jurisdiction-without-consent principle was particularly important because tribes are not subject to the Bill of Rights,⁸² and tribal justice systems are “influenced by the unique customs, languages, and usages of the tribes they serve.”⁸³ The Court emphasized that consent must be explicit, rejecting the notion that implicit consent could be conferred by contacts with the tribe, as it would be in cases of state personal jurisdiction.⁸⁴

Although there seems no obvious reason why a consent-based notion of sovereignty should operate differently in the criminal and civil contexts, the Court nonetheless appeared for some time to leave room for a slightly more expansive notion of tribal civil jurisdiction. The *Montana* rule includes two narrow exceptions not present in the criminal setting—one for nonmembers who enter into “consensual relationships” with the tribe and another for nonmember conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁸⁵ Both exceptions have

⁷⁷ See 520 U.S. at 454.

⁷⁸ See Philip Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 433 (2005) (describing case law as “remarkably incoherent”).

⁷⁹ See, e.g., *Duro*, 495 U.S. at 693.

⁸⁰ See *supra* note 75.

⁸¹ 495 U.S. at 693.

⁸² Note, however, that the vast majority of the Bill of Rights has been made applicable to tribes through the Indian Civil Rights Act, which, for instance, specifically provides for a writ of habeas corpus to test the legality of imprisonment. See 25 U.S.C. § 1302 (2006) (constitutional rights); *id.* § 1303 (habeas corpus).

⁸³ *Duro*, 495 U.S. at 693.

⁸⁴ See *id.* at 695 (rejecting a contacts-based approach to tribal jurisdiction). As Philip Frickey has noted, the Court’s rejection of a kind of consent that routinely suffices in the state context suggests that the Court is not really concerned about the issue at all; rather, it simply regards tribes as membership organizations rather than true sovereigns. See Frickey, *supra* note 78, at 479.

⁸⁵ 450 U.S. at 565, 566. Although such relationships nominally include “commercial dealing, contracts, leases, or other arrangements,” the Supreme Court has in practice suggested

been interpreted extremely narrowly, and the first is in many ways only a minor variation on the general principle of consent.⁸⁶ Nonetheless, the “political integrity” exception suggests at least some conception of tribal sovereignty extending even to those who do not explicitly agree to be governed.

Further, even apart from these explicit exceptions, *Montana* and *Strate* nominally left the assumption that ownership confers government power intact. *Montana* involved a tribe’s attempted regulation of nonmember fee land,⁸⁷ and *Strate* hinged on a finding that a state right-of-way acquired over tribal land for purposes of a state highway “render[ed] the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land.”⁸⁸ Both cases thus suggested that the one circumstance in which tribes might still retain power over nonmembers was when the nonmembers’ activities occurred on tribal trust lands.

Two subsequent cases, however, have at the very least called this assumption into question. In the 2001 case *Nevada v. Hicks*, the U.S. Supreme Court held that tribal adjudicative jurisdiction did not extend to a suit by a Fallon Paiute-Shoshone Tribes member against state officers alleged to have improperly searched his property.⁸⁹ In so holding, the Court minimized the importance of land status, stating that “the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers” and suggesting that all nonmember regulation might be improper unless one of *Montana*’s limited exceptions applies.⁹⁰

that only explicit jurisdictional waivers in contracts or leases would suffice. *See id.* at 565. In *Strate*, for example, the Court held that this exception did not apply even though the defendant was under a contractual relationship with the tribe and doing agreed-upon work on the reservation at the time of the events giving rise to the suit. *See* 520 U.S. at 456–57.

⁸⁶ *See, e.g., Plains Commerce Bank*, 128 S. Ct. at 2723 (drawing a distinction between sale of nonmember land and conduct on nonmember land, and finding that *Montana* exceptions permit regulation only of the latter); *Strate*, 520 U.S. at 456–59 (articulating a narrow view of both *Montana* exceptions). Indeed, the 1989 case of *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation* may be the sole case in which the Supreme Court has found either exception to apply. *See* 492 U.S. 408, 444 (1989) (Stevens, J., concurring); *see also Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (citing this fact and calling *Brendale* a “minor exception” to the general rule prohibiting jurisdiction).

⁸⁷ *See* 450 U.S. at 547.

⁸⁸ *See* 520 U.S. at 454.

⁸⁹ *See* 533 U.S. at 364.

⁹⁰ *See id.* at 360.

Scholars and tribal advocates initially suggested narrow readings of *Hicks*, some of which the opinion's text may support.⁹¹ As the Court observed, the case was against state law enforcement authorities and concerned an off-reservation crime, potential grounds for distinguishing a scenario in which ordinary state citizens and wholly on-reservation events were involved.⁹² Nonetheless, the Court's most recent pronouncement on the subject in 2008, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, sharply limits the scope lower courts have for interpreting *Hicks*.⁹³ *Plains Commerce Bank* considered the question of whether a tribal court could assert jurisdiction over a claim by a tribal couple that a non-Indian bank discriminated against them in the sale of on-reservation fee land they had previously leased.⁹⁴ The Court held that—despite *Montana's* ostensible “consensual relationship” exception granting tribal courts jurisdiction over nonmembers entering into “commercial dealing, contracts, leases, or other arrangements” with the tribe—sales of nonmember-owned land remained beyond tribal jurisdiction.⁹⁵

This narrow reading of one of the few bases for tribal nonmember regulation left by *Montana* is itself a sharp blow to tribal sovereignty. Also significant, however, is the primary importance the Court put on nonmember status. As the Court put it, “[t]his general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians—what we have called ‘non-Indian fee land.’”⁹⁶ Thus, where previous cases had suggested that only nonmember activities on nonmember land were presumptively exempt from tribal regulation, *Plains Commerce Bank* now indicates that nonmember activities are exempt, period, where nonmember land is

⁹¹ See, e.g., Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 95 (2003) (“It is possible that *Hicks* will be read narrowly in the future and applied only in instances where the tribe attempts to exercise authority over state officials on tribal land.”).

⁹² See *Hicks*, 533 U.S. at 355.

⁹³ See *Plains Commerce Bank*, 128 S. Ct. at 2720.

⁹⁴ *Id.* at 2714. Notably, the land was formerly owned by the father of one member of the couple; the lease arrangements had been negotiated by the couple with the bank as an alternative to foreclosure. *Id.*

⁹⁵ See *id.* at 2720, 2721 (“*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land.”). The Court reasoned that *Montana's* “consensual relationships” exception was limited to “activities,” and that land sales did not fall within the category of “activities.” See *id.* at 2721–23.

⁹⁶ *Id.* at 2719. The Court also observed that “tribes do not, as a general matter, possess authority over non-Indians who *come within their borders*.” *Id.* at 2718 (emphasis added).

involved. At least one lower court has already read *Plains Commerce Bank* as dictating an expansive reading of *Hicks*.⁹⁷

It is beyond question that the line of cases from *Oliphant* through *Plains Commerce Bank* represents both a severe narrowing of tribal authority and a shift in focus from territory to membership in construing limits on tribal power. These cases have raised the specter that, even as the Supreme Court has disclaimed any such intention, it increasingly treats tribes as something more akin to “private voluntary organizations”⁹⁸—or, as Philip Frickey has put it, “ethnocentric Elks Clubs”⁹⁹—than to autonomous sovereigns still possessing most of their historical powers.

Further, these cases have not merely reduced the scope of tribal sovereignty, but have done so in a particular way—by shifting the relevant criterion for the exercise of tribal authority from tribal territory to tribal membership. This shift is important not only because it represents a narrowing of tribes’ traditional powers, but because it means that tribal sovereignty is, in a fundamental sense, different from any other sort of sovereignty U.S. courts recognize. Indeed, for purposes of determining the limits of tribal regulatory or adjudicative jurisdiction over nonmembers, the borders of reservations are almost totally irrelevant—and, since *Hicks* and *Plains Commerce Bank*, the status of the land on which relevant events have occurred is only marginally less so. That is, it is almost impossible to imagine a scenario in which tribes have any increased right to regulate nonmember conduct on fee land simply because it took place within reservation boundaries.¹⁰⁰ To say the least, this is in sharp contrast to general conceptions regarding the regulatory and adjudicative jurisdiction of other nations and states.¹⁰¹

⁹⁷ See *Dolgen Corp., Inc. v. Miss. Band of Choctaw Indians*, No. 4:08CV22TSL-JCS, 2008 WL 5381906, at *2 n.1 (S.D. Miss. Dec. 19, 2008) (concluding that *Plains Commerce Bank* forecloses a narrow reading of *Hicks* proposed by tribal litigants because it clarifies that “*Montana* applies to Indian and non-Indian land alike”).

⁹⁸ See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations’”); *Duro*, 495 U.S. at 688 (“The tribes are, to be sure, a good deal more than private voluntary organizations, and are aptly described as unique aggregations possessing attributes of sovereignty over both their members and their territory.”) (internal quotations omitted).

⁹⁹ Frickey, *supra* note 11, at 80.

¹⁰⁰ The taxation power may be a partial exception. See *infra* notes 107, 344 and accompanying text.

¹⁰¹ This argument is explored further elsewhere in this Article. See *infra* notes 218–263 and accompanying text.

C. Increasing State Power in Tribal Territory

A related effect of the U.S. Supreme Court's recent jurisprudence in the area of tribal sovereignty is to increase the power states have over what is nominally tribal territory. That is, as the Court has limited tribes' power over their own lands, it has further lessened the territorial integrity of reservations by permitting states some ability to regulate within-reservation events. Whereas in 1832 Justice Marshall could pronounce that the Cherokee Nation was "a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force,"¹⁰² it is now the case that "[s]tates and tribes have concurrent jurisdiction over the same territory."¹⁰³

The effect of recent cases is thus not only to decrease tribes' power to assert regulatory authority over events and conduct occurring within reservation borders but also to provide that, at least in some circumstances, state law will fill the void. In *Strate*, the Court assumed that state courts would provide the natural alternative to tribal courts for resolving disputes involving nonmember defendants.¹⁰⁴ Further, the Court appeared to assume that state courts would apply state law to such disputes, notwithstanding nonmembers' substantial reservation-based contacts.¹⁰⁵ The Supreme Court has also given states some authority to assert direct regulatory control over the activities of nonmembers on reservations, possibly including Indians who belong to a different tribe from that which governs the reservation.¹⁰⁶ The Court has, for example, permitted states to tax on-reservation sales of cigarettes by tribes to nonmembers.¹⁰⁷ A federal statute, Public Law 280, gives several states with large tribal populations the power to exercise criminal jurisdiction

¹⁰² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832).

¹⁰³ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

¹⁰⁴ See 520 U.S. at 459 ("[Plaintiff] may pursue her case against A-1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway.").

¹⁰⁵ See *id.* The author has previously taken issue with this assumption, arguing that there is no reason not to apply tribal law to many disputes in state court that involve tribal contacts. See Florey, *supra* note 23, at 1632-33.

¹⁰⁶ See CANBY, *supra* note 41, at 288-89 (noting that the Supreme Court has increasingly focused on the member/nonmember rather than the Indian/non-Indian distinction in delineating the respective spheres of tribal and state authority). The general principle that states cannot assert direct regulatory authority over the activities of tribe members on reservations remains more or less intact. See *id.* at 292. Nonetheless, states can assert indirect authority over tribe members' on-reservation conduct by applying state law to cases in which tribe members sue nonmember defendants, because states possess virtually exclusive jurisdiction over such cases. See *infra* notes 107-109 and accompanying text.

¹⁰⁷ See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 190 (1980).

over events in Indian country.¹⁰⁸ The Court has held that this power also encompasses a right by states to apply civil “prohibitory” statutes within Indian country’s borders.¹⁰⁹

The growth in state authority over tribal territory has not always increased commensurately with the decline of tribal power.¹¹⁰ Indeed, the absence of tribal jurisdiction often creates a simple void in governing authority; this is frequently the case with criminal prosecutions.¹¹¹ Nonetheless, to the extent states have made even modest gains in their ability to regulate events in Indian country, tribal territorial integrity has been further eroded. When state law applies in Indian country, tribes appear less like independent nations and more like a dependent subsidiary of the state. Thus, the application of state law on reservations creates its own threat to the territorial notion of tribal sovereignty.

II. IMMUNITY AS SOVEREIGNTY

If the story of tribal territorial jurisdiction is one of the slow and almost complete erosion of tribes’ traditional sovereign powers, the story of tribal sovereign immunity is a nearly opposite one: one in which tribes have fully retained and, in some ways, expanded the sovereign’s prerogative to be free from suit. The different progressions of the two doctrines are particularly notable because sovereign immunity has long been a controversial doctrine in numerous contexts.¹¹² Further, even more so than territoriality, it is a European import. Territoriality has some basis in intrinsically tribal ideas: although it is true that the Westphalian notion of territorial sovereignty developed in seventeenth-century Europe,¹¹³ many tribes have their own long-entrenched notions of the importance of place to community, and even the earliest treaties

¹⁰⁸ 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006). Public Law 280 (“P.L. 280”) permitted five states (California, Minnesota, Nebraska, Oregon, and Washington), with a sixth jurisdiction added in 1958 (the then-territory of Alaska), to assume extensive criminal and civil adjudicative jurisdiction over Indian country. *Id.*; see CANBY, *supra* note 41, at 232. The Supreme Court has since clarified that the civil jurisdiction granted by P.L. 280 was merely adjudicative and not regulatory. See *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976).

¹⁰⁹ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

¹¹⁰ See COHEN, *supra* note 17, § 6.04(3) (noting that state authority in Indian country remains limited).

¹¹¹ See Fields, *supra* note 2.

¹¹² Sovereign immunity has been described as an “easy doctrine to attack and hard to defend. On its face, it seems clearly inconsistent with democratic government.” See Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign’s Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 395 (2005).

¹¹³ See HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 254 (6th ed. 1985).

with tribes involved the concept of setting aside some land on which they could exist as at least partially sovereign entities.¹¹⁴ By contrast, the U.S. Supreme Court did not articulate clear principles of tribal sovereign immunity until the mid-twentieth century.¹¹⁵

Why the difference in the Court's approach to these two facets of tribal sovereignty? This Part considers that question, and explores some of the consequences of coupling a robust doctrine of sovereign immunity with a weak notion of territorial jurisdiction.

A. *The Origins of Sovereign Immunity Doctrines*

In European and British law, the idea that sovereigns enjoy immunity from suit under some circumstances is a well-entrenched jurisprudential notion, dating back at least to medieval England.¹¹⁶ The earliest version of the doctrine concerned only domestic sovereign immunity—that is, the idea that the king could not be sued in the courts of his own country.¹¹⁷ The origins of this doctrine are debated. It is sometimes said to stem from a metaphysical notion of the king's infallibility, but it may have also arisen from the more mundane reality that, because the king was the lawmaker and highest judicial authority, there existed no practical means of challenging the king's actions in court.¹¹⁸

As the doctrine of the monarch's immunity developed, a parallel notion of foreign sovereign immunity—the comity-based principle that one sovereign should have protections in the courts of another state similar to those it enjoys in its own—began to take hold.¹¹⁹ Today the United States recognizes both doctrines—that is, the U.S. government,

¹¹⁴ See COHEN, *supra* note 17, § 3.04[2][a] (“Federal law has always recognized and protected a distinct status for tribal Indians in their own territory.”).

¹¹⁵ See *infra* notes 136–142 and accompanying text.

¹¹⁶ See Seidman, *supra* note 112, at 434.

¹¹⁷ See *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (“The King’s immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.”) (describing origins of domestic sovereign immunity).

¹¹⁸ See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2–5 (1972); see also *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 102–03 (1996) (Souter, J., dissenting). In dissent, Justice Souter explained the origins of the doctrine by noting that:

The doctrine of sovereign immunity comprises two distinct rules, which are not always separately recognized. The one rule holds that the King or the Crown, as the font of law, is not bound by the law’s provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts.

Id.

¹¹⁹ See *Hall*, 440 U.S. at 416.

U.S. states, and foreign nations all enjoy some degree of immunity in U.S. courts.¹²⁰

Although the doctrines of domestic and foreign sovereign immunity appear on their face to provide similar protections and have followed parallel courses of development in many respects, they also contain many important differences.¹²¹ They differ first in rationale. Many rationales for domestic sovereign immunity focus on governmental structure. Commentators frequently cite Justice Holmes's famous "logical and practical" justification for domestic sovereign immunity—the idea that "there can be no legal right as against the authority that makes the law on which the right depends."¹²² In addition, some scholars have seen domestic sovereign immunity as a protection for the democratic process, arguing that Congress and state legislatures—not courts awarding damages to individual litigants—should make the final decision on allocation of damage awards that must be satisfied out of taxpayer funds and thus affect government spending priorities.¹²³ By contrast, foreign sovereign immunity is grounded not in governmental structure but in comity and respect for the dignity of foreign nations.¹²⁴

The two doctrines also differ in scope. Both federal and state sovereign immunity contain an exception for prospective injunctive relief against officers of the state who violate existing law.¹²⁵ The fiction underlying this exception is that such officers are acting *ultra vires*, beyond the scope of their duties as agents of the government, and are therefore

¹²⁰ See *id.* at 415–18 (describing parallel development of the doctrines of domestic and foreign immunity in American law).

¹²¹ See Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 769–70 (2008) (noting that various sovereign immunity doctrines have similarities and have often developed in tandem).

¹²² See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). Note, however, that while this rationale explains federal sovereign immunity and state immunity from state-law suits, it does not address the problem of state sovereign immunity in federal causes of action.

¹²³ See, e.g., Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1537 n.23 (1992).

¹²⁴ In the classic—and, as a matter of U.S. law, foundational—case, *The Schooner Exchange v. McFaddon*, Chief Justice John Marshall thus stated that a foreign sovereign should not be "understood as intending to subject himself to a jurisdiction incompatible with his dignity." 11 U.S. (7 Cranch) 116, 137 (1812). Later, the Supreme Court described this doctrine as a matter of "grace and comity." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983).

¹²⁵ See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (federal context); *Ex parte Young*, 209 U.S. 123, 154 (1908) (state context).

no longer protected by the government's immunity.¹²⁶ Officer suits are a broad and vital exception to sovereign immunity, often cited as a key protection that ensures that sovereign immunity does not become merely a way of sanctioning official lawlessness.¹²⁷

Foreign sovereign immunity, as recognized in the United States, is not subject to an equivalent limitation. It does, however, include a powerful exception of its own. Since at least 1952, the United States has recognized a distinction between the private and public acts of foreign sovereigns, recognizing immunity only for the latter.¹²⁸ Since 1976, this distinction has been codified in the Foreign Sovereign Immunities Act ("FSIA"), which provides that foreign countries are not immune from suits arising out of U.S.-based commercial activity.¹²⁹

Finally, the doctrines differ in the branch of government that has primary responsibility for their development. Federal and state sovereign immunity originated as common-law doctrines, and are in many ways still the province of the judicial branch.¹³⁰ By contrast, courts have taken in some respects a more hands-off approach to foreign sovereign immunity, essentially treating it as an outgrowth of foreign policy and thus the proper domain of the executive branch.¹³¹

¹²⁶ See *Larson*, 337 U.S. at 689. This is, of course, something of an oversimplification of a complicated doctrine that has played out in different ways with respect to federal and state sovereign immunity.

¹²⁷ See, e.g., 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4231 (3d ed. 2007) (noting that *Ex parte Young* "go[es] to the very heart of a federal system" and is "one of the three most important decisions the Supreme Court of the United States has ever handed down").

¹²⁸ See *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). This policy, which represented a change from existing practice, was advocated in a 1952 letter from Acting Legal Adviser for the Secretary of State, Jack B. Tate. The so-called "Tate letter" was influential, although not universally followed by the State Department or by courts until the enactment of the Foreign Sovereign Immunities Act in 1976. See *id.* at 689–90.

¹²⁹ 28 U.S.C. § 1605(a) (2) (2006).

¹³⁰ See *Larson*, 337 U.S. at 705; *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). To some extent, the Supreme Court has changed the status quo with respect to state sovereign immunity by finding that a robust notion of state immunity from suit is embedded in the constitutional structure. See *Alden v. Maine*, 527 U.S. 706, 728–29 (1999) (describing principles of state sovereign immunity as "fundamental postulates implicit in the constitutional design"). Nonetheless, whatever constitutional principle of state sovereign immunity may exist is a largely implicit one, and the Court has carved out an active role for itself in determining how far such a principle might extend—by, for example, striking down federal legislation that, in the Court's view, exceeds Congress's powers to abrogate state sovereign immunity. See *Seminole Tribe*, 517 U.S. at 72 ("We reconfirm that the background principle of state sovereign immunity . . . is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government.").

¹³¹ See *Vertinden B.V.*, 461 U.S. at 486 (describing Court's tradition of "defer[ence] to the decisions of the political branches—in particular, those of the Executive Branch—on

B. *The Development of a Tribal Immunity Doctrine*

In some respects, tribal immunity is a hybrid of both domestic and foreign sovereign immunity doctrines. Just as tribes themselves have some characteristics of both foreign nations and U.S. states, tribal immunity partakes of some qualities of both foreign and state sovereign immunity.¹³² Courts have suggested resemblances between tribal immunity and each doctrine, but the U.S. Supreme Court has never really clarified the doctrinal underpinnings of tribal immunity, opining instead that the doctrine developed “almost by accident.”¹³³ Further, unlike state sovereign immunity—which the Supreme Court has, at least recently, viewed as a constitutional right enjoyed by states that they retained as part of the constitutional plan¹³⁴—tribal sovereign immunity appears to be without either implicit or explicit basis in the U.S. Constitution.¹³⁵

Despite the murkiness of tribal sovereign immunity’s origins, it has a fairly long history of recognition in federal law. The Court did not explicitly refer to tribal sovereign immunity until 1919, when it did so in passing and in dicta.¹³⁶ Some scholars have suggested, however, that the Court implicitly recognized and relied upon a tribal sovereign immunity doctrine much earlier.¹³⁷ Additionally, in the late nineteenth

whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities”).

¹³² See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 759 (1988). For example, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Court analogized tribal immunity to foreign sovereign immunity, in the history of which the Court found “instructive” parallels. See *id.* At the same time, courts have recognized strong doctrinal parallels between tribal and state sovereign immunity. See Florey, *supra* note 121, at 783 n.105 (describing many similarities between state and tribal immunity, as noted by several courts).

¹³³ See *Kiowa Tribe*, 523 U.S. at 756.

¹³⁴ See *Seminole Tribe*, 517 U.S. at 54 (describing sovereign immunity as an attribute retained by the states in the plan of the constitution).

¹³⁵ See, e.g., *Kiowa Tribe*, 523 U.S. at 756 (distinguishing state sovereign immunity from tribal sovereign immunity in part because “tribes were not at the Constitutional Convention”); see also Struve, *supra* note 21, at 167 (noting that tribal sovereign immunity does not derive from the constitutional text). Struve observes, however, that the Court has expanded state sovereign immunity beyond its constitutional basis. See Struve, *supra* note 21, at 167.

¹³⁶ See *Turner v. United States*, 248 U.S. 354, 358 (1919) (noting that, in the case before it, “the fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover”).

¹³⁷ See *Parks v. Ross*, 52 U.S. (11 How.) 362, 374 (1850); see also Struve, *supra* note 21, at 148–50 (discussing *Parks v. Ross*).

century, some lower federal courts recognized a tribal sovereign immunity doctrine as well.¹³⁸

Further, the U.S. Supreme Court has long linked tribal immunity to broader principles of tribal autonomy. The Court's first extensive discussion of the doctrine came in a 1940 case, *United States v. U.S. Fidelity & Guaranty Co.*, in which the Court explicitly held that tribes shared fully in ordinary principles of sovereign immunity.¹³⁹ The Court based this holding on the "public policy which exempted the dependent as well as the dominant sovereignties from suit without consent," supported by the "unusual governmental organization and peculiar problems" of Indian nations.¹⁴⁰ Thus, tribes inherently possessed "immunity which was theirs as sovereigns," subject only to congressional abrogation.¹⁴¹ *U.S. Fidelity* was thus a broad affirmation of tribal immunity, closely tying the doctrine to a robust view of tribal sovereignty.¹⁴²

The Supreme Court continued to explore the immunity-sovereignty connection in the still-controversial case *Santa Clara Pueblo v. Martinez*.¹⁴³ In *Martinez*, the Court held that the Indian Civil Rights Act ("ICRA"), in which Congress extended most of the protections of the Bill of Rights and Fourteenth Amendment to Indian country, did not create a private right of action for enforcement of its provisions against the tribe.¹⁴⁴ In reaching this conclusion, the Court relied in part on "the common-law immunity from suit traditionally enjoyed by sovereign powers" that "Indian tribes have long been recognized as possessing."¹⁴⁵ Although the Court recognized that Congress had the ability to waive tribal immunity, it found that such a waiver "must be unequivocally expressed."¹⁴⁶ Because the ICRA contained no such unequivocal state-

¹³⁸ See Seielstad, *supra* note 5, at 689–92 (discussing *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373 (8th Cir. 1895), and *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908)).

¹³⁹ 309 U.S. 506, 512 (1940).

¹⁴⁰ *Id.* at 512–13.

¹⁴¹ *See id.* at 512.

¹⁴² *See id.* The effect of the case was to permit a collateral attack on a bankruptcy judgment against a tribe on the grounds that tribal immunity should have barred the proceeding in the first instance. *See id.* at 514. Sovereign immunity aside, this is a questionable holding. The majority of authorities hold that the allegedly incorrect resolution of a sovereign immunity issue should not override ordinary principles of res judicata. *See* Florey, *supra* note 121, at 817–19.

¹⁴³ *See* 436 U.S. 49, 58 (1978).

¹⁴⁴ *See id.* at 72; *see also* 25 U.S.C. §§ 1301–03 (2006). Among the few provisions omitted (in recognition of special tribal cultural and financial factors) were the Second Amendment, the Establishment Clause, and the right to state-appointed counsel. *See Martinez*, 436 U.S. at 57 n.8.

¹⁴⁵ *Martinez*, 436 U.S. at 58.

¹⁴⁶ *Id.* (internal citation omitted).

ment, the Court could not presume congressional intent to abrogate tribal immunity.¹⁴⁷

Martinez involved a challenge under the ICRA's equal protection provisions to the membership rules of the Santa Clara Pueblo, which excluded the children of female but not male members who married outside the tribe.¹⁴⁸ The case raised the difficult—and still much-debated—question of the extent to which tribes should be required to conform to notions of fairness and equality in dominant American legal culture.¹⁴⁹ *Martinez* is thus notable for linking tribal immunity to tribal freedom from regulation. In other words, the Santa Clara Pueblo were able to maintain a policy that would otherwise potentially run afoul of the ICRA because the tribe was not subject to suit in federal court.¹⁵⁰ *Martinez* thus made clear that tribal immunity was not simply a procedural device designed to spare tribes the burden of court appearances or protect fragile tribal finances from runaway litigation costs.¹⁵¹ It also had the potential to serve as a substantive protection for tribal autonomy.

C. Immunity in the Context of Current Indian Law

In the decades following *Martinez*, the legal landscape for tribes changed significantly. As previously discussed, the U.S. Supreme Court began the process of radically narrowing tribes' sovereignty in almost every area of law except immunity.¹⁵² Further, as the tribal gaming industry came into being, the volume of transactions between tribes and non-Indians increased, and so did the occasions for potential suit.¹⁵³ Tribal immunity became controversial, leading to various efforts in Congress to place substantial limits on the doctrine, all of which failed.¹⁵⁴ Nonetheless, the Supreme Court has continued to hold the line on efforts by liti-

¹⁴⁷ See *id.* at 59.

¹⁴⁸ See *id.* at 51, 52.

¹⁴⁹ See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 816–20 (2007) (discussing the scholarship).

¹⁵⁰ See *Martinez*, 436 U.S. at 59. Note, however, that another important part of the holding in *Martinez* was the Court's conclusion that the ICRA did not create a private right of action. In the absence of such a finding, the Court suggested, plaintiffs would have been able to sue tribal officers for injunctive relief for ICRA violations under principles analogous to those of *Ex parte Young*. See *id.* at 59–61.

¹⁵¹ See *id.* at 59.

¹⁵² See *supra* notes 75–111 and accompanying text.

¹⁵³ *Kiowa Tribe*, 523 U.S. at 758.

¹⁵⁴ For a detailed account of these efforts, see Seielstad, *supra* note 5, at 729–52.

gants to limit the scope of sovereign immunity, holding that any restrictions on the doctrine are the province of Congress.

In 1991, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the U.S. Supreme Court held that a tribe's decision to seek an injunction against the application of a state tax to cigarette sales on tribal lands did not constitute a waiver of its sovereign immunity as to the state's counterclaims for unpaid taxes.¹⁵⁵ The Court disagreed with the Oklahoma Tax Commission's claim that "tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in this context."¹⁵⁶

The question of tribal immunity's continuing relevance was again debated in the 1998 case, *Kiowa Tribe v. Manufacturing Technologies, Inc.*, in which the Court was asked to consider whether tribal immunity should apply to off-reservation commercial activities.¹⁵⁷ Manufacturing Technologies ("MT") attempted to sue the Kiowa Tribe for the balance on a promissory note, which had allegedly been executed in Oklahoma City—i.e., not on tribal trust land.¹⁵⁸ Although no prior Supreme Court case had imposed geographical or activity-based limits on tribal sovereign immunity's scope, MT argued that tribal immunity should apply only to on-reservation and "governmental" (as opposed to commercial) activities.¹⁵⁹ This distinction would have mapped a similar exception to foreign sovereign immunity as that codified in the FSIA.¹⁶⁰ The Court rejected this suggestion, holding that "our precedents have not drawn these distinctions" and that "tribal immunity is a matter of federal law and is not subject to diminution by the States."¹⁶¹

Oklahoma Tax Commission and *Kiowa Tribe* are the Court's most recent pronouncements on the tribal immunity subject. There is, however, a more recent case that is related: in a unanimous 2001 decision, the Court held that a tribe waived tribal immunity by agreeing to a form arbitration clause in a contract.¹⁶² The two cases suggest several clear contrasts between the Court's approach to tribal immunity and its treatment of other tribal sovereignty issues. The first striking difference

¹⁵⁵ 498 U.S. 505, 509–10 (1991).

¹⁵⁶ *Id.* at 510.

¹⁵⁷ 523 U.S. at 753–54.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 755.

¹⁶⁰ See 28 U.S.C. § 1605(a)(2) (2006).

¹⁶¹ *Kiowa Tribe*, 523 U.S. at 755, 756.

¹⁶² See *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414 (2001).

has to do with geographical scope. In most areas of tribal sovereignty, the Court's approach has been to shrink tribes' geographical reach, confining their power first to tribe-owned areas within reservations, and ultimately only to the activities of tribe members within those areas.¹⁶³ By contrast, tribal immunity might be fairly described as superterritorial as it follows the tribe everywhere: on the reservation as well as off it, in commercial activities as well as strictly governmental ones.¹⁶⁴ It protects tribal activities on the reservation even where state law could otherwise encroach on them. As *Oklahoma Tax Commission* makes clear, for example, a state may be able to legally tax some activities on the reservation, but that does not mean it can sue to collect those taxes.¹⁶⁵ In *Kiowa Tribe*, the Court put the matter bluntly. In arguing for tribal immunity restrictions, MT had pointed to case law giving states the power to tax and regulate tribal off-reservation conduct.¹⁶⁶ The Court, however, found these cases inapplicable, observing that "[t]o say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . *There is a difference between the right to demand compliance with state laws and the means available to enforce them.*"¹⁶⁷

Another striking contrast between tribal immunity and other tribal sovereignty cases is found in the stance the Court has taken toward congressional power. In the line of cases starting with 1978's *Oliphant v. Suquamish Indian Tribe*, the Court began to intrude on Congress's traditional plenary power over Indian affairs, determining that the scope of tribal sovereignty was a matter for judicial as well as congressional definition.¹⁶⁸ It is hard to convey how radical a break from past practices this approach was; and it is one for which the Court has been widely criticized.¹⁶⁹ By contrast, despite the many reservations the Court ex-

¹⁶³ See *supra* notes 75–101 and accompanying text.

¹⁶⁴ See *Kiowa Tribe*, 523 U.S. at 755.

¹⁶⁵ See 498 U.S. at 514 (discussing Oklahoma's complaint that the Court's decisions cumulatively provide it with a "right without any remedy" in the collection of taxes from tribes).

¹⁶⁶ See 523 U.S. at 755.

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ See generally 435 U.S. 191 (1978).

¹⁶⁹ See, e.g., Frickey, *supra* note 11, at 5 (observing that the Court has "undercut" the traditional understanding of tribal sovereignty in "fundamental ways"). The zenith of the Court's newfound hands-on approach may have come with the 2004 case of *United States v. Lara*, in which the Court considered the question of whether Congress could statutorily reverse *Duro v. Reina*, 495 U.S. 676 (1990), the decision depriving tribes of their traditional power to prosecute nonmember Indians, by passing a statute affirming the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians, including nonmembers." See *United States v. Lara*, 541 U.S. 193, 198

pressed in *Kiowa Tribe* about the wisdom of continuing to immunize tribes' business activities from suit, the Court nonetheless held that the matter was entirely within Congress's hands.¹⁷⁰

In some ways, tribal sovereign immunity might have seemed a more logical area for judicial involvement than matters of tribal jurisdiction and self-government. Tribal sovereign immunity was originally a court-created doctrine that was built on the common-law development of sovereign immunity in other arenas.¹⁷¹ Nonetheless, the Court chose to remain sidelined on matters of tribal immunity while adopting what may be fairly called an activist stance in other issues of tribal sovereignty.¹⁷²

Various explanations have been proposed for the Court's hands-off approach. Some have suggested that the Court was influenced by the

(2004) (internal quotations and citations omitted); see also 25 U.S.C. § 1301(2) (2006). Although the Court ultimately upheld the provision in *Lara*, it did so by a 5–4 margin—a surprisingly narrow majority given that the effect of the statute was simply to restore the pre-*Duro* status quo in an area in which Congress ostensibly has plenary power. See *Lara*, 541 U.S. at 210. The issue in *Lara* was whether the *Duro* fix represented “delegated federal authority” or simply a recognition on the part of Congress of “inherent tribal sovereignty.” *Id.* at 199. If the former, tribal prosecutions of nonmembers would arguably have been subject to constitutional restrictions. See *id.*

¹⁷⁰ See 523 U.S. at 758. In a seemingly gratuitous digression, Justice Kennedy's majority opinion noted that tribal sovereign doctrine, while now “settled law,” originally had “developed almost by accident” by judicial over-reading of dicta in *Turner v. United States*. See *Kiowa Tribe*, 523 U.S. at 756–57; see also *Turner v. United States*, 248 U.S. 354 (1919). Further, the Court suggested that tribal immunity was suspect on policy as well as doctrinal grounds; given the extent of tribal commercial ventures, it “extend[ed] beyond what is needed to safeguard tribal self-governance,” and had the potential to “harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” *Kiowa Tribe*, 523 U.S. at 758.

¹⁷¹ See *Kiowa Tribe*, 523 U.S. at 756–57. The Court in *Kiowa Tribe* supported this reasoning with a rather odd analogy to foreign immunity, which “began as a judicial doctrine,” but was codified when Congress ultimately passed FSIA to provide “more predictable and precise rules.” See *id.* at 759. This explanation slightly oversimplifies the history of the development of foreign sovereign immunity doctrine and overstates the role of the FSIA. Prior to the FSIA's enactment, the Court deferred to the executive branch on the question of whether foreign sovereign immunity should be granted in any particular case. See *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). The executive branch normally recommended immunity for friendly sovereigns regardless of the circumstances, despite the 1952 “Tate letter” that urged limiting the doctrine to public acts. See *id.* at 689–90. The FSIA thus represented not a decision by the Court to defer to Congress, but a shifting of responsibility for setting standards for foreign sovereign immunity from the executive to the legislative branch. The comparison to tribal sovereign immunity is therefore somewhat inapt, because the executive has never had a role in delineating the extent of the tribal immunity that courts recognize.

¹⁷² See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996) (describing the Court's “rulerless exercise in judicial subjectivism” in the area of tribal sovereignty).

fact that, as *Kiowa Tribe* was decided, Congress was seriously considering statutory limitations on tribal sovereign immunity.¹⁷³ Congress ultimately rejected those limitations, however, and the Court has shown no inclination to step in and fill the void.¹⁷⁴ A perhaps equally or more significant factor may have been the Court's commitment to the idea of immunity as the cornerstone of state sovereignty. *Seminole Tribe of Florida v. Florida*, a well-known case decided two years before *Kiowa Tribe*, ushered in the Rehnquist Court's new view of state sovereign immunity and congressional power.¹⁷⁵ In that case, the Court held that Congress had no power to abrogate state sovereign immunity under the Indian Commerce Clause (and, by implication, its other Article I powers).¹⁷⁶

Seminole Tribe held that Congress could not constitutionally subject states to suit by tribes under the Indian Gaming Regulatory Act.¹⁷⁷ Somewhat ironically, this holding was greatly harmful to tribal interests. Nonetheless, it may have worked to tribes' advantage in protecting their immunity from judicial incursion. That is, in light of the aggressive limitations the Court has placed on most aspects of tribal sovereignty, many commentators have argued that a principal reason the Court has been reluctant to restrict sovereign immunity in the tribal arena is that to do so might undermine the foundations of its Eleventh Amendment jurisprudence.¹⁷⁸

¹⁷³ See Seielstad, *supra* note 5, at 665–66 (“Congress, at the time the Court deliberated over and rendered its decision in *Kiowa Tribe*, was actively reconsidering the [tribal immunity] doctrine, and the Court was aware of this fact.”).

¹⁷⁴ *Id.* at 666.

¹⁷⁵ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47–62 (1996).

¹⁷⁶ See *id.* at 47, 62. Subsequent developments have slightly modified this view. In *Central Virginia City College v. Katz*, for example, the Court suggested that the Article I Bankruptcy Clause was “intended . . . to authorize limited subordination of state sovereign immunity in the bankruptcy arena.” See 546 U.S. 356, 362–63 (2006).

¹⁷⁷ See 517 U.S. at 47 (“We hold that notwithstanding Congress’ clear intent to abrogate the States’ sovereign immunity, the Indian Commerce Clause does not grant Congress that power . . .”). Furthermore, in lumping the Indian Commerce Clause with other Article I powers, the Supreme Court ignored a wealth of historical and doctrinal evidence that the Indian Commerce Clause gave Congress a distinctive and especially powerful role in guiding Indian affairs. See Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 611–13 (2008).

¹⁷⁸ See Seielstad, *supra* note 5, at 762–63. Professor Seielstad explains:

Even where the Court conveys its reluctance to perpetuate tribal immunity in contemporary society, it is compelled to uphold principles that are firmly rooted in the historical and jurisprudential fabric of this nation. . . . [T]he fact that the tradition of sovereign immunity is rooted in inherent notions of sovereignty rather than in the text of a statute or the Constitution may provide a better explanation for its resilience.

The specific reasoning the Supreme Court has used in the Eleventh Amendment context supports this view in many ways. In its state sovereign immunity cases, the Court has focused on sovereign immunity as a primary and inherent aspect of sovereignty.¹⁷⁹ The Court has thus declared that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent”¹⁸⁰ and that immunity was “a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.”¹⁸¹ Indeed, the Court’s Eleventh Amendment cases might be said to depend on a notion of sovereignty and immunity as inextricable, because only by equating the two has the Court been able to explain how the Constitution preserves and enshrines a general principle of state sovereignty despite its lack of explicit mention of the doctrine.¹⁸²

In addition to their discussion of the link between sovereignty and immunity, the Court’s Eleventh Amendment cases also make clear that the Court regards state sovereign immunity as a restriction specifically on *judicial* authority.¹⁸³ The Court, for example, has viewed state sovereign immunity as embodied in Article III (although Article III does not directly discuss the doctrine) and thus in a category with other constitutional limitations on the judicial power.¹⁸⁴ As a result, the Court has retreated to some extent from the judiciary’s historical role in expounding and developing a sovereign immunity doctrine, instead viewing the doctrine as something that courts are powerless to shape or alter.¹⁸⁵

Read against this backdrop, the Court’s noninterference with immunity in the tribal context is in some ways more logical. If all sovereigns by definition possess immunity—and, moreover, cannot be di-

Id.

¹⁷⁹ See, e.g., *Alden*, 527 U.S. at 712.

¹⁸⁰ *Seminole Tribe*, 517 U.S. at 54 (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

¹⁸¹ *Alden*, 527 U.S. at 713. *Alden v. Maine*, in which the Supreme Court held that states are immune from suit in their own courts as well as in federal court, was decided about a year after *Kiowa Tribe*. *Id.* at 712. Nonetheless, it is particularly significant for illustrating the way a majority of the Rehnquist Court regarded immunity: as an inextricable part of sovereignty that exists whether or not it is formally enshrined in the Constitution or other sources of law. See *id.*

¹⁸² See Seielstad, *supra* note 5, at 663 (noting that sovereign immunity has come to be seen as an index of the degree of sovereignty a particular entity is accorded).

¹⁸³ See, e.g., *Seminole Tribe*, 517 U.S. at 64.

¹⁸⁴ See, e.g., *id.* (“[T]he Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limit[s] the federal courts’ jurisdiction under Article III.”).

¹⁸⁵ See Florey, *supra* note 121, at 771, 775 (discussing how recently the Supreme Court has overlooked sovereign immunity’s origins as a common-law doctrine and regarded it, at least in the state context, as a more inflexible constitutional command).

vested of it without their clear consent—it makes sense that, no matter the degree to which tribal sovereignty has been otherwise eroded, tribal immunity would be the one remaining attribute tribes continue to possess. Furthermore, if state sovereign immunity is a bedrock constitutional principle that specifically limits the power of courts, it seems to follow that courts should have a limited role in restricting tribal immunity as well. Thus, even as the Court has been more explicit in drawing parallels between tribal and *foreign* immunity, its state sovereign immunity jurisprudence may have influenced more profoundly the way in which it conceives of tribal immunity.

D. *The Boundaries and Effects of Tribal Sovereign Immunity*

Whatever the explanation for the Court's hands-off approach in the tribal immunity arena, it has had significant practical effects. Despite the Court's expressed reservations about the wisdom of an expansive tribal sovereign immunity doctrine,¹⁸⁶ the actual contours of the doctrine remain astonishingly broad. The doctrine is arguably broader than both state sovereign immunity, which is in practice extensively limited by waiver, abrogation, and the exception for prospective injunctive relief under federal law,¹⁸⁷ and foreign sovereign immunity, which does not protect commercial acts outside the foreign nation's territory and thus would not have applied to a transaction of the sort in which the Kiowa tribe engaged.¹⁸⁸ Furthermore, tribal sovereign immunity applies not just broadly but deeply, frequently protecting not just tribal governments, but tribal entities and corporations that are considered sub-entities of the tribe.¹⁸⁹ Some courts have even found tribal immunity to

¹⁸⁶ See *supra* note 170.

¹⁸⁷ See Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 216, 250, 255, 256 (2006) (arguing that exceptions to state sovereign immunity and alternative means of enforcing federal law blunt the impact of the Court's Eleventh Amendment rulings). Although in theory tribal immunity is subject to some of the same checks as state sovereign immunity, in practice they are often less effective in the tribal context. For example, Congress has unlimited power to abrogate tribal sovereign immunity, but it has exercised this power sparingly. See COHEN, *supra* note 17, § 7.05(b) (describing the very limited circumstances in which Congress has abrogated tribal sovereign immunity under the Indian Civil Rights Act and Indian Gaming Regulatory Act, and noting that Congress has rejected broader limits on tribal immunity); see also *infra* notes 278–281 and accompanying text (describing limits of injunctive relief and waiver in the tribal context).

¹⁸⁸ See *Verlinden B.V.*, 461 U.S. at 488.

¹⁸⁹ See, e.g., *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (finding that tribal resort was “clothed with the sovereign immunity of the Tribe”). Note also that tribal immunity shields tribes from suits by states,

apply to individual tribal employees, from managers to maintenance workers, when they are acting in the course of their duties for an immune tribal corporation.¹⁹⁰

Tribal immunity is, of course, of more than symbolic importance. Under current law, tribal immunity serves as a safeguard of tribal sovereignty in several practical ways. Perhaps its most obvious function is to save tribes litigation costs. State and federal sovereign immunity have both been justified on the grounds that they are necessary to protect public treasuries.¹⁹¹ To many commentators, however, these rationales ring hollow, as it is arguably fairer to spread the costs of compensating victims among the public than to force such victims to pay their own damages.¹⁹² The fragile finances of many tribes, however, give the treasury argument added force in the tribal context.¹⁹³ One large judgment has the potential to threaten the tribe's existence. Unlike states, most tribes do not have a sufficiently large tax base to absorb substantial and unexpected costs.¹⁹⁴ Furthermore, in contrast to the scenario in which a

although not by the United States because Congress can authorize the suit. COHEN, *supra* note 17, § 7.05[1][a], at 635. In contrast, states may sue each other notwithstanding state sovereign immunity (though state immunity does protect states from suits by tribes). See *Alden*, 527 U.S. at 755. Although state sub-entities may also receive sovereign immunity protections, this rule has more important consequences where tribes are concerned, because it is much rarer for states to engage in the wide range of commercial activities that many tribes do. Cf. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 & n.54 (1978) (noting that the Eleventh Amendment does not bar municipal liability). States, of course, do run businesses, such as state-run lotteries, to raise revenue in much the same way as tribes do. In general, however, states do not engage in the variety and scale of commercial activities that tribes do, nor do they depend on them as extensively for revenue.

¹⁹⁰ See, e.g., *Cook v. AVI Casino Enters.*, 548 F.3d 718, 727 (9th Cir. 2008) (employees were protected by tribal immunity because they acted "in the course and scope of their authority as casino employees"); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1071–72 (N.D. Okla. 2007) (concluding that managers of tribal tobacco company were immune from suit because allegations were related to their official duties in running a tribal enterprise); *Romanella v. Hayward*, 933 F. Supp. 163, 167–68 (D. Conn. 1996) (finding tribe members responsible for maintenance of parking lot where accident occurred were protected by tribe's immunity, because alleged negligence "[arose] from [defendants'] positions as tribal officials responsible for the maintenance of the parking lot").

¹⁹¹ See, e.g., Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1032–35 (2000) (arguing that suits against states do not pose a serious threat to state financial welfare).

¹⁹² For a more detailed version of this argument, see Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 647–48 (2007).

¹⁹³ As Angela Riley has argued, many tribes "have struggled with financial solvency and have long existed on tiny budgets, operating on poverty-stricken reservations." Angela Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1109 (2007).

¹⁹⁴ See Struve, *supra* note 21, at 169.

state is sued by one of its citizens, nonmember suits against tribes do not simply represent a redistribution of costs from one individual to the larger community of which that person is a part. Rather, they represent a net flow of money out of the tribal community.¹⁹⁵

The costs to tribes of litigating may be more than monetary. States and the federal government are familiar repeat players in the state and federal court system, with a dedicated staff of attorneys to serve their legal interests. By contrast, tribes may have little or no institutional experience with the state or federal court system. Tribes, therefore, may be at a structural disadvantage when forced to litigate outside their own courts. Additionally, if the case concerns issues of general Indian law, a loss in state or federal court may create undesirable precedent that may harm the interests of other tribes as well.

A second important function of tribal immunity is to foster the development of tribal courts. The jurisdiction of tribal courts is normally limited to tribe members.¹⁹⁶ Because tribes lack jurisdiction over off-reservation claims involving nonmembers, nonmembers can only be sued in tribal court by their consent, and nonmember plaintiffs generally have little reason to file in tribal court voluntarily.¹⁹⁷ Selective waivers of immunity in tribal, but not state or federal, court provide a way for tribes to permit claims against them to be heard on their own terms. Furthermore, tribal courts themselves are frequently important

¹⁹⁵ See Riley, *supra* note 193, at 1109 (quoting a tribal judge's defense of tribal immunity: "Suits against the tribe seeking damages attack the community treasury. This money belongs to all the people of the Sauk-Suiattle nation. It must be guarded against the attacks of individuals so that it can be used for the good of all in the tribal community."). Of course, one might argue that such an outflow of funds is appropriate because tribes have an obligation to compensate those they injure. Nonetheless, the situation is quite different from, say, a suit against a state by one of its citizens, which represents a redistribution of funds within one political community.

¹⁹⁶ See *supra* notes 94–95 and accompanying text.

¹⁹⁷ As previously discussed, tribes also lack jurisdiction over nonmember defendants even in suits that concern on-reservation transactions. See *supra* notes 75–101 and accompanying text. However, in one of the few remnants of the Supreme Court's earlier era of favoring tribal autonomy, the *opposite* is true when non-Indian plaintiffs sue Indian defendants in cases arising from events occurring in Indian country; in such situations, tribal courts have *exclusive* jurisdiction. See *Williams*, 358 U.S. at 223. Nonetheless, sovereign immunity remains a helpful forum-shifting device even when tribes are defendants, because *Williams* applies only to on-reservation transactions. Further, in the several states subject to P.L. 280, states have civil jurisdiction even over events occurring in Indian country. See 28 U.S.C. § 1360 (2006). Finally, tribal defendants who are sued in tribal court may wish to assert counterclaims over nonmember plaintiffs, claims over which in the absence of consent the tribal court would lack jurisdiction.

institutions in tribal life.¹⁹⁸ Permitting tribal judges to hear a variety of cases and issues enhances the experience and prestige of the tribal judiciary. By using tribal immunity to funnel cases into tribal courts, tribes help to enhance the strength of their own courts and ensure that they do not lose out in “competition” with state courts that may be larger, better funded, and more conveniently located for nonmembers.

In addition to these two fairly straightforward mechanisms, tribal sovereign immunity also protects tribal interests in a subtler manner. At a time when tribes’ autonomy to “make their own laws and be ruled by them”¹⁹⁹ is increasingly in jeopardy, sovereign immunity permits tribes in a very concrete way to avoid the encroachment of state or federal law that might otherwise be found to apply. This effect may permit tribes more autonomy than they might otherwise enjoy. In the previously discussed *Martinez* case, for example, the presence of tribal sovereign immunity sharply limited the usefulness of the ICRA to litigants—and, consequently, also any real obligation on the part of the tribe, aside from perhaps an ethical one, to comply with federal law.²⁰⁰ This result was controversial because it left tribes in effect free to ignore constitutional rights and protections if they so chose.²⁰¹ It is virtually indisputable, however, that for better or worse, it also promoted the ability of tribes to make decisions autonomously on matters that might otherwise be subject to federal law.²⁰² Some courts have held that, whether or not federal employment law is applicable to tribes, it cannot be enforced against them because there is no evidence of congressional intent to abrogate tribal sovereign immunity.²⁰³ This, of course, limits the practical effect of federal law that might otherwise be found to govern tribes.

Sovereign immunity also provides tribes more practical advantages in more ordinary business and tort disputes. It is this dimension of tribal immunity that has proven most controversial. In the 2008 case, *Cook v. AVI Casino Enterprises, Inc.*, for example, a plaintiff injured in a motorcy-

¹⁹⁸ See, e.g., *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (observing that tribal courts “play a vital role in tribal self-government”).

¹⁹⁹ The Court famously used this phrase to encapsulate tribal sovereignty in *Williams*, 358 U.S. at 220.

²⁰⁰ See *Martinez*, 436 U.S. at 72; *supra* notes 143–151 and accompanying text.

²⁰¹ Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 362–63 (2004).

²⁰² See *Martinez*, 436 U.S. at 72.

²⁰³ See, e.g., *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 85–86 (2d Cir. 2001) (“Regardless of whether the substantive norms of the ICRA, the ADEA, and the Age Discrimination Act all apply to tribes, none of the laws abrogates tribal sovereign immunity from suit.”).

cle collision by an “obviously intoxicated” casino employee sued other casino employees under both Arizona and Fort Mojave tribal law for alleged negligence in serving the intoxicated driver drinks and driving her to her car.²⁰⁴ The U.S. Court of Appeals for the Ninth Circuit, while acknowledging the potential unfairness of applying sovereign immunity to tribal corporations “competing in the economic mainstream,” nonetheless held that, in accordance with established law, the tribal employees were immune from suit.²⁰⁵

Likewise, *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, a 2007 case in the U.S. District Court for the Northern District of Oklahoma, involved an intra-tribal business dispute in which a tribe member and his tobacco distributing company alleged that the Seneca-Cayuga Tobacco Co. (“SCTC”), a tribal enterprise, had breached contracts and violated federal antitrust law by giving preferences to favored distributors and various other actions.²⁰⁶ The plaintiff further claimed that SCTC’s managers had misleadingly informed him that SCTC was subject to an immunity waiver in the tribe’s corporate charter and that an additional waiver of immunity was not necessary.²⁰⁷ The district court found that the suit was barred by sovereign immunity, rejecting plaintiff’s argument that SCTC should be estopped from claiming immunity because of its managers’ alleged misrepresentation: “[C]ourts may not find a waiver of immunity based on perceived inequities arising from the assertion of immunity, or the unique context of a case.”²⁰⁸ Plaintiffs argued that the “purpose [of tribal immunity] is not served . . . when a sophisticated, multi-million dollar tobacco company cynically uses tribal sovereign immunity as a shield to protect itself from prosecution for illegal business conduct”²⁰⁹ While calling this argument “compelling,” the district court nonetheless found that it had “no authority to find a waiver of immunity based on policy concerns.”²¹⁰

In contract cases, sovereign immunity issues can in theory be handled by a negotiated waiver. Sophisticated parties who enter into contracts with tribes are usually aware of the need to obtain such a

²⁰⁴ 548 F.3d 718, 720–21 (9th Cir. 2008).

²⁰⁵ *See id.* at 725 (noting that plaintiff’s policy arguments “are not without some insight but are foreclosed by our precedent”).

²⁰⁶ 491 F. Supp. 2d 1056, 1058–59, 1062 (N.D. Okla. 2007).

²⁰⁷ *Id.* at 1068–69.

²⁰⁸ *Id.* at 1069 (internal citations and quotations omitted).

²⁰⁹ *Id.* at 1070.

²¹⁰ *Id.*

waiver.²¹¹ Waivers, however, often multiply rather than eliminate sovereign immunity litigation as disputes arise over their validity and scope. *Native American Distributing* illustrates one common problem: tribal enterprises that are issued a corporate charter from the Department of the Interior normally include a “sue and be sued” clause in the charter.²¹² Such clauses, however, have generally been construed as applying only to the corporation, not the tribe as a whole, and as a given tribal enterprise may be found to be a division of the tribe itself rather than a particular tribal corporation.²¹³ The individuality and complexity of many tribal business arrangements often complicates the resolution of such issues. Further, not only tribal business partners, but tribes themselves may sometimes be unpleasantly surprised by courts’ construction of sovereign immunity waivers; some courts have construed waivers more broadly than the tribe has maintained it intended.²¹⁴

In addition to the policy goals it serves, tribal immunity is a bargaining chip in business dealing and litigation—one that usually redounds to the advantage of tribes, but can in some cases cause them unpleasant surprise. Although an essentially collateral effect of the strong tribal immunity doctrine the Supreme Court has continued to recognize, this function of tribal immunity has become central to the debates about tribal immunity’s role and future.²¹⁵

III. TERRITORY, IMMUNITY, AND THE FRAGILE STATE OF TRIBAL SOVEREIGNTY

The preceding Parts have sketched the contours of the current doctrine of both tribal territoriality and tribal immunity, and explored some of the real-world effects that changes in these doctrines have had. This Part now poses the question: what is wrong with the status quo? In

²¹¹ See James K. Kawahara & Michelle LaPena, *Indian Country*, L.A. LAW., Jan. 2006, at 26, 29 (practitioner’s guide to Indian country transactions describing the need for a waiver of sovereign immunity).

²¹² See *Native Am. Distrib.*, 491 F. Supp. 2d at 1059.

²¹³ See *id.* at 1066. For the proposition that “sue and be sued” clauses apply only to the corporation, see *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989) (citing several cases). Even as applied solely to a tribal corporation, “sue and be sued” clauses are not universally construed as waiving sovereign immunity. See COHEN, *supra* note 17, § 4.04[3][a], at 256.

²¹⁴ See, e.g., *Catskill Dev. v. Park Place Entm’t Corp.*, 206 F.R.D. 78, 89–90 (S.D.N.Y. 2002) (reading waiver of immunity in light of other contractual language to reject narrow interpretation urged by the tribe).

²¹⁵ For a more in-depth exploration of questions about tribal immunity’s role and future, see *infra* notes 264–322 and accompanying text.

other words, if sovereign immunity has filled some of the void left by the decreasing importance of traditional territorial components of tribal sovereignty, why is this an undesirable outcome? This Part thus begins by considering whether territorial sovereignty is a concept that has continuing relevance to tribes in the face of both its European origins and the practical reality of weakening territorial bounds worldwide.²¹⁶ It goes on to consider whether immunity can be an acceptable substitute for territoriality as a foundation for sovereignty.²¹⁷

A. *Territoriality and Tribes*

It goes almost without saying that territoriality is central to sovereign power and identity, both in popular conception and in law.²¹⁸ As one international law treatise puts it, sovereignty “is founded upon the fact of territory. Without territory, a legal person cannot be a state.”²¹⁹ Territory defines the limits of sovereignty; sovereign control over territory consists of “the right to exercise therein, to the exclusion of any other State, the functions of a State.”²²⁰ Further, territoriality is the unifying concept on which other sovereign powers are predicated and by which they are explained. Thus, it has long been the case that “fundamental legal concepts as sovereignty and jurisdiction can only be comprehended in relation to territory.”²²¹

Recently, however, cultural and geopolitical changes—from the redrawing of national boundaries to the expanded possibilities of borderless community fostered by the Internet—have caused some scholars to consider whether territorial boundaries are, or should be, of decreasing significance in law. Paul Schiff Berman, for example, has argued that “human behavior and communal groupings are less influenced by territory, even as coercive power tends to remain primarily the province of territorially-based sovereigns.”²²² Territorial ties, Berman argues, have been weakened by what he calls the “deterritorialization of effects,” or the consequences of distant events on people’s eve-

²¹⁶ See *infra* notes 218–263 and accompanying text.

²¹⁷ See *infra* notes 264–322 and accompanying text.

²¹⁸ See MORGENTHAU & THOMPSON, *supra* note 113, at 294 (dating the modern conception of territorial sovereignty from the Peace of Westphalia in 1648).

²¹⁹ MALCOLM N. SHAW, INTERNATIONAL LAW 409 (5th ed. 2003).

²²⁰ See REBECCA M.M. WALLACE, INTERNATIONAL LAW 92 (3d ed. 1997) (quoting Arbitrator Max Huber in the *Island of Palmas Case* (Neth. v. U.S.), 2 R. Int’l Arb Awards 829, 838 (Perm. Ct. Arb. 1928)).

²²¹ See SHAW, *supra* note 219, at 409.

²²² Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 929 (2006).

ryday lives.²²³ For example, people shop at malls populated mostly by national chain stores, and suffer personal bankruptcy as the result of global economic events.²²⁴ Likewise, people's most important community affiliations may be with political and social institutions, such as NGOs or online networks, that cross geographical boundaries.²²⁵

Some have argued that these developments also serve to weaken the significance of territoriality with respect to indigenous peoples.²²⁶ Indeed, the argument goes, because tribes had no role in the elevation of territoriality to a cornerstone of sovereignty in Europe, territorial sovereignty has always been a poor fit for tribes, and we should therefore not excessively mourn its demise. Austen Parrish, for example, has argued that the fading of territorial boundaries in various arenas of law has in some ways strengthened the position of tribes relative to other sovereign entities.²²⁷ As Parrish argues, colonization has robbed tribes, like other indigenous peoples, of the land they traditionally occupied.²²⁸ Furthermore, the European model of the territorial nation-state is in some respects at odds with traditional tribal forms of social and political organization.²²⁹ Thus, Parrish claims, the weakening of traditional borders—and, in particular, the willingness of many people to identify with groups that span the boundaries of various nations—may have positive consequences for tribes.²³⁰ Tribes may, for example, be better able to make their case for autonomy within more traditional nation-states and they may have more opportunities to forge alliances with transnational organizations.²³¹

It certainly may be that some aspects of the decreasing focus on boundaries will prove beneficial to tribes, whether helping tribes to maintain a closer sense of community with tribe members living off the reservation, or enabling tribes to profit from Internet-based businesses and advertising. Likewise, in a legal climate in which tribes are under

²²³ See *id.* at 933.

²²⁴ *Id.* at 933–34; see also John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 141 (1993) (describing increased flow of transnational goods, services, and information).

²²⁵ See Berman, *supra* note 222, at 936–37; see also Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1821 (2005).

²²⁶ See Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 298–99 (2007).

²²⁷ See *id.* at 306–07.

²²⁸ See *id.* at 299.

²²⁹ See *id.* at 297.

²³⁰ See *id.* at 306–07.

²³¹ See *id.* at 311–12.

continual threat of becoming little more than “voluntary organizations,”²³² the worldwide rise of true “voluntary organizations” as legitimate sources of political power can only be good news. This Article, however, takes the opposite view: that territorial sovereignty remains of prime importance for tribes, perhaps even more so than for other sovereigns, and that the (still fairly modest) decline in global significance of the concept does not change that fact.²³³

To begin with, the decline of territoriality in legal doctrine generally can be overstated. Even Berman, while arguing that traditional notions of territoriality are inadequate to explain the complex transnational affiliations that often exist in the modern world, concedes that the ability to enforce law remains rooted in territorial notions of power.²³⁴ He notes, for example, that groups whose membership spans national boundaries are normally able to achieve their ends only by lobbying local governments and working with local authorities.²³⁵ In countless areas of law, factors based on physical location remain relevant even though the precise nature of territoriality may have changed. Consider, for example, choice-of-law issues. In the United States until the second half of the twentieth century, courts used a system often described as rigidly territorial under which the location of the last event giving rise to a cause of action would be applied to a dispute.²³⁶ Most states have now adopted more modern choice-of-law schemes that frequently consider multiple factors, including the location of relevant conduct and the domicile of the parties.²³⁷ Yet these schemes, too, rely almost completely on territorial principles, just of a different sort. That is to say, they too depend on connections between events and place. As Lea Brilmayer has observed: “Clearly there is no way to formulate a choice of law regime other than to found it upon territorial assumptions of some sort.”²³⁸

To think about tribes as wholly nonterritorial entities, then, is to deny them full sovereignty in two respects. First, to the extent that sovereigns in general enjoy territorial prerogatives, a wholly nonterritorial

²³² See *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

²³³ See *infra* notes 264–322 and accompanying text.

²³⁴ See Berman, *supra* note 222, at 938–39.

²³⁵ See *id.* Berman argues that these developments are likely to “put pressure” on doctrines of jurisdiction and choice of law as national institutions increasingly try to regulate distant events (and thus become subject to charges of extraterritorial regulation). See *id.* at 941–43.

²³⁶ See Florey, *supra* note 23, at 1651–52.

²³⁷ See *id.* at 1651–55.

²³⁸ Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *YALE L.J.* 1277, 1306 (1989).

notion of tribal sovereignty means granting tribes an inherently lesser version of sovereignty than that which most states and nations enjoy. This would be true even if tribes did not also have powerful cultural and historical reasons—as discussed below—for attaching value to autonomous control of land. A second and slightly subtler reason is that the less tribes possess a version of sovereignty that is widely understood and accepted, the more difficult their relationships with other sovereigns will be—something that has the potential in turn to impede tribes' ability to “make their own laws and be ruled by them”²³⁹ as autonomous nations.²⁴⁰ Because the choice-of-law systems followed by most states are rooted in territorial considerations, states may be reluctant to apply tribal law even in circumstances where the tribe has a substantial connection to the transaction and where the court normally *would* apply the law of a sister state or foreign nation.²⁴¹

Likewise, interjurisdictional cooperation between states and tribes in enforcing court orders or responding to crime may be made more difficult by the uncertainty surrounding the limits on tribal territorial authority. Thus, the absence of clear territorial markers of tribal authority has—in addition to the primary effect of providing tribes with a less powerful version of sovereignty in the first instance—the potential secondary effect of diminishing tribes' ability to protect their interests vis-à-vis states or other entities that are accustomed to operating in a territorial framework.

Another way of looking at the issue is to consider the importance of territory to tribes as a function of the specific tribal experience within the United States. The association between tribes and particular parcels of land is, for the most part, arbitrary—determined by the convenience of colonizers rather than tribes' historical land claims or use.²⁴² It is important to note that this is not, however, universally true—certain tribes, such as the Quechan Tribe of Fort Yuma, continue to occupy their traditional land base.²⁴³ This does not mean, however, that territoriality is therefore irrelevant to tribal sovereignty. Most tribe members, in fact,

²³⁹ See *Williams v. Lee*, 358 U.S. 217, 220 (1959).

²⁴⁰ This author has explored this problem in a previous article. See Florey, *supra* note 23.

²⁴¹ See *id.* at 1650–76.

²⁴² See, e.g., Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 236 (2001) (“Internal administrative boundaries utilized by the larger contemporary state [demarcating indigenous lands] may differ greatly from the boundaries ascribed to the historic entity . . .”).

²⁴³ McCoy, *supra* note 74, at 429.

regard the reservation as an integral part of tribal sovereignty and identity because it symbolizes the promise of tribal community and provides a tangible symbol of tribes' existence apart from non-Indian American culture and politics.²⁴⁴ Historically, when the United States has tried to reduce tribal power, it has done so by separating tribes from their land.²⁴⁵ Conversely, pro-Indian policies have attempted to foster the autonomous existence of tribes by establishing clearly delineated physical spaces, whether reservations or other parts of Indian country.²⁴⁶

The notion that territoriality continues to have importance for tribes also surfaces in the abundant literature arguing that it is important for indigenous peoples to both reaffirm and reinvent European conceptions of sovereignty.²⁴⁷ Perry Dane, for example, notes that, though tribal sovereignty is in one sense constructed by federal law, tribes' sovereignty in another sense belongs to them: "It would not exist if Indians had not fought for it, and lived it."²⁴⁸ For Dane, a continuing emphasis on traditional notions of sovereignty is important for tribes because it acknowledges tribes' separateness and the fact that they possess rights as communities, not just collections of individuals.²⁴⁹ Padriac

²⁴⁴ See FRANK POMMERSCHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 11 (1995). Frank Pommersheim describes in detail the centrality of the reservation to the identity of many tribes. *Id.* The reservation, he observes, is

a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspirations of Indian people, their communities, and their tribes. It is a place that marks the endurance of Indian communities against the onslaught of a marauding European society; it is also a place that holds the promise of fulfillment.

Id. As Pommersheim notes, tribes' commitment to reservations has a long history; from the early nineteenth century, "[t]he need for reservations was the one point on which both the tribes and federal government could readily agree." *Id.* at 17; see also McCoy, *supra* note 74, at 426–27.

²⁴⁵ See McCoy, *supra* note 74, at 447.

²⁴⁶ See, e.g., POMMERSCHEIM, *supra* note 244, at 19 (describing allotment as an attack on the "measured separatism" tribes had previously enjoyed and the "most devastating historical blow to tribalism and Indian life"). By contrast, the Indian Reorganization Act—widely praised for ending the allotment era—includes provisions designed to help tribes expand their land base. See McCoy, *supra* note 74, at 450–51.

²⁴⁷ See, e.g., Kingsbury, *supra* note 242, at 216–19; Leslie Sturgeon, Note, *Constructive Sovereignty for Indigenous Peoples*, 6 CHI. J. INT'L L. 455, 465 (2005).

²⁴⁸ See Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 962 (1991); see also Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1111 (2004) (observing that, for many tribe members, "sovereignty" is as common and heartfelt a term as 'rights' is to most other Americans").

²⁴⁹ See Dane, *supra* note 248, at 967. As Dane argues:

Sovereignty-talk requires legal systems to step—ever so partially—outside themselves. . . . [Sovereignty] is less a grant of freedoms or privileges than the

McCoy argues that land, in particular, is vitally significant to tribal sovereignty.²⁵⁰ Land is significant because North American tribes have “historically been, and continue to be, a land-based culture.”²⁵¹ Further, a “protected land base” continues to be vital in the continuing survival and health of tribal communities.²⁵² For tribes accustomed to regarding the reservation as the center of tribal life and identity, the inability to control events occurring within tribal borders can, at the very least, be demoralizing.²⁵³

Territorial control is important in more practical senses as well. Tribes, after all, *do* occupy land, and activities that occur on or close to tribal territory are thus likely to have far-reaching effects on many members of the tribe. Consider the scenario of 2008’s *Plains Commerce Bank v. Long Family Land & Cattle*, in which the title to on-reservation land long used for a tribal business passed to a non-Indian bank.²⁵⁴ By virtue of the bank’s ownership, the U.S. Supreme Court held that the tribe had lost all rights to regulate any future sale of the land, even to the extent of prohibiting discrimination against one of its members in the sales terms.²⁵⁵ The significance of *Plains Commerce Bank*, is that a private land transaction over which the tribe has no sway could result in what is in effect a diminution of the geographical reach of the tribe’s authority.²⁵⁶ Such a rule creates a fundamental uncertainty about the permanence of tribes’ power to make their own legal rules and diminishes tribes’ ability to plan for the future.²⁵⁷

power to define freedoms and privileges. More important, it is the capacity to build an order of values and structures to sustain or change those values. . . . [H]owever divided, limited, and heterogeneous it is, it is a dynamic, organic whole.

Id. Dane suggests that a somewhat complex understanding of territoriality may be necessary within this vision of sovereignty. Though he argues that “territorial division is in some deep sense necessary to the definition of legal orders,” he also suggests that tribes might be ill-served by rigid notions of territoriality, and that ideas of tribal sovereignty should be flexible enough to encompass notions of overlapping jurisdiction or jurisdiction based on categories other than territory. *See id.* at 978–79.

²⁵⁰ *See* McCoy, *supra* note 74, at 422.

²⁵¹ *Id.* at 424.

²⁵² *See id.*

²⁵³ *See* POMMERSCHEIM, *supra* note 244, at 18.

²⁵⁴ *See* 128 S. Ct. 2709, 2714 (2008). Although the original owner of the land at issue in *Plains Commerce Bank*, Kenneth Long, was a non-Indian (though a long-term resident of the reservation who operated a family business there), it is easy to imagine a scenario in which Indian-owned land could be similarly “lost” to tribal control. *Id.* at 2715.

²⁵⁵ *See id.* at 2719.

²⁵⁶ *See id.*

²⁵⁷ *See id.*

Another vivid example is the plight of the Oglala Lakota on the Pine Ridge Reservation in South Dakota, located in the second-poorest county in the United States.²⁵⁸ When Chane Coombs, a non-Indian, used a house he owned on the reservation as a haven for conducting various crimes, including methamphetamine dealing, assault, and trafficking in stolen goods, the tribe was helpless to do anything but order Coombs off the reservation, orders he ignored.²⁵⁹ Coombs remained on the Pine Ridge Reservation until an off-reservation act of domestic violence gave state authorities jurisdiction to prosecute him.²⁶⁰

The lack of territorial jurisdiction over nonmembers is just one of the problems tribes face in limiting on-reservation criminal activity. Tribes, for example, are limited to a maximum one-year sentence even against tribe members, which in many cases is not a sufficient deterrent.²⁶¹ But the absence of criminal jurisdiction over nonmembers within reservation borders—and the resulting tendency of criminals to seek sanctuary on the reservation—is perhaps the most vivid symbol of tribes' helplessness.²⁶²

For tribes within the borders of the United States, territoriality is thus an aspect of sovereignty that is easily understood in non-Indian culture, that has strong roots in the history and experience of many tribes, and that powerfully affects tribes' daily existence. Although a strong case can be made that tribes should take advantage of the trends described by Berman and Parrish to assert their sovereignty in non-territorial dimensions as well, such nascent and untested forms of political organization are not a substitute for traditional territorial control.²⁶³ Further, to suggest otherwise would be to ignore the rich and particularized relationship that tribes have with the actual land they occupy. Thus, territory does and should continue to occupy a central place in the development of tribal sovereignty.

²⁵⁸ See Fields, *supra* note 2.

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ See *id.* (quoting ex-girlfriend of tribe member serving one-year sentence after assaults and death threats as summing up his situation as follows: “[H]e was fine in jail. He got fed three times a day, had a place to sleep and he wasn’t going to be there long.”).

²⁶² Although U.S. Attorneys have jurisdiction over several enumerated major on-reservation crimes, they often lack resources to prosecute all but the most serious cases. See Tweedy, *supra* note 4, at 691; Fields, *supra* note 2.

²⁶³ See Berman, *supra* note 222, at 938–39; Parrish, *supra* note 226, at 306–07.

B. *The Effects of Immunity*

If the absence of territorial sovereignty continues to be a problem for tribes, what about sovereign immunity? In some ways, tribal sovereign immunity has become a substitute for some features of territorial control. As the Supreme Court candidly observed in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the fact that state law may in theory apply to tribes in particular circumstances does not necessarily mean that the state has the power to enforce that law against an immune tribe.²⁶⁴ Even as the erosion of tribal territorial sovereignty means that state law may sometimes apply to the conduct of tribes within tribal territory, the existence of tribal immunity nonetheless limits the circumstances under which state law can be effectively asserted.²⁶⁵ Thus, a robust doctrine of tribal immunity tempers to some extent the erosion of tribal power within Indian country.

Advocates for tribes understand this, and have forcefully urged continued respect for tribal immunity in the face of increasing encroachment on other tribal sovereign powers.²⁶⁶ Because the news on other tribal sovereignty fronts, at least as far as the Supreme Court is concerned, has been unremittingly bleak for the past couple of decades, immunity offers one of the few arenas in which tribes can assert their power. It is thus important to tread carefully in pointing out the negative aspects of tribal immunity, because any trend toward increased restriction of the doctrine—whether by judicial or congressional action—is likely to be a severe blow to what remains of tribal autonomy. At the same time, however, immunity is an intensely problematic doctrine on which to hang the hat of tribal sovereignty, and sole reliance on sovereign immunity as a source of power has the potential to impair tribal interests in other regards.²⁶⁷ The following section attempts to explain why this is true.

1. Tribes and General Critiques of Sovereign Immunity Doctrine

Sovereign immunity has a long history as a disfavored doctrine. Prior to the revival of state sovereign immunity as part of the Rehnquist Court's "new federalism," sovereign immunity doctrines were—almost

²⁶⁴ See 523 U.S. 751, 755 (1988).

²⁶⁵ See *id.*

²⁶⁶ See, e.g., Scielstad, *supra* note 5, at 662–63 (describing sovereign immunity as crucial to tribal sovereign status).

²⁶⁷ See *supra* notes 268–322 and accompanying text.

universally—criticized by scholars and interpreted narrowly by courts.²⁶⁸ As Kenneth Culp Davis put it a half-century ago, “nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go.”²⁶⁹ Detractors argue that modern sovereign immunity doctrines are based upon a misinterpretation (and over-extension) of their historical counterparts,²⁷⁰ foster a lack of democratic accountability,²⁷¹ and generally permit state lawlessness.²⁷²

To be sure, some criticisms of state or federal immunity apply with less force to tribes. The fact that Congress has limited powers to abrogate state sovereign immunity, for example, arguably makes it more difficult for the federal government to enforce federal law against states.²⁷³ By contrast, Congress has unlimited power to abrogate tribal sovereign immunity, even though it has exercised this power only rarely.²⁷⁴ Likewise, as previously noted, the undemocratic elements of sovereign immunity may be less troubling in the tribal context, because sovereign immunity is used most often to shield tribes against non-Indian litigants rather than their own population.²⁷⁵

Nonetheless, other criticisms of sovereign immunity apply with equal strength where tribes are concerned. Perhaps the most important of these is the argument that sovereign immunity in effect allows the sovereign to ignore the law at will and leaves tort victims without a remedy.²⁷⁶ In some respects, this argument applies with particular force to tribes. To begin with, the nature of many tribal enterprises—casinos

²⁶⁸ See Florey, *supra* note 121, at 766 (describing historical view of the doctrine as disfavored).

²⁶⁹ KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 435 (1st ed. 1958).

²⁷⁰ See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–03 (2001); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 28–30 (2002).

²⁷¹ See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485 (1987). Amar has noted, for example, that sovereign immunity’s effect is to “limit and control citizens in their efforts to vindicate constitutional rights.” *Id.*

²⁷² See, e.g., Robert A. Shapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2171 (2006) (“The Court’s interpretation of the Eleventh Amendment licenses states to act in a lawless fashion.”).

²⁷³ See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999).

²⁷⁴ See, e.g., *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 47 (1996).

²⁷⁵ See *supra* notes 152–85 and accompanying text.

²⁷⁶ See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 631 (5th ed. 2007) (“The effect of sovereign immunity is . . . to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.”). Indeed, as a few scholars have remarked, tribes themselves have often borne the negative consequences of assertions of immunity by other sovereigns, because there is no exception to state or federal immunity for suits by tribes. See Florey, *supra* note 121, at 814; Struve, *supra* note 21, at 171–72.

and other recreational establishments that may involve alcohol, large crowds, and long-distance drivers—multiply the occasions on which serious personal injuries may occur. Moreover, the checks that protect victims of injuries caused by a state may not necessarily protect those who suffer from tribal negligence.²⁷⁷ For example, both the U.S. Supreme Court and lower courts have suggested that an analogy to the *Ex parte Young* doctrine in state immunity exists for tribal immunity, permitting suits for prospective injunctive relief against tribal officials.²⁷⁸ This situation arises, however, far less frequently in the tribal context. By virtue of the Supremacy Clause, there is a large body of law that states are bound to follow, and *Ex parte Young* thus provides a meaningful and important check on state lawlessness.²⁷⁹ By contrast, a much smaller body of federal law is specifically applicable to tribes, and there are thus many fewer opportunities for plaintiffs suing tribes to benefit from the *Ex parte Young* exception.

Similarly, the federal government and many states have extensively waived immunity.²⁸⁰ Tribes, on the other hand, may be subject to less political pressure to waive immunity and, as a result, vary considerably in the degrees to which waivers are available and the terms of those waivers.²⁸¹

This argument that tribal immunity has the potential to deny victims a remedy has been made in skeptical asides by courts that nonetheless consider themselves bound to apply tribal sovereign immunity doctrine as the Supreme Court has delineated it.²⁸² This critique of tribal immunity has also found its way into the popular media. Reporters have taken up the plight of non-Indians unable to obtain legal recourse for a dizzying array of alleged injuries by tribes and tribal entities: negligence

²⁷⁷ See *infra* note 278 and accompanying text.

²⁷⁸ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). In *Martinez*, for example, the Court, determined that tribal officers were not protected by the tribe's immunity. See *id.* (citing *Ex parte Young*, 209 U.S. 123 (1907)). Like the similar exception to state immunity, the right to sue tribal officers rests on the fiction that an officer acting outside the scope of her legal authority can no longer be cloaked with the protections of her office. See *id.*

²⁷⁹ See *Ex parte Young*, 209 U.S. at 142–43.

²⁸⁰ See, e.g., 5 U.S.C. §§ 702, 703 (2006); 28 U.S.C. §§ 1346, 1491 (2006) (statutes waiving federal government's immunity for certain claims); Choper & Yoo, *supra* note 187, at 258–59 (noting that most states have waived their sovereign immunity for tort and certain contract claims). But see Struve, *supra* note 21, at 163–64 (noting that, though many states have extended the degree to which they waive immunity in recent years, “important restrictions remain”).

²⁸¹ See Riley, *supra* note 193, at 1111–12.

²⁸² See, e.g., *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 720–21, 725 (9th Cir. 2008) (noting potential unfairness of tribes invoking immunity in ordinary business disputes).

by tribal first responders in seeking medical help for a casino employee who collapsed;²⁸³ contusions resulting from a hit by a stray garbage can;²⁸⁴ making high-interest “payday” loans in violation of state consumer protection laws;²⁸⁵ construction defects in an off-reservation home build by an Indian-owned corporation;²⁸⁶ loss of equipment confiscated by a tribe in a business dispute;²⁸⁷ an accident in which a woman’s legs were crushed by a heavy gambling machine;²⁸⁸ hidden defects in a fish farm leased from the Seminole Tribe of Florida rendering it “impossible to raise fish without extensive and expensive restoration”;²⁸⁹ a car crash resulting from a drunk driver served alcohol by a tribal casino while already intoxicated;²⁹⁰ and sexual harassment in which a casino employee was allegedly coerced into having sex and then fired when she became pregnant.²⁹¹ The variety of such incidents in itself provides a sense of the multiplicity of kinds of encounters that non-Indians have with modern tribal businesses and enterprises. It also suggests the popular ignorance and dislike of the basic principle that a sovereign—particularly a tribal one—does not need to answer to those it has injured.

Many articles discussing the subject particularly focus on the fact that tort victims were entirely surprised by the unavailability of familiar remedies for legal wrongs.²⁹² The *Broward Daily Business Review* quoted a lawyer for a tort plaintiff as saying that the “vast majority of the general public have no idea on the limitations about suing [tribes].”²⁹³ A *Sacra-*

²⁸³ See Jordana Mishory, *Seminoles Hold All the Cards in Legal Disputes on Tribe Land; Sovereign Immunity: Most Have “No Idea on the Limitations About Suing,”* 50 BROWARD DAILY BUS. REV. (Fla.), Apr. 7, 2009, at A3.

²⁸⁴ See Martin Paskind, *Suing Indian Tribes Is Not Easy Task*, ALBUQUERQUE J., June 10, 2002, at 10.

²⁸⁵ See Marc Lifsher, *Regulators Target Loans from Tribes*, L.A. TIMES, Apr. 13, 2009, at B1.

²⁸⁶ See Walter Yost, *Suit Pits Owner vs. Tribe: Lawyers Hope the U.S. Supreme Court Will Review A Home-Defect Claim Turned Immunity Battle*, SACRAMENTO BEE, Mar. 27, 2008, at H1.

²⁸⁷ See Stephen Magagnini, *Some Learn Indian Justice the Hard Way: California Tribes Enjoy the Same Sovereign Immunity from Civil Suits as That Granted to Foreign Countries*, SACRAMENTO BEE, Apr. 7, 2003, at A1.

²⁸⁸ See *id.*

²⁸⁹ See Wyatt Olson, *Indian War: A Hollywood Man Has Spent the Past Decade Trying to Pry Open the Seminoles’ Accounting Books—Without Much Success*, NEW TIMES BROWARD-PALM BEACH, Dec. 5, 2002, available at <http://www.browardpalmbeach.com/2002-12-05/news/indian-war/>.

²⁹⁰ See Gary Fields, *Legal Grounds: Plaintiffs Suing U.S. Tribes Can’t Get Their Day in Court—Hit with Lawsuits, Indian-Owned Casinos Can Claim Immunity*, WALL ST. J., Oct. 12, 2007, at A1.

²⁹¹ See Pat Doyle, *Suit Brings Tribal Immunity Before High Court; Sexual Harassment Case Challenges Sovereignty of Dakota Casino*, MINNEAPOLIS STAR TRIB., Feb. 6, 1996, at 1A.

²⁹² See *id.*; Magagnini, *supra* note 287.

²⁹³ See Mishory, *supra* note 283.

mento Bee article thundered that “[m]ost Californians don’t realize that when they enter California Indian territory, they leave many of their rights as U.S. citizens at the border.”²⁹⁴

Some of the negative tone in press coverage, of course, can be attributed to a general lack of familiarity with the continuing sovereign status of tribes and the important functions tribal immunity continues to serve. Whatever their biases, however, these stories are significant for two reasons. First, they suggest that, whatever the benefits of tribal immunity, it also comes at a cost of both perceived and real unfairness to tort victims who feel themselves to be left without adequate remedy.²⁹⁵ The extent of this problem, of course, is debatable. Many tribes provide tort victims with remedies of various sorts, ranging from rudimentary hearings before the tribal council to comprehensive tribal procedures that may be equal or superior to state and federal ones.²⁹⁶ Where tribal courts are available as forums to hear disputes, justice for nonmembers is certainly achievable; as Bethany Berger has documented, for example, nonmembers in Navajo tribal court win approximately half of the suits in which they are involved.²⁹⁷

Second, whatever the actual merits of tribal remedies, press coverage is often negative. For example, a *Sacramento Bee* article quoted the lawyer for several nontribal plaintiffs describing a tribal review process as “a joke.”²⁹⁸ The consistently negative tone of news coverage of tribal immunity suggests that tribes have, at the least, a perception problem. In some ways, the existence of tribal immunity—even when it is waived to some degree—may contribute to this problem, because tort victims may be skeptical of remedies when they are provided only on the tribe’s terms.²⁹⁹

²⁹⁴ See Magagnini, *supra* note 287.

²⁹⁵ See *supra* notes 282–294 and accompanying text.

²⁹⁶ See Struve, *supra* note 21, at 160 n.146. Tribes also differ substantially in the extent to which they have waived tribal immunity, if at all. See *id.* (discussing American Indian Law Center survey of tribes on various issues pertaining to tribal justice systems). As Professor Struve notes, the survey results indicated that thirty-six respondents had waived immunity at least to some extent, while fifty-seven had not. The data, however, have substantial limitations, as Struve explains. *Id.* Indeed, a plaintiff’s lawyer quoted in the *Broward Daily Business Review* conceded that the Seminole Tribe had been willing to settle “practically all” of his clients’ claims. See Mishory, *supra* note 283.

²⁹⁷ See Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1051 (2005) (“47.4% of nonmembers win when they appear before [Navajo tribal] court, and 52.6% lose . . .”).

²⁹⁸ See Magagnini, *supra* note 287.

²⁹⁹ The *Broward Daily Business Review*, for example, quoted a local attorney expressing skepticism about tribes’ willingness to waive immunity in meaningful ways by observing:

Though the press coverage may be subject to criticisms that it is incomplete and unfair, it is nonetheless likely that the problem it documents is to some extent real. The very effectiveness of sovereign immunity as a litigation tool—in the tribal context as in others—makes it inherently subject to abuse, and states have been criticized for deploying their immunity in unfair or manipulative ways.³⁰⁰ It should hardly be surprising that tribes, with a more limited litigation arsenal at their disposal, may at times do the same. Because sovereign immunity permits the defendant to determine what remedy will be allowed, it is certainly conceivable that in many cases the defendant will choose to provide little or inadequate compensation.³⁰¹ Moreover, individuals who wander into casinos are in a much poorer position to demand advance waivers of sovereign immunity than are, say, sophisticated contractors who negotiate with states. Thus, even if the problem is exaggerated, it seems likely that tribal immunity comes at the cost of many instances of individual injustice.

2. The Future of Tribal Immunity

Critiques of tribal immunity are troubling not only because they present cases of potential injustice in their own right, but also because they highlight the fragility of tribal sovereign immunity as a basis for tribal power. Although Congress has so far resisted calls to exercise its power to place wholesale limits on tribal immunity, there is no reason to believe that this state of affairs will last forever.³⁰² Even in the absence of congressional action, it is possible that the Supreme Court will take steps to limit the doctrine. In two recent cases, the Court has taken surprisingly broad views of Congress's powers to abrogate state immunity, perhaps indicating that the Court may be retreating slightly from the high point of its protection of state sovereign immunity.³⁰³ To the ex-

“If you were Superman, and no one could hurt you, you wouldn't voluntarily pick up a piece of Kryptonite” Mishory, *supra* note 283.

³⁰⁰ In *Wisconsin Department of Corrections v. Schacht*, for example, Justice Kennedy noted one example of such a tactic, observing in concurrence that “permitting the belated assertion of [sovereign immunity defenses] allow[s] States to proceed to judgment without facing any real risk of adverse consequences.” See 524 U.S. 381, 394 (1998) (Kennedy, J., concurring).

³⁰¹ See, e.g., Fields, *supra* note 290; Magagnini, *supra* note 287.

³⁰² See Struve, *supra* note 21, at 138 (suggesting that Congress may respond to calls to limit tribal immunity if tribes fail to waive it on their own).

³⁰³ See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362–63 (2006) (holding that Congress may abrogate state sovereign immunity under the Bankruptcy clause); *Nev. Dep't of Human*

tent that state and tribal sovereign immunity are linked, this trend suggests possible dangers for tribal immunity as well.

The effectiveness of tribal immunity as a litigation tactic has already made the doctrine a target in some state courts. In 2006, in *Agua Caliente Band of Cahuilla Indians v. Superior Court*, the Supreme Court of California's holding illustrated the high stakes involved in the potential collision of sovereign immunity and state law.³⁰⁴ In *Agua Caliente*, the court employed rather startling reasoning to conclude that a bipartisan state body, the Fair Political Practices Commission, could file suit in California court against the Agua Caliente Band (the "Band") for alleged non-compliance with campaign contribution reporting requirements under a California statute, the Political Reporting Act ("PRA").³⁰⁵ The Band, relying on seemingly well-established doctrine, argued that it was immune from suit in state court.³⁰⁶ The decision should have been straightforward, as there was certainly no suggestion that Congress had abrogated the Band's immunity in this situation.³⁰⁷ Nonetheless, the court accepted arguments that to grant the tribe immunity from a state action to enforce the PRA would "intrude upon the state's exercise of its reserved power under the federal Constitution's Tenth Amendment" and "interfere with the republican form of government guaranteed to the state under . . . the United States Constitution."³⁰⁸ This argument hinged on the notion that tribal immunity was a matter of federal common law, not tribes' inherent sovereignty.³⁰⁹ Thus, the court suggested that the application of tribal immunity, where it has the effect of thwarting a state's political autonomy, would in effect be impermissible overreaching by the *federal* government.³¹⁰

Agua Caliente is significant both for explicitly highlighting the potential usefulness of tribal immunity as a device for avoiding state law and for showing that, when used for that purpose, tribal immunity has its limits. To begin with, *Agua Caliente* illustrates how tribes are often at

Res. v. Hibbs, 538 U.S. 721, 726–27, 740 (2003) (allowing Congress to abrogate immunity in certain circumstances under the enforcement power of the Fourteenth Amendment).

³⁰⁴ See 148 P.3d 1126, 1128 (2006).

³⁰⁵ See *id.*

³⁰⁶ See *id.* at 1129.

³⁰⁷ See *id.* at 1128.

³⁰⁸ *Id.* at 1129.

³⁰⁹ See *id.* at 1130 (noting that FPPC's argument rested on assertion that "the doctrine of tribal sovereign immunity is a federal common law doctrine that does not give the Tribe the power to interfere with state sovereign power over state elections"); see also *id.* ("Tribal sovereign immunity from suit is not synonymous with tribal sovereignty. Rather, it is merely one attribute of the status of Indian tribes as domestic dependent nations.").

³¹⁰ See *Agua Caliente*, 148 P.3d at 1129–30.

the mercy of state courts when it comes to interpretations of sovereign immunity.³¹¹ Even though the extent of tribal immunity is theoretically a federal issue, in most situations it is not a basis for removal to federal court because it is generally pleaded as a defense.³¹² Moreover, the Supreme Court certainly cannot police every state court's resolution of a tribal immunity issue.

Even if the Supreme Court were to grant certiorari in a case that pits tribal immunity against state sovereign prerogatives, the result could be a highly undesirable one for tribes. As noted, tribal sovereign immunity may have survived this far because of its consistency with the Supreme Court's "new federalism" jurisprudence.³¹³ *Agua Caliente*, however, raises the specter of a headlong collision between the two doctrines.³¹⁴ If the Supreme Court were to directly confront the possibility that tribes' immunity might encroach on states' own political autonomy, it is by no means clear that tribes would win the fight. Indeed, the U.S. Supreme Court's 1996 holding in *Seminole Tribe of Florida v. Florida* that Congress lacked the power to abrogate state sovereign immunity for purposes of furthering tribal sovereignty may provide some clue as to the likely outcome in such a situation.³¹⁵

The purpose of this discussion is not to predict the impending demise of tribal sovereign immunity. For the most part, the doctrine remains robust, and neither Congress nor the Supreme Court has given any immediate signals that it is in danger. Rather, the intent is to demonstrate that tribal immunity may be peculiarly vulnerable in a way that other traditional sovereigns are not. Territorial sovereignty conforms to popular notions of how governments operate and most people's routine experiences that, when they travel to a different jurisdiction, different substantive rules may apply. By contrast, sovereign immunity is a technical legal doctrine that generally takes laypeople by surprise. Further, tribal immunity is fraught with both uncertainty about its reach—it is, after all, a power raised only once litigation has already commenced—and the potential for individual injustice. As a result, it tends to generate both stories of personal unfairness and larger structural

³¹¹ See *id.* at 1128–30.

³¹² Sovereign immunity is generally pleaded under one of the subsections of Rule 12 of the Federal Rules of Civil Procedure. See *Union Pac. R.R. Co. v. Burton*, 949 F. Supp. 1546, 1550 (D. Wyo. 1996) (reviewing pleading practices in various courts). For a case to be removable to federal court, the federal issue must appear on the face of the complaint, not as a defense. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908).

³¹³ See *supra* note 178 and accompanying text.

³¹⁴ See *Agua Caliente*, 148 P.3d at 1128–30.

³¹⁵ See 517 U.S. 44, 47 (1996).

power struggles with states.³¹⁶ Both these effects may be potent ammunition for those who are skeptical about the consequences of robust tribal sovereignty.

3. Immunity as a Basis of Sovereignty

A final, more subtle issue worth raising about tribal immunity is that it is a wholly negative power. It permits the sovereign to stay out of court, to avoid expending government funds on litigation, and to skirt the consequences of otherwise applicable law. It does not, however, convey any affirmative powers. It does not permit tribes to define what sort of government they want to have or what standards of conduct they believe should apply to those they have dealings with. Further, even as a negative power, sovereign immunity has severe limits. Individual tribe members generally do not share in the tribe's immunity unless they are tribal employees acting in the course of their employment.³¹⁷ Likewise, a tribe wishing to sue a nonmember will almost always be subject to state law.³¹⁸

Despite these qualifications, tribal immunity remains a vital part of tribal sovereignty, and it is hard to imagine a world in which it could be otherwise.³¹⁹ By raising questions about the negative effects of the doctrine, this Article does not intend to argue that tribal immunity should be formally scaled back, either by courts or by Congress. It simply suggests that tribes may be ill-served by a situation in which tribal sovereignty—particularly vis-à-vis nonmembers—has become defined almost exclusively by tribal immunity.

Furthermore, there may be circumstances in which it is not to tribes' advantage to push tribal sovereign immunity to its absolute limit. Angela Riley has suggested that "good native governance" might be fostered by tribes' decision to voluntarily limit and shape the use of tribal immunity.³²⁰ Tribes might, for example, use their immunity not as a way to avoid litigation entirely but as a way to require plaintiffs to sue in

³¹⁶ See *supra* notes 282–294 and accompanying text.

³¹⁷ See *Cook*, 548 F.3d at 727 (tribal immunity protects only tribal employees acting within the course of their employment).

³¹⁸ This is the case because nearly all suits against nonmembers must be heard in state court after *Strate* and *Hicks*, and state courts generally apply state law to such disputes. See *supra* notes 77, 86 and accompanying text.

³¹⁹ See POMMERSCHEIM, *supra* note 244, at 42–44.

³²⁰ See Riley, *supra* note 193, at 1111–13.

tribal court as a condition of subjecting themselves to suit.³²¹ Another device already used by certain tribes is to create separate businesses that are distinct from the tribe and do not share in its immunity. All judgments against such businesses must be satisfied by their own assets, not by the tribe's.³²²

Such voluntary limits on tribal immunity mitigate the doctrine's harsher effects while permitting tribes adequate scope to use the doctrine to protect their finances and avoid suits in unfamiliar or unfriendly courts. If used more widely, such devices could help improve tribal sovereign immunity's perception problem while still helping to strengthen tribal sovereign autonomy.

IV. DIRECTIONS FOR THE DEVELOPMENT OF TRIBAL TERRITORIAL SOVEREIGNTY

The preceding Parts have explored the difficulties that the current balance of territoriality and immunity pose for the development of a strong concept of tribal sovereignty. This Part concludes by arguing that there are ways in which tribes can test and ultimately shift that balance. In particular, this Part argues that, despite the U.S. Supreme Court's massive de-emphasis on territoriality brought about in recent years, a few areas of law exist in which territorial borders remain significant—perhaps most important among them the tribal right to exclude. This Part explores ways in which tribes have used these remnants of territoriality to bring about more effective governance, and how they can continue do so. It also considers ways in which tribes can—and are beginning to—make use of immunity in ways that strengthen rather than undermine other sovereign attributes.

A. *Vestiges of Territoriality in Current Law*

As this Article has explained, the Supreme Court has substantially undercut the significance of tribal borders—first by focusing on ownership rather than borders as the measure of tribal power, and more recently by the increasing substitution of tribal membership status for both factors.³²³ Yet this transition is not yet entirely complete. For ex-

³²¹ Many tribes already do some version of this. See, e.g., Kawahara & LaPena, *supra* note 211, at 29 (“A frequent mechanism for addressing prospective dispute resolution is to provide for forum selection, such as a waiver of immunity to suits before a tribal court.”).

³²² See COHEN, *supra* note 17, § 21.02[2], at 1286 (describing tribes' use of this arrangement).

³²³ See *supra* notes 218–263 and accompanying text.

ample, some earlier cases that are still good law, particularly in the area of tax and limits of state authority, focus on the significance of borders.³²⁴ Moreover, the Court has recently reaffirmed the existence of other territorial rights, such as the right to exclude, even if the precise contours of those rights remain unmapped.³²⁵

A still-important way in which borders have significance is in defining the limits of state regulatory authority vis-à-vis tribe members. In general, states have little authority to apply their laws to tribe members engaging in activities on Indian lands. In some cases, the Court has arrived at this conclusion based on principles of preemption—the idea that state regulation in particular circumstances may be “incompatible with federal and tribal interests reflected in federal law.”³²⁶ In other cases, the Court has limited states’ power over matters of tribal governance based on more fundamental principles of tribal sovereignty.³²⁷ Under either rationale, the basic doctrine is fairly clear. States have virtually no taxing power over Indians in Indian country: they may not tax tribal property (including trust lands or on-reservation fee land owned by tribe members), on-reservation vehicles owned by tribe members, or income earned by tribe members on the reservation.³²⁸ Additionally, subject to extremely narrow exceptions, states cannot regulate the activities of tribe members in Indian country.³²⁹

These protections for tribe members acting on the reservation are important. As a practical matter, they enable tribes to have a tax base and ensure that tribe members are not subject to double taxation. More broadly, they promote tribal autonomy, by permitting the tribe to set its own standards of conduct for nonmembers and, in a more abstract sense, by helping to foster the sense of the reservation as a distinct, autonomous community.

These rules against state intrusion into on-reservation activities are, however, subject to the serious limitation that they do not apply to nonmembers.³³⁰ That is, nonmembers may under certain circum-

³²⁴ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

³²⁵ See *infra* notes 341–427 and accompanying text.

³²⁶ See *Cabazon Band of Mission Indians*, 480 U.S. at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)).

³²⁷ See, e.g., *Williams*, 358 U.S. at 220.

³²⁸ See CANBY, *supra* note 41, at 264–65.

³²⁹ See *id.* at 292.

³³⁰ See, e.g., *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 467 (1995) (suggesting that income of nonmember employees of a tribe is subject to state taxation); Washing-

stances be subject to state taxation on their on-reservation dealings with tribes,³³¹ and, conversely, tribes lack power to tax nonmembers on within-reservation fee land absent the application of one of the *Montana* exceptions.³³² Thus, these rules are consistent with the Court's recent emphasis on membership rather than territorial status. As such, they leave untouched tribes' serious problem of a lack of authority to prescribe standards of conduct for nonmembers within their borders.

Nevertheless, a possible way for tribes to expand tribal territorial control over nonmembers within the existing framework is to expand the circumstances under which tribal courts exercise jurisdiction over disputes involving nonmembers. To begin with, a rare exception to the rule that tribes lack jurisdiction over nonmembers concerns nonmembers acting as plaintiffs. When nonmembers sue tribe members in cases arising on the reservation for on-reservation transactions, the rule of *Williams v. Lee* requires the nonmember to sue in tribal court as her exclusive remedy.³³³ Thus, even under existing law, a nonmember's decision to do business on the reservation requires her in effect to accept the application of tribal law in the event she is the aggrieved party in a dispute.³³⁴

A modest way of expanding the applicability of tribal law within tribal borders is for tribes to bargain with nonmembers to agree to litigate in tribal court in circumstances in which tribes are defendants. Tribal immunity can be used as important leverage in this regard: a few commentators have suggested, for example, that tribes use their immunity as a forum-selection device, requiring all disputes to be heard in tribal court as a condition of waiving their immunity.³³⁵ Other circumstances exist in which it may be in nonmembers' interests to litigate disputes in tribal court. For example, when a tribe member wishes to sue a nonmember—a case over which the tribal court would normally lack jurisdiction—but the nonmember also would like to counterclaim

ton v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160–61 (1980) (permitting state to tax tribal cigarette sales to non-Indians).

³³¹ See, e.g., *Okl. Tax Comm'n*, 515 U.S. at 467; *Confederated Tribes*, 447 U.S. at 160–61.

³³² See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) (holding that tribe could not tax hotel guests on nonmember fee land within reservation and observing that “[a]n Indian tribe’s sovereign power to tax—whatever its derivation—reaches no further than tribal land”).

³³³ See 358 U.S. at 223.

³³⁴ See *id.*

³³⁵ See Riley, *supra* note 193, at 1111–13 (suggesting tribes’ use selective waivers of tribal immunity to permit ICRA claims in tribal courts); Struve, *supra* note 21, at 137 (“This essay argues that tribes should use their immunity as a forum-allocation device.”).

for an on-reservation transaction—a claim that, under *Williams*, can *only* be brought in tribal court—the nonmember may agree to the tribal court's jurisdiction rather than be required to litigate claims in two different fora.³³⁶

These devices for expanding tribal court jurisdiction do have their limits. Many disputes arising against nonmembers on the reservation will involve individual tribe members who do not share in sovereign immunity and thus cannot use it as a negotiating tactic. In such tribe member-nonmember disputes, it may be relatively rare for the nonmember to agree to litigate in tribal court, particularly in a tort case in which the forum cannot be negotiated in advance. Furthermore, all these tactics apply only in civil disputes and are of little help to tribes confronted with the serious problem of nonmember, on-reservation crime.

As a result, another possible direction for expanding tribal on-reservation authority is to encourage the application of tribal law in appropriate circumstances by state and federal courts to disputes arising on the reservation. Indeed, because many choice-of-law principles look to the place where relevant events occurred, it would be consistent with normal practice for state and federal courts to apply tribal law to cases arising in Indian country.³³⁷ In practice, many nontribal courts have been reluctant to apply tribal law because choice-of-law principles tend to be highly territorial.³³⁸ Nonetheless, some state courts have recently been more receptive to arguments that tribal law should apply to events that occurred on the reservation.³³⁹ Such a shift on the part of state courts could have important beneficial effects for the applicability of tribal law within tribal borders. Although for most tribes having tribal law applied by a state court is a distant second to permitting the dispute to be heard in tribal court, nontribal application of tribal law at least permits the tribe's substantive standards of conduct to apply to disputes that arise within its borders.³⁴⁰ Thus, it may be useful in fostering respect

³³⁶ Such splitting of a case across courts is generally held to be undesirable as a matter of procedural fairness and efficiency. *See, e.g.,* Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 *IND. L.J.* 181, 183 (1998) (noting that Federal Rules of Civil Procedure policy of resolving an entire case in one court is "rooted in convenience, efficiency, and fairness to the parties").

³³⁷ *See generally* Florey, *supra* note 23.

³³⁸ *See id.* at 1660–64.

³³⁹ *See id.* at 1665–69 (describing several cases in which nontribal courts have applied tribal law).

³⁴⁰ *See id.*

among nonmembers for the applicability of tribal law within tribal borders.

B. *The Right to Exclude*

1. The Origins of the Exclusion Power

Perhaps the most powerful territorial attribute tribes still possess is the power to exclude undesirables—whether formerly members or not—from the reservation. Despite the U.S. Supreme Court’s increasing reluctance to give significance to geographical factors in determining the reach of a tribe’s power, the Court has frequently alluded to tribes’ “traditional and undisputed power to exclude persons . . . from tribal lands” as a facet of traditional tribal sovereignty that retains force.³⁴¹ As part of this power, tribal law enforcement authorities may “restrain those who disturb public order on the reservation, and if necessary, . . . eject them.”³⁴² The Court has also suggested that a tribe can use this power in certain circumstances to exact concessions from nonmembers who have voluntary dealings with the tribe. In this way, tribes can acquire more regulatory power over nonmembers than might otherwise be possible. Tribes have the power, for example, to “set conditions on entry to [tribal] land via licensing requirements and hunting regulations.”³⁴³ Likewise, the Court has linked tribes’ taxing power to the power to exclude, noting that such power “may be exercised over . . . nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.”³⁴⁴

The Court has been somewhat unclear about the exact nature and source of the right to exclude. Earlier cases speak of the power to exclude as one of the inherent trappings of tribal sovereignty.³⁴⁵ In 1982 in *Merrion v. Jicarilla Apache Tribe*, for example, the Supreme Court explained that “a hallmark of Indian sovereignty is the power to exclude

³⁴¹ See *Duro v. Reina*, 495 U.S. 676, 696 (1990).

³⁴² *Id.* at 697.

³⁴³ See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2723 (2008).

³⁴⁴ *Id.* (quoting *Confederated Tribes*, 447 U.S. at 153).

³⁴⁵ McCoy argues that tribes possess greater powers than landowners because tribes can form governments that are recognized by the United States and exercise other sovereign powers. See McCoy, *supra* note 74, at 478–79. It is certainly true that, despite the erosion of their sovereignty in recent years, tribes continue to possess elements of sovereignty that are recognized by the United States, although increasingly territoriality is a less important element of that sovereignty.

non-Indians from Indian lands.”³⁴⁶ More recently, however, the Court has indicated that the right of exclusion may simply be a byproduct of tribal ownership of land. In 1997, in *Strate v. A-1 Contractors*, for example, the Court determined that the right-of-way over tribal land granted to the state precluded the tribe from exercising “a landowner’s right to occupy and exclude.”³⁴⁷ This view—essentially reducing the tribe’s rights to those of an ordinary owner—is consistent with the Court’s reduced emphasis on tribes’ inherent sovereignty in recent years.³⁴⁸ This is a powerful symbolic distinction. It is not clear, however, what difference the distinction makes in practice, although in theory a right to exclude based solely in landownership might limit the power to exclude with respect to people—whether members or nonmembers—owning fee land on the reservation or traveling to the private fee land of others.³⁴⁹

Several avenues exist for tribes to make use of the right to exclude. The more established method might be called the indirect route—in other words, relying on the theoretical right to exclude to establish conditions on which nonmembers can reside on reservation land.³⁵⁰ In at least one case, the Supreme Court has found that such indirect use of the right to exclude gave the tribe increased powers to regulate nonmember land.³⁵¹ A second avenue is the direct use of the right to exclude, through banishment and related devices, as either a punishment for crimes or as a way of ridding the reservation of troublemakers.³⁵² In recent years, the Supreme Court has appeared to give a stamp of approval to this practice, and many tribes—increasingly desperate for resources to deal with on-reservation crime—have made use of it.³⁵³

³⁴⁶ 455 U.S. 130, 141 (1982). Notably, the Court in *Merrion* concluded that the power to tax nonmembers did not derive solely from the right to exclude, but was also an “an inherent power necessary to tribal self-government and territorial management.” *Id.*

³⁴⁷ 520 U.S. 438, 456 (1997); *accord* *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (linking ownership status of land to tribe’s right to regulate, although finding that tribes may lack power to regulate tribe-owned land in certain circumstances).

³⁴⁸ *See supra* notes 75–101 and accompanying text.

³⁴⁹ At least one court has also found that tribes have potentially heightened powers to regulate when they attempt to invoke rights specifically related to the landowner’s—as opposed to the sovereign’s—right to exclude. *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2009); *see also infra* notes 363–365 and accompanying text.

³⁵⁰ *See Brendale v. Confederated Tribes of the Yakima Nation*, 492 U.S. 408, 421–22 (1989) (White, J., announcing the judgment of the Court).

³⁵¹ *See id.* at 430–31.

³⁵² *See, e.g., Duro*, 495 U.S. at 696.

³⁵³ *See, e.g., id.*

The indirect approach is perhaps best illustrated in 1989 by *Brendale v. Confederated Yakima Indian Nation*, in which the U.S. Supreme Court found a partial tribal right to regulate nonmembers on the grounds that *Montana's* “political integrity” exception applied.³⁵⁴ This is the sole case in which the Court has found tribal regulation to be justified by either *Montana* exception.³⁵⁵ In *Brendale*, the Court considered the Yakima’s right to regulate two parcels owned by nonmembers.³⁵⁶ The first, owned by nonmember Philip Brendale, was a 160-acre tract in a so-called “closed area” of the reservation, heavily forested and open only to Yakima Nation members and permittees.³⁵⁷ The second, owned by nonmember and non-Indian Stanley Wilkinson, was a 40-acre tract “bordered on the north by trust land and on the other three sides by fee land,” that was located in a part of the reservation open to visitors, close to the reservation’s northern boundary, and that consisted of almost half of the fee land.³⁵⁸

A plurality of the Court prohibited the Yakima Nation from applying its zoning laws to the Wilkinson parcel, but permitted Yakima Nation regulation of the Brendale parcel.³⁵⁹ In its limited endorsement of tribal regulation, the justices focused on the tight control the tribe had exercised over the activities of nonmembers in the area.³⁶⁰ Justice Stevens’s concurrence—which announced the opinion of a highly fractured Court as to the Brendale parcel—found that the presence of “logging operations . . . [and Bureau of Indian Affairs] roads” as well as “the transfer of ownership of a relatively insignificant amount of land in the closed area” had “diminished the Tribe’s power to exclude non-Indians from that portion of its reservation.”³⁶¹ Nonetheless, the Yakima Nation, “[b]y maintaining the power to exclude nonmembers from entering all but a small portion of the closed area” had “preserved the power to define the essential character of that area” in order to ensure that it remained “an undeveloped refuge of cultural and religious significance.”³⁶²

³⁵⁴ *Brendale*, 492 U.S. at 430–31 (White, J., announcing the judgment of the Court).

³⁵⁵ See *Hicks*, 533 U.S. at 360 (noting that the Court has not found the exceptions to apply elsewhere).

³⁵⁶ 492 U.S. at 417–19 (White, J., announcing the judgment of the Court).

³⁵⁷ *Id.* at 417–18, 432–33. Brendale had some Indian ancestry but was not a member of the Yakima Nation. *Id.* at 417.

³⁵⁸ *Id.* at 418.

³⁵⁹ *Id.* at 419–21, 432–33.

³⁶⁰ *Id.* at 441 (Stevens, J., concurring).

³⁶¹ *Id.*

³⁶² *Brendale*, 492 U.S. at 441 (Stevens, J., concurring).

Lower courts have also focused on the right to exclude in upholding tribes' right to regulate in certain circumstances. In 2009, in *Elliott v. White Mountain Apache Tribal Court*, the U.S. Court of Appeals for the Ninth Circuit permitted a tribe to assert adjudicative jurisdiction over nonmembers for the purpose of enforcing regulations regarding "trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands."³⁶³ In reaching this conclusion, the Ninth Circuit made reference to the exclusion power, determining that "[t]respass regulations plainly concern a property owner's right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner's right to occupy."³⁶⁴ Elsewhere, the Ninth Circuit has similarly suggested that the right to exclude encompasses a host of subsidiary rights, including "the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; [and] to expel those who enter the reservation without proper authority"³⁶⁵

Cases like *Brendale* and *Elliott* raise the intriguing possibility that active tribal border control could help tribes not only in controlling the circumstances under which nonmembers enter their land but in supporting a broader tribal right to regulate.³⁶⁶ In practice, of course, there are likely to be difficulties in carrying out such a policy. Limited finances may handicap many tribes from exploring the full possibilities of border control.³⁶⁷ Most tribes are unlikely to have the resources to police their borders with any consistency, let alone to fight the legal battles that may ensue. Further, the livelihoods of many tribes depend on the regular flow of nonmembers onto tribal land for gaming or tourism; such tribes are unlikely to want any policy that might deter nonmember travel. Finally, the notion that the right to exclude may enhance tribes' regulatory powers may rest on a shaky foundation. For example, *Brendale* may be a case without much continuing force, given the highly unusual facts and the inability of the Court to reach a clear majority rationale.³⁶⁸

³⁶³ 566 F.3d 842, 849 (9th Cir. 2009).

³⁶⁴ *Id.* at 850.

³⁶⁵ See *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

³⁶⁶ See *Brendale*, 492 U.S. at 415 (White, J., announcing the judgment of the Court); *Elliott*, 566 F.3d at 850.

³⁶⁷ See *Riley*, *supra* note 193, at 1109.

³⁶⁸ See 492 U.S. at 415 (White, J., announcing the judgment of the Court).

Despite these serious qualifications, *Brendale* and similar cases have the potential to be useful to tribes in some respects. At a minimum, such cases allow for some hope that a tribe's physical control of land will beget regulatory control of that land, suggesting that tribes with the resources to do so should consider limiting, or imposing conditions upon, nonmember entry.³⁶⁹

2. Enhancing the Effectiveness of Banishment and Exclusion Orders

In recent years, many tribes have chosen to invoke the right to exclude in the more direct and practical way of removing offenders from the reservation.³⁷⁰ Given tribes' limited abilities to impose orthodox criminal sanctions even against tribe members for anything other than petty crimes,³⁷¹ many tribes have used exclusion from tribal lands as a punishment for serious offenses—from murder to embezzlement to child abuse—committed by tribe members or others residing on the reservation.³⁷²

A main advantage of banishment for tribes is that—unlike other sorts of serious criminal sanctions—it has received the tacit approval of the U.S. Supreme Court.³⁷³ Further, though it may sound exotic, banishment is far from an exclusively tribal sanction. Some U.S. jurisdictions explicitly permit banishment for certain offenses or as a condition of probation.³⁷⁴ The Supreme Court has elsewhere observed that deportation, frequently used punitively in the United States, can be “at times the equivalent of banishment or exile.”³⁷⁵ Likewise, commentators have noted strong resemblances between banishment and some U.S. laws such as anti-gang ordinances or sex offender residency restrictions.³⁷⁶

³⁶⁹ *See id.*

³⁷⁰ *See, e.g.*, *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1125 (D. Or. 1999) (nonmember Indian daycare worker excluded after allegedly abusive conduct); *see also* Patrice H. Kunesch, *Banishment as a Punishment in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 85–86 (2007) (discussing murder and embezzlement cases).

³⁷¹ Normally tribes must rely on overworked and often uninterested U.S. Attorneys to prosecute serious crimes. *See Tweedy, supra* note 4, at 691.

³⁷² *See Alire*, 65 F. Supp. 2d at 1125; Kunesch, *supra* note 370, at 85–86.

³⁷³ *See Duro*, 495 U.S. at 696.

³⁷⁴ *See* Doron Teichmann, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1851 (2005) (noting that “banishment is very much a part of the criminal justice system in the United States” and describing banishment-like policies in Georgia and Cicero, Illinois).

³⁷⁵ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

³⁷⁶ *See, e.g.*, Kunesch, *supra* note 370, at 87 nn.13–14 (describing several such ordinances and drawing the analogy to banishment). *See generally* Stephanie Smith, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461

In addition to its prevalence in other countries and societies, banishment also has the advantage of being a punishment traditionally used by many tribes.³⁷⁷ In its traditional form, banishment was a sanction applied principally to tribe members, usually followed by reintegration into the tribe after a defined period of reflection and rehabilitation.³⁷⁸ Banishment has been used against both members and nonmembers, and has taken a variety of forms.³⁷⁹ Some banishments, for example, are permanent; some are for a defined period; and some permit reinstatement provided certain conditions are met, such as restitution to the victim.³⁸⁰ Banishment can thus be tailored to the severity of the crime and can be a useful device for integrating offenders back into the community.³⁸¹ Banishment can also be a civil sanction—as Patrice Kunesch suggests, something akin to a restraining order—for everything from vandalism to contempt for a court order.³⁸² Although some federal courts have found criminal sanctions of banishment to be reviewable under the ICRA’s habeas jurisdiction, at least one federal court has held that federal courts lack power under the ICRA to review a civil sanction of banishment.³⁸³

In the decades since *Oliphant v. Suquamish Indian Tribe* and *Strate*, many tribes have either adopted banishment ordinances or made new use of existing ones in order to deal with persistent offenses such as drug dealing or unlawful weapons possession.³⁸⁴ The Mille Lacs tribe in Ojibwe, Minnesota, for example, has used banishment to exclude several members who had engaged in a persistent pattern of lawlessness, including holding up drivers at gunpoint.³⁸⁵ Tribes have also used ban-

(2000); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007).

³⁷⁷ See Kunesch, *supra* note 370, at 87–88.

³⁷⁸ See *id.* at 115 (“[W]hile banishment and exclusion are indeed punishments for offensive conduct, the intended purpose is to motivate the excluded individual to reform his or her conduct and eventually be restored to the community.”).

³⁷⁹ See *id.* at 93.

³⁸⁰ See *id.*

³⁸¹ See Riley, *supra* note 193, at 1103–04.

³⁸² See Kunesch, *supra* note 370, at 93 (analogizing banishment to a restraining order); *id.* at 113–15 (describing various uses of banishment for civil purposes).

³⁸³ See *Alire*, 65 F. Supp. 2d at 1128.

³⁸⁴ See Curt Brown, *Age-Old Practice Battles a Modern Threat: The Mille Lacs Band of Ojibwe Has Recently Banished Four Members in an Attempt to Curb Chronic Violence. It Isn't Alone.*, MINNEAPOLIS STAR TRIB., Oct. 6, 2008, at 1A.

³⁸⁵ See *id.*

ishment to exclude nonmembers who attempt to bring drugs onto the reservation,³⁸⁶ and as a sanction for thefts by casino patrons.³⁸⁷

A particularly intriguing use of banishment is as a sanction against nonmembers, over whom the tribe ordinarily has little or no criminal jurisdiction.³⁸⁸ Unlike banishment of members, which normally occurs after a full adjudicative process, the decision to exclude a nonmember may be at the discretion of tribal officers or the tribal council.³⁸⁹

There are few published decisions in nontribal courts related to nonmember banishment, but at least some courts have let such banishment decisions stand. In 1985, in *Hardin v. White Mountain Apache Tribe*, the U.S. Court of Appeals for the Ninth Circuit upheld a banishment order against Hardin—a nonmember—who had leased land on the Apache reservation.³⁹⁰ Following Hardin's conviction for stealing federal property, the tribe permanently expelled him from the reservation.³⁹¹ Hardin sued various tribal officials in federal court, arguing that such an order was beyond the tribe's jurisdiction. The Ninth Circuit found that the order was proper.³⁹²

The case was, admittedly, an easy one. As someone who had entered into a consensual relationship with a tribe and whose violation of federal criminal law threatened the tribe's "health or welfare," Hardin potentially fell within both *Montana* exceptions permitting tribal regulation of nonmembers.³⁹³ Additionally, the Supreme Court had specifically affirmed tribes' right to place conditions on entry, and Hardin had "entered the reservation under color of a lease in which the Tribe had specifically reserved its power of exclusion."³⁹⁴

In other cases, courts have declined to interfere with tribal banishment orders under less clear-cut circumstances. In 1999's *Alire v. Jack-*

³⁸⁶ See *id.* (describing drug-related banishment of nonmember by the Bois Forte Band of Ojibwe).

³⁸⁷ See Renee Ruble, *Tribes Turning to Banishment as a Tool for Curbing Trouble Resurrected Practice Helps Reservations Deal with Gangs, Drugs, Theft*, ST. PAUL PIONEER PRESS, Dec. 6, 2003, at B5.

³⁸⁸ With the so-called "Duro fix," Congress restored to tribes modest criminal jurisdiction over nonmember Indians, but tribes still lack criminal jurisdiction over non-Indians—and civil jurisdiction, in most cases—against nonmembers. Issues of banishment and membership may be linked, since in some cases tribes may unenroll members as part of the banishment sanction. See, e.g., *Quair v. Sisco*, 359 F. Supp. 2d 948, 952 (E.D. Cal. 2004).

³⁸⁹ See *Riley*, *supra* note 193, at 1105; see also *Alire*, 65 F. Supp. 2d at 1125 (non-member Indian excluded from reservation by vote of tribal council).

³⁹⁰ See 779 F.2d 476, 480 (9th Cir. 1985).

³⁹¹ See *id.* at 478.

³⁹² See *id.* at 478, 480.

³⁹³ See *id.* at 479 (quoting *Montana*, 450 U.S. at 566).

³⁹⁴ *Id.*

son, the U.S. District Court for the District of Oregon held that it lacked jurisdiction to review a tribe's decision to banish a nonmember, non-resident Indian.³⁹⁵ The tribal council had voted to exclude a childcare worker accused of child neglect based on provisions in the Warm Springs Tribal Code permitting exclusion for breaches of the peace and violations of a tribal ordinance, among other grounds.³⁹⁶ In considering the worker's challenge to the order under the ICRA's habeas provisions, the district court suggested that federal courts may have more limited power to review a banishment action against a nonmember than one against a member.³⁹⁷ Finding that the order as applied to the plaintiff did not constitute a "severe restraint on her liberty," the court noted that "plaintiff has not been stripped of her Indian name, her lands, her tribal citizenship, or her tribal membership, nor has she been banished from her *own* Tribe's reservation or territory."³⁹⁸ Thus, nonmember banishment may not constitute the sort of burden on liberty necessary to trigger federal courts' habeas jurisdiction under the ICRA, giving tribes great latitude to fashion exclusion orders on their own terms.³⁹⁹

Furthermore, courts have accepted that tribes, in some circumstances, may be entitled to use force to enforce a valid exclusion order against a nonmember. In 2009's *Coleman v. Duluth Police Department*, nonmember Coleman—who had had frequent run-ins with Duluth police and had previously engaged in disruptive behavior at the Fond-du-Luth Casino—tried to enter the casino and was forcibly ejected and later restrained by tribal security guards.⁴⁰⁰ Coleman then sued the casino guards, along with various Duluth police officers under 42 U.S.C. § 1983 for violating his Fourth Amendment rights.⁴⁰¹ Citing the principle that tribal officers acting pursuant to tribal authority are not subject to individual capacity suits under § 1983, the Magistrate judge for the U.S. District Court for the District of Minnesota found that the tribal officers had acted properly according to tribal procedures and within the bounds of the tribe's rights to exclude.⁴⁰² As a result, the Magistrate judge recommended that the claim against the tribal defendants be

³⁹⁵ See *Alire*, 65 F. Supp. 2d at 1128.

³⁹⁶ See *id.* at 1125 & n.5.

³⁹⁷ See *id.* at 1128–29.

³⁹⁸ *Id.* at 1128, 1129 (emphasis added).

³⁹⁹ See *id.*

⁴⁰⁰ See *Coleman v. Duluth Police Dep't*, No. 07-473, 2009 WL 921145, at *4 n.5, *5 (D. Minn. Mar. 31, 2009).

⁴⁰¹ See *id.* at *5.

⁴⁰² See *id.* at *24.

dismissed.⁴⁰³ The District Court followed the recommendation and dismissed the claims.⁴⁰⁴

The power to exclude—often mentioned by the U.S. Supreme Court as a kind of consolation prize for a tribe’s inability to regulate or punish more directly—is certainly far from a comprehensive solution to tribes’ law enforcement needs on the reservation.⁴⁰⁵ Nonetheless, mechanisms exist for increasing the effectiveness of exclusion orders. In cases involving Indians, whether tribe members or not, many tribes use the modest criminal jurisdiction they possess to impose penalties on violators of exclusion orders.⁴⁰⁶ The usefulness of exclusion orders against nonmembers could be significantly enhanced if tribes had similar enforcement powers at their disposal where non-Indians are concerned. To some extent, tribes have sought to develop those powers.⁴⁰⁷ Bethany Berger details creative ways in which tribal authorities have been able to enhance their power to address the immediate law enforcement violations of nonmembers, from cross-deputization with state police to offering offenders a choice between “accept[ing] tribal jurisdiction [or] hav[ing] the matter turned over to the state police.”⁴⁰⁸ Nonetheless, tribes have little recourse against nonmembers determined to flout tribal authority, particularly those who repeatedly return to the reservation despite an exclusion order against them.⁴⁰⁹

One option for enhanced enforcement may be the involvement of state and federal authorities. Such a practice could be helpful to tribes both because nontribal authorities may have more resources available to them and because state and federal courts potentially have jurisdiction to impose the full panoply of sanctions available under state and federal law against nonmembers. State and federal authorities, however, have often been reluctant to expend resources in enforcing exclu-

⁴⁰³ See *id.* at *25.

⁴⁰⁴ See *id.* at *2–3.

⁴⁰⁵ See, e.g., *Duro*, 495 U.S. at 696 (“For felonies such as the murder alleged in this case at the outset, federal jurisdiction is in place The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.”).

⁴⁰⁶ See *United States v. Lara*, 541 U.S. 193, 196 (2004). Indeed, *United States v. Lara* stemmed from a prosecution for violation of such an order. *Id.*

⁴⁰⁷ See Berger, *supra* note 297, at 1048–49.

⁴⁰⁸ See *id.* at 1049 n.7 (describing Berger’s experience as a nonmember receiving speeding tickets from tribal police officers).

⁴⁰⁹ See, e.g., Ruble, *supra* note 387.

sion orders,⁴¹⁰ in some cases expressing concerns that lawbreakers expelled from the reservation will become problems for the criminal justice system in surrounding communities.⁴¹¹

Overcoming these objections by facilitating government-to-government cooperation between tribes and state or local authorities is essential if tribes are to benefit from the enhanced resources of nontribal institutions. In other circumstances, tribes have been able to make such partnerships successful.⁴¹² Cooperation in enforcing exclusion decisions has a strong basis in existing law: most state and federal courts grant either complete or qualified full faith and credit to tribal court orders.⁴¹³ In at least one case, a tribe has argued that state authorities were subject to treaty obligations requiring them to respect tribes' right to exclude.⁴¹⁴

Nonetheless, a fundamental problem in applying full faith and credit to exclusion orders involving nonmembers is that the tribal court may lack all criminal and civil jurisdiction over them. Therefore, it may be difficult for tribes to generate an actual judicial order regarding a nonmember exclusion that would be entitled to full faith and credit.⁴¹⁵ An important way, therefore, in which tribes could expand the usefulness of exclusion orders is to use the issue of exclusion to test the boundaries of current law restricting tribal jurisdiction over nonmembers. A strong argument can be made that a nonmember who engages in conduct leading to a tribal exclusion order presents a demonstrated threat to the tribe's safety and welfare, thus falling within *Montana's* second exception and permitting the tribe to exercise civil jurisdiction over

⁴¹⁰ See *id.* The United States has occasionally brought actions to prevent other forms of unlawful trespass on tribal lands. See, e.g., *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 343 (1941) (suit to enjoin railroad's trespass on tribal lands).

⁴¹¹ See Brown, *supra* note 384.

⁴¹² See, e.g., Carol Tebben, *Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin*, 26 AM. INDIAN L. REV. 177, 188-89 (2001) (describing friendly relationships between state and tribal judicial authorities in a Wisconsin county).

⁴¹³ See Florey, *supra* note 23, at 1635 n.34 (summarizing various state policies on full faith and credit); see also *AT&T Corp. v. Coeur D'Alene Tribe*, 283 F.3d 1156, 1161 (9th Cir. 2002) (noting that federal courts "must recognize and enforce tribal court judgments under principles of comity" unless the tribal court lacked jurisdiction or did not comply with principles of due process) (citing *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)).

⁴¹⁴ See Brown, *supra* note 384.

⁴¹⁵ See *supra* note 389 and accompanying text. A somewhat ironic consequence of the lack of jurisdiction by tribal courts is that exclusion orders against nonmembers are often issued by vote of the tribal council or even by individual officers, thus providing the offender with far less process than a tribal judicial body would grant.

the nonmember.⁴¹⁶ Acceptance by courts of this argument would help to strengthen and expand a rarely invoked *Montana* exception—a great victory for tribes in its own right. Furthermore, such a holding would enhance the usefulness of the exclusion power, because court recognition of clear tribal jurisdiction over nonmembers for adjudicating exclusion issues would enable tribes to generate a judicial order that the tribe could then more easily seek to enforce in state or federal court.

A final way to exclude nonmembers may be an original proceeding in a nontribal court seeking to enforce a tribal ordinance or resolution permitting exclusion. In at least one published case, a tribe brought suit in federal district court seeking enforcement of a tribal resolution excluding a nonmember general contractor.⁴¹⁷ Though the court denied summary judgment on the ground that the defendant could assert a defense based on alleged noncompliance with the ICRA,⁴¹⁸ it nonetheless held that it had jurisdiction to hear the case because the question of whether the tribe had the authority to exclude a nonmember presented a federal question.⁴¹⁹ Thus, in some circumstances, tribes may be able to

⁴¹⁶ A federal court apparently accepted some version of this argument in *Moss v. Bossman*, in which several plaintiffs challenged an ex parte exclusion order issued by the Yankton Sioux Tribal Court. See No. CIV 08-4085, 2009 WL 891867, at *2 (D.S.D. Mar. 31, 2009). The court found that the plaintiffs, apparently nonmembers, had not presented a challenge to “the legislative or judicial authority of the Tribe . . . to have jurisdiction over non-members within reservation boundaries on civil matters with respect to ‘the political integrity, the economic security, or the health or welfare of the tribe.’” *Id.* at *4 (citing *Montana*, 450 U.S. at 566); see also *Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 2003) (finding that ex parte exclusion order directed to a nonmember was facially valid where nonmember had involved herself with the tribe by “liv[ing] on the reservation, . . . work[ing] for the tribe, [having] a large civil suit against the tribe, and [possessing] various other personal and professional ties to the tribe and its members”). Note that the argument for tribal jurisdiction might be even stronger with respect to nonmembers who violate already pending exclusion orders against them, even if the order was issued through a tribal resolution process rather than by a court. Thus, tribes might be able to assert jurisdiction, at a minimum, over nonmembers who ignore a tribal resolution providing for exclusion.

⁴¹⁷ See *Santa Ynez Band of Mission Indians v. Torres*, 262 F. Supp. 2d 1038, 1040 (C.D. Cal. 2002).

⁴¹⁸ See *id.* at 1047.

⁴¹⁹ See *id.* at 1041–42. The court’s jurisdictional holding seems potentially questionable; although it seems clear that the defendant could raise federal defenses, did the tribe’s suit really present an original federal question? The court relied heavily on a much older Ninth Circuit case, in which a tribe sued nonmembers to enforce a tribal ordinance. See *id.* (citing *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1474 (9th Cir. 1989)). In that case, the U.S. Court of Appeals for the Ninth Circuit found that such a case lay “on the boundaries of tribal jurisdiction” because:

[T]he state of the law is such that the heart of the controversy over the claim will be the Village’s power, under federal law, to enact its ordinance and apply

invoke the resources of nontribal courts by, in effect, asking them to take action directly against nonmembers who violate tribal orders.

3. The Controversial Aspects of Banishment

To gain ground as a realistic method of tribal law enforcement, however, exclusion orders must overcome the controversy that has attended them—particularly if nontribal authorities are to participate in their enforcement. Although, as discussed, both banishment and analogues to banishment are still used in many U.S. jurisdictions, some commentators have viewed banishment as an antiquated punishment incompatible with modern notions of a liberal society.⁴²⁰ Some critics of banishment have also argued that tribes that exclude troublemakers are simply exporting their problems to surrounding communities.⁴²¹ Furthermore, despite the fact that the Supreme Court itself has indicated that exile from the reservation is an appropriate and permissible means of enforcing tribal orders, outside the tribal context the Court has suggested that banishment may raise Eighth Amendment issues.⁴²² Since the ban on cruel and unusual punishment is one of the constitutional guarantees incorporated into the ICRA, this raises the possibility that courts could find banishment—particularly if permanent or accompanied by a loss of tribal citizenship—to be an ICRA violation.⁴²³

it to non-Indians. . . . Indeed, the meaning of the ordinance is barely open to dispute, but the Village's power under the federal statute or common law to enact and apply it is open to immense dispute.

Chilkat Indian Vill., 870 F.2d at 1474. Note that in theory tribes could also seek enforcement of a tribal exclusion ordinance against a nonmember in state court, because state courts have jurisdiction of claims brought by tribe members against nonmembers. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 889–90 (1986).

⁴²⁰ Chief Justice Warren, for example, once described banishment as a “fate universally decried by civilized people,” “offensive to cardinal principles for which the Constitution stands” that “subjects the individual to a fate of ever-increasing fear and distress.” See *Trop v. Dulles*, 356 U.S. 86, 102 (1958); see also Riley, *supra* note 193, at 1106 (describing objections to banishment).

⁴²¹ See Brown, *supra* note 384. This is not, of course, an argument unique to tribal exclusion; for example, similar criticisms have been made of non-Indian communities that steer homeless residents to other jurisdictions. See, e.g., Richard Lacayo, *The Two Americas: Playing By Suburbia's Rules*, TIME, May 18, 1992, at 28, 28, (describing Westchester County's policies of sending homeless to Manhattan).

⁴²² See *Trop*, 356 U.S. at 100; Riley, *supra* note 193, at 1106 (noting that banishment may raise Eighth Amendment issues).

⁴²³ Some banishment decisions, for example, involve sentencing the offender to conditions of physical hardship. Angela Riley describes a case in which two Tlingit teenagers, as a punishment for robbery and assault, were “sentenced to a period of exile on separate

Indeed, some courts have already found authority under the ICRA to review banishment decisions. Despite the fact that the ICRA normally only grants habeas jurisdiction to federal courts, some courts have found banishment—at least when applied to a tribe member—to be both criminal in nature and a sufficient restraint on liberty to permit habeas review.⁴²⁴ Although there appears to be no published decision in which a court has found that banishment per se violates due process or constitutes cruel and unusual punishment, some courts that have accepted habeas review have gone on to invalidate particular banishment decisions on the grounds that the tribe failed to provide sufficient procedural protections to the offender.⁴²⁵

Despite this skepticism about banishment, there is much to be said in its defense. When used in certain circumstances and with adequate safeguards, banishment can be a reasonable method by which tribes assert control over their territory. Banishment is not, of course, *solely* about territorial control, particularly when applied to tribe members for whom—because it potentially represents exclusion from their community and livelihood—it can also function as a severe form of punishment. At the same time, however, banishment and other forms of exclusion represent the most basic form of border control and territorial security. Exclusion for such offenses as attempting to import drugs onto the reservation, for example, bears a strong resemblance to the steps nearly all governments take to avoid the smuggling of contraband at their borders.

Additionally, arguments against exclusion orders are particularly weak when nonmembers are involved. Applied to nonmembers, an exclusion sanction is far less severe, as no loss of community ties or politi-

remote islands for one year, where they were expected to survive on their own.” See Riley, *supra* note 193, at 1104.

⁴²⁴ See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900–01 (2d Cir. 1996); *Quair*, 359 F. Supp. 2d at 971. Although the tribe’s sovereign immunity would normally have barred suit, courts permitting review of banishment decisions have held that sovereign immunity does not apply when tribal officials are sued for alleged violations of federal law. See *supra* note 150 and accompanying text (discussing this exception). Other courts have found that exclusion orders are, at least in certain circumstances, not a criminal sanction and thus do not fall within ICRA’s grant of jurisdiction. See, e.g., *Alire*, 65 F. Supp. 2d at 1127–28.

⁴²⁵ See, e.g., *Dodge v. Nakai*, 298 F. Supp. 26, 33–34 (D. Ariz. 1969) (holding, in early, pre-*Martinez* case, that banishment of nonmember who engaged in controversial legal advocacy was invalid under ICRA because it constituted a restraint on free expression and because the exclusion order had not been the result of any judicial process); see also *Quair*, 359 F. Supp. 2d at 977–78 (finding triable issues of fact on issues of whether disenrolled and banished tribe members were denied due process and a fair trial).

cal status is involved (by definition, that is, nonmembers do not fully participate in the tribal community). Moreover, where nonmembers are concerned, the possibility that tribal governments will use exclusion to settle scores or to remove political dissenters—one objection to the practice when used against members—is far more remote.⁴²⁶ Finally, because tribes have limited options when dealing with nonmembers, exclusion cannot be attacked on the basis that a less severe sanction would be more appropriate given that tribes generally have no means of imposing such a sanction.⁴²⁷

On the whole, then, exclusion holds promise for strengthening tribal territorial control of lands. Increased use of exclusion—and increased cooperation between tribal and state or federal authorities in enforcing exclusion orders—may have collateral benefits for both tribes and nonmembers. For nonmembers, the threat of exclusion may reinforce the idea that the reservation is a distinct and perhaps even foreign place, with its own laws and customs, in which the visitor should not necessarily count on precisely the same legal norms that apply at home. This heightened awareness would provide tribes with a useful deterrent to ensure that nonmembers comply with tribal laws while on tribal territory.

C. *Final Suggestions: Borders and Immunity*

Two final suggestions about strengthening tribal territoriality are perhaps the most straightforward. The first is simply for tribes themselves to draw more attention to their borders and to offer frequent reminders of their sovereign, autonomous status to visitors within Indian country. I have already mentioned the variety in tribal border signs, some of which are nearly invisible and others of which directly proclaim tribes' sovereign status.⁴²⁸ Other tribes have found more creative ways to proclaim to nonmembers the tribe's distinct identity, such as the use of tribal language within the reservation or on signs pointing to it. The Crow and other tribes in Montana, for example, have successfully lobbied to have tribal words placed on state highway exit signs.⁴²⁹ Likewise, Cahuilla artist Gerald Clark has created various road signs in

⁴²⁶ See Riley, *supra* note 193, at 1108.

⁴²⁷ See Fields, *supra* note 2.

⁴²⁸ See *supra* notes 31–34 and accompanying text.

⁴²⁹ See Becky Bohrer, *Tribal Words Highlight Exit Signs*, BILLINGS GAZETTE, Apr. 23, 2006; see also Joanna Brooks, *Samson Occom at the Mohegan Sun: Finding History at a New England Indian Casino*, 4 COMMON-PLACE: THE INTERACTIVE J. OF EARLY AM. LIFE 4, at P. I (2004) (showing sign greeting visitors in Mohegan and English).

the Cahuilla language, designed to be posted on the property of family and friends on the Cahuilla Reservation, that are intended to reinforce traditional Cahuilla identity.⁴³⁰ Popular destinations such as casinos or resorts are logical places for tribes to use signs to emphasize their sovereign status or the necessity of compliance with tribal rules.

Such measures might seem trivial, but their role goes beyond symbolism. Many objections to subjecting nonmembers to tribal law center, at their core, on lack of notice: the law governing tribes is obscure, complicated, and little-publicized.⁴³¹ Nonmembers entering a reservation—in contrast to Americans crossing the border into Mexico or Canada—may not be aware of the full extent of tribal sovereignty, the possibility that different laws may apply, or the fact that claims against the tribe or tribal corporations may be barred by sovereign immunity.⁴³² Nonmembers' potential surprise may be used as a justification for restricting tribal territorial sovereignty still further.⁴³³ Thus, prominent proclamation of the tribe's right to govern particular land both decreases the possibility that nonmembers will be subject to unfair surprise and enables tribes to better argue that tribal law should apply in a broader array of circumstances. It is unclear whether this argument would find a receptive audience in the Supreme Court, as the Court has already held, at least in the criminal context, that warning signs to nonmembers cannot create implied consent to criminal jurisdiction.⁴³⁴ It nonetheless could help to change the popular notion of tribal sovereignty in ways that might ultimately resonate in legal doctrine.

The second suggestion is, in some ways, closely tied to the first. It calls for tribes to use sovereign immunity less as a separate source of power from territoriality and more as a tool for enhancing territorial control. As other commentators have suggested, one way for tribes to do so is to waive immunity from suit in tribal court routinely, thus funneling more on-reservation suits into tribal court where tribal law can

⁴³⁰ See Gerald Clarke, Artist, Cahuilla Installation: NESUN E'ELQUISH (2001), http://hanksville.org/artists/GClarke/Photoalbum/pages/nesun-sign_jpg.htm. Unfortunately, some of the signs have been vandalized (last visited May 3, 2010). See *id.* http://hanksville.org/artists/GClarke/Photoalbum/pages/netaxmuqa-sign_jpg.htm (last visited May 3, 2010).

⁴³¹ See POMMERSHEIM, *supra* note 244, at 36–57.

⁴³² See *supra* notes 283–295 and accompanying text.

⁴³³ See *Strate*, 520 U.S. at 441 (suggesting potential burden in requiring nonmember defendants “to defend against this commonplace state highway accident claim in an unfamiliar court”).

⁴³⁴ See *Oliphant*, 435 U.S. at 193 n.2 (“Notices were placed in prominent places at the entrances to the Port Madison Reservation informing the public that entry onto the Reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court.”). It is possible that similar signs may carry more weight in the civil context.

be applied to them.⁴³⁵ Also, if tribes were to create more visual reminders of their sovereign status for visitors within reservation borders, they could thereby bring about heightened awareness of tribal immunity by reminding visitors to be on notice of the possibility that different legal principles may apply to transactions in Indian country.⁴³⁶ Thus, heightened awareness of tribal territoriality could have the welcome side effect of reinforcing the message to nonmembers that, in their dealings with tribes, they—like travelers to foreign jurisdictions generally—bear the burden of acquainting themselves with tribal rules.

CONCLUSION

Tribal sovereignty remains—as it has always been—under construction. Tribes' ambiguous status within the United States has often meant that traditional notions of sovereign power may not necessarily apply. In recent years, however, the U.S. Supreme Court has taken a sharp turn toward completely severing the link between tribal power and tribal territory. In the process, it has done tribes a disservice, and one that has not been adequately remedied by permitting tribes to preserve the often-problematic right of immunity from suit.

Although tribes cannot undo the damage the Court has done, avenues remain by which tribes can reinforce and perhaps ultimately expand the territorial powers they continue to possess. Tribes can be vigilant in protecting their right to control the activities of tribe members within tribal land. They can advocate for state and federal courts to apply tribal law to events within tribal borders. Perhaps most importantly, they can make creative use of the exclusion power, both to expand their practical control over nonmembers and to nudge Supreme Court case law in more favorable directions. Regardless, tribes can make use of their sovereign immunity in ways that are both responsible to those they injure and advantageous to the tribes' own interests. In this way, immunity can serve to enhance tribal territoriality rather than simply constituting a weak substitute for it.

⁴³⁵ See *supra* note 321 and accompanying text.

⁴³⁶ In reality, of course, tribal immunity applies to all dealings with the tribe, whether on-reservation or off-reservation. In practice, however, legal disputes between tribes and nonmembers are overwhelmingly likely to arise on the reservation, particularly when they involve unsophisticated nonmembers most likely to be surprised by the operation of tribal immunity. Certainly most recorded disputes (both in the media and in case law) bear this out. See, e.g., *supra* notes 283–294 and accompanying text.