Kiowa Tribe v. Manufacturing Technologies, Inc.: Doing the Right Thing for All the Wrong Reasons

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The doctrine of sovereign immunity derives from the ancient concept that "the King could do no wrong." The United States has incorporated this principle into its system of justice in order to protect the federal and state governments from suit by their own and foreign citizens. In practice, the doctrine of sovereign immunity precludes parties from bringing suit against an unwilling sovereign. For example, Article III of the
United States Constitution, in conjunction with the Eleventh Amendment, prohibits an unwilling state from being sued in federal court by citizens of another state.\(^4\) A well-recognized exception to the immunity of the states occurs if a state waives its immunity by consenting to suit in federal court.\(^5\) Likewise, the enforcement provisions of the Fourteenth Amendment limit state sovereign immunity,\(^6\) and parties may sue state government officials in federal court if the suit is for injunctive relief, not monetary damages, and the issue concerns federal, not state, law.\(^7\)

Similarly, Indian tribes enjoy a form of sovereign immunity.\(^8\) Under federal law, an Indian tribe is subject to suit only if Congress has authorized the suit, usually through legislation, or if the tribe has waived its sovereign immunity.\(^9\) Tribal sovereign immunity promotes tribal businesses and allows tribes to protect their scarce resources.\(^10\) Since the

\(^4\) See U.S. Const. art. III; U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); Hans v. Louisiana, 134 U.S. 1, 4-5 (1890) (holding that the Eleventh Amendment prohibits the federal courts from entertaining a suit brought by a citizen against his own state); see also Kaplin, supra note 2, at 69.

\(^5\) See Kaplin, supra note 2, at 69.

\(^6\) See U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that "the enforcement provisions of § 5 of the Fourteenth Amendment" necessarily limit the Eleventh Amendment affirmation that sovereign immunity qualifies the grant of judicial authority in Article III of the Constitution); Kaplin, supra note 2, at 69 (citing Fitzpatrick, 427 U.S. at 456).

\(^7\) See Kaplin, supra note 2, at 70 (citing Ex parte Young, 209 U.S. 123 (1908)).

\(^8\) See United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940); Thebo v. Choctaw Tribe of Indians, 66 F. 372, 374 (8th Cir. 1895); Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law 283-84 (1986) (recognizing that the judicial and legislative bodies first discussed the principle of tribal sovereign immunity in Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895), and later, in United States Fidelity); Fogelman, supra note 1, at 1346-47 & nn.12-17 ("The Supreme Court has given no hint of general dissatisfaction with the notion of tribal immunity, refusing as recently as 1991 to modify the 'long-established principle of tribal sovereign immunity.'") (citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991)) (footnote omitted). But see Bruce A. Wagman, Advancing Tribal Sovereign Immunity as a Pathway to Power, 27 U.S.F. L. Rev. 419, 422 & nn.17-22 (1993) ("The development of the law of tribal sovereign immunity has been haphazard."); see also infra notes 182-84 and accompanying text (discussing the Court's holding in United States Fidelity).

\(^9\) See Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751, 760 (1998); United States Fidelity, 309 U.S. at 512; Thebo, 66 F. at 374 (holding that judicial jurisdiction over an Indian tribe could not be maintained in the absence of explicit Congressional approval); Cohen, supra note 8, at 283 (recognizing the lack of juristic capacity over the Indian tribes in the absence of tribal consent or "clear congressional authorization"); see also infra notes 170-84 and accompanying text (summarizing the United States Fidelity Court's acknowledgment of tribal sovereignty immunity).

\(^10\) See Cogo v. Central Council of the Tlingit & Haida Indians, 465 F. Supp. 1286,
signing of the Constitution, Congress historically has protected Indian tribes from encroachment by the states. The states, however, have historically attacked the inherent right of the Indian tribes to claim sovereign immunity. In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, the United States Supreme Court defended the doctrine of tribal sovereign immunity from yet another incursion by the states. In doing so,

1288 (D. Alaska 1979) (emphasizing that sovereign immunity is necessary “to protect what assets the Indians still possess from loss through litigation”); Atkinson v. Haldane, 569 P.2d 151, 174 (Alaska 1977) (stating that tribal sovereign immunity claims have been sustained “to protect the limited and irreplaceable resources of the Indian tribes from large judgments”); see, e.g., Thebo, 66 F. at 376 (“As rich as the Choctaw Nation is said to be rich in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it.”); Fogleman, *supra* note 1, at 1348-49 (recognizing that the continued existence of tribal sovereign immunity has been justified “primarily as a means to protect scarce tribal resources”); see also *Egan, supra* note 1, at A24 (recognizing that “sovereignty equals survival”); *infra* note 30 (describing the Oklahoma state court’s seizure, pursuant to its abrogation of tribal sovereign immunity, of the Kiowas’ oil and gas severance taxes as well as federal funds authorized by the Indian Self Determination and Education Assistance Act). Indeed, vulnerable governments like the Indian tribes or the “heavily indebted post-Revolutionary states” have viewed immunity from suit “as necessary for survival.” Brief for Petitioner at 19, *Kiowa Tribe v. Manufacturing Techs., Inc.* 523 U.S. 751 (1998) (No. 96-1037) (citing Nevada v. Hall, 440 U.S. 410, 418 (1979), which recognized that the vulnerable, post-revolutionary states were vitally concerned with whether they would be subject to suit in the courts of a “higher” sovereign).

11. *See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554-57 (1832)* (recognizing that since the formation of the United States, Congress has enacted laws, such as the Indian Trade and Intercourse Act, designed to provide for the protection promised in peace treaties such as the Treaty of Hopewell); see also *Thebo, 66 F. at 374* (holding that the judicial branch is bound by the acts of the political departments of the United States that—whether by treaties, acts of Congress, or executive action—have always recognized the inherent sovereignty of the Indian tribes). *See, e.g., The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450a-450n (1994).* The purpose of this Act was to promote tribal sovereignty through “effective . . . participation by the Indian people in the planning, conduct, and administration of [federal] programs and services.” *Id.* § 450a(b); see also *infra* notes 124-37 and accompanying text (discussing the *Worcester* Court’s role in recognizing how Congress acted to reinforce tribal sovereignty by protecting the Indian tribes from the states).


14. *See id.* at 758.
the Court recognized that tribal sovereign immunity does not depend on whether the tribal activity occurs on or off the reservation, or whether the activity is commercial or governmental in nature.\textsuperscript{15}

In 1990, the Kiowa Industrial Development Commission, on behalf of the Kiowa Tribe,\textsuperscript{16} a federally recognized Indian tribe,\textsuperscript{17} entered into a
contract\textsuperscript{18} with Manufacturing Technologies, Inc., for the purchase of stock issued by Clinton-Sherman Aviation, Inc., an Oklahoma corporation.\textsuperscript{19} On behalf of the Kiowa tribe, the then-chairman of the Kiowas' Business committee signed a Promissory Note.\textsuperscript{20} The Note obligated the Kiowas to make payments totaling $285,000 plus interest in Oklahoma City, outside of Indian Country.\textsuperscript{21} The Note, under the heading "Waivers and Governing Law," provided that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."\textsuperscript{22}

The Kiowas defaulted on the Note.\textsuperscript{23} Manufacturing Technologies

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\item[18.] See Kiowa Tribe, 523 U.S. at 753. This particular contract is one of a series of analogous contracts that gave rise to a number of related suits against the Kiowa Tribe. See Brief for Petitioner at 5-6 & n.2, Kiowa Tribe (No. 96-1037). The other suits include Hoover v. Kiowa Tribe, 909 P.2d 59 (Okla. 1995); Aircraft Equipment Co. v. Kiowa Tribe, 921 P.2d 359 (Okla. 1996); and Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe, 975 P.2d 442 (Okla. 1998).
\item[19.] See Kiowa Tribe, 523 U.S. at 753-54; Brief for Petitioner at 6, Kiowa Tribe (No. 96-1037).
\item[20.] See Kiowa Tribe, 523 U.S. at 753-54. The Note itself states that it was signed at Carnegie, Oklahoma, where the Kiowa Tribe occupies land held in trust by the United States for the Kiowa Tribe's benefit. See id. However, the parties did not contest Manufacturing Technologies' allegations that the note was to be performed in Oklahoma City, beyond tribal lands and within Oklahoma territory. See id.
\item[21.] See id. The Kiowa Tribe agreed to pay a 10\% annual interest rate and a 15\% interest rate upon default. See U.S. Amicus at 3, Kiowa Tribe (No. 96-1037). Indian Country is specifically defined as
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\item[(a)] all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ,
\item[(b)] all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
\item[(c)] all Indian allotments, the Indian titles to which have not been extinguished . . .
\end{itemize}
18 U.S.C. § 1151 (1994); see also BLACK'S LAW DICTIONARY 531 (6th ed. 1991) (defining "Indian Country" as "[p]art of the public domain set apart for use, occupancy and protection of Indian peoples"); WILKINS, supra note 16, at 371 (defining "Indian Country" as "the land under the supervision and protection of the United States government that has been set aside primarily for the use of Indians").
\item[22.] Kiowa Tribe, 523 U.S. at 754 (quoting the Promissory Note, which was signed by the Kiowas' Business Committee); Brief for Petitioner, Kiowa Tribe (No. 96-1037) (same). As such, the Kiowa Tribe expressly reserved the right to claim sovereign immunity from suit. See Kiowa Tribe, 523 U.S. at 754. Moreover, this provision placed Manufacturing Technologies on actual and constructive notice of Kiowa Tribe's reservation of this right. Cf. Ray v. William G. Eurice & Bros., Inc., 93 A.2d 272, 278 (Md. 1952) ("[A]bsent fraud, duress or mutual mistake, . . . one having the capacity to understand a written document who reads and signs it, . . . is bound by his signature in law . . . ").
\item[23.] See Kiowa Tribe, 523 U.S. at 754; Brief for Petitioner at 7, Kiowa Tribe (No. 96-1037).
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brought suit in the District Court of Oklahoma for money damages on the Note.\textsuperscript{24} The Kiowa Tribe moved to dismiss for lack of jurisdiction, asserting its sovereign immunity from suit.\textsuperscript{25} The trial court granted Manufacturing Technologies' motion for summary judgment, holding that tribal immunity does not apply to business ventures occurring outside of the reservation.\textsuperscript{26} The Oklahoma Court of Appeals affirmed, relying upon the theory that tribal immunity, like state immunity, is a matter of comity.\textsuperscript{27} According to the Oklahoma Court of Appeals, contracts between Indian tribes and non-Indians that are "executed outside of Indian Country" are enforceable in the Oklahoma courts because Oklahoma permits its courts to assert jurisdiction over breach of contract suits against itself.\textsuperscript{28} The Oklahoma Supreme Court refused to grant discretionary review to the Kiowas' claim of sovereign immunity.\textsuperscript{29}

The United States Supreme Court, however, granted the Kiowa

\textsuperscript{24} See Kiowa Tribe, 523 U.S. at 754. The holders of the other four analogous notes foreclosed upon shares held as collateral and then brought suit to recover the remaining debt. See Brief for Petitioner at 7, Kiowa Tribe (No. 96-1037).

\textsuperscript{25} See Kiowa Tribe, 523 U.S. at 754. The Kiowa Tribe had not waived its right to claim sovereign immunity from suit. See U.S. Amicus at 4, Kiowa Tribe (No. 96-1037). The Kiowas moved to dismiss on the ground that the Oklahoma state courts lacked jurisdiction to entertain a suit against an unwilling Indian tribe. See id.; see also Brief for Petitioner at 8, Kiowa Tribe (No. 96-1037) (stating that in denying the Kiowas' motion to dismiss, the District Court of Oklahoma County, Oklahoma, asserted that tribal immunity did not apply to off reservation commercial activities).

\textsuperscript{26} See Brief for Petitioner at 8, Kiowa Tribe (No. 96-1037). Accordingly, a judgment was entered against the Kiowa Tribe awarding Manufacturing Technologies a total of $445,471 in damages plus interest and costs. See id.; see also Kiowa Tribe, 523 U.S. at 754.

\textsuperscript{27} See Kiowa Tribe, 523 U.S. at 755 (citing Hoover v. Kiowa Tribe, 909 P.2d 59, 62 (Okla. 1995)); U.S. Amicus at 4-5, Kiowa Tribe (No. 96-1037) (summarizing the Oklahoma Court of Appeals' holding). In particular, the Oklahoma Court of Appeals relied upon the Oklahoma Supreme Court's decision in Hoover, which arose out of an analogous contract. See Hoover, 909 P.2d at 62. In turn, the Hoover court relied upon Lewis v. Sac & Fox Tribe Hous. Auth., 896 P.2d 503 (N.M. 1994), for the view that "'[o]nly that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance.'" Id. at 62 (quoting Lewis, 896 P.2d at 508). With respect to tribal sovereign immunity, the Hoover court looked to the New Mexico Supreme Court's decision in Padilla v. Pueblo of Acoma, 754 P.2d 845, 850 (N.M. 1988), for the theory that tribal immunity, like state immunity, "'is solely a matter of comity.'" Hoover, 909 P.2d at 62 (quoting Padilla, 754 P.2d at 850). The Padilla court, in turn, had relied upon the Supreme Court's decision in Nevada v. Hall, 440 U.S. 410 (1979). See Padilla, 754 P.2d at 850. The Hall Court held that Nevada could not assert immunity from a suit brought in a California court to recover injuries caused by an automobile collision on a California highway involving a vehicle owned by Nevada. See Hall, 440 U.S. at 426-27.

\textsuperscript{28} See Hoover, 909 P.2d at 62; Kiowa Tribe, 523 U.S. at 755 (summarizing the Oklahoma Court of Appeals' holding).

\textsuperscript{29} See Kiowa Tribe, 523 U.S. at 754.
Tribe's petition for certiorari and reversed the Oklahoma Court of Appeals' decision. The majority of the Court recognized that the issue of whether an Indian tribe is subject to suit is a matter of federal law. As such, the power to claim tribal sovereign immunity from suit "is not subject to diminution by the States." The majority also affirmed the historical principle that absent tribal or congressional consent the Indian tribes remain entitled to claim immunity from suit regardless of the place or type of tribal activities that gave rise to the suit. In contrast, the dis-

30. See id. At the time the Oklahoma Supreme Court denied review, enforcement of the judgment against the Kiowa Tribe had not been initiated. See Brief for Petitioner at 9, Kiowa Tribe (No. 96-1037). In the other analogous cases, however, extensive and disruptive collection efforts were imposed against the Kiowa Tribe. See id. at 9-10. For example, by seizing the Kiowas' oil and gas severance taxes, the revenues needed to run the Kiowas' government was garnished by the Oklahoma state court. See id. Moreover, the seizure of the Kiowas' revenues interfered with the enforcement of Kiowas' law within Indian Country. See id. Under the Kiowas' tax statutes, for example, the Kiowas have the right to foreclose land liens if the oil and gas taxes are not paid. See id. The Oklahoma state court, however, ordered the Kiowas not to enforce their own laws. See id. Ironically, the Oklahoma state court also seized the very federal funds, authorized by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1974), and the Indian Tribal Judgement Funds Use and Distribution Act, 25 U.S.C. § 1401 (1974), for the purpose of promoting economic development as well as tribal self-sufficiency and autonomy. See id. Accordingly, enforcement of the state court damage award, as argued by the Kiowas, effectively cede tribal lands, prevent the operation of tribal laws and shut down tribal government. See id.

31. See Kiowa Tribe, 523 U.S. at 760.

32. See id. at 754.

33. Id. at 756 (affirming that "the immunity possessed by the Indian tribes is not co-extensive with that of the States") (applying Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)). In reaching this conclusion, the Court distinguished state sovereign immunity from tribal sovereign immunity. See id. (citing Blatchford, 501 U.S. at 782). Unlike the states, none of the Indian tribes participated in the mutuality of concession at the Constitutional Convention. See id.; see also infra notes 66-69 and accompanying text. Mutuality of concession permitted the states to surrender a portion of their sovereign immunity to the federal government. See Kiowa Tribe, 523 U.S. at 756 (quoting Blatchford, 501 U.S. at 782). The Indian tribes, however, never surrendered their sovereign immunity from suit. See id. (citing Blatchford, 501 U.S. at 782).

34. See Kiowa Tribe, 523 U.S. at 754-55. The Kiowa Tribe majority recognized that the Court's precedents have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. See id. (citing Puyallup Tribe, Inc., v. Department of Game, 433 U.S. 165, 167, 172 (1977) (holding that a tribe's claim of sovereign immunity against a state court asserting jurisdiction over tribal fishing "on or off its reservation" was "well founded" regardless of where the fishing had taken place)). Moreover, the Court's prior tribal sovereign immunity cases have not distinguished between governmental and commercial activities. See Kiowa Tribe, 523 U.S. at 754-55. See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991) (recognizing tribal immunity for taxation of cigarette sales); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 510, 513 (1940) (recognizing that tribal immunity applies to a coal mining lease).
sent argued that the majority unjustifiably undermined the power of the state courts to determine, as a matter of comity, whether to acknowledge the sovereign right of the Indian tribes to claim judicial immunity.\textsuperscript{35}

Any discussion of the complex issues involved in determining the scope of the inherent power of the Indian tribes to claim, as sovereigns, immunity from suit must first begin with an appreciation for the historical development of the relationship between the Indian tribes\textsuperscript{36} and the federal government.\textsuperscript{37} Accordingly, this Note first examines the roots of tribal sovereign immunity from suit in the United States. This Note tracks the early Court's recognition of fundamental aspects of tribal sovereignty while establishing a trend toward undermining the inherent sovereignty of the Indian tribes. Next, this Note examines the modern Court's articulation and subsequent application of the doctrine of tribal immunity from suit as an essential aspect of tribal sovereignty. This Note then analyzes the majority and dissenting opinions in \textit{Kiowa Tribe v. Manufacturing Technologies, Inc.}, and evaluates their reasoning. Although acknowledging that, in the end, the result in \textit{Kiowa Tribe} was proper, this Note concludes that by criticizing the doctrine of tribal sovereignty and ignoring the historical underpinnings of the concept of tribal sovereignty found in the Court's early precedent, the Court greatly increases the likelihood that the federal government, including the Court itself, inevitably will breach its obligation to protect the Indian tribes from the destruction of their way of life.

\textsuperscript{35} \textit{See Kiowa Tribe}, 523 U.S. at 760 (Stevens, J., dissenting).

\textsuperscript{36} \textit{See Wilkins, supra} note 16, at x. The widespread use of the term "Indian" to make reference to each of the hundreds of independent and autonomous indigenous nations of North America has been criticized as overbroad. \textit{See id.} The inevitability of overgeneralization of such a culturally diverse group of peoples, however, has been recognized. \textit{See David H. Getches et al., Cases and Materials on Federal Indian Law} 7 (4th ed. 1998). As such, this term will continue to be used when no tribe is specified, without overlooking the inherent distinctiveness of each of the Indian tribes. \textit{See Wilkins, supra} note 16, at x.

\textsuperscript{37} \textit{See Getches, supra} note 36, at 39 (emphasizing "the crucial role which history has played" in shaping the life of Indian law).
I. THE DEVELOPMENT OF THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

A. The Historical Genesis of Tribal Sovereignty

1. Tribal Sovereign Immunity's Roots in United States' History: From Autonomy to Dependence

The original inhabitants of North America were the Indian tribes. In the early days of European settlement, the Indian tribes were acknowledged to be in rightful possession of the land. Indeed, the Indian tribes always have been considered "distinct, independent political communities," who have retained their original natural rights. The Indian tribes were viewed by the colonists as independent powers, and alternatively as "formidable enemies, or effective friends." The internal affairs and self-governance of the Indian tribes always were respected. As a matter of necessity, cooperative agreements were made between representatives

38. See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (recognizing that the rights of the "original inhabitants" were not disregarded at the time of the European discovery of North America). Indeed, long before European settlement, the Indian Tribes were "self-governing political communities." National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1985).

39. See Francis Jennings, The Invasion of America 15-16, 32 (1975) (recognizing Euro-American myths exemplified by the use of the term "settle" to describe European conquest of the North American wilderness including the resident "savage" population); see also Robert N. Clinton et al., American Indian Law Cases and Materials 6-7 (3d ed. 1991) (recognizing that, in Johnson, Chief Justice Marshall characterized the Indian tribes as "'fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest'" to justify the separate autonomous yet non-foreign nature of the Indian tribes) (quoting Johnson, 21 U.S. (8 Wheat.) at 590).

40. See Johnson, 21 U.S. (8 Wheat.) at 574 (acknowledging that the Indian tribes were the "rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion" while holding that "their rights to complete sovereignty, as independent nations, were necessarily diminished" by the European discovery and conquest of America).

41. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (recognizing that the Indian nations were respected as "the undisputed possessors of the soil, from time immemorial"); Black's Law Dictionary 713 (6th ed. 1991) (defining "Natural rights" as "[t]hose which grow out of nature of man and depend upon his personality and are distinguished from those which are created by positive laws enacted by a duly constituted government to create an orderly civilized society").


43. See id. at 547 (recognizing how the European colonists specifically prohibited any attempts "to interfere with the internal affairs of the Indians").

44. See Getches, supra note 36, at 73 (describing how the colonists were compelled to create "legal and political relationships with the tribes in order to legitimate land trans-
of the colonial governments and the governing bodies of the Indian Tribes.\textsuperscript{45} Moreover, the colonial governments prohibited individuals from purchasing Indian lands or from otherwise interfering with the self-governance of the Indian tribes.\textsuperscript{46} Hence, the genesis of tribal sovereignty\textsuperscript{47} stems directly from their separate aboriginal possession and occupancy, as autonomous societies, of the territory that has been absorbed into the United States.\textsuperscript{48}

Upon achieving independence from England, the United Colonies first enacted the Articles of Confederation,\textsuperscript{49} which vested Congress "with all the powers of war and peace" in conducting relations with foreign nations such as the Indian tribes.\textsuperscript{50} Specifically, Article IX of the Articles of Confederation provided that Congress had the power to regulate the trade and manage the affairs of the Indians.\textsuperscript{51} Congress, however, was
not permitted to infringe upon the legislative powers of the states.\textsuperscript{52} North Carolina and Georgia, though, construed this limitation on the grant of power to Congress to nullify the grant of power itself.\textsuperscript{53} Hence, individual states, that may have felt threatened by rumor of an Indian invasion, were permitted to declare war unilaterally upon an Indian tribe.\textsuperscript{54} In addition, each of the states was free to make separate treaties with the Indian tribes.\textsuperscript{55} Consequently, this framework of divided responsibility between the federal and state governments concerning tribal affairs proved to be "absolutely incomprehensible."\textsuperscript{56} In response, the delegates to the Constitutional Convention of 1787 sought to provide a more workable division of responsibility between the federal government and the states over managing relations with the Indian Tribes.\textsuperscript{57}

Ratification of the Constitution eliminated the states' restrictions on Congress' power to manage Indian affairs.\textsuperscript{58} Under the Constitution, each of the states ceded to Congress not only the authority to make treaties,\textsuperscript{59} but also the power to "regulate Commerce with . . . the Indian

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\textsuperscript{53} See U.S. ARTS. OF CONFEDERATION OF 1777 art. II (stating that Congress, under the Articles of Confederation, could not interfere with the legislative right of the states); Worcester, 31 U.S. (6 Pet.) at 558-59 (recognizing that the Articles of Confederation specifically afforded Congress the sole and exclusive right to control trade and affairs with the Indians).


\textsuperscript{55} See id. at 558 (stating that, under the Articles of Confederation, a state could declare war on an Indian tribe upon receipt of "certain advice of a resolution being formed by some nation of Indians to invade such state").

\textsuperscript{56} See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (discussing the separate treaties made between the Cherokees and the state of New York under a then unsettled framework of government created by the Articles of Confederation).

\textsuperscript{57} THE FEDERALIST NO. 42, at 284 (James Madison) (Jacob E. Cooke Ed., 1982). Indeed, James Madison questioned how trade with the Indians, who are not members of a state, could ever be regulated by the federal government without intruding on the internal rights of the state legislatures in accordance with the Articles of Confederation. See id.

\textsuperscript{58} See Worcester, 31 U.S. (6 Pet.) at 559 (describing how the conflicting claims of the states and the federal government caused confusion). As a result, in 1787, a congressional committee recommended that the states acquiesce to the federal government's absolute authority over the management of Indian tribal affairs. See id.; see also GETCHES, \textit{supra} note 36, at 95 (recognizing that the committee of the Continental Congress regarded attempts by the states to acquire Indian lands as "the principal source of difficulties with the Indians").

\textsuperscript{59} See Worcester, 31 U.S. (6 Pet.) at 558-59 (recognizing that the adoption of the Constitution eliminated the shortcomings of the Articles of Confederation). The adoption of the Constitution specifically conferred upon Congress the power to regulate war, peace, and commerce with the Indian tribes. \textit{I}d; see also Frickey, \textit{supra} note 50, at 56 n.101 (stating that the Constitution resolved the ambiguities created by the Articles of Confederation explicitly by assigning exclusive authority to Congress).

\textsuperscript{59} See U.S. CONST. art I. § 10 (prohibiting the states from entering into any separate
tribes.” The regulation of Indian affairs became the sole province of the federal government. The Supremacy Clause required the states to honor federal law on tribal immunity as “the supreme Law of the Land.” Independent state power over the affairs of the Indian tribes effectively became constrained constitutionally. Thus, the Indian Commerce Clause and the Treaty Clause vested Congress with a kind of plenary power over Indian affairs.

Unlike each of the states, however, the Indian tribes did not surrender voluntarily any tribal authority to the central government of the United States upon the adoption of the Constitution. Like other foreign sover-

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60. U.S. Const. art. I, § 8, cl. 3 (granting to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); Worcester, 31 U.S. (6 Pet.) at 559 (recognizing that the adoption of the Constitution conferred upon “congress the powers of war and peace; of making treaties, and of regulating commerce...with the Indian tribes”).


62. U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States...and all Treaties made...under the Authority of the United States, shall be the supreme Law of the Land.”).

63. See Wilkins, supra note 16, at 375-76 (recognizing that the Supremacy Clause provides the federal government with exclusive powers that the states must follow, but cannot utilize).

64. See id. at 373-74. The term “plenary power” encompasses the following three distinct meanings:

a) exclusive—Congress, under the Commerce Clause, is vested with sole authority to regulate the federal government’s affairs with Indian tribes;

b) preemptive—Congress may enact legislation which effectively precludes state government’s acting in Indian related matters; and

c) unlimited or absolute—this judicially created definition maintains that the federal government has virtually boundless governmental authority and jurisdiction over Indian tribes, their lands, and their resources.

Id.; see also infra notes 142-44 and accompanying text (discussing Lone Wolf v. Hitchcock, 187 U.S. 533 (1903), and the Court’s vision, in dicta, of plenary power).

65. See McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 172-73 (1973). The source of the federal government’s exclusive power over Indian affairs derives from the Indian Commerce Clause and the Treaty Clause. See id. at n.7. In determining the scope of Indian sovereignty and the limits of state power, “the trend has been away from the idea of inherent Indian sovereignty as a bar to State jurisdiction and toward reliance on federal preemption” by interpreting “the applicable treaties and statutes which define the limits of state power” against the historic backdrop of the Indian tribes’ claim to sovereignty that pre-exists the formation of the United States. See id. at 172-73 (footnote omitted).

eigns, the Indian tribes were not parties to the Constitutional Convention. Thus, the Indian tribes did not participate in the mutuality of concession that allowed the states to surrender their sovereignty to the federal government. As such, the Indian tribes, absent from the Constitutional Convention, never surrendered voluntarily their sovereignty nor their inherent right to claim sovereign immunity from suit. The development of a strong national government with exclusive responsibility over Indian relations "necessarily diminished" the original sovereignty of the Indian tribes as the United States expanded its territorial lands at the expense of Indian lands. It was the United States, not any of the individual states, who, whether by purchase, treaty or conquest, brought the Indian tribes under its dominant sovereignty. The federal government, according to the Supreme Court, brought Indian tribes enjoy immunity against suits by States"; cf. Worcester, 31 U.S. (6 Pet.) at 561 (recognizing that "a weaker power does not surrender its independence... by associating with a stronger" power).

67. See Blatchford, 501 U.S. at 782. There can be no mutual surrender of immunity, as the Blatchford Court appreciated, between the states and either foreign nations or the Indian tribes because only the states participated in mutual concession. See id.

68. See id. ("It would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties").

69. See id. at 780 n.1; THE FEDERALIST NO. 81 at 548 (Alexander Hamilton) (Jacob E. Cooke ed., 1982) ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent."); see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (recognizing that an Indian tribe does not waive its sovereign immunity when it admits certain actions in pleadings).

70. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823). The Indian tribes, according to the Johnson Court, were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Id.

71. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15-17 (1831) (contending that the Indian tribes lost their complete sovereign status as "once numerous, powerful, and truly independent" foreign nations by virtue of their land becoming absorbed "within the acknowledged boundaries of the United States"); WILKINS, supra note 16, at 368 (defining the term "domestic-dependent nation" by noting that the Cherokee Nation Court specifically concluded that the Indian tribes "lacked foreign national status because of their geographic proximity in the United States").

72. See Cherokee Nation, 30 U.S. (5 Pet.) at 17 (generalizing that each of the Indian tribes acknowledged in their treaties that the United States would protect them in exchange for land cessions).

73. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (holding that the Constitution, treaties, and laws of the United States had established boundaries that separated Indian territory from that of the states); Cherokee Nation, 30 U.S. (5 Pet.) at 17 (stating
lands "within the jurisdictional limits of the United States." As such, the Indian claim of title to real property absorbed by the United States became a "[p]ermissive right of occupancy granted by the federal government." Indian tribal sovereignty, in the Supreme Court's view, became dependent on, and subject to, the exclusive power of Congress.

The unique nature of tribal sovereignty remains so rooted in the history of the United States, however, that it necessarily provides an important backdrop in any discussion by the courts of the sovereign rights of the Indian tribes. The pre-existing sovereignty of the Indian nations was not destroyed when the United States asserted its dominant sovereignty and protection over the Indian tribes. The Indian tribes did not

that the Indian Tribes resided "within the acknowledged boundaries of the United States"; see also infra notes 120 and 133 and accompanying text (discussing Marshall's evolving views from Cherokee Nation to Worcester with respect to whether Indian tribal territory is distinct from that of the United States).

74. Cherokee Nation, 30 U.S. (5 Pet.) at 17; BLACK'S LAW DICTIONARY 531 (6th ed. 1991) (defining "Indian lands" as "[r]eal property ceded to the U.S. by Indians, commonly to be held in trust for Indians"); WILKINS, supra note 16, at 371 (defining "Indian Country" as "the land under the supervision and protection of the United States government that has been set aside primarily for the use of Indians").

75. BLACK'S LAW DICTIONARY 531 (6th ed. 1991) (defining "Indian title" as "[c]laim of Indian tribes of right, because of immemorial occupancy, to occupy certain territory to exclusion of any other Indians"). Indian title became a "[p]ermissive right of occupancy granted by the federal government to aboriginal possessors of the land; it is mere possession not specifically recognized as ownership and may be extinguished by the federal government at any time." Id.; see also WILKINS, supra note 16, at 370 (defining "[i]mplicit divestiture" as a "[l]egal doctrine that [the Indian] tribes, by becoming subject to the dominant sovereignty of the U.S. via geographic incorporation, implicitly surrendered or were divested of certain sovereign powers").

76. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (deciding that tribal sovereignty is ultimately subject to the plenary power of Congress); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940) (recognizing the public policy that exempts both the dominant and dependent sovereigns from suit without consent).

77. See White Mountain, 448 U.S. at 143. "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." Id. For example, "[a]mbiguities in federal law" have been construed in favor of protecting tribal sovereignty so as to "comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." Id. at 143-44. Moreover, no express congressional statement has been required "to find a particular state law to have been preempted by operation of federal law." Id. at 144.

78. See Worcester, 31 U.S. (6 Pet.) at 560-61 (identifying that the "very fact of repeated treaties . . . recognizes [tribal sovereignty]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection" in exchange for land cessions); Cherokee Nation, 30 U.S. (5 Pet.) at 53 (Thompson, J., dissenting) ("[A] weak state . . . in order to provide for its safety, places itself under the protection of a more powerful [sovereign], without stripping itself of the right of government and sover-
surrender their right to autonomy by submitting to, or availing themselves of, the protection of the United States. Rather, the Court declared that a unique trust relationship had developed between the Indian tribes and the federal government. Accordingly, the Indian tribes did not lose their status as independent foreign nations, but continued to enjoy a kind of quasi-sovereign status.

2. The Early Court's Role in Legitimizing Indian Dependence and Undermining Tribal Sovereignty

Beginning in 1823, the Supreme Court undermined the inherent sovereignty of the Indian tribes in a series of landmark decisions commonly known as the "Marshall Trilogy." This trend began in Johnson v.
where the Court began to diminish, as a matter of law, the Indian tribes' pre-existing inherent sovereignty. At issue was whether Indian land transfers—which Great Britain had recognized prior to the Revolution—to private individuals could be sustained by the courts of the United States over subsequent land transfers by the United States to a different private individual.

Chief Justice Marshall reasoned that the rule of law governing property rights must be interpreted in light of not only past legal precedent but also the principles that the national government had adopted in the course of dealing with the Indian tribes. At the core of Marshall's rea-

83. 21 U.S. (8 Wheat.) 543 (1823).
84. See id. at 573-74, 586-91.
85. See WILKINS, supra note 16, at 29-30 (appreciating that “the general land policy of Great Britain, the United States, and Spain” was to recognize virtually all of such “pre- and post-revolutionary individual/tribal land transactions”).
86. See Johnson, 21 U.S. (8 Wheat.) at 571-72. In 1773 and 1775, the Illinois and Piankeshaw tribes ceded Indian title to plaintiffs, Joshua Johnson and Thomas J. Graham. See id. at 561-62. In 1818, the defendant, William M'Intosh, purchased title from the United States to land that coincided with a portion of Johnson's original purchase from the Indian tribes. See id. at 560-61. Chief Justice Marshall framed the issue to be “confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.” Id. at 572. It has been asserted that by generating this issue so as to answer it in the negative, Marshall fabricated a legal rationale for restricting Indian rights “without allowing any room for listening to the Indian voice.” WILKINS, supra note 16, at 30.
87. See WILKINS, supra note 16, at 31. Wilkins further argued that Marshall was asserting that if the rule of law or “abstract justice” was in conflict with the national government's right to generate rules favorable to its own property and political needs then it was the Court's duty to construct principles or amend existing principles which would sanction those new standards. In other words, the rule of law, which should have led to a decision in favor of the plaintiffs (Johnson et al.) because of their preexisting and lawfully executed property rights, was circumvented in this case by what amounted to a political decision cloaked in judicial doctrines and strengthened by the politically expedient compromise agreed to by the founders of the American Republic which “provided for the cession of frontier claims by the 'landed' states to a federal sovereign claiming exclusive rights to extinguish Indian title claimed by purchase or conquest . . . [and] settled the legal status and rights of the American Indian in United States law.”
Id. (quoting Robert A. Williams Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 231 (1990)) (footnote omitted).
88. See Johnson, 21 U.S. (8 Wheat.) at 572-74. The Court looked to the historical state of affairs governing interaction with the Indian Tribes set forth first by the European colonists and finally by the United States in developing the doctrine of discovery and concluding that the Indian tribes' “complete sovereignty, as independent nations, [was] necessarily diminished . . . ” Id. at 574. The doctrine of discovery, however, actually places a limitation on the “discovering” states, not a limitation on indigenous rights. Id. at 573-74 (discussing how the adoption of the doctrine of discovery, which gave the discovering state the exclusive right to deal with “the Indian right of occupancy,” allowed the European na-
sioning was the idea that society has the unquestionable right to prescribe its own rules. In determining what principles of property law had been adopted, the *Johnson* Court looked to the actual state of affairs between the Indian tribes and the European and federal governments that began upon the discovery of North America.

In examining the history of America, the *Johnson* Court first described how the doctrines of discovery and conquest, coupled with a quasi-political question doctrine, provided alternative legal grounds for diminishing the pre-existing sovereignty of the Indian tribes. According to the *Johnson* Court, upon the discovery of North America, each of the European settlers sought to appropriate as much of the vast new lands as they could acquire respectively. In order to avoid conflicting land

89. *See Johnson*, 21 U.S. (8 Wheat.) at 572. Chief Justice Marshall recognized that the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

Id. The modern Court's analog of society's unquestionable right to prescribe its own laws is the doctrine of political question. *Wilkins*, *supra* note 16, at 374 (defining "[p]olitical question" as "[a] question that courts refuse to decide because it is deemed to be essentially political in nature or because its determination would involve an intrusion on the powers of the legislative or executive branch").


91. *See Wilkins*, *supra* note 16, at 368 (recognizing that the *Johnson* Court's adoption of its version of the doctrine of discovery legitimized the exclusion of the Indian tribes from participation as sovereign entities "in the process of international community development").

92. *See id.* at 367 (defining the doctrine of conquest as a "[[l]egal doctrine under international law which entails the acquisition of territory by a victorious state from a defeated state in warfare"). Essentially, "[[t]he state acquiring by conquest is regarded as the successor to the rights and duties previously applicable to the territory." *Id.*

93. *See Johnson*, 21 U.S. (8 Wheat.) at 588 (deciding that the Court "will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits"). Marshall concluded that "[c]onquest gives a title which the Courts of the conqueror cannot deny." *Id.*

94. *See id.* at 588-89; *see also id.* at 574 (noting that while Indian rights were not "entirely disregarded," they were "to a considerable extent, impaired").

95. *See id.* at 572-74. Moreover, according to Chief Justice Marshall, the uncivilized character and non-Christian based religion of the Indian tribes might have afforded a moral justification for the "superior genius" of the European colonists to bestow "on them civilization and Christianity." *Id.* at 573.
claims, the European governments, as well as the United States as successor-in-interest,\(^9\) established principles of property law to regulate the course of land acquisition among themselves.\(^9\) Under these principles, the act of discovering land occupied by the Indian tribes gave the discovering European country the sole right to appropriate land from the Indian tribes, to the exclusion of all the other European nations.\(^8\) The Johnson Court concluded that the adoption of this discovery principle as a rule of law could not be questioned by the Court because society had the indisputable right to prescribe its own rules.\(^9\) As such, the previously acknowledged “complete sovereignty”\(^10\) of the Indian tribes, according to the Johnson Court, was “necessarily diminished” by the elimination of the Indians’ right to alienate land to non-discovering European nations.\(^10\)

Alternatively, the Johnson Court explained that the doctrine of conquest could also serve to overshadow Indian sovereignty.\(^10\) According to the Court, the European nations and, later, the United States, limited the remaining property rights of the Indian tribes to a “right of occupancy.”\(^10\) The Court concluded that it could not question the federal government’s ability to assert ultimate dominion over the remaining Indian right of occupancy.\(^10\) Accordingly, the Court declined to adjudicate, pursuant to an early equivalent of the political question doctrine,\(^5\) the issue of whether the federal government had the legal right to extinguish title held or transferred by the Indian tribes.\(^6\) When a nation acquires

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96. See id. at 584-85. Pursuant to the conclusion of the American revolution, Great Britain relinquished all territorial rights to the United States. Id. at 584. Moreover, according to the Johnson Court, the United States, in turn, unequivocally adopted the principle that “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” Id. at 587.

97. See id. at 573 (describing one principle as a “right of acquisition”).

98. See id.

99. See id. at 591-92.

100. See id. at 574 (acknowledging that the Indian tribes “were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion”).

101. See id.

102. See generally id. at 574, 584-95.

103. See id. at 574.

104. See id. at 585.

105. See, e.g., id. at 588; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) (utilizing an early form of the modern political question doctrine in holding that the plenary power of Congress over tribal affairs is not subject to control by the judicial branch); Wilkins, supra note 16, at 112-13 (recognizing that the Lone Wolf opinion “represented a perfect and deadly synthesis of the plenary power concept and the political question doctrine”).

106. See Johnson, 21 U.S. (8 Wheat.) at 588.
Indian territory, whether by purchase or conquest, the judiciary branch cannot deny the validity of the acquiring nation's land claims. Thus, the Johnson Court held that the Indian tribes lacked the power to enforce Indian land transfers in the federal courts over conflicting land title claims arising from United States land transfers. In doing so, the Johnson Court legitimized the federal government's ultimate power to control the judiciary branch's ability to adjudicate the scope of Indian sovereignty.

In Cherokee Nation v. Georgia, the Supreme Court continued this

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107. See id. at 588-89.

108. See id. at 604-05. In essence, the Johnson Court held that the Indian land transfers could not be sustained by the courts of the United States over subsequent land transfers by the United States. See id.

109. See GETCHES, supra note 36, at 69-70 (recognizing the tension Chief Justice Marshall created between "natural law" and "positive law" before finally yielding to a positivist justification for legitimatizing, as a matter of law, the actual state of affairs).

110. See Johnson, 21 U.S. (8 Wheat.) at 589. Significantly, the Johnson Court observed that "[h]umanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest." Id. Moreover, the Johnson Court understood that

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice. Id. at 591-92.

Furthermore, commentators have recognized the "cruel dilemma" Chief Justice Marshall faced. See GETCHES, supra note 36, at 69. The Court could have held either that the Indians had no title or rights whatsoever, or held that the federal land grants on which much of the American economy was rested upon were void. See Felix S. Cohen, Original Indian Title, 32 MINN. L. REV. 28, 48 (1948). Thus, the Johnson opinion has been read as a "blend of Marshall's federalist convictions, his sense of moral obligation toward Indians, and a pragmatic need to fit Indian title into our system of land tenure with a minimum amount of disruption to well-established" land acquisition procedures. See GETCHES, supra note 36, at 69. To reach this compromise, however, Marshall had to embrace the "premise of the Indians' inferiorly-regarded 'character and religion' as the basis for the superior sovereignty of European governments over Indian land as an accepted part of United States law." Id.

111. 30 U.S. (5 Pet.) 1 (1831).
trend toward legitimizing federal control over Indian affairs. The Cherokee Nation Court considered whether it had original jurisdiction over an action brought by the Cherokee Nation to enjoin Georgia from executing laws, which were designed to abolish the Cherokees' laws and institutions as well as seize lands guaranteed to the Cherokees by the United States through a series of treaties. Writing for the Court, Chief Justice Marshall recognized that these laws would "annihilate the Cherokees as a political society." Marshall held that the Court lacked original jurisdiction because the Cherokee Nation was not a "foreign nation" within the meaning of the Constitution's grant of judicial power.

112. See id. at 15, 20.

113. See id. The 1785 Treaty of Hopewell with the Cherokees is representative. See Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokees, 7 Stat. 18. This Treaty provided that, in exchange for peace and land cessions, Congress "[f]or the benefit and comfort of the Indians, and for the prevention of injuries or oppressions . . . shall have the sole and exclusive right of regulating the trade with the Indians." Treaty of Hopewell, supra, art. IX, 7 Stat. at 20. Moreover, the Treaty specified that upon the occurrence of "a manifest violation of this treaty . . . a demand of justice" must be made before resorting to "a declaration of hostilities." Treaty of Hopewell, supra, art. VII, 7 Stat. at 20.

In 1830, Congress passed the Removal Act for the purpose of providing the Executive Branch with the power to remove Indian tribes to certain western territories in exchange for solemn assurances that the United States shall forever protect and guarantee Indian title to those western territories. GETCHES, supra note 36, at 98. In response, the Cherokee Nation "reminded the national government that the Cherokee's sovereignty was secured by treaty and asserted in the Cherokee constitution." Id. at 96.

114. See GETCHES, supra note 36, at 111 (noting that although frequently relied upon, Chief Justice Marshall's opinion in Cherokee Nation failed to command even a plurality opinion due to the Court's 2-2-2 split).

In a concurring opinion, Justice Johnson argued that the Cherokee Nation did not constitute a foreign state even within the meaning of the Treaty of Hopewell. See Cherokee Nation, 30 U.S. (5 Pet.) at 22-23. The Indian tribes, in Justice Johnson's view, were "nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state." Id. at 27-28. Moreover, it has been argued that Justice Johnson, while admitting that the Cherokee government "must be classed among the most approved forms of civil government," viewed their evolution from "the hunter state to a more fixed state of society" as an unbearable threat to the sovereignty of the United States. GETCHES, supra note 36, at 111 (citing Cherokee Nation, 30 U.S. (5 Pet.) at 21, 23 (Johnson, J., concurring)).

In contrast, Justice Thompson's dissenting opinion appreciated that the law of nations would respect the Cherokee Nation as a foreign sovereign state because it reserved to itself the right to govern its people. See Cherokee Nation, 30 U.S. (5 Pet.) at 53. Moreover, Justice Thompson recognized that an "inferior ally" or "a weak state" does not surrender its sovereign status by entering into a protective alliance with a more powerful sovereign "in order to provide for its safety." Id. at 53; see also infra note 134 (noting Chief Justice Marshall's subsequent adoption in Worcester of Justice Thompson's dissenting opinion in Cherokee Nation).

115. See Cherokee Nation, 30 U.S. at 15.

116. See id. at 18; see also U.S. CONST. art. III, § 2, cl. 1 (granting Judicial power over "[c]ontroversies between . . . a state . . . and foreign States").
In reaching this conclusion, Marshall recognized that numerous United States treaties had recognized the Cherokee Nation as a "distinct political society, . . . capable of managing its own affairs and governing itself."\(^{117}\) Hence, Marshall considered the Cherokee Nation a state.\(^{118}\)

As to whether the Cherokee Nation constituted a "foreign" state, Marshall recognized, however, several "peculiar and cardinal" features that distinguish the federal-tribal relationship from the typical federal-foreign relationship.\(^{119}\) Marshall noted that the Indian tribes, unlike foreign nations, resided "within the acknowledged boundaries of the United States" but unquestionably possessed an extinguishable right of occupancy.\(^{120}\) Moreover, Marshall asserted that the text of the Commerce Clause\(^{121}\) provided conclusive evidence that the Founders did not intend to open the courts of the union to the Indian tribes.\(^{122}\) Marshall recognized the Indian tribes, not as foreign nations possessing inherent sover-

\(^{117}\) Cherokee Nation, 30 U.S. (5 Pet.) at 16.

\(^{118}\) See id.

\(^{119}\) See id. at 16-18.

\(^{120}\) Id. at 17. It could be argued, however, that holding that the Cherokee Nation was not a foreign entity was itself a foregone conclusion once Marshall considered that the Indian tribes resided within the territory of the United States. For example, if Marshall had first recognized that the Cherokee's territorial boundaries were distinct from the United States' territory, as he later acknowledged in Worcester, then holding that the Cherokee Nation was a foreign entity would, likewise, result in a foregone conclusion. See generally Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 547-48 (1832) (recognizing that the colonial governments accurately fixed the boundaries of Indian lands and forbid "all encroachments on the territories allotted to them"); id. at 557 (recognizing that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . ."); id. at 559 (stating that "[t]he very term 'nation' . . . means 'a people distinct from others'"); see also Thebo v. Choctaw Tribe of Indians, 66 F. 372, 374-75 (8th Cir. 1895) (recognizing that the United States promised that no Indian lands "shall ever be embraced in any territory or state"). Moreover, it could be argued that Marshall's early extinguishable right of occupancy distinction applies equally to any "weak" foreign sovereign state capable of being conquered by a stronger sovereign; cf. Worcester, 31 U.S. (6 Pet.) at 560-61 (holding that "a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection").

\(^{121}\) See U.S. CONST. art. 1, § 8, cl. 3 (empowering Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes"). Marshall concluded that by distinguishing between "foreign Nations" and "the Indian tribes," the Founders could not have intended to grant judicial power over the Cherokee Nation. See Cherokee Nation, 30 U.S. (5 Pet.) at 18-19. If the Founders had intended otherwise, Marshall argued, they would have empowered Congress "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." Id. at 19.

\(^{122}\) See Cherokee Nation, 30 U.S. (5 Pet.) at 18-19. Marshall asserted that, at the time the constitution was written, the Framers would not have considered providing for the adjudication of Indian claims because the Indians would rather seek redress by force ("[t]heir appeal was to the tomahawk") or treaty with the federal government. See id. at 18.
eignty, but as "domestic dependent nations" who relied upon Congress for protection. 123 

In the seminal case of *Worcester v. Georgia*,124 the Court was forced to adjudicate whether Georgia had the power to enact legislation, which abolished the Cherokees' laws and institutions, seized reservation lands, and extended Georgia law over the residents of the Cherokee Nation.125 As in *Cherokee Nation*, Marshall appreciated that enforcement of these laws against the Cherokee Nation would "annihilate its political existence."126 As in *Johnson*, Marshall re-examined how the historical practices of the European nations and the United States had shaped the sovereignty of the Indian nations.127 The Indian nations, Marshall recognized, "had always been considered as distinct, independent polit-
cal communities.” Indeed, the Constitution, treaties, and laws of the United States, Marshall held, had established boundaries that separated Indian territory from that of the states. In addition, these federal

128. See id. at 559.
129. See U.S. CONST. art. I, § 10; U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, cl. 2; see Worcester, 31 U.S. (6 Pet.) at 558-59. Marshall recognized that the Constitution granted to Congress the exclusive power to declare war, make peace treaties, and to regulate commerce with the Indian tribes. See Worcester, 31 U.S. (6 Pet.) at 559. Moreover, by adopting the Constitution, the United States adopted all previous treaties with the Indian tribes and, via the Supremacy Clause, declared all existing and future treaties to be “the supreme law of the land.” Id. at 559-60 (recognizing that even Georgia, in the 1802 contract of cession, acquiesced to these universal convictions upon the adoption of the Constitution).

130. See Worcester, 31 U.S. (6 Pet.) at 549 (recognizing that Congress, “[f]ar from advancing a claim to their lands, or asserting any right of dominion over them,” resolved to secure the friendship of the Indian nations by entering into treaties).

By examining the provisions of the Treaty of Hopewell and the Treaty of Holston, Marshall recognized that the United States had explicitly and repeatedly pledged to protect, not to destroy, the sovereign character of the Cherokees. See id. at 551-56; see also Treaty of Hopewell, supra note 113, art. III, 7 Stat. at 19 (acknowledging that the Cherokees were under the exclusive “protection” of the federal government); art. IV, 7 Stat. at 19 (setting forth a boundary between Cherokee Country and the territory of the United States); art. V, 7 Stat. at 19, (withdrawing the “protection” of the national government from any citizen who resides on lands allotted to the Cherokees longer than six months); art. IX, 7 Stat. at 20 (providing Congress with the exclusive right to regulate Indian affairs “[f]or the benefit and comfort of the Indians, and for the prevention of injuries or oppressions”).

Specifically, Marshall held that Congress’ power to manage the affairs of the Indians was limited to the extent that the exercise of that power was consistent with “the spirit of this and of all subsequent treaties.” See Worcester, 31 U.S. (6 Pet.) at 554. For example, Marshall stated that construing the expression “managing all their affairs[]” into a surrender of self-government” would not be “for the benefit and comfort of the Indians” within the meaning of the Treaty of Hopewell. See id. at 553-54. Similarly, construing the term “protection” into a means for subverting Indian sovereignty would be directly hostile to Congress’ obligation under these treaties. See id. at 552 (holding that “[p]rotection does not imply the destruction of the protected”). In addition, Marshall noted that the federal government had promised to “restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.” Id. at 556.

131. See Worcester, 31 U.S. (6 Pet.) at 556-57. “From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.” Id.

132. See id. at 557. But see supra note 120 and accompanying text (noting that in Worcester, Chief Justice Marshall reversed his previous determination in Cherokee Nation that Indian lands had been absorbed within the territory of the United States). Thus, unlike in Cherokee Nation, because Marshall considered Indian tribal territorial lands to be distinct from the United States’ territory, the Worcester Court’s holding that Georgia’s laws unconstitutionally undermined the inherent sovereignty of the Cherokee became a foregone conclusion. See Worcester, 31 U.S. (6 Pet.) at 557 (recognizing that “[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . .”). See, e.g., Treaty of Hopewell, supra note 113, art. IV, 7 Stat. at 20 (enumerating a boundary between Cherokee country and territory of the
laws guaranteed to the Indian nations that the federal government would act forever, in good faith, to protect their rights to self-government from encroachment by the citizens of the states and recognize the pre-existing power of the Indian nations to govern themselves. With this in mind, Marshall decided that Georgia's laws were unconstitutional because they violated the protections afforded to the Indian nations by the various treaties and laws enacted by the federal government. The Worcester Court held Georgia's laws to be void because they were "re-pugnant to the constitution, laws, and treaties of the United States." This decision established the fundamental principal that the inherent sovereignty of the Indian nations acts as a bar to the assertion of state jurisdiction.

In Lone Wolf v. Hitchcock, the Court resumed its restrictive trend toward shrinking tribal sovereign immunity by increasing the likelihood that Congress could undermine the sovereignty of the Indian tribes. At issue was whether Congress could enact a statute directing the sale of over two million acres of "surplus" land in direct violation of a prior treaty with the Kiowa, Camanche, and Apache Tribes. The Lone Wolf

United States).  
134. See Worcester, 31 U.S. (6 Pet.) at 561-62. Specifically, the Worcester Court recognized that Georgia's laws were in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.  

Id.  
135. See id. at 561; see also Stephen M. Feldman, The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights, 18 HARV. ENVT'L. L. REV. 433, 436 (1994) (asserting that the federal government, according to Justice Marshall's "domestic dependent nation" theory, "was assigned a protective role which obliged all three of its branches to insulate Indian tribes from non-Indian—specifically state and foreign—encroachment").  
136. See id. at 561-62.  
137. See Worcester, 31 U.S. (6 Pet.) at 542, 561-62 (noting that "the very passage of this act is an assertion of jurisdiction over the Cherokee nation"); GETCHES, supra note 36, at 125.  
138. 187 U.S. 553 (1903).  
139. See id. at 564-65.  
140. See id. at 561; see also supra note 16 (summarizing the history the United States' relationship with the Kiowa tribe). Between 1837 and 1867, the United States made several peace treaties with the Kiowas. See Treaty with the Kiowas, May 26, 1837, U.S.-
Court held that Congress' abrogation of the Indians' treaty rights was constitutional because Congress was presumed to have acted in good faith for the best interests of each of the tribes. Moreover, the Court, in dicta, asserted that Congress had unquestionable authority to act for the “care and protection” of the Indians because Congress' power over the relations of the Indians was a political question, not subject to judicial review. According to the Court, Congress had exercised plenary authority over tribal relations since the beginning of the United States' legislative system. Thus, the Lone Wolf Court established a kind of irrebuttable presumption that when Congress acts it always acts to “pro-

Kiowas, 7 Stat. 533; Treaty with the Camanches, July 27, 1853, U.S.-Camanches, 10 Stat. 1013; Treaty with the Camanches and the Kiowas, Oct. 18, 1865, 14 Stat. 717; Treaty with the Kiowas and Camanches, Oct. 21, 1867, 15 Stat. 581; Treaty with the Kiowa Indians, Oct. 21, 1867, U.S.-Kiowas, 15 Stat. 589. The peace treaty of 1867, known as the Medicine Lodge Treaty, reserved over two million acres of reservation lands for the Kiowas in what is now southwestern Oklahoma. See Brief for Petitioner at 4, Kiowa Tribe (No. 96-1037); U.S. Amicus at 2, Kiowa Tribe (No. 96-1037). In exchange for certain land cessions, the federal government explicitly promised the Kiowas that no additional land cessions would be made without the consent of three-fourths of the adult male Indians. See Lone Wolf, 187 U.S. at 561. Despite the absence of the required Kiwas' consent, however, Congress, pursuant to the General Allotment Act of 1887 and the Jerome Agreement of 1892, sought to obtain additional Kiowa land cessions by directing the sale of over two million acres of “surplus” land. See WILKINS, supra note 16, at 106-09. Lone Wolf, a Kiowa headman, filed suit to protect the Kiowas', Apaches', and Camanches' lands. See Lone Wolf, 187 U.S. at 560.

141. See Lone Wolf, 187 U.S. at 564 (speculating that judicial review of congressional enactments adversely affecting the Indian nations would deprive Congress of the necessity of acting in an emergency for the "care and protection" of the Indians "if the assent of the Indians could not be obtained"); see also WILKINS, supra note 16, at 113.

142. See Lone Wolf, 187 U.S. at 564-65.

143. See WILKINS, supra note 16, at 373-74 (defining the three distinct meanings of plenary authority); see also supra note 64 and accompanying text (discussing the definitions of plenary authority).

144. See Lone Wolf, 187 U.S. at 565.

145. See id. (presuming that "the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race"). But see Robert A. Williams, Jr., Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes, 39 FED. B. NEWS & J. 358, 361 (1992). Williams recognized that [b]ecause of their lack of familiarity with the racist origins of the core doctrines of modern Federal Indian law, most practitioners and students do not realize that every time the current Supreme Court cites to any of the core principles to uphold one of its Indian law decisions, it perpetuates and extends the racist legacy brought by Columbus to the New World of the use of law as an instrument of racial domination and discrimination against indigenous tribal peoples' rights of self-determination.

tect” the sovereign rights of the Indian nations. As such, the Lone Wolf Court reduced the federal-Indian trust responsibility to a “moral obligation” to act in good faith to protect the sovereignty of the Indian tribes.

3. The Modern Court's Role in Developing the Doctrine of Tribal Sovereign Immunity: The Necessity of Tribal or Congressional Consent

Although the Court consistently has recognized tribal sovereignty as predating the Constitution, judicial authority for the doctrine of tribal sovereign immunity from suit has been said to have arisen in Turner v. United States. In 1890, the Creek Nation comprised a population of 15,000 individual “Creeks” occupying a limited territory defined by the federal government. Throughout its existence, the Creek Nation exercised the traditional powers of a sovereign people, including its own tribal government comprised of legislative, executive, and judicial branches for the creation, enforcement and adjudication of its system of laws.

In 1889, during the “Allotment Period,” the federal government persuaded the Creek government to subdivide portions of the Creek na-

146. See Lone Wolf, 187 U.S. at 564-68.
147. See id. at 567 (describing the rationales for the existence of the federal trust relationship with specific reference to the states). The Court stated:

“These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection ....”

Id. (quoting United States v. Kagama, 118 U.S. 375, 383 (1885)).

148. See id. at 565-66; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 38 (3d ed. 1998) (noting how the Lone Wolf Court’s holding has allowed Congress to use the federal trust responsibility to “become far more of a sword for the government than a shield for the tribes”); Gibeaut, supra note 80, at 42 (discussing the federal government’s duty, for example, of managing the Indian trust fund); see also id. at 99 (stating that the federal trust responsibility to the Indians “includes treaties, case law, statutes, and most of all, a moral obligation”).

151. See id.
152. See CLINTON, supra note 39, at 147-52 (3d ed. 1991); see also WILKINS, supra note 16, at 370 (recognizing that Marshall’s analogy to Indian wardship in Cherokee Nation led to the Allotment Period’s negative affects on the Indian tribes); supra note 123.
tion's public lands by allotting grazing rights to individual Creeks. Turner, a non-Indian, acquired grazing rights from one hundred Creeks and built a dividing fence that was destroyed by a mob of anti-allotment Indian protestors. Turner sought to hold the Creek nation liable for damages caused by failing to keep the peace. Before Turner could obtain a remedy in the Creek nation's jurisdiction, however, the Creek nation's government was dissolved. Later, Congress authorized the Court of Claims to adjudicate the merits of Turner's case. The Court of Claims dismissed the suit. The Supreme Court affirmed, holding that "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from the failure of a government or its officers to keep the peace."

Recently, the Turner Court's holding has been described as "but a slender reed" for the doctrine of tribal sovereign immunity because sovereign immunity was not actually at issue. In reality, the issues before the Turner Court were (1) whether, under the common law, the Creek Nation could be held liable in a suit for damages to the property of a non-Indian caused by a mob of Creek citizens and resulting from a failure to keep the peace, and (2) whether the Act of Congress, which created federal jurisdiction to adjudicate the merits of such a suit, granted a substantive right to recover such damages.

With respect to the first issue, the Turner Court recognized that the Creek Nation, like any other "distinct political community," owed no duty, under the common law, to protect individuals against breaches of the peace and, thus, could not be held liable for personal or property damages caused by "mob violence or failure to keep the peace." Thus, the sovereign status of the Creek Nation precluded the existence of a substantive right of recovery. Turner had no cause of action because the Turner Court recognized that the Creeks were a sovereign nation.

154. See id. at 355-56.
155. See id. at 357.
156. See id. at 356.
157. See id. at 357.
158. See id.
159. Id. at 358.
161. See Turner, 248 U.S. at 357.
162. See id. at 357-58.
163. See id.
164. See id. As such, the Turner holding was predicated upon the inherent sovereignty
Like any other sovereign nation, the Creeks were immune, under the common law, not only from an action based on a failure to keep the peace, but also from the assertion of jurisdiction over them. The Turner decision, however, failed to hold explicitly that congressional action is a prerequisite to create jurisdiction over an Indian tribe because Congress had authorized the suit expressly.

With regard to the second issue, the Court held that the creation of jurisdiction over the merits of Turner's suit did not create a new substantive right to hold a sovereign nation liable for breaches of the peace. Rather, Congress simply provided a forum in which the Court of Claims could adjudicate such rights as Turner allegedly possessed against the Creek nation. As such, the Turner Court's holding did not depend strictly on the Creeks' sovereign status and concomitant power to claim sovereign immunity because Congress had created federal jurisdiction over the Creek nation.

Not until the landmark case of United States v. United States Fidelity & Guaranty Company (United States Fidelity) did the Court lay to rest any doubt as to the necessity of congressional action to abrogate the Tribes' sovereign immunity from suit in order to create the power to adjudicate a suit against an Indian nation. In United States Fidelity, the

of an Indian tribe. See id. Alternatively, however, the Turner holding could likewise be read to depend on the ability of an Indian tribe to claim immunity from suit because the tribal immunity itself derives from the inherent sovereign status of the Indian tribes. See Blatchford v. Native Village of Naotak, 501 U.S. 774, 780 & n.1 (1991) (quoting Hamilton, who recognized that tribal immunity from suit is an inherent aspect of the inherent sovereignty of the Indian tribes); see also Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375 (1895) (recognizing that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission") (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857)); COHEN, supra note 8, at 284 (citing Thebo, 66 F. at 375).

165. See Turner, 248 U.S. at 357-58. As such, the Kiowa Tribe majority disregarded the fact that the lack of such a substantive right derives from the inherent sovereign status of the Indian tribes. See Kiowa Tribe, 523 U.S. at 756-57; see also infra note 291 and accompanying text (describing how the Kiowa Tribe Court failed to recognize that Turner's essential holding was predicated upon the inherent tribal sovereignty of the Indian tribes).

166. See Kiowa Tribe, 523 U.S. at 757. The Kiowa Tribe Court considered Turner to lack an express holding on the facts of the case that congressional action was necessary to abrogate immunity because, in Turner, Congress had specifically created an exception to sovereign immunity. See id. at 757.


168. See id.

169. See Kiowa Tribe, 523 U.S. at 757 (describing Turner as assuming, arguendo, tribal immunity from suit if Congress had not created jurisdiction).

170. 309 U.S. 506 (1940).

171. See United States Fidelity, 309 U.S. at 512; Kiowa Tribe, 523 U.S. at 756-57 (stating that the doctrine of tribal immunity “developed almost by accident” in Turner but finally
United States, on behalf of the Choctaw and Chickasaw Nations, filed a claim in the District Court of Missouri to recover royalties due under certain mineral leases guaranteed by the USF&G Company. The debtor, the Central Coal and Coke Company, filed a cross-claim seeking credits against the Indian nations that exceeded the royalties sought by the United States. The Missouri District Court decreed a balance in favor of the debtor against the Indian nations. The Supreme Court voided the Missouri court judgment to the extent that it fixed "a credit against the Indian nations" without congressional or Tribal consent.

The issue in United States Fidelity was whether a state court had jurisdiction over either the United States or an Indian nation to adjudicate a cross-claim. The United States Fidelity Court recognized that sovereign immunity is applicable to dependent as well as dominant sovereigns. As first recognized in the Marshall Trilogy, the United States Fidelity Court reaffirmed that Indian tribes did not surrender their preexisting status as sovereign nations by virtue of the dominion and protection of the United States. Rather, like any other sovereign nation, the exercise of tribal immunity remained an inherent aspect of the quasi-sovereign character of the Indian nations. When the United States acted on behalf of Choctaw and Chickasaw Nations, their tribal sovereign immunity from suit accrued to the United States, to be used for their benefit and protection. The interests of the federal government and the Creek Nations became one and the same.

The United States Fidelity Court concluded that the Missouri court

"became an explicit holding that tribes had immunity from suit" in United States Fidelity).
lacked jurisdiction over the United States because Congress had not consented to a cross-claim against the interests of the federal government. Conversely, because Congress had not created jurisdiction over the Indian tribes, the Missouri court lacked the power to adjudicate the controversy. Thus, the United States Fidelity Court held that, as a matter of federal law, congressional action to abrogate the Tribes' inherent sovereign immunity from suit is necessary to protect "a quasi-sovereignty from judicial attack . . . ."

B. Modern Applications of the Doctrine of Tribal Sovereign Immunity

1. The Absence of a Distinction Between On and Off Reservation Tribal Activities

Throughout its history the Supreme Court has refused to limit the power of an Indian tribe to claim sovereign immunity based on whether tribal activities occur on or off the reservation. For instance, in Puyallup Tribe, Inc. v. Department of Game, the Puyallup Tribe brought suit to vacate a Washington court judgment that sought to regulate fishing activities on and off the reservation for purposes of taxation. The Washington court ordered the Puyallup Tribe to limit fishing activities, identify members involved, and report the number of fish caught each week. The Puyallup Tribe claimed that the court's order violated their sovereign immunity, as neither the Puyallups nor Congress had consented to be sued. The Puyallup Tribe Court recognized that the Puyallups' claim was justified only to the extent that it applied to the Puyallup Tribe itself, but not to the individual members. Hence, the

182. See id.
183. See id.
184. Id. at 512-13.
187. See id. at 167 (recognizing that the state of Washington asserted jurisdiction over the Puyallup tribe itself as well as over its individual members in order to regulate fishing activities occurring both on and off the reservation). The Puyallup tribe repeatedly relied on Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), Turner v. United States, 249 U.S. 354, (1919), and United States Fidelity, 309 U.S. 506 (1940), in claiming tribal sovereign immunity. See id. at 170-71 & n.9.
188. See id. at 172.
189. See id. (recognizing that the Puyallup tribe explicitly "attacked that order as an infringement on its sovereign immunity to which neither it nor Congress has consented").
190. See id. (holding that the Puyallup tribe's claim was "well founded" to the extent it
Puyallup Tribe Court vacated the Washington court's order vis-a-vis the Puyallup tribe itself. As such, the Puyallup Tribe Court, like the United States Fidelity Court, held that absent waiver or consent, a state court may not violate an Indian tribe's sovereign immunity, notwithstanding the fact that the tribal fishing activities at issue had occurred off the reservation. Accordingly, the Puyallup Tribe Court reaffirmed that each of the Indian nations possess the inherent power to claim sovereign immunity, regardless of whether the activities occur on or off reservation lands, subject only to congressional limitation.

2. The Preservation of Tribal Sovereign Immunity Without Regard to Whether the Tribal Activity Was Commercial or Governmental

The Court has also preserved the power of an Indian tribe to claim sovereign immunity, as enunciated in United States Fidelity, without regard to whether tribal activity was commercial or governmental in nature. The United States Fidelity Court, for example, upheld an Indian tribe's claim of sovereign immunity over a state court's assertion of jurisdiction over the merits of a cross-claim arising out of a commercial coal-mining lease. Similarly, in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe (Potawatomi Tribe), the Potawatomi Tribe asserted that an Oklahoma court lacked jurisdiction to entertain Oklahoma's counterclaim that sought to collect taxes on cigarette sales to non-tribal members.

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191. See id. at 172-73 (holding that the portions of the state-court order that involved the Tribe itself must be vacated in order to recognize the Tribe's valid claim of immunity).

192. See id. at 172 (holding that "absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe" even though the Puyallup tribe engaged in off-reservation commercial activity).

193. See id. at 174 & n.13 (recognizing that the Treaty of Medicine Creek qualified Tribes' pre-existing exclusive fishing rights by limiting the 'Tribes' fishing rights to "all usual and accustomed" places exercised by all citizens of the Territory). Under the Puyallup Court's interpretation, "the exercise of that right was subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource." Id. at 175.


195. See United States Fidelity, 309 U.S. at 512; see also Kiowa Tribe, 523 U.S. at 755, 757 (citing United States Fidelity as the source of the Supreme Court's modern articulation of tribal sovereign immunity from suit).


197. See id. at 507-08.
In Potawatomi Tribe, the Potawatomi Tribe had sold cigarettes at a convenience store on land held in trust by the federal government without collecting Oklahoma's cigarette tax. Neither the Potawatomi Tribe nor Congress specifically had authorized the Oklahoma court to assert jurisdiction over the tribe's commercial activities. Oklahoma contended that business activities such as cigarette sales were so removed from traditional tribal interests that the tribal-sovereignty doctrine should not be applicable. Hence, Oklahoma insisted that the doctrine of tribal sovereign immunity, as originally set forth in Turner and United States Fidelity, was limited to governmental activities by tribes, such as activities of tribal courts and the internal affairs of tribal government.

The Supreme Court reversed the Oklahoma court's holding, refusing to alter the doctrine of tribal sovereign immunity in this manner. With regard to Oklahoma's policy arguments, the Potawatomi Tribe Court found congressional intent instructive in this area. The Potawatomi Tribe Court determined that Congress had exercised its power to dispense, limit, or approve of the Court's conception of tribal immunity. For example, the Court recognized that Congress restricted tribal immunity in limited circumstances, such as in the Indian Financing Act of 1974, but that it has not authorized suits to enforce tax assessment such as the one here. Rather, Congress has declared an intention not to alter the Court's broad application of tribal sovereign immunity. Indeed, in en-

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198. *See id.* at 507.
200. *See id.* at 510 (arguing 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"); *see also Kiowa Tribe*, 523 U.S. at 764 (Stevens, J., dissenting) (contending that the Court has "simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the Tribe's land or its sovereign functions").
201. *See Potawatomi Tribe*, 498 U.S. at 510 (arguing that tribal immunity from suit "should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws").
202. *See id.* at 510 (refusing "to modify the long-established principle of tribal sovereign immunity").
203. *See id.;* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) (holding that the "plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").
205. *See id.* (recognizing that Congress "has never authorized suits to enforce tax assessments").
206. *See Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(n)* (1994) (providing that nothing in the financial-assistance program itself is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from
acting the Indian Self-Determination and Education Assistance Act. Congress left tribal immunity intact so as to fulfill its overriding goal of promoting "tribal self-sufficiency and economic development." Accordingly, the Potawatomi Tribe Court declined to second guess Congress and reaffirmed that the Indian nations continue to possess the inherent power to claim sovereign immunity regardless of whether they employ commercial or governmental means to further Congress' goals.

3. State Power to Regulate or Tax Tribal Operations Beyond Indian Country Does Not Undermine Tribal Immunity

In a series of cases, the Supreme Court has established that a state may regulate and tax operations of Indian tribes or individual Indians that occur within the state but beyond Indian Country. The Court has also determined that, unless preempted by federal law, the states may tax Indian commercial activities occurring solely within reservation territories if the source of the revenue taxed is non-Indians. In Organized Village of Kake v. Egan, the Court allowed Alaska to regulate the use of fishtraps by Indians in Alaska waters pursuant to the states Anti-Fish Trap Conservation law. The Kake Court held that, in the absence of congressional action, the Alaska Statehood Act, which divested Alaska of its exclusive right to regulate its own affairs in favor of the federal government, did not authorize the Indians to violate Alaska's Conservation law. With regard to the absence of federal preemption, the Kake suit enjoyed by an Indian tribe”); Potawatomi Tribe, 498 U.S. at 510.

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209. See id.
211. See CANBY, supra note 148, at 251 (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)).
212. 369 U.S. 60 (1962).
213. See id. at 75-76.
215. See Kake, 369 U.S. at 64-68.
216. See id. at 76. Where “the subject or object of state legislation is also a subject or object of federal concern, i.e., a subject or object within the reach of Congress' constitutional powers,” the state legislation may be preempted if it falls within a “field of federal concern.” KAPLIN, supra note 2, at 95. There are three basic possibilities for preemption: (1) express preemption due to a preemption clause in a federal statute; (2) preemption due to a real conflict between the federal and state laws; and (3) “preemption because the federal law has ‘occupied the field.’” Id. at 101. In Kake, the court held that the federal
Court emphasized that Congress had not entered the field of fishing regulation because it had not authorized the use of fish traps.\textsuperscript{217}

Similarly, in \textit{Mescalero Apache Tribe v. Jones},\textsuperscript{218} New Mexico sought to tax commercial activities.\textsuperscript{219} The Mescalero Apache Tribe filed suit in state court to recover state sales taxes imposed upon the operations of a ski resort located within New Mexico but beyond the tribe's reservation.\textsuperscript{220} After granting certiorari, the Supreme Court in \textit{Mescalero} recognized that the \textit{Kake} precedent applied to Indian tribal business activities, other than fishing, such as the operation of a ski resort.\textsuperscript{221} Hence, the \textit{Mescalero} Court held that absent contrary federal law New Mexico could levy "nondiscriminatory" taxes on businesses operated by an Indian tribe just as it could tax other businesses otherwise run by citizens of the state or citizens of other foreign sovereigns.\textsuperscript{222}

The \textit{Mescalero} Court responded as the \textit{Kake} Court had to the Alaska fishing laws, and determined that the Enabling Act of New Mexico illustrates the difference between on and off reservation activities.\textsuperscript{223} Specifically, the Act expressly provided that "nothing herein . . . shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian . . . ."\textsuperscript{224} Accordingly, the \textit{Mescalero} Court found that New Mexico had retained the "general power" to tax both on and off reservation activities unless expressly prevented from doing so by Congress.\textsuperscript{225} Finding that Congress had not created a special Indian business tax exemption, the \textit{Mescalero} Court reaffirmed the \textit{Kake} principle that a

\begin{itemize}
\item \textsuperscript{217} \textit{See} \textit{Kake}, 369 U.S. at 76.
\item \textsuperscript{218} 411 U.S. 145 (1973).
\item \textsuperscript{219} \textit{See id.}
\item \textsuperscript{220} \textit{See id. at 146-47.}
\item \textsuperscript{221} \textit{See} \textit{id. at 149 (recognizing that the \textit{Kake} "principle . . . applies as much to tribal ski resorts as it does to fishing enterprises").}
\item \textsuperscript{222} \textit{See id. at 148-49. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." \textit{Id.} (citing Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968); \textit{Kake}, 369 U.S. at 75-76).}
\item \textsuperscript{223} \textit{See Mescalero Apache Tribe}, 411 U.S. at 149 (quoting Enabling Act for New Mexico, ch. 310, 36 Stat. 557 (1910)) (internal quotes omitted).
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{See id. at 149-50 (holding that New Mexico had retained the "general power" to tax, "unless Congress forbade it, all Indian land and Indian activities located or occurring 'outside of an Indian reservation'") (footnote omitted); \textit{id. at 156 ("[A]bsent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.").}
\end{itemize}
state, as a governmental entity, has the power to demand off reservation Indian businesses to comply with nondiscriminatory state taxes and other regulatory laws. Similarly, the state may tax revenue accruing from a non-Indian source even if the business activity occurs on the reservation.

The principle of allowing a state to insist that an Indian tribe comply with its substantive laws may seem to be incompatible with the Court's conception of the doctrine of tribal sovereign immunity. But because both the tribes in Mescalero and Kake waived immunity by filing suit in state court, neither Court addressed whether a state could judicially enforce its substantive laws over an Indian tribe's outright claim of sovereign immunity. Moreover, the Court has drawn a distinction between the power to adjudicate the merits of suits against Indian tribes and the power of a state to demand a tribe to comply with the state's substantive laws.

The Potawatomi Tribe Court squarely addressed this distinction between adjudication and regulation. Oklahoma argued that if it had the right to tax a tribal business then it must have a judicial remedy to enforce that right by asserting jurisdiction over the tribe. Otherwise, Oklahoma contended, it had "a right without a remedy." The Potawatomi Tribe Court recognized that even though the states cannot sue Indian tribes in court, which is arguably "the most efficient remedy,"

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226. See id. at 157.
227. See id.
228. See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514-15 (1991) (Stevens, J., concurring) (alleging that "[t]he doctrine of sovereign immunity is founded upon an anachronistic fiction").
229. See Mescalero Apache Tribe, 411 U.S. at 147 (addressing the Mescalero Apache Tribe's writ of certiorari arising from the New Mexico Court of Appeals' decision to subject a tribal ski resort to state taxation); Organized Village of Kake v. Egan, 369 U.S. 60, 61-62 (1962) (addressing a writ of certiorari filed by a group of Indian communities arising out of an action seeking to enjoin the Governor of Alaska from enforcing the Alaska Anti-Fish-Trap Conservation Law against the Indians). Indeed, Indian tribes can waive sovereign immunity from suit by filing suit in state court. See Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751, 754 (1998).
230. See Kiowa Tribe, 523 U.S. at 755 (noting that the Court held in both Mescalero and Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), that a States' substantive laws may apply to an Indian tribe).
231. See CANBY, supra note 148, at 243 (noting that "[a] distinction is drawn in the field of Indian Law between governmental power to tax or regulate and the power to adjudicate. This division is significant because the two kinds of jurisdiction are not always coextensive.").
233. See id. at 513-14.
234. See id. at 514.
other remedies are available. For example, Oklahoma could collect its sales taxes either by forming contracts with the Indian tribes themselves or directly from the cigarette suppliers. The Court established that state power to regulate or tax tribal operations beyond Indian Country does not undermine the doctrine of tribal sovereign immunity from suit. Like any other foreign sovereign, including foreign states, an immune tribe may be subject to certain state obligations while conducting business within a state without being amenable to a state's judicial jurisdiction.

II. KIOWA TRIBE V. MANUFACTURING TECHNOLOGIES, INC.: UPHOLDING TRIBAL SOVEREIGN IMMUNITY FROM SUIT AS A MATTER OF STARE DECISIS

A. The Kiowa Tribe Majority Holding

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., the Court held that the Indian tribes may continue to claim sovereign immunity from suit. At issue was whether the Oklahoma Court of Appeals properly asserted jurisdiction over the Kiowa Tribe's claim of sovereign immunity to adjudicate the merits of a breach of contract suit despite the fact that (1) neither the Kiowa Tribe nor Congress specifically authorized the suit, and (2) the Kiowa Tribe expressly reserved the right to claim sovereign immunity in the contract itself. In reversing the Oklahoma court's decision that Indian tribal immunity, like state immunity, is subject to comity with the states, the Court held that comity does not apply to the Indian tribes because they did not participate in the states' mutuality of concession at the Constitutional Convention.

235. See id. (recognizing that "[t]here is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy" in holding that there are other "adequate alternatives," that Oklahoma remains free to utilize).
236. See id. (suggesting that a state could "seek appropriate legislation from Congress" without addressing the obvious negative effects on tribal economic self-sufficiency that would result if Congress modified tribal sovereign immunity).
237. See id.
238. See Verlinden v. Central Bank, 461 U.S. 480, 493 (1983) (recognizing implicitly that the courts lacked jurisdiction before Congress enacted "a statute comprehensively regulating the amenability of foreign nations to suit").
240. See id. at 760.
241. See id. at 753-54.
242. See id. at 756. With respect to comity among the states, the Court has held that "the state courts are under no constitutional compulsion to recognize the sovereign immunity of sister states." CLINTON, supra note 39, at 337 (citing Nevada v. Hall, 440 U.S. 410
Writing for the majority, Justice Kennedy recognized that tribal immunity from suit is solely a matter of federal law and, therefore, cannot be undermined by the states. The majority acknowledged that, as a matter of federal law, prior precedent mandated holding that an Indian tribe is subject to suit only if either (1) the Indian tribe itself has waived its right to claim sovereign immunity from the suit, or (2) Congress has authorized the suit specifically.

The Kiowa Tribe Court also rejected the Oklahoma court's attempt to confine the right to claim tribal sovereign immunity solely to suits involving governmental, on-reservation activities. The Supreme Court's prior precedents, as the majority emphasized, had never distinguished between on and off reservation activities. In Puyallup Tribe, for example, the Court upheld the power of the Puyallup Tribe to claim sovereign immunity from suit although the tribal fishing activities at issue occurred outside of the reservation and within state territory. Accordingly, the Kiowa Tribe majority reaffirmed that, absent an effective tribal waiver or congressional consent, an Indian tribe does not surrender its right to claim sovereign immunity when it engages in activity outside the boundaries of the reservation.

In addition, the Kiowa Tribe majority rejected the Oklahoma court's view that the right to claim sovereign immunity should be limited to gov-

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244. "See id. at 754-55, 760; see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g, 476 U.S. 877, 890 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940). With this in mind, the Kiowa Tribe majority articulated a kind of default rule where an Indian tribe's right to claim sovereign immunity from suit remains absolute in the absence of specific tribal or congressional consent to the suit. See Kiowa Tribe, 523 U.S. at 754-55.
245. "See Kiowa Tribe, 523 U.S. at 755 (citing Nevada v. Hall, 440 U.S. 410, 426 (1979)); Kiowa Tribe, 523 U.S. at 760 (holding that tribal immunity from suit governs in the absence of tribal consent or Congressional abrogation of tribal immunity regardless of "whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation").
246. "See Kiowa Tribe, 523 U.S. at 754-55; Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 167-72 (1977); United States Fidelity, 309 U.S. at 512; see also supra notes 185-93 and accompanying text (discussing how the Puyallup Tribe Court, like the United States Fidelity Court, upheld tribal sovereign immunity without distinguishing between on- and off-reservation tribal activities).
247. "See Puyallup Tribe, 433 U.S. at 172 (refusing to allow a state court to assert jurisdiction over the Puyallup Tribe to adjudicate a dispute involving off-reservation commercial activity); see also supra note 192-93 and accompanying text (discussing the Puyallup Tribe Court's holding).
248. "See Kiowa Tribe, 523 U.S. at 760."
The majority recognized that the Court always has preserved the power of an Indian tribe to claim sovereign immunity, as indisputably enunciated in *United States Fidelity,* without regard to whether the tribal activity was commercial or governmental. Indeed, the *Kiowa Tribe* majority noted that, in *Potawatomi Tribe,* its own prior precedent squarely rejected the invitation to restrict sovereign immunity solely to suits involving “traditional tribal interests,” such as the “internal affairs of tribal government.” The *Kiowa Tribe* majority, however, characterized the *Potawatomi Tribe* opinion as being based on the “theory” that Congress had failed to undermine tribal sovereign immunity. The *Kiowa Tribe* majority also expressly challenged the Con-

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249. See id. at 754-56.

250. See *United States Fidelity,* 309 U.S. at 512; see also supra notes 194-95 and accompanying text (discussing how the *Kiowa Tribe* Court regarded the *United States Fidelity* opinion as the first judicial articulation of tribal sovereign immunity).

251. See *Kiowa Tribe,* 523 U.S. at 754-55; *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 510 (1991) (refusing “to modify the long-established principle of tribal sovereign immunity”); *Puyallup Tribe,* 433 U.S. at 165, 172 (recognizing tribal immunity for fishing); *United States Fidelity,* 309 U.S. at 512 (recognizing tribal sovereign immunity from suit over a coal-mining lease); see also supra notes 192-209 and accompanying text (discussing how the Supreme Court has always preserved tribal sovereign immunity regardless of whether the tribal activity at issue was commercial or governmental).

252. See *Kiowa Tribe,* 523 U.S. at 757 (noting that, in *Potawatomi Tribe,* 498 U.S. at 510, Oklahoma argued that tribal sovereign immunity should be narrowed “because tribal businesses had become far removed from tribal self-governance and internal affairs”). In *Potawatomi Tribe,* Oklahoma contended that, as a policy matter, no purpose could be served by allowing the Indian tribes to assert sovereign immunity from suits over non-governmental activities. See *Potawatomi Tribe,* 498 U.S. at 509-10; see also supra notes 201-02 and accompanying text (discussing the *Potawatomi Tribe* Court's outright rejection of Oklahoma's policy arguments).

253. *Potawatomi Tribe,* 498 U.S. at 510; see also supra notes 203-09 and accompanying text (discussing how the *Potawatomi Tribe* Court, in response to Oklahoma's policy arguments, specifically declined to second guess Congress in light of Congress' recognition of the various policy justifications for tribal immunity). In doing so, the *Potawatomi Tribe* Court identified at least one obvious rationale for respecting tribal sovereign immunity—tribal sovereign immunity fulfills Congress' goal of promoting “tribal self-sufficiency and economic development” by protecting scarce tribal resources. See *Potawatomi Tribe,* 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987)) (recognizing that the *Potawatomi Tribe* Court found congressional intent instructive in this area).

254. See *Kiowa Tribe,* 523 U.S. at 757. “We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency.” Id. (citing *Potawatomi Tribe,* 498 U.S. at 510). But see *Potawatomi Tribe,* 498 U.S. at 510 (discussing how the rationale for upholding the doctrine of tribal sovereign immunity was based on Congress's affirmative enactment of the Indian Self-Determination and Education Assistance Act); supra notes 203-08 and accompanying text (discussing how the *Potawatomi* Court's rationale was not based on Congress' lack of
gressional policy rationale, which was recognized by the *Potawatomi Tribe* Court, for protecting the sovereignty of the Indian tribes. As such, the majority relied upon the *Potawatomi Tribe* Court's holding solely as a matter of stare decisis. The *Kiowa Tribe* Court declined to modify the well-settled doctrine of tribal sovereign immunity in deference to past precedent and Congress' implicit approval.

The *Kiowa Tribe* majority also realized that the Court's prior law allowing states to demand an Indian tribe to comply with its substantive laws does not undermine tribal immunity from judicial jurisdiction. In *Mescalero*, the Court held that a state could apply nondiscriminatory taxes to tribal businesses just as it could tax other businesses run by citizens of either the state itself or other foreign nations. In *Potawatomi Tribe*, the Court expressly held that although Oklahoma had the right to tax or otherwise regulate tribal businesses, it could not enforce judicially these rights by disregard the Potawatomi Tribe's claim of sovereign

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255. *See Kiowa Tribe*, 523 U.S. at 757-58 ("The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."); *see also infra* notes 291-92 and accompanying text (discussing how the *Kiowa Tribe* Court stripped the sovereign rationale for supporting tribal sovereign immunity from the doctrine itself and, thus, viewed its "tribal immunity" doctrine to be based on unexplainable "tribal" justifications). By so criticizing the wisdom of Congress' policy of respecting and promoting the sovereignty of the Indian tribes, the *Kiowa Tribe* Court ignored the political question doctrine and, thus, stepped into the shoes of a super-legislature. *See Kiowa Tribe*, 523 U.S. at 758; *see also infra* notes 279-81 and accompanying text (discussing how the *Kiowa Tribe* Court also performed a one-sided legislative function by dramatically hypothesizing that tribal immunity could harm tort victims "who have no choice in the matter," *Kiowa Tribe*, 523 U.S. at 758, while ignoring the protective role the federal government itself assumes when defending tort causes of action on behalf of Indian tribes). Indeed, the *Kiowa Tribe* majority essentially adopted Justice Stevens' *Potawatomi Tribe* concurring opinion without so holding. *See Kiowa Tribe*, 523 U.S. at 758 (citing *Potawatomi Tribe*, 498 U.S. at 514-15 (Stevens, J., concurring) (contending that tribal immunity was "founded upon an anachronistic fiction").

256. *See Kiowa Tribe*, 523 U.S. at 758; *see also* BLACK'S LAW DICTIONARY 978-79 (6th ed. 1991) (defining the term "stare decisis" as the "[p]olicy of courts to stand by precedent and not to disturb settled point"). The doctrine of stare decisis is based on the "theory that security and certainty require that accepted and established legal principle... be recognized and followed." *Id.* However, stare decisis "is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta ...." *Id.* at 979.

257. *See Kiowa Tribe*, 523 U.S. at 755, 758; *see also* Potawatomi Tribe*, 498 U.S. at 510.

258. *See Kiowa Tribe*, 523 U.S. at 755; *see also* CANBY, supra note 148, at 243.

259. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").
immunity. For example, the Potawatomi Tribe Court emphasized that Oklahoma could always enforce its tax laws either by entering into agreements with the Potawatomi Tribe itself or by collecting its cigarette sales taxes directly from cigarette suppliers. Hence, the Court's prior cases have distinguished between the right to demand compliance with state regulations and tax laws and the Indian tribes' sovereign power to protect themselves from suits directed against them.

B. The Kiowa Tribe Dissenting Opinion

Writing for the dissent, Justice Stevens characterized the Court's holding as extending the doctrine of tribal sovereign immunity beyond its present contours to include off reservation conduct. Justice Stevens believed that the Court's holding would undermine the power of the state courts to determine whether, as a matter of comity, to acknowledge tribal sovereign immunity. In addition, the dissent attacked the majority's suggestion that it was following precedent. Justice Stevens argued that the Court had never determined before whether a tribe possesses sovereign immunity from judicial jurisdiction over suits involving off reservation conduct that lacks any "meaningful nexus to the Tribe's land or its sovereign functions."

Moreover, the dissent asserted that the Court failed to provide any reasoned basis for the distinction between the power to regulate off reservation tribal conduct and the power to adjudicate disputes arising out

260. See Potawatomi Tribe, 498 U.S. at 514.
261. See id. at 514.
262. See Kiowa Tribe, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); see also Potawatomi Tribe, 498 U.S. at 514; supra notes 232-38 and accompanying text (discussing the Potawatomi Tribe Court's holding and rationale).
263. See Kiowa Tribe, 523 U.S. at 760 (Stevens, J., dissenting) (arguing that the court should not "extend the judge-made doctrine of sovereign immunity to preempt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity").
264. See id. Justice Stevens, however, did not address how the Indian tribes, absent from the Constitutional Convention and not members of the union, can be subject to the same mutuality of concession that makes state-to-state surrender of sovereign immunity (comity), in the United States' framework of government, possible. See id.
265. See id. at 764.
266. Id. In the dissent's view, the Court's holding followed prior dicta, rather than precedent, because the majority perpetuated the same lack of reasoned analysis favoring tribal immunity that it criticized. See id.; cf. id. at 756 (stating for the Court that although "the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident" and was subsequently reiterated "with little analysis").
of such conduct. As such, Justice Stevens agreed that it was too late to discard the doctrine entirely, but argued that it should not be extended to purely off reservation commercial conduct.

The dissenting opinion also provided several reasons for limiting the doctrine of sovereign immunity from suit. First, the dissent conceded that in the absence of a congressional statute or treaty expressly granting tribal sovereign immunity, the majority's tribal sovereign immunity default rule could have been justified by federal interests. Justice Stevens found that the majority failed to identify any positive federal interests favoring tribal immunity: it criticized the wisdom of perpetuating the doctrine itself, encouraged Congress to abrogate it, and all but acquiesced that the doctrine lacked justification. The majority, in the dissent's view, had failed to justify the preemption of state power. Accordingly, Justice Stevens described the Court's holding as "creating law," rather than merely following precedent, by curtailing state power without adequate justification.

Second, the dissent argued that the majority's tribal immunity rule places the Indian tribes in a "strikingly anomalous" status relative to the federal government, the states, and foreign states. As recognized by the dissent, each of the states, the federal government, and foreign

267. See id. at 764-65 (Stevens, J., dissenting).
268. See id. at 764.
269. See id. at 764-66.
270. See id. at 764-64; see also supra note 244 (describing the Kiowa Tribe majority's default rule where tribal immunity governs in the absence of affirmative Congressional abrogation or tribal consent).
271. See Kiowa Tribe, 523 U.S. at 765. See, e.g., CLINTON, supra note 39, at 337 ("An obvious justification for the doctrine [of sovereign immunity] is to protect the public fisc from treasury-draining lawsuits.").
272. See Kiowa Tribe, 523 U.S. at 765.
273. See id. at 764-65.
274. See id.; see also infra notes 284-85 and accompanying text (discussing the Kiowa Tribe majority's failure to explain the well-known "peculiar and cardinal" distinctions, which have justified the unique relationship between the Indian tribes and the United States for over 150 years). But see, e.g., infra notes 301-03 and accompanying text (identifying important federal interests such as the federal government's historical treaty based duty to "protect"—not to destroy—the inherent sovereignty of the Indian tribes).
275. See Kiowa Tribe, 523 U.S. at 765. But see Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-18 (1831) (describing the relationship between the Indian tribes, the federal government, and the states as marked with "peculiar and cardinal distinctions"). Ironically, Justice Stevens' recognition of the "strikingly anomalous" situation of the Indian tribes is analogous to the "peculiar and cardinal" distinctions recognized over 150 years ago by Chief Justice Marshall. See id.; see also supra note 119 and accompanying text.
276. See Kiowa Tribe, 523 U.S. at 765 (questioning why the Indian tribes should "enjoy broader immunity than the States, the federal government, and foreign nations").
states are, unlike the Indian tribes, subject to suits in federal and state courts. The dissent believed that the majority failed to explain why the Indian tribes should be treated differently from either the states or other foreign sovereigns.

Finally, the dissent speculated, as did the majority, that the Court's tribal sovereign immunity rule was unfair to tort victims, as a matter of policy, who may be denied relief without the opportunity to negotiate a tribal waiver of immunity. In the entire Court's view, the long-recognized policy of respecting tribal immunity as an essential aspect of inherent tribal sovereignty should yield to the policy of ensuring fairness to tort victims. As such, the dissenting opinion concluded that Con-

277. See id. With respect to the federal government, the dissent recognized that Congress has waived immunity from tort liability and over suits involving commercial activities. See id.; see also 28 U.S.C. § 1346(a) (1994) (defining types of claims against the United States over which "[t]he district courts shall have original jurisdiction, concurrent with the United Stated Court of Federal Claims"); id. at § 1491 (discussing the jurisdiction of claims against the United States generally); id. at § 2674 (defining the liability of the United States for tort claims). With regard to foreign states, Congress has determined, the dissent noted, that federal and state courts can assert jurisdiction over foreign nations for claims involving commercial activities either occurring in the United States or having a "direct effect in the United States." See Kiowa Tribe, 523 U.S. at 765 (citing Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2)). With respect to the states, it has been established that each state may be sued in the courts of another state provided comity exists between each state. See id. (citing Nevada v. Hall, 440 U.S. 410 (1979)).

278. See Kiowa Tribe, 523 U.S. at 765. But see Cherokee Nation, 30 U.S. at 16-18 (coining the phrase "peculiar and cardinal distinctions" to describe the status of the Indian tribes).

279. See Kiowa Tribe, 523 U.S. at 758 (suggesting that tribal immunity can harm those "who have no choice in the matter, as in the case of tort victims").

280. See Kiowa Tribe, 523 U.S. at 766 (contending that "nothing in the Court's reasoning limits the rule to lawsuits arising out of a voluntary contractual relationship"). But see supra notes 18-24 and accompanying text (discussing the fact that Kiowa Tribe involved a suit arising out of a voluntary contractual relationship rather than arising out of any kind of tort incident). The dissent, however, failed to recognize that tort victims may obtain relief when the federal government assumes a protective role by defending tort causes of action on behalf of the Indian tribes. See, e.g., The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f(d) (1994) (providing that tort causes of action arising out of an Indian tribe performing a self-determination contract constitute actions against the United States).

281. See Kiowa Tribe, 523 U.S. at 758, 766; see also infra notes 322-26 and accompanying text (recognizing that both the majority and dissent stepped into the shoes of the legislature by making policy decisions against recognizing the inherent sovereignty of the Indian tribes). In making this policy judgment, however, both the majority and dissent failed to consider the historical roots of tribal sovereignty. See infra notes 293-96 and accompanying text (discussing the Kiowa Tribe Court's failure to consider Chief Justice Marshall's foundational contributions to the field of Federal Indian Law, such as the preservation of the original sovereign powers of the Indian tribes). See, e.g., infra notes 302-03, 311 and accompanying text (describing how the Kiowa Tribe Court ignored the previ-
gress should make tribal governments, like individuals, accountable in the courts of the United States when they participate in non-governmental off reservation enterprises that violate state or federal law.\textsuperscript{282}

III. \textit{Kiowa Tribe v. Manufacturing Technologies, Inc.}: Disregarding the Historical Treaty-Based Duty to "Protect" the Inherent Sovereignty of the Indian Tribes

A. Ignoring the Inherent Sovereignty of the Indian Tribes

Consistent with over fifty years of Federal Indian Law jurisprudence, the \textit{Kiowa Tribe} Court continued to disregard the roots of tribal sovereign immunity from suit in United States history.\textsuperscript{283} The Court, as recognized by Justice Stevens in his dissenting opinion, failed to provide any explanation for the unique relationship between the Indian tribes and the federal government.\textsuperscript{284} Indeed, the majority failed to acknowledge the well-known "peculiar and cardinal distinctions" recognized in the Marshall Trilogy, which explain why the Indian tribes have been treated differently throughout the existence of the United States.\textsuperscript{285} Consequently, the \textit{Kiowa Tribe} Court upheld its own early sovereign immunity decisions while criticizing them for assuming "immunity without extensive reasoning."\textsuperscript{286} Thus, the \textit{Kiowa Tribe} Court perpetuated the very lack of

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\item \textsuperscript{282}Kiowa Tribe, 523 U.S. at 766.
\item \textsuperscript{283}See \textit{Kiowa Tribe}, 523 U.S. at 758 (questioning the rationale for continuing to honor tribal sovereign immunity). Moreover, the Court stated that the source of the "tribal immunity" doctrine, which "developed almost by accident" in \textit{Turner}, arose in the \textit{United States Fidelity} Court's opinion. \textsuperscript{See id.}
\item \textsuperscript{284}See \textit{id.} at 765; \textit{see also supra} note 272 and accompanying text (discussing the \textit{Kiowa Tribe} majority's failure to identify any important interests in recognizing sovereign immunity).
\item \textsuperscript{285}See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-19 (1831); \textit{supra} notes 119-23 and accompanying text (discussing Chief Justice Marshall's recognition of such distinctions in \textit{Cherokee Nation}); \textit{see also} Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-62 (1832); \textit{see generally infra} notes 304-13 and accompanying text (discussing the \textit{Worcester} Court's recognition of the unique place of the Indian tribes within United States history).
\item \textsuperscript{286}Kiowa Tribe, 523 U.S. at 753.
\end{itemize}
analysis it criticized by reaffirming tribal sovereign immunity solely as a matter of stare decisis.287

By so holding, the Court discarded the historical foundation for the principle of inherent tribal sovereignty as found in its early precedent.288 Moreover, the Court ignored important federal interests, such as protecting the inherent sovereignty of the Indians tribes.289 Indeed, the Kiowa Tribe Court avoided the Potawatomi Tribe Court's acknowledgment that Congress, in enacting the Indian Self-Determination and Education Assistance Act, had determined that tribal sovereign immunity advances Congress' interest in protecting tribal self-sufficiency and encouraging economic development.290 Consequently, the Court overlooked the "sovereign" rationale for the doctrine of tribal sovereign immunity.291 The Kiowa Tribe Court, therefore, considered its "tribal

287. See id.; see also supra notes 256-57 and accompanying text (describing the stare decisis nature of the Kiowa Tribe Court's holding).
289. See, e.g., The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450(a) (1994); supra note 11 and accompanying text (discussing how Congress has historically protected the Indian tribes from state encroachments). Although the Kiowa Tribe Court failed to recognize important federal interests justifying tribal sovereign immunity, Congress and many commentators have specifically identified a variety of justifications. See CLINTON, supra note 39, at 337 (stating that "modern adherents of the doctrine argue that suits against the government interfere with its day-to-day operations, both directly when suits seek equitable and injunctive relief and indirectly by requiring reallocation of the resources needed to defend such suits"); id. at 340 (noting that rationales for limiting "the sovereign immunity of other sovereigns do not extend to restricting tribal sovereign immunity, because of the limited revenue base of Indian tribes compared to the states and the importance of building and maintaining tribal assets in order to provide for economic security and protect political autonomy") (citing Note, In Defense of Tribal Sovereign Immunity, 95 HARV. L. REV. 1058, 1072-74 (1982)); GETCHEs, supra note 36, at 383 (acknowledging that tribal sovereign immunity sustains tribal self-determination and encourages economic development) (citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991)); supra note 10 and accompanying text (discussing tribal sovereign immunity's well-known role in protecting scarce tribal resources and promoting tribal businesses).
290. See Kiowa Tribe, 523 U.S. at 757-58; Potawatomi Tribe, 498 U.S. at 510.
291. See Kiowa Tribe, 523 U.S. at 757-58; Potawatomi Tribe, 498 U.S. at 510; see also supra notes 206-08, 252-57 and accompanying text (discussing how the Kiowa Tribe majority even criticized Congress's wisdom, as recognized by the Potawatomi Tribe Court, in acting to protect the self-sufficiency, economic development, and sovereignty of the Indian tribes, for example). Hence, the Court erased the term "sovereign" from the doctrine itself. See Kiowa Tribe, 523 U.S. at 753-60 (defining a "rule of tribal immunity" rather than acknowledging the prior law's doctrine of tribal sovereign immunity) (emphasis added). But see United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940) (establishing that the doctrine of tribal sovereign immunity was essentially based on the sovereignty of the Indian tribes) (emphasis added). Indeed, a recent comment summa-
immunity" doctrine to be based solely on unexplained "tribal" justifications.292

B. Failing to Consider the Prior Precedent's Recognition of the Inherent Nature of Tribal Sovereignty

With respect to the historical roots of tribal sovereignty, the Kiowa Tribe Court failed to acknowledge Chief Justice John Marshall's foundational contributions to the field of Federal Indian Law.293 Over 150 years ago, Marshall appreciated that the Indian tribes were the original sovereigns of America.294 The Indian tribes, Marshall concluded, always have


For example, the Kiowa Tribe Court acknowledged that the origin of the doctrine of "tribal immunity" has been attributed to the Turner Court's opinion, but held that Turner was "but a slender reed" for supporting tribal sovereign immunity. See Kiowa Tribe, 523 U.S. at 757; see also supra notes 160 & 165 and accompanying text (discussing the Kiowa Tribe Court's characterization of the Turner Court's opinion). By so holding, the Kiowa Tribe Court failed to recognize that Turner's essential holding—that the Creek Nation's government could not be liable for a failure to keep the peace cause of action—was predicated upon the inherent sovereignty of the Indian tribes. See Turner v. United States, 249 U.S. 354, 357-58 (1919); see also supra notes 162-65 and accompanying text (discussing the actual nature of the Turner Court's holding). Consequently, the Kiowa Tribe Court failed to consider tribal sovereign immunity, like the lack of a substantive right to recover damages from a failure of the government to keep the peace, to be an inherent aspect of the sovereign status of the Indian tribes. See Kiowa Tribe, 523 U.S. at 756-57.

292. See Kiowa Tribe, 523 U.S. at 757-58 (challenging the Potawatomi Tribe Court's rationale for tribal sovereign immunity as inapposite, as a matter of policy, to modern tribal businesses that extend beyond traditional tribal activities and contending that tribal immunity was "founded upon an anachronistic fiction") (citing Potawatomi Tribe, 498 U.S. at 514-15 (Stevens, J., dissenting)). The Kiowa Tribe Court relied upon the Potawatomi Tribe Court's holding solely as a matter of stare decisis by expressly challenging the Potawatomi Tribe Court's Congressional policy rationale. See Kiowa Tribe, 523 U.S. at 757-58; see also supra notes 256-57 and accompanying text (describing the stare decisis nature of the Kiowa Tribe Court's holding). Hence, the Kiowa Tribe Court implied that its "tribal" immunity doctrine was unjustified, as a matter of policy, by failing to explain that the Potawatomi Tribe Court's rationale itself was predicated upon the fact that Congress itself had justified the tribal sovereign immunity doctrine. Compare Kiowa Tribe, 523 U.S. at 757-58, with Potawatomi Tribe, 498 U.S. at 510; see also supra note 254 (discussing the Kiowa Tribe Court's characterization that the Potawatomi Tribe Court's holding was based on the absence of Congressional action).

293. See Kiowa Tribe, 523 U.S. at 758-59. But see generally supra notes 82-137 and accompanying text (discussing the Marshall Trilogy's well-known role in legitimizing Indian dependence and undermining tribal sovereignty).

294. See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823). See, e.g., supra note 16 (discussing how the existence of the Kiowa tribal government pre-exists that of the United States). Recently, members of Congress have also recognized that the sovereignty of the Indian tribes "predates the formation of the United States and the United States
been considered “distinct, independent political communities,” possessing inherent sovereign powers distinct from the United States’ framework of government.295 Marshall also recognized, in contrast to the Kiowa Tribe Court, that the original sovereign powers of the Indian tribes were diminished but not entirely destroyed as a consequence of the expansion of the federal government at the expense of Indian lands.296

Indeed, whether by discovery,297 treaty,298 or conquest299 the Indian tribes were brought eventually, as legitimized in the Marshall Trilogy, under the dominant sovereignty of the European colonists and the federal government as successor in interest.300 As a matter of necessity, the federal government obtained land cessions from the Indian tribes by resorting to peace treaties.301 Marshall held that by establishing treaties with the Indian tribes, the federal government recognized the inherent nature of tribal sovereignty and promised to protect forever, not to de-
stroys, the sovereign character of the Indian tribes.\textsuperscript{302} To fulfill its duty to protect, the federal government (1) asserted its dominant sovereignty over the Indian tribes, and (2) established boundaries to separate Indian Country from territories of the United States through peace treaties and congressional statutes backed by the force of the Supremacy Clause.\textsuperscript{303}

The pre-existing sovereignty of the Indian tribes, however, was not destroyed, as Marshall concluded in \textit{Worcester}, when the national government asserted its dominant protection, via peace treaties, over the Indian tribes.\textsuperscript{304} Rather, "a unique legal and political relationship" developed between the Indian tribes and the federal government.\textsuperscript{305} Marshall, unlike the \textit{Kiowa Tribe} Court, realized that the "peculiar and cardinal distinctions" of this relationship justified treating the Indian tribes differently from either the states or foreign nations.\textsuperscript{306} With respect to whether the Indian tribes should be treated like the states, Marshall first understood that although treaties acknowledged the Indian tribes as distinct political societies, they were not states of the Union within the meaning of the Constitution.\textsuperscript{307} Moreover, Marshall found that the text of the Commerce Clause provided conclusive evidence that the Founders did not intend the Indian tribes to be treated like foreign states within the United States' constitutional framework of government.\textsuperscript{308} Hence, Marshall concluded that the Indian tribes, unlike the states of the Union or

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\item \textsuperscript{302} \textit{See Worcester}, 31 U.S. (6 Pet.) at 552; \textit{see also supra} note 131 and accompanying text (discussing Marshall's recognition of Congress' treaty based duty to protect the Indian tribes' right to self-government, e.g., from encroachment by the states). Indeed, members of Congress have similarly found that "through treaties, statutes, Executive orders, and course of dealings," the United States has continued to respect the inherent sovereignty of the Indian tribes. \textit{See S. 2097, 105th Cong. § 2(a)(3) (1998)}.
\item \textsuperscript{303} \textit{See U.S. CONST. art. VI, cl. 2; Worcester}, 31 U.S. (6 Pet.) at 559-60 (recognizing that the Supremacy Clause declared all existing and future treaties to be "the supreme law of the land"). Indeed, one commentator has recognized that
\begin{quote}
When Indians were held up mainly as icons, or poverty-crippled examples of failed policy, it was rare for any action in Indian country to become talk radio fodder. They were considered largely powerless. But in fact, the power was nearly always there, imbedded in Article VI of the Constitution, which holds treaties backed by Congress to be "the supreme law of the land."
\end{quote}
\textit{Egan, supra} note 1, at A24.
\item \textsuperscript{304} \textit{See Worcester}, 31 U.S. (6 Pet.) at 560-61; \textit{see also supra} notes 78-79 and accompanying text (describing how the Indian tribes did not surrender their right to self-government by submitting to the "protection" of the United States because of their unique place in the history of the United States).
\item \textsuperscript{305} \textit{See S. 2097, 105th Cong. § 2(a)(2) (1998)}.
\item \textsuperscript{306} \textit{See Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 16-18 (1831); \textit{Getches, supra} note 36, at 73.
\item \textsuperscript{307} \textit{See Cherokee Nation}, 30 U.S. (5 Pet.) at 17-18.
\item \textsuperscript{308} \textit{See id. at 18-19}.
\end{itemize}
traditional foreign nations, were to be treated as "domestic dependent nations." 309 The federal government, according to Justice Marshall's theory, assumed a maternal role that obligated all three of its branches, including the judiciary branch, to protect the sovereignty of the Indian tribes. 310 Accordingly, in contrast to the Kiowa Tribe Court's lack of explanation, Marshall not only appreciated the inherent nature of tribal sovereignty but also recognized, as a matter of federal law, the treaty-based duty to protect tribal sovereignty. 311

Similarly, the Kiowa Tribe Court accepted the United States Fidelity Court's opinion as the source of the doctrine of tribal sovereignty, but failed to recognize that tribal immunity is an essential aspect of the inherent sovereignty of the Indian tribes. 312 The Kiowa Tribe Court ignored the United States Fidelity Court's reaffirmation that the Indian tribes did not surrender their pre-existing sovereign status by virtue of coming under the dominion and protection of the federal government. 313 Furthermore, the United States Fidelity Court, in contrast to the Kiowa Tribe Court, understood the public policy that justifies exempting both the dominant and dependent sovereignties from suit without consent. 314 Like any other sovereign nation, the exercise of tribal immunity remains, as noted by the United States Fidelity Court, an inherent aspect of the quasi-sovereign status of the Indian tribes. 315 Accordingly, the Kiowa Tribe Court also failed to confirm the United States Fidelity Court's appreciation that tribal immunity remains an essential aspect of inherent tribal sovereignty. 316

309. See id. at 17.
310. See Feldman, supra note 135, at 436; see also Thebo v. Choctaw Tribe of Indians, 66 F. 372, 374 (8th Cir. 1895) (holding that the judicial branch is bound by the acts of the political departments of the United States that—whether by treaties, acts of Congress, or executive action—have always recognized the inherent sovereignty of the Indian tribes).
312. See Kiowa Tribe v. Manufacturing Techs., Inc, 523 U.S. 751, 757 (1998) (acknowledging, in the end, the United States Fidelity Court's holding that as sovereigns or quasi-sovereigns, the Indian nations continue to be immune from suit absent consent to be sued) (citing United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 513-14 (1940)).
313. See Kiowa Tribe, 523 U.S. at 757 (stating that tribal immunity (1) did not become an explicit holding until United States Fidelity, and (2) was subsequently reiterated with little analysis).
314. See United States Fidelity, 309 U.S. at 512. Compare supra notes 177-81 and accompanying text (discussing public policies adopted by the United States Fidelity Court for justifying tribal sovereign immunity from suit that the Kiowa Tribe Court ignored), with supra notes 255-56 (discussing the Kiowa Tribe Court's adoption of its vision of tribal immunity as a matter of stare decisis).
316. See Kiowa Tribe, 523 U.S. at 757-58; United States Fidelity, 309 U.S. at 512-13; see
C. Advocating the Destruction of Inherent Tribal Sovereign Immunity by Encouraging Congress to Abrogate Its Treaty-Based Duty to "Protect" the Sovereignty of the Indian Tribes

The *Kiowa Tribe* Court also took the unnecessary step of criticizing its own vision of tribal immunity from suit. In the past, tribal immunity "might have been thought necessary," the *Kiowa Tribe* Court stated, to protect fragile tribal governments, such as that of the Kiowas, from encroachments by the states. The Court contended, however, that tribal immunity in modern society extends beyond "what is needed to safeguard tribal self-governance." This is evidenced by the existence of flourishing tribal enterprises, such as ski resorts, gambling, and sales of cigarettes, that could be immune from suit.

The *Kiowa Tribe* Court failed to discuss the impact of tribal immunity on the protection of well-known aspects of tribal sovereignty, such as shielding the Kiowas' scarce resources, promoting the Kiowa Tribe's right to self-government and encouraging economic development. This conclusion illustrates the *Kiowa Tribe* Court's failure to recognize tribal immunity as an essential aspect of inherent tribal sovereignty. Likewise, the *Kiowa Tribe* Court disregarded its own role in fulfilling the well-known treaty-based duty to protect tribal sovereignty, as a matter of federal law, as first established in the Marshall Trilogy. The *Kiowa

*also supra* note 184 and accompanying text.


318. *See* Brief for Petitioner at 9-10, *Kiowa Tribe* v. Manufacturing Techs., Inc., 523 U.S. 751 (1998). *See, e.g., supra* note 30 (describing specifically how the abrogation of the Kiowas' right to claim immunity would unquestionably (1) interfere with the Kiowas' ability to enforce its own laws and operate its government, and (2) undermine the self-sufficiency and economic development of the Kiowas).


320. *See id.*

321. *See id.*

322. *See id.; Egan, supra* note 1, at A24 (recognizing that "sovereignty equals survival"); *see also* supra note 11 and accompanying text (recognizing that Congress historically has acted to protect the right to self-government and economic development of the Indian tribes). *See, e.g., supra* notes 206-07, 253, 290 (discussing Congress' intent, in enacting the Indian Self-Determination and Education Assistance Act, to protect and promote the self-sufficiency and economic welfare of the Indian tribes). In addition, the *Kiowa Tribe* Court failed to recognize how the Kiowas, whose remaining reservation lands are scattered among state lands, could participate in any meaningful tribal commerce that would not occur in state territory. *See* Petitioner's Brief at 34, *Kiowa Tribe* (No. 96-1037); *see also supra* note 16 (reviewing the history of the Kiowa tribe).

323. *See Kiowa Tribe*, 523 U.S. at 758; *see also supra* notes 312-16 and accompanying text (reviewing the *Kiowa Tribe* Court's treatment of the holding in *United States Fidelity*).

324. *See* Feldman, *supra* note 135, at 436 (discussing the Supreme Court's theoretical role, as the supreme authority of one of the three branches of the federal government, in
Tribe Court did, however, emphasize that immunity can harm unsuspecting commercial actors as well as tort victims. Accordingly, the Kiowa Tribe Court invited Congress to abrogate what it perceived as an overbroad tribal immunity.

Yet, the Kiowa Tribe Court did recognize that Congress, rather than the Court itself, had the ability to accommodate the competing policy concerns through appropriate legislation. The Court, therefore, ultimately declined to modify its vision of tribal immunity in deference to the role of Congress in making such policy determinations. By inviting Congress to abrogate tribal immunity, without acknowledging the duty to protect tribal sovereignty, the Kiowa Tribe Court violated its own duty, as the ultimate interpreter of the laws and treaties of the United States, to give legal effect to treaties between the federal government and the Indian tribes. For example, the Court failed to acknowledge the federal government's implicit promise, in treaties such as the Treaty of Medicine Lodge, to protect forever the inherent sovereignty of the Indian tribes, including specifically the Kiowa Tribe. Moreover, by failing to inform Congress of the existence of its moral obligation to act in good faith to protect Indian sovereignty, the Kiowa Tribe Court increased the likelihood that the federal government will inevitably breach its duty to protect the sovereign status of the Indian tribes.

325. See Kiowa Tribe, 523 U.S. at 758; see also supra notes 279-81 and accompanying text (discussing how both the Kiowa Tribe majority and dissenting opinions perceived tribal sovereign immunity to be unfair to tort victims); supra notes 252-53 and accompanying text (discussing the Potawatomi Tribe Court's rejection of the same policy arguments advocated by the Kiowa Tribe Court because of affirmative Congressional action).

326. See Kiowa Tribe, 523 U.S. at 758.

327. See id.

328. See id.

329. See Feldman, supra note 135, at 436; see also Thebo, 66 F. at 374 (holding that the judicial branch is bound by the acts of the political departments of the United States that—whether by treaties, acts of Congress, or executive action—have always recognized the inherent sovereignty of the Indian tribes) (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15-16 (1831)).

330. See, e.g., Treaty with the Kiowas and Camanches, Oct. 21, 1867, 15 Stat. 581 (“If bad men . . . subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States . . . .”); see also supra notes 16, 140 (discussing various peace treaties made between the federal government and the Kiowa Tribe to obtain Indian land cessions in consideration for “protection”).

331. Cf. Gibeaut, supra note 80, at 42 (discussing the federal government's undisputed breach of its duty, for example, to manage and account for the Indian trust fund, which
IV. CONCLUSION

The doctrine of tribal sovereign immunity is rooted deeply in the history of the United States. As original inhabitants of North America, the Indian tribes were considered autonomous political entities. Upon the ratification of the Constitution and the development of a strong national government with, according to the Supreme Court, "plenary" power over Indian affairs, the original sovereignty of the Indian tribes was diminished. Although peace treaties distinguished between reservation lands and United States territories, and obligated the federal government to "protect" the Indian tribes from encroachments by the states, the Indian tribes' property rights were limited to a right of occupancy. As the federal government brought Indian lands within the jurisdictional limits of the United States, the Indian tribes became dependent on the federal government for their "protection."

The federal government historically has protected the sovereignty of the Indian tribes by defending their sovereign immunity from suit. Indeed, Congress has recognized that sovereign immunity encourages tribal self-determination and economic development by protecting scarce tribal resources. Although deeply rooted in United States history and Supreme Court jurisprudence, respect for the inherent sovereignty of the Indian tribes has suffered a gradual erosion.

This trend continued in *Kiowa Tribe v. Manufacturing Technologies, Inc.*. Although it upheld the Kiowas' sovereign immunity from suit, the Supreme Court failed to fulfill its constitutional and treaty-based duty to protect the Indian tribes from encroachments by the states. The Court not only declined to acknowledge this duty, both in history and Supreme Court jurisprudence, but it also issued an invitation to Congress to abrogate tribal sovereign immunity with respect to tribal economic development activities occurring off the reservation. In doing so, the *Kiowa Tribe* Court greatly increased the likelihood that the federal government inevitably will breach its obligation to protect and preserve the Indian tribes' way of life. Consequently, this seemingly favorable precedent, in fact erodes the inherent sovereignty of the Indian tribes and represents another in a long line of betrayals of the Indian tribes by their so-called protectors.

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involves between four and 10 billion in Indian assets; see also id. at 99 (stating that the federal trust responsibility "includes treaties, case law, statutes, and, most of all, a moral obligation"); supra notes 145-48 and accompanying text (describing the Court's role in *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903), in establishing an irrebuttable presumption that when Congress acts it always acts to "protect" the sovereign nature of the Indian tribes regardless of whether, in fact, the sovereignty of the Indian tribes is preserved).