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2010]

## SOVEREIGN LITIGANTS: NATIVE AMERICAN NATIONS IN COURT

CATHERINE T. STRUVE\*

### I. INTRODUCTION

THE topic of this symposium—“Sovereignty’s Seductions: Reconciling Conflicting Claims to Govern”—invited participants to discuss a wide array of attributes of sovereignty. I chose as my topic the sovereignty of Native American nations. As is well known, Native American tribes pre-existed both the state and federal governments. The federal government, however, has asserted authority over the tribes and has acted to limit tribal authority in a number of ways. Tribes retain governmental authority over their members, but their criminal and civil authority over nonmembers has been significantly curtailed over the past three decades. Tribes do, however, retain relatively intact another traditional attribute of sovereignty—sovereign immunity. I have argued elsewhere that tribes can use their immunity as a forum choice mechanism—choosing to provide redress for valid claims but requiring those claims to be litigated in tribal court.<sup>1</sup>

In this Article, I will consider another attribute of sovereignty: the ability of tribes—and other governments—to sue in their own courts. As I note in Part II, it is ordinarily uncontroversial that a government may sue in its own courts, and such suits are recognized as serving important governmental interests. But, as I explain in Part III, that ordinary assumption fails to capture the realities of litigation for tribal plaintiffs.

Native American nations are sovereigns, but federal law views them as subject to the power of the federal government.<sup>2</sup> This has long meant that

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\* Professor, University of Pennsylvania Law School. I thank the participants in the Villanova Law Review’s Norman J. Shachoy Symposium for an enlightening and thought-provoking discussion, Ann Juliano and Patrick Brennan for organizing the symposium, and Frank Goodman for helpful comments on a draft.

1. See Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L. J. 137, 177 (2004).

2. This view is doctrinally well-established but often criticized. See, e.g., Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 845 (1990) (“The tribes never formally consented to become part of the Union, and, therefore, the legitimacy of the exercise of federal and state authority over them is frequently questioned.”); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 196 (1984) (“The judiciary’s frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs.”); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 696 (1989) (“Instead of the expected (if complex) references to consent and to a federal government of limited powers, other, often unspoken rationales—conquest, violence, force—are the primary sources of the power exercised by the federal government over Indian tribes.”).

tribal government powers were seen as limited not only by treaties between the relevant tribe and the federal government, but also by federal statutes.<sup>3</sup> In addition, federal doctrine held that tribes no longer possessed certain powers that were deemed inconsistent with their status (in federal law) as “domestic dependant nations.”<sup>4</sup> Until the late twentieth century, this third sort of limitation on tribal power covered only a few areas, such as the tribe’s ability to convey title to land without federal permission<sup>5</sup> or to conduct international relations.<sup>6</sup> Within the past thirty years, however, the United States Supreme Court has created a striking range of federal common law limitations on tribal authority. Part III summarizes those limitations, which currently bar tribes from criminally prosecuting non-Indians and which often bar tribes from exercising regulatory or civil adjudicative jurisdiction over nonmembers.

Commentators have already discussed in detail the conceptual flaws and practical problems associated with current doctrine.<sup>7</sup> I focus here on a particular aspect of the doctrine’s effects—namely, the implications for

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3. Thus, as late as 1982, the standard treatise on federal Indian law described the framework as follows:

(1) an Indian tribe possesses in the first instance, all the powers of any sovereign state; (2) conquest renders the tribe subject to the legislative power of the United States and . . . terminates the external powers of sovereignty of the tribe, for example, its power to enter into treaties with foreign nations . . . ; (3) [the tribe’s remaining] powers are subject to qualification by treaties and by express legislation of Congress.

FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 241-42 (Lexis Law Pub. 1982) (1945).

4. For the origin of this phrase, see *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (“[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.”).

5. In 1823 the Supreme Court had formulated the “doctrine of discovery” in the following terms: Indian tribes, the Court stated,

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.

*Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823).

6. In *Cherokee Nation*, Chief Justice Marshall stated:

They [the Indian tribes] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

30 U.S. at 17-18.

7. See, e.g., Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 79 (1999) (critiquing cases in which “the Court has fallen victim to a ‘dormant plenary power impulse’ to bring constitutional values to Indian country”).

the tribe's ability to litigate as a plaintiff. The limitations on tribal authority summarized in Part III ensure that much of the litigation that a tribe may wish to bring against nonmembers must now proceed in non-tribal court. To some extent, a tribe may be able to pursue its sovereign interests in protecting the welfare of tribe members by suing in non-tribal court under non-tribal law. Such a choice is a second-best option—from the tribe's perspective—compared to the standard ability of most sovereigns to vindicate their interests in their own courts. In Part IV, I consider the fact that such a choice carries an additional implication for the tribe: a defendant may attempt to counterclaim against the tribe on the theory that the tribe's decision to sue waived its sovereign immunity with respect to the counterclaim.

This Article, accordingly, points out a link between the scope of a tribe's affirmative authority to govern and a tribe's negative right to be free from unconsented suit: the limits on the former sort of authority may force a tribe to assert claims in non-tribal courts where defendants may contend that the suit waives the tribe's immunity from the defendant's claims against the tribe. Part IV contends that if such a waiver is found, it ordinarily should be limited to claims that arise from the same transaction as the tribe's claim and that operate only to reduce the tribe's recovery (as opposed to establishing an affirmative liability on the part of the tribe). Such an approach accords with the treatment of claims brought by the federal government, though it is more restrictive than the approach taken with respect to claims brought by foreign nations or (sometimes) than the approach taken with respect to claims brought by states.

## II. SOVEREIGN LITIGANTS

It is commonly accepted that one of the attributes of sovereignty is the power to create courts and to use them. A sovereign may sue in its own courts to enforce its law—both through criminal prosecutions and through civil suits. Such suits may vindicate the public interest<sup>8</sup> or protect the sovereign's proprietary interests.<sup>9</sup>

The assumption that such suits are a basic governmental prerogative finds expression, as to the federal government, in the grant of jurisdiction to the federal courts over suits brought by the United States. Article III provides that the federal judicial power "shall extend . . . to Controversies

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8. *See, e.g., In re Debs*, 158 U.S. 564, 584 (1895) ("Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other."), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194, 208 (1968).

9. *See, e.g., Cotton v. United States*, 52 U.S. 229, 231 (1850) ("Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal. . . . [A]s a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws.").

to which the United States shall be a Party.”<sup>10</sup> In *The Federalist No. 80*, Hamilton thought this grant so obviously appropriate that he treated it in three sentences: “Still less need be said in regard to [this grant of jurisdiction]. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.”<sup>11</sup> Justice Story provided a lengthier explanation along the same lines in his *Commentaries on the Constitution*:

It seems scarcely possible to raise a reasonable doubt, as to the propriety of giving to the national courts jurisdiction of cases, in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. . . . A sovereign, without the means of enforcing civil rights, or compelling the performance, either civilly or criminally, of public duties on the part of the citizens, would be a most extraordinary anomaly.<sup>12</sup>

The first Congress under the Constitution promptly made use of this Article III power, granting the lower federal courts jurisdiction over federal criminal prosecutions<sup>13</sup> and over civil suits by the United States for amounts of \$100 or more.<sup>14</sup> Today, a general statutory grant provides that “[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”<sup>15</sup>

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10. U.S. CONST. art. III, § 2.

11. THE FEDERALIST NO. 80 (Alexander Hamilton).

12. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 620-21 (1833).

13. See Act of September 24, 1789, § 9, 1 Stat. 73, 76-77 (granting federal district courts jurisdiction—exclusive of state courts—over crimes cognizable under federal authority, committed within the relevant district or on the high seas, where penalty fell below certain specified limits); *id.* § 11, 1 Stat. 78-79 (granting federal circuit courts exclusive jurisdiction—except where provided otherwise in First Judiciary Act or other federal law—of all crimes cognizable under federal authority).

14. See *id.* § 9, 1 Stat. 77 (granting federal district courts jurisdiction over suits by United States where “the matter in dispute amounts, exclusive of costs,” is \$100); *id.* § 11, 1 Stat. 78 (granting federal circuit courts jurisdiction over civil suits by United States “where the matter in dispute exceeds, exclusive of costs,” exceeds \$500). At that time, the Supreme Court had exclusive jurisdiction over suits by the United States against a state. See *id.* § 13, 1 Stat. 80. Today, the relevant statute provides that “[t]he Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll controversies between the United States and a State.” 28 U.S.C. § 1251(b)(2) (2006).

15. 28 U.S.C. § 1345 (2006). See, e.g., *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 9 (1st Cir. 2005) (“Section 1345 creates subject matter jurisdiction, and the statute can only be limited, as the initial proviso provides, by (1) an

It is, likewise, a standard notion in the federal system that state governments may bring criminal prosecutions and civil suits in their own courts. “The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.”<sup>16</sup> Thus, explaining why the federal courts ordinarily will not enjoin pending state criminal prosecutions, the Court in *Younger v. Harris*<sup>17</sup> noted the principle “that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief,” but it stressed

an even more vital consideration, the notion of “comity,” that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.<sup>18</sup>

That respect for state criminal prosecutions—coupled with recognition of the inconvenience that a state prosecutor would face if forced to maintain a state criminal prosecution in a federal court—also contributed to the Court’s conclusion in *Mesa v. California*<sup>19</sup> that the federal officer removal statute permits removal only when the federal officer defendant asserts a federal-law defense.<sup>20</sup>

States’ rights to bring civil suits in their own courts are also well-recognized and protected. As one example, in applying *Younger* abstention to civil enforcement suits by states, the Court has recognized states’ interest in pursuing civil remedies in their own courts.<sup>21</sup> And even when a state asserts a claim created by federal law, the state ordinarily may bring that

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explicit repeal of the statute by an Act of Congress or (2) an implicit repeal by total irreconcilability of the two acts.”).

16. *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).

17. 401 U.S. 37 (1971).

18. *Id.* at 44.

19. 489 U.S. 121 (1989).

20. *Id.* at 138 (reasoning that it would contravene strong policy against federal interference with state prosecutions “to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions”).

21. *See Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (“The state action was a suit by the State to recover from appellees welfare payments that allegedly had been fraudulently obtained. . . . [T]he principles of *Younger*. . . are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity.”); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (“[W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State’s interest in

claim in its own courts because the state courts have concurrent jurisdiction to hear federal claims unless state-court jurisdiction is excluded “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”<sup>22</sup> Admittedly, the defendant in a state-court federal question suit might remove the case to federal court,<sup>23</sup> but if the defendant failed to do so then the suit would proceed in state court.

What, then, of tribal litigants’ prerogative to bring suit in tribal courts? As I discuss in the part that follows, federal doctrines significantly limit the range of situations in which a tribe may sue in its own courts.

### III. TRIBAL SUITS IN TRIBAL COURTS

It has long been a principle of federal Indian law that Native American tribes retain all the attributes of governmental power except to the extent that those attributes are removed by treaty, by federal statute, or by virtue of inconsistency with the tribes’ status as “domestic dependent nations.”<sup>24</sup> At least 175 of the federally recognized Indian tribes in the lower forty-eight states have “a formal tribal court.”<sup>25</sup> The tribal respondents in

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the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.”).

22. *Tafflin v. Levitt*, 493 U.S. 455, 460 (1990) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). Indeed, some case law favors concurrent state-court jurisdiction even more than this quotation might suggest. Soon after deciding *Tafflin*, the Court held that state courts have concurrent jurisdiction over claims under Title VII of the Civil Rights Act of 1964. The Court first noted that “Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent.” *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). It proceeded to note and reject arguments based on the second and third rationales cited in *Tafflin* (namely, legislative history and incompatibility). See *Yellow Freight*, 494 U.S. at 824.

23. See 28 U.S.C. §§ 1331, 1441(a) (2006). It seems unlikely that the state could successfully interpose a sovereign immunity objection to the removal of a federal question case. In *Ames v. Kansas*, the Supreme Court rejected the State’s Eleventh Amendment objection to the removal of its case from state to federal court on federal question grounds. See *Ames v. Kansas*, 111 U.S. 449, 472 (1884). It should be kept in mind, of course, that *Ames* predated *Hans v. Louisiana*, 134 U.S. 1 (1890), in which the Court held that state sovereign immunity barred a federal question claim. See Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed In State Court?*, 38 J. MARSHALL L. REV. 513, 525-26 (2004). The Court’s subsequent expansion of state sovereign immunity as a constitutional principle that extends well beyond the letter of the Eleventh Amendment might provide some basis to challenge the rationale of *Ames*, but the Supreme Court has not overruled it.

24. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

25. STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at iii (2005) [hereinafter 2002 CENSUS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic>

a 2002 Bureau of Justice Statistics survey reported that more than 127,000 criminal cases and more than 81,000 civil cases were filed in tribal courts in the prior calendar year.<sup>26</sup> As a point of comparison, during a year-long period in federal district court in the same time frame some 275,000 civil cases were filed<sup>27</sup> and the federal government commenced prosecutions in federal district court against roughly 90,000 defendants.<sup>28</sup>

Tribal courts, then, handle a large number of both civil and criminal cases. Those courts can provide a vital forum, not only for private litigants, but for the tribe itself. But, as this part discusses, in a series of decisions since 1978 the Supreme Court has limited the tribal courts' authority to hear both criminal and civil matters.<sup>29</sup>

#### A. *Criminal Jurisdiction*

The federal law of tribal criminal jurisdiction is the product of an ongoing dialogue between Congress and the Supreme Court. Congress, in the Indian Civil Rights Act of 1968, subjected tribal-court criminal prosecutions to a number of constraints similar to those in the Bill of Rights,<sup>30</sup>

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02.pdf. I say "at least" because the survey report states that 314 of the 341 federally recognized tribes in the lower forty-eight states participated in the survey, and thus the numbers in the report may be slightly lower than the actual numbers for all 341 tribes.

26. See 2002 CENSUS, *supra* note 25, at tbl.11 (listing number of criminal cases filed during last calendar year, by tribe; figures add up to 127,070); *id.* (listing number of civil cases filed during last calendar year, by tribe; figures add up to 81,988).

27. See LEONIDAS RALPH MECHAM, 2002 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2002 tbl.S-7 (2003), available at <http://www.uscourts.gov/> (listing "Civil Cases Filed, by Origin, 1998 Through 2002" and showing 274,841 total filings during period ending September 30, 2002; this figure includes cases filed in federal court, cases removed from state court, cases remanded by courts of appeals, cases that were reopened, and cases that were transferred).

28. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICES STATISTICS, 2002, at tbl.4.1 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs02.pdf> (showing number of "[d]efendants in criminal cases commenced, by offense, October 1, 2001-September 30, 2002" as 87,727); *id.* at 1 ("The number of defendants prosecuted in Federal courts increased slightly between 2001 and 2002, from 86,728 to 90,407."). The Compendium does not explain the difference between the figures of 87,727 and 90,407.

29. I focus here on federal law that limits tribal regulatory authority and tribal-court subject matter jurisdiction. The Indian Civil Rights Act's due process clause may limit the exercise of territorial jurisdiction by tribal courts over absent defendants. See generally David A. Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253 (2006).

30. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 73, 77-78 (1968) (providing statutory rights addressing, inter alia, unreasonable searches and seizure; double jeopardy; self-incrimination; speedy trial; confrontation; excessive bail or fines; cruel and unusual punishment; and criminal jury trial). *But see id.* at 77 (providing for tribal-court criminal defendant right "at his own expense to have the assistance of counsel for his defense"). As discussed below, Congress's 2010 amendments to Section 1302 provide tribal-court defendants



limited the criminal punishment that a tribe could impose,<sup>31</sup> and provided for federal habeas review of tribal-court criminal convictions.<sup>32</sup> The Supreme Court—in decisions in 1978 and 1990—created limits on the type of defendants who could be criminally prosecuted by tribes. Congress responded in 1990 with legislation that overrode the more recent of those decisions and recognized tribes' inherent authority to try Indians who are members of other tribes. The Supreme Court has acknowledged that the 1990 legislation succeeded in altering federal constraints on tribal authority, such that tribes' criminal prosecutions of non-member Indians constitute an exercise of inherent tribal authority. But the patchwork of criminal jurisdiction in Indian country has continued to cause severe under-enforcement problems, and to address the resulting problems Congress recently enacted the Tribal Law and Order Act of 2010.

The first of the Supreme Court decisions, *Oliphant v. Suquamish Indian Tribe*,<sup>33</sup> held that tribes lack authority to prosecute non-Indians. "The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians," the Court asserted, "is a relatively new phenomenon"<sup>34</sup>—and one which, in the Court's view, threatened the liberty interests of the non-Indian defendants to such an extent that such jurisdiction should be deemed inconsistent with the tribes' status under federal law.<sup>35</sup> In sum,

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with a right to counsel consonant with Sixth Amendment standards (including a right to government-paid counsel for indigent defendants) in cases where the defendant is sentenced to more than one year's imprisonment. See 25 U.S.C. § 1302(c).

31. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 73, 77 (1968) (limiting punishment for any one offense to "a term of six months or a fine of \$500, or both"). In 1986, "[t]o enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations," Congress raised the maximum penalty per offense to one year's imprisonment, a \$5,000 fine, or both. Pub. L. No. 99-570, Title IV, § 4217, 100 Stat. 3207 (1986). In 2010, as discussed below, Congress further altered the penalty ceilings so as to permit a maximum sentence of three years or \$15,000 per offense (subject to a maximum aggregate penalty of nine years' imprisonment) if certain requirements are met. See Pub. L. No. 111-211, Title II, § 234 (2010) (amending 25 U.S.C. § 1302 by, inter alia, redesignating existing text as subsection (a), revising that subsection, and adding new subsections (b) and (c)).

32. See 25 U.S.C. § 1303 (2006).

33. 435 U.S. 191 (1978).

34. *Id.* at 196-97. Robert Clinton has noted that [s]ince most tribal justice systems of the nineteenth century were informal and restorative, rather than punitive, the Court not surprisingly found few examples of Indian tribes actually punishing whites after trial during the period. Nevertheless, to solidify its historical point, the Court was forced to marginalize early treaties that expressly provided that Indian tribes could punish illegal white settlers.

Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 214 (2002).

35. See *Oliphant*, 435 U.S. at 210. The Court asserted:

[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . solicitude that its citizens be protected by the United States from unwarranted intrusions on their per-

the *Oliphant* Court concluded, “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.”<sup>36</sup>

Interestingly, the first draft of Justice Rehnquist’s opinion for the Court in *Oliphant* had instead concluded that “Indian tribes do not have inherent jurisdiction to try and punish nonmembers of their tribe.”<sup>37</sup> Within days after that draft opinion circulated, Justice Blackmun wrote to say that he would join it;<sup>38</sup> but Justice Blackmun also wrote separately to Justice Rehnquist with “two very minor and picky suggestions.”<sup>39</sup> One of those suggestions was to change “nonmembers of their tribe” to “non-Indians”; Justice Blackmun explained that “[i]f either of the offenses charged in this case had involved a Rosebud Sioux who was vacationing in Washington, I am not sure what the answer would be.”<sup>40</sup> The next draft of the opinion duly referred to “non-Indians” instead of “nonmembers.”<sup>41</sup>

The Justices were not, however, consistent in their terminology. *United States v. Wheeler*,<sup>42</sup> decided a couple of weeks after *Oliphant*, held that the Navajo Nation’s prosecution of a Navajo constituted an exercise of inherent tribal authority and thus did not trigger double jeopardy protections under the federal Constitution.<sup>43</sup> The *Wheeler* Court reasoned that

the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. . . . They cannot enter into direct commercial or governmental relations with foreign nations. . . . And, as we have recently held, they cannot try nonmembers in tribal courts.<sup>44</sup>

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sonal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.

*Id.*

36. *Id.* at 212.

37. First Draft Opinion, *Oliphant v. Suquamish Indian Tribe*, at 21 (circulated by Justice Rehnquist Feb. 23, 1978) (copy on file with author).

38. Memorandum from Justice Blackmun to Justice Rehnquist (Feb. 27, 1978) (copy on file with author).

39. Letter from Justice Blackmun to Justice Rehnquist (Feb. 27, 1978) (copy on file with author).

40. *Id.*

41. Second Draft Opinion, *Oliphant v. Suquamish Indian Tribe*, at 21 (circulated by Justice Rehnquist Mar. 1, 1978) (copy on file with author).

42. 435 U.S. 313 (1978).

43. *See id.* at 328, 330 (citing *Oliphant*, 435 U.S. at 191).

44. *Id.* at 326.

The *Wheeler* Court was imprecise in suggesting that *Oliphant's* holding had concerned nonmembers (as opposed to non-Indians). And *Wheeler's* holding might be explained less by the Court's solicitude for tribal authority than by its reluctance to jeopardize "important federal interests in the prosecution of major offenses on Indian reservations": if jeopardy attached to a tribal prosecution, that would impair the federal government's own interest in exercising criminal jurisdiction.<sup>45</sup>

Nonetheless, the *Wheeler* Court also recognized the importance of tribal criminal jurisdiction (albeit in the limited context of jurisdiction over tribe members). Noting that Congress could solve the double jeopardy puzzle by preempting tribal jurisdiction, the Court pointed out that "such a fundamental abridgment of the powers of Indian tribes might be thought as undesirable as the federal pre-emption of state criminal jurisdiction that would have avoided" similar issues with successive state and federal criminal prosecutions.<sup>46</sup> "[T]ribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests."<sup>47</sup> Moreover, the fact that a tribe's approach to criminal justice issues might differ from that of the federal government or the states served to underscore, in the *Wheeler* Court's view, the importance of tribal criminal jurisdiction: tribes, the Court stated, have

their own mores and laws . . . which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions . . . . Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own.<sup>48</sup>

But the Court would later cite such distinctive aspects of tribal justice systems as a reason to curtail, rather than preserve, tribal criminal authority. In *Duro v. Reina*,<sup>49</sup> the Court extended *Oliphant* to cover not only non-Indians but also nonmember Indians.<sup>50</sup> The *Duro* majority opened by stating that "the rationale of our decisions in *Oliphant* and *Wheeler*, as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members."<sup>51</sup> As support, the majority adduced in particular the portion of *Wheeler* that described *Oliphant* as

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45. *Id.* at 331.

46. *Id.*

47. *Id.* at 332.

48. *Id.* at 331-32.

49. 495 U.S. 676 (1990).

50. *Id.* at 688.

51. *Id.* at 685.

holding “that the tribes ‘cannot try nonmembers in tribal courts.’”<sup>52</sup> (Justice Blackmun, who had successfully persuaded then-Justice Rehnquist to narrow *Oliphant*’s wording so as not to address the question of tribal criminal jurisdiction over nonmember Indians, joined the majority opinion in *Duro*.) In the view of the *Duro* majority, “the retained sovereignty of the tribe as a political and social organization to govern its own affairs” did not encompass “the authority to impose criminal sanctions against a citizen outside its own membership.”<sup>53</sup> To bolster this conclusion, the Court stressed the differences between tribal and non-tribal criminal justice practices:

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often “subordinate to the political branches of tribal governments,” and their legal methods may depend on “unspoken practices and norms.” It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer.<sup>54</sup>

As the dissenting Justices pointed out in *Duro*, that decision “create[d] a jurisdictional void in which neither federal nor tribal jurisdiction exist[ed] over nonmember Indians who commit[ed] minor crimes against another Indian”<sup>55</sup> within Indian country.<sup>56</sup> The Major Crimes Act, as its name suggests, imposes federal criminal penalties on Indians only for specified major offenses.<sup>57</sup> The General Crimes Act, which extends certain other federal criminal laws to Indian country, exempts Indian-on-Indian offenses.<sup>58</sup> And except in states to which Public Law 280 has extended criminal jurisdiction over Indian reservations,<sup>59</sup> state governments lack criminal jurisdiction over crimes committed by Indians within

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52. *Id.* (quoting *Wheeler*, 435 U.S. at 326).

53. *Id.* at 679.

54. *Id.* at 693.

55. *Id.* at 704-05 (Brennan, J., joined by Marshall, J., dissenting).

56. See 18 U.S.C. § 1151 (2006) (defining Indian country).

57. See *id.* § 1153. The discussion in the text leaves aside federal criminal statutes of general applicability, which may be interpreted to apply to conduct by Indians within Indian country.

58. See *id.* § 1152 (“Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian . . . .”); see also *Duro*, 495 U.S. at 705 n.3 (Brennan, J., joined by Marshall, J., dissenting).

59. See 18 U.S.C. § 1162 (2006).

Indian country. Even where a state has such jurisdiction, problems arose because states failed to devote sufficient resources to the prosecution of crimes committed within Indian country.

Less than six months after the *Duro* decision Congress overrode it by amending the Indian Civil Rights Act (ICRA). The ICRA now defines a tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."<sup>60</sup> In a reprise of *Wheeler*, the "*Duro* fix" legislation was challenged on the ground that it constituted a federal delegation of authority to the tribes, such that a tribe's exercise of criminal jurisdiction over a nonmember Indian triggered double jeopardy protection against a subsequent federal prosecution. The Supreme Court rejected that challenge in *United States v. Lara*, holding that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do," and, therefore, that the tribe's exercise of criminal jurisdiction over Lara, a member of a different tribe, did not trigger double jeopardy protection.<sup>61</sup>

The *Lara* decision did not settle all questions relating to a tribe's exercise of criminal jurisdiction. On the one hand, the *Lara* Court put to one side Lara's equal protection and due process challenges to his tribal criminal prosecution, because those challenges—even if successful—would not invalidate or bar the subsequent federal prosecution.<sup>62</sup> On the other hand, *Lara*'s recognition of congressional authority to "relax[ ] restrictions on the bounds of the inherent tribal authority that the United States recognizes"<sup>63</sup> underscores the fact that Congress has the power to lift other aspects of the federal-law constraints on tribal authority.

The bounds of tribal criminal jurisdiction are unstable because the limits on that jurisdiction impede tribes' ability to protect their members and other residents of Indian country from criminal activity. For example, a 2005-2006 Amnesty International study of rape and sexual assault against Native women on or near tribal lands found an extremely high incidence of such crimes and concluded that the law enforcement response was inadequate.<sup>64</sup> The Amnesty study noted that confusion over which sover-

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60. Pub. L. No. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1892 (1990) (codified at 25 U.S.C. § 1301(2)).

61. *United States v. Lara*, 541 U.S. 193, 200 (2004).

62. *Id.* at 208-09.

63. *Id.* at 207.

64. See AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, ii-iii (2007) [hereinafter AMNESTY REPORT], available at <http://www.amnestyusa.org/women/maze/report.pdf> (describing study); *id.* at 2 (citing Department of Justice figures "indicat[ing] that Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA in general" and stating that Amnesty International's interviews indicate "that available statistics greatly underestimate the severity of the problem"); *id.* at 8 (stating that jurisdictional framework in Indian country "has created areas of effective lawlessness

eign—tribal, federal, or state—has jurisdiction over a particular crime often delays prosecution and can contribute to a total failure to prosecute.<sup>65</sup> Tribal prosecutions are limited in their effectiveness for several reasons.<sup>66</sup> Tribal justice systems are underfunded.<sup>67</sup> Tribal prosecutors sometimes defer to federal prosecutors on the (often mistaken) assumption that the federal government will choose to prosecute.<sup>68</sup> Tribes, as noted above, are currently barred by federal law from prosecuting non-Indians—who, some data suggest, commit a sizeable number of sex crimes against Native women in and around Indian country.<sup>69</sup> And even when a tribe has criminal jurisdiction, until 2010 the ICRA limited tribal-court criminal sentences to a maximum of one year for any one offense.<sup>70</sup>

Federal and state prosecutions do not adequately fill this void. First, the federal government does not have general criminal jurisdiction in all parts of Indian country. Public Law 280, a termination-era statute that granted certain states criminal jurisdiction over certain reservations and provided for the assumption by states of such jurisdiction over other reservations, removed federal criminal jurisdiction over crimes (other than violations of generally-applicable federal criminal statutes) committed within

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which encourages violence”). The report notes that the currently available statistics do not focus on crimes committed within Indian country. *Id.* at 4.

65. See AMNESTY REPORT, *supra* note 64, at 61-62.

66. In addition to the reasons noted in the text, the Amnesty Report also observes that some tribal codes fail to criminalize all instances of sexual violence—for example, some codes do not define marital rape as a crime. The report notes various possible reasons for the persistence of such features in tribal law—such as the lack of funding to support updates of tribal codes or a perception that federal law prohibits tribes from exercising jurisdiction over major crimes. See *id.* at 63.

67. See *id.* at 63-64.

68. See *id.* at 63.

69. The Amnesty Report states:

Some of the data made available to Amnesty International in the three locations studied . . . suggests that a high number of perpetrators of sexual violence against American Indian and Alaska Native women are non-Indian. In Oklahoma, one support worker for Native American survivors of sexual violence told Amnesty International that 58 percent of the cases she had worked on in the preceding 18 months involved non-Native perpetrators. In Anchorage, Alaska, a statistical study found that 57.7 percent of Alaska Native victims of sexual violence reported that their attackers had been non-Native men. Amnesty International documented individual cases involving both Native and non-Native perpetrators. While overall the data available appears to indicate that a significant number of perpetrators are non-Indian, there is a lack of quantitative data on the ethnic origin or Indigenous status of perpetrators of sexual violence against American Indian and Alaska Native women.

*Id.* at 5.

70. See *supra* note 31; see also AMNESTY REPORT, *supra* note 64, at 64 (noting that “some prosecuting authorities may charge suspected perpetrators with multiple offenses, providing the possibility of imposing consecutive sentences in the event of conviction”).

certain affected reservations.<sup>71</sup> Second, even where the federal government has criminal jurisdiction, federal prosecutors may exercise their discretion not to prosecute crimes committed in Indian country. While federal prosecutors declined to prosecute 21.5% of suspects referred for prosecution by any federal agency, they declined to prosecute 47.9% of suspects referred for prosecution by the Bureau of Indian Affairs—a difference in rate that does not establish the rate at which Indian country crimes are federally prosecuted but that is suggestive.<sup>72</sup> The findings in a Senate bill precursor to the Tribal Law and Order Act of 2010 stated that “during the period of calendar years 2004 through 2007, federal officials declined to prosecute 62 percent of violent crimes alleged to have occurred in Indian country.”<sup>73</sup> As to sex offenses in Indian country, the Amnesty International report found some evidence to suggest that federal prosecutors “may be applying overly stringent criteria for selecting cases for prosecution.”<sup>74</sup> Third, practical problems also may deter the pursuit of criminal charges, given that the nearest federal prosecutor may be located far from the crime scene and from the victim’s residence.

States have criminal jurisdiction over non-Indians who commit crimes within Indian country, and in some instances, Public Law 280 has also given them jurisdiction to prosecute Indian offenders. Periodic reports, however, suggest that a number of states devote insufficient resources to prosecuting offenses committed within Indian country.<sup>75</sup> Moreover, state or local prosecutors may not be located near the crime scene or the victim

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71. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1416 (1997) (explaining that Public Law 280 “extended state criminal jurisdiction and civil judicial jurisdiction over reservation Indians in certain states [and] eliminated special federal criminal jurisdiction over reservation areas in the states specifically named in the law”).

72. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at tbl.2.3 (2006) (“Suspects in matters concluded and declined, by investigating agency, October 1, 2003 - September 30, 2004.”).

73. S. 797, 111th Cong. § 2(a)(10) (2009). The committee report accompanying this bill noted “that declination statistics alone do not show the Department [of Justice]’s commitment to combating reservation crime. In fact, they likely reflect difficulties caused by the justice system in place. The lack of police on the ground in Indian country often results in delayed responses to criminal activity, which prevents officers from securing the crime scene and gathering evidence.” S. REP. NO. 111-93, at 14 (2009). The Tribal Law and Order Act of 2010 “authorize[s] and encourage[s]” U.S. Attorneys in districts that encompass Indian country to appoint special assistant U.S. Attorneys to prosecute Indian country crimes when, inter alia, “the rate at which criminal offenses are declined to be prosecuted exceeds the national average declination rate.” See Pub. L. No. 111-211, Title II, § 213(b) (2010).

74. AMNESTY REPORT, *supra* note 64, at 66.

75. So, for example, seventeen of nineteen tribes that responded to a 1990s survey of California tribes “complained of serious gaps in protection from county law enforcement.” Goldberg-Ambrose, *supra* note 71, at 1437.

and their decisions may sometimes reflect a lack of familiarity with the culture and experiences of the complainant.<sup>76</sup>

To address these problems, the Amnesty International report suggested (among other things) that the federal government should recognize tribal criminal jurisdiction over non-Indians and that it should lift or otherwise modify the current limits on tribal criminal penalties.<sup>77</sup> In 2010, Congress implemented the second of these suggestions. The Tribal Law and Order Act of 2010 raised the maximum tribal penalty per offense to three years or \$15,000, or both—provided that certain requirements concerning prior convictions or type of offense are met, and that (in the case of sentences of imprisonment for more than one year) the tribe in question affords the defendant a right to counsel compliant with Sixth Amendment standards (including government-paid counsel if the defendant is indigent), the judge trying the case is legally trained and licensed to practice law, the tribe's criminal laws and evidentiary and procedural rules are publicly available, and a record is made of the criminal proceeding.<sup>78</sup>

It is interesting to note that the 2010 legislation rolled back federal limits on tribal criminal penalties while requiring the resulting prosecutions to comply with new requirements such as government-paid counsel for indigent defendants. The absence of such a right to government-paid counsel was one of the features of tribal criminal justice systems cited by the *Duro* Court as a reason not to permit tribal prosecution of nonmembers.<sup>79</sup> Under the 2010 legislation, tribes may regain some measure of the criminal jurisdiction otherwise foreclosed to them under federal law only by mirroring more closely the criminal procedures employed in non-tribal courts.<sup>80</sup> And the vindication of the relevant procedural guarantees by

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76. See AMNESTY REPORT, *supra* note 64, at 69.

77. See *id.* at 63.

78. See Pub. L. No. 111-211, Title II, § 234 (2010) (amending 25 U.S.C. § 1302 by redesignating the existing content as subsection (a), revising that subsection, and adding new subsections (b) through (f)). The legislation limits the total aggregate penalty that can be imposed for multiple offenses to nine years, see 25 U.S.C. § 1302(a)(7)(D), and designates the facilities in which tribal sentences longer than a year are to be served, see *id.* § 1302(d).

79. See *Duro v. Reina*, 495 U.S. 676, 693 (1990) (“The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer.”).

80. Indian tribes are not among the governments bound by the Constitution's Bill of Rights. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“[A]s the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment . . .”). The Indian Civil Rights Act, as originally enacted, imposed on tribes statutory constraints that echoed most of the provisions in the Bill of Rights. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 73, 77-78 (1968) (enumerating constraints on a tribe's governmental powers; the list omitted, *inter alia*, a bar on the establishment of religion and a requirement of government-paid counsel for indigent criminal defendants). See generally Nell Jessup Newton, *Tribal Court Praxis*:



the tribal courts continues to be subject to review—by means of habeas petitions—in federal court.

### B. *Civil and Regulatory Jurisdiction*

The line of cases that commenced with *Oliphant* is not limited to tribal criminal jurisdiction; it has dramatically affected tribal civil and regulatory authority as well. This section discusses civil regulatory and adjudicatory authority together, because—as we shall see—the Supreme Court’s decisions conflate them. The Justices’ concern about tribal authority over nonmembers—noted above with respect to criminal jurisdiction—also influences their views of tribal civil and regulatory jurisdiction.<sup>81</sup>

A few years after deciding *Oliphant*, the Supreme Court held in *Montana v. United States*<sup>82</sup> that the Crow Tribe of Montana lacked jurisdiction to regulate fishing and hunting by non-Indians on land owned in fee by a non-Indian within the boundaries of the Tribe’s reservation.<sup>83</sup> As noted above, the traditional federal-law presumption had been that tribes retained all their governmental powers except to the extent those powers were removed by treaty or statute, or by virtue of inconsistency with the tribes’ status under federal law. In *Montana*, the Court inverted this presumption with respect to a tribe’s efforts to regulate nonmembers:<sup>84</sup> “[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations,” the *Montana* Court reasoned, “is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”<sup>85</sup> Thus, in the Court’s view, the hunting and fishing regulations at issue in the case fell outside the Tribe’s inherent authority.<sup>86</sup> The Court did, however, recognize some circumstances under which that authority extends to nonmembers:

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*One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 343 (1998) (discussing tribal courts’ interpretations of ICRA). As noted above, the 2010 amendments to 25 U.S.C. § 1302 add right-to-counsel requirements in cases where the tribe imposes more than a year’s imprisonment.

81. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., joined by Kennedy & Thomas, JJ., concurring) (“[A] presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be ‘protected . . . from unwarranted intrusions on their personal liberty.’” (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978))).

82. 450 U.S. 544 (1981).

83. See *id.* at 547, 566-67.

84. See Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1315 (1995) (noting that in *Montana* “the Court shifted the burden to the tribe to establish its regulatory power over non-Indians by reversing the presumption against state power to a presumption against tribal power”).

85. *Montana*, 450 U.S. at 564.

86. See *id.*

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>87</sup>

The Court has subsequently extended *Montana* in two significant ways. First, it has held that the *Montana* limits on tribal civil regulatory authority also mark the bounds of tribal-court civil adjudicative authority<sup>88</sup>—a peculiar notion in light of non-tribal courts' well-established practice of hearing claims arising under laws other than their own.<sup>89</sup> Second, the Court has applied the *Montana* limits not only to conduct on land owned by non-Indians but also to conduct occurring on tribally owned land within the reservation<sup>90</sup>—though it has indicated that the *Montana* limits are especially stringent “when the nonmember’s activity occurs on land owned in fee simple by non-Indians.”<sup>91</sup>

In applying the exceptions to the general *Montana* limits on tribal authority, the Court has taken a relatively narrow view of both the consensual-relationship exception<sup>92</sup> and the exception relating to the tribe’s political integrity, economic security, or health and welfare.<sup>93</sup> Most recently, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*,<sup>94</sup> the Court held that neither of the *Montana* exceptions justified tribal-court jurisdiction

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87. *Id.* at 565-66.

88. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (“As to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”).

89. *See, e.g., THE FEDERALIST* NO. 82 (Alexander Hamilton) (“The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.”).

90. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (“The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’ It may sometimes be a dispositive factor.”).

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

92. *See, e.g., Hicks*, 533 U.S. at 355-56, 359 n.3 (refusing to apply consensual-relationship exception to claims arising from state game warden’s search of tribe member’s home pursuant to tribal-court search warrant).

93. *See id.* at 371.

94. 128 S. Ct. 2709 (2008).

over claims by tribe members (the Longs) and their family-run company against their long-time bank.<sup>95</sup> Mr. Long's father (a non-Indian) had mortgaged to the bank more than 2,000 acres of his land within the reservation.<sup>96</sup> The bank and the company entered into an agreement under which the bank would cancel some of the company's debt and loan it more money, and in exchange the 2,000+ acres would be deeded to the bank by Mr. Long, Senior's estate in lieu of foreclosure.<sup>97</sup> The parties also agreed that the company would lease the 2,000+ acres from the bank with an option to purchase after two years.<sup>98</sup> The Longs asserted that the bank initially contemplated selling the land to the company over the course of twenty years, but then rejected this possibility because of "possible jurisdictional problems" that might have been caused by the Bank financing an "Indian owned entity on the reservation."<sup>99</sup> Ultimately, the Longs and their company sued the bank in tribal court, claiming, *inter alia*, that the bank discriminated against them in violation of tribal law by selling the land to a non-tribe-member on more favorable terms.<sup>100</sup>

The *Plains Commerce Bank* Court conceded the possibility that the *Montana* exceptions would justify a tribe in regulating a nonmember's conduct on non-Indian land within the reservation—though it also stated that it had upheld such regulation, post-*Montana*, in only one prior instance.<sup>101</sup> In any event, the Court concluded, even though a tribe can sometimes regulate nonmember *conduct on* non-Indian-owned land within the reservation, it cannot regulate a non-Indian's *sale of* that land.<sup>102</sup> The Court indicated that the latter type of regulation does not fall within the second *Montana* exception:

The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land . . . because non-Indian fee parcels have ceased to *be* tribal land.

Nor can regulation of fee land sales be justified by the tribe's interests in protecting internal relations and self-government. Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of

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95. *See id.* at 2714.

96. *See id.* at 2715.

97. *See id.*

98. *See id.*

99. *Id.*

100. *See id.* at 2715-16.

101. *Id.* at 2722 (citing *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)).

102. *See id.* at 2723-24.

that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.<sup>103</sup>

As to the first *Montana* exception, the Court acknowledged that the Longs and their company had a long-established course of dealing with the bank, but it held that this course of dealing could not bring the Longs' discrimination claim within the compass of the consensual-relationship exception:

The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.<sup>104</sup>

Four Justices partially dissented in *Plains Commerce Bank*, arguing that the first *Montana* exception applied and permitted the plaintiffs' tribal-court damages claim for discrimination.<sup>105</sup> One might also question—in light of recent events—the assumption that land transactions between non-Indians concerning land within a reservation never implicate the tribe's governmental interests. The experience of municipalities around the country in connection with the foreclosure crisis might suggest differently.

Leaving these questions aside, however, the *Plains Commerce Bank* decision should not be taken to guide the treatment of cases that do not involve sales of land by one non-Indian to another. As the Court itself emphasized, “conduct taking place on the land and the sale of the land are two very different things,” and thus the *Plains Commerce Bank* decision should be read to leave intact *Montana's* principle “that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land.”<sup>106</sup> Cases will arise that fall within one or both of the *Montana* exceptions. Indeed, the tribal respondents in a recent survey reported that over 8,800 civil cases involving non-Indian defendants were filed in tribal courts during the prior calendar year.<sup>107</sup>

Cases brought by the tribe itself should be particularly likely to fall within a *Montana* exception. Many such claims may be brought, for example, precisely to vindicate the types of interests that implicate the second

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103. *Id.* at 2723-24; *see also id.* at 2727 (holding explicitly that second *Montana* exception did not apply).

104. *Id.* at 2725.

105. *Id.* at 2728 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting in part).

106. *Id.* at 2726 (majority opinion).

107. *See* 2002 CENSUS, *supra* note 25, at tbl.11 (listing number of civil cases, filed during prior calendar year, in which a defendant was non-Indian; figures add up to 8,808).

*Montana* exception—the tribe’s interests in protecting its political or economic security or the health and welfare of its members. But where neither of the *Montana* exceptions applies, claims against nonmembers for conduct occurring on non-Indian land will fall outside tribal regulatory authority, and any claims by the tribe must be grounded in non-tribal law and brought in non-tribal court. It is to tribal suits in non-tribal court, therefore, that I turn in the next part.

#### IV. TRIBAL SUITS IN NON-TRIBAL COURTS

The default rule that applies to the federal and state governments—that they presumptively may sue in their own courts—frequently does not apply to tribes. As noted in the preceding section, limits on tribal court subject matter jurisdiction will often require a tribe to sue a nonmember, if at all, in a non-tribal court. That fact has a number of implications for the tribe’s ability to vindicate its rights. Suit in another sovereign’s courts may be burdensome and inconvenient, due both to the physical distance between the tribe and the relevant state or federal court and to the fact that the court system in question may apply procedures that differ from those applied in the relevant tribal court. Moreover, the relative disadvantages to a sovereign when it must sue in another sovereign’s courts flow not merely from general differences in procedure between the two court systems, but also from the fact that in the other court system it likely will not receive the same sorts of special procedural protections that sovereigns often accord themselves in their own courts. These disadvantages may significantly affect a tribe’s ability to prevail on its claims in another sovereign’s courts. But I wish to focus here on a further question: can a tribe’s suit in a non-tribal court subject the tribe to liability on a defendant’s counterclaim, and, if so, in what circumstances?

As we shall see, that question is one that also affects other sovereign litigants—the federal government, the state governments, and foreign countries—when they bring suit in a court within the United States. In each instance, a sovereign’s assertion of a claim may sometimes subject that sovereign to liability on a counterclaim despite the fact that the sovereign would otherwise have been immune from suit on such a claim. The degree to which a sovereign’s suit subjects it to liability for a counterclaim varies depending on whether the sovereign in question is a federal, state, foreign, or tribal government. This part reviews those variations and argues that, of the four types of sovereigns, tribes possess the strongest arguments for construing narrowly the availability of counterclaims in such situations.

At the outset, it is necessary to briefly review the doctrinal and policy bases for sovereign immunity. The doctrinal bases for the doctrine vary depending on the sovereign in question. States are now recognized to possess a constitutional immunity from unconsented suits by individuals—

an immunity grounded not only in the Eleventh Amendment<sup>108</sup> but in the structure of the Constitution.<sup>109</sup> The federal government's immunity from unconsented suits by individuals is well recognized, although—apart from the constitutional provision requiring appropriations for government expenditures—federal sovereign immunity is a creature of case law.<sup>110</sup> Foreign nations historically possessed immunity from suit in United States courts as a matter of comity (not as a matter of constitutional command);<sup>111</sup> that immunity has now been codified and defined in the Foreign Sovereign Immunities Act.<sup>112</sup> Native American nations' immunity rests neither on the Constitution nor on a federal statute; rather, it has long been recognized as a matter of federal common law.<sup>113</sup>

Various rationales have been adduced for maintaining a sovereign's immunity from suit.<sup>114</sup> Immunity protects the sovereign's monetary resources<sup>115</sup> and permits those resources to be directed according to the decisions made by the political branches of the sovereign's govern-

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108. 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.”).

109. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”).

110. *See, e.g.*, Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 544-45 (2003) (“As early as the 1850s, the Court identified the appropriations power as the basis for requiring a specific statute authorizing awards of monetary relief against the treasury before judicial relief could be granted.”); Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 446-56 (2005) (discussing key Supreme Court decisions relating to federal sovereign immunity).

111. *See Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (citing “Chief Justice Marshall’s observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement”).

112. *See* Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at, *inter alia*, 28 U.S.C. §§ 1602-11 (2006)).

113. *See* Struve, *supra* note 1, at 148 (“[C]ommentators (and the Court itself) have assumed that the Supreme Court did not specifically recognize tribal sovereign immunity until 1919 at the earliest. However, the Court’s 1850 decision in *Parks v. Ross* displays reasoning strikingly similar to that found in sovereign immunity doctrine.”).

114. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216 (2001) (identifying and rejecting six possible rationales: “the importance of protecting government treasuries; separation of powers; the absence of authority for suits against the government; the existence of adequate alternative remedies; a curb on bureaucratic powers; and tradition”).

115. *See, e.g.*, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (“[T]he impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State’s treasury.”).

ment.<sup>116</sup> Immunity provides some measure of protection for the sovereign's discretion to determine how to govern, free of judicial interference. When the immunity protects one sovereign against private suits authorized by another, it may help to maintain the balance of authority between the two types of sovereigns—a value that the Supreme Court has stressed in supporting its expansive view of state sovereign immunity.<sup>117</sup> (However, the fact that government officials may be sued on federal claims for prospective injunctive relief<sup>118</sup> helps to ensure that, overall, the governments in question comply with the dictates of federal law.) And immunity can be argued to protect “dignity” interests of the government by preventing it from being dragged into court against its will by an individual.<sup>119</sup>

Against these arguments for sovereign immunity one must weigh the value of providing a judicial remedy to those whom a government has injured. Injured claimants deserve compensation. And, as Judith Resnik and Julie Chi-hye Suk have pointed out, a government shows most dignity when it takes responsibility for the harm it has done.<sup>120</sup> These arguments help to explain why governments—federal, state, and tribal—show a trend toward waiving their immunity to certain types of suits and for certain remedies.<sup>121</sup>

But all three types of governments continue to rely on immunity across a wide range of situations. And, as I and others have noted, the policy arguments in favor of tribal sovereign immunity seem stronger than

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116. See *Alden v. Maine*, 527 U.S. 706, 751 (1999) (stating that “the allocation of scarce resources among competing needs and interests lies at the heart of the political process”).

117. See, e.g., *id.* at 750 (“[A]n unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney’s fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design.”).

118. See *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (regarding state official). The Supreme Court has indicated that the same type of avenue exists for suits against tribal officials for prospective injunctive relief—but only, of course, if the plaintiff has a cause of action. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 70 (1978) (concluding that tribal sovereign immunity did not bar claim for injunctive relief against Pueblo’s governor but that non-habeas claims under Indian Civil Rights Act could be brought only in tribal court).

119. See, e.g., *Ex parte Ayers*, 123 U.S. 443, 505 (1887) (“The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.”).

120. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1928 (2003).

121. See, e.g., Lauren K. Robel, *Sovereignty and Democracy: The States’ Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 548-53 (2003) (discussing states’ trend toward narrowing state immunity from suit); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 744-48 (2002) (discussing provision of remedies by various tribes); Struve, *supra* note 1, at 156-60 (same).

those in favor of state or federal sovereign immunity. For example, protection against money judgments can be particularly vital for tribes, many of which have very limited resources.<sup>122</sup> And dignity-based arguments—which have been much criticized in connection with state sovereign immunity<sup>123</sup>—may be more persuasive with respect to tribal immunity.<sup>124</sup>

Even where sovereign immunity exists, it can be waived. A government may consent to be sued, and if it does so, then sovereign immunity will present no barrier to the suit. Of central importance to our analysis, a government can, under certain circumstances, waive its immunity (to at least some extent) by asserting a claim of its own.

Thus, if the federal government sues a defendant, that defendant can assert a counterclaim against the federal plaintiff arising from the same transaction.<sup>125</sup> Congress has set some procedural requirements for the defendant—it generally must show that the claim was presented to the Government Accountability Office and was disallowed<sup>126</sup>—but so long as

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122. See, e.g., Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal For Statutory Waiver For Tribal Businesses*, 79 VA. L. REV. 1345, 1349 (1993) (“Courts and commentators have justified the continued existence of tribal sovereign immunity primarily as a means to protect scarce tribal resources.”).

123. See, e.g., Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1040 (2000) (“The notion that respecting state dignity requires not merely regulating the forum but also restricting congressional power to authorize private suit at all is . . . difficult to integrate with the American constitutional tradition.”).

124. Cf. Resnik & Suk, *supra* note 120, at 1927 (arguing that “institutional dignity” can usefully “enabl[e] a fledgling organization—be it a court or a nation—to function”); *id.* at 1928 (concluding that dignity concerns do not justify sovereign immunity but conceding that “[a]ccommodations to respect institutional role-dignity and to facilitate governance may be crafted, for example, by courts limiting the kinds of remedies to be imposed or by shaping special formats for adjudication of disputes involving states”).

125. See *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994) (“In order to constitute a claim in recoupment (1) the claim must arise from the same transaction or occurrence as the plaintiff’s suit; (2) the claim must seek relief of the same kind or nature; and (3) the claim must seek an amount not in excess of the plaintiff’s claim.”); GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT: CASES AND MATERIALS* 958 (2000) (“[T]he courts generally have interpreted the implicit consent to a set-off by the defendant as limited to counterclaims that are both defensive in nature and related in substance to the government’s affirmative claim.”); Gil Seinfeld, *Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question*, 63 OHIO ST. L.J. 871, 888-89 (2002) (“The lower federal courts have qualified [the waiver] rule by explaining that the government’s waiver of immunity is restricted to claims arising out of the transaction upon which the government’s suit is based.”).

126. 28 U.S.C. § 2406 provides:

In an action by the United States against an individual, evidence supporting the defendant’s claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the Government Accountability Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the Government Accountability Office by absence from the United States or unavoidable accident.



the defendant complies with those statutory requisites it can reduce the government's recovery by the amount of the counterclaim. However, the counterclaim can serve only the defensive function of reducing the government's recovery; it cannot result in affirmative liability for the government.<sup>127</sup> Federal Rule of Civil Procedure 13(a)'s compulsory-counterclaim provision generally requires a defendant to assert any claim it has against the plaintiff "aris[ing] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Civil Rule 13(d), however, points out that "[t]hese rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency." Even if Civil Rule 13(d) did not exist, it would seem clear that Civil Rule 13(a) could not affect a government plaintiff's immunity from liability on a counterclaim. Sovereign immunity, though waivable, could be viewed as otherwise akin to a limit on subject matter jurisdiction,<sup>128</sup> and it is well established that the Civil Rules do not extend courts' subject matter jurisdiction.<sup>129</sup> Moreover, a Civil Rule that purported to alter the scope of sovereign immunity would seem to run afoul of the Rules Enabling Act's requirement that rules adopted through the rulemaking process "shall not abridge, enlarge or modify any substantive right."<sup>130</sup>

Similar, though apparently not identical, principles of waiver govern a state's immunity from suit. States, like other governments, can waive immunity from suit.<sup>131</sup> For example, in *Lapides v. Board of Regents of the University System of Georgia*,<sup>132</sup> the Court held that a state agency waived its immunity from suit by removing a case involving state-law claims on which

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28 U.S.C. § 2406 (2006). Statutory predecessors of § 2406 have existed since the late 1790s. For discussion of one such prior statute, see *United States v. Wilkins*, 19 U.S. 135, 143 (1821) ("The object of the act seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only, as the defendant in equity and justice should be proved to owe to the United States.").

127. See *United States v. Shaw*, 309 U.S. 495, 502 (1940) ("Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off."); *United States v. Eckford*, 73 U.S. 484, 489 (1867) ("Claims for credit in suits against persons indebted to the United States, if it appears that the claim had previously been presented to the accounting officers of the treasury for their examination, and had been by them disallowed, in whole or in part, may be admitted upon the trial of the suit, but it can only be admitted as a claim for a credit, and not as a demand for judgment.").

128. But see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1615-17 (2002) (arguing that Eleventh Amendment imposes limit on subject matter jurisdiction but that state immunity in cases not addressed by Eleventh Amendment can be viewed as implicating principles of personal jurisdiction rather than subject matter jurisdiction).

129. See FED. R. CIV. P. 82.

130. 28 U.S.C. § 2072(b).

131. See generally Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003).

132. 535 U.S. 613 (2002).

the agency would have been subject to suit in state court. As the *Lapides* Court explained,

It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the “Judicial power of the United States” extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the “Judicial power of the United States” extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.<sup>133</sup>

The *Lapides* Court distinguished both a case concerning the federal government’s liability on a counterclaim<sup>134</sup> and cases addressing similar questions concerning tribal-government plaintiffs,<sup>135</sup> explaining that

[t]hose cases . . . do not involve the Eleventh Amendment—a specific text with a history that focuses upon the State’s sovereignty vis-à-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (i.e., the United States) to seek the protection of its own courts (i.e., the federal courts), or an effort to protect an Indian tribe.<sup>136</sup>

It is, perhaps, because the principles governing state sovereign immunity are distinguishable from those concerning federal sovereign immunity that the scope of permissible counterclaims against state-government plaintiffs appears somewhat hazier. Some courts, admittedly, take the view that state-government plaintiffs should be treated like federal government plaintiffs, and thus that any counterclaim against the state must arise from the same transaction or occurrence as the state’s claim, must seek a similar type of relief as the state’s claim, and can only be used defensively.<sup>137</sup> But some other courts appear not to impose any requirement that the defendant’s counterclaim be limited to the amount sought by the state. So, for example, the Federal Circuit has held that when a state brings patent claims in federal court it thereby waives immunity with respect to any compulsory counterclaims.<sup>138</sup> And in a number of pre-2004 appellate cases, a

133. *Id.* at 619.

134. *See id.* at 623 (citing *United States v. Shaw*, 309 U.S. 495 (1940)).

135. *See id.* (citing *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), and *Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991)).

136. *Id.* at 623.

137. *See Texas v. Caremark, Inc.*, 584 F.3d 655, 659 (5th Cir. 2009); *see also id.* at n.1 (“[T]here is no reason to distinguish between waiver asserted by the United States and that asserted on the basis of state sovereign immunity.”).

138. *See Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1126 (Fed. Cir. 2003) (“[B]y filing suit for a declaration of patent ownership and inventorship based on certain contracts and conduct, UNM waived its Eleventh Amendment

circuit split developed concerning the effect of a state's decision to file a proof of claim in a bankruptcy proceeding, with at least one court determining that the state's filing of the proof of claim subjected it to the full amount of any counterclaims arising from the same transaction or occurrence.<sup>139</sup>

The Supreme Court's subsequent decisions in *Tennessee Student Assistance Corp. v. Hood*<sup>140</sup> and *Central Virginia Community College v. Katz*<sup>141</sup> may have diminished the need to resolve this particular question of waiver: *Katz*'s holding that "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts"<sup>142</sup> might reduce the need to rely on a waiver rationale to deal with counterclaims against a state that has submitted a proof of claim in bankruptcy. But the underlying views that gave rise to the circuit split continue to be of interest, to the extent that they suggest a willingness to subject states to somewhat more stringent ground rules than the federal government. The First Circuit, explaining its view that filing a proof of claim in bankruptcy subjects the state to the full amount of counterclaims arising from the same transaction or occurrence, noted that this conclusion subjected the state to "a Hobson's choice":

If the state chooses to file a proof of claim with the court, it exposes itself to liability arising from a compulsory counterclaim; if it declines to file a proof of claim, it will be permanently barred from collecting its debt or, for that matter, collecting a pro rata share of the bankruptcy estate.<sup>143</sup>

But the court nonetheless adhered to its conclusion concerning waiver, reasoning that "[e]ven the Eleventh Amendment . . . does not ensure a state the choice of a desirable alternative."<sup>144</sup> Perhaps this conclusion can be seen as particularly justifiable in the context of bankruptcy, where the focus must be on providing one centralized adjudication of claims relating to the debtor's estate.<sup>145</sup> But it is interesting to note that no similar imper-

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immunity with respect to all compulsory counterclaims arising from those contracts and conduct.").

139. *Compare* *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001) (concluding that "[11 U.S.C.] § 106(b) validly waives a state's Eleventh Amendment immunity with respect to the full amount of any compulsory counterclaims"), *with In re Friendship Med. Ctr., Ltd.*, 710 F.2d 1297, 1300-01 (7th Cir. 1983) (apparently reasoning in the alternative that waiver did not extend to counterclaims in excess of the state's claim). *See generally* Siegel, *supra* note 131, at 1225 n.316 (2003) (noting this apparent circuit split).

140. 541 U.S. 440 (2004).

141. 546 U.S. 356 (2006).

142. *Id.* at 378.

143. *Arecibo Community Health Care*, 270 F.3d at 29.

144. *Id.*

145. *Cf. infra* notes 148-149 and accompanying text (discussing in rem jurisdiction).

ative for centralized adjudication drove the Federal Circuit's determination that a state's patent suit subjects it to counterclaims arising from the same transaction or occurrence—even though such a holding could be seen to present the state with a similar Hobson's choice, given that patent claims fall within exclusive federal-court jurisdiction.<sup>146</sup>

Moving still further along the spectrum, Congress has subjected foreign nations suing in United States courts to somewhat broader liability on counterclaims. The Foreign Sovereign Immunities Act (FSIA) provides that

[i]n any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.<sup>147</sup>

The FSIA's distinctive feature, for our purposes, is that it lists options (b) and (c) in the disjunctive: a foreign state's assertion of a claim waives the nation's immunity from liability on a counterclaim to the extent that the counterclaim *either* arises out of the same transaction or occurrence *or* is limited to the kind and amount of relief sought by the nation itself.<sup>148</sup>

Having reviewed the treatment of claims by the federal government and by state and foreign governments, we can now turn to the treatment of similar questions in cases involving claims by Native American nations. An early case involving tribal sovereign immunity, *United States v. United States Fidelity & Guaranty Co.*,<sup>149</sup> indicates that tribes are treated the same as the federal government with respect to counterclaims. In *United States Fidelity & Guaranty*, the United States had filed a claim on behalf of certain Indian nations, and the Supreme Court held that the tribes' sovereign immunity applied in such a context because “[i]t is as though the immunity

146. See 28 U.S.C. § 1338(a) (2006).

147. *Id.* § 1607.

148. As to the transactional waiver, the House Report explained: “Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that transaction or occurrence.” H.R. REP. NO. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6622. The House Report stated that the setoff provision “codifies the rule enunciated in *National Bank v. Republic of China*, 348 U.S. 356 (1955).” *Id.* at 18.

149. 309 U.S. 506 (1940).

which was [the tribes'] as sovereigns passed to the United States for their benefit."<sup>150</sup> The government had conceded that a counterclaim could validly be used to diminish the government's recovery on the tribes' behalf.<sup>151</sup> But the Court roundly rejected the possibility that the waiver extended further than that:

The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.<sup>152</sup>

More recently, in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*,<sup>153</sup> the Court invalidated a state law under which a tribe "could not avail itself of state court jurisdiction unless it consented to waive its sovereign immunity and to have any civil disputes in state court to which it is a party adjudicated under state law."<sup>154</sup> The Court framed its analysis by stating that

not all conditions imposed on access to state courts which potentially affect tribal immunity, and thus tribal self-government, are objectionable. For instance, even petitioner concedes that its tribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit. . . . Petitioner also concedes that a non-Indian defendant may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a setoff or recoupment.<sup>155</sup>

The state law in question, however, was

unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws. By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for all matters occurring on the reservation, the statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws.<sup>156</sup>

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150. *Id.* at 512.

151. *See id.* at 511.

152. *Id.* at 513.

153. 476 U.S. 877 (1986).

154. *Id.* at 878.

155. *Id.* at 891.

156. *Id.*

In *Three Affiliated Tribes* the Court avoided deciding “[t]he extent to which respondent’s counterclaim may be used not only to defeat or reduce petitioner’s recovery, but also to fix the Tribe’s affirmative liability.”<sup>157</sup> But in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,<sup>158</sup> the Supreme Court rejected the contention that a tribe’s suit for injunctive relief against a state tax assessment waived immunity from the state’s counterclaims for injunctive relief and \$2.7 million in back sales taxes.<sup>159</sup> And a number of lower appellate court decisions support the view that a tribe’s assertion of a claim waives tribal sovereign immunity only to the extent that a counterclaim arises from the same transaction or occurrence, seeks relief that is similar in kind to that sought by the tribe, and operates defensively to reduce the defendant’s liability on the tribe’s claim.<sup>160</sup> The case law does include one nuance relating to in rem jurisdiction: some cases indicate that if a government invokes the court’s jurisdiction to determine the disposition of a res, then it may be held to have waived its immunity from any resulting determination concerning rights in that res. This principle appears to apply similarly to both the federal government<sup>161</sup> and tribal governments.<sup>162</sup>

Construing a tribe’s waiver of immunity more narrowly than similar waivers by states or foreign nations makes sense. For one thing, the scope of a foreign nation’s waiver as to counterclaims has been set by Congress; and Congress has, generally speaking, enacted no similar statute with respect to counterclaims against tribal plaintiffs.<sup>163</sup> For another, Native American tribes are situated very differently than either a state or a foreign country. Both states and foreign countries ordinarily can bring in their

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157. *Id.* at 891 n.\* (“We have no occasion to resolve this issue because the case comes to us before trial and we do not know the extent of the counterclaim asserted by respondent.”).

158. 498 U.S. 505 (1991).

159. *See id.* at 509-10.

160. *See, e.g., Berrey v. Asarco Inc.*, 439 F.3d 636, 644-45 (10th Cir. 2006); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552-53 (8th Cir. 1989).

161. *Cf. The Siren*, 74 U.S. 152, 154 (1868) (discussing government’s suit for condemnation of ship and explaining that “when [the United States] proceed in rem, they open to consideration all claims and equities in regard to the property libelled”).

162. *See United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1982) (treating limited fishing resources as res under federal court’s continuing equitable control, and concluding that tribe’s intervention therefore constituted consent to entry of decree enjoining it from fishing).

163. For an early example of one such statute, see Act of April 26, 1906, § 18, 34 Stat. 137, 144 (“Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.”).

own courts many of the claims that are most important to them. By contrast, as discussed in Part III, current federal Indian law prevents tribes from bringing many claims against nonmembers in tribal court. A tribe's choice to bring suit in a non-tribal court, therefore, is often much less a voluntary choice than an act of necessity.<sup>164</sup> And given that the scope of tribal sovereign immunity is broader in other respects than the scope of foreign sovereign immunity,<sup>165</sup> there is no incongruity in maintaining different frameworks for waiver of tribal sovereign immunity and waiver of foreign sovereign immunity.

## V. CONCLUSION

For Native American nations, sovereignty and litigation are closely linked—perhaps most obviously, because it was through litigation that the limits described in Part III of this Article were imposed on the tribes. Part II discussed another connection between sovereignty and litigation—namely, a government's interest in being able to sue in its own courts. For tribes, the limits summarized in Part III often impair this interest by barring a tribe from suing nonmembers in tribal court. In Part IV, I observed that when a tribe instead brings suit in a non-tribal court, that litigation may affect the tribe's sovereign interests in yet another way, by waiving the tribe's immunity from suit on possible counterclaims. I have argued that, in the light of the matters discussed in this Article, the scope of such a waiver should be narrower for tribal plaintiffs than it is for state or foreign government plaintiffs.

This is not to say that a tribe should leave a claimant without a forum in which to obtain affirmative relief on a valid claim. As I have argued elsewhere, it is salutary for a tribe to waive immunity from suit in its own courts in order to provide such a remedy. Though tribal courts may be foreclosed from hearing many claims by a tribe against nonmembers, they can provide a suitable forum for hearing claims by nonmembers against the tribe.

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164. *Cf.* Seinfeld, *supra* note 125, at 912 (“The decision to forego immunity from suit in order to gain a right of access to the federal courts (as a plaintiff, claimant, or otherwise) can be classified as voluntary only if one concedes that the cost of exclusion from the federal courts is not impossibly high. If the cost of exclusion were perceived as too high, then the choice to forego immunity would be no choice at all; rather, it would be the only possible response to the threatened sanction.”).

165. The Foreign Sovereign Immunities Act sets a number of exceptions to foreign sovereign immunity, including an exception for cases “in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2). By contrast, there is no commercial-activities exception to tribal sovereign immunity. *See* *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).