A 'Strikingly Anomalous,'
'Anachronistic Fiction': Off-Reservation
Sovereign Immunity for Indian Tribal
Commercial Enterprises*

TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................... 744

II. KIOWA AND ITS RECENT LEGACY ................................................................. 749
    A. The Case, Its Holding, and Its Effects ......................................................... 749
    B. The Nature of the Sovereign Immunity at Issue Here:
       Off-Reservation, Commercial Activity ..................................................... 752
    C. Trouble Areas: Places that This Will Reach ............................................. 754
    D. How Far Will It Go? Dixon, Ex parte Young, and Waiver as
       Possible Limitations .................................................................................... 757

III. THE CHANGING FACE OF SOVEREIGN IMMUNITY FOR FEDERAL,
    STATE, FOREIGN, AND TRIBAL GOVERNMENTS ........................................ 760
    A. Federal, State, and Foreign Governments: The Decline
       of Sovereign Immunity ................................................................................ 760
       1. The Federal Government as a Sovereign Entity .................................... 761
       2. States as Sovereigns ............................................................................... 762
       3. Foreign Governments ............................................................................ 763

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I. INTRODUCTION

To the outside observer, and even perhaps to those involved, cases involving a tribal entity and a non-tribal one may look like ordinary business dealings. For example, the tribal company involved may do construction, operate resorts, or anything else a non-tribal corporation might do. In one case, for instance, a corporation contracted to deliver goods onto a reservation and then receive payment. Payment never came, and the goods were not returned. When the corporation, United Linings, Inc., sued in state court, the suit was dismissed for lack of jurisdiction over the company. So it sued in tribal court, only to be

2. In fact, an assertion of sovereign immunity may defeat a state’s subject matter jurisdiction. This is because a state or even a federal court cannot assert jurisdiction over a sovereign entity, even if it may have the proper personal jurisdiction. See, e.g., Williams v. Lee, 358 U.S. 217 (1959). There, the Court held that the state court was without subject matter jurisdiction to adjudicate a lawsuit filed by a non-Indian trader against an on-reservation Indian couple for a debt allegedly incurred on the reservation. There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would
confronted with an impenetrable wall: sovereign immunity.\textsuperscript{4} The lawsuit could not proceed, and legal costs quickly overcame the amount due on the contract.\textsuperscript{5} Justice Stevens refers to such an immunity rule as "strikingly anomalous"\textsuperscript{6} and the doctrine behind it as an "anachronistic fiction."\textsuperscript{7}

infringe on the right of the Indians to govern themselves." \textit{Id.} at 223. \textit{See also} United States v. Land, Shelby County, 45 F.3d 397, 398 n.2 (11th Cir. 1995); Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir. 1994); Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 673 (9th Cir. 1993); Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), \textit{cert. denied}, 489 U.S. 1052 (1989).

3. \textit{See} United Linings, Inc. v. Vi-ikam Doag Indus., Inc., No. 98-C-7354 (Tohono O'odham Tribal Ct. 1998). Although the actual disposition of the case in the Judicial Court of the Tohono O'odham Nation is unknown, it is certain that Vi-ikam Doag (VDI) again asserted its sovereign immunity defense. Following this asserted defense, United Linings (ULI) filed a Motion for Reconsideration in state court, claiming that it had been misled. ULI claimed that VDI had mislead it into filing suit in tribal court by stating that a non-state court remedy was available, since tribal court was the proper place for the suit to be heard. ULI seems to have assumed that the sovereign immunity defense would not be asserted there. However, VDI responded:

VDI did not mislead this Court in any way. VDI's position regarding jurisdiction and sovereign immunity has not changed. VDI strongly protests the charge that it somehow "whipsawed" ULI or did anything else improper....

... VDI noted... that ULI's remedy was to "bring this action in the Tohono O'odham Tribal Court." VDI, however, neither represented nor implied that if ULI sued it in Tribal Court, VDI would withdraw or waive its sovereign immunity defense.


4. Sovereign immunity is [a] judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that "the King can do no wrong," it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.


5. One brief stated that "[t]he Defendant's attorneys seek $29,506.89 for attending a provisional remedy hearing, making a Motion to Dismiss and arguing that motion. All of that was done in a case where the prayer for relief that the Plaintiff seeks is approximately $32,000.00." Response and Opposition to Defendant's Application for Attorney's Fees and Costs at 3, United Linings, Inc. v. Vi-ikam Doag Indus., Inc. (Ariz. Super. Ct. 1998) (No. 324116).


Indian tribes enjoy sovereign immunity. The doctrine of tribal immunity also "extends to individual tribal officials acting in their representative capacity and within the scope of their authority." Tribes may create commercial enterprises that, for all intents and purposes, look like normal corporations. They have a charter and may have a “sue-or-be-sued” provision. However, such provisions are not necessarily self-executing. Thus, the corporation itself may enjoy sovereign immunity, and suits against it will be dismissed. Congress has authority under the "Indian Commerce Clause" to control the field of Indian law, including waiving sovereign immunity. Thus, unless the corporation or Congress explicitly waives this immunity for a particular contract, the corporation cannot be sued in state, federal, or even tribal court. Waivers rarely occur. Therefore, there is no remedy for potential


10. "Sue-or-be-sued" provisions are exactly that: a provision in a corporation's charter or articles of incorporation stating that nothing shall limit the ability of the corporation to sue or be sued. While on its face such a provision makes it sound as if the corporation is consenting to "be sued," many courts hold that this merely entitles the corporation to waive immunity in contracts if it so desires. See, e.g., Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D. Mont. 1978); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977). For a more complete description of such provisions, and waiver in general, see WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 91-95 (3d ed. 1998); Scott D. Danahy, Comment, License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses, 25 FLA. ST. U. L. REV. 679, 681-82 (1998); Steve E. Dietrich, Comment, Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution, 67 WASH. L. REV. 113, 127-28 (1992) (stating that "sue or be sued" provision in an ordinance can be an effective waiver).


12. Congress may "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.


14. One scholar has noted that "[d]espite market pressures, most tribes have chosen not to waive their sovereign immunity in commercial dealings." Lake, supra note 11, at 101.
victims.

This situation is exacerbated because such tribal corporations engage in the sorts of activities for which non-tribal corporations may normally be sued. Their employees may, for example, drive trucks off reservations and get into accidents. The tribally-owned corporation may issue promissory notes and then refuse to pay them back; operate a poorly-marked off-reservation marina park that caters to non-Indians; and operate ski lodges. While many of the corporations retain the names of their tribal owners, some have names like Mt. Adams Furniture, Capital International Bank & Trust, Clipper Seafoods Co., Pequot Pharmaceutical Network, and Picopa Construction Co. In addition, many tribes are represented by non-tribal management companies in their business dealings. Therefore, many non-tribal businesses may not even realize they are doing business with an Indian entity, much less a sovereign one.

The issue of sovereign immunity is becoming an increasingly important one as tribes that were traditionally impoverished and isolated reach out and do business around the country. On the one hand, tribes have been focusing on a few, specific businesses “includ[ing] ski resorts, gambling, and sales of cigarettes to non-Indians.” But more recently, as the 1998 Supreme Court case of Kiowa Tribe v. Manufacturing Technologies, Inc. notes, the “modern, wide-ranging tribal enterprises extend[] well beyond traditional tribal customs and activities.” This creates some initial difficulties. Non-tribal corporations may be hesitant

19. See Richardson (In re Greene) v. Mt. Adams Furniture, 980 F.2d 590 (9th Cir. 1992).
22. See Lake, supra note 11, at 101-02.
23. Kiowa, 523 U.S. at 758.
24. Id. at 751.
25. Id. at 757-58.
to do business with tribal corporations, which themselves may be hesitant to give up the powerful tool of sovereign immunity. Non-tribal corporations also face complex jurisdictional issues and may be required to sue in tribal court.

The situation was heightened by the recent Kiowa Supreme Court case, in which the Court extended the doctrine to its current state in holding that a tribally-owned corporation retains its sovereign immunity, even when it conducts non-tribally related commercial transactions off the reservation. Some commentators, and even some Supreme Court justices, had predicted that the doctrine would not extend this far. The Court, in a six to three decision, even stated, "There are reasons to doubt the wisdom of perpetuating the doctrine." In fact, Justice Kennedy, who wrote the opinion for the majority, spends much of the argument tearing the doctrine down, yet retaining it on the sole principle that Congress has yet to speak clearly on the topic. This leaves the Court open to criticism: why extend a doctrine that may well be "harmful" and "anachronistic"?

In spite of such "doubt," businesses and ordinary people will find themselves running up against the doctrine more and more in the future. This Comment argues that Kiowa was wrong in widening the doctrine in this way, an expansion that is already being followed in courts throughout the country. Part II explores the Kiowa doctrine and what it means, and also argues against further expansion of the doctrine.

26. See supra note 14 and accompanying text; see also Danahy, supra note 10, at 700 (on waiving sovereign immunity); Charles R. Zeh & Treva J. Hearne, Development Considerations on Indian Lands, 13 NAT. RESOURCES & ENV'T 350, 351-52, 371 (1998) (citing a specific example of a tribe creating a corporation that waives its immunity, so that the tribe itself can maintain its own immunity).


28. See Reynolds, supra note 27, at 540-51, 598-601. Such jurisdictional issues, however, are beyond the scope of this Comment.

29. Kiowa, 523 U.S. at 760.


31. Kiowa, 523 U.S. at 758.

32. See id. at 759-60.

33. Id. at 758.

34. Potawatomi, 498 U.S. at 514 (Stevens, J. concurring).
limiting it, for example, in a manner recommended by an Arizona Supreme Court case, Dixon v. Picopa Construction Co. This is particularly important given the areas sovereign immunity affects, particularly commercial transactions, employment, and tort litigation. Part III shows that such immunity is inconsistent with the changing nature of sovereignty recognized by the federal government and by the states, and perhaps throughout the world. Part IV will outline the arguments raised for and against the necessity and legality of the doctrine, and Part V will outline some recommendations for businesses, courts, individuals, and Congress.

II. Kiowa and Its Recent Legacy

A. The Case, Its Holding, and Its Effects

On May 26, 1998, the United States Supreme Court handed down a decision which set the doctrine of tribal sovereign immunity for off-reservation commercial activities in stone until Congress may choose to change it. The facts were relatively simple. The tribe had formed an industrial development commission, which agreed to buy stock from the plaintiff. The commission issued a promissory note in the tribe’s name. The tribe then defaulted; plaintiff sued, and ultimately lost when the tribe asserted sovereign immunity. Plaintiff had argued that immunity

36. See Kiowa, 523 U.S. at 751.
37. The doctrine of sovereign immunity for tribal corporations had already received support from a number of cases, including Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Sac and Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995), cert. denied, 516 U.S. 810 (1995); Richardson (In re Greene) v. Mt. Adams Furniture, 980 F.2d 590 (9th Cir. 1993), cert. denied, 510 U.S. 1039 (1994); Morgan v. Colorado River Indian Tribe, 443 P.2d 421 (Ariz. 1968). See CANBY, supra note 10, at 89.
should not apply when the tribal entity was involved in a commercial venture off the reservation. Plaintiff argued in the alternative that conducting commercial activities off tribal lands constituted a waiver. The Court asserted, "[t]o date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." The Court stated further, "[n]or have we yet drawn a distinction between governmental and commercial activities of a tribe." The manner in which these two issues were resolved in Kiowa served to extend tribal sovereign immunity beyond its prior state by permitting tribes to create corporations that can engage in non-governmental business off the reservation and to avoid being sued for any of their acts. No contracts can be enforced against such corporations if they have not waived their immunity. Certainly, the immediate upshot of this is that one should be careful accepting promissory notes from corporations owned by the Kiowa Tribe of Oklahoma. Obviously, however, given the number of tribes and their far-reaching business activities, this has greater potential than that indicated in one case to cause harm.

For example, immediately after Kiowa, other courts, bound by Kiowa, have held tribal corporations immune from suit under similar circumstances. While several of the cases involve employment issues, their holdings are based on the same rationales in Kiowa regarding immunity for off-reservation commercial activity. In Burnham v. Pequot Pharmaceutical Network, for instance, the plaintiff sought to sue his employer and his superiors when he was fired from his job as a pharmacist at PRxN. Pequot Pharmaceutical Network is a tribal entity

40. See id. at *10-13.
41. Kiowa, 523 U.S. at 754.
42. Id. at 754-55.
that operates PRxN as a for-profit business off the reservation in Connecticut. PRxN does no business on the reservation. Despite Burnham’s allegations that he had been guaranteed a “secure” position and grievance procedures by the employee handbook, the suit against the tribal entity was dismissed in light of *Kiowa*. Meanwhile, Burnham was permitted to maintain his suit against individual defendants, since he had alleged that they had acted beyond the scope of their authority. Interestingly, all of the other defendants, Burnham’s superiors, were Connecticut residents who were not tribal members. If they were deemed to have acted within the scope of their authority, it appears they too would enjoy the tribe’s immunity.

In another case, *Chance v. Coquille Indian Tribe*, another employment-related matter ended without reaching the merits of the claim. Chance was hired by the president of a corporation owned by the tribe, and sued when he was fired. Despite various waiver theories advanced by the plaintiff, the tribe claimed immunity in light of *Kiowa* and won. The corporation’s own charter said that the corporation could consent to be sued. Furthermore, the employment contract itself stated, “CEDCO and the Coquille Indian Tribe grant limited sovereign immunity only for the enforceability of this contract.” The corporation’s president himself intended this to be a waiver, and was himself a tribal spokesman authorized to enter into contracts on the corporation’s behalf. However, the court held that, since he had not been given authority to waive immunity, he could not have done so. Approval by the corporation’s board of directors was required.

In *Calvello v. Yankton Sioux Tribe*, the manager of a gaming casino sued when he was fired, but the claim was dismissed in light of *Kiowa*. The contract contained an arbitration clause; however, the contract had only been approved by the Tribal Chairman. According to the tribe’s constitution, such contracts must be approved by the General Council, which is composed of all adult members of the tribe. The tribe, via its

45. *See id.* at *5 n.7.
46. The court stated that “[t]he doctrine of tribal immunity ‘extends to individual tribal officials acting within their representative capacity and within the scope of their authority.’” *Id.* at *4* (quoting Romanella v. Hayward, 933 F. Supp. 163, 167 (D. Conn. 1996), aff’d, 114 F.3d 15 (2d Cir. 1997) (quoting Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 478 (9th Cir. 1985))).
47. 963 P.2d 638 (Or. 1998).
48. *Id.* at 640.
49. *See id.* at 640-41.
Chairman and its Tribal Counsel, even participated in arbitration. However, the court held that this did not bind the tribe since it had not approved the action. Even the gaming compact with the state was held not to have waived tribal immunity for this action.51

In Strader v. Verant,52 when gamblers tried to sue state officials alleging breach of a duty to enforce anti-gambling statutes, the entire claim was dismissed when the Supreme Court of New Mexico held that Indian tribes were indispensable parties that could not be joined because of sovereign immunity under Kiowa and other cases.53 Thus, the action was dismissed. In Thompson v. Crow Tribe of Indians,54 the tribe itself had filed tax liens off the reservation against an individual who owned a business on the reservation. That individual attempted to fight the liens, but the court held that tribal immunity had not been waived, even by initiation of proceedings off the reservation.55

Obviously, Kiowa has had wide-ranging effects in various areas, and will continue to do so in the future. Before considering all the areas into which Kiowa may reach, it is first important to explore the significance of the sovereign immunity doctrine itself.

B. The Nature of the Sovereign Immunity at Issue Here:
Off-Reservation, Commercial Activity

It is critical to frame the particular nature of the grant of sovereign immunity at issue in Kiowa. In such an instance as that presented in Kiowa, a tribe creates a corporation to conduct off-reservation business of any sort. That corporation then claims sovereign immunity to any actions brought against it. This is particularly significant because the corporate entity and the sovereign entity are distinct, yet the tribe’s sovereign status attaches to the corporation. In the case of Kiowa, the corporation was a tribal economic development council, but, in other cases, the corporation is a purely for-profit enterprise having nothing to do with tribal self-governance. These corporations, therefore, are completely independent bodies, doing business in the territory of another sovereign. This would seem to justify a ruling that no sovereign immunity exists.56

51. See id. at 110-16.
52. 964 P.2d 82 (N.M. 1998).
54. 962 P.2d 577 (Mont. 1998).
55. See id. at 581-82.
56. For the application of this idea to states, see Nevada v. Hall, 440 U.S. 410,
The Kiowa immunity is so startling not only because of its possible effects on those who come in contact with the tribe, but also because it appears to directly contravene prior Supreme Court leanings and policy. For example, in Mescalero Apache Tribe v. Jones, the Court held that activities conducted by the Mescalero Band off the reservation were subject to non-discriminatory state taxes. In a concurring opinion in Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe, Justice Stevens pointed out, “[n]evertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe’s conduct of commercial activity outside its own territory.” In fact, the majority in Potawatomi went to great lengths to show that there was no distinction between activities on a reservation, which is the typical scenario, and the facts of the case, in which the activity occurred on trust land. Had the Court believed that the on-reservation/off-reservation distinction was irrelevant, as it did in Kiowa, it need not have even bothered with the reservation/trust land distinction. Furthermore, the conduct in both Turner v. United States and United States v. United States Fidelity & Guaranty Co., two of the most important cases on tribal sovereign immunity, involved conduct that had occurred on the reservation, not

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57. See infra Part II.C., where such instances are considered.
60. 498 U.S. 505 (1991). In Potawatomi, Oklahoma levied a tax on cigarettes sold on land held in trust for the tribe. However, the tribe had never collected the tax. When the State demanded payment, the tribe sued to enjoin relief, and the State counterclaimed to enjoin future sales unless the tribe collected the tax. The Court, in finding the tribe immune from suit, held that although the State could levy such a tax against nonmembers of the tribe, it could not force the tribe to collect the tax. See id. at 505.
61. Id. at 515 (Stevens, J., concurring).
62. See id. at 512. Trust land refers to land held in trust for an Indian tribe by the federal government. It may include both reservation and off-reservation land. In this case, the Court held that the distinction between trust land and reservation land was irrelevant for the purposes of sovereign immunity; rather, the significance was “whether the area has been ‘validly set apart for the use of the Indians as such, under the superintendence of the Government.’” Id. at 511. The Court held that any land held in trust had been “validly set apart” and thus qualifies as a reservation for tribal immunity purposes.” Id. (citations omitted).
63. 248 U.S. 354 (1919).
64. 309 U.S. 506 (1940) [hereinafter USF&G].
Providing sovereign immunity for commercial activity seems contrary to current sovereignty law. For example, distinctions are made for foreign governments, states, and the federal government when they enter the commercial arena.

C. Trouble Areas: Places that This Will Reach

Such a broad immunity for tribal entities will have a significant impact in many areas. The first and most obvious impact concerns commercial ventures like the one in Kiowa. What if the more than 320 federally recognized tribes each sent tribal corporations into each of the fifty states to do business, free from the fears of lawsuits? With a majority of the states now home to high stakes tribally-owned casinos, the possibilities for business problems are endless. Immunity has far-reaching implications in other areas as well. Employees of such corporations will be unable to sue, for example, for sexual harassment. Tort claims become impossible under these circumstances. Waiver is not available in tort claims, and potential

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65. For further discussion of these two cases, see infra Part III.B.1. See also Kiowa Tribe v. Manufacturing Tech., Inc., 523 U.S. 751, 762 (1998) (Stevens, J., dissenting) (pointing out that Turner and USF&G involved on-reservation conduct).

66. See infra Part III.A.1-3 for more on commercial distinctions for foreign, state and federal governmental entities. See also McLish, supra note 30, at 191.


69. See, e.g., Burnham v. Pequot Pharm. Network, No. CV 9536264, 1998 WL 345463 (Conn. Super. Ct. June 19, 1998) (in non-sexual harassment case, wrongful termination claim dismissed, demonstrating that suing tribal employers under other circumstances such as for sexual harassment would be impossible); see also Danahy, supra note 10 (discussing sexual harassment and other employment cases); Lake, supra note 11, at 104 & 105 n.88 (citing Gavle v. Little Six, Inc., 534 N.W.2d 280 (Minn. Ct. App. 1995) (holding that tribal corporation was immune from suit for sexual harassment, pregnancy and race discrimination, civil rights violations, and other torts)).

70. As Justice Kennedy noted, "In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." Kiowa, 523 U.S. at 758 (emphasis added).

For a detailed exploration of tort claims, see Danahy, supra note 10, at 700 n.198 (citing several accidents on reservations, reported in an L.A. Times article, in which sovereign immunity caused dismissal of the claims). See also Lake, supra note 11, at 105 n.87; Alan Abrahamson, Tribes' Immunity Sparks Criticism, L.A. TIMES, July 29,
victims may have insufficient notice that they are dealing with immune entities. Although a victim could sue the individual at fault, say, in a trucking or boating accident, the doctrine of respondeat superior is inapplicable. In *Morgan v. Colorado River Indian Tribe*, a child was killed at a marina owned by the tribe. The parents could not sue the tribe for alleged poor demarcation lines. If a tribal corporation employee drove a truck off the reservation and was involved in an accident, the tribe would enjoy immunity. Respondeat superior would again be defeated. Slip and fall accidents are inevitable at casinos and construction sites, yet there would be little recourse for injured patrons or workers. Justice Stevens seems particularly concerned about the plight of tort victims, as evidenced in his dissent in *Kiowa*:

> [T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

Immunity also creates some procedural difficulties, especially considering rules on compulsory jurisdiction and indispensable parties. For example, if a tribe were to sue an individual or an entity, and there was a compulsory counterclaim, that claim could not be asserted. While lawsuits have in some instances been held to waive immunity, this is far from a settled issue. In a case following *Kiowa*, plaintiffs sued a number of defendants over gambling issues. The tribes were held to be indispensable parties to the action, but could not be joined because they enjoyed sovereign immunity, and so the whole claim was dismissed.

There are also bankruptcy ramifications, commerce clause issues,

71. 443 P.2d 421 (Ariz. 1968).
72. See id.; see also Lake, supra note 11, at 105 n.87; McLish, supra note 30, at 173.
74. *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting).
76. See Richardson (*In re Greene*) v. Mt. Adams Furniture, 980 F.2d 590, 598 (9th Cir. 1992) (holding tribe immune from suit by bankruptcy trustee for off-reservation commercial activity in operation of furniture store).
and anti-trust potential. The effect on water rights is unknown.\textsuperscript{78} There may be serious ramifications for cross-boundary nuisance, such as pollution or lights from casinos. A tribe may in such instances be acting from within its own boundaries, although the effects of its activities are off-reservation. Yet immunity would be retained and the state might be powerless. Or what if, for example, a wealthy tribe formed a large, national corporation that started acquiring off-reservation businesses? Would those corporations get the immunity too? Or perhaps wealthy, non-Indian businesses can strike deals with tribes to cover their corporations with the immunity blanket. These questions remain unsettled.

Furthermore, the doctrine of sovereign immunity is a virtual “Pandora’s Box” for states in their dealings with tribes, as tribes may be able to override or ignore state law. The problems arising from \textit{Kiowa} were hinted at in an earlier case, \textit{Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe}.\textsuperscript{79} In \textit{Mescalero Apache Tribe v. Jones},\textsuperscript{80} the Court held that states could tax tribal corporations doing business off the reservation.\textsuperscript{81} In \textit{Potawatomi}, however, the Supreme Court indicated that although states could assess taxes on tribes under certain circumstances, they might be powerless to collect the taxes because of the tribe’s sovereign immunity.\textsuperscript{82} This appears to go against the Court’s landmark holding in \textit{International Shoe Co. v. Washington},\textsuperscript{83} i.e., that the jurisdiction to regulate, and specifically the jurisdiction to tax, provides jurisdiction to enforce that tax.\textsuperscript{84}

Such immunity gives rise to potential nightmares. For example, during petitioner’s oral argument in \textit{Kiowa}, the Supreme Court posed an interesting hypothetical: “[S]uppose the tribe goes [to] downtown Tulsa and they buy a piece of property and open an office, and the taxes are $4,000 a year, and they don’t pay, right. Can the city or the State sue the tribe and get the taxes?”\textsuperscript{85} Both the Justice and counsel for petitioner agreed that neither the state nor the city could bring the tribe, or its corporation, to court to collect the taxes. Another question posed further

\begin{itemize}
  \item \textsuperscript{78} For a succinct description of water rights issues, see \textit{Canby}, \textit{supra} note 10, at 400-18.
  \item \textsuperscript{79} 498 U.S. 505 (1991).
  \item \textsuperscript{80} 411 U.S. 145 (1973).
  \item \textsuperscript{81} \textit{See id.} at 148-49.
  \item \textsuperscript{82} \textit{See Potawatomi}, 498 U.S. at 514.
  \item \textsuperscript{83} 326 U.S. 310 (1945).
\end{itemize}
hypotheticals that yielded the same result: “Maybe they have oil bubbling up underneath the basement, violating environmental laws. Can you get an injunction? What about a fine? What about taxes, and what about the rent?” All of these appear to have the same resolution under Kiowa: the state will not be able to enforce any of its laws against the tribe, even though the tribe is doing business within the state itself.

On the one hand, the state can still act against individual officers if they are breaking the law by exercising jurisdiction over the individual. However, enforcement of state law may be limited based on sovereign immunity. For example, if a tribal officer is speeding in a tribal corporation-owned truck, on corporate business, then that driver can be stopped and ticketed. But if state law would normally authorize seizing the truck, the police would be unable to do so.

D. How Far Will It Go? Dixon, Ex parte Young, and Waiver as Possible Limitations

Given the potential trouble areas described above, it is important at this point to consider the farthest reaches of the Kiowa immunity, and possible ways for states, businesses, and individuals to head off problems. On the one hand, Kiowa would seem to suggest unlimited sovereign immunity, not subject to much, if any, review by the courts. However, courts and litigants have made inroads to curtail the doctrine and prevent it from becoming too strong.

As noted, there is the possibility of some future tribal corporation buying up non-tribal corporations, then doing business off-reservation and claiming immunity. Kiowa does not approach this potential problem. As early as 1989, the Supreme Court of Arizona was wrestling with Kiowa-like questions in Dixon v. Picopa Construction Co. It is

86. Id. at *12-13.
87. For the origin of this hypothetical, see id. at *21. The Justice who raised this scenario as a hypothetical during oral argument was apparently drawing a distinction between individual property and tribal property. Seemingly, the individual property could be seized, while the tribal property, belonging to a sovereign entity, cannot legally be seized.
88. See supra Part II.C.
89. Note that this section only considers the basics of possible methods of hemming in the Kiowa immunity; for further developed recommendations for courts, businesses, states, and practitioners, see infra Part V.
90. See supra Part II.C.
one of the few cases to find *against* a grant of immunity.\textsuperscript{92} The case was not appealed to the U.S. Supreme Court, but the court’s analysis bears a closer look, and may provide both courts and practitioners with arguments that provide a means of scaling the nearly insuperable wall of *Kiowa*.

*Dixon* attacks sovereign immunity by questioning whether the corporation at hand is even enough of a part of the tribe to properly assert sovereign immunity. This case was a tort action involving a truck driven off the reservation and owned by a tribal construction corporation, which itself operated off the reservation. The court held that the corporation was not a “subordinate economic organization” of the tribe, in spite of the fact that the tribe owned all of its stock. In holding that the corporation was not an arm of the tribe, the court looked to several factors: (1) “a board of directors, separate from the tribal government, which exercises full managerial control over the corporation;” (2) “the purchase of general liability insurance covering Picopa’s negligence and the limited liability clause found in Picopa’s charter insulate the Community’s assets from Picopa’s debts;”\textsuperscript{93} (3) “the ordinance’s express declaration that the Community formed Picopa solely for business purposes;” (4) the corporation was formed “without any declared objective of promoting the Community’s general tribal or economic development” and “was simply a for-profit corporation involved in construction projects” that had not “limited itself to tribal projects;” (5) the charter did “not require that either board members or corporate officers be selected from among Community officers or even members;” and (6) the corporation held “title to any acquired property in its own name and not in the Community’s.”\textsuperscript{94}

*Dixon* has never been specifically overruled, although its distinctions regarding governmental purposes versus general business purposes would be void under *Kiowa*.\textsuperscript{95} However, it does help in answering questions about how far the immunity will go, since it suggests a line of attack against a corporation that has grown far afield of the tribe. *Dixon*

\begin{itemize}
\item 92. For further analyses of this case, see Lake, *supra* note 11, at 94-96, and Canby, *supra* note 10, at 94-95. For another case finding against sovereign immunity, see *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (holding that sovereign immunity did not apply to off-reservation activities and recognition of another sovereign’s immunity was solely a matter of comity; this idea was not advanced by the Court in *Kiowa*, however).
\item 93. The presence of insurance was deemed evidence that the entity was not a subordinate economic unit, but insurance itself does not waive the immunity. See *Dixon*, 772 P.2d at 1109-10.
\item 94. Id. at 1108-10.
\item 95. The Supreme Court stated that “[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities.” *Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 U.S. 751, 760 (1998).
\end{itemize}
may be a useful shield if tribes begin creating large, off-reservation corporations or buying a corporation and then claiming immunity for that corporation.

Besides Dixon, two other approaches provide some hemming in of the nearly infinite reach given immunity in Kiowa. Plaintiffs can attempt to get around sovereign immunity, either by suing individual defendants or by proving a waiver has taken place. Both avenues are rife with problems. In suing individual defendants, a plaintiff must show those individuals acted outside the scope of employment, not merely beyond their authority. The plaintiff succeeded in Burnham, but only in getting past the motion to dismiss stage.96 Under Ex parte Young,97 a state officer may be sued in federal court for prospective injunctive relief to stop that officer from violating rights guaranteed by a federal statute. While the Ex parte Young doctrine may be helpful in framing suits facing sovereign immunity,98 it does not provide for damages, only for injunctive relief. In addition, the doctrine has been weakened somewhat in cases like Seminole Tribe v. Florida99 and Idaho v. Coeur d'Alene Tribe.100

Waiver is another method used to cut back at the outer limits of Kiowa immunity. However, proving a waiver of sovereign immunity is nearly impossible. All such waivers are strictly construed. Under the standard articulated in Santa Clara Pueblo v. Martinez,101 waivers will not be implied, and must be unequivocally expressed.102 A waiver cannot be

97. 209 U.S. 123 (1908). The Ex parte Young doctrine, as it is known, established the ability of litigants to enjoin state officers from continuing acts of illegality.
98. Instead of suing the tribe and facing certain defeat, litigants could sue tribal officials and enjoin them from acting contrary to state and federal law. For example, if the officials were imposing a tax in violation of federal law, the taxpayer could sue to enjoin enforcement. See, e.g., Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1133-34 (9th Cir. 1995); Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991), cert. denied, 505 U.S. 1212 (1992); CANBY, supra note 10, at 90.
99. 517 U.S. 44 (1996) (holding that Ex parte Young doctrine does not apply where intricate remedial measures are already contemplated by Congress, as under the Indian Gaming Regulatory Act).
100. 521 U.S. 261 (1997) (holding that Ex parte Young doctrine does not apply in areas of special sovereignty interests, such as quiet title actions involving the state). Ironically, both Seminole and Coeur d'Alene involved tribes blocked from suing states by Eleventh Amendment sovereign immunity.
102. See id. at 58-59. In this case, the Court held that Congress had not waived
implied merely by entering into a contract or by submitting to arbitration, or even via a gaming compact. In *Calvello v. Yankton Sioux Tribe*, the tribe initially submitted to arbitration, had an oral contract with an employee and a compact with the state, yet none of these actions waived immunity. Even a “sue-or-be-sued” provision does not state a waiver clearly enough, according to most courts. Furthermore, those doing business with tribes must be certain they obtain a perfectly clear waiver. Even more confusing, those doing business must be certain to obtain the waiver from the proper tribal authority. In *Chance v. Coquille Indian Tribe*, the plaintiff obtained a waiver from the president of the tribe’s management corporation; however, the waiver had to be approved by the corporation’s board of directors and therefore was invalid.

The difficulties in bringing arguments under *Dixon, Ex parte Young*, and waiver, as discussed above, highlight the breadth of immunity granted in *Kiowa*. Obviously, ordinary business sense will necessitate contracting properly for clear waivers but, as noted, some litigants will simply not have that choice. The breadth of the immunity is particularly apparent considering the relatively narrow immunity currently enjoyed by other sovereigns. This issue is considered in the next section.

III. THE CHANGING FACE OF SOVEREIGN IMMUNITY FOR FEDERAL, STATE, FOREIGN, AND TRIBAL GOVERNMENTS

A. Federal, State, and Foreign Governments: The Decline of Sovereign Immunity

While a complete analysis of the changing face of sovereign immunity in this nation is beyond the scope of this Comment, it is useful to sovereign immunity with the Indian Civil Rights Act, contrary to the rulings of numerous lower courts. At issue was a tribal ordinance which denied tribal membership to children of female tribal members who married outside the tribe, while granting it to children of male members who married outside the tribe. Thus, a female tribal member was not allowed to sue on an Equal Protection claim. The Court held that only the writ of habeas corpus was given a specific remedy in the statute, and so only in that area had Congress waived tribal sovereign immunity. Courts have construed this as being an extremely strict waiver requirement. See id.

104. See id. at 112-13.
105. See supra note 10.
106. See, e.g., Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991).
107. 963 P.2d 638 (Or. 1998). This case is also notable because it is one of the first to cite *Kiowa* as binding.
108. See id. at 640-41.
consider the expanding nature of tribal sovereign immunity in relation to state and federal sovereign immunity. Most significantly, although federal and state governments could enjoy sovereign immunity in virtually every area, it is yielded in many important ways. Though they certainly maintain it as something of a shield in some instances, the choice to give it up is evidence of a modern governmental trend that is contrary to the maintenance of immunity for tribes. Though tribes could choose to follow suit by waiving immunity, they do not appear to have done so. This modern trend of yielding sovereign immunity by federal and state governments is a result of practicality and reasonableness as well as political forces. In addition, the United States has chosen to alter its treatment of foreign sovereigns in some instances. As a result, tribal governments enjoy more immunity in U.S. courts than federal, state and foreign governments. According to Justice Stevens, “In my opinion all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct.” Yet even as immunity is cut back for federal, state and foreign governments, it is increasing for tribes.

1. The Federal Government as a Sovereign Entity

As the sovereign, the federal government cannot be sued at all without its express waiver. Yet in many instances the federal government has in fact chosen to do just that. Most significantly, Congress has limited the sovereign immunity for tort liability via the Federal Tort Claims Act and for liability arising out of its commercial activities via the Tucker Act. The federal government also allows suits for violations of the Bill of Rights. In direct contradiction to the immunity held for tribal corporations, corporations created by the federal government have been

held not to have the same sovereign immunity as the federal government. Only Congress can grant these corporations immunity.\textsuperscript{114} In addition, the federal government may allow qui tam actions, in which citizens may bring suit on behalf of the government for violations of law.\textsuperscript{115}

2. States as Sovereigns

Like the federal government, the states are essentially immune from suit without express permission. While the federal immunity is rooted in implicit recognition of the sovereign, state sovereign immunity is required by the Eleventh Amendment: \textquote{\textquoteright\textquoteleft 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\textquoteright\textquoteright}.\textsuperscript{116}

This has been interpreted as providing immunity against suits even from a State\textquote{l}s own citizens, although states can sue states and the United States retains the non-delegable\textsuperscript{117} power to sue States. Yet states have waived their immunities in many instances, from tort claims to contract actions and state constitution suits. Also, such immunity has been impinged in different ways. For example, the \textit{Ex parte Young} doctrine permits suits against government officials to enjoin actions in violation of law. Under the precedent set in \textit{Nevada v. Hall},\textsuperscript{118} a state retains its sovereignty only within its borders, yielding it when the state or its employees enter the domain of another sovereign.

In addition, even though a tribe automatically extends its immunity to entities it forms, the same is not true for states. For example, a county does not have standing to assert a state\textquote{l}s Eleventh Amendment

\begin{footnotes}
\item 114. \textit{See} Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 389 (1939); \textit{see also} McLish, supra note 30, at 176 (noting that federal corporations do not hold the immunity unless Congress specifically grants it to them); \textit{CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS, AND EMPLOYEES} 5 (Jon L. Craig ed., 2d ed. 1992) (noting that immunity does not automatically apply to federally created corporations).

\item 115. \textquote{Qui tam pro domino rege quam pro si ipso in hac parte sequitur} means \textquote{Who sues on behalf of the King as well as for himself.\textquoteright} \textit{BLACK\textquotesingle S LAW DICTIONARY} 1251 (6th ed. 1990). Under this doctrine, an individual may be permitted by statute to sue on behalf of himself as well as for the government, and is permitted to retain part of the penalty recovered. \textit{See id.}

\item 116. U.S. CONST. amend. XI.

\item 117. \textit{See} Seminole Tribe v. Florida, 517 U.S. 44, 47, 55-73, 76 (1996) (stating that the United States cannot delegate its power to sue states to Indian tribes, effectively invalidating a significant portion of the IGRA).

\item 118. 440 U.S. 410, 416-27 (1978) (holding that immunity is not recognized for Nevada state employee\textquote{l}s car accident in California).
\end{footnotes}
sovereign immunity. In *In re Merry-Go-Round Enterprises, Inc.*, the County, as a mere subdivision of a state, could not use the state's Eleventh Amendment immunity to preclude the bankruptcy court from adjudicating the secured nature of a claim which it had filed in a debtor-taxpayer's case. To claim such an immunity, the County would have to show it was "the arm or alter ego of a State." Furthermore, in this case, the County had waived any immunity it might have claimed by filing proof of claim with the bankruptcy court. By way of contrast, courts have held that tribal involvement in arbitration and litigation does not waive its immunity.

3. **Foreign Governments**

At one time, foreign governments enjoyed absolute immunity against suits in the courts of the United States. This right, like that of tribal immunity, was developed by the Supreme Court. Congress has since limited such absolute immunity via the Foreign Sovereign Immunities Act. While the Act still allows foreign sovereign immunity for governmental acts, it makes a clear distinction for commercial activities carried on in the United States, or such activities elsewhere that have a "direct effect in the United States." While a foreign sovereign might of course refuse to appear in court, its commercial entity may not have a choice, since it may have assets in the United States which can be seized.

120. See id. at 777.
121. Id. at 778.
122. See id. at 779.
123. See, e.g., Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108, 112 (S.D. 1998) (holding that casino participation in arbitration proceedings does not waive its tribal sovereign immunity; nor did a contract or a gaming compact).
124. See Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). This case's holding, permitting immunity from suit in United States courts for a foreign sovereign's vessel of war, has extended virtually absolute immunity to sovereigns. See id. at 145; see also McLish, supra note 30, at 176.
B. Indian Tribal Sovereign Immunity: The Expansion of Sovereign Immunity

1. History

The doctrine of Indian tribal sovereignty has varied widely throughout U.S. history based on statutes, case law, and particular federal policies existing at a given time. This section\textsuperscript{127} considers only that history which is necessary as a background to the issues leading up to the doctrine of sovereign immunity\textsuperscript{128} for tribally-created commercial entities doing business off the reservation,\textsuperscript{129} particularly in light of the discussion of history in \textit{Kiowa}.\textsuperscript{130}

Any discussion of sovereign immunity, particularly its history in the courts, must start with the classic triumvirate of Supreme Court cases: \textit{Johnson v. McIntosh},\textsuperscript{131} \textit{Cherokee Nation v. Georgia},\textsuperscript{132} and \textit{Worcester v. Georgia}.\textsuperscript{133} To start at the beginning of the Supreme Court’s analysis of tribal sovereignty is to start with the narrow view expressed in \textit{Johnson}. Here, the Court set forth the idea that the federal government allows tribal immunity as a matter of discretion. Tribes’ sovereignty was deemed “necessarily diminished” by the discovery of North America by the Europeans.\textsuperscript{134}

\textit{Cherokee Nation} also provides a somewhat narrow view of Indian sovereignty, even referring to the tribes as “domestic dependent nations.”\textsuperscript{135} On the one hand, this had the effect of subjugating the tribes. According to Justice Marshall, “they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.”\textsuperscript{136} On the other hand, it brought out the idea that they were in fact nations—of a sort. The tribe was “a distinct political society, separated

\begin{itemize}
\item \textsuperscript{127} See also \textit{infra} Part IV.A.2 for more on history in the context of \textit{Kiowa}.
\item \textsuperscript{128} For concise histories focusing on tribal sovereign immunity, see \textit{Canby}, \textit{supra} note 10, at 68-95; \textit{McLish}, \textit{supra} note 30, at 178-80.
\item \textsuperscript{129} For more extensive treatments of the history of Indian tribes and their status as sovereign nations, see \textit{Canby}, \textit{supra} note 10, at 10-32. \textit{See generally} \textit{Cohen}, \textit{supra} note 8.
\item \textsuperscript{130} \textit{See Kiowa}, 523 U.S. at 756-58.
\item \textsuperscript{131} 21 U.S. (8 Wheat.) 543 (1823) (holding land conveyance by tribal chiefs to private individuals invalid since tribe only had right of occupancy, not title).
\item \textsuperscript{132} 30 U.S. (5 Pet.) 1 (1831) (holding that tribe could not bring suit when Georgia law invalidated Cherokee laws).
\item \textsuperscript{133} 31 U.S. (6 Pet.) 515 (1832) (holding that Georgia was preempted by federal law from applying its laws to two missionaries on Cherokee land).
\item \textsuperscript{134} \textit{Johnson}, 21 U.S. at 574.
\item \textsuperscript{135} \textit{Cherokee Nation}, 30 U.S. at 17.
\item \textsuperscript{136} \textit{Id}.
\end{itemize}
from others, capable of managing its own affairs and governing itself.”\textsuperscript{137} This “domestic dependent nation” status provided a framework for the Court to view tribes in terms of their sovereignty, yet allowed for great limitations to that sovereignty.

\textit{Worcester} provides for the broad view of sovereignty that has lasted over 150 years. In saying that Georgia laws would not apply to the tribe, the Court gave the first clear expression of the doctrine regarding sovereign immunity. According to the case, before colonization tribes had been full sovereigns, and even though they were subjugated to a higher government now, the tribes were still “distinct, independent, political communities, retaining their original natural rights.”\textsuperscript{138}

With sovereignty established by the Court, it could now develop the boundaries of an immunity doctrine, which was viewed as “a necessary corollary to Indian sovereignty and self-governance.”\textsuperscript{139} \textit{Turner v. United States}\textsuperscript{140} has proven an ironic turning point for the sovereign immunity doctrine for Indian tribes. There, the Court dismissed a relatively simple suit by a non-Indian against a tribe. The Court explained, “The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.”\textsuperscript{141} In other words, the Court was saying that although immunity might be viewed as an obstacle, the primary obstacle was something else entirely: the tribal government should not be held liable for the actions of its citizens. The \textit{Kiowa} Court so characterized \textit{Turner}: “[Turner] is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.”\textsuperscript{142}

\textit{Turner}’s language regarding “immunity of a sovereign to suit” was picked up by \textit{USF&G}\textsuperscript{143} and a series of cases and used to defend the “fact” that tribes have immunity from suit. \textit{Kiowa} has provided the final linchpin for the doctrine. Starting with the narrow view of \textit{Johnson}, it is

\begin{itemize}
\item \textsuperscript{137} \textit{Id.} at 15.
\item \textsuperscript{138} \textit{Worcester}, 31 U.S. at 559.
\item \textsuperscript{139} Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g, 476 U.S. 877, 890 (1986).
\item \textsuperscript{140} 248 U.S. 354 (1919).
\item \textsuperscript{141} \textit{Id.} at 358.
\item \textsuperscript{143} 309 U.S. 506, 512 (1940) (dismissing a cross-claim against a tribe based on sovereign immunity; this immunity continued even after the dissolution of the tribal government).
\end{itemize}
hard to imagine that the sovereignty doctrine covering these "domestic dependent nations" would have spread so far as to encompass tribally-created entities leaving the reservation to perform purely commercial functions. But that is exactly what has happened.

2. Some Limitations

Although the long history of Indian tribal sovereign immunity appears like an insuperable wall, the question remains: what sort of sovereigns are these? After all, despite their court-respected sovereign status, Congress can take away sovereign immunity at any time.144 Such Congressional power makes tribes seem more like departments of the federal government than actual sovereign entities. In fact, Congress can choose to take away a tribe's status as a tribe entirely,145 and has done so in the past.146 For example, several tribes have been terminated by statute, such as the Klamaths of Oregon and the Menominees of Wisconsin.147 This was during a time when the federal government was seeking to integrate Indians into general society. In fact, in 1953, Congress stated "termination" as its official policy, in order to "make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States."148 As a result, over a hundred tribes, particularly smaller ones, lost their tribal status.149

Tribes, therefore, are a different kind of creature than states. Although the federal government has the power to sue states, Congress cannot simply delegate that power to others, as Seminole Tribe v. Florida made clear. There, the Supreme Court held that Congress could not delegate its power to sue to Indian tribes under the IGRA.150 However, Congress has broader, perhaps infinite, powers over tribes, since it acts as a trustee and superior sovereign over them.151

144. Congress, for instance, could pass a statute eliminating sovereign immunity for any tribally-created corporations. It can also include a waiver of sovereign immunity within certain statutes, applicable only to the statute at hand.
145. See CANBY, supra note 10, at 55-58.
146. See, e.g., United States v. Wheeler, 435 U.S. 313, 323, 328-30 (1978) (holding that since Congress could have but had not dissolved the tribe, it retained its sovereignty; therefore, double jeopardy was not found where the sovereign tribe had already punished defendant for crimes at issue in separate federal prosecution).
147. See CANBY, supra note 10, at 25-26, 55-58.
149. See id. at 55-58.
151. The "special relationship" between the United States and the Indian tribes has been characterized both by commentators and the federal government as that of trustee
When considering the limited nature of the tribe as sovereign, the question also arises as to what exactly constitutes a tribe. After all, many tribes did not even exist as tribes, much less sovereign entities, before the federal government began putting them together, moving them around, and placing them on reservations. Following the War of 1812, in which many Indians sided with the British, and in light of various land disputes, the federal government mandated a policy of moving tribes to lands in the West in exchange for their territory in the East. Most affected were the "Five Civilized Tribes": the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles. President Andrew Jackson in particular endorsed removal; Congress concurred with the Indian Removal Act of 1830. Various tribes moved West to new homes, while some settled elsewhere. For example, some Choctaws remained in Mississippi and are still recognized as a tribe. Other currently recognized tribes existed as parts of other tribes that the federal government then split off, sometimes haphazardly. For example, Congress dealt with various bands of Minnesota Indians as a single tribe, finally unifying them by statute in 1889. Congress and the Executive have often departed from ethnological principles in order to determine tribes with which the United States would carry on political relations. Congress has created "consolidated" or "confederated" tribes consisting of several ethnological tribes, sometimes speaking different languages. Where no formal Indian political organization existed, scattered communities were sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties. Once recognized in this manner, the tribal existence of these groups has continued. On the other hand, Congress has sometimes divided a single tribe, from the ethnological standpoint, into a number of tribes or "bands.

Very few tribes exist now as the same entities as before the federal government began its shuffling and reshuffling. Thus, to view Indians as sovereigns because of their time-immemorial existence is to contradict what clearly has been the law governing them for this nation's history. The upshot of these limitations is that tribes are sovereign and beneficiary, with the federal government holding tribal land in trust. This relationship has given the government broad powers over the Indians, as well as special responsibilities. However, the precise nature of such a relationship has been difficult to define. See Canby, supra note 10, at 33-58.

152. See id. for the derivation of this account of Indian history.
154. See Cohen, supra note 8, at 4-5.
155. Id. at 5-6 (footnotes omitted).
156. For more on the complicated and tragic history of the United States' early
only inasmuch as another sovereign, i.e., the federal government acting through Congress, allows them to be so. However, it is questionable whether Congress, or the Supreme Court, should have been recognizing various disassociated groups as sovereigns.

Some tribes, such as those in Alaska, are rather unique in their structure as corporations, built of stock that is fully alienable. Under the Alaska Native Claims Settlement Act of 1971, \(^{157}\) regional and village corporations were established. Enrolled natives would receive corporate stock, and the corporations were delegated control over land and natural resources. \(^{158}\) It is difficult to envision a corporate entity, owned by individuals yet recognized as a tribe, as being “sovereign.” Such notions challenge the very framework of what constitutes a tribe and why such an entity might be deemed sovereign. They also highlight the rather nebulous nature of their immunity.

Against this background it is possible to examine the laws and cases that have diminished tribal sovereign immunity. Considering these both calls into question the firmness of immunity as expounded by the Supreme Court and helps highlight the nature of that immunity. Sovereignty itself has been limited in many ways. Tribes don’t have criminal jurisdiction over non-Indians. \(^{159}\) In fact, Indian tribes may not even have jurisdiction over their own members under certain circumstances. For example, the Major Crimes Act \(^{160}\) states that murder and other serious crimes are under federal jurisdiction when committed by an Indian in Indian country. The law was passed in an era when tribal courts were nearly non-existent, \(^{161}\) but the law’s vitality continues to this day. In addition, tribes have only limited jurisdiction over non-Indians in civil suits, \(^{162}\) and there are some limitations on hunting and fishing regulations. \(^{163}\) Even if an Indian tribe has sovereignty over its own land, that sovereignty does not protect it from state taxes after the

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relations with Indians and Indian tribes, see generally id. at 47-127; CANBY, supra note 10, at 10-20.


158. For more on the complex structure of these corporate/tribal entities, see COHEN, supra note 8, at 739-70; CANBY, supra note 10, at 367-99.


161. The act was passed in response to Ex parte Crow Dog, 109 U.S. 556 (1883). In this case, the Court held that a murder of an Indian by another Indian in Indian country was within the sole jurisdiction of the tribe. See id. at 572. That decision would have given federal courts no power to hear the case had the Major Crimes Act not later been passed.

162. See National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852-53, 856 (1985) (holding that the District Court may determine whether the tribal court had exceeded its jurisdictional powers, though only after there had been exhaustion of tribal court remedies).

tribe has sold freely alienable tribal property to a third party and then repurchased it. 164

Public Law 280, 165 enacted in 1953, severely limits tribal jurisdiction, even over internal matters, within a tribe’s own reservation borders. It provides that certain states, five initially and those choosing to adopt it, 166 shall have civil and criminal jurisdiction over Indian territory. This seriously impinges on a tribal government’s right to govern itself and act as a sovereign.

In addition, the Indian Civil Rights Act (ICRA) 167 brings the Bill of Rights to bear on tribal governments. 168 Such an act may appear to foster sovereign immunity by recognizing tribes as governments and by placing them somewhat on an equal level with the federal and state governments with respect to tribes’ duties to their citizens. However, such an act effectively stamps out the right of tribes to determine their own laws in the areas covered by the ICRA, since Congress has effectively exercised its dominion and control over it. In other words, it is Congress and not the tribes doing the governing. 169

The Indian Gaming Regulatory Act (IGRA), 170 on its face, appears to grant tribes greater power over their own affairs by compelling states to use good faith in bargaining for gaming compacts with the tribes. 171 However, this merely reiterates what has been implicit all along: tribes are entirely dependent on Congress for their sovereign status. Congress can even subjugate tribes to states by allowing tribes to govern

164. See Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998) (holding that when Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render the land subject to state and local taxation, and the repurchase of the land by an Indian tribe does not cause the land to reassume tax-exempt status).


166. Initially, California, Nebraska, Minnesota, Oregon, and Wisconsin were given jurisdiction under the statute. See CANBY, supra note 10, at 27.


168. Prior to this act, the Bill of Rights only applied directly to the federal government and, via the Fourteenth Amendment, to the states. See CANBY, supra note 10, at 29.

169. See id.


171. After Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that tribes cannot sue states), the tribes may not have much legal ability to compel states to bargain in good faith; they must rely on the federal government for this.
themselves only when they bargain with states. In fact, if a state, such as Utah, does not allow gambling within its borders, then the tribes within that state have no right to allow gambling. Tribes are completely preempted by state law on this issue. Finally, the Indian Self-Determination and Education Assistance Act\(^\text{172}\) limits tribes by requiring liability insurance\(^\text{173}\) and the IGRA restricts immunity with respect to gaming activities.\(^\text{174}\)

In general, Indians and Indian entities are governed by state law when they are in the state but off the reservation. For example, a state would have the authority to tax or regulate tribal activities occurring within the state but outside Indian country.\(^\text{175}\)

In addition to the cases mentioned above, other cases limiting Indian sovereignty include *Montana v. United States*,\(^\text{176}\) in which the Court held that even though the tribe owned a stream, the state had the sovereign right to the riverbed, since such ownership was inherent in state sovereignty;\(^\text{177}\) *Rice v. Rehner*,\(^\text{178}\) in which the Court held that a state can require an Indian trader to obtain a state liquor license;\(^\text{179}\) and *Seminole Tribe v. Florida*.\(^\text{180}\) *Seminole* further highlights the fact that tribal sovereignty is by no means unlimited. Although states can sue states, tribes cannot sue states without a waiver. Although the United States can sue states, it cannot simply delegate that power to tribes, in this case, to sue over a state's failure to bargain in good faith under the IGRA. This puts the tribes in an awkward position: in terms of sovereignty, they clearly are on a different par than states. This fact, coupled with the laws discussed above, calls into question the continuing vitality of their status as sovereigns and their legal right to govern many of their own affairs and to defend their rights in court. The question remains: even if the Supreme Court treats them as sovereigns in cases like *Kiowa*, are they really?

### 3. Expansions and Reaffirmations

*Kiowa* merely highlights the fact that sovereignty for tribes has been

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173. See id. § 450f(c)(3) (regarding mandatory liability insurance).
177. See id. at 551-57.
179. See id. at 720-22.
expanded and reaffirmed in several ways. Notwithstanding any diminishment of tribal sovereignty, and notwithstanding any challenges to the notions of what constitutes a tribe, the fact remains that tribes are effectively treated in the law as sovereigns. Though different than states, tribes retain many characteristics of independent, self-determining entities, and in some instances, those powers have been growing.

As self-governing entities, tribes have almost unlimited powers over internal affairs. For example, cases like *Merrion v. Jicarilla Apache Tribe*, 181 *National Farmers v. Crow Tribe of Indians*, 182 and *Santa Clara Pueblo v. Martinez* 183 establish and reaffirm their powers over their own internal affairs. 184 Meanwhile, cases like *USF&G* 185 have supported sovereign immunity. Several cases have both reaffirmed and increased sovereignty, particularly sovereign immunity. Among cases that have reaffirmed sovereignty are *United States v. Wheeler* 186 and *Washington v. Confederated Tribes of the Colville Indian Reservation*. 187

Although Congress can waive a tribe’s immunity, it did not do so in the Civil Rights Act of 1968, despite the imposition of some of the restrictions of the Bill of Rights upon the tribes. 188 In addition, it is very significant for the tribes that states do not have the authority to infringe tribal self-governance, and states are effectively preempted from the field of Indian law by the federal government. 189 In fact, as a result of the expansion of tribal immunity and the contraction of state, federal and foreign sovereign immunity, tribes currently enjoy more immunity from

181. 455 U.S. 130, 137 (1982) (holding that the tribe has inherent power to tax).
183. 436 U.S. 49, 59 (1978) (holding that suits against the tribe under the ICRA are barred by sovereign immunity).
184. But see Reynolds, supra note 27 (discussing internal areas over which tribes are not sovereign); Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998) (holding that tribes do not retain rights against taxation over lands sold to non-Indians and then repurchased).
185. 309 U.S. 506, 512-13 (1940) (holding that tribes are immune from cross-claims).
186. 435 U.S. 313, 323-28 (1978) (holding that tribes have those rights not specifically withdrawn by treaty or statute, and have inherent rights to punish tribal offenders, and do so as independent sovereigns, not as arms of the federal government).
187. 447 U.S. 134, 151-54 (1980) (holding that although the state can impose some nondiscriminatory taxes on non-Indian customers of Indian retailers doing business on the reservation, tribes have inherent power to tax on their own lands).
188. See *Santa Clara*, 436 U.S. at 58-59 (holding that ICRA did not waive sovereign immunity, except in habeas corpus actions); see also Canby, supra note 10, at 91.
189. See Danahy, supra note 10, at 685 & n.56.
suit than many other government entities.\textsuperscript{190} According to Justice Stevens, "[T]he rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?"\textsuperscript{191} The reasons for this "anomaly" are discussed in the next section.

IV. FLAWS IN THE ARGUMENTS: WHY SOVEREIGN IMMUNITY SHOULD NOT EXTEND THIS FAR

The Supreme Court in \textit{Kiowa}, and in other cases,\textsuperscript{192} advanced a series of arguments in favor of sovereign immunity for tribal corporations that conduct business off the reservation. This section addresses these arguments, and provides possible counterarguments, some of them supplied by the Court in \textit{Kiowa}. This section also advances direct arguments against the \textit{Kiowa} immunity.

A. Arguments Given in Support of the Doctrine

1. \textit{Congress Hasn't Spoken}

"[W]e defer to the role Congress may wish to exercise in this important judgment."\textsuperscript{193} The majority's argument in \textit{Kiowa} that the Supreme Court must defer to Congress is perhaps the strongest one in favor of retaining, and recognizing the expansion of, tribal sovereign immunity. After all, stare decisis is a powerful force, and it is difficult to reverse years of cases and potentially throw tribes into disarray at this late date. Furthermore, the Supreme Court has been particularly unwilling to reverse a line of cases in which Congress appears to acquiesce when Congress could easily change the rule of law. According to \textit{Kiowa}, "[t]he capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution . . . in this area."\textsuperscript{194} The Supreme Court may be less willing to reverse here than on constitutional interpretations. If Congress disagreed with the Court's decision on a constitutional issue, Congress would face the nearly

\textsuperscript{190} Of course, one main difference between tribes and state and federal governments is that another entity besides the tribes themselves, i.e., Congress, can alter that immunity. This makes them more akin to foreign sovereigns than states in this regard.


\textsuperscript{193} \textit{Kiowa}, 523 U.S. at 758.

\textsuperscript{194} Id. at 759.
impossible task of passing an amendment. In the area of sovereign immunity, Congress need only pass a statute to overrule the Court’s holding. Thus, the Court’s argument that “Congress hasn’t spoken” is a strong one and is, in fact, the only one that the Kiowa majority itself does not tear down.

The Court in an earlier case, Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,195 rested its decision on similar grounds. The Court stated, “Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine.”

This argument in favor of sovereign immunity relies mainly on the premise that if Congress cared, it would speak; by negative implication, Congress is expressing approval by saying nothing. Congress can, and has, spoken on the issue when it wishes to do so. For example, the Hazardous Materials Transportation Act196 specifically states that it applies to Indian tribes, and this has been interpreted to mean that immunity does not apply. As Kiowa states, “Congress has acted against the background of our decisions”199 by enacting legislation that included presumptions that have arisen in Supreme Court cases, like Indian sovereignty. In addition, Congress did speak in the area of foreign sovereigns when it chose to limit that immunity.200

The idea that Congress can regulate through silence is rather dubious, and has been the subject of criticism.201 The “Congress hasn’t spoken”

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196. Id. at 510.
198. See id.; see also CANBY, supra note 10, at 91; Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 462 (8th Cir. 1993) (holding that the Act preempted a tribal nuclear radiation control ordinance, and that Congress has the power to waive tribal sovereign immunity).
199. Kiowa, 523 U.S. at 758.
201. See, e.g., Henry P. Monaghan, The Supreme Court, 1974 Term: Forward: Constitutional Common Law, 89 HARV. L. REV. 1, 16-17 & 16 n.92 (1975); see also McLish, supra note 30, at 183-84 & 184 n.92.
argument can be attacked on two grounds. First, it is not necessary that Congress act to prevent the Court from expanding rules of law. Second, Congress may already have spoken in some ways that might prohibit the extension expounded in *Kiowa*.

In oral argument during *Kiowa*, Supreme Court questions suggested that perhaps Congress does not need to speak in order for a tribal corporation to be subject to state jurisdiction when off the reservation. As one Justice suggested at oral argument: “absent Federal law to the contrary, [the fact that] these activities are subject to State authority suggests that... Congress would have to affirmatively prohibit the jurisdiction, rather than affirmatively authorize it.”

On the one hand, Congress has stated its intent to promote Indian self-sufficiency in its acts. On the other, Congress itself has never passed a statute in which Congress has expressly said tribes have immunity. By negative implication, this suggests Congress elected not to provide such a grant. Of course, Congress in its legislation has acted against the background of Supreme Court decisions, as *Kiowa* notes. Indeed, Congress has passed an act directly recognizing tribal sovereign immunity: “Nothing in this Act shall be construed as (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.”

The key to the “Congress hasn’t spoken” issue comes down to whether the Supreme Court is declining to change an already existing rule, or if it is actually expanding it. For example, the Supreme Court probably could not have adopted as part of United States domestic law the commercial acts exception of the Foreign Sovereign Immunities Act before that act passed. Thus, the Supreme Court might not now be

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208. The exception provides that foreign sovereigns waive their immunity for
able to carve an "exception" for sovereign immunity for tribal commercial enterprises, and must defer to Congress.

The argument that the Supreme Court is merely upholding an existing rule fails on two counts. First, this assumes that the default rule provides for pure sovereign immunity for Indian tribes, which itself was a judicially created doctrine. Prior Supreme Court cases stated that the default for sovereigns (specifically, states) acting in the domain of another sovereign was no immunity. Second, it fails to recognize that it provides an extension of sovereign immunity, rather than mere recognition of an already existing immunity. Congress has never provided for immunity under Kiowa circumstances, and instead has spoken only about tribes themselves. Courts have been denying immunity under such Kiowa-like circumstances, so rather than restating existing common law, the Supreme Court in fact contravenes it.

A second line of attack on the "Congress hasn't spoken" argument is the notion that Congress may already have spoken, albeit implicitly. First of all, Congress may have in fact spoken by not saying anything, i.e., by not granting immunity in this area, it intended there be none. Acts themselves may speak to Congressional intent. Under the Indian Reorganization Act, Congress constructed a system whereby tribes can organize themselves in two distinct ways. Under section 16, the tribe organizes itself as a governmental entity. To account for commercial activities, the tribe can use section 17 to organize its corporate entities. This allows the section 16 governmental entity to retain its sovereign immunity, while permitting the section 17 corporate entity to conduct commercial transactions, with a number of exceptions. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1604, 1605, 1607 (1994 & Supp. III 1997). The fact that Congress itself had to create such an exception helps back up the Court's position that it must wait for Congress to act now.

209. See, e.g., Nevada v. Hall, 440 U.S. 410, 416-27 (1978) (holding that the state was not immune from suit for its employee's involvement in a tort in another state).


211. For more on this argument, see McLish, supra note 30, at 189-90.


213. Id. § 476.

214. Id. § 477.
business in a normal fashion. Congress, therefore, may have intended tribal corporations, particularly those conducting non-tribal business, not to retain the sovereign immunity of the tribes, in much the same fashion that federal government corporate entities do not have such sovereignty.\textsuperscript{215}

The real issue, of course, arises when section 16 tribes choose to create corporate entities that retain sovereign immunity. This power would seem to negate the very purpose of section 17; after all, it is questionable why a tribe would create a corporation that can be sued, when the tribe can create one that cannot be. Of course, it will be easier for a corporation that can be sued to do business. However, the tribe can choose to waive such immunity for some business deals and retain it for others, which it cannot do for section 17 corporations. This seems to contravene the intent of Congress in setting forth a corporation-creating provision in the first place.

The "Congress hasn't spoken" argument is even more dubious because even if Congress has not spoken directly, the Supreme Court may not be authorized to speak where Congress has not. It's hard to say that gap-filling is what is going on in \textit{Kiowa}. Congress doesn't speak for numerous reasons. This issue may simply not be at the top of its priority list. It may merely be a matter of inertia.\textsuperscript{216} In addition, tribes have lobbies that may discourage Congress from acting. One commentator has even suggested another reason Congress may not have acted: "Congress may have assumed that market pressures would encourage the tribes to establish such [non-immune] corporations."\textsuperscript{217}

The final argument against the "Congress hasn't spoken" argument is that the Supreme Court is effectively legislating in place of Congress, which it should not be doing. This is taken up later.\textsuperscript{218}

\textbf{2. History: A 'Slender Reed' of an Argument}

Once a decision has been rendered, it becomes very difficult to overturn it, especially when Congress itself could alter the result through legislation. Therefore, when the Court in \textit{Kiowa} refers to the pull of

\begin{itemize}
\item \textsuperscript{215} See supra Part III.A.1.
\item \textsuperscript{216} See generally Robert J. McCarthy, \textit{Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years}, 34 \textit{IDAHO L. REV.} 465 (1998).
\item \textsuperscript{217} Lake, supra note 11, at 101.
\item \textsuperscript{218} See infra Part IV.B.5.
\end{itemize}
history, it really may mean the pull of stare decisis. On the one hand, tribal sovereignty, and with that, sovereign immunity, is "settled law." Even Justice Stevens, who is opposed to the doctrine, has admitted, "[t]he rule that an Indian tribe is immune from an action for damages absent its consent is . . . an established part of our law." The sovereign immunity doctrine traces its way from its roots in early nineteenth century decisions to such key decisions as Turner v. United States and USF&G.

The Court's decision in Kiowa is quick to point out that sovereign immunity developed almost by accident. However, the long history of an accidental doctrine cannot seriously be put forth as a justification. Cases following Turner have used that case, and little else, to back up sovereign immunity for tribes. According to Kiowa, "[t]he doctrine is said by some of our own opinions to rest on the Court's opinion in Turner v. United States." However, "examination shows [Turner] simply does not stand for that proposition." In Turner, the tribe gave members parcels of land, and one hundred of them leased to Turner, who built a fence around the parcels. A mob of Creek Indians tore down the fence, and Congress passed a law allowing Turner to sue the Creek Nation in the Court of Claims. Apparently, Congress had to permit Turner to sue not because the tribe had immunity, but because "[t]he tribal government had been dissolved." The "accident" of Turner occurred because the Supreme Court affirmed dismissal of the suit, explaining, "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." In other words, a sovereign cannot be held liable for the actions of its members and for its own failure to adequately police them.

220. See id. at 756-58.
221. Id. at 756.
223. See supra Part III.B.1.
225. 309 U.S. 506 (1940).
227. Id.
228. The Court of Claims was established to permit litigation of certain types of suits by and against Indian tribes. It is still in existence. See Canby, supra note 10, at 354-57.
230. Id.
"No such liability existed by the general law." According to Kiowa, the quoted language is the heart of Turner, and "[i]t is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine."

Many cases, including those of the Supreme Court, picked up on the "sovereign immunity" language and it became an explicit holding. Yet none of these cases performed careful analysis of the doctrine or where it had come from; they merely cited Turner and its successor, USF&G, as authority. These cases had, "with little analysis," merely "reiterated the doctrine." USF&G itself really relied on Turner for its assertion that "[t]hese Indian Nations are exempt from suit without Congressional authorization." In fact, Justice Stevens felt that even USF&G was not reliable for expounding the sovereign immunity proposition: "At most, the holding extends only to federal cases in which the United States is litigating on behalf of a tribe." This means that an entire line of cases is fatally flawed and cannot be relied upon to assert or expand a doctrine like sovereign immunity.

3. Sovereignty and Self-Determination

A sovereign entity can choose whether or not it wants to be sued. This is the basic presumption underlying the notion of tribal sovereign immunity. In order to govern itself and determine its path, it must be able to wield such sovereignty in whatever way it chooses, or it is no longer sovereign. With so many laws already impinging on the Indian right to self-governance, it may seem natural that a rule allowing unlimited sovereign immunity is only fair. Congress has passed many acts recognizing and endorsing tribal sovereignty.

Arguably, however, the actions of a for-profit corporation doing non-tribal business off the reservation have little, if anything, to do with self-
determination. After all, such a corporation is acting independently of the tribe and its goals. Such immunity has more to do with bad business. The only manner in which Kiowa immunity connects with sovereignty, of course, is in the tribe’s right to act as a sovereign in creating whatever entity it wants and in choosing not to let such an entity be sued anywhere for anything. First, this assumes the absolute sovereignty of tribes, which is not an easy assumption. But more importantly, it presumes that such immunity advances the cause of tribes, and that such immunity should exist in areas governed by other sovereigns, neither of which may be legitimate arguments.

It is worthwhile to note that the Supreme Court has already established a rule for determining state civil jurisdiction over Indians in Indian country. In the seminal case Williams v. Lee, the Court established the oft-quoted analysis that such cases involve the query whether “the state action infringed on the right of [the] reservation Indians to make their own laws and be ruled by them.” While that case dealt with a denial of state court jurisdiction to hear a claim by a non-Indian against an Indian for the purchase price of goods sold on the reservation, the principle appears to have merit here. If the government wants to promote tribal self-governance, it still need not grant tribal for-profit corporations complete immunity off the reservation. State action (i.e., a lawsuit) in such cases would not infringe on the right of tribes to “make their own laws and be ruled by them,” because tribal laws are unenforceable off the reservation.

4. Economic Reasons

To say the least, the federal government’s economic policy toward Indians has been a disaster. Many tribes exist in a state of abject poverty; gaming is perhaps the only economic chance many tribes

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240. See discussion supra Parts III.B.1-2.
241. See Nevada v. Hall, 440 U.S. 410, 416-27 (1979) (holding that the state cannot claim immunity for actions of its employee in another state); see also Kiowa, 523 U.S. at 760-61 (Stevens, J., dissenting) (“The sovereign’s claim to immunity in the courts of a second sovereign... normally depends on the second sovereign’s law.”).
243. Id. at 220.
244. For example, unemployment on Indian reservations “is on average the highest for any discrete group in the United States, ranging from seventeen percent on the Jicarilla Apache Reservation in New Mexico to ninety percent on the Rosebud Reservation in South Dakota.” Seth H. Row, Comment, Tribal Sovereignty and
have to survive. The federal government has wavered in its policy toward the existence of Indian tribes, from opting to wipe out the tribal governments during the 1950s to the more recent attempt to support the tribes in their efforts to become self sufficient. Congress’s current goal is the promotion of economic development. For example, the Indian Financing Act Amendment of 1984 states as its goal that the government

provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Such language, coupled with the notion that there is a trust agreement between the federal government and the tribes, certainly gives credence to the argument that Congress and the courts should do all they can to protect impoverished tribes, even when this means vindicating the interests of the tribe in its immunity against innocent victims. Of course, a primary problem with the economic argument is that it pits victims against one another. Granted, the large corporation and the tribe will work out a deal whereby the tribe will waive immunity beforehand. However, the sovereign immunity doctrine also strikes at tort victims, employees of tribal corporations, businesses that are unaware of the immunity yet sign contracts with tribal corporations, and bankrupt businesses. A perplexing dilemma might arise when tribes, working in fields like casino gambling, actually do business with one another: who needs economic help in such a situation? In these instances, immunity from suit will help tribes (potentially rich ones, at that) at the economic expense of those who could have recovered had the other party not been a tribal corporation.


245. According to one scholar, “those tribes with substantial gaming operations are understandably inclined to view gaming as the first tribal economic program that has really worked.” CANBY, supra note 10, at 282.

246. For a history of the changing policy of the federal government toward Indian tribes, see generally id. at 10-32.


249. According to the trust arrangement, the federal government serves as trustee and the Indians as beneficiaries, with the government holding tribal lands in trust. See supra note 62; see also CANBY, supra note 10, at 33-58.
Under this economic heading is also the argument that tribes deserve sovereign immunity out of deference following a long period of human rights violations. Notably, the Supreme Court has upheld preferences for members of Indian tribes both on the reservations and in immediately adjacent areas. But granting special rights to Indians alone is puzzling. This argument might work as well for giving such rights to corporations owned by other disenfranchised groups. In other words, it might provide an argument for federal affirmative action for other groups as well. And what if the tribes themselves discriminate against other disenfranchised groups?

The economic argument probably has more backing than the human rights one, especially given the power over finances it provides for tribes: they alone (assuming Congress does not step in) have the power to determine when to waive their immunity and when to subject themselves to suit. But such economic arguments suggest tribes are at risk of multimillion dollar lawsuits that would bankrupt them. However, this is not the case. It is possible to set up tribal corporations to assume all liability, to carry liability insurance, and yet still retain immunity for the tribe itself.

These economic arguments also suggest that Kiowa sovereign immunity should end when the tribes become self-empowered and able to support themselves. It is, of course, difficult to tell when that has occurred, especially given the disparity in resources among all the tribes. Some are located in areas where gambling will pay off, with some left in too remote an area to take advantage of the current law. However, there is significant evidence that this is already an economic boom time for many tribes. As Kiowa notes, "[t]ribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." Casinos have made many tribes rich; one extreme example is the Mashantucket Pequot Tribe of Connecticut. The tribe, composed of 275 members, employs 6900 workers and as of 1994 had an estimated payroll of $226 million. The tribe recently donated ten million dollars to the Smithsonian Institute. Tribes are not limited to these multimillion dollar enterprises, either. Tribes own thousands of businesses off-

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250. Such "Indian preference" has been upheld as valid. See, e.g., Morton v. Mancari, 417 U.S. 535, 552-53 (1974) (relying on the fact that the preference is for a recognized political designation, not a racial group); CANBY, supra note 10, at 313-15.

251.  Kiowa, 523 U.S. at 758.

252.  See Danahy, supra note 10, at 696.
reservation, including a federally chartered bank in Montana.\textsuperscript{253}

In addition, \textit{Kiowa} immunity may not even help tribes economically. While it may save them money that might be given to tort victims, it may cost them business in the long run.\textsuperscript{254} Businesses, of course, will be unwilling to work with an immune entity; the risk is simply too high. Getting tribes to waive immunity simply adds to transaction costs. Employees may be unwilling to work for an employer that will not own up to its wrongs. Finally, those who do business at the reservations, such as gamblers and skiers, may fear an inability to recover, both from accidents at the place of business and in other parts of the reservation as they travel to the place of business.

5. \textit{Comparison to Sovereign Immunity of the States}

The tribes cannot sue the states,\textsuperscript{255} and at first cut it seems grossly unfair to recommend ending immunity for one sovereign and not for another. In other words, a change in the law might leave states able to sue tribes, but tribes unable to sue states. Furthermore, tribes were not present at the Constitutional Convention to yield their immunity, as the states were. In \textit{Blatchford v. Native Village of Noatak},\textsuperscript{256} the Supreme Court distinguished state and tribal immunity on this basis. The Court there held that states retained their sovereign immunity against tribes because tribes were not at the Convention, and thus were not parties to the “mutuality of . . . concession” that “makes the States’ surrender of immunity from suit by sister States plausible.”\textsuperscript{257} By way of extension, it can be argued that tribes did not give up their immunity to states or individuals.

However, the fact remains that tribal immunity has less basis in the law than does state immunity. Tribal immunity still rests on a misinterpretation of \textit{Turner}\textsuperscript{258} that was picked up by future cases and, to some extent, by Congress. Many tribes did not even exist at the time of the Convention and would therefore have no sovereignty to retain, and would have only that immunity which Congress specifically granted

\begin{footnotes}
\item 253. \textit{See id.}
\item 254. For further discussion of the economic pitfalls of immunity, see McLish, \textit{supra} note 30, at 188-89.
\item 258. \textit{See supra} Part IV.A.2.; \textit{Kiowa}, 523 U.S. at 756-57.
\end{footnotes}
them upon their recognition.\textsuperscript{259} Meanwhile, state immunity rests on the Eleventh Amendment. States entered the Union on more or less equal footing with each other and the federal government, and thus would be accorded more consideration than tribes in this regard.

\section*{B. Why Sovereign Immunity Is Wrong in This Area}

Sovereign immunity is a very dangerous doctrine and a very questionable litigation tool. It allows the government to escape liability for its illegal conduct. On the one hand, sovereigns must have the right to act in governmental ways that will not constantly subject them to potentially frivolous damages suits by their citizens that might impede the flow of government operations. On the other hand, it gives a government the power to avoid consequences and to injure its own citizens and those of other sovereigns with impunity. With this understanding of the potential harm inherent in sovereign immunity, it is easier to attack the doctrine of sovereign immunity for off-reservation commercial entities. It is neither an attack on Indians nor on Indian rights. It is, rather, an appeal to justice. Can the notion that "the king can do no wrong" really justify sovereign immunity today?

\subsection*{1. The Kiowa Grant Is Overbroad}

In its current form, tribal sovereign immunity is too broad.\textsuperscript{260} There is simply no justification for allowing a corporation to enjoy immunity from suit in another sovereign's borders. It extends too far in allowing the immunity to apply to commercial transactions, and in covering activities off the reservation; the immunity goes beyond any "meaningful nexus to the tribe's land or its sovereign functions."\textsuperscript{261} Such immunity is broader than that of federal, state, and foreign governments.\textsuperscript{262}

The Court in \textit{Kiowa}, claiming its hands were tied, almost begged Congress to take note of the breadth of the doctrine. As the Court stated in \textit{Kiowa}, "[a]t one time, the doctrine of tribal immunity from suit might

\begin{thebibliography}{9}
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\bibitem{259} For more on the varied history of tribes and their creation and recognition, see \textit{supra} Part III.B.2; \textit{see also} \textit{COHEN, supra} note 8, at 47-127; \textit{CANBY, supra} note 10, at 10-20.
\bibitem{260} \textit{See McLish, supra} note 30, at 178-79.
\bibitem{261} \textit{Kiowa}, 523 U.S. at 764 (Stevens, J., dissenting).
\bibitem{262} \textit{See id.} at 765 (Stevens, J., dissenting).
\end{thebibliography}
have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard self-governance. Furthermore, "[t]he rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."

2. The Harm of Such a Sovereign Immunity Doctrine Is Clear

One of the principal arguments against allowing Kiowa immunity is the harm it may cause others without reciprocal benefits for the tribes. While it may, in the short-term, benefit tribes to be able to default on promissory notes and then simply claim sovereign immunity and refuse to pay, or to assert immunity when tort victims sue, it significantly harms those parties that have been denied due process of law as well as harming the tribes asserting immunity.

The harm to third parties is clear, whether they be contracting parties or tort victims. If a company contracts to deliver goods to a tribal corporation, it should expect payment, or at least be able to get back its goods. Under the current doctrine, it can do neither. Of course, it is easy to downplay the importance, since the company should have realized what it was getting into. However, in reality, only those who have studied Indian law would realize that the tribal corporation enjoys sovereign immunity and would understand the waiver requirements. In United Linings v. Vi-ikam Doag Industries, Inc., both the company and its attorney were surprised when its claim could not be heard, and the attorney even advanced a theory of fraud, i.e., that the tribal corporation had committed fraud by not revealing its immunity, and should therefore be subject to suit on some sort of equity basis. Needless to say, this argument did not work. A government action like this seems to amount to a taking without just compensation, in violation of the Takings Clause, which is effective on tribes via the ICRA. But the tribe can

263. Id. at 758 (emphasis added).
264. Id. at 757-58.
265. For some of the potential areas of impact of the doctrine, see supra Part II.C.
267. See Application for Issuance of Provisional Remedies Without Notice at 2, United Linings, Inc. v. Vi-ikam Doag Indus., Inc. (Ariz. Super. Ct. 1998) (No. 324116). "The fact that activity of VI IKM [sic] DOAG INDUSTRIES is outside the jurisdiction of the United States, the fact that VI IKM [sic] DOAG INDUSTRIES has refused to secure UNITED LININGS and does not have sufficient assets with which to pay its debts, constitute a defrauding of the creditors" of the tribe. Id. For more on this case, see notes 1-3 & 5 and accompanying text.
still assert immunity against such a claim.\textsuperscript{269}

The harm to the Indian tribe has yet to be assessed. It may very well be that corporations will continue to do business with tribes, while insisting on waivers. On the other hand, it may be that corporations are "once bitten twice shy." Fearful of having to contract with unknown entities and fearful of laws they do not understand, corporations may decide not to bother hiring an Indian law expert just to figure out the terms of a single contract. This will leave both parties without the business they wanted.

Although states themselves have been less than accommodating to tribes within their borders, it is true that the doctrine stands to harm states in an unfair way. States are effectively preempted from governing within their own territory.\textsuperscript{270} This means that states may assess but might not be able to collect taxes that they levy on all within their borders.\textsuperscript{271} Furthermore, it means that states are confronted with entities doing business within their borders over which they have no control. Such corporations could potentially rent property and not pay for it, and their workers can commit torts, with no repercussions on the tribal corporation. Suppose that the state passed a law automatically waiving sovereign immunity for any entity doing commercial business within the state (but outside tribal borders). Suppose then that the tribal corporation not only did business within the state but even had obtained a license to do business there. Would tribal immunity preempt the waiver, and would an express waiver be required? Under the Supreme Court's strict readings of waiver, that might be the case.

The primary harm, of course, is to those caught unaware: tort victims, employees, visitors to the reservation, and others. As the \textit{Kiowa} Court recognized, "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."\textsuperscript{272} It is hard to say whether tribes actually benefit from potential harm to such individuals. It may leave entities free to hire and fire whomever they want. It also leaves tribes less fearful of a crippling


\textsuperscript{270} For further analysis of the state preemption issue, see \textit{Kiowa}, 523 U.S. at 765 (Stevens, J., dissenting) (arguing that a more thorough analysis is required to preempt states in the Indian law context).

\textsuperscript{271} See, \textit{e.g.}, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991).

\textsuperscript{272} \textit{Kiowa}, 523 U.S. at 758.
lawsuit, although liability insurance and separation of the corporation and tribal government should handle that. Finally, tribes can choose to ignore claims by visitors to the reservation; however, the Indian Self-Determination and Education Assistance Act and IGRA already have provisions covering this.  

3. Kiowa Contradicts Sovereignty Law Trends  
The tide of sovereignty law in the United States has been turning away from absolute immunity from suits, and has been heading toward more responsibility to its citizens. While nations still maintain their sovereign status as against other nations, in the United Nations, for example, the federal government and the states have yielded their sovereignty and allowed suits on matters ranging from torts to civil rights violations. Of course, such sovereign bodies still maintain their sovereignty when it is in their best interest, and, in some respects, when they can get away with it. For instance, states still maintain their sovereign status as against tribes. However, sovereign bodies in a democratic society are compelled both morally and politically to pass laws giving up sovereignty. In short, voters may have control over the power of the sovereign. The same does not hold true for tribes. They have maintained their sovereignty whenever they can, in part because they fear further encroachments, and in part because they fear economic consequences. Those most likely to sue a tribe are not its own members, but those outside it, i.e., those who do not vote in its elections. Therefore, political will has not been exerted in this way. Yet tribes cannot deny the anomaly that has been created: they enjoy broader immunity in United States courts than state, federal, and foreign governments.

4. Equity  
The equity argument clearly cuts both ways. Tribes may resent encroachment of any sort into their affairs, and with the federal government already guilty of mismanagement and neglect and with tribes suffering in poverty, it would be easy to understand why tribes want to retain and even extend immunity.

However, governments and their corporations should be held

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274. See supra Part III.
accountable for their actions. "[T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court’s reasoning limits the rule to lawsuits arising out of voluntary contractual relationships." Retaining immunity allows for no remedy. If the Constitution applies on reservations, why should standard remedies not also apply? Otherwise, tribes are simply provided with a windfall, obtained in violation of the rights of another party. One attorney, in his pleadings, sarcastically commented that his clients had effectively made a charitable donation to the tribe in the form of goods delivered. Such unintended donations are hardly equitable, and are evidence of a government that is unwilling to be held accountable for its conduct. Perhaps tribes feel justified in doing so, given the failures of the federal government to live up to its agreements in the past. However, it is hard to say that this justifies failing to provide remedies for innocent, uninvolved parties.

5. The Supreme Court Is Legislating

Sovereign immunity for tribes is the Supreme Court’s rule, not a Constitutional command, and it is the Court’s obligation to justify its expansion. The Court effectively legislated, rather than merely interpreting, when it expanded the doctrine into areas in which tribal immunity has never before been applied. This can hardly be gap-filling, since that would assume a default rule of absolute sovereignty of tribes, even in the domain of other sovereigns. In other words, the Supreme Court in Kiowa is claiming that it is merely applying an already-existing absolute sovereign immunity, but such expansive immunity did not exist until the Court decided this case. Furthermore, does the fact that Congress didn’t speak necessarily authorize another branch of the government to do so? It is doubtful that it is the Court’s prerogative to speak and then let Congress strike down whatever the Court got wrong. Simply having good reasons for a doctrine is not enough. The Court

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276. Kiowa, 523 U.S. at 766 (Stevens, J., dissenting).
277. See McLish, supra note 30, at 192-93 (stating that tribes are gaining an unfair windfall).
278. See Response and Opposition to Defendant’s Application for Attorneys’ Fees and Costs at 2, United Linings, Inc. v. Vi-ikam Doag Indus., Inc. (Ariz. Super. Ct. 1998) (No. 324116). “Since [United Linings] did not feel it was fair that they should be required to donate the materials, they chose to initiate litigation.” Id.
would have to derive the power to establish and enlarge upon the doctrine through some specific source, which it does not appear to have done.\textsuperscript{279}

"[I]t is quite wrong for the Court to suggest that it is merely following precedent,\textsuperscript{280} because the line of cases before\textsuperscript{281} Kiowa had allowed sovereign immunity only for issues arising on reservation land concerning tribal matters. In fact, its own cases had previously suggested that it would not extend immunity to off-reservation activity. For example, in Mescalero Apache Tribe v. Jones,\textsuperscript{282} the Court held that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."\textsuperscript{283} This indicates that the federal government does not have exclusive jurisdiction over the tribes; states may apply their rules in certain instances. However, Kiowa appears to erase that possibility and, in effect, insert the Supreme Court's will in the picture. According to Justice Stevens,

By setting such a rule, however, the Court is not deferring to Congress or exercising "caution[...]")--rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity—indeed, it all but concedes that the present doctrine lacks such justification--and completely ignores the State's interests. ... Stronger reasons are needed to fill the gap left by Congress.\textsuperscript{284}

V. RECOMMENDATIONS AND CONCLUSIONS

A. Recommendations

The Supreme Court has basically mapped out a strict doctrine of

\begin{itemize}
\item[279.] For further discussion of possible sources for the Supreme Court affording sovereign immunity to tribes, see McLish, \textit{supra} note 30, at 181 (concluding pre-Kiowa that the Court has no valid authority).
\item[280.] \textit{Kiowa}, 523 U.S. at 764 (Stevens, J., dissenting).
\item[281.] For this argument, see Oral Argument of John E. Patterson, Jr., On Behalf of the Respondent, \textit{Kiowa}, 523 U.S. 751 (1998) (No. 96-1037), 1998 WL 15116, at *32 (Jan. 12, 1998). Patterson stated, "[t]he cases which amount[...]") to the general rule that the tribe is not subject to suit absent its waiver or a congressional abrogation of immunity arose historically out of cases where the tribe was acting in proper tribal matters on a tribal reservation, on land." \textit{Id.}
\item[282.] 411 U.S. 145 (1973).
\item[283.] \textit{Id.} at 148-49. The Kiowa dissent uses this as a key argument. See \textit{Kiowa}, 523 U.S. at 760 (Stevens, J., dissenting); \textit{see also} Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968); Organized Village of Kake v. Egan, 369 U.S. 60, 75-76 (1962).
\item[284.] \textit{Kiowa}, 523 U.S. at 765 (Stevens, J., dissenting).
\end{itemize}
sovereign immunity. Those who must deal with the immunity must either accept it, try to go around it, or ask Congress to change it. Those most affected include: courts dealing with a tribal corporation that refuses to be sued; businesses that see opportunities but do not want to take risks; states that must work with tribes; employees of the tribal corporations; and tort victims. Primary recommendations include expansion of the waiver doctrine; expansion of the Dixon doctrine; and allowing the ICRA to provide a platform for lawsuits. In addition, businesses and states may take action before problems begin by prior negotiations.

The Supreme Court has left little room for waiver of immunity. A more sensible doctrine would allow for automatic waiver under certain circumstances. The widest form of waiver would state that any tribal corporation doing business off the reservation automatically waives immunity by submitting to the laws of the sovereign state in which it is doing business. This is not unlike the law under the Foreign Sovereign Immunities Act (FSIA), and allows the tribe to remain sovereign in its own realm while requiring it to yield immunity if it chooses to enter other areas (though, obviously, the tribe could contract for immunity). Such a use of waiver was raised in questioning by the Supreme Court during petitioner's oral argument in Kiowa. The FSIA also includes waiver for any commercial enterprises, i.e., for those actions not taken in furtherance of governmental functions. This seems like a sensible distinction to make.

In many cases, the actions or statements of tribes cause others reasonably to believe the immunity has been waived or that the tribe has agreed to waive it. Such conduct should be upheld as a valid waiver. For example, where a contract with a tribe contains an arbitration clause, a party signing the contract would reasonably assume that the other contracting entity would be willing to abide by the ruling of the arbitration hearing, e.g., if the ruling found the contracting tribal entity


286. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (1994 & Supp. III 1997). The Act states that courts will have jurisdiction over foreign sovereigns involved in non-governmental commerce. For example, a bank owned by China would not have sovereign immunity in its business dealings.

negligent. Distributing an employee handbook that includes grievance mechanisms would likewise cause an employee to assume that such procedures could be followed and that the tribe would uphold the results of such procedures.\textsuperscript{285} Waivers should also be found when a tribe sues someone in non-tribal courts, especially because of mandatory counterclaim rules. Finally, the actions of a tribe in inviting nonmembers onto the tribal property to ski and gamble would cause such individuals to believe that they could sue for negligence or recklessness, since visitors might believe the tribal duty to be the same as the duty held toward visitors by non-tribal businesses. Tribes do, however, often post signs that notify visitors of the lack of liability, which seems fair.

In a sense, such waivers could also be seen as waivers by nondisclosure. Seen in this light, nondisclosure is fraud, particularly in light of the presence of sue-or-be-sued clauses and other clauses that appear to waive immunity without actually doing so. Nondisclosure gives tribes a serious informational advantage, since it allows them to contract with full knowledge that the other party bears all the risks of nonperformance and market problems. Such an informational advantage should not be allowed.\textsuperscript{289}

Relying on such implied waivers is risky, however. Barring federal legislation, it is still up to the courts to determine how strictly they will interpret any waivers. So far courts have been very strict. Those doing business with tribes or their corporations, or working for them, will have to insist upon carefully worded waivers.\textsuperscript{290} Fortunately, some tribes have had the foresight to take actions like creating corporations that waive sovereign immunity and maintain liability insurance, which helps the corporations do business while not allowing judgments to pierce the corporate veil to reach the assets of the tribe itself.\textsuperscript{291} Insisting on express waivers in dealings with tribes that have not taken such actions may prove problematic, however. To start with, it raises transaction costs, because the clause must be negotiated into every contract unless the tribe has already waived it for the corporation. If a non-tribal corporation is insistent on the waiver, the tribe may assume that the other party plans on suing, and may be hesitant to continue doing business. After all, the other party may begin requesting all sorts of terms, like requiring the tribe to submit to the jurisdiction of non-tribal

\textsuperscript{289} See generally Lake, supra note 11, at 99-104.
\textsuperscript{290} See Zeh & Hearne, supra note 26, for some examples of those waivers that work and those that do not.
\textsuperscript{291} See id.
courts. Meanwhile, the non-tribal corporations may eventually be unwilling to do business at all without such a waiver. This could become a sticking point every time the parties come to the table. In addition, casino employees, school teachers, and ski instructors may not be in a position to make demands of the tribe, some of which already request that such individuals themselves sign waivers.

States are unlikely to get clear waivers from tribes. Thus, they will have to approach tribes to negotiate many matters concerning taxation, land use, fishing, and hunting. “States may... enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of... tax[es].” States may find tribes unwilling to cooperate, since tribes are still growing and may not want such intrusion into their economic affairs. However, both groups have reasons to want to work together. States may also take other actions to collect taxes. According to the Supreme Court in Potawatomi: “[s]tates may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores.” States may also be forced to take the Supreme Court’s suggestion in Washington v. Confederated Tribes of the Colville Indian Reservation to heart: seize cigarettes before they ever get to the reservation, and thereby satisfy their claims. States might be able to sue individuals over the tax issue as well, since the Supreme Court has “never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.”

The negotiation process still leaves one group out: tort victims, since they cannot contract ahead of time to avoid their situations. If many people realize the dangers, perhaps they will avoid ski lodges and gambling casinos altogether for fear of accidents. It is unlikely, however, because individuals will not be checking the charters of corporations and tribes to determine if sovereign immunity has been

293. Id. (citations omitted).
295. See id. at 161-62 (“We find that Washington’s interest in enforcing its valid taxes is sufficient to justify these seizures.... It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.”).
296. Potawatomi, 498 U.S. at 514; see also Ex parte Young, 209 U.S. 123 (1908) (setting forth the doctrine allowing suits to enjoin government officials from continued infringements of law).
waived and if proper liability insurance is carried. Individuals are the most unlikely to realize that a corporation could even be immune from suit.

Courts have been unwilling to abrogate sovereign immunity even when an off-reservation tort is at issue. The Dixon case came up with a clever method that courts could expand upon, since the Supreme Court has not approached this particular subject. In holding that the tribally created corporation could be held liable and did not have sovereign immunity for an off-reservation tort, the Dixon court held that the corporation did not have close enough ties with the tribe to qualify as a "subordinate economic organization" of the tribe. Courts can look to factors such as whether the corporation was "formed to aid the Community in carrying out tribal governmental functions" and whether it has "a board of directors, separate from the tribal government, which exercises full managerial control over the corporation" that doesn’t have to be "selected from among Community officers or even members."

Courts, individual tribes, businesses, and individuals, however, can only have a limited effect on the doctrine. Congress, ultimately, would have to act in order to foster business transactions and fair solutions for victims. It could expand the waiver doctrine, require tribal corporations to carry liability insurance, as it requires under the Indian Self-Determination and Education Act, or allow suits under the ICRA, particularly the Takings Clause of the ICRA.

Congress should also allow causes of action under the Due Process clause. According to the ICRA, "No Indian tribe in exercising powers of self-government shall— . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Courts have held that "person" in the ICRA includes both Indians and non-Indians. However, the

298. Id. at 1109.
299. Id. at 1110.
300. Id. at 1109.
301. Id. at 1108.
302. For specific statutory suggestions, see Lake, supra note 11, at 107-16 (favoring a limitation on the immunity); Dietrich, supra note 10, at 127-32 (favoring maintaining the immunity).
305. Id. § 1302(8) (1994).

792
Supreme Court has held that no suits may be brought under the ICRA except for writs of habeas corpus.\textsuperscript{307} Although ICRA suits can be brought against tribal officials in their official capacity, this may not provide an adequate remedy, since such suits cannot necessarily be brought in federal court.\textsuperscript{308} In addition, to help tort victims, Congress should expand the Federal Tort Claims Act to include tribal governments. It clearly has that power under the Constitution.\textsuperscript{309}

Finally, over twenty years ago, the Supreme Court indicated that it would not expand tribal sovereign immunity into certain areas. In Oliphant v. Suquamish Indian Tribe,\textsuperscript{310} the Court stated that such immunity would be limited "so as not to conflict with the interests" of the United States.\textsuperscript{311} Furthermore, tribes retain all sovereign powers except those "expressly terminated by Congress" and those "inconsistent with their status."\textsuperscript{312} Arguably, when a tribe creates a corporation, and that corporation does non-governmental business off the reservation, and then refuses to settle legitimate claims or pay legally-imposed taxes, it is acting inconsistently with its status, in a way that conflicts with the interests of the United States.

Furthermore, if Congress is unwilling to pull off the "band-aid" of sovereign immunity in one painful action, it can provide other remedies.

\textsuperscript{307} See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-60 (1978) (holding that a tribal member could not bring an Equal Protection claim, since the ICRA had not specifically waived tribal sovereign immunity to suit; however, a claim against a tribal official was not barred by a tribe’s sovereign immunity).

\textsuperscript{308} See id. at 59-62. Justice White pointed out that denying federal forums might contradict Congressional intent to protect individuals from tribal governments. See id. at 72-74 (White, J., dissenting). In addition, if the absence of any right to enforce ICRA rights in federal courts, the refusal of tribal courts to honor them is difficult to address in the federal court system. Martinez, in sum, recognizes the responsibility of Indian tribes to adhere to the substantive requirements of the ICRA and concludes that Congress intended, in deference to tribal self-government, to remove federal courts from overseeing tribal compliance with the ICRA except in habeas cases or unusual circumstances.

\textsuperscript{309} See id. at 163-65.

\textsuperscript{310} See U.S. Const. art. I, § 8, cl. 3.

\textsuperscript{311} Id. at 209.

\textsuperscript{312} Id. at 208 (emphasis omitted).
It can, of course, waive it in certain instances, but that might prove time-consuming for Congress. Congress certainly would be unwilling to analyze specific state, contract, and tort claims to determine if they might merit waiver. It could instead provide for qui tam actions. Under this theory, since the federal government could sue tribes at any time, it may permit entities to sue on its behalf. Although the Supreme Court in *Seminole Tribe v. Florida* held that Congress could not use the IGRA to delegate its right to sue states to tribes, this holding does not apply to states or individuals suing tribes. The *Seminole Tribe* holding rested on the fact that states are sovereign under the Eleventh Amendment. Basically, because of the unique nature of tribal sovereignty, Congress would clearly be permitted to waive sovereign immunity or delegate the right to sue. Although the Supreme Court has said Congress cannot delegate such power to sue with regard to state sovereign immunity, the sovereignty of tribes is clearly distinguishable, as it is entirely under the purview of Congress.

**B. Conclusions**

Clearly, the primary remaining issue is whether Congress will in fact act to remove the court-created sovereign immunity for tribal corporations doing non-tribal business off the reservation. On the one hand, Congress may not feel pressure to do so given the ease with which such immunity can be contracted around. Large lobby groups like those controlled by oil companies do not have much to gain if they already insist on waiver clauses with tribes; they already have the financial power to deal on an equal plane with the tribes and their corporations. However, Congress may eventually feel enough pressure from states and from those doing business with tribes (either contractually or by entering tribal land) to take action. If enough individuals enter tribal land to purchase cigarettes, ski, or gamble, or if enough employees run up against the sovereign immunity wall, Congress may begin to take notice. After all, even though tribes react to economics and not the results of the voting booth, Congress must listen to both.

Already, movement has been made by Congress, but no results have been reached. As early as 1988, Senator Orrin Hatch introduced legislation which would have waived tribes' sovereign immunity to suit

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313. Qui tam actions allow one to sue on behalf of the government in a suit in which only the government would ordinarily be entitled to sue. *See* BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).
315. *See* id. at 76.
Extensive hearings on immunity were held in 1996. A 1997 bill, which passed the Senate, would have waived immunity under certain circumstances. However, that provision was removed on the grounds that the hearings would be held in 1998 by the Committee on Indian Affairs of the Senate.

Finally, the Supreme Court obviously is unlikely to take any action in this area. Although it has initiated and extended sovereign immunity for tribes "almost by accident," it prefers to wait for Congress to correct its mistakes.

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316. See 135 CONG. REC. 3530 (1989), cited in McCarthy, supra note 216, at 466.
318. Kiowa, 523 U.S. at 756; see also supra Part IV.A.2.