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## Tribal Sovereignty and Economic Efficiency Versus the Courts

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# TRIBAL SOVEREIGNTY AND ECONOMIC EFFICIENCY VERSUS THE COURTS

Robert J. Miller\*

*Abstract:* American Indian reservations are the poorest parts of the United States, and a higher percentage of Indian families across the country live below the poverty line than any other ethnic or racial sector. Indian nations and Indian peoples also suffer from the highest unemployment rates in the country and have the highest substandard housing rates. The vast majority of the over three hundred Indian reservations and the Alaska Native villages do not have functioning economies. This lack of economic activity starves tribal governments of the tax revenues that governments need to function. In response, Indian nations create and operate business entities to bring jobs and income to Indian Country, improve the standard of living for their citizens, and earn profits to help fund their governments.

As constitutionally recognized governments, Indian nations possess inherent sovereign powers, including sovereign immunity wherein they cannot be sued by anyone (except the United States) or in any court unless the tribe consents. Their sovereign rights, and especially sovereign immunity, assist Indian nations to be successful and profitable in their economic endeavors.

In the last few decades, however, state and lower federal courts have interfered with tribal sovereign decisions and sovereign immunity. These courts have imposed onerous and even outrageous requirements on tribal governments that violate well-recognized principles of efficiency, profitability, and common sense. These court decisions are defeating the very reasons Indian nations operate business concerns. In contrast, the United States and the states engage in a wide array of economic activities and they benefit from the protections of sovereign immunity. Those governments operate almost totally free of judicial restraints on how they establish, manage, and operate their businesses. Indian nations and their legislative and executive decisions should be treated with the same judicial respect and deference that state and federal legislative and executive branches receive.

This Article describes and critiques the improper approach many state and lower federal courts have taken in forcing tribal governments to create, manage, and operate their economic entities. The Article argues that Indian nations, the U.S. Supreme Court, and Congress should not tolerate this judicial overreach and infringement on the sovereign rights of Native governments. The Article briefly lays out four possible strategies Indian nations, Congress, and the Supreme Court should consider to prevent this judicial activism. The very future of Indian Country as viable places where Indigenous governments, peoples, and cultures can survive and thrive is at issue.

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## INTRODUCTION

In 1999, President Bill Clinton compared American Indian reservations to “third world countries.”<sup>1</sup> In truth, reservations are the poorest parts of America, and a higher percentage of Indian families all across the country live below the federal poverty line than any other ethnic or racial group in the United States.<sup>2</sup> Indian nations and Indian peoples nationwide also suffer from the highest unemployment rates—as high as 90% on some

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1. Brenda Norrell, *Clinton's New Market Focus on Indian Country*, INDIAN COUNTRY TODAY, May 3, 2000, at A1; Michelle M. Taggart, *Challenging the Traditional View of Tribal Economics*, AM. INDIAN REP., Oct. 1999, at 17.

2. E.g., MIRIAM JORGENSEN, NATIVE NATIONS INST., ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES 4 (2016) (stating that from 2006–2010 American Indian poverty rates were 32% compared to 14% for non-natives); ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 2–4 (2012) (citing numerous authorities); SUZANE MACARTNEY, ALEMAYEHU BISHAW & KAYLA FONTENOT, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011 2–3, 13 (2013); Ryan D. Dreveskracht, *Native Nation Economic Development via the Implementation of Solar Projects: How to Make It Work*, 68 WASH. & LEE L. REV. 27, 30 n.14 (2011) (noting that the poverty rates on reservations was 31.6% compared to 13.1% for U.S.).

reservations—and the highest substandard housing rates in the country.<sup>3</sup> In addition, Indians have the lowest educational attainment levels of any ethnic or racial group in the United States.<sup>4</sup> The vast majority of the approximately three hundred and thirty Indian reservations in the lower forty-eight states and Alaska Native communities do not possess fully functioning economies.<sup>5</sup> This lack of economic activity starves tribal governments of the usual form of governmental funding: income and sales taxes.<sup>6</sup> The economic activities that do occur on most reservations and the employment opportunities therein are primarily found in tribal and federal government jobs and in entities that are owned and operated by tribal and federal governments.<sup>7</sup>

Due to centuries of colonial and United States misappropriation of Indian lands and assets, and active ethnic cleansing and even genocide of

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3. E.g., Shelly Hagan, *Where U.S. Unemployment Is Still Sky-High: Indian Reservations*, BLOOMBERG (Apr. 5, 2018), <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations> [https://perma.cc/P8PB-Q3DK]; *American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU (Nov. 2, 2015), <https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html> [https://perma.cc/6SUM-CXRY] (stating that 28.3% of American Indians and Alaska Natives live in poverty compared to the national rate of 15.5%); U.S. DEP'T OF THE INTERIOR, OFF. OF THE ASSISTANT SEC'Y-INDIAN AFFS., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 10–11, <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf> [https://perma.cc/3469-KYQ9]; Richard Read, *With 63% Unemployment, Oregon Tribe Clings to Hope*, THE OREGONIAN, Dec. 5, 2009, at A1; U.S. CENSUS BUREAU, U.S. DEP'T OF COM., AMERICAN INDIAN, ALASKA NATIVE TABLES FROM THE STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005 441, 451 (124th ed. 2005), <https://nmu.edu/nativeamericanstudies/sites/nativeamericanstudies/files/2021-11/AIANstatabst04-05.pdf> [https://perma.cc/8QUS-SEVK]; CMTY. DEV. FIN. INSTS. FUND, U.S. DEP'T OF THE TREASURY, THE REPORT OF THE NATIVE AMERICAN LENDING STUDY 13–14 (2001), [https://www.cdfifund.gov/sites/cdfi/files/documents/2001\\_nacta\\_lending\\_study.pdf](https://www.cdfifund.gov/sites/cdfi/files/documents/2001_nacta_lending_study.pdf) [https://perma.cc/HKJ3-W95W]; U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF AMERICAN INDIAN HOUSING NEEDS AND PROGRAM: FINAL REPORT xii, 66–67, 76–79 (May 1996) (reporting that Indians have the worst housing problems in the U.S.; 44% of housing in Indian Country is substandard as compared to 27% in the U.S.).

4. E.g., Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 943 (1999); 143 Cong. Rec. S5876–77 (daily ed. June 17, 1997); Ward Churchill & Winona LaDuke, *Native North America: The Political Economy of Radioactive Colonialism*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 241, 246 (M. Annette Jaimes ed., 1992) (noting that Indians have the lowest level of formal education of any group in the United States).

5. Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1338 (2018).

6. See Adam Creppelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1020 (2020); see also Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 760 (2004).

7. MILLER, RESERVATION “CAPITALISM”, *supra* note 2, at 49–55, 138.

Indians and Indian nations, it is no surprise that “Indian Country”<sup>8</sup> lacks many of the human and financial resources needed to create beneficial economic conditions on reservations.<sup>9</sup> Tribal governments today desperately look to their own business entities and even their governmental departments, such as their social welfare and health programs, as sources of reservation-based employment and tribal income.<sup>10</sup> This is primarily the case, not surprisingly, because tax revenues are in very short supply for the 574 federally recognized tribal governments in the United States. Consequently, Indian nations create and operate tribally owned businesses to try to earn profits in lieu of taxes to fund their operations, their nation’s economic and social welfare, and to provide employment and housing in Indian Country.<sup>11</sup> These governments are well aware that their sovereign rights and sovereign immunity assist them in successfully and profitably operating economic entities.

In the last few decades, however, state and federal courts have begun interfering with tribal sovereign decisions and the immunity protection all governments enjoy from being sued in any court unless they consent to such suits. Many of these courts have also begun imposing economic and business conditions and requirements on tribal governments that violate well-recognized norms and principles of economic efficiency and

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8. “Indian Country” is a term of art. In general, it defines the areas where tribal governments primarily exercise their sovereign powers. It is also the area where, for the most part, state authority and laws do not apply, and where the majority of federal laws regarding Indian affairs apply. Congress defined the term in 1948 for purposes of criminal law. Pub. L. No. 80-772, § 1151, 62 Stat. 757 (1980) (codified at 18 U.S.C. § 1151). The same definition generally applies in the civil law arena. *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 428 n.2 (1975). Indian Country generally includes: (1) all lands within reservation borders; (2) dependent Indian communities (a complex issue that can include lands not owned by a tribe and even off-reservation lands); and (3) allotments of land to tribal governments and individual Indians when the land is still held in trust ownership by the United States. 18 U.S.C. § 1151(a)(1)–(3).

9. MILLER, RESERVATION “CAPITALISM”, *supra* note 2, at 2–7, 27, 34–36, 40–41, 44–46, 113–14, 135–37. *See generally* THE STATE OF NATIVE AMERICA, *supra* note 4.

10. *See, e.g.*, Ron Allen & Ecotrust, *Negotiating a Future: Indigenous Leadership Through the Ages*, ECOTRUST, at 39:57–40:20 (Dec. 15, 2021), <https://ecotrust.org/negotiating-a-future-indigenous-leadership-through-the-ages/> [<https://perma.cc/HJ3B-9T43>] (explaining that because his tribe has only 550 citizens and is thus too small to justify starting a clinic in and for such a small rural community, the tribe “turned [its] health care clinic into a business” for the region and now serves 17,000 people); Miller, *Sovereign Resilience*, *supra* note 5, at 1379–80 & n.199 (describing Tohono O’otham Nation built a skilled elder housing complex for social welfare reasons but then realized economic benefits from construction and 100 permanent facility care jobs; Mississippi Choctaw Tribe opened a 120-bed nursing home that employs 125 people to assist purposely in tribal economic development); MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 49–50, 71–92 (discussing tribal gaming), 121, 127–29, 137–40; Alyce S. Adams, Andrew J. Lee & Michael Lipsky, *Governmental Services and Programs: Meeting Citizens’ Needs*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 223, 223–25, 227–39, 241–43 (Miriam Jorgensen ed., 2007).

11. *See* Fletcher, *supra* note 6.

profitability. These court mandates thus work to defeat the very purpose of businesses operated by Indian nations to bolster economic strength. In contrast, the United States and state governments also engage in economic activities while maintaining sovereign immunity and the ability to establish and operate their business entities as they determine.

It is vital that Indian nations pursue the goal of improving the living conditions on reservations to ensure the livability of Indian Country and to best preserve the existence of the homelands of Indian nations, peoples, and cultures. These crucial goals will only be met if tribal governments are allowed to use their sovereign rights to revive and develop their public and private sector economies and traditional institutions according to their needs and criteria. The interference of federal and state judges into these economic affairs hinders Indian nations and Native peoples from serving those laudable goals. In the procedural and governmental systems in the United States, judges are ill-equipped to intervene into these decisions. Courts have little to no expertise in the business world, and do not possess adequate procedures to hold legislative-type hearings to balance and determine best policies and practices for governments.

This Article proceeds as follows. Part I surveys governmental sovereign immunity, the exercise of sovereignty, and the protections federal and state governments enjoy in operating a wide variety of economic entities and activities. Part II then examines the sovereignty and sovereign protections Indian nations have enjoyed for over one hundred years in operating their economic activities. It also analyzes an emerging and disturbing judicial trend limiting and removing those protections at the whim of state and federal judges. Part III addresses how state and federal courts are imposing inefficient and unsound rules on the formation and the actual operations of businesses created by Indian nations that are designed to improve economic and social conditions in Indian Country. Part III also puts forth some initial thoughts on countermeasures that courts themselves should consider, as well as strategies that Indian nations and Congress could adopt to resist this judicial trend. This Article concludes that state and federal courts should not interfere with well-accepted sovereign and economic principles the judicial branch is ill-equipped to address. This interference undermines tribal nations' abilities to improve their economic conditions. Indian nations and reservation communities must dramatically improve the living standards on reservations and create economies that produce adequate wages, employment, and housing if Indian Country is to remain a viable homeland for tribal nations and peoples for the generations to come.

## I. GOVERNMENTAL SOVEREIGN IMMUNITY AND BUSINESS ENTITIES

There is no purely capitalist country in the world.<sup>12</sup> Every nation regulates, manages, and even actively participates in its national economy to varying extents.<sup>13</sup> Likewise, all governments in the United States manage, regulate, and intervene in their economies via taxation and legislative policies. In addition, governments take a more active role by even creating, owning, and operating governmental businesses. These economic entities compete in the open market with private companies, even though governments often express valid social and economic policy justifications for these interventions.

State and federal governments are of course sovereign entities, and they enjoy the protection of sovereign immunity to safeguard their public treasuries—the public fisc—from lawsuits. The question of state and federal immunity often arises in litigation. Courts seemingly have little problem in granting this immunity protection to the operations of these governmental business entities, their governmental owners, and even for private contractors who operate these entities for governments.<sup>14</sup> I briefly examine here this economic practice of state and federal governments and how courts handle state and federal sovereignty and sovereign immunity when lawsuits arise regarding the operations of these businesses.

### A. *Sovereign Immunity*

Sovereign immunity is the centuries-old legal principle that you cannot sue the king in the king's own court.<sup>15</sup> That ancient idea has morphed

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12. See, e.g., HARRY SHUTT, *THE TROUBLE WITH CAPITALISM* 10–13, 66 (1998) (“[T]he development of capitalist enterprise has always [relied] on significant state intervention.”).

13. E.g., Organisation for Economic Co-operation and Development, *The Size and Sectoral Distribution of State-Owned Enterprises* 7 (2017), <https://doi.org/10.1787/9789264280663-en> [<https://perma.cc/R8X7-KZ2H>] (“State-owned enterprises (SOEs) are important elements of many national economies.”); Jane Nelson, CORPORATE RESPONSIBILITY INITIATIVE: HARVARD KENNEDY SCHOOL, BUILDING LINKAGES FOR COMPETITIVE AND RESPONSIBLE ENTREPRENEURSHIP: INNOVATE PARTNERSHIPS TO FOSTER SMALL ENTERPRISE, PROMOTE ECONOMIC GROWTH, AND REDUCE POVERTY IN DEVELOPING COUNTRIES 3, 12–13 (2006), [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cr/ri/files/report\\_8EXEC\\_UNIDO%2Bexecutive%2Bsummary.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cr/ri/files/report_8EXEC_UNIDO%2Bexecutive%2Bsummary.pdf) [<https://perma.cc/6DYA-GWMC>].

14. See Kate Sablosky Elengold & Jonathan D. Glater, *Qualified Sovereignty*, 97 WASH. L. REV. 155, 155–56, 162–82 (2022); see also *id.* at 155 & n.1 (in “early 2008 at least 190,000 contractor personnel . . . were working on U.S.-funded contracts in the Iraq theater”).

15. See 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* 328 (2d ed. 2011); *Hale v. Port of Portland*, 308 Or. 508, 513 (1989) (“Sovereign immunity originated in the rule that the English King could not be sued in his own courts.” (citing 1 POLLOCK & MAITLAND,

today into the principle that a plaintiff cannot sue a government, or any entity of that government, unless the government has expressly consented to be sued in a specific court, for that specific type of claim, and for those specific damages. State, tribal, and federal governments often use immunity to defend against lawsuits, but they also have often waived their immunity to be sued in different fora and on specific topics.

Sovereign immunity serves two primary public purposes. First, it upholds the dignity, or the “dignitary interests” of governments.<sup>16</sup> Second, and most importantly, it protects the public by protecting the public treasury from private lawsuits that might imperil the financing and operations of crucial governmental services and programs.<sup>17</sup> Sovereign immunity for Indian nations promotes these same objectives.<sup>18</sup>

“Sovereign immunity shields the Federal Government and its agencies from suit” absent an express waiver.<sup>19</sup> Thus, the United States is “immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.”<sup>20</sup> Waivers of federal immunity “must be unequivocally expressed.”<sup>21</sup>

The Supreme Court has described the breadth of this immunity: “Such immunity applies ‘however erroneous the act may have been, and however injurious in its consequences [the act] may have proved to the plaintiff.’”<sup>22</sup> In addition, this immunity also bars a plaintiff from pursuing

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HISTORY OF ENGLISH LAW 518 (2d ed. 1898)); *Nevada v. Hall*, 440 U.S. 410, 414–16 (1979) (“The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries.”); Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign’s Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 426–27 (2005).

16. *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 83 (3d Cir. 2016) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994)) (recognizing that immunity “does not merely shield state treasuries. Instead, it advances two fundamental goals: safeguarding States’ dignity and protecting their financial solvency”); *see also* *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003).

17. *Alden v. Maine*, 527 U.S. 706, 750 (1999) (stating that sovereign immunity protects the financial integrity of states, many of which “could have been forced into insolvency but for their immunity from private suits for money damages”); *Edelman v. Jordan*, 415 U.S. 651, 674 (1974).

18. *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006), *cert. denied*, 549 U.S. 1231 (2007)) (“[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.”), *cert. denied*, 556 U.S. 1221 (2009).

19. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Harger v. Dep’t of Labor*, 569 F.3d 898, 903 (9th Cir. 2009) (quoting *Dep’t of the Army v. Blue Fox, Inc.* 525 U.S. 255, 260 (1999)).

20. *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

21. *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

22. *Cleavinger v. Saxner*, 474 U.S. 193, 199–200 (1985) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1871)).

claims for monetary damages against a federal officer or employee if they were acting within their official capacities.<sup>23</sup>

State governments also enjoy sovereign immunity. In fact, this principle was enshrined in the U.S. Constitution in 1795 in the Eleventh Amendment.<sup>24</sup> “Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, ‘we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’”<sup>25</sup> The “presupposition” the Court referred to “has two parts: first, that each State is a sovereign entity in our federal system; and second, that ‘[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.’”<sup>26</sup> The U.S. Supreme Court has also extended sovereign immunity to bar suits for damages against “arms of the State”—entities that by their very nature are so intertwined with a state government that a suit against them renders the state the “real, substantial party in interest.”<sup>27</sup> Congress is allowed to abrogate state sovereign immunity but only in very narrow situations.<sup>28</sup>

Under these general principles, the Supreme Court has also long held that Indian nations possess immunity and cannot be sued by state governments.<sup>29</sup> In 1991, the Court balanced that relationship by also holding that tribal governments cannot sue states without state consent.<sup>30</sup>

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23. See *DOBBS ET AL.*, *supra* note 15, at 330–31, 393–402.

24. “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.” U.S. CONST. amend. XI. See also *DOBBS ET AL.*, *supra* note 15, at 329 (stating that the principle of the king’s immunity from lawsuits continued for federal and state governments after the American Revolution).

25. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

26. *Seminole Tribe*, 517 U.S. at 54 (first quoting *Blatchford*, 501 U.S. at 779; then quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

27. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945)); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“In the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.”); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977) (using the term “arm of the State”).

28. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Court only allows Congress to abrogate state immunity and subject states or state officials to retrospective damage lawsuits when Congress acts within its Fourteenth Amendment power); *Seminole Tribe*, 517 U.S. at 72 (“Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”).

29. *E.g.*, *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509–10 (1991); *Puyallup Tribe, Inc. v. Dep’t of Game of Wash.*, 433 U.S. 165, 167–68 (1977).

30. *Blatchford*, 501 U.S. at 783–88. See also *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe*, 517 U.S. at 59–60 (holding that the Eleventh Amendment prohibited tribe from suing state to force it to negotiate a compact regarding tribal gaming).

It should be noted, however, that the ultimate sovereign in our federalist system, the United States, can sue states or Indian nations and those governments do not have immunity against the federal government.<sup>31</sup>

As already mentioned, governments can waive sovereign immunity and consent to lawsuits against them on specific claims, for specific damages, and in specific courts. The United States and the state governments usually do this through statutes.<sup>32</sup> Apparently, the first waiver of federal immunity by Congress was when it enacted the Court of Claims in 1855 and, as amended in 1887, when it waived its immunity to lawsuits against the United States for money damages for breach of contract claims.<sup>33</sup> Most if not all state governments have also waived their immunity to contract claims, but not until much later, such as Pennsylvania in 1978 and Oregon in 1959, for example.<sup>34</sup>

Second, the federal government partially waived its immunity to tort lawsuits in 1946 in the aftermath of a military plane crashing into New York's Empire State Building.<sup>35</sup> Most if not all states have subsequently done the same in regard to tort claims. Oregon, for example, partially waived its immunity for tort lawsuits in 1968.<sup>36</sup> But most states severely limit their exposure to such suits and restrict their waivers to small dollar amounts. For decades Oregon only allowed torts damages up to \$100,000, and it only raised that amount in 1989.<sup>37</sup> Nevada only allowed plaintiffs

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31. *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001); *Arizona v. California*, 460 U.S. 605, 613–14 (1983). See also NELL JESSUP NEWTON, FELIX COHEN & ROBERT ANDERSON, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 637 & n.8 (2012).

32. See DOBBS ET AL., *supra* note 15, at 331; *Rogers v. Holmes*, 332 P.2d 608, 611 (Or. 1958) (“That a sovereign state cannot be sued without its consent is a cardinal principle of law so well established as to require no citation.”).

33. Act of Feb. 24, 1855, 10 Stat. 612 (1855); DOBBS ET AL., *supra* note 15, at 330, n.9, 332 n.1. See also COHEN'S, *supra* note 31, at 652–53. The U.S. Constitution also provides a partial exception to immunity because governments cannot take private property without paying just compensation. The Administrative Procedures Act of 1946 also constitutes a partial waiver of federal sovereign immunity. COHEN'S, *supra* note 31, at 652, n.112. The current version of the waiver provision for the U.S. Court of Federal Claims is 28 U.S.C. § 1491(a)(1).

34. *Nevada v. Hall*, 440 U.S. 410, 417 n.13 (1979) (discussing Pennsylvania's 1978 waiver); *Anderson v. Dep't of Revenue*, 828 P.2d 1001, 1005 n.4 (Or. 1993) (citing the 1959 Oregon law that waived state immunity to contract claims).

35. 1945 *Empire State Building B-25 Crash*, WIKIPEDIA, [https://en.wikipedia.org/wiki/1945\\_Empire\\_State\\_Building\\_B-25\\_crash](https://en.wikipedia.org/wiki/1945_Empire_State_Building_B-25_crash) [https://perma.cc/EHZ3-TAD8]. The Federal Tort Claims Act, enacted in 1946, is only a limited waiver of federal sovereign immunity. See 28 U.S.C. §§ 1346, 1491, 2402, 2672, 2674–2675 (2012); 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS 2–4 & § 2.01 (2003).

36. OR. REV. STAT. § 30.270 (2001).

37. OR. REV. STAT. § 30.270.(1)(b) (1988); see also *Griffin v. Tri-County Metro. Transp. Dist.*, 870 P.2d 808, 810 (Or. 1994).

in tort suits to recover up to \$25,000 as late as 1977.<sup>38</sup> Some states have chosen to retain the complete immunity for certain tort claims. California, for example, still retains its immunity for many claims related to its alleged failure to provide fire protection, and for injuries and deaths that occur due to fighting fires.<sup>39</sup>

The 1946 Federal Tort Claims Act (FTCA)<sup>40</sup> is worthy of special attention. In the FTCA, Congress made a limited waiver of federal sovereign immunity for torts suits filed against any governmental employee, official, agency, or entity that Congress has expressly made subject to the Act. But Congress only provided a limited waiver for such claims, and the terms of those waivers are strictly construed against plaintiffs and present them with “significant obstacles.”<sup>41</sup> Under the FTCA, plaintiffs can only sue the United States and its agencies, officers, and employees in a federal court.<sup>42</sup> Plaintiffs also have no right to a jury trial, and if they do prevail, they cannot recover pre-judgment interest, punitive damages, or attorney’s fees.<sup>43</sup> FTCA claims are also strictly time limited. A claimant must give the relevant officer or employee and the federal agency six months’ notice of their claim before they can file a complaint, and they are also required to file suit within six months of an agency denying their claim or if the agency delays more than six months in ruling on the claim.<sup>44</sup> Claimants have only two years in total from the date their injury accrued to give this required notice, for the notice period to run, and then to file their complaints in court.<sup>45</sup>

Significantly, Congress still retained federal immunity in the FTCA in many circumstances, including for “the exercise . . . [of] a discretionary

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38. *Nevada*, 440 U.S. at 412–13 n.2, 417 n.13.

39. CAL. GOV. CODE §§ 850, 850.2, 850.4 (2022).

40. 60 Stat. 843 (1946). Its provisions are listed in various sections of the U.S. Code. DOBBS ET AL., *supra* note 15, at 332 n.5.

41. See DOBBS ET AL., *supra* note 15, at 334–45, & Supp. 54 (2021); JONATHAN M. GAFFNEY, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 4, 16–35 (2019).

42. 28 U.S.C. § 1346(b). DOBBS ET AL., *supra* note 15, at 332–33 nn.5 & 8.

43. 28 U.S.C. §§ 1346, 2402, 2474, 2671, 2674, 2675(a), 2671–2680; CONG. RSCH. SERV., *supra* note 41, at 18–35; *Anderson v. United States*, 127 F.3d 1190, 1191–92 (9th Cir. 1997) (“Congress has not waived the government’s sovereign immunity for attorneys’ fees and expenses under the FTCA.”); see also *Bergman v. United States*, 844 F.2d 353, 355 (6th Cir. 1988).

44. DOBBS ET AL., *supra* note 15, at 55 n.7.50 (Supp. 2021); *Sconiers v. United States*, 896 F.3d 595 (3rd Cir. 2018).

45. *Sconiers*, 896 F.3d at 595; 28 U.S.C. § 2401(b); DOBBS ET AL., *supra* note 15, at 332; see generally *Rollo-Carlson v. United States*, 971 F.3d 768 (8th Cir. 2020) (dismissing case for lack of subject matter jurisdiction because plaintiff did not present claim to VA before filing suit); *Chronis v. United States*, 932 F.3d 545 (7th Cir. 2019) (dismissing complaint because plaintiff failed to make a demand for a “sum certain” before filing suit).

function.”<sup>46</sup> This provision has led to a multitude of instances in which the FTCA was held not to apply, and thus the United States, its agencies, and employees were still protected from any possible liability in situations where it appears that the FTCA arguably should have applied.<sup>47</sup> Moreover, the FTCA expressly states that federal immunity completely bars suits against the government in over a dozen specific categories of torts and for alleged constitutional violations.<sup>48</sup> And, ordinarily, waivers of federal immunity must be construed in favor of protecting the United States.<sup>49</sup> These exceptions and procedural requirements demonstrate that the FTCA is only a limited waiver of federal sovereign immunity.<sup>50</sup> State tort claims waivers no doubt also retain a multitude of protections for states and their employees and entities.

This brief look at federal and state sovereign immunity demonstrates the protections of sovereign immunity that these governments enjoy. It also sets up the following brief narrative on how the United States and state governments intervene in their economies through economic entities and yet often retain immunity protections.

### *B. United States Economic Activities and Immunity*

Throughout its history, the United States has operated economic entities and increasingly today has partnered with private enterprise to operate governmental services, all of which are potentially protected by sovereign immunity.<sup>51</sup> These activities compete with the private sector

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46. 28 U.S.C. § 2680(a). *See* United States v. S.A. Empresa de Viacao, 467 U.S. 797, 814 (1984) (“Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in *social, economic, and political* policy through the medium of an action in tort.” (emphasis added)); *Hinsley v. Standing Rock Protective Servs. & Bureau of Indian Affs.*, 516 F.3d 668, 672 (8th Cir. 2008) (“The FTCA, however, includes a number of exceptions to its broad waiver of sovereign immunity—and these exceptions apply with equal force to FTCA claims brought against a tribal organization. . . . [N]o liability shall lie for ‘the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.’” (quoting 28 U.S.C. § 2680(a))).

47. *See generally, Hinsley*, 516 F.3d at 672; Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. 1101, 1104–05 n.4 (2021).

48. 28 U.S.C. § 2680; *FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994) (FTCA does not waive sovereign immunity for alleged constitutional violations).

49. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. v. Williams*, 514 U.S. 527, 531 (1995).

50. Elengold & Glater, *Qualified Sovereignty*, *supra* note 14, at 157 n.13, 164 (The FTCA provides a limited waiver of immunity in “specified circumstances . . . [and] only in certain circumstances and in accord with a particular protocol.”); *see also id.* at 163 (“the Act’s exceptions that restore immunity”).

51. *E.g., id.* at 156 & nn.1–4 (private businesses act for the United States in numerous ways such as fighting wars, operating prisons and detention centers, and managing a \$1.6 trillion student loan portfolio); Elengold & Glater, *The Sovereign in Commerce*, *supra* note 47, at 1104–05 & n.4, 1108

and the principles of capitalism. “Directly and indirectly the federal government is in the retail business.”<sup>52</sup>

Between 1795 and 1822, for example, at the suggestion of President George Washington, Congress authorized the federal government to establish and operate twenty-nine trading posts across its western frontiers to control trade with Indian nations and peoples, and to control and even to purposely exclude private companies from these same activities.<sup>53</sup> In more modern times, Congress has created multiple economic entities arguably to assist the national economy to operate more efficiently but in many instances these entities compete with the private sector and undeniably limit and even exclude private enterprise from the same opportunities.<sup>54</sup> Not surprisingly, issues regarding sovereign immunity for these federal entities have arisen. Here, we will briefly survey just a few of the economic entities that Congress has created over the past decades and how Congress and the courts have dealt with immunity issues.

Operating a nationwide postal service is a constitutionally mandated federal obligation and the United States has done so since 1789.<sup>55</sup> In 1970, however, Congress turned the Postal Service into an “independent establishment” and lodged it in the executive branch.<sup>56</sup> The President appoints the board and Congress funds its operations. I mention the Post Office because today private corporations, like Federal Express (FedEx) and U.P.S., are in direct competition with the Post Office for all forms of mail and delivery services. The United States Postal Service even contracts to deliver packages for Amazon, FedEx, and U.P.S.<sup>57</sup> Thus, the Service has an impact on private sector economic activities. For the purposes of this Article, it is important to note that even though Congress made the Service an independent entity, Congress and the courts still

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(discussing private contractors conducting a wide range of federal government activities and they are often protected by federal sovereign immunity); Kate Sablosky Elengold & Jonathan Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969, 971–72, 974–75, 975 nn.12–18, 980, 986–92, 1010–21 (2021) (citing cases where private contractors, including military contractors, conducted a wide range of federal activities and were protected by federal sovereign immunity); *Walding v. United States*, 995 F.Supp.2d 759, 809–11 (W.D. Tex. 2013) (finding that U.S. sovereign immunity meant private contractor who allegedly injured minors in detention facility escaped liability).

52. Elengold & Glater, *The Sovereign in Commerce*, *supra* note 47, at 1108.

53. MILLER, RESERVATION “CAPITALISM”, *supra* note 2, at 34, 40 & nn.40 & 60–61; FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 116–24, 130–34 (1995).

54. *See infra* note 62 and accompanying text.

55. U.S. CONST. art. I, § 8, cl. 7.

56. 39 U.S.C. § 201 (2018).

57. *See* Mark Solomon, *FedEx, UPS Begin the Great Last-mile Delivery Divergence*, FREIGHT WAVES (2019), <https://www.freightwaves.com/news/fedex-ups-to-begin-the-great-last-mile-delivery-divergence> [<https://perma.cc/7HSU-ASYV>].

partially protect the Service with federal sovereign immunity.<sup>58</sup> This is clear because when Congress applied the FTCA to claims against the Service, it shows that the Service was previously fully protected and that Congress has continued to partially provide it with immunity.<sup>59</sup> The Service continues to enjoy the sovereign immunity procedural protections that the FTCA retains, such as the two-year statute of limitations, the requirement that claimants exhaust their administrative remedies, the claim notice period, no juries, no pre-judgment interest, and no punitive damages.<sup>60</sup> Consequently, the Postal Service still enjoys significant immunity protection.<sup>61</sup> These remaining protections surely provide the Postal Service a competitive advantage over Amazon, Federal Express, and U.P.S.

In a multitude of other situations, Congress has created federally owned and operated economic entities and has often only partially waived their sovereign immunity protections through the FTCA. In 1939, for example, Congress had created and was using at least forty such federal corporations to carry out governmental functions.<sup>62</sup> Furthermore, in 1995, the United States General Accounting Office (GAO) issued a 190-page report profiling fifty-eight then existing U.S. governmental corporations.<sup>63</sup> This report also addressed the extent to which these federal corporations were covered by the FTCA and thus were still partially protected in their operations and activities by the United States' immunity. Many of these corporations compete directly or indirectly with private industry and their immunity protections contribute to their profitability

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58. 39 U.S.C. § 409(c); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 483–84, 486–87 (2006); *Baker v. Runyon*, 114 F.3d 668, 671 (7th Cir. 1997), *cert. den. sub nom. Baker v. Henderson*, 525 U.S. 929 (1998); *Cleveland v. Runyon*, 972 F.Supp. 1326, 1327 (D. Nev. 1997).

59. *See Baker*, 114 F.3d at 671 (Congress' "waiver of sovereign immunity is necessary solely because the Postal Service is a government agency."); *id.* at 669–71 ("Congress' waiver of the Service's sovereign immunity" demonstrates that the Service is a government agency and not subject to punitive damages under Title VII).

60. 39 U.S.C. § 409(c) (the FTCA "shall apply to tort claims arising out of activities of the Postal Service"); 28 U.S.C. § 2674; *see also supra* note 44 and accompanying text.

61. *Dolan*, 546 U.S. at 484, 486–87 ("[T]he Postal Service enjoys federal sovereign immunity absent a waiver."); *Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 741 (2004); *Johnson v. United States*, 529 Fed.Appx. 474, 474 (6th Cir. 2013) ("As an independent establishment of the executive branch, the USPS enjoys federal sovereign immunity absent a waiver.").

62. *Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 390 (1939) ("Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends . . . [D]uring the past two decades . . . Congress has provided for not less than forty of such corporations discharging governmental functions.").

63. U.S. GEN. ACCT. OFF., *GOVERNMENT CORPORATIONS: PROFILES OF EXISTING GOVERNMENT CORPORATIONS* (1995), <https://www.gao.gov/assets/ggd-96-14.pdf> [<https://perma.cc/BN9T-3WR3>].

and give them competitive advantages over private business entities.

In the 1995 GAO report, the agencies/corporations/entities stated whether Congress had made them subject to the limited waivers of immunity in the FTCA.<sup>64</sup> These organizations run the gamut of economic activities, and while they were designed to support the national economy in various ways, it is clear that they compete with the private sector to greater and lesser extents. We will list here just a few of these organizations, mention whether Congress partially waived their immunity by subjecting them to the FTCA, and note how they compete with private sector businesses.

- **The Commodity Credit Corporation.** This corporation was created in 1948 to grant loans to farmers, buy agricultural products to prop up prices, and provide credit guarantees to exporters. This entity clearly competes with the private market in several ways and even actively works to keep agricultural prices at high levels. The corporation enjoys the protections of the FTCA.<sup>65</sup>
- **Community Development Financial Institutions Fund.** While created to assist and protect American banking, this entity could also compete with the private banking industry and yet it is protected by the limited waivers of immunity in the FTCA.<sup>66</sup>
- **Corporation for National and Community Service.** This entity promotes community development and national service and provides grants to community service organizations. It arguably competes with the private sector in several ways and yet is protected by the FTCA.<sup>67</sup>
- **Export-Import Bank.** The Bank was created in 1934 to help fund private commerce by providing credit, insurance, and guarantees to U.S. and foreign banks, purchasers, and foreign governments to encourage the export of U.S. goods and services and to facilitate the import of commodities and services. The Bank is a wholly owned corporation of the United States, and its board is appointed by the President, by and with the advice and consent of the Senate. The Bank clearly seems to be in competition with several sectors of the private economy, but it is protected by the limited waivers of

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64. *See id.* at 52, 57.

65. *Id.* at 7, 34, 45, 48.

66. *Id.* at 7, 50, 52.

67. *Id.* at 7, 34, 54, 57.

the FTCA.<sup>68</sup>

- **Federal Crop Insurance Corporation.** This corporation was created in 1938 to improve the stability of agriculture through a system of federal crop insurance for farmers in which the government pays up to 30% of each producer's premium. It is a wholly owned corporation of the U.S. Department of Agriculture and is covered by the FTCA. This entity surely competes with the private insurance and farming industries and impacts the national economy.<sup>69</sup>
- **Federal Deposit Insurance Corporation.** This corporation was created in 1933 to promote public confidence in banks and to protect the money supply by providing insurance coverage for bank deposits. The FDIC also administers consumer and securities laws and requires banks to comply with federal regulations and to submit reports. It is partially covered by the FTCA and apparently fully protected by federal sovereign immunity for some of its activities. The President appoints the three board members with the advice and consent of the Senate.<sup>70</sup>
- **The Federal Housing Administration.** This entity was created in 1934 to stabilize the home mortgage industry, encourage improvements in housing standards and conditions, to provide a financing system of insurance for home mortgages and credit, and to help stabilize the mortgage market. The FHA was created to compete with and influence the private housing and insurance industries in the United States and it has a significant impact on the national economy.<sup>71</sup> The entity is protected by the FTCA.<sup>72</sup>
- **Federal Prison Industries, Inc. ("FPI").** This corporation was created in 1934 to train prison inmates in the manufacture of office furniture and furnishings. The FPI operates eighty industrial factories in thirty-seven federal prisons and sells its goods and services only to correctional institutions and federal departments. Even though its sales market is limited, this does not limit its competition with and its major impact on the private office furnishings industry. The FPI is protected by the

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68. *Id.* at 7, 34, 59, 62.

69. *Id.* at 7, 34, 64, 66.

70. *Id.* at 7, 34, 68–69, 72; *FDIC v. Meyer*, 510 U.S. 471, 471 (1994).

71. *E.g.*, Quintin Johnstone, *Private Mortgage Insurance*, 39 WAKE FOREST L. REV. 783, 822–25, 836–38 (2004).

72. U.S. GEN. ACCT. OFF., *supra* note 63, at 7, 76, 79.

FTCA. It is a wholly owned government corporation, and its board is appointed by the President.<sup>73</sup>

- **Government National Mortgage Association (“Ginnie Mae”).** Ginnie Mae was established in 1968 to facilitate the funding of home mortgages and to provide mortgage-backed securities. The entity appears to have been designed to assist private banks, saving, and loans to be more profitable and to assist the national home mortgage market. But it also appears to compete with the private housing and lending markets and impacts the national housing market. The entity claims that it is not statutorily subject to the FTCA but that it has administratively adopted it.<sup>74</sup>
- **Rural Telephone Bank.** This entity was created in 1971 to provide loans to private telephone companies. It would seem to have an impact on the private sector, and it is protected by the FTCA.<sup>75</sup>

The GAO issued a similar report in 1988 of over three hundred pages, which includes federally owned and operated corporations and entities, many of which compete with the private sector.<sup>76</sup> They were, of course, created with laudable goals in mind. I am only pointing out their possible competition with private businesses and their sovereign immunity protections.

- **Farm Credit Banks.** This system of banks was created in 1988 by Congress through a merger of several federal entities. Its mission is to provide loans to “farmers, ranchers, rural homeowners, owners of farm related businesses and commercial fishermen.”<sup>77</sup> It acts as a clearing agent for thirty-seven farm credit banks and also buys, sells, and holds farm credit securities. It is a federally chartered instrumentality of the United States and competes with the private insurance and lending industries. Moreover, it affects the nationwide agricultural system. The 1988 GAO report does not clearly state whether the entities on which it reports are protected by the FTCA as the 1995 report does. The Bank and other federal agency banks state in this 1988 report that Congress granted

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73. *Id.* at 7, 82, 85, 105. *See also* United States v. Demko, 385 U.S. 149, 152–53 (1966) (analyzing, without deciding, whether FTCA could apply to ex-inmate’s injury claim for working in prison).

74. U.S. GEN. ACCT. OFF., *supra* note 63, at 7, 34, 87, 90.

75. *Id.* at 8, 34, 132, 135.

76. U.S. GEN. ACCT. OFF., PROFILES OF EXISTING GOVERNMENT CORPORATIONS (1988), <https://www.gao.gov/assets/90/88616.pdf> [<https://perma.cc/DWT4-7X2U>].

77. *Id.* at 50.

them the power to “sue and be sued.”<sup>78</sup> Some courts have held that such a power is a waiver of sovereign immunity, but multiple courts disagree. Thus, the Bank might enjoy total federal immunity or perhaps be subject to the limited waivers of the FTCA.<sup>79</sup>

- **Federal Savings and Loan Insurance Corporation.** This entity was created in 1934 to ensure the liquidity of federal savings and loan associations, federal mutual savings banks, and state-chartered institutions. It is a wholly owned government corporation and would appear to impact the private sector. Its board members are all appointed by the President. Congress also authorized it to “sue and be sued” but note my comments on that provision in the Farm Credit Bank entry immediately above.<sup>80</sup>
- **Neighborhood Reinvestment Corporation.** This corporation was created in 1978 to promote investments in older neighborhoods by local financial institutions. All six of its board members are appointed by the President. It would seem to be in competition with the private financing industry. It is also authorized to “sue and be sued” but, as mentioned above, that ambiguous legal phrase might not mean the United States has waived the corporation’s immunity protections.<sup>81</sup>
- **Student Loan Marketing Association.** This corporation is an agency of the United States and was created in 1972 to serve as a secondary market for student loans and to assist students to finance their college educations. The entity appears to be in

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78. *Id.* at 53; *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989); *contra* *Dillion v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583–84 (8th Cir. 1998).

79. U.S. GEN. ACCT. OFF., *supra* note 63, at 50–57; 12 U.S.C. § 2001 *et seq.*; *see generally* Selland v. United States, 966 F.2d 346 (8th Cir. 1992) (finding no private cause of action existed under the Agricultural Credit Act of 1987). Several courts have rejected the idea that a “sue and be sued” clause is a clear enough waiver to hold that Congress or an Indian nation has waived sovereign immunity for a governmental department or business entity. Instead, these courts have held that the clause just authorizes that entity to prospectively waive its immunity, in contracts for example, on a case-by-case basis as that entity decides. *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940) (“Congress which, as we have said, has full authority to make such restrictions on the ‘sue and be sued’ clause as seem to it appropriate or necessary”); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583–84 (8th Cir. 1998); *Medina v. Jicarilla Apache Hous. Auth.*, No. Civ. 06-877, 2007 WL 1176023 at \*1 (D.N.M. Feb. 2, 2007) (“sue and be sued” clause in tribal ordinance creating Housing Authority did not waive immunity); *Olson v. Nooksack*, 6 N.I.C.S. App. 49, 52–53 (Nooksack Tribe Ct. App. 2001) (holding immunity was preserved absent express waiver; tribal housing code authorizing Housing Authority to “sue or be sued” was not a sufficiently clear waiver).

80. U.S. GEN. ACCT. OFF., *supra* note 63, at 114–16.

81. *Id.* at 180–81.

competition with private industry. Seven members of its twenty-one-person board are appointed by the President. Today, the Association relies on private entities to manage \$1.6 trillion in U.S.-backed student loans. The private entities working for the corporation have used federal sovereign immunity to shield their activities from legal scrutiny.<sup>82</sup>

This brief description of just a few of the corporations and entities Congress has created is sufficient to demonstrate that the federal government is actively involved in managing and even operating its national economy through governmental commercial entities. Furthermore, today, an increasing number of private contractors offer services and goods to or for the United States, including military activities, and they often enjoy sovereign immunity and other federal governmental immunities.<sup>83</sup> It appears correct to assume that these concerns compete either directly or at least indirectly with private business. In addition, these entities are undoubtedly still protected by federal sovereign immunity to some extent even if Congress has exposed them to the limited liabilities of the FTCA.

### C. *State Economic Activities and Immunity*

State governments also create, own, and operate entities and corporations that impact economic outcomes. Moreover, states often attempt to protect these concerns through state sovereign immunity. Of course, Indian nations have the exact same objectives in operating their governmental and economic activities and clearly, they are not acting outside state and federal norms.<sup>84</sup>

State owned and operated business entities run the gamut across the United States. For example, forty-eight states and U.S. territories allow gambling lotteries that are operated by government agencies, departments, or corporations.<sup>85</sup> Furthermore, North Dakota owns and operates the North Dakota Mill and Elevator, the largest flour mill and the only state-owned mill in the United States.<sup>86</sup> It is overseen by the state Industrial

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82. See Elengold & Glater, *The Sovereign Shield*, *supra* note 51, at 1010–30.

83. See generally Elengold & Glater, *Qualified Sovereignty*, *supra* note 14; Elengold & Glater, *The Sovereign in Commerce*, *supra* note 47.

84. See *infra* section II.B.

85. Lotteries in the United States, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lotteries\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Lotteries_in_the_United_States) [<https://perma.cc/DMD7-Q9P9>].

86. Gretchen Dykstra, *Pragmatism on the Prairie*, N.Y. TIMES (March 30, 2012), <https://www.nytimes.com/2012/03/31/opinion/pragmatism-on-the-prairie.html> (last visited Sept. 11, 2022).

Commission and its members are publicly elected.<sup>87</sup> South Dakota has operated a state wide public broadcasting network of educational radio stations since 1919, and a network of television stations since 1961.<sup>88</sup> These state entities compete with the private sector in the gambling, milling, and media arenas. States even admit that their economically related activities “participate[] in activities or provide[] services that are also provided by private enterprise.”<sup>89</sup>

In addition, states operate public universities that directly compete with private universities for students and tuition dollars. Most, if not all, courts have held that these state institutions enjoy the protections of sovereign immunity.<sup>90</sup> “[T]he vast majority of state universities . . . have been found to be ‘arms’ of the State for immunity and diversity purposes . . . .”<sup>91</sup> Many states also operate publicly owned hospitals and housing authorities that compete with the private health and housing industries yet they are often protected by immunity.<sup>92</sup> And, states operate other economic entities like ports and public transportation systems that compete directly with the private sector; these entities also often enjoy immunity protections.<sup>93</sup>

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87. *Id.*

88. *South Dakota Public Broadcasting*, WIKIPEDIA, [https://en.wikipedia.org/wiki/South\\_Dakota\\_Public\\_Broadcasting](https://en.wikipedia.org/wiki/South_Dakota_Public_Broadcasting) [<https://perma.cc/4XS7-GZCW>].

89. *See, e.g.*, OR. REV. STAT. § 353.010(2) (2020) (“‘Public corporation’ means an entity that is created by the state to carry out public missions and services. In order to carry out these public missions and services, a public corporation participates in activities or provides services that are also provided by private enterprise.”).

90. *See, e.g.*, *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 99 (3rd Cir. 2016) (holding state university was an arm of the state entitled to Eleventh Amendment immunity from suit in federal court); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 776 (6th Cir. 2015); *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981), *aff’d sub nom.* *Kush v. Rutledge*, 460 U.S. 719 (1983) (Arizona State University and Arizona Board of Regents are arms or instrumentalities of the State and share in the State’s immunity). Even state school districts can enjoy immunity. *Vendrell v. Sch. Dist. No. 26C*, 226 Or. 263, 278 (1961).

91. *Univ. of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1204 (1st Cir. 1993). *Accord* *Irizarry-Mora v. Univ. of Puerto Rico*, 647 F.3d 9, 14–17 (1st Cir. 2011) (finding the institution’s impact on Puerto Rico’s treasury weighed in favor of finding the University was an arm of the state); *accord* *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 301–02 (6th Cir. 1984); *Lazarescu v. Ariz. State Univ.*, 230 F.R.D. 596, 601 (D. Ariz. 2005).

92. *See* *Clarke v. Or. Health Sci. Univ.*, 343 Or. 581, 593 (2007); *Jenkins v. Portland Hous. Auth.*, 260 Or. App. 26, 33 (2013). *But see* *Fresenius Medical Care Cardiovascular Res., Inc. v. Puerto Rico*, 322 F.3d 56, 68–75 (1st Cir. 2003) (deciding in a breach of contract suit against public corporation hospital that hospital was not an arm of the state because there was no direct risk of state losing money from any judgment).

93. *See, e.g.*, *Griffin v. Tri-County Metro. Trans. Dist.*, 318 Or. 500, 507–10 (1994) (holding Oregon Tort Claims Act limit in 1987 of liability of a public body to \$100,000 applies to damages, attorney fees, and costs); *Hale v. Port of Portland*, 308 Or. 508, 518 (1989) (holding damage limitations in the Oregon Tort Claims Act are constitutional as applied to cities and port districts); *Noonan v. City of Portland*, 88 P.2d 808, 821 (Or. 1939). *But see* *Fitchik v. N.J. Transit Rail*

This brief survey of a sampling of federal and state corporations and business entities, and the extent to which they enjoy the protections of sovereign immunity, demonstrates that these governments intervene and operate within their own economies to varying extents at the same time that they enjoy competitive advantages over private industry due to being governmental entities. We now look at similar activities conducted by Indian nations across the United States.

## II. INDIAN NATIONS' SOVEREIGNTY, SOVEREIGN IMMUNITY, ECONOMIC ACTIVITIES, AND JUDICIAL INTERFERENCE

The Indigenous nations and peoples of North America have exercised governmental sovereign powers since time immemorial. The European nations and American colonial governments worked with tribal nations through treaty-making and international diplomatic interactions for centuries before the United States was created.<sup>94</sup> The new national government then continued to deal with Indian nations as governments and political entities through diplomacy and treaty-making.<sup>95</sup> Tribal governments, their separate existence, and their sovereignty are recognized in the U.S. Constitution and have been so recognized by the United States government ever since.<sup>96</sup> For more than one hundred and fifty years, the federal courts have also explicitly recognized sovereign immunity as an inherent aspect of tribal sovereignty.<sup>97</sup>

In recent decades, however, state and federal courts have intruded on these rights. Some courts have developed multi-factor tests to determine if and when tribal governmental businesses are considered an arm of the tribe, thereby sharing immunity protections from unconsented lawsuits. These federal and state court cases have muddied the waters and created uncertainty of when and how sovereign immunity will protect tribal businesses. In this Part, we examine tribal sovereignty and immunity, the

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Operations, Inc., 873 F.2d 655, 660 (3d Cir. 1989) (denying immunity to a regional rail authority despite receiving state funding, “that an entity derives some of its income from the state does not mean that it is entitled to partake of the state’s immunity”).

94. Robert J. Miller, *Treaties Between the Eastern Shawnee Tribe and the United States: Contracts Between Sovereign Governments*, in *THE EASTERN SHAWNEE TRIBE OF OKLAHOMA: RESILIENCE THROUGH ADVERSITY* 107, 107–09 (Stephen Warren ed., 2017).

95. *Id.*

96. U.S. CONST. art. I, § 8, cl. 3; *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014).

97. See *Bay Mills*, 572 U.S. at 788–89; *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 760 (1998); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 357–58 (1919); William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1594 (2013) (discussing a U.S. Supreme Court case from 1850 and two Eighth Circuit cases from 1895 and 1908 that recognized tribal sovereign immunity).

multi-factor tests courts have developed to determine arm-of-the-tribe status, and their impacts on tribal immunity. Part III will then examine and critique how these cases are negatively impacting tribal decisions, sovereign powers, and the efficiency, operations, and profitability of tribal business entities.

#### A. *Tribal Sovereignty and Sovereign Immunity*

American Indian nations are governmental entities and political bodies that exercised jurisdiction and governance in North America for centuries before Europeans arrived.<sup>98</sup> From the outset, European nations and colonial governments dealt with Indian nations through treaty-making and political diplomacy.<sup>99</sup> Today, Indian nations continue to exercise jurisdiction and governmental authority over Indian Country, sometimes beyond those areas, and over their citizens and non-citizens alike.<sup>100</sup> As governments, tribal nations enjoy most of the same aspects of sovereignty as do federal and state governments.

The new United States continued the European and colonial tactics of dealing politically and diplomatically with Indian nations. The American Founding Fathers even enshrined the political status and sovereign existence and authority of Indian nations into the United States Constitution. The 1789 Constitution retained and strengthened the principle, from the 1781 Articles of Confederation, that state governments have no authority in Indian affairs and that only “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”<sup>101</sup> The U.S. Supreme Court has cited this provision dozens if not hundreds of times. This provision and our Constitution expressly recognize that there are three

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98. *E.g.*, Robert J. Miller, *American Indian Sovereignty Versus the United States*, THE ROUTLEDGE HANDBOOK OF CRITICAL INDIGENOUS STUDIES 347, 347–51 (Brendan Hokowhitu et al. eds., 2021).

99. *Id.* at 350–52; Miller, *Treaties Between the Eastern Shawnee*, *supra* note 94, at 107–08; 1 VINE DELORIA JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979 6, 103, 106–07 (1999); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 8–9, 59 (1994); 4 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS (HISTORY OF INDIAN-WHITE RELATIONS) 128–43, 185–94, 211–29 (Wilcomb E. Washburn ed., 1988).

100. *Bay Mills*, 572 U.S. at 782; *Kiowa Tribe*, 523 U.S. at 760; *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998) (holding that non-profit corporation created by two tribes was protected by sovereign immunity for conduct that included off-reservation activities); *Settler v. Lameer*, 507 F.2d 231, 238 (9th Cir. 1974).

101. U.S. CONST. art I, § 8, cl. 3. This provision is the Interstate Commerce Clause and is also called the Indian Commerce Clause by the U.S. Supreme Court.

governments within the United States: federal, state, and Indian tribes.<sup>102</sup> The Interstate/Indian Commerce Clause clearly acknowledges Indian nations as governments that are somewhat similar to the states and the foreign nations. This clause was expressly drafted to grant the United States Congress the exclusive authority to deal with Native governments and to exclude state governments from meddling in Indian affairs.<sup>103</sup>

The Constitution also impliedly refers to Indian nations in the Supremacy and Treaty Clauses in Article VI where it states that “all Treaties made, or which shall be made, . . . shall be the supreme Law of the Land . . . .”<sup>104</sup> By the spring of 1789, when the new United States national government created under our Constitution began operating, the United States had entered twenty-three treaties with foreign countries and nine treaties with Indian nations.<sup>105</sup> Thus, the Treaty Clause language, “all Treaties *made*, or *which shall be made*,” ratified these prior foreign and Indian nation treaties as the supreme law of the United States, and provided that same status for future treaties with foreign countries and with tribes.<sup>106</sup> Consequently, this constitutional provision recognizes Indian nations as governments that possess the sovereign existence and power to engage in diplomacy and treaty-making with the United States.

Constitutionally authorized treaty-making with tribal nations is a very significant point because it demonstrates that the United States recognizes the inherent political and sovereign existence of Indian nations. As the U.S. Supreme Court stated in 1979: “A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.”<sup>107</sup> From 1778 to 1871, the U.S. negotiated and ratified 375 treaties with Indian nations and at least two treaties with the Kingdom of Hawaii in 1849 and 1875.<sup>108</sup>

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102. U.S. CONST. art I, § 8, cl. 3; ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED*: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 43–44 (2006).

103. U.S. CONST. art. I, § 8, cl. 3; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989); *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.4 (1985) (“Madison cited the National Government’s inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause. . . .”); *THE FEDERALIST* NO. 3 (John Jay); *THE FEDERALIST* NO. 42 (James Madison); Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. IND. L. REV. 133, 133–34, 143–45, 151–54 & nn.145–62 (1993); FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* 207–57 (Rennard Strickland ed., 1982).

104. U.S. CONST. art. VI, cl. 2.

105. See, e.g., Miller, *Treaties Between the Eastern Shawnee*, *supra* note 94, at 110.

106. U.S. CONST. art. VI, cl. 2 (emphasis added); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

107. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979).

108. Miller, *Treaties Between the Eastern Shawnee*, *supra* note 94, at 107–09; Treaty with the

Individual Indians, and their citizenship in their own sovereign nations, are also expressly noted in the Constitution, in Article I and in the Fourteenth Amendment which was ratified in 1868. In counting the population of the states for the decadal census, Indians were not counted as part of a state's population unless they paid taxes.<sup>109</sup> In effect, the Constitution and our Founding Fathers recognized that Indians were not federal or state citizens because they were citizens of their own nations. After the Civil War, when citizenship rights were extended to "[a]ll persons born or naturalized in the United States" the Fourteenth Amendment still "exclud[ed] Indians not taxed."<sup>110</sup> This demonstrates again that as of 1868 Congress still considered Indians to be citizens of their own sovereign governments and not federal or state citizens. In fact, the U.S. Supreme Court agreed with this point in 1884 when it held that the Fourteenth Amendment had not made Indians citizens.<sup>111</sup> It was not until 1924 that Congress made all Indians United States citizens.<sup>112</sup>

The United States Supreme Court has also made repeated and numerous statements that recognize and support tribal sovereignty. In 1831 for example, the Court held that Indian nations are governments/states that possess political sovereignty.<sup>113</sup> The Court stated that tribes had:

been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character . . . . The acts of our government plainly recognize the Cherokee nation as a state . . . .<sup>114</sup>

The next year, the Court stated that the history and actions of the United States towards Indigenous governments were proof that the U.S. "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those

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Hawaiian Islands, Haw.-U.S., Dec. 20, 1849, 9 Stat. 977; Convention between the United States of America and His Majesty the King of the Hawaiian Islands. Commercial Reciprocity., Haw.-U.S., Dec. 6, 1884, 19 Stat. 625.

109. U.S. CONST. art I, § 2, cl. 3.

110. U.S. CONST. amend. XIV, § 2.

111. *Elk v. Wilkins*, 112 U.S. 94, 120 (1884).

112. Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924).

113. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 68 (1831).

114. *Id.* at 1–2.

boundaries . . . .”<sup>115</sup> Therefore, the Court stated that Indian nations are “distinct, independent political communities, retaining their original natural rights” of land ownership and self-governance.<sup>116</sup> The Court’s analysis also included this salient point:

The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.<sup>117</sup>

The Supreme Court continued to render decisions and make key statements about the existence and extent of tribal sovereignty in subsequent centuries. In 1896, the Court stated that Indian governments do not acquire their political existence or sovereign authorities from the United States or from the Constitution.<sup>118</sup> In fact, the Court expressly noted in *Talton v. Mayes*,<sup>119</sup> and has frequently reaffirmed, that tribal governments predate the Constitution and that tribal sovereignty was not created by the Constitution or by Congress and that tribal nations are unrestrained by constitutional and federal provisions that limit federal and state authorities.<sup>120</sup> Instead, tribal governments’ sovereignty and

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115. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832).

116. *Id.* at 559.

117. *Id.* at 559–60.

118. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). In 1883, the Court held that the federal government did not possess criminal jurisdiction in Indian Country over criminal acts between Indian individuals. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Indian nations remain a “separate people, with the power of regulating their internal and social relations.” *U.S. v. Kagama*, 118 U.S. 375, 381–82 (1886).

119. *Talton*, 163 U.S. at 384.

120. *Id.* at 382, 384 (holding that the Fifth Amendment does not apply to tribes; the “Cherokee Nation” and its “attributes of local self government . . . existed prior to the Constitution,” and exercised not “Federal powers” but powers of “self government,” and that “powers [were] not created by the Constitution”); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134–35 (10th Cir. 1959) (holding that aspects of First Amendment do not apply to tribes). *See also* *United States v. Wheeler*, 435 U.S. 313, 319–21, 323–24, 328 (1978) (stating that double jeopardy does not prevent federal and tribal governments from trying a defendant for the same criminal act because they are separate governments); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); Miller, *American Indian Influence*, *supra* note 103, at 158–59.

sovereign powers are the “inherent powers of a limited sovereignty which has never been extinguished.”<sup>121</sup> Therefore, tribal nations are “separate sovereigns pre-existing the Constitution.”<sup>122</sup>

As one of the three separate forms of government in the United States, Indian nations enjoy the standard governmental protection of sovereign immunity against unconsented suits by tribal citizens, other individuals, or state governments.<sup>123</sup> The Supreme Court has stated that immunity “is a necessary corollary to Indian sovereignty and self-governance.”<sup>124</sup> In 1978 for example, the Court stated: “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”<sup>125</sup> In 2014, the Court repeated that point: “Among the core aspects of sovereignty that tribes possess . . . is the ‘common law immunity from suit traditionally enjoyed by sovereign powers.’”<sup>126</sup> Thus, tribal governments cannot be sued in tribal, state, or federal courts without their specific consent except by the United States itself.<sup>127</sup>

In recent decades, the Court has consistently applied and even strengthened this legal right to protect tribal governments from lawsuits. For example, the Court has held that immunity applies when an Indian nation is acting in a governmental or business capacity, and whether or not the activity at issue occurs inside or outside of Indian Country.<sup>128</sup> The principle of tribal immunity is so strong that Indian nations can even file lawsuits as a plaintiff and yet they still retain immunity from compulsory

121. *Wheeler*, 435 U.S. at 322–24. *See also* *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that Indian nations exercise powers of self-government via original tribal sovereignty); *Washington v. Confederated Tribes of the Colville Indian Rsr.,* 447 U.S. 134, 152–54 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

122. *Santa Clara Pueblo*, 436 U.S. at 52. *See also* *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (finding tribal sovereign immunity derives from the status of Indian tribes as “separate sovereigns pre-existing the Constitution” (quoting *Santa Clara Pueblo*, 436 U.S. at 56)).

123. *Bay Mills*, 572 U.S. at 788–89; *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 760 (1998); *Santa Clara Pueblo*, 436 U.S. at 58; *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919).

124. *Three Affiliated Tribes of the Ft. Berthold Rsr. v. Wold Eng’g*, 476 U.S. 877, 890 (1986); *accord Bay Mills*, 572 U.S. at 788.

125. *Santa Clara Pueblo*, 436 U.S. at 58.

126. *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

127. *Id.*; *Kiowa Tribe*, 523 U.S. at 754; *Santa Clara Pueblo*, 436 U.S. at 58; *Kerr v. Muckleshoot*, 6 N.I.C.S. App. 36, 37 (Muckleshoot Tribal Ct. App. 2001).

128. *Bay Mills*, 572 U.S. at 804; *Kiowa Tribe*, 523 U.S. at 760 (holding that tribe was protected by immunity even though contract was signed and involved commercial activity outside Indian Country); *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064–65 (10th Cir. 1995) (holding that directors of tribe’s commercial entity could not sue tribe because there was no waiver of immunity just because tribe operated commercial activities off reservation); *Kerr*, 6 N.I.C.S. App. at 37 (holding that tribal sovereign immunity applies to agencies as well as commercial activities of the tribe).

cross-claims and counterclaims.<sup>129</sup>

Moreover, tribal governmental entities, agencies, departments, and tribally owned businesses, colloquially known as arms of the tribe, whether they are created to perform governmental activities or purely commercial activities, usually benefit from the protections of tribal sovereign immunity.<sup>130</sup> This is so because Congress has recognized that tribal immunity is necessary “in order to promote economic development and tribal self-sufficiency,”<sup>131</sup> that tribal economic development “foster[s] tribal self-government,”<sup>132</sup> that immunity furthers “tribal self-sufficiency and economic development,”<sup>133</sup> and “reflect[s] Congress’ desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.”<sup>134</sup>

In addition, tribal officials are usually protected from lawsuits or court process by their nation’s sovereign immunity if they were acting within the scope of their tribal authority and in the absence of a congressional or tribal waiver of that protection.<sup>135</sup> In 2019, however, the Second Circuit extended by analogy the famous 2008 Supreme Court case *Ex parte Young*<sup>136</sup> to allow state citizens to sue tribal officials and employees in

129. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509–10 (1991); *Wold Eng’g*, 476 U.S. at 890; *McClendon v. United States*, 885 F.2d 627, 630–33 (9th Cir. 1989); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986).

130. See, e.g., *J.L. Ward Assoc. v. Great Plains Tribal Chairmen’s Health Bd.*, 842 F.Supp.2d 1163 (D.S.D. 2012) (involving a health board created by sixteen tribes which was a tribal entity that was protected by sovereign immunity). State entities, called arms of the state, also share in the sovereign immunity of state governments: “an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself.” *Lewis v. Clarke*, 581 U.S. \_\_\_, 137 S. Ct. 1285, 1290 (2017).

131. *Kiowa Tribe*, 523 U.S. at 757 (“Congress had failed to abrogate [tribal immunity] in order to promote economic development and tribal self-sufficiency.”).

132. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982).

133. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 510. See also *Kiowa Tribe*, 523 U.S. at 758.

134. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 510 (internal quotations omitted). See also *Wold Eng’g*, 476 U.S. at 890 (tribal immunity “is a necessary corollary to Indian sovereignty and self-governance”); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (“Immunity of the Casino directly protects the sovereign Tribe’s treasury, which is one of the historic purposes of sovereign immunity in general.”); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182–83 (10th Cir. 2010) (finding that immunity serves to “protect the sovereign Tribe’s treasury,” “encourage[s] tribal self-sufficiency,” and is “necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy”).

135. *Lewis*, 581 U.S. \_\_\_, 137 S. Ct. at 1291; *Kiowa Tribe*, 523 U.S. at 754, 758 (finding that sovereign immunity has been necessary to protect tribes from state invasions of their jurisdiction); *Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1179–80 (10th Cir. 1999); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995); *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *aff’d*, 114 F.3d 15 (2nd Cir. 1997).

136. 209 U.S. 123 (1908).

their official capacities for prospective and injunctive relief for allegedly violating federal and state substantive laws.<sup>137</sup> In addition, claims against tribal officers and employees deemed to have acted in their individual capacities, or beyond their tribal authority, will usually not be barred by a tribe's immunity.<sup>138</sup>

Furthermore, there are only two valid ways that tribal immunity can be waived. Congress has the authority to waive tribal sovereign immunity and tribal governments can also do so.<sup>139</sup> Both types of waivers, however, must be clearly, explicitly, and expressly stated.<sup>140</sup> A waiver "cannot be implied but must be unequivocally expressed."<sup>141</sup> And, in fact, courts apply a "strong presumption against waiver."<sup>142</sup>

Tribes often waive their immunity in contracts.<sup>143</sup> Almost all tribal governments have waived their immunity in specific situations and contracts to facilitate business deals.<sup>144</sup> Tribes primarily have to waive

137. *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2nd Cir. 2019) (applying *Young* to allow state citizens to sue tribal officials in their official capacities for alleged violations of state and federal substantive law), *cert den. sub nom. Sequoia Cap., LLC v. Gingras*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 856 (2020).

138. *Lewis*, 581 U.S. \_\_\_, 137 S. Ct. at 1292–93 (claims against tribal officers/employees in their individual capacities are not barred by immunity); *see also* *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697–98 (8th Cir. 2019).

139. *See* *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014); *Kiowa Tribe*, 523 U.S. at 724; *Citizen Band Potawatomi*, 498 U.S. at 509; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) ("A waiver of [tribal] sovereign immunity 'cannot be implied, but must be unequivocally expressed.'" (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976))); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996); *Kerr v. Muckleshoot*, 6 N.I.C.S. App. 36, 37 (Muckleshoot Tribal Ct. App. 2001).

140. *Santa Clara Pueblo*, 436 U.S. at 58; *Sokaogon Gaming*, 86 F.3d at 659; *United States v. Oregon*, 657 F.2d 1009, 1012 (9th Cir. 1981).

141. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Olson v. Nooksack*, 6 N.I.C.S. App. 49, 52–53 (Nooksack Tribe Ct. App. 2001) (holding that tribal immunity is preserved absent an express waiver).

142. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (quoting *Demontney v. Dep't Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001)).

143. *See generally* Lorenzo E. Gudino, *Who, What, Where, and How: The Fundamental Elements for Contracts Implicating Tribal Sovereign Immunity*, 2022 WIS. L. REV. 239 (2022).

144. *See, e.g., id.*; MILLER, RESERVATION "CAPITALISM", *supra* note 2, at 97–98. For a time, there were apparently conflicting cases whether contractual agreements to arbitrate were valid waivers of tribal immunity. *Compare* *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419–20 (9th Cir. 1989) (holding that contract that provided for disputes to be arbitrated but did not mention court actions to enforce any award did not waive immunity), *with* *Sokaogon Gaming*, 86 F.3d at 659–60, *and* *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995). *See also* *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde C'mty*, No. 07-05-KI, 2007 WL 3283699, at \*3 (D. Or. Nov. 2, 2007) (granting comity to the tribal court decision in *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde C'mty*, No. A-05-09-001, at \*1, \*16–21 (Grand Ronde Ct. App. Oct 31, 2006) and stating that a tribe's consent to arbitration did not also waive its immunity for attorney fees when there was no mention of waiving immunity to attorney fees in the agreement). In 2001, however, the Supreme Court held unanimously that a contract providing for

their immunity in this *ad hoc* fashion instead of by enacting laws that might waive immunity to all contract lawsuits, for example. This prospective and individualized method of waiver is time consuming, but it is about the only way to deal with this subject for tribal properties and assets that are held in trust, legal ownership, by the United States.<sup>145</sup> This is a fact of life because federal approval of contracts regarding tribal/United States trust properties is a requirement for most contracts, and for a waiver of tribal immunity in the contract to be valid.<sup>146</sup> This is the main reason why waivers of tribal immunity are usually accomplished on an individual contractual basis.

Moreover, many Indian nations have enacted tort claims statutes and made limited waivers of sovereign immunity to allow tort suits to be filed against them the same as federal and state governments have done. For example, the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan, the Mashantucket Pequot Tribal Nation in Connecticut, and the Grand Ronde, Umatilla, Siletz, and Warm Springs Tribes in Oregon, have enacted tort claims ordinances waiving their immunity in certain cases.<sup>147</sup> These nations have decided to enact limited waivers and open their courts to persons injured in tribal establishments. In addition, many, if not all, Indian nations carry insurance policies. And, tribal enterprises or governmental departments and their employees that operate certain federal programs are also covered by the Federal Tort Claim Act for liability for acts committed in carrying out those programs, and thus the public is protected to the extent of the FTCA.<sup>148</sup>

This discussion demonstrates that Indian nations are governments separate from state and federal governments. As pre-Constitution political entities, tribal governments possess inherent powers of sovereignty, including immunity from unconsented lawsuits. Indian nations use sovereignty and immunity in the operation of their business entities in the exact same fashion as the United States and state governments.

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arbitration, that also stated that Oklahoma law would apply, and that any court with jurisdiction could enforce the award, was an express waiver. This was so even though the agreement did not mention tribal sovereign immunity or provide for a waiver of that immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 414–15, 418–20, 423 (2001); David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 197–98, 220 (2004).

145. See MILLER, RESERVATION “CAPITALISM”, *supra* note 2, at 97.

146. See 25 U.S.C. §§ 81, 177, 415, 466, 2103(b), 3104(b); 25 C.F.R. § 166.300; *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 686, 694, 702 (7th Cir. 2011).

147. MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 97–98.

148. 25 U.S.C. § 458cc(c); Dep’t of Interior and Related Agencies Appropriations Act, Pub. L. No. 103–138, § 308, 107 Stat. 1379, 1416 (1993); 25 C.F.R. §§ 900.180–210, 255.6(c) & (e) (1998).

### B. Tribal Economic Activities

Poverty is rampant on nearly all American Indian reservations.<sup>149</sup> Living wage jobs, adequate housing, educational opportunities, and functioning economies are in very short supply.<sup>150</sup> Most reservations are ringed by border towns where most of the consumer dollars from reservations are spent because that is where the closest businesses and stores are located. Indian nations have long tried to combat these challenges by operating tribally owned business entities and public sector dominated economies. In fact, the majority of the economic enterprises operating in Indian Country are owned and operated by tribal nations.<sup>151</sup> Indian nations often operate the standard governmental social welfare departments and programs with economic objectives in mind, in addition to the usual policy objectives.<sup>152</sup> Indian nations seek to provide jobs and income on reservations. Tribes also operate a host of businesses that outside of Indian Country are part of the private sector such as housing construction, radio stations, gas stations, grocery stores, tourism enterprises, hunting and fishing activities, casinos, restaurants, and even laundromats.<sup>153</sup>

Indian nations engage in governmental and business operations to generate profits because “few tribes have any significant tax base. Tribal business enterprises may be the only means by which a tribe can raise revenues—and thus such enterprises may be essential to the fulfillment of the tribe’s governmental obligations.”<sup>154</sup> In 2014, Justice Sotomayor also noted that, due to a lack of revenue sources, “tribal business operations are critical to the goals of tribal self-sufficiency.”<sup>155</sup> This point is worth repeating: Indian nations need to earn profits from economic investments

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149. See *supra* notes 1–3.

150. See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 842–43 (2001).

151. See MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 138–39.

152. See *id.* at 50–70, 127–30, 138–39.

153. See Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 122, & 128 (2017); Ashley Nerbovig, *After 10 Years Without, Northern Cheyenne Builds a New Laundromat*, BILLINGS GAZETTE (Sept. 14, 2016), [https://billingsgazette.com/business/after-10-years-without-northern-cheyenne-builds-new-laundromat/article\\_1887136c-d493-5ade-a81b-3f996566562a.html](https://billingsgazette.com/business/after-10-years-without-northern-cheyenne-builds-new-laundromat/article_1887136c-d493-5ade-a81b-3f996566562a.html) [<https://perma.cc/63YX-2BYY>]; MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 49–70; THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 111–21, 145–53, 162–71, 211–12, 256–57 (2008); REBUILDING NATIVE NATIONS, *supra* note 10, at 3–5; Miller, *supra* note 150, at 759–61, 800–01, 817–27.

154. Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 169 (2004). See also Creppelle, *supra* note 6, at 1020.

155. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring).

and from tribally owned economic entities because they almost totally lack the ability to acquire income from taxation to fund their governments like state and federal governments are able to do.<sup>156</sup>

Similar to many states, tribal governments engage in what can be considered as public sector endeavours such as gaming, developing tribally owned timberlands and mineral resources, and tribally owned farms and cattle and bison ranching companies that utilize tribally owned lands.<sup>157</sup> Other Indian nations own manufacturing facilities and even slaughterhouses.<sup>158</sup> Some tribes have banded together to develop their resources and hopefully to benefit from economies of scale. The Intertribal Timber Council in Portland, Oregon, the Council of Energy Resource Tribes, the InterTribal Buffalo Council, the Intertribal Agriculture Council are examples of these types of economic activities in Indian Country.<sup>159</sup> Indian governments also operate public utilities to provide services on reservations and earn profits. For example, the Confederated Tribes of the Warm Springs Reservation in Oregon have co-owned since 2001 the power-generating Pelton Dam in partnership with Portland General Electric, and the Confederated Tribes of the Salish and Kootenai Reservation in Montana own and operate the Kerr Dam and its

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156. Miller, RESERVATION “CAPITALISM,” *supra* note 2; *see also* Crepelle, *supra* note 6; Fletcher, *supra* note 6.

157. *E.g.*, Kristi Eaton, *In South Dakota, a Tribal Nation Owns the Largest Native-Managed Buffalo Herd in the World*, THE DAILY YONDER (March 17, 2022), <https://dailyyonder.com/in-south-dakota-a-tribal-nation-owns-the-largest-native-managed-buffalo-herd-in-the-world/2022/03/17/> [https://perma.cc/M8T7-F7DD]; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2018); Steve Friess, *Indian Tribes Look Beyond Casinos for Income*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/business/indian-tribes-look-beyond-casinos-for-income.html> [https://perma.cc/W3UV-M35T] (marijuana); MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 49–93; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (cigarette sales); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) (cigarettes); HARVARD PROJECT, *supra* note 153, at 111–21, 145–74.

158. QUAPAW CATTLE CO., <https://www.quapawtribe.com/511/Quapaw-Cattle-Company> [https://perma.cc/K5RM-T6SA]; Lacey Newlin, *Native American Tribes to Build a Bison Processing Plant*, HIGH PLAINS J. (July 10, 2019), [https://www.hpj.com/livestock/native-american-tribes-to-build-a-bison-processing-plant/article\\_d149a37e-9f42-11e9-b5ec-0790c47b0dde.html](https://www.hpj.com/livestock/native-american-tribes-to-build-a-bison-processing-plant/article_d149a37e-9f42-11e9-b5ec-0790c47b0dde.html) [https://perma.cc/8HM2-45Y4]; Morgan, *supra* note 153, at 128; RESERVATION “CAPITALISM,” *supra* note 2, at 52; HARVARD PROJECT, *supra* note 153, at 112; REBUILDING NATIVE NATIONS, *supra* note 10, at 4–5; *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 806 (7th Cir. 1993) (finding that Devils Lake Sioux Tribe created tribally owned corporation to address 45% unemployment rate and manufacture military camouflage cloth and helmets).

159. INTERTRIBAL TIMBER COUNCIL, <https://www.itcnet.org/> [https://perma.cc/JGX9-LD4E]; ROGER FRAGUA, COUNCIL OF ENERGY RESOURCE TRIBES, DEPARTMENT OF ENERGY COOPERATIVE AGREEMENT GRANT #DE-FG36-03Go13039 (2005), [https://www.energy.gov/sites/prod/files/2016/01/f28/0510review\\_02fragua.pdf](https://www.energy.gov/sites/prod/files/2016/01/f28/0510review_02fragua.pdf) [https://perma.cc/BWA6-KLTB]; INTER TRIBAL BUFFALO COUNCIL, <https://americanindian.si.edu/nk360/plains-belonging/itbc> [https://perma.cc/R5LJ-PQX7]; INTERTRIBAL AGRICULTURE COUNCIL, <https://www.indianag.org/> [https://perma.cc/HXP9-8SS9].

electrical generation system.<sup>160</sup>

In addition to taxing products like tobacco, alcohol, and fuels, for example, several tribal nations are actively involved in earning profits by manufacturing and selling cigarettes, cannabis, hemp, alcohol, and gasoline.<sup>161</sup> In these situations, tribal governments are attempting to make profits in lieu of taxes by operating a wide variety of businesses. Often, tribal nations have had to exercise their sovereign rights or look to Congress and the federal courts to fend off state attempts to inhibit their economic endeavours.<sup>162</sup> States and non-Indian business entities are often jealous of competition from successful tribal enterprises.<sup>163</sup>

In the past decade, a few Indian nations have entered the high-interest online lending industry in their attempts to attract jobs and economic activities to their reservations.<sup>164</sup> Plaintiffs have sued these tribal business

160. Pat Kruis, *Confederated Tribes Now Own 49.9% Interest in Pelton Dam*, PAMPLIN MEDIA GROUP: THE MADRAS PIONEER (Jan. 27, 2022), <https://pamplinmedia.com/msp/129-news/534520-427791-confederated-tribes-now-own-499-interest-in-pelton-dam-> [<https://perma.cc/PT8P-FY2L>]; Jack McNeel, *Salish-Kootenai Dam: First Tribally Owned Hydro-Electric Dam in U.S.*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/salish-kootenai-dam-first-tribally-owned-hydro-electric-dam-in-us> [<https://perma.cc/7X72-9U97>].

161. *E.g.*, *Tribal Hemp Initiative*, ANISHINAABE AGRIC. INST., <http://anishinaabeagriculture.org/tribal-hemp-initiative> [<https://perma.cc/REK9-7Y94>]; Christopher Helman, *The Inside Story of the First (Legal) Native American Distillery*, FORBES (Aug. 17, 2020, 6:30 AM), <https://www.forbes.com/sites/christopherhelman/2020/08/17/the-inside-story-of-the-first-legal-native-american-distillery/?sh=2c9922c43412> [<https://perma.cc/2A5Z-NQGN>]; Kathleen Willcox, *Behind the Rise of Native American Wines*, WINE ENTHUSIAST (Nov. 15, 2019), <https://www.winemag.com/2019/11/15/behind-the-rise-of-native-american-wines/> [<https://perma.cc/V22U-HEW3>] (highlighting several wine-making tribes); Richard Walker, *More Tribal Governments Considering Cannabis Operations*, KITSAP DAILY NEWS (Apr. 11, 2017, 1:30 AM) <https://www.kitsapdailynews.com/business/more-tribal-governments-considering-cannabis-operations/> [<https://perma.cc/759N-6YRW>] (Squaxin Island and Suquamish Tribes); Ty Rushing, *Nebraska Factory Makes 1.1B Cigarettes a Year*, U.S. NEWS (April 29, 2017, 1:05 AM), <https://www.usnews.com/news/best-states/nebraska/articles/2017-04-29/nebraska-factory-makes-11b-cigarettes-a-year> (last visited July 26, 2022) (Winnebago Tribe); Melinda Smith, Comment, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 AM. INDIAN L. REV. 507 (2014).

162. *See* Morgan, *supra* note 153; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987); *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013) (holding that sovereign immunity protected tribe and its officials from suit opposing its cigarette tax).

163. *See* MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 74–77; *Prevent All Cigarette Trafficking (PACT) Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Dec. 21, 2021), <https://www.atf.gov/alcohol-tobacco/prevent-all-cigarette-trafficking-act-pact-2009> [<https://perma.cc/9HVN-SREY>]; Gale Courey Toensing, *Senate Passes ‘Termination Era’ PACT Act; Tribal Leaders Will Continue Fight*, INDIAN COUNTRY TODAY (Sept. 12, 2018), <https://indiancountrytoday.com/archive/senate-passes-termination-era-pact-act-tribal-leaders-will-continue-fight> [<https://perma.cc/HES4-J2ZQ>] (the PACT Act “bans the shipment of tobacco products through the U.S. Postal Service, cutting off the only remaining delivery service for Indian retailers doing business over the Internet”).

164. *See* *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 174 (4th Cir. 2019); *People v. Miami Nation Enters.*, 386 P.3d 357, 361 (Cal. 2016). These cases are addressed *infra* in section II.C.

entities, leading to several of the sovereign immunity cases we discuss below in section II.C. The Indian gaming industry has also been met with this same intense level of state and individual opposition since its inception.<sup>165</sup>

This brief survey demonstrates that tribal governments have long sought to address the unemployment and poverty issues in Indian Country by pursuing a wide variety of economic activities. In the past few decades, several Indian nations have been spectacularly successful with gaming and others have succeeded with specific economic enterprises. But the vast majority of tribes and Native communities continue to struggle to provide living wage jobs and adequate housing, healthcare, and education for their peoples.

### C. *Judicial Interference*

So-called “arms-of-the-tribe” entities—formed by Indian nations to perform governmental or even purely commercial activities, such as governmental departments, agencies, or tribally owned corporations—benefit from tribal sovereign immunity for operations that occur on or off reservations.<sup>166</sup> “Agencies and enterprises of an Indian tribe are equivalent to the tribe itself for purposes of jurisdictional analysis.”<sup>167</sup> Thus, tribal departments, administrative agencies, and quasi-independent entities and businesses can enjoy immunity protections.<sup>168</sup>

In recent decades, however, some state and federal courts have adopted significant changes that have affected this general rule and have interfered with tribal decisions about entity formation, management, and even the actual day-to-day operations of a variety of tribal governmental and economic activities. In doing so, these courts seem to be straying outside

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165. See MILLER, RESERVATION “CAPITALISM,” *supra* note 2, at 74–77, 83–84; Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 311–12 (5th Cir. 1981).

166. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 824 n.4 (2014) (Thomas, J., dissenting); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998); Long v. Snoqualmie Gaming Comm’n, 7 Wash. App. 672, 675–80, 435 P.3d 339, 341–44 (2019) (dismissing case in which former CEO of tribe’s casino sued tribal gaming commission; case dismissed due to commission possessing sovereign immunity); Miller, 705 F.3d at 923–24; Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1292 (10th Cir. 2008) (“Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe’s commercial activities.”).

167. Warm Springs Forest Prod. Indus. v. Emp. Benefits Ins. Co., 703 P.2d 1008, 1009 n.1 (Or. Ct. App. 1985), *aff’d*, 716 P.2d 740 (Or. 1986).

168. Williams, 929 F.3d at 174 (dismissing case due to arm of the tribe sovereign immunity); White v. Univ. of Cal., 765 F.3d 1010, 1025 (9th Cir. 2014) (“Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe.”); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670–71 (8th Cir. 1986); Long, 7 Wash. App. at 675, 435 P.3d at 341 (dismissing case due to tribal gaming commission possessing sovereign immunity); Wilson v. Alaska Native Tribal Health Consortium, 399 F. Supp. 3d 926, 936 (D. Alaska 2019).

their areas of expertise and authority. They have, in effect, substituted their own ill-informed policy and economic judgments for tribal decision-making on how Indian nations must establish and operate their businesses if the tribe and its entities are to enjoy the protections and economic advantages of sovereign immunity the same as federal and state governments. These courts have developed multi-factor tests to determine when and if tribally owned governmental departments, agencies, and commercial entities enjoy sovereign immunity. We examine the leading and most recent cases in this section.

*1. Ransom (N.Y. 1995) and Sue/Perior (N.Y. 2014)*

In 1995, the New York Court of Appeals created a multi-factor test to analyze the arm of the tribe issue raised in *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*<sup>169</sup> In that case, the St. Regis Mohawk Tribe had created the St. Regis Mohawk Education and Community Fund as a nonprofit corporation under the Nonprofit Corporation Act of the District of Columbia.<sup>170</sup> The purpose of the Fund was to provide education, health care, social, and historical services to residents of the Tribe's reservation.<sup>171</sup> Plaintiffs sued the Fund for wrongful discharge and the defendant moved to dismiss the suit due to sovereign immunity.<sup>172</sup>

The New York court developed nine factors to determine whether the Tribe's non-profit entity was an arm of the tribe entitled to immunity:

1. The entity is organized under the tribe's laws or constitution rather than federal law;
2. The organization's purposes are similar to or serve those of the tribal government;
3. The organization's governing body is comprised mainly of tribal officials;
4. The tribe has legal title or ownership of property used by the organization;
5. Tribal officials exercise control over the administration or accounting activities of the organization;
6. The tribe's governing body has power to dismiss members of the organization's governing body;
7. The corporate entity generates its own revenue;
8. A suit against the corporation will impact the tribe's fiscal

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169. 658 N.E.2d 989, 992 (N.Y. 1995).

170. *Id.* at 991.

171. *Id.*

172. *Id.* at 991–92.

resources;

9. The sub-entity has the power to bind or obligate the funds of the tribe.<sup>173</sup>

Four of the nine factors related to the Tribe's ownership, control, and operation of the entity:

the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has the power to dismiss members of the organization's governing body.<sup>174</sup>

After analyzing these factors, the court held that the Fund enjoyed sovereign immunity because

[c]ritically, under its by-laws, the Fund's governing body may only be comprised of elected Chiefs of the Tribe. Thus, the Fund's provision of social services on behalf of and under the direct fiscal and administrative control of the Tribe renders it an entity so closely allied with and dependent upon the tribe that it is entitled to the protection of tribal sovereign immunity.<sup>175</sup>

The Fund was thus an arm of the tribe and protected.<sup>176</sup>

In 2014, the New York Court of Appeals was faced with the issue of whether a subsidiary of a tribally owned corporation enjoyed immunity in *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*<sup>177</sup> In this appeal, a contractor had sued a tribal corporation formed under the laws of the Seneca Nation of Indians in regards the construction of a golf course to be operated by that corporation for the benefit of the Nation.<sup>178</sup> This court cited *Ransom* and used its multi-factor approach to determine whether the golf course corporation was an entity separated from the Nation's immunity.<sup>179</sup> The *Sue/Perior* court relied on *Ransom*'s "functions or purposes" factor, and made this rather remarkable statement:

[T]he primary purpose of creating the golf course . . . was to act as a regional economic engine and thereby serve the *profit-making interests of the Seneca Nation's casino operations* . . . . While this may result in more funds for

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173. *Id.* at 992.

174. *Id.*

175. *Id.* at 993.

176. *Id.*

177. 25 N.E.3d 928 (N.Y. 2014).

178. *Id.* at 931.

179. *Id.* at 932–33.

government projects on the Seneca Nation's reservations and elsewhere *that benefit members of the tribe*, we agree with the Appellate Division that the *purposes* of Lewiston Golf were *sufficiently different from tribal goals* that they militate against Lewiston Golf's claim of sovereign immunity.<sup>180</sup>

The court also looked to the other eight *Ransom* factors and agreed that several cut in favor of the tribal corporation's argument.<sup>181</sup> But the 4-3 majority felt that the most important factors leaned in the opposite direction. These facts included that the Seneca Nation did not take legal title or ownership of the golf course.<sup>182</sup> Most significantly, the court noted that the "record firmly indicates the intent to ensure that a suit against Lewiston Golf will not impact the Seneca Nation's fiscal resources" and that the Nation "would not be liable for the debts or obligations incurred by [the golf course]."<sup>183</sup> The Nation argued, however, that the lawsuit against the golf course would have an economic impact on the Seneca Nation because revenues that would otherwise be distributed to the Nation and its citizens would be diminished by the suit.<sup>184</sup> The majority of the court responded that whether the profits would have been distributed to the Seneca Nation "is beside the point. The test, with respect to the financial relationship factors of *Ransom*, is not the indirect effects of any liability on the tribe's income, but rather whether the immediate obligations are assumed by the tribe."<sup>185</sup> Ultimately, the court held that the tribal entity did not possess sovereign immunity because the most significant *Ransom* factors counted against a finding of immunity.<sup>186</sup> The three dissenting justices, however, argued that the Seneca Nation would lose much needed revenues, the Nation had the sovereign rights to organize its economic entities as it saw fit, and that this litigation would impact the tribal treasury.<sup>187</sup>

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180. *Id.* at 934 (emphasis added).

181. *Id.*

182. *Id.* at 934–35.

183. *Id.* at 935 (quotations omitted).

184. *Id.*

185. *Id.* (noting also the "effect on tribal treasuries, just as 'the vulnerability of the State's purse' is considered 'the most salient factor' in determinations of a State's Eleventh Amendment immunity" (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994))).

186. *Id.* at 937.

187. *Id.* at 940–43 (Rivera, J., dissenting) ("[T]he Nation created Lewiston Golf as a commercial business venture to increase the Nation's gaming revenues for the benefit of the Tribe and its members. . . . As a sovereign, the Nation is certainly able to decide that this corporate arrangement will enhance its economic independence. . . . Lewiston Golf is intended . . . to 'further[] . . . the economic success of the Nation's gaming operations.' . . . We should look to whether the corporate entity furthers tribal self-determination and self-governance, and as such, benefits the tribe's

## 2. Breakthrough (10th Cir. 2010)

Federal circuit courts have also been faced with arm-of-the-tribe issues and questions about sovereign immunity. They have also developed and applied multi-factor tests to answer those questions. Perhaps the most influential federal case is the Tenth Circuit 2010 decision regarding immunity and a tribal casino in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*.<sup>188</sup>

In *Breakthrough*, the Picayune Rancheria of the Chukchansi Indians had created a separate tribal corporation, the Chukchansi Economic Development Authority (“Authority”), to own and operate the casino for the Rancheria.<sup>189</sup> A plaintiff sued the Rancheria, the Authority, the casino, and individual defendants. The federal district court dismissed the Rancheria due to sovereign immunity but allowed the suit to proceed against the Authority and casino.<sup>190</sup> The Tenth Circuit then developed a six-factor test that it used to analyze and answer whether the Authority, created by the Rancheria, and the casino, owned and operated by the Authority, were arms of the tribe and protected by sovereign immunity. The Tenth Circuit factors are:

1. The method of creating the economic entity;
2. The organization’s purpose;
3. The organization’s structure, ownership, and management, including the amount of control the tribe has over the entity;
4. Whether the tribe intended the entity to have sovereign immunity;
5. The financial relationship between the tribe and the entity;
6. Whether the purposes of tribal immunity are served by granting immunity to the entity.<sup>191</sup>

In analyzing its factors, the Tenth Circuit was not overly impressed by the extent of the actual tribal control and operation of the Authority and the casino. The court did note that the members of the Authority’s board of directors were all tribal citizens and “also are sitting members of the Tribal Council.”<sup>192</sup> Thus the court emphasized that the tribal council was

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members. . . . [T]he court in *Ransom* recognized, ‘preserving tribal resources and tribal autonomy are matters of vital importance.’” (quoting *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 86 N.Y.2d 553, 560–61 (1995))).

188. 629 F.3d 1173 (10th Cir. 2010). The California Supreme Court called *Breakthrough* the most influential case in this emerging field. *People v. Miami Nation Enters.*, 386 P.3d 537, 367 (Cal. 2016).

189. *Breakthrough*, 629 F.3d at 1176–77.

190. *Id.* at 1177.

191. *Id.* at 1181.

192. *Id.* at 1193.

“identical to the Authority’s Board” and that the tribal “Chairperson . . . also acts as the Chairperson of the Authority.”<sup>193</sup> But the court was still concerned that the chief financial officer of the Authority, and the general manager and chief financial officer of the casino “[were] not tribal [citizens]. Moreover, the Casino itself [had] fifteen directors, twelve of whom [were] not Tribal members.”<sup>194</sup> In light of these facts the court stated: “The third factor in our analysis, the structure, ownership, and management of the Authority and the Casino, weighs both for and against a finding of immunity.”<sup>195</sup>

Notwithstanding its concerns about the tribal control, the court dismissed the suit against the Authority and the casino because: “After considering these factors, it is patent to us that the Authority and the Casino are so closely related to the Tribe that they should share in the Tribe’s sovereign immunity.”<sup>196</sup> The court stated that “the balance of the factors weighs . . . strongly in favor of immunity.”<sup>197</sup> Consequently, the Tenth Circuit held that the Authority and the casino were arms-of-the-tribe and protected by sovereign immunity.<sup>198</sup>

Fourteen years earlier, a different tribal casino was also found immune from suit under a three-factor test. In 1996, the Minnesota Supreme Court also dismissed a suit versus a tribal casino due to sovereign immunity. In *Gavle v. Little Six, Inc.*,<sup>199</sup> the plaintiff sued Little Six, Inc. and three officers for torts claims regarding her employment at the casino. Little Six is a tribal corporation that was created under the laws of the Shakopee Mdewakanton Sioux Community to operate its casino.<sup>200</sup> The state supreme court affirmed the lower court decision dismissing the suit because the sovereign immunity of the tribal Community extended to its casino.<sup>201</sup> The Minnesota Supreme Court analyzed three factors that it developed to answer this issue and held that the casino was a tribally owned business entity, formed to enhance the well-being of the Community, and was closely linked to it in governance. Consequently, the tribal casino was immune from suit.<sup>202</sup>

The court used these three factors to determine “whether tribal

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193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1177–78, 1181, 1195.

197. *Id.* at 1191 n.13.

198. *Id.* at 1181, 1195.

199. 555 N.W.2d 284 (Minn. 1996).

200. *Id.* at 287.

201. *Id.*

202. *Id.* at 287, 295–96.

sovereign immunity extends to a tribal business entity.”

1. Whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;
2. Whether the tribe and the business entity are closely linked in governing structure and other characteristics;
3. Whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.<sup>203</sup>

In regard to these factors, the court noted that the casino was “owned wholly by the Community, as a governmental unit . . . [and the] Board of Directors must include at least three members of the Community Business Council and a majority of the Board of Directors must be members of the Community.”<sup>204</sup> This court had no trouble holding “[t]here is, therefore, a close link between the Community and the management of [the casino].”<sup>205</sup>

### 3. *White (9th Cir. 2014)*

In 2014, in *White v. University of California*,<sup>206</sup> the Ninth Circuit was asked whether an inter-tribal consortium of individuals, the Kumeyaay Cultural Repatriation Committee, whose individual members had been appointed by twelve separate federally recognized tribal governments, shared the sovereign immunity protection of their associated Indian nations.<sup>207</sup> The Committee had been created to protect the tribes’ rights to repatriation of human remains, funerary objects, and cultural artifacts under the Native American Graves Protection and Repatriation Act of 1990.<sup>208</sup>

In this situation, the University of California had decided to repatriate ancient human remains to the Committee and tribes.<sup>209</sup> Several professors and scientists sued the University system, state officials, and the Committee to be allowed to study these remains instead of the University repatriating them.<sup>210</sup> But the Ninth Circuit panel ultimately held that the Committee was an arm of the tribe and protected by the tribes’ sovereign immunity, and thus the professors’ suit was dismissed because the

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203. *Id.* at 294.

204. *Id.* at 295.

205. *Id.*

206. 765 F.3d 1010 (9th Cir. 2014), *cert. denied*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 983 (2016).

207. *Id.* at 1015 & n.1, 1016, 1018.

208. *Id.* at 1025; 25 U.S.C. §§ 3001–3013 (2018).

209. *White*, 765 F.3d at 1021.

210. *Id.* at 1021–22.

Committee and the tribes were indispensable parties who could not be joined in the suit.<sup>211</sup> To analyze this issue, the court reviewed the six-factor Tenth Circuit *Breakthrough* test and then adopted for the Ninth Circuit a five-factor test:

1. Method of the creation of the economic entity;
2. The entity's purpose;
3. The entity's structure, ownership, management, and amount of tribal control;
4. The tribe's intent with respect to sharing its sovereign immunity with the entity;
5. The financial relationship between the tribe and the entity.<sup>212</sup>

This court refused to adopt the sixth *Breakthrough* factor of whether the purposes of sovereign immunity would be served by granting immunity to this entity. After analyzing the facts regarding the creation of the Committee in light of its five-factor test, the Ninth Circuit held that the consortium was protected by tribal sovereign immunity.<sup>213</sup>

#### 4. Miami Nation (*Cal. S. Ct. 2016*)

In 2016, the California Supreme Court was faced with the question of whether online lending corporations, created and allegedly controlled by two Indian nations, shared the tribes' immunity from being sued for injunctive relief, restitution, and civil penalties.<sup>214</sup> The California court analyzed the developing body of case law set out above and adopted its own five-factor test to assess whether these business entities were arms-of-the-tribe and possessed sovereign immunity. The court adopted "a modified version of the Tenth Circuit's *Breakthrough* test" and used factors one through five of *Breakthrough's* six-part test.<sup>215</sup>

1. [T]he entity's method of creation,
2. [W]hether the tribe intended the entity to share in its immunity,
3. [T]he entity's purpose,
4. [T]he tribe's control over the entity, and
5. [T]he financial relationship between the tribe and the entity.<sup>216</sup>

In this case, the state of California sued multiple payday lenders for

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211. *Id.* at 1025–27.

212. *Id.* at 1025 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).

213. *Id.* at 1015, 1025.

214. *See People v. Miami Nation Enters.*, 386 P.3d 357 (Cal. 2016).

215. *Id.* at 371.

216. *Id.* at 365.

injunctive relief, restitution, and civil penalties for violating state lending laws.<sup>217</sup> Two of the lenders were controlled by the Santee Sioux Tribe and the Miami Nation and they moved to quash service of summons based on the state court's lack of jurisdiction due to sovereign immunity.<sup>218</sup> An individual operator had contracted with these two tribes to offer the online lending services.<sup>219</sup> The California Supreme Court analyzed many cases, including *Ransom*, *Sue/Perior*, *Breakthrough*, *White*, and *Gavle*, and applied its multi-factor test to determine if these payday lending entities were arms of the tribe and protected by immunity.<sup>220</sup>

The factor that seemed to weigh most heavily in the court's decision was the "control" factor. The court described the test to determine actual tribal control of a tribally owned business entity in this way:

[T]he control factor examines the degree to which the tribe *actually*, not just nominally, *directs* the entity's *activities* . . . . This factor concerns the entity's "structure, ownership, and management, including the amount of control the Tribe has over the entities." Relevant considerations include the entity's formal governance structure, the extent to which it is owned by the tribe, and the entity's *day-to-day management*. An entity's decision to outsource management to a nontribal third party is not enough, standing alone, to tilt this factor against immunity. As the Minnesota Supreme Court has observed, "control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management." If the tribe retains some ownership and formal control over the entity but has *contracted out its management*, this factor may weigh either for or against immunity depending on the particular facts of the case. Evidence that the *tribe actively directs or oversees* the operation of the entity weighs in favor of immunity; evidence that *the tribe is a passive owner*, neglects its governance roles, *or otherwise exercises little or no control or*

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217. *Id.* at 362.

218. *Id.*; *cf.* *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1102 (Colo. 2010) (holding that if business entities were "arms of the tribe" they could use sovereign immunity to defend against state investigative subpoenas. The court remanded and directed the trial court to use these three factors to determine whether the entities were arms-of-the-tribes: 1. Whether the tribes created the entities pursuant to tribal law; 2. whether the tribes own and operate the entities; and 3. whether the entities' immunity protects the tribe's sovereignty.).

219. *Miami Nation*, 386 P.3d at 362.

220. *Id.* at 366–67, 376–79.

*oversight* weighs against immunity.<sup>221</sup>

In analyzing this factor, the court stated that “[t]he record . . . contains scant evidence that either tribe actually controls, oversees, or significantly benefits from the underlying business operations of the online lenders.”<sup>222</sup>

The court also stated:

[M]embers of the Santee Sioux’s governing Tribal Council serve as the SFS board of directors. MNE’s board of directors is appointed by the chief of the Miami Tribe with the advice and consent of the Tribal Business Committee . . . . [But] significant evidence suggests that in fact neither . . . the Miami Tribe or Santee Sioux, *maintains operational control* over the underlying lending businesses.

Both [tribal entities] have *relied heavily on outsiders to manage* their online . . . businesses since those businesses were founded.<sup>223</sup>

The court noted “other evidence casts doubt on whether SFS’s and MNE Services’ role in approving loans indicates a significant degree of [tribal] control.”<sup>224</sup> The evidence demonstrated that the majority of the operations were conducted outside of tribal lands, by non-Indian, non-tribally employed employees.<sup>225</sup> The court then concluded that “the balance of evidence suggests that [non-Indians] exercised a high degree of practical control over the online lenders here and that the tribes were not ‘enmeshed in the direction and control of the business[es].’”<sup>226</sup>

Consequently, the California Supreme Court determined that the Santee Sioux Tribe and Miami Nation did not actually control and operate the lending companies and that in fact the individual non-Indian operator did.<sup>227</sup> The court held “neither [tribally owned entity] has shown by a preponderance of the evidence that it is entitled to tribal immunity as an arm of its affiliated tribe.”<sup>228</sup> The entities did not benefit from their tribes’ sovereign immunity and could not avoid the state summons. The court remanded the matter, however, for the trial court to expand the record, and

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221. *Id.* at 371, 373 (emphasis added) (citations omitted) (quoting *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 295 (Minn. 1996)).

222. *Id.* at 376.

223. *Id.* (emphasis added).

224. *Id.* at 377.

225. *See id.*

226. *Id.* (quoting *Gavle*, 555 N.W.2d at 295); *see also id.* at 378 (“Neither [tribal entity] has carried its burden of demonstrating *practical control* by either tribe or a close financial relationship between either tribe and the lending businesses.” (emphasis added)).

227. *Id.* at 378–79.

228. *Id.* at 379.

to apply the newly articulated multi-factor test to any evidence produced by the parties.<sup>229</sup>

5. *Williams (4th Cir. 2019)*

In 2019, the Fourth Circuit was also faced with the issue of whether tribally owned online lending businesses were entitled to immunity from a suit alleging violations of Virginia's usury laws. In *Williams v. Big Picture Loans, LLC*,<sup>230</sup> the court also considered and adopted five of the six-factors from the *Breakthrough* test. "Like the Ninth Circuit, we adopt the first five *Breakthrough* factors to analyze arm-of-the-tribe sovereign immunity":<sup>231</sup>

1. The method of creation;
2. Purpose of the entity;
3. The tribe's ownership and the control it exercises over the entity's management;
4. The tribal intent to share sovereign immunity with the entity;
5. The financial relationship between the tribe and the entity.<sup>232</sup>

In this case, the Lac Vieux Desert Band of the Lake Superior Chippewa Indians in northern Michigan had formed two business entities to offer online lending.<sup>233</sup> Virginia plaintiffs sued the businesses and various individuals alleging the high-interest loans were illegal.<sup>234</sup> The tribal entities moved to dismiss claiming immunity as arms-of-the-tribe.<sup>235</sup> The district court denied the motion because it found they had failed to prove they were entitled to sovereign immunity.<sup>236</sup>

After adopting the Ninth Circuit's multi-factor test, the Fourth Circuit addressed the control and management factor:

The third *Breakthrough* factor examines the structure, ownership, and management of the entities, "including the amount of control the Tribe has over the entities." Relevant to this factor are the entities' formal governance structure, the extent to which the entities are owned by the tribe, and *the day-to-day management*

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229. *Id.*

230. 929 F.3d 170 (4th Cir. 2019).

231. *Id.* at 177.

232. *Id.*

233. *Id.* at 174.

234. *Id.*

235. *Id.*

236. *Id.*

of the entities.<sup>237</sup>

The Fourth Circuit examined and emphasized the fact that Big Picture was managed by two elected tribal council members, who were appointed to those positions by a majority vote of the elected tribal council.<sup>238</sup> These tribal council managers were granted broad authority to legally bind Big Picture and to perform all actions necessary to carry out its business.<sup>239</sup> The circuit court stated that the “district court correctly recognized that this general structure is to assure that Big Picture is answerable to the Tribe at every level, which supports immunity.”<sup>240</sup> The Fourth Circuit was not overly concerned that the other defendant company, Ascension, “manage[d] many of the day-to-day activities associated with Big Picture’s lending, [because] an entity’s decision to outsource management in and of itself does not weigh against tribal immunity, as the district court recognized.”<sup>241</sup> The court then found that the Tribe through Big Picture “remain[ed] in control of its essential functions” and limited the authority of Ascension in significant ways.<sup>242</sup> The court cited *Miami Nation* and agreed with the California Supreme Court that simply because some “day-to-day management tasks” were outsourced to Ascension does “not in itself weigh against immunity, given the other evidence of Tribal control.”<sup>243</sup>

Ultimately, the Fourth Circuit stated that the control factor question was a closer call as to the defendant Ascension than for Big Picture.<sup>244</sup> And it noted that even though the Tribe owned Ascension, and there was significant tribal council and tribal council members’ management of Ascension, the evidence tended to weigh slightly against a finding of arm-of-the-tribe status and immunity for Ascension.<sup>245</sup> But after analyzing and weighing all five factors, the Fourth Circuit reversed the district court and held that Big Picture Loans, LLC and Ascension Technologies, LLC were arms-of-the-tribe, protected by sovereign immunity, and not subject to being sued.<sup>246</sup>

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237. *Id.* at 182 (emphasis added) (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1191 (10th Cir. 2010)).

238. *Id.* at 182–83.

239. *Id.* at 182.

240. *Id.* (quotation marks and citation omitted).

241. *Id.* at 182–83 (citing *People v. Miami Nation Enters.*, 386 P.3d 357, 373 (Cal. 2016)).

242. *Id.* at 183–84.

243. *Id.* at 183 (citing *Miami Nation*, 386 P.3d at 373).

244. *Id.*

245. *Id.* at 183–84.

246. *Id.* at 185.

6. Hwal'Bay Ba (*Ariz. S. Ct. 2020*)

In 2020, the Arizona Supreme Court analyzed its own precedent, and the *Breakthrough* and *Miami Nation* cases in particular, and adopted a multi-factor test to decide when a tribal business entity shares the Indian nation's immunity. In *Hwal'Bay Ba: J Enterprises v. Jantzen in & for Mohave*,<sup>247</sup> the court set forth this six-part test:

1. The entity's creation and business form;
2. The entity's purpose;
3. The business relationship between the tribe and the entity (including the structure, management, and ownership of the entity);
4. The tribe's intent to share immunity with the entity;
5. The financial relationship between the entity and the tribe;
6. Whether providing immunity to the entity will further federal policies underlying sovereign immunity.<sup>248</sup>

In *Hwal'Bay Ba*, the plaintiff sued the Hualapai Indian Tribe and its corporate entities for injuries she suffered on a rafting trip.<sup>249</sup> The Tribe is the sole shareholder and owner of the Grand Canyon Resort Corporation ("GCRC"), and Hwal'Bay Ba: J Enterprises, Inc. does business under the trade name of GCRC to operate rafting trips.<sup>250</sup> The state trial court dismissed the Tribe due to sovereign immunity but did not grant immunity to the tribal corporate entities.<sup>251</sup> The Arizona Supreme Court applied its new six-factor test to determine if these business entities were arms of the tribe.<sup>252</sup>

In discussing its factor on the Tribe's ownership, control, and operation of GCRC and Hwal'Bay Ba, the court stated:

This inquiry should illuminate the tribe's ownership interest and the *amount of control* exercised by it over the entity's affairs. "Control" does *not require directing day-to-day* operations but addresses the tribe's involvement in the direction and control of the entity. "Evidence that *the tribe actively directs or oversees the operation* of the entity weighs in favor of immunity; evidence that the tribe is a passive owner, neglects its governance roles, or otherwise *exercises little or no control or oversight* weighs

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247. 458 P.3d 102 (Ariz. 2020).

248. *Id.* at 108–10.

249. *Id.* at 105.

250. *Id.*

251. *Id.* at 105–06.

252. *Id.* at 108–11.

against immunity.”<sup>253</sup>

The court, however, seems to have then ignored the above view of the control factor that a Tribe does not have to direct the day-to-day operations of its entities:

*[C]ontrol and operation of GCRC is vested in a board of directors, which can hire officers, make investment decisions, borrow funds, and enter in contracts; . . . and the Tribe is prohibited from “interfer[ing] with or giv[ing] orders or instructions to the officers or employees of GCRC” regarding day-to-day operations . . . . And nothing reflects the level of control and oversight the Tribe actually exercises over GCRC as the plan of operation authorizes the Tribe to do.*<sup>254</sup>

The Arizona Supreme Court then held that the tribally owned corporation had failed to demonstrate it was an arm of the tribe and protected by sovereign immunity because the Tribe was not in control and operation of the business.<sup>255</sup> The court remanded the matter, however, for further development of the record in light of the new six-factor test adopted by the court.<sup>256</sup>

It seems important to note that a federal district court in California arrived at the exact opposite conclusion regarding sovereign immunity for this identical Tribe and tribal corporation in a tort action just over a month before the *Hwal’Bay Ba* decision was issued.<sup>257</sup> The California federal district judge applied the Ninth Circuit *White* five-factor test and held that the tribal corporation was protected by immunity.<sup>258</sup> In addition, there are two Arizona Court of Appeals cases from 2009 concerning an injury on a rafting trip with the identical Tribe and tribal corporations and defendants in *Hwal’Bay Ba*, and a 2020 case—again in regard to the identical Tribe and tribal corporation—in which these state appellate courts came to different conclusions than the Arizona Supreme Court did in *Hwal’Bay*

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253. *Id.* at 109 (emphasis added) (quoting *People v. Miami Nation Enters.*, 386 P.3d 357, 373 (Cal. 2016)).

254. *Id.* at 111 (emphasis added). The facts the Arizona Supreme Court criticized are the very principles that the Harvard Project has been advising Indian nations to do for the past thirty plus years. *See, e.g.*, REBUILDING NATIVE NATIONS, *supra* note 10, at 150 (“Political leaders should do what they were elected to do—run the government—but they shouldn’t be directly managing it.”).

255. *Hwal’Bay Ba*, 458 P.3d at 110.

256. *Id.* at 111.

257. *Min Zhang v. Grand Canyon Resort Corp.*, No. 5:19-cv-00124-SVW-SP, 2020 WL 1000608, at \*1–2 (C.D. Cal. Jan. 15, 2020) (granting motion to dismiss for the same defendant from *Hwal’Bay Ba*, the Hualapai Indian Tribe wholly owned Grand Canyon Resort Corporation, due to sovereign immunity in a *pro se* case).

258. *Id.* at \*2.

*Ba.*<sup>259</sup> The Arizona Supreme Court did not cite, and perhaps did not consider, any of these three cases in deciding *Hwal'Bay Ba*.

In conclusion, this Part has laid out briefly the existence of tribal sovereignty and governance both before and after the colonial eras and the enactment of the U.S. Constitution and creation of the United States. Indian nations have always exercised varying amounts of political power and jurisdiction over their peoples and territories. That existence and authority arises from the compacts of their peoples and not from the United States or the states. For over one hundred and fifty years, federal courts have recognized that the protection of sovereign immunity is an inherent aspect of tribal sovereignty. Indian nations have utilized and oftentimes waived their immunity to operate a wide array of economic entities and activities in their attempts to bring beneficial jobs, housing, and healthcare to their communities. This also demonstrates, however, what can be described as a new trend of judicial interference into tribal decision-making regarding the creation, management, and operation of their business entities.

These cases show that numerous courts have developed very similar multi-factor tests to analyze whether a tribal department, agency, or business entity is an arm of the tribe and thus protected by immunity. One can reasonably argue that these tests and these court decisions are examples of the state and federal judiciaries interfering in tribal legislative and executive branch decisions. Instead, tribal governments should have the inherent sovereign right to create, manage, and operate their businesses and economic entities as Native nations determine best. Furthermore, they should still enjoy the immunity protections inherent to sovereign Indian nations and to the federal and state governments.<sup>260</sup>

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259. *WD at the Canyon, LLC v. Honga*, No. 1 CA-CV 16-0468, 2017 WL 5404369, ¶¶ 13–19 (Ariz. Ct. App. Nov. 14, 2017) (affirming dismissal of complaint against tribal members, board members, executives, and elected tribal leaders regarding the operation of a tourist attraction on the Hualapai Tribe Reservation because defendants were protected by sovereign immunity by acting within their authority as elected tribal council members and board members or executives of the tribal corporation *Hwal'Bay Ba: J Enterprises, Inc. d/b/a Grand Canyon Resort Corporation*); *Rosenberg v. Hualapai Indian Nation*, No. 1 CA-CV 08-0135, 2009 WL 757436, ¶¶ 2, 7–8, 10, 12, 17 (Ariz. Ct. App. Mar. 24, 2009), (affirming dismissal of complaint against Tribe due to sovereign immunity for an injury incurred on a rafting trip with Hualapai River Runners which was owned and operated by the Tribe), *cert. denied*, 559 U.S. 1036 (2010).

260. *Cf. Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019); *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014), *cert. denied*, 577 U.S. 1124 (2016); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010); *McCoy v. Salish Kootenai Coll., Inc.*, 785 F. App'x 414 (9th Cir. 2019) (finding that even though tribal college was incorporated under Montana law, college was protected by tribal sovereign immunity); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (tribal housing authority “as an arm of the Tribe, enjoys the full extent of the Tribe’s sovereign immunity”); *Wilson v. Alaska*

### III. ECONOMIC EFFICIENCY, TRIBAL SOVEREIGNTY AND BUSINESS, AND THE COURTS

The judicial tests described above present serious challenges to tribal sovereignty, economic development and efficiency, and even common sense. When courts intervene in topics beyond the judicial purview, capacity, experience, and expertise, they create problems for other branches of government, other governments, and the public to handle. Of course, courts usually have the responsibility and power to decide the cases and issues presented to them. But when federal and state courts choose to address issues regarding tribal sovereign immunity and to set standards that Indian nations *must* follow in creating, managing, and operating their own business concerns, courts appear to be interfering into the sovereign's realm, the sovereign decisions of the legislative and executive branches and actions of Indian nations, and beyond the expertise, power, and proper role of courts and judges. In Part III, I examine the contradictions and the costs imposed by these court decisions on tribal economic development, efficiency, common sense, profitability, and the long-term health of reservation communities.

In section B, I also briefly set out some initial thoughts on ways that Indian nations and Congress might prevent federal and state courts from interfering in decisions more properly reserved for Indian nations. The U.S. Supreme Court has already pointed out one very valid suggestion, as noted by the leading treatise in Federal Indian Law: “The Court has consistently affirmed [tribal] immunity, deciding that *Congress is the appropriate body* to determine whether to abrogate it, because Congress is in a better position ‘to *weigh and accommodate the competing policy concerns* and reliance interests.’”<sup>261</sup>

#### A. *Economic Efficiency, Common Sense, and Profitability*

Under the tests described above, state and federal courts are mandating that Indian nations engage in inefficient, unwise, unprofitable, and even nonsensical methods of creating, managing, and operating their economic entities if they are to benefit from their own inherent powers of sovereignty and sovereign immunity. The only logical conclusion one can take from these cases is that federal and state judiciaries are forcing Indian nations to own, manage, and operate their economic concerns on a day-

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Native Tribal Health Consortium, 399 F. Supp. 3d 926 (D. Alaska 2019) (finding inter-tribal health organization was an arm of the tribe and protected by immunity); Olson v. Nooksack, 6 N.I.C.S. App. 49, 52–53 (Nooksack Ct. App. 2001) (finding sovereign immunity protected tribal housing authority).

261. COHEN’S, *supra* note 31, at 637 & n.5 (emphasis added) (quoting Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998)).

to-day basis.<sup>262</sup> But clearly, these judicial requirements are in direct opposition to every normative economic principle and sound economic advice that governments—especially tribal governments—have ever been given about how best to create and operate publicly-owned economic enterprises. Instead of actually controlling and operating these commercial entities on a day-to-day basis, Indian nations have been inundated with advice for many decades that they absolutely must separate tribal politics, bureaucracies, and elected political leaders from the day-to-day management and actual operations of their commercial endeavors.<sup>263</sup>

Even worse, the 2020 Arizona Supreme Court case *Hwal'Bay Ba*, and at least one earlier Arizona state case, stated that tribally owned corporations and businesses should *not* purchase insurance to cover their activities. According to those cases, if tribal governments have insurance to protect the public from tribal economic activities, it cuts against an Indian nation and its immunity protection because then the tribal nation is protected from any risk of financial loss by the insurance policy.<sup>264</sup> That statement, and that reasoning, is simply unbelievable—to put it mildly.<sup>265</sup> First, a tribal government or entity pays for insurance protection out of its profits and investments, thus impacting the tribal treasury by decreasing the income returning to the tribe and community. Second, the government and entity will bear any increased insurance premium costs if claims ensue. Those increased costs will also impact the tribal treasury. Third, the tribe or entity might also be liable for damage claims that exceed the policy limits if sovereign immunity does not protect the tribe or entity. Fourth, no one, and especially not a government, would ever logically or reasonably run a business or manage these affairs in such a fashion. These Arizona courts were mistaken that buying insurance means there is no possible impact on a tribal treasury because insurance expenses cost the entity or tribe and lessen the profits that flow back to the Indian nation.

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262. See *Hwal'Bay Ba*: J Enters. v. Jantzen in & for Mohave, 458 P.3d 102 (Ariz. 2020); *People v. Miami Nation Enters.*, 386 P.3d 357 (Cal. 2016); *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928 (N.Y. 2014).

263. See *infra* notes 269–71 and accompanying text.

264. *Hwal'Bay Ba*, 458 P.3d at 109; *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109–10 (Ariz. 1989) (stating that tribal corporation that operates independently of the tribal government might not qualify for immunity if it is not considered to be an arm of the tribe; tribal company had liability insurance so the tribe itself was not at risk). *Contra* *Graves v. White Mountain Apache Tribe*, 117 Ariz. 32 (Ariz. Ct. App. 1977) (finding that the fact that the tribe purchased liability insurance did not waive its governmental immunity).

265. Cf. *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981) (en banc) (“[The Board’s] funds are state funds. The fact that such funds may have been derived from insurance proceeds does not alter this conclusion.”), *abrogated by* *Haygood v. Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985).

These courts also seem to have lost their way and common sense in suggesting that a tribal government or entity must forego buying insurance or else lose its sovereign rights.

In contrast to the nonsensical requirements that tribal governments must own, manage, and operate their economic enterprises' daily affairs is the reality of well-respected economic principles that these judicially imposed requirements absolutely contradict. It appears to be common knowledge and common sense that politically directed and operated business enterprises are inherently less efficient and less profitable than privately operated entities. "Compared to a regular enterprise, state-owned enterprises are typically expected to be less efficient due to political interference, [because] unlike profit-driven enterprises they are more likely to focus on public objectives."<sup>266</sup> Economists also argue that "state firms are typically extremely inefficient, and their losses result in huge drains on their countries' treasuries."<sup>267</sup> This is because politicians and bureaucrats have very different goals than community social and economic interests since politicians are driven by their own political interests.<sup>268</sup>

Furthermore, these multi-factor judicial tests directly conflict with the tribal-specific economic advice Indian nations have been receiving for over thirty years. The well-known and well-respected Harvard Project on American Indian Economic Development has been operating since 1987 and engages in extremely important research investigating the elements that create successful Indian nations' economic development.<sup>269</sup> The Project has engaged in over thirty years of scholarly economic studies, masters theses and doctoral dissertations, and rigorous comparative analyses to reach its conclusions. The Project has conclusively proven that for tribal governmental businesses to survive, function, and generate long-term employment and tribal income, they must be kept as far away as possible from the management and interference of politicians and direct governmental control.<sup>270</sup> As with almost all businesses, these entities function best, survive longer, and are more profitable if they are operated by—and day-to-day decisions are made by—experienced business people who are as free as possible from the daily interventions, vicissitudes, and

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266. *State-owned Enterprise*, WIKIPEDIA, [https://en.wikipedia.org/wiki/State-owned\\_enterprise#cite\\_note-ShleiferVishny97-11](https://en.wikipedia.org/wiki/State-owned_enterprise#cite_note-ShleiferVishny97-11) [<https://perma.cc/G4ML-TED9>]; see also Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 767 (1997).

267. Shleifer & Vishny, *A Survey of Corporate Governance*, *supra* note 266, at 767.

268. *Id.* at 768.

269. *About*, HARV. PROJECT ON AM. INDIAN ECON. DEV., <https://hpaied.org/about> [<https://perma.cc/NC94-GTA5>].

270. STATE OF THE NATIVE NATIONS, *supra* note 153, at 123 & n.26, 128.

intrigues of politics.<sup>271</sup>

The Harvard Project's extensive studies since 1987 have firmly echoed the truth of those principles for tribally owned commercial enterprises. The Project's comparative studies of over 100 Indian nations have proven that tribal entities have a 400% better chance of being profitable, successful, and sustainable if they keep politics and politicians out of their daily management.<sup>272</sup> Other Harvard Project studies reinforce that finding because they have found in studying scores of tribes across the United States that an independent tribal judicial system helps to keep political influence out of economic decision-making and contract disputes, for example, and leads to a 5% higher employment rate for reservations that have independent judicial systems.<sup>273</sup> Moreover, the Harvard Project has also found that Indian nations that couple independent court systems with a constitutional or statutory separation of powers provision enjoy an overall 15% better employment rate than those tribal governments that have not yet adopted those beneficial tools.<sup>274</sup> These results demonstrate that Indian nations should consider operating their economic concerns as free from political control as possible. They also illustrate that the multi-factor judicial tests undercut the ability of Indian nations to contribute to the sustainability and future of their reservation communities.

The Harvard Project is also well known for three core conclusions that it has proven lead to successful and sustained tribal economic development. Two of those findings are directly relevant to our discussion. First, the Project has proven through its extensive studies that there is an important role for tribal governments in creating successful reservation economic development. Tribal sovereignty matters. Tribal leaders and Indian nations must set the overall strategic direction and must make the big decisions on what economic endeavors will be pursued by a tribal nation.<sup>275</sup> This is especially important in light of the fact that tribal governments are often the beneficial owners, along with the United States as the legal owner, of the majority of lands and natural resources and assets on most reservations. Tribal leaders are obligated and entrusted to make those kinds of higher-level decisions, and they are plainly the best qualified to make decisions that impact the overall development and use of a reservation, the community, and their assets. The Harvard Project has

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271. *Id.* at 123–128; Andrei Shleifer & Robert W. Vishny, *Politicians and Firms*, 109 Q.J. ECON. 995, 996 (1994) (citing authorities).

272. STATE OF THE NATIVE NATIONS, *supra* note 153, at 123 & n.26.

273. *Id.* at 128; Stephen Cornell & Joseph P. Kalt, *Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development*, 29 J. SOCIO-ECON. 443, 458–61 (2000).

274. STATE OF THE NATIVE NATIONS, *supra* note 153, at 128.

275. *Id.* at 126–28.

also proven that tribal governments and politicians have to be kept out of day-to-day business management and operations: the tactics of running an economic entity. According to its studies and findings, tribal governments must separate politics from the day-to-day operations of tribally owned businesses to ensure their profitability and sustainability.<sup>276</sup>

The Project's next finding is that tribal institutions, including court systems, departments, and bureaucracies, are crucial in impacting economic decision-making and operations and economic development on reservations.<sup>277</sup> For the benefit of both public and private economic sectors, tribal institutions must be efficient, competent, fair, and even "business-friendly" to attract and support the success of business activities in Indian Country.<sup>278</sup> The Project's third finding is perhaps less relevant to this Article. The Project has proven that tribal cultures also matter in successful Indian nation economic development.<sup>279</sup> This finding seems fairly obvious because a reservation culture or community that totally rejects a certain type of business activity is not going to tolerate or support a tribal or privately owned business whose operations and sheer existence violate tribal and community norms.

The Harvard Project has long made explicit suggestions to tribal governments to consider how best to benefit from its studies and findings and how to institute lasting economic development. The Project and its studies strongly recommend that Indian nations appoint non-elected leaders and experienced and independent boards of directors to control and manage tribal commercial entities, and that they hire business experts, Native or non-Native, to operate the departments and companies a tribal government creates to develop reservation assets and opportunities.<sup>280</sup>

Note that these studies and the Harvard Project's recommendations are the exact opposite of what the state and federal cases set out above are requiring of tribal governments. In contrast, those courts are demanding that elected tribal leaders sit on the boards of their corporate and business entities and actively manage and even control daily business operations and decision-making. There seems to be no other way to view these judicial tests than as mandating economically inefficient and ultimately disastrous requirements on Indian nations when they create

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276. *Id.* at 123, 128.

277. *Id.* at 122–25.

278. MILLER, RESERVATION "CAPITALISM," *supra* note 2, at 108–09; *accord* Miller, *Sovereign Resilience*, 2018 BYU L. REV., *supra* note 5, at 1382 ("[B]usinesses and entrepreneurs are attracted to locations where the branches of government are competent and can assist businesses to locate, operate, and profit."); STATE OF THE NATIVE NATIONS, *supra* note 153, at 123–25.

279. STATE OF THE NATIVE NATIONS, *supra* note 153, at 125–26.

280. *Id.* at 123, 128.

governmentally owned economic endeavors.

Furthermore, these state and federal tests impose conditions on Indian nations that imperil the profitability and thus the very sustainability of the business enterprises and the sustainability of reservation communities themselves. Most tribal governments and reservation communities suffer from extreme poverty and from many deficits and obstacles for operating successful and sustainable economic concerns. Most Indian reservations are located in remote and rural areas, lack physical, social, health, and educational infrastructures, suffer from a nearly complete lack of a tax base, lack financial and human capital, and face other issues that present serious challenges for any tribal nations' business and reservation to survive and thrive.<sup>281</sup> Tribal governments and Indian Country need successful and sustainable economic activities and they need every benefit and advantage that is available to them as sovereign entities, including the protection of sovereign immunity.<sup>282</sup>

In sum, federal and state court interference into tribal economic affairs is problematic and very detrimental for Indigenous economic development and efforts to improve living conditions in Indian Country. The next section lays out some preliminary thoughts on how Indian nations and Congress might work to successfully repel this judicial overreach.

### *B. Tribal Sovereignty Versus the Courts*

The judicial tests discussed above arguably constitute inappropriate and improper judicial overreach into the prerogatives of tribal governments. In this section, I briefly set out four arguments that might counter the judicial activism that has been underway for the past few decades as state and federal courts forced inefficient and unwise requirements on tribal governments. These arguments will be developed more fully in future articles.

My first point is that the U.S. Supreme Court has already demonstrated the correct approach that state and federal courts should take before even considering delving into, never mind imposing requirements on, tribal sovereign immunity. In 1998 and 2014, the Court demonstrated judicial modesty, self-restraint, and the proper role for courts before engaging

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281. *Supra* notes 1–3; RESERVATION “CAPITALISM”, *supra* note 2, at 118–20, 123, 144.

282. *Min Zhang v. Grand Canyon Resort Corp.*, No. 5:19-cv-00124-SVW-SP, 2020 WL 1000608, at \*2 (C.D. Cal. Jan. 15, 2020) (stating “as one of its purposes is to provide economic opportunities to Tribe members, GCRC’s continued operation directly benefits the tribe by employing its members”); *see, e.g.*, *Morgan*, *supra* note 153, at 122, 124, 126, 128, 130 (stating tribal businesses are helped to succeed by being “shielded from a lawsuit by sovereign immunity”).

these tribal issues. In 1998, in *Kiowa Tribe*,<sup>283</sup> and 2014 in *Bay Mills*,<sup>284</sup> the Court rejected the very arguments that the lower courts and the multi-factor tests described above have now adopted: whether courts can limit tribal sovereign immunity. In contrast, the Supreme Court took a totally different approach and left tribal immunity decisions to the appropriate and constitutionally mandated branch of the federal government to decide these issues: Congress.<sup>285</sup>

In *Kiowa Tribe*, a 6-3 opinion, the Court at first took a relatively dim view of tribal immunity and criticized how its own case law on the topic had “developed almost by accident.”<sup>286</sup> The Court said there “are reasons to doubt the wisdom of perpetuating the doctrine.”<sup>287</sup> In this case, the Kiowa Tribe in Oklahoma engaged in economic activities and conduct that occurred outside of Indian Country. But the Court rejected the invitation to intrude on the well-recognized parameters of tribal sovereignty and immunity. The Court did so because, as I have noted several times, the Constitution places the primary federal role for dealing with Indian nations, peoples, and tribal affairs in the hands of Congress. In earlier cases, the Court had already adopted the practice of deferring to Congress on questions of tribal immunity, and “Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency.”<sup>288</sup> Note that the plaintiff in *Kiowa Tribe* did not ask the Court to “repudiate the principle outright, but suggest[ed] instead that we confine it to reservations or to noncommercial activities.”<sup>289</sup> However, the Court again relied on Congress’ preeminence and stated that it would

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283. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

284. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

285. *Kiowa Tribe*, 523 U.S. at 756 (stating “tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (stating tribal immunity “is subject to the superior and plenary control of Congress” and Indian Nations are exempt from suit without congressional authorization); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 704 (1949) (noting it is the function of Congress, not the Supreme Court, to determine the immunity of a particular government agency); *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940) (noting Congress determines whether governmental agencies and corporations have sovereign immunity); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047–48 (9th Cir. 2006), *cert. denied*, 549 U.S. 1231 (2007) (“[T]he breadth of [tribal] sovereign immunity in the absence of congressional action[] [retains its full force] because Congress has not limited the immunity of Indian tribes.”).

286. *Kiowa Tribe*, 523 U.S. at 756. Commentators have disputed that characterization. *See generally* Wood, *supra* note 97. Professor Skibine calls these statements of the Court dicta. Alex Tallchief Skibine, *From Foundational Law to Limiting Principles in Federal Indian Law*, 80 MONT. L. REV. 67, 76 (2019).

287. *Kiowa Tribe*, 523 U.S. at 758; *see also Bay Mills*, 572 U.S. at 815 (Thomas, J., dissenting).

288. *Kiowa Tribe*, 523 U.S. at 757 (citing *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991)).

289. *Id.* at 758.

follow Congress' lead. "Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. And in other statutes it has declared an intention not to alter it."<sup>290</sup> The Court noted that Congress has the authority to alter tribal immunity and even change Supreme Court case law on the subject, as the Court had held for many decades.<sup>291</sup> In fact, the Court expressly recognized that Congress is the branch of the federal government with that authority, and that it is in a much better position to make such decisions than is the judicial branch: "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution *by us* in this area."<sup>292</sup> Thus, the Court "cho[se] to defer to Congress" and left it up to that branch whether to enact legislation to limit tribal immunity for off-reservation commercial activities.<sup>293</sup>

Sixteen years later, in *Bay Mills*, the Court was again faced with the question whether it should intrude and limit tribal sovereign immunity, or if it would continue to leave those decisions up to Congress.<sup>294</sup> Interestingly, Justice Scalia changed his position from 1998 in *Kiowa Tribe* and became convinced that decision was wrongly decided. Thus, he joined the dissent that would have taken up the issue and maybe altered the Court's precedent on tribal immunity.<sup>295</sup> Notwithstanding that change, a 5-4 decision, the Court continued to rely on Congress and leave it to that branch to consider and perhaps enact any changes.<sup>296</sup> The Court continued to show self-restraint in not considering reversing or modifying *Kiowa Tribe* or tribal immunity. The *Bay Mills* Court stated: "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal

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290. *Id.* (citations omitted).

291. *Id.* at 759.

292. *Id.* (emphasis added). Cf. Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 35 (2018) ("Congress should take action to solve the tribal lending controversy because courts are not well-suited for policymaking.").

293. *Kiowa Tribe*, 523 U.S. at 760. The Supreme Court has recognized in regards to the Federal Tort Claims Act that Congress preserved sovereign immunity for federal discretionary functions because "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984). This justification seems to apply equally for keeping federal and state courts out of tribal executive and legislative branch decisions.

294. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

295. *Id.* at 814.

296. *Id.* at 799 ("Congress exercises primary authority in this area and 'remains free to alter what we have done' —another factor that gives 'special force' to *stare decisis*." (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989))).

immunity.”<sup>297</sup> The majority added: “All that we said in *Kiowa* applies today, with yet one more thing: Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity.”<sup>298</sup>

The Court noted that after its invitation in *Kiowa Tribe*, sixteen years earlier, for Congress to address the subject of tribal immunity, Congress had done so. Crucially, even though Congress then considered several bills to “modify tribal immunity in the commercial context,” and two of the bills even expressly referred to reversing *Kiowa Tribe*, Congress chose instead “to enact a far more modest alternative” and simply require Indian nations to either disclose the existence of or to waive their immunity in certain contracts.<sup>299</sup> So now the *Bay Mills* Court stated “rather than confronting, as we did in *Kiowa*, a legislative vacuum as to the precise issue presented, *we act today against the backdrop of a congressional choice: to retain tribal immunity . . . .* Reversing *Kiowa* in these circumstances would scale *the heights of presumption*.”<sup>300</sup> In sum, state courts and the lower federal courts should emulate the Supreme Court’s restraint and judicial modesty and not consider issues of tribal immunity. This topic is the province of Congress. The *Kiowa Tribe* and *Bay Mills* Courts refused to render decisions or even consider imposing mandates for how Indian nations should exercise their sovereign rights. The Court left those decisions to Congress and its proper constitutional role and its ability to hold hearings, debate public policies, and legislate on Indian law issues.

My second point concerns “Our Federalism” and the proper role of state and lower federal courts in Indian affairs.<sup>301</sup> When the Supreme Court first used this phrase it was surely thinking only of the relations and respect due between the federal and state governments. But there is no question that the Constitution recognizes three different governmental entities within the United States: the Indian nations, the states, and the national government. “Our Federalism” properly includes Indian nations. So, the respect or comity that is owed between governments encompassed within “Our Federalism” should also exist between state, tribal, and federal courts. Consequently, state and lower federal courts should apply a well-known principle of federal jurisprudence and respect tribal

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297. *Id.* at 800.

298. *Id.* at 801.

299. *Id.* at 801–02; *see also* 25 U.S.C. § 81 (amended 2000).

300. *Bay Mills*, 572 U.S. at 802–03 (emphasis added).

301. *See Hale v. Bimco Trading*, 306 U.S. 375, 378 (1939). This was apparently the first use by the Supreme Court of the phrase that became “Our Federalism.” Michael G. Collins, *Whose Federalism?*, 9 CONST. COMMENT. 75, 75–76 (1992).

governments and courts by requiring plaintiffs to exhaust their tribal court remedies and litigate issues like sovereign immunity in tribal courts before state or federal courts hear such cases.<sup>302</sup>

My second argument also arises naturally from a “‘prudential,’ not jurisdictional” exhaustion rule<sup>303</sup> that the Supreme Court began imposing on litigants suing Indian nations in federal courts beginning in 1985 and 1987. In *National Farmers Union*<sup>304</sup> and *Iowa Mutual*<sup>305</sup> the Court applied the principles of comity and respect due between governments to tribal governments and tribal judicial systems and began requiring parties to address questions about a tribal court’s jurisdiction over them to tribal courts first before commencing litigation in federal courts.<sup>306</sup> Only after the parties have exhausted their tribal court remedies can they proceed in federal court.<sup>307</sup> Even then, however, parties do not get to re-litigate a case that was fully heard in a tribal court if the federal district judge agrees with the tribal court that it possessed jurisdiction over those parties and those claims.<sup>308</sup> In that situation, the federal court case is simply dismissed.<sup>309</sup>

I am simply asking whether the proper application of comity and respect for tribal governments and courts, and “Our Federalism,” should require state courts to also make parties litigate issues of tribal sovereign immunity first in the appropriate tribal court before proceeding, if at all, in a state court. And perhaps federal courts should expand their use of *National Farmers Union* and *Iowa Mutual* to require the same of parties in federal court litigation who raise issues concerning tribal immunity. Perhaps the same U.S. Supreme Court analysis and comity rule set out in *Kiowa Tribe* and *Bay Mills* could be expanded to require lower federal courts to force litigants to first present and exhaust their sovereign immunity arguments in tribal courts? In addition, perhaps state and tribal

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302. See *infra* notes 302–03 and accompanying text. Cf. Elengold & Glater, *The Sovereign in Commerce*, *supra* note 47, at 1118–21 (arguing that Federalism between state and federal governments is implicated when private contractors use federal sovereign immunity).

303. *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 451 (1997).

304. *Nat’l Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985).

305. *Iowa Mut. v. LaPlante*, 480 U.S. 9 (1987).

306. *Id.* at 16 (“[R]espect for tribal legal institutions requires that they be given a ‘full opportunity’ to consider the issues before them and to ‘rectify any errors.’”); *Nat’l Farmers Union*, 471 U.S. at 855–57; accord *Norton v. Ute Indian Tribe*, 862 F.3d 1236, 1243 (10th Cir. 2017).

307. *Cayuga Nation v. Parker*, No. 5:22-cv-00128, 2022 WL 1813882, at \*12 (N.D.N.Y. June 2, 2022).

308. COHEN’S, *supra* note 31, at 620 (citing *Iowa Mut.*, 480 U.S. at 19).

309. See, e.g., *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde Cmty.*, No. 07-05-KI, 2007 WL 3283699, at \*5 (D. Or. Nov. 2, 2007) (granting comity to the tribal court decision in *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde Cmty.*, No. A-05-09-001, at \*1, \*16–21 (Grand Ronde Ct. App. Oct 31, 2006)).

governments could consider enacting something like the existing state certification statutes that allow state supreme courts to hear questions of state law that are referred to them from federal courts. Tribal governments could require their courts to accept certified questions on Indian law questions, and sovereign immunity issues, from federal and state court systems.<sup>310</sup>

My third suggestion is that Indian nations could consider lobbying Congress for an act to prevent state and even federal courts from addressing or attempting to limit tribal sovereign rights. Such a law would be a powerful protective step for Indian nations and their rights. The Supreme Court has long held pursuant to the Interstate/Indian Commerce Clause that state governments have no role at all in Indian affairs and policies.<sup>311</sup> The Supreme Court has also held that Congress is all powerful over the other branches of the federal government in Indian affairs.<sup>312</sup>

There are analogous and relevant examples in current acts of Congress for what I am suggesting. In 1968, Congress enacted the Indian Civil Rights Act,<sup>313</sup> and required Indian nations to extend to their own citizens and all persons “within its jurisdiction” most of the protections of the Bill of Rights and some other provisions of the U.S. Constitution.<sup>314</sup> But Congress did not expressly create a federal cause of action under ICRA for aggrieved parties to sue tribal governments in federal courts. Lower federal courts began implying a cause of action in the ICRA and began hearing ICRA cases versus Indian nations.<sup>315</sup> But in 1978 the Supreme Court stopped that improper judicial conduct. Since ICRA did not expressly waive tribal sovereign immunity to federal courts, or expressly create a federal cause of action, such claims could not be heard in federal courts.<sup>316</sup> In addition, Congress enacted the Indian Child Welfare Act in

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310. See, e.g., Bennett Evan Cooper, *Certification of Questions of Law to State Supreme Courts*, REUTERS (June 22, 2021), <https://www.reuters.com/legal/legalindustry/certification-questions-law-state-supreme-courts-2021-06-22/> [<https://perma.cc/K592-QD27>] (stating that forty-nine states have enacted certification statutes and some allow state courts to certify legal questions to tribal courts). The federal government has already enacted an analogous statute that respects state sovereignty and requires a federal court to notify the state attorney general, and allow the state to intervene, when a federal case calls into question the constitutionality of a state law. 28 U.S.C. § 2403(b). Congress could amend this statute to require federal courts to do the same when they are considering questions about tribal sovereignty or sovereign immunity.

311. E.g. U.S. CONST. art. I, § 8, cl. 3; *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (“[T]ribes are subject to plenary control by Congress.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“[State] laws . . . can have no force” in Indian Country.).

312. E.g. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989).

313. 25 U.S.C. §§ 1301–1303.

314. *Id.* § 1302.

315. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61–62 (1978).

316. *Id.* at 69–70.

1978,<sup>317</sup> and granted tribal courts exclusive jurisdiction over state courts in foster care and adoption cases for Indian children who are domiciled on a reservation.<sup>318</sup> Congress further mandated that even for Indian children who are domiciled off a reservation that state courts should transfer those cases to tribal courts unless there is “good cause to the contrary.”<sup>319</sup> In light of just these two examples, convincing Congress to enact a law preventing state and even federal courts from hearing certain cases regarding tribal immunity and tribal economic affairs is not an outlandish suggestion.

My fourth suggestion also concerns an act of Congress. It appears that Congress could enact a removal type statute motivated by the same comity and respect issues as demonstrated in *National Farmers Union*. Under the current federal removal statutes, defendants sued in state courts are allowed to remove cases raising federal law issues to federal courts.<sup>320</sup> But Congress has mandated that certain categories of cases cannot be removed to federal courts at all.<sup>321</sup> Obviously, Congress thought it was justified for valid policy reasons to force such cases to be heard only in state courts. Perhaps Congress could be convinced that there are equally valid policy justifications to keep tribal sovereign immunity issues out of state courts. In addition, once such cases were in federal courts, or were filed there initially, perhaps *National Farmers Union*, or Congress itself, would require federal courts to force the parties to exhaust their tribal court remedies first and address questions regarding sovereign immunity to the proper tribal court. If Congress considered such a bill, it would be pursuing the same comity and respect ideas that motivated the Supreme Court rulings in *National Farmers Union* and *Iowa Mutual*. If Congress does not adopt the later provision, perhaps the Supreme Court could be convinced to extend its case law and require the same as a matter of common law.

These preliminary ideas appear to be viable starting points for Indian nations and Congress to begin resisting what I have defined as judicial overreach and state and federal court intrusions into the purview of the federal legislative branch and into the executive and legislative branch

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317. 25 U.S.C. §§ 1901–1923.

318. *Id.* § 1911(a). ICWA is currently being challenged on constitutional grounds by several states in *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted*, \_\_ U.S. \_\_, 142 S. Ct. 1205 (Feb. 28, 2022).

319. 25 U.S.C. § 1911(b).

320. 28 U.S.C. §§ 1441–1443.

321. *Id.* § 1445.

decisions of Indian nations.<sup>322</sup> Further research and debate on these topics will help flesh out these and perhaps other valid strategies.

There is no question that federal and state court decisions are intentionally or incidentally forcing tribal governments to operate their business concerns, and even their governmental departments, inefficiently, unprofitably, and in violation of solid economic principles. The state and federal courts are intruding on Congress' authority, congressional Indian policies, and Supreme Court precedent in not respecting and granting comity to Indian nations' sovereign decisions and their inherent powers of sovereign immunity. State courts have arguably vastly exceeded their constitutional and proper roles by intruding into areas of federal Indian law and Indian nations' sovereign decisions. Courts possess no particular expertise or proper role in reviewing the economic development policies and decisions of Indian nations and enacting policies that infringe on tribal rights. These courts should exercise proper judicial modesty and get out of the "business" of mandating how tribal legislative and executive branches create, manage, and operate their governmental departments, bureaucracies, and economic entities.

## CONCLUSION

Today, 574 federally recognized Indian nations govern themselves and their territories pursuant to long established tribal and federal law principles. Prominent among those legal rules are that Indian nations are governments that possess and exercise inherent sovereign rights and powers. One of those important rights is to be as free as possible from federal control, and to be completely free of state infringements on tribal sovereignty. Sovereignty includes the right of sovereign immunity. Consequently, Indian nations are almost totally protected by immunity from being sued in federal, state, or tribal courts without their express consent.

Indian nations have also long used their sovereign powers to engage in a multitude of tribally owned business and economic endeavors to try to rid themselves and their communities of the pernicious effects of endemic poverty. Tribal sovereignty, the history of federal and tribal legal principles supporting that sovereignty, and sovereign immunity, should prevent states, state law, and state and federal judicial incursions into tribal executive and legislative branch economic decisions and operations. In contrast, though, federal and state judges have intervened into the field

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322. *See, e.g., Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754–58 (1998) (stating that sovereign immunity is necessary to protect tribes from state invasions of their jurisdiction).

of tribal sovereign authority, and interfered with tribal economic efficiency, profitability, federal Indian policies, and even with common sense. These courts appear to have acted beyond the proper judicial role and have mandated how tribal executive and legislative branches must create, control, and manage their economic operations. “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”<sup>323</sup> Consequently, instead of being mandated to and ordered about, Indian nations should be the only entities authorized, and they are obviously the best suited in the United States political system, to determine how best to serve the economic goals of Indian Country, economic efficiency, and the needs of Indian Country.

Indian nations should resist this judicial overreach just as they have battled for centuries against federal and state incursions into tribal sovereignty. Political strategies and legal arguments need to be developed to keep state and federal courts out of decision-making about the best and most efficient ways for tribal economic development to proceed and how best to operate tribal economic entities. Indian nations, tribal governments, and tribal courts are best suited to undertake these tasks and they must be the governmental entities that deal with these critical issues and needs in the future.

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323. *Rice v. Olson*, 324 U.S. 786, 789 (1945).