IN DEFENSE OF TRIBAL SOVEREIGN IMMUNITY: A PRAGMATIC LOOK AT THE DOCTRINE AS A TOOL FOR STRENGTHENING TRIBAL COURTS

RYAN SEELAU*

ABSTRACT

Although the doctrine of tribal sovereign immunity was recently upheld by the Supreme Court in *Michigan v. Bay Mills Indian Community*,[1] its existence continues to be attacked as "antiquated" and leading to "unfair" results. While most defenses of tribal sovereign immunity focus on how the doctrine is a necessary part of sovereignty or how the doctrine is necessary for financial reasons, the more pragmatic benefits of tribal sovereign immunity have remained largely overlooked. Any desire to take tribal self-determination seriously and to allow Native nations to produce their own robust and capable governing systems means re-examining the role tribal sovereign immunity plays in such efforts.

This article conducts such a re-examination. First, it takes note of the extensive research indicating that strong tribal courts are generally necessary for healthy and resilient Native nations. Second, it looks at the six components that comprise strong tribal courts: (1) accountability; (2) capacity; (3) funding; (4) independence; (5) jurisdiction; and (6) legitimacy. Finally, it argues that the strategic use of tribal sovereign immunity has positive effects on all six components of strong tribal court systems. In essence, tribal sovereign immunity is a valuable tool that Native nations can use to strengthen their own courts, institutions, and nations themselves.

---

*Co-Founder, Project for Indigenous Self-Determination. S.J.D., University of Arizona, 2009; LL.M, University of Arizona, 2006; J.D., University of Iowa, 2005. I would like to thank the following individuals for their contributions and support (in alphabetical order): Patrick Bauer, Stephen Cornell, Charisa Delmar, Matthew Fletcher, Herminia Frias, Reneé Goldtooth, Emily Hughes, Mary-Beth Jäeger, Carolyn Jones, Miriam Jorgensen, Emily McGovern, John McMinn, Stephanie Rainie, Ian Record, Jennifer Schultz, Rachel Starks, Joan Timeche, John Whiston, and the faculty of Stetson University who listened to me present a version of this paper in March of 2014. I'd also like to thank the Udall Center for Studies in Public Policy at the University of Arizona for their support in developing this publication.

1. 134 S. Ct. 2024, 2029-31 (2014).

I. INTRODUCTION....123
II. NATION BUILDING AND TRIBAL COURTS....125
A. THE NATION BUILDING PRINCIPLES....125
B. EFFECTIVE GOVERNING INSTITUTIONS....126
C. TRIBAL COURTS....127
III. THE MAKINGS OF STRONG TRIBAL COURTS....128
A. ACCOUNTABILITY....129
B. CAPACITY....130
C. FUNDING....131
D. INDEPENDENCE....131
E. JURISDICTION....132
F. LEGITIMACY....133
IV. TRIBAL SOVEREIGN IMMUNITY....136
V. TRIBAL SOVEREIGN IMMUNITY'S IMPACT ON TRIBAL COURTS....141
A. TRIBAL SOVEREIGN IMMUNITY IS A TOOL THAT AFFECTS TRIBAL COURTS....141
B. THINKING STRATEGICALLY ABOUT TRIBAL SOVEREIGN IMMUNITY....144
C. TRIBAL SOVEREIGN IMMUNITY WAIVERS CAN STRENGTHEN TRIBAL COURTS....145
1. *Accountability, Funding, and Independence*....145
2. *Capacity*....146
3. *Jurisdiction*....147
4. *Legitimacy*....148
VI. TRIBAL SOVEREIGN IMMUNITY AND TRIBAL COURTS: THREE CASE STUDIES....150
A. MISSISSIPPI BAND OF CHOCTAW INDIANS....150
1. *Court System*....152
2. *Tribal Sovereign Immunity Policies*....152
3. *Tribal Sovereign Immunity in Action*....153

B. TULALIP TRIBE.....155
1. *Court System*.....156
2. *Tribal Sovereign Immunity in Action*.....156
C. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS.....162
1. *Court System*.....162
2. *Tribal Sovereign Immunity Policies*.....163
3. *Tribal Sovereign Immunity in Action*.....163
VII. CONCLUSION.....169

I. INTRODUCTION

There is a revolution currently taking place in Native American communities throughout the United States. After more than 200 years of policies designed to destroy and/or assimilate Native American culture, many Native nations have started taking control of their own destinies by exercising true self-determination over the decisions that affect their everyday lives.[2] The result has been stronger and healthier communities.

Tribal courts and tribal justice systems play a key role in meaningful exercises of Native American self-determination.[3] A strong tribal court system is critical to Native nation building[4] because "it advances sovereignty, helps uphold the nation's constitution, helps ensure the maintenance of law and order, bolsters economic development, promotes peace and resolves conflicts within the community, preserves tribal customs, and develops and implements new laws and practices for

2. Miriam Jorgensen, *Editor's Introduction* to REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT xi, xii (Miriam Jorgensen, ed., 2007).

3. Raymond L. Niblock & William C. Plouffe, *Federal Courts, Tribal Courts, and Comity: Developing Tribal Judiciaries and Forum Selection*, 19 U. ARK. LITTLE ROCK L.J. 219, 227 (1997) ("To be able to adjudicate a claim involving applicable law is an essential element of sovereignty, self-government, and self-determination. Thus a critical part of promoting tribal self-government is advancing a tribal judiciary.").

4. *See* Stephen Brimley et al., *Strengthening and Rebuilding Tribal Justice Systems: Learning from History and Looking Towards the Future*, NATIONAL INSTITUTE OF JUSTICE iii (2005), www ncjrs.gov/pdffiles1/nij/grants/210893.pdf ("'Nation building' refers to the process, undertaken by indigenous nations themselves, of constructing effective institutions of self-government that can provide a foundation for sustainable development, community health, and successful political action. In other words, it is the process of promoting Indian nations' self-determination, self-governance, and sovereignty—and, ultimately, of improving tribal citizens' social and economic situations—through the creation of more capable, culturally legitimate institutions of governance.").

addressing contemporary realities."[5] But what makes a tribal court system a *strong* tribal court system—what are the components of a strong tribal court system? And how can Native nations strengthen their own court systems?

In this article, I argue that strong tribal court systems are composed of at least six components: accountability, capacity, funding, independence, jurisdiction, and legitimacy.[6] The extent to which these six components are present or absent in a tribal court system has a large role in determining whether, and to what degree, the court system is effective at carrying out its goals. Furthermore, I argue that the often-maligned[7] doctrine of tribal sovereign immunity—and the ability of Native nations to determine how and when to waive it—are critical in reinforcing the six aforementioned components and, ultimately, in producing a strong tribal court system.[8]

To make these arguments, this article is divided into seven parts: Part II examines the critical role tribal courts play in Native self-determination. It does this by first looking at the so-called "nation building research," which explains how effective governing institutions are critical to any Native self-determination efforts. Second, Part II explains the role courts play in any society and why their functions are particularly important in the context of Native nation building. Part III digs deeper into the characteristics of a strong tribal court system and discusses six key components—accountability, capacity, funding, independence, jurisdiction, and legitimacy—drawn from the available literature on the topic. Part IV introduces the legal doctrine of tribal sovereign immunity and looks briefly

---

5. Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Rebuilding, in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 117 (Miriam Jorgensen, ed. 2007).

6. Listed alphabetically, not in order of importance.

7. *See, e.g.,* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 766 (1998) (Stevens, J., dissenting) (arguing that the doctrine of tribal sovereign immunity is an unjust rule, and "[t]his is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct."); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

8. The central argument of this article is as an elaboration on the one put forth by another commentator, Catherine Struve. In her piece, Struve argues that "tribes should use their immunity as a forum-allocation device" and that "waiv[ing] immunity in tribal courts but not elsewhere can simultaneously provide redress for valid claims and strengthen tribal court systems." Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 137 (2004). However, the body of Struve's piece is less concerned with how sovereign immunity waivers strengthen courts, and is more concerned with establishing that the doctrine of tribal sovereign immunity is justified within the parameters of the U.S. political and legal systems. This article attempts to pick up where Struve ended by exploring how the doctrine of tribal sovereign immunity—and more importantly, the practice of waiving it—actually strengthens tribal court systems. In that sense, this article is neither a repetition nor a contraction of Struve's work, but is instead a complimentary piece to it.

at the justifications for its existence. Part V explains how the doctrine of tribal sovereign immunity can be used to strengthen—or weaken—tribal court systems. Part VI provides real-life examples of how Native nations with strong court systems are using the doctrine of tribal sovereign immunity to their benefit. Additionally, Part VI retells the stories of three award-winning tribal court systems—the Mississippi Choctaw Band of Indians' Tribal Court System, the Northwest Intertribal Court System (with a focus on the Tulalip Tribe's actions within that system), and the Grand Traverse Band of Ottawa and Chippewa Indians' Tribal Court. Each case study demonstrates a slightly different strategy with respect to the tribal sovereign immunity doctrine, and together they offer examples other Native nations can draw from. Finally, Part VII provides a brief conclusion.

II. NATION BUILDING AND TRIBAL COURTS

A. THE NATION BUILDING PRINCIPLES[9]

Indigenous self-determination is alive and well in United States Native communities. After centuries of government policies designed to destroy and/or assimilate Native American culture, many Native nations have re-taken control of their own destinies by exercising true self-determination over the decisions that affect their everyday lives.[10] The result has been stronger and healthier communities. But what "explain[s] the fact that—despite decades of crippling poverty and powerlessness—some American Indian nations recently [have] been strikingly successful at achieving their own economic, political, social and cultural goals, while others [are] having repeated difficulty accomplishing the same things?"[11]

The Harvard Project on American Indian Economic Development ("Harvard Project") and the Native Nations Institute for Leadership, Management, and Policy ("NNI") have been examining these types of questions for more than twenty-five years.[12] The results of their extensive research indicate that five principles are crucial for successful community development in Indian Country: (1) Native nations must make their own decisions by exercising *practical sovereignty*, or *self-rule*; (2) Native nations need to back-up their decisions with *effective governing institutions*;

9. Although modified, portions of Part II A and B of this paper originally appeared in the Berkeley Journal of Criminal Law. *See* Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKLEY J. CRIM. L. 97, 118-20, 124-28 (2012).

10. Jorgensen, *supra* note 2, at xii.

11. *Id.* at xi.

12. *Id.*

(3) these governing institutions must match their own political cultures, that is, they must exhibit *cultural match*;[13] (4) Native nations need a *strategic orientation* when making their decisions; and (5) Native *leadership* is necessary to mobilize the community and promote community development.[14] Taken together, these five nation building principles indicate that community development and economic development are, above all else, governance problems and must be addressed as such.[15]

In its most basic formulation, the nation building principles refer to "the processes by which a Native nation enhances its own foundational capacity for effective self-governance and for self-determined community and economic development."[16] The better a community adheres to the five nation building principles, the greater chance that community has of successfully achieving its cultural, economic, political and social goals.[17] Practically speaking, the nation building principles take on many forms within Indian Country.[18] The nation building principles do not offer a one-size-fits-all formula that can be replicated in every community, but rather present those factors that are critical for a community to successfully address its own unique problems with its own unique solutions.

B. EFFECTIVE GOVERNING INSTITUTIONS

One of the nation building principles stemming from the Harvard Project and NNI research states that self-determination and self-governance

13. *See* Brimley et al., *supra* note 4, at 14 ("Using a rigorous research methodology and carefully chosen tribal comparisons, Cornell and Kalt show that certain tribes with identical constitutional-level governing institutions have experienced radically different socioeconomic outcomes, while other tribes with quite different institutions have realized comparable levels of success. Other things equal, the variable that explains these divergent outcomes is 'cultural match': if a nation's institutional rules and processes are culturally legitimate (that is, if they match underlying expectations of the way authority and power should be distributed and exercised), they underwrite socioeconomic progress; if not, progress is difficult.").

14. Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 18 (Miriam Jorgensen ed., 2007).

15. *See* Stephen Cornell & Joseph P. Kalt, *Where's the Glue?: Institutional Bases of American Indian Economic Development*, 29 J. SOCIO-ECON. 443, 447 (2000) ("Economic development is a social problem. Among other things, it requires that people organize themselves in ways that take advantage of the fact that specialization by individuals in their production activities is critically important to the advancement of their well-being."); *see also* Miriam Jorgensen & Jonathan Taylor, *What Determines Indian Economic Success?: Evidence from Tribal and Individual Indian Enterprises*, NATIVE NATIONS INSTITUTE 6 (2000), http://hpaied.org/images/resources/publibrary/PRS00-3.pdf ("Essentially the research of the Harvard Project finds that poverty in Indian Country is a political problem—not an economic one."). For a more complete presentation of the Nation Building Model and its key components, *see* Seelau, *supra* note 9, at 118-33.

16. Jorgenson, *supra* note 2, at xii.

17. Cornell & Kalt, *supra* note 14, at 6.

18. *Id.*

are more likely to succeed when *effective governing institutions* capable of carrying out Native nation policies are in place.[19] Institutions are responsible for implementing policy and transforming it from an idea on paper to something practical that affects the lives of the nation's citizens. Institutions, to be useful for purposes of self-determination, must be *effective* at achieving their designed purpose.[20] Effective governing institutions are stable and must have clear rules and policies in place to define their rights and responsibilities as well as their relationship to other aspects of government.[21] Having well-defined institutional roles is especially important because, in order to effectively govern, an institution is frequently going to be part of a coordinated effort with other governing institutions.

While the primary value of having effective governing institutions is the ability to turn policy into action, such institutions provide additional benefits as well. For example, effective governing institutions can reduce a Native nation's dependency on non-Native governments and the negative consequences that often accompany such dependency,[22] can provide an opportunity for Native nations to demonstrate their skill in addressing various political and social issues, which may lead to future opportunities to increase practical sovereignty,[23] and, if designed to be culturally relevant, can create and reinforce Native norms.[24] When Native nations "back up sovereignty with stable, fair, effective, and reliable governing institutions," they "increase their chances of improving community well-being."[25]

C. TRIBAL COURTS

Although exercising effective self-determination requires a variety of effective governing institutions, a forum for non-politicized dispute

19. *Id.* at 22.

20. *Id.* at 24.

21. *Id.* at 23.

22. Amy Besaw et al., *The Context and Meaning of Family Strengthening in Indian Country: A Report to the Annie E. Casey Foundation,* HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT 1, 20 (2004), http://files.eric.ed.gov/fulltext/ED485942.pdf.

23. For example, the Citizen Potawatomi Nation has increased its practical sovereignty by developing a court system that is so effective in administering justice that local non-Native communities willingly submit themselves to its jurisdiction. *See Bethel Trustee Removed 'Under Operation of Law*,' THE TECUMSEH COUNTYWIDE NEWS AND THE SHAWNEE SUN, December 6, 2007, http://www.countywidenews.com/articles/2007/12/06/news/03bethel%20trustee.txt.

24. To put it another way, effective governing institutions can be a tool in the struggle *against* assimilation and *for* cultural preservation. *See generally* John G. Red Horse et al., *Family Preservation: Concepts in American Indian Communities*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION (2000), www.nicwa.org/research/01.FamilyPreservation.pdf.

25. Cornell & Kalt, *supra* note 14, at 24.

resolution is among the most crucial.[26] An independent dispute resolution system is necessary to ensure that the rules and policies created by the nation are enforced even-handedly, regardless of who is seeking to have them enforced. More and more frequently for Native nations in the United States, an independent dispute resolution system includes some type of tribal court.[27]

Tribal courts play a significant role in self-determination and self-governance efforts and have responsibilities that "bear heavily on how well Indian tribes succeed overall."[28] These responsibilities include: advancing tribal sovereignty, empowering the other branches of government, promoting peace and community health, and supporting economic growth.[29] More generally, tribal courts "define the legal expectations on which people—Indian and non-Indian—and entities will rely when living, visiting, and doing business on the reservation."[30]

III. THE MAKINGS OF STRONG TRIBAL COURTS

While there is widespread agreement that strong tribal court systems are vital to self-determination among academics, government officials, and practitioners alike, considerably less has been said or written about what distinguishes a strong tribal court from a weak one. One of the most robust attempts to define the elements of a strong tribal court system comes from scholars Duane Champagne and Carole Goldberg. Champagne and Goldberg propose a six-part framework outlining what tribal justice systems require to be successful.[31] The six requirements they outline are: control, cultural competency, effective management, fairness, funding, and intergovernmental cooperation.[32] While their book offers compelling support for the proposed framework, it is significant to note that the

---

26. *Id.* at 23; Niblock & Plouffe, *supra* note 3, at 227 ("To be able to adjudicate a claim involving applicable law is an essential element of sovereignty, self-government, and self-determination. Thus a critical part of promoting tribal self-government is advancing a tribal judiciary.").

27. *Compare Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 576-1 (2008) (statement of Sen. Byron Dorgan) ("Today, there are about 290 tribal district courts and more than 150 tribal appellate courts."), *with* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) ("As of 1992, there were about 170 tribal courts, with jurisdiction encompassing a total of perhaps one million Americans.").

28. Douglas B. L. Enderson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 143-44 (1995).

29. *See generally* Flies-Away, Garrow, & Jorgensen, supra note 5, at 115-45.

30. Enderson, *supra* note 28, 143-44.

31. *See* DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2012).

32. *Id.*

authors' framework was written—as the book title indicates—for Native nations living under Public Law 280 ("P.L. 280") jurisdiction.[33] And within that context, the authors are particularly concerned with the administration of criminal justice within such jurisdictions. While neither consideration radically harms the usefulness of the proposed framework, it does mean the framework possesses some limitations when applied outside the criminal justice context of P.L. 280 states. Given the specific context of their work, I offer my own modification on the Champagne-Goldberg framework, which I assembled from a number of sources.[34] Upon completing this research, six components of strong tribal court systems emerged: accountability, capacity, funding; independence, jurisdiction, and legitimacy.

A. ACCOUNTABILITY

Strong tribal court systems are accountable for the decisions they produce. Or, to put it more accurately, judges in strong tribal court systems are accountable for their actions. Accountability likely means that some mechanism for reprimand and/or removal is in place in the event a judge begins to act in bad faith or conducts him or herself unethically. For many Native nations, this accountability might be tied to an election of some sort or to a removal proceeding. Regardless of the exact mechanism employed by a Native nation to ensure accountability, accountability needs to occur within the confines of an independent judiciary. A judge who can be removed at the whim of another branch of government may be accountable to that branch of government in the technical sense, but the cost of that accountability is a lack of judicial independence, which is another component necessary for a strong tribal court system.[35]

---

33. For more information on P.L. 280, *see, e.g.,* Carole E. Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 700-01 (2006) ("Public Law 280 authorized state criminal jurisdiction over Indians and non-Indians on reservations in six named states with significant numbers of federally recognized tribes: Alaska (added in 1958 when it became a state), California, Minnesota, Nebraska, Oregon, and Wisconsin . . . . The act also allowed all other states to opt for similar jurisdiction, and several did so . . . Public Law 280 did not eliminate or limit tribal criminal jurisdiction, although the Department of the Interior often used it as a justification for denying funding support to tribes in the affected states for law enforcement and criminal justice.").

34. These sources include review of the academic legal literature, including, of course, Champagne and Goldberg's CAPTURED JUSTICE, a review of the literature produced by non-Indian government officials, a review of the literature produced by non-Indian businesspeople who interact regularly with Native nations, and, most importantly, a review of the literature produced by employees of, and practitioners in, tribal courts.

35. *See* discussion *infra* Part III.D. for a more complete discussion of "independence" as a component of strong tribal court systems. *See also* Tim Shimizu, *Strengthening Sovereignty Through the Courts: How Native American Tribal Courts Can Inform Native Hawaiian Nation Building*, 17 UCLA ASIAN PAC. AM. L.J. 56, 72-73 (2012).

Accountability may also be achieved, in part or in whole, through the use of appellate courts.[36] While appellate court systems may be neither feasible nor desirable for all Native nations, they do offer the benefit of keeping lower court judges accountable for the decisions they make.[37] Ideally, an appellate judge will have more capacity—i.e. experience and training—than the lower court judges he or she is reviewing in order to ensure that the best decision possible is being reached in any given case. In order to be a component of a strong tribal court system, appellate review needs to occur within the confines of an independent judiciary. A tribal council conducting appellate review of a tribal court judge may promote accountability, but at the expense of independence.

B. CAPACITY

Strong tribal court systems require the capacity necessary to administer justice. This component is comprised of both human capacity and institutional capacity. A tribal court system's capacity, in the literal sense, is the number of disputes it can resolve over a given period of time. This is dependent on both the human and institutional limitations of a given court system.[38] Capacity, in a more general sense, includes not just the literal number of disputes that a court system can handle, but also the skill and effectiveness with which those disputes are dealt.

As such, human capacity includes the abilities, education-level, experience, and skills of all who service the tribal court system, including clerks, judges, lawyers, and support staff. The need to improve human capacity within many tribal court systems was identified decades ago and continues to this day.[39] Discussions of human capacity frequently revolve around the need, on one hand, to have educated and trained tribal court personnel and the need, on the other hand, to have those same personnel be aware of and understand the unique cultural norms and values of the community they are serving.[40]

---

36. *Hearing*, *supra* note 27 (statement of Sen. Byron Dorgan) ("Today, there are about 290 tribal district courts and more than 150 appellate courts.").

37. *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the S. Comm. on Indian Affairs*, 100th Cong. 338-36 (1988) (statement of Joseph Little).

38. Frank Pommersheim, *What Must be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary*, 7 KAN. J. L. & PUB. POL'Y 8, 12 (1997).

39. O'Connor, *supra* note 27, at 5; *see also* Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, AMERICAN BAR ASSOCIATION (2009), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/winter2009/striving_for_the_independence_of_native_american_tribal_courts html.

40. *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 576-10 (2008) (statement by Roman Duran).

While human capacity is undoubtedly the heart and soul of any tribal court system, the importance of institutional capacity cannot be overlooked.[41] Institutional capacity involves all of the non-human elements that make up a tribal court system—the building itself, the computer network, the filing system, and so forth. For example, in the context of criminal justice, institutional capacity would likely extend to the availability of beds in juvenile centers and adult prisons. A Native nation's institutional capacity can have a surprisingly strong effect on how justice is administered and, in certain circumstances, may directly affect perceptions of legitimacy.[42] As with human capacity, institutional capacity of a tribal court system is also tied very closely to the issue of funding.

C. FUNDING

Funding is without a doubt the component of strong tribal court systems upon which there is the greatest consensus and greatest amount written.[43] Without delving into the history of the underfunding of tribal court systems or the efforts to help remedy deficiencies in funding, it suffices to say that funding hugely impacts the relative strength or weakness of a tribal court system. The reasons for this are obvious and include the fact that funding has an enormous role in determining the various capacities of a tribal court system. And the capacities—both human and institutional—of a tribal court system go a long way in determining the overall strength of the system.

D. INDEPENDENCE

Strong tribal court systems must be independent from outside influences. Most importantly, this means tribal court judges need to be able to make decisions freely and independently of influences from other branches of government. To this end, tribal court judges need to be able to make decisions without fear of retaliation from other branches of government and without the possibility that other branches of government will improperly overturn their decisions. Tribal court systems also need to be independent from other outside influences, including other courts,

41. *Id.* at 5 (statement by Patrick Ragsdale) ("Although the main request from tribal courts is operating funding, the next two main areas that tribal courts consistently seek assistance is in training for tribal judges and staff, and technical assistance in developing judicial administrative systems."). *See also id.* at 13 (statement of Roman Duran) ("A vital note to make here is that most tribal justice systems lack access to law libraries, legal authorities, internet access, and law clerks to provide the needed research in rendering decisions.").

42. *See* discussion *infra* Part III.F. for a more complete discussion of "legitimacy" as a component of strong tribal court systems.

43. *See generally* Kickingbird, *supra* note 39; *Hearing*, *supra* note 27.

governments, and corporations. A non-independent tribal court system will likely lose legitimacy in the eyes of the nation itself and with those who do business with the nation. And a reputation of non-independence can easily lead to devastating consequences.[44] To avoid such consequences, Native nations may enact laws and procedures to ensure the independence of a tribal court system.[45]

E. JURISDICTION

Strong tribal courts—like any other type of court—require jurisdiction within which to operate. The best funded, most accountable, independent, and legitimate court system in the world, even if staffed with the brightest human minds, would be of no value if it had no jurisdiction. At first glance, those familiar with federal Indian law may argue that this should not be a component of strong tribal court systems because it is something seemingly outside the control of any individual Native nation. The reality, however, is that while the outer boundaries of tribal jurisdiction may largely be setup by the contours of federal Indian law, in practice, Native nations have some significant control over the cases they hear.

Native nations have some discretion over the types of cases their tribal judicial systems hear limited, of course, by the jurisdictional confines of federal Indian law.[46] This control is evident when one compares a Native nation with no tribal court system with a Native nation that has such a system. Native nations with no tribal court systems have the same *de jure* jurisdiction as nations with court systems, but their *de facto* jurisdiction is essentially non-existent because they have no way to exercise it. To put it differently, because Native nations are governments, they have a significant amount of control over both the procedural law and substantive law governing cases that come before their courts. Additionally, Native nations

---

44. *See* Jorgensen & Taylor, *supra* note 15, at 5 ("Thus, all else equal, tribes that implement a separation of powers that leaves their dispute resolution mechanisms outside political influence enjoy a 5 percent lower level of unemployment than tribes that do not.").

45. However, it is worth saying that adequate funding of court system personnel may, in certain circumstance, play a limited role in deterring the likelihood that one type of influence—money—will have any effect on influencing court personnel.

46. For example, Native nations' jurisdiction over nonmembers in civil actions is limited; *see, e.g.,* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1503 (2013) ("In the past few decades, the Supreme Court has undertaken a near-complete dismantling of tribal civil jurisdiction over nonmembers. Following cases like *Montana*, *Strate*, and *Hicks*, tribes have virtually no authority to regulate nonmember conduct or hale nonmembers into tribal court—even when nonmembers have significant ties to the tribe and have come onto the reservation deliberately and for personal gain."). Similarly, Native nations criminal jurisdiction over nonmembers is essentially nonexistent. *See* 18 U.S.C. § 1152 (1817*)*; *but see* Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009).

have some ability to work around the jurisdictional confines of federal Indian law through consensual jurisdiction. Although not an unlimited principle, tribal court systems are able to hear many types of cases that initially may seem to be outside the scope of tribal jurisdiction, so long as the party or parties involved consent to jurisdiction.[47] In this respect, the doctrine of tribal sovereign immunity—discussed later in this article—provides Native nations with a tool that can assist in acquiring the consent necessary to expand tribal jurisdiction. Native nations have expanded their jurisdiction based on consent to: provide court services to non-Native communities,[48] ensure that taxation disputes with states go through tribal court,[49] and address a myriad of difficult criminal and social problems.[50]

F. LEGITIMACY

Strong tribal court systems must be legitimate in the eyes of the citizenry whom they serve *and*, secondarily, in the eyes of the non-Native population with which the nation interacts or has the desire to interact with.[51] Tribal court systems "must strive to embody tribal values—values that at times suggest the use of different methods than those used in the Anglo-American, adversarial, common-law tradition."[52] If a tribal court does not reflect tribal values, the very people the court is designed to serve will see it as illegitimate. There is now a strong body of empirical evidence clearly indicating that illegitimate institutions significantly harm Native nations' self-determination efforts.[53] On the other hand, because "law is

47. For a thorough discussion of how nonmembers consent to tribal criminal jurisdiction, *see* Paul Spruhan, *"Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79 (2013).

48. *See* Seelau, *supra* note 9, at 127.

49. Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 32 (2004).

50. *See* Seelau, *supra* note 9, at 130-33 (case study from the Organized Village of Kake demonstrating how a *de facto* expansion of jurisdiction can be used to combat underage drinking and other social ills in remote locations).

51. O'Connor, *supra* note 27, at 2.

52. *Id.*

53. Brimley et al., *supra* note 4, at 14 ("Using a rigorous research methodology and carefully chosen tribal comparisons, Cornell and Kalt show that certain tribes with identical constitutional-level governing institutions have experienced radically different socioeconomic outcomes, while other tribes with quite different institutions have realized comparable levels of success. Other things equal, the variable that explains these divergent outcomes is "cultural match": if a nation's institutional rules and processes are culturally legitimate (that is, if they match underlying expectations of the way authority and power should be distributed and exercised), they underwrite socioeconomic progress; if not, progress is difficult.").

one of the methods by which a community constitutes its own identity,"[54] a legitimate tribal court is able to define and promote its nation's Native culture through procedures and substantive decisions.[55] Specifically, a culturally legitimate tribal court can take laws developed by the nation and "interpret[] them according to culturally distinct traditions and customs," and by doing so, the court helps advance the nation's "*own* agenda for the future."[56]

In addition to being accepted as legitimate by the Native nation's own citizenry, a tribal court system "must provide a forum that commands the respect of . . . the non-tribal community, including courts, governments, and litigants."[57] Tribal court systems rely on external legitimacy to encourage non-Indian actors—particularly those related to economic development—to engage with the nation[58] and to discourage non-Indian actors—particularly state governments and the federal government—from interfering with tribal authority.[59] With respect to encouraging non-Indian actors to engage with the nation, there is now ample evidence to indicate that a tribal court system that is seen as legitimate by external actors is "an indispensable foundation" to any substantial economic development efforts because it is the court that "helps create an atmosphere of fair play in the disputes that inevitably arise among those who live, work, or do business in a tribal community."[60] Along the same lines, when a tribal court system is deemed to be illegitimate by external actors—particularly by state governments and/or the federal government—outside actors tend to make efforts to interfere with Native nations' sovereignty in an effort to fix a perceived injustice.[61] On

54. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 293 (1998).

55. *See, e.g.,* Seelau, *supra* note 9, at 124-29.

56. Flies-Away, Garrow, & Jorgensen, *supra* note 5, at 117 (emphasis added).

57. O'Connor, *supra* note 27, at 2.

58. *See, e.g., Hearing*, *supra* note 37, at 21 (statement by Joseph Flies-Away) ("Tribal courts are "a way to contribute to economic development, our economic possibility. When people want to come to the reservation and do business and there is a fair playing field to do so, then that is going to be a court, a good court is going to be a place where they can come and actually feel good and comfortable about doing business there.").

59. Newton, *supra* note 54, at 293.

60. Flies-Away, Garrow, and Jorgensen, *supra* note 5, at 118-19.

61. The Cherokee Freedman saga that ultimately resulted in federal intervention is perhaps the best recent example of perceived unfairness resulting in outside actors getting involved in Native nation government. *See, e.g.,* Chris Casteel, *Obama administration lawsuit could finally decide freedmen issue, Cherokee Nation says*, NEWOK, July 4, 2012, http://newsok.com/obama-administration-lawsuit-could-finally-decide-freedmen-issue-cherokee-nation-says/article/3689660; Julianne Jennings, *Cherokee Freedmen: One Year Later*, INDIAN COUNTRY TODAY MEDIA NETWORK, Jan. 31, 2012, http://indiancountrytodaymedianetwork.com/opinion/cherokee-freedmen%3A-one-year-later-78777; Nathan Koppel, *Tribe Fights with Slaves' Kin*, WALL ST. J., July 16, 2012, http://online.wsj.com/article/SB10001424052702303292204577519000907248734.html.

the other hand, when a Native nation's court system is seen as legitimate by external actors, not only do non-Native governments tend to interfere less, but they may, in certain circumstances, seek to partner with Native nations capable of administering justice in a competent, legitimate, and efficient fashion.[62]

But what does a tribal court system need to do in order to be judged "legitimate" by external actors? The answer seems to rest in the concept of fairness.[63] Tribal court systems that are deemed "fair" will be treated as legitimate courts, while "unfair" courts will be called "illegitimate," "dishonest," or "kangaroo courts." While fairness is always going to be in the eye of the beholder to some degree, courts around the world have agreed on a set of principles that, generally speaking, separate fair courts from unfair ones. One principle is that every wrong must have a remedy.[64] The quickest way to be deemed an unfair court is to turn away individuals who believe they have been seriously wronged and seek redress in the judicial system. Second, fair courts must have procedures in place to dispense justice and, more importantly, those procedures must treat all individuals equally.[65] Third, fair courts must dispense justice consistently—meaning similar cases must be decided similarly.[66] Fourth, fair courts require judicial independence, a topic discussed above. And finally, fair court systems tend to be transparent systems—everyone knows the rules ahead of time, everyone understand how a decision is going to be made, and everyone has access to a decision after it has been produced.[67] Perhaps surprisingly to some, fairness in a court context is more about notice and procedure than it is about substantive outcomes—telling people how the process will work and then making sure it works as advertised will go a long ways in getting a court labeled "fair."

While identifying the components of a strong tribal court system is important, the real challenge is determining *how* a Native nation's court system can improve in each of these six areas. Although many paths are available to Native nations seeking to strengthen tribal court systems, the remainder of this article argues that the doctrine of tribal sovereign

62. *See Bethel Trustee Removed*, *supra* note 23.

63. O'Connor, *supra* note 27, at 2.

64. Marbury v. Madison, 5 U.S. 137, 163 (1803).

65. *See, e.g.,* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

66. *See* Vacco v. Quill, 521 U.S. 793, 799 (1997); *contra* Kenneth I. Winston*, On Treating Like Cases Alike,* 62 CALIF. L. REV. 1 (1974).

67. *See generally* Álvaro Herrero & Gaspar López, *Access to Information and Transparency in the Judiciary: A Guide to Good Practices from Latin America*, WORLD BANK (2010), http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf.

immunity is a critical tool all Native nations have. When used strategically, tribal sovereign immunity can help build strong tribal court systems by strengthening the six components discussed above.

IV. TRIBAL SOVEREIGN IMMUNITY

Sovereign immunity, in its simplest formulation, is the right of the sovereign to be free from being sued in court except when it consents to the lawsuit.[68] A more functional definition of sovereign immunity is a government's power "to define the forum, procedure, and limits respecting [law]suits against itself."[69] The doctrine of sovereign immunity has its origins in British common law and was considered settled law as early as the late thirteenth century.[70] It has been a part of United States jurisprudence from the time of the country's founding.[71] Typically, the doctrine of sovereign immunity is said to have derived from the notion that "the King can do no wrong,"[72] a precept that, historically, was not shared by any of the Native nations living in the Americas.[73]

Today, federally recognized tribes enjoy the privilege of sovereign immunity. The first Supreme Court case to mention tribal sovereign immunity was *Turner v. United States*.[74] Although the case did not primarily concern the issue of tribal sovereign immunity, the Court still recognized its application to tribes by noting that "[w]ithout authorization from Congress, the [tribe] could not have been sued in any court; at least without its consent."[75] It was more than twenty years later when the Court solidified the doctrine of tribal sovereign immunity in the case of *United*

68. Cohens v Virginia, 19 U.S. 264, 380 (1821) ("The counsel for the defendant in error . . . have laid down the general proposition that a sovereign independent State is not suable except by its own consent. This general proposition will not be controverted.").

69. *NNI Forum: Tribal Sovereign Immunity*, NATIVE NATIONS INSTITUTE (May 14, 2007), https://nnidatabase.org/video/nni-forum-tribal-sovereign-immunity.

70. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3 (1963).

71. *See generally* Cohens v Virginia, 19 U.S. 264 (1821); THE FEDERALIST NO. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.").

72. Chemerinsky, *supra* note 7, at 1202.

73. *See NNI Forum*, *supra* note 69 ("And so Europeans brought to this country this notion of the doctrine of sovereign immunity, which . . . has no parallel anywhere in Indian country. I have not studied a North American Indian tribe [that] adopted the doctrine of tribal sovereign immunity prior to 1492. In fact, in the famous words of Chief Sitting Bull when he was told about the doctrine [in which the doctrine] was translated to mean 'the Chief can do no wrong,' he replied, 'and expect to get away with it.' In Indian country, the idea that our leaders aren't accountable just doesn't fly.").

74. 248 U.S. 354 (1919).

75. *Id.* at 358.

States v. United States Fidelity & Guaranty Co.[76] In *U.S. Fidelity*, the Court held that "Indian Nations are exempt from suit without Congressional authorization," citing the *Turner* case as support.[77] Over the decades, the doctrine has been refined, but the basic principle has remained unchanged: "federally recognized Indian tribes are immune from suit by any entity or individual, other than the United States, absent their consent or congressional abrogation."[78]

Although tribal sovereign immunity is widely understood as an inherent part of tribal sovereignty,[79] the legal doctrine rests on shaky ground. As an inherent part of tribal sovereignty, sovereign immunity should be understood *not* as a delegation of congressional power, but as a privilege each Native nation possessed prior to the creation of the United States by virtue of its status as a sovereign nation. In reality, however, tribal sovereign immunity—like all other areas of federal Indian law—is subject to the will of Congress[80] and, at least in the eyes of some, to the will of the Supreme Court.[81] It has long been held that Congress has plenary powers over Indian affairs, including power over tribal sovereign immunity. Thus, at any point in time, Congress could choose to limit or eliminate the doctrine of sovereign immunity in the tribal context altogether.

---

76. 309 U.S. 506 (1940).

77. *Id.* at 512 n.11.

78. Clay R. Smith, *Tribal Sovereign Immunity: A Primer*, 50 THE ADVOC. 19, 19 (2007), www.isb.idaho.gov/pdf/advocate/issues/advo7may.pdf.

79. *See, e.g.,* Vann v. Kempthorne, 534 F.3d 741, 749 (D.C. Cir. 2008) ("the nature of tribal sovereign immunity . . . is not the product of any enactment but an inherent attribute of a tribe's sovereignty. Tribal sovereign immunity existed at the Founding, as surely did tribal sovereignty . . . ."). *See also* Mary-Beth Moylan, *Sovereign Rules of the Game: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity*, 20 B.U. PUB. INT. L.J. 1, 5 (2010) ("Tribal sovereignty, including immunity to suit, is rooted in a tribe's historical existence preceding the formation of the United States."); Erick J. Rohan, *What Congress Gives, Congress Takes Away: Tribal Sovereign Immunity and the Threat of Agroterrorism*, 19 SAN JOAQUIN AGRIC. L. REV. 137, 138 (2010) ("Indian tribes were recognized as sovereigns prior to the existence of the United States which entitles them to some immunity from suit"); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002) ("[T]he doctrine [of tribal sovereign immunity] has long been recognized by all three branches of the federal government as an essential and inherent element of tribal sovereignty."). *But see* Smith, *supra* note 78, at 20 ("[Tribal sovereign] immunity is judge-made, or federal common law, in character. It does not derive from the United States Constitution and is subject not only to congressional control but also to federal constitutional restrictions.").

80. *See generally* Aaron F.W. Meek, Comment, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 147-54 (2011).

81. *See* Transcript of Oral Argument at 55, Michigan v. Bay Mills Cmty., 133 U.S. 907 (2013) (No. 12-515).

In its current form, tribal sovereign immunity has boundaries.[82] First, Native nations may not invoke sovereign immunity to avoid being sued by the federal government.[83] Additionally, the doctrine of tribal sovereign immunity does not protect individual tribal members from suit,[84] although Native nation-owned businesses may be able to exercise the power of sovereign immunity.[85] Similar to state sovereign immunity protected by the Eleventh Amendment, tribal sovereign immunity is also limited by the fact that tribal officers may be sued for injunctive relief in appropriate circumstances.[86] Generally speaking though, tribal sovereign immunity's boundaries are located where tribes have given consent to being sued and to where Congress has abrogated the applicability of the doctrine itself.[87]

Native nations can consent to being sued, thus waiving tribal sovereign immunity. This most commonly occurs when a Native nation *expressly*

---

82. Although a complete discussion of the boundaries of tribal sovereign immunity is beyond the scope of this paper. *See generally* Smith, *supra* note 78, at 20 ("[Sovereign] immunity applies to suit in federal or state court brought by any party other than the United States, federal agency or a federal official. The immunity applies without regard to relief sought. The immunity applies without regard to nature of the controversy itself. It therefore applies equally to tort, contract and enforcement claims. The immunity applies without regard to where the dispute arises . . . . The immunity applies without regard to whether the involved tribal activity is subject to regulation under valid federal or state law. It is concerned with remedy, not with underlying liability. The immunity may be waived by the affected tribe or abrogated by Congress. Any waiver or abrogation must be unequivocal. Immunity ordinarily does not preclude prospective relief against tribal officers or employees when their actions are alleged to violate federal law. Immunity does not extend to actions taken by tribal members in their individual capacities.").

83. *See, e.g.,* EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001) ("Indian tribes do not, however, enjoy sovereign immunity from suits brought by the federal government."); *see also* Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check*, 57 FED. LAW. 41, 44 (2010) ("The doctrine does not shield tribes from suits brought by the United States.").

84. Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 171-72 (1977) ("Second, whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was applied in United States v. United States Fidelity & Guaranty Co., 309 U. S. 506, does not immunize the individual members of the Tribe.").

85. Jeff M. Kosseff, Note, *Sovereignty for Profits: Courts' Expansion of Sovereign Immunity to Tribe Owned Businesses*, 5 FLA. A&M U. L. REV. 131, 138 (2009) ("[D]ecisions from lower courts after *Kiowa* have extended tribal sovereignty even further: to shield for-profit businesses that are owned by tribes and do not perform a governmental function."). Although Native nation-owned businesses may enjoy the privilege of exercising sovereign immunity, there are currently a variety of tests being used by courts to determine whether tribal sovereign immunity applies in a specific situation or not.); Meek, *supra* note 80, at 156-90.

86. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) ("As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit."); *see also* Vann v. Kempthorne, 534 F.3d 741, 750 (D.C. Cir. 2008) ("Applying the principle of *Ex parte Young* in the matter before us, we think it clear that tribal sovereign immunity does not bar the suit against tribal officers."); McCoy, *supra* note 83, at 44; Smith, *supra* note 78, at 19.

87. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). For an analysis of Congress' decisions to abrogate tribal sovereign immunity in specific contexts, *see* Seielstad, *supra* note 79, at 717-29.

waives its right to sovereign immunity via clear language in a legal document or via the decision not to exercise the right at trial. A Native nation may also *impliedly* waive its right to sovereign immunity in circumstances where the nation's actions and/or words are interpreted by a court as consenting to a lawsuit, regardless of whether that was the nation's actual intent or not. For example, in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, the Native nation had a construction contract with a business.[88] The contract expressly stated that any disputes would be resolved via arbitration, but made no mention of lawsuits in court. A unanimous Supreme Court held that this type of clause was sufficient for a Native nation to be subjected to lawsuits with respect to the arbitration reward.[89] On the other hand, in 1991, the Supreme Court, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, held that the mere filing of an action for injunctive relief by the Native nation did not result in a waiver of sovereign immunity and did not open up the nation to counterclaims alleging money-damages.[90]

In addition to consent, Native nations may also be precluded from relying on the doctrine of sovereign immunity when Congress has abrogated that privilege. Congressional legislation abrogates tribal sovereign immunity and subjects Native nations to lawsuits only when an "unequivocal expression" of congressional intent to do so exists.[91] Absent such an expression, tribal sovereign immunity remains intact.

Given that the doctrine of sovereign immunity is based on a precept—"the King can do no wrong"—that is generally rejected by democratic principles and given that the doctrine seems to run contrary to notions of traditional Native leadership by consensus, why then does the doctrine continue to exist? While commentators have put various justifications of sovereign immunity forth,[92] the two strongest invoke sovereignty and fiscal considerations. Additionally, the role tradition plays in United States jurisprudence also helps explain why, despite its detractors, sovereign immunity remains a part of the American legal landscape.

Sovereign immunity is often justified on the basis that it is a natural extension of a sovereign's autonomous status.[93] To be sovereign is to be

88. 532 U.S. 411 (2001).

89. Smith, *supra* note 78, at 19.

90. 498 U.S. 505, 516 (1991).

91. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

92. *See, e.g.,* Chemerinsky, *supra* note 7, at 1216 ("Six primary rationales [for sovereign immunity] are discussed below: the importance of protecting government treasuries; separation of powers; the absence of authority for suits against the government; the existence of adequate alternative remedies; a curb on bureaucratic powers; and tradition.").

93. McCoy, *supra* note 83, at 43.

the source of political power from which all specific political powers are derived.[94] Thus, sovereignty includes the power to define the forum, procedure, and limits with respect to lawsuits against the sovereign—which is, in essence, how the doctrine of sovereign immunity functions. As sovereigns, the federal government, [95] the states,[96] and Native nations all enjoy the benefits of sovereign immunity.[97] When outside actors acknowledge and respect a government's exercise of sovereign immunity, they are implicitly recognizing that government's sovereignty. In this sense, it has been argued that this justification for sovereign immunity is more "likely to ring true with respect to tribal than nontribal governments."[98]

Sovereign immunity is also frequently justified on the grounds that "the doctrine prevents burdensome financial losses that could seriously impair or destroy governmental operations."[99] There is no question that sovereign immunity protects governmental treasuries by preventing lawsuits for money damages.[100] This justification for the doctrine tends to be particularly significant within the tribal context. After all, although great strides with respect to governmental operating budgets have been made by many Native nations, when compared to the states and the federal government, Native nations continue to have significantly less capital and less ability to raise capital through taxation.[101] To quote one tribal court judge, "[i]t is not long ago that the only thing standing between the nation and bankruptcy was sovereign immunity."[102]

Finally, tradition also helps explain why sovereign immunity continues to exist within the United States legal context. As discussed above, sovereign immunity has been a part of the United States' legal fabric since

---

94. BLACK'S LAW DICTIONARY 1430 (8th ed. 2004).

95. *See, e.g.,* Cohens v. Virginia, 19 U.S. 264 (1821).

96. *See generally* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1890 (1983).

97. Smith, *supra* note 78, at 19.

98. *See* Struve, *supra* note 8, at 166-67.

99. *Tribal Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. 104 (1996) (statement of Sen. Daniel Inouye).

100. Chemerinsky, *supra* note 7, at 1216-17.

101. *Tribal Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong., 105-595 (1998) (statement of Wayne Taylor, Jr.) ("What is overlooked by those who hold up Federal and State waivers of immunity in contrast to tribal waivers of immunity is the fact that Federal and State governments with their huge tax bases are in a much better position to grant broad waivers of immunity than are the Tribes which have historically been hamstrung by the lack of a tribal tax base, partly as a result of the dual taxation problem engendered by state taxation of transactions within Indian country, and partly as a result of struggling tribal economies which are only now beginning to see the light of day.").

102. Newton, *supra* note 54, at 338 (quoting Kingsley v. Ho-Chunk Nation, 23 Indian L. Rep. 6113, 6117 n.3 (Ho-Chunk Tribal Ct. 1996)).

the country's founding.[103] Even within the Native context, the Supreme Court has explicitly recognized the doctrine for nearly a century.[104] Due in part to the United States' common law tradition and legal principles like *stare decisis*, legal changes tend to occur very slowly. Undoing centuries of legal precedent—whether in the federal, state, or tribal context—would undoubtedly bring with it significant and varied impacts, the likes of which have probably aided in preventing the Supreme Court from abolishing the doctrine in any context.[105]

V. TRIBAL SOVEREIGN IMMUNITY'S IMPACT ON TRIBAL COURTS

As legal scholars and courts continue to weigh the pros and cons of tribal sovereign immunity, the fact remains that Native nations currently enjoy the privilege of immunity and must decide how to use this power. Like any power, sovereign immunity is a tool that can be used to achieve different ends. And no matter how this tool is utilized, it frequently has consequences for tribal courts. This section examines the options Native nations have available to them as well as the pros and cons of different strategies with respect to tribal sovereign immunity policies.

A. TRIBAL SOVEREIGN IMMUNITY IS A TOOL THAT AFFECTS TRIBAL COURTS

Every time tribal sovereign immunity is invoked or waived, it affects tribal courts. When a Native nation invokes sovereign immunity and prevents a lawsuit from moving forward, the effect on the tribal court system is, in the immediate sense, one less case on the docket. In the long-term, if a Native nation continually invokes sovereign immunity with respect to a certain type of cases (for example, all contract cases), then the tribal court will fail to develop any expertise or jurisprudence in that area of law. Conversely, when a Native nation waives sovereign immunity and allows a case to be heard by the tribal court, the short-term effect is adding one case to the docket, and the potential long-term effect is the development

103. *See* United States v. Lee, 106 U.S. 196, 208 (1882) ("And while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.").

104. Turner v. United States, 248 U.S. 354, 358 (1919).

105. For a discussion of possible consequences associated with eliminating the doctrine of tribal sovereign immunity, see Ryan Seelau & Ian Record, *How Tribes Can Prepare for Tribal Sovereignty Blow From Supreme Court*, INDIAN COUNTRY TODAY MEDIA NETWORK (November 8, 2013), http://indiancountrytodaymedianetwork.com/2013/11/08/sovereign-immunity-and-bay-mills-case-how-tribes-can-prepare.

of expertise and jurisprudence with respect to the substantive area of law the case concerns. These relatively straightforward strategic considerations, when paired with innovation and time, can achieve dramatically different results. By way of demonstrating how tribal sovereign immunity can shape a tribal court system over time, consider two extreme situations: a Native nation that *never* waives sovereign immunity and a Native nation that *always* waives sovereign immunity.

In a Native nation that never waives sovereign immunity under any circumstances, no lawsuits against the nation itself would ever be heard by the tribal court unless authorized by Congress.[106] This would likely include lawsuits related to civil rights violations, contract disputes arising out of Native nation-owned business, and torts arising out of injuries sustained on nation-owned lands. Additionally, no lawsuits initiated by any of the states against the Native nation would be heard in any forum either. Potentially, a strategy of never waiving immunity could have the positive benefit of providing maximum protection to the nation's treasury. However, the same strategy would likely also have other long-term costs. One potential cost to the Native nation might be a tribal court system that is seen as underutilized, unsophisticated with respect to certain critical areas of law, unable to create a culturally appropriate jurisprudence in certain critical areas of law, and possibly illegitimate, especially to the outside world.[107] Such a court system would likely find it increasingly difficult to carry out its purposes—advancing tribal sovereignty, empowering the other branches of government, promoting peace and community health, and supporting economic growth over time. Additionally, a Native nation government always invoking tribal sovereign immunity is likely to be seen as increasingly unfair—at least to those having to deal directly with the nation—a situation that one would expect to produce negative economic and relational consequences as well.[108]

---

106. Smith, *supra* note 78, at 19.

107. Non-Natives are often quick to label a Native court system "illegitimate" based on its use of tribal sovereign immunity. *See, e.g.,* Kosseff, *supra* note 85, at 145; Seielstad, *supra* note 79, at 729-35.

108. For example, one could imagine what such a policy would do in the context of Native nations' businesses. While the exercise of sovereign immunity by Native-nation owned businesses tends to garner media backlash regardless of the specifics of the situation, the use of tribal sovereign immunity in certain situations draws especially harsh attention from the media. Among the businesses that have received extra interest from the media and commentators are casinos, payday loan companies, and insurance companies. *See* Bree R. Black Horse, *The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity*, 1 AM. INDIAN L. J. 388, 411-12 (2013) ("Moreover, tribes should not conduct payday lending over an extended period of time, and if a tribe elects to engage in this business, the tribe should attempt to fly under the radar of the press, federal officials, and the courts . . . Otherwise, a misinformed tribal nation may abrogate the right to sovereign immunity for all of Indian Country.").

On the opposite end of the spectrum, a Native nation that always waives sovereign immunity could potentially have a very active court, but one that would also carry both positive and negative consequences along with it. For the sake of argument, I will assume that the Native nation in question is choosing to waive every lawsuit filed against it into tribal court without any limitations on damages.[109] Potentially, this strategy would result in some negative effects on the tribal court. On the positive side, a tribal court operating under these circumstances would have the opportunity to develop expertise and culturally-appropriate jurisprudence in a wide range of substantive fields of law. This court, depending on the decisions it makes, may also be able to produce a track record of fairness, thus potentially increasing its legitimacy with all who interact with it. On the negative side, a tribal court functioning under a strategy of always waiving tribal immunity would run the risk of being overburdened, and if that were to occur, then the effectiveness of the institution would decrease as delays in justice would likely increase. Additionally, a strategy that allowed all lawsuits to move forward with no limitations on damages would put the nation's treasury at risk and one lawsuit could, at least theoretically, cause significant financial harm to the nation. That risk could possibly be counteracted somewhat by the likelihood that economic development originating from outside the reservation is more likely where sovereign immunity waivers are possible.

In the end, neither of the extreme scenarios just discussed create an idea situation for a Native nation. But these examples begin to illustrate how sovereign immunity policies result in different outcomes. To put it more succinctly: tribal sovereign immunity is a tool that can be used by Native nations to achieve a wide variety of outcomes.

Gabe Galanda, *Tribes and Insurance Defense Lawyers Should Avoid Asserting Sovereign Immunity*, NORTHWEST INDIAN LAW & BUSINESS ADVISOR, July 6, 2009, http://www nwindianbusinesslawblog.com/2009/07/articles/oklahoma-indian-law/tribes-insurance-defense-lawyers-should-avoid-asserting-sovereign-immunity/; Kosseff, *supra* note 85; David Lazarus, *Tribes' payday loans under scrutiny*, LOS ANGELES TIMES, April 29, 2013, http://articles.latimes.com/2013/apr/29/business/la-fi-lazarus-20130430.

109. This would not necessarily have to be the case. As discussed *supra*, sovereign immunity is essentially the right of a sovereign to define the forum, procedure, and limits of a lawsuit. As such, a Native nation could waive sovereign immunity and allow a case to proceed in a state or federal court instead of its own. Likewise, a Native nation could waive sovereign immunity and allow a case to proceed in its own court, but in doing so, cap damages. Finally, a Native nation could waive sovereign immunity and allow a case to go to arbitration or mediation instead of going to a trial setting. The permutations and variations available to a Native nation waiving sovereign immunity are substantial and each carries with it different consequences.

B. THINKING STRATEGICALLY ABOUT TRIBAL SOVEREIGN IMMUNITY

That tribal sovereign immunity is a tool affecting tribal courts is significant because, as discussed above, strong tribal courts are one of the foundational institutions that that vast majority of Native nations exercising real self-determination have in place. Thus, Native nations serious about self-determination are likely going to want to contemplate how best to use the doctrine of tribal sovereign immunity to best achieve their nation's goals. To this end, the nation building principles offer some additional insight. First, to use the language of the nation building principles, although tribal sovereign immunity is not the same as tribal sovereignty, it is an instrument of sovereignty—that is, of practical self-rule—that Native nations can use to further their goals. Therefore, Native nations wishing to exercise practical self-rule are going to have to make difficult decisions about when to waive sovereign immunity and when to invoke it. When waiving immunity, Native nations need to ensure they have effective governing institutions—i.e., an effective court system—prepared to adjudicate the cases that may arise. Finally, the nation building principles suggest that a nation should approach tribal sovereign immunity with a strategic orientation, which includes considering the nation's values and long-term goals.

Approaching tribal sovereign immunity strategically is critical to understanding how the doctrine can help strengthen tribal court systems. Within the nation building research, strategic orientation means moving away from a reactive governance to one focused on "developing sustainable solutions to problems."[110] A strategic approach to any issue involves transitioning "from reactive thinking to proactive thinking," "from short-term thinking to long-term thinking," "from opportunistic thinking toward systemic thinking," and "from a narrow problem focus to a broader societal focus."[111] With respect to tribal sovereign immunity, shifting from reactive and short-term thinking to proactive and long-term thinking with respect to tribal sovereign immunity likely means shifting from the question "Can sovereign immunity be raised in this case" to "What policy should the nation have in place with respect to raising sovereign immunity in a case." Shifting from opportunistic thinking toward systemic thinking likely means determining what the nation's long-term goals are and how *both* waiving

110. Stephen Cornell et al., *Seizing the Future: Why Some Native Nations Do and Others Don't*, NATIVE NATIONS INSTITUTE 1, 5 (2005), https://nnidatabase.org/db/attachments/text/JOPNAs/2005_CORNELL_orgensen_etal_JOPNA_seizingfuture.pdf.

111. Cornell & Kalt, *supra* note 14, at 16-17.

and asserting sovereign immunity might be a tool to reach those goals. Shifting from a narrow problem focus to a broader societal focus likely means considering *all* the consequences of asserting tribal sovereign immunity in a given context. These consequences include ramifications to the nation's institutions, especially its tribal court system, the legal consequences to the nation and other Native nations, the public relations consequences to the nation and other Native nations, and any additional consequences that may occur both locally and globally.[112]

C. TRIBAL SOVEREIGN IMMUNITY WAIVERS CAN STRENGTHEN TRIBAL COURTS

At this point, it should be clear that a Native nation's tribal sovereign immunity policy affects its tribal court system, but the question that remains is how can tribal sovereign immunity be used to *strengthen* tribal court systems. The reality is that the consequences of a Native nation's tribal sovereign immunity policy have the potential to be felt in all six of the components required for strong tribal courts. Most significantly, any tribal sovereign immunity policy will directly affect the capacity, jurisdiction, and legitimacy of the tribal court associated with it, while having lesser impacts on the areas of accountability, funding, and independence.

1. Accountability, Funding, and Independence

The relationship between a Native nation's tribal sovereign immunity policy and a tribal court's accountability, funding, and independence is weak, but does exist. With respect to accountability and independence, the relationship stems from the number of cases being heard by the court, which can be controlled—to a degree—by how a Native nation utilizes the sovereign immunity doctrine. Specifically, a tribal court system seeking to demonstrate that it is accountable and independent will require cases moving through the system.[113] After all, there can be no demonstrated accountability and no demonstrated independence if no disputes are being heard. To this limited end, because a tribal sovereign immunity policy has

112. *See* Seiselstad, *supra* note 79, at 774 ("In light of the ever-present potential for change, it is imperative that tribes take advantage of this window of opportunity to reflect on what balance they wish to maintain between the need for immunity, on the one hand, and the need for government accountability and the ability of citizens and others who interact with tribes to seek enforcement of rights and redress for their injuries, on the other hand. By doing so, tribes will strengthen the rules and institutions important to sustaining their powers of self-governance and prepare for future attacks aimed at the integrity and fairness of their justice systems.").

113. *See, e.g.*, Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 232-23 (1994).

an affect on the number of cases progressing through the court system, it, in turn, has a very limited affect on these two components.

Although similarly weak in its connection, a tribal sovereign immunity policy may also affect a tribal court system's funding. As alluded to above, there is a large body of empirical evidence indicating that tribal court systems are key to Native nation economic development efforts.[114] In order for tribal court systems to be useful in such efforts, they need to be seen as legitimate by potential investors and businesspersons.[115] And, as will be discussed in more detail, a Native nation's sovereign immunity policy—particularly with respect to contracts—greatly affects whether its justice system is viewed as being fair, which is at the heart of legitimacy. To the extent a nation's tribal sovereign immunity policy affects investment within the nation, it also affects the money available to fund tribal court systems. To put it more bluntly, a tribal sovereign immunity policy that creates an environment of fairness—particularly with respect to contract disputes—has the potential to help improve a Native nation's economic situation, which could, in turn, result in additional funding available for the tribal court system.[116]

2. Capacity

A Native nation's sovereign immunity policy can substantially affect its court system's capacity with respect to the types of substantive issues it is capable of addressing. Tribal court personnel develop legal expertise by a combination of formal education, various types of training and continuing education programs, and in courtroom experience.[117] To a substantial degree, the types of cases that come before a tribal court system can be controlled by how a Native nation uses tribal sovereign immunity. For example, a nation that allows no tort cases to proceed against the nation is likely to have a less sophisticated jurisprudence and understanding of tort issues. At the other extreme, a nation that creates a special judicial body to handle only tort cases filed against the nation and then uses tribal sovereign immunity to waive those cases into this special body is more likely to have a very sophisticated understanding of torts and a developed jurisprudence in that substantive area. Strategically using tribal sovereign immunity in this

114. Jorgenson & Taylor, *supra* note 15, at 5.
115. *See, e.g.,* Valencia-Weber, *supra* note 113, at 233.
116. Jorgenson & Taylor, *supra* note 15, at 5.
117. *See Hearing*, *supra* note 36, at 29 (statement by William Thorne, Jr.).

manner can allow a tribal court system to hear more types of cases and improve its capacity.[118]

Additionally, it is worth noting that the doctrine of tribal sovereign immunity allows for even more subtle control over developing capacity in the manner just discussed. Recall that tribal sovereign immunity allows Native nations not only to choose the forum and procedure used in a dispute, but it also allows a nation to determine its liability in such cases. Thus, a Native nation with a relatively young court system and relatively low capacity could strategically choose to waive sovereign immunity and allow a wide variety of cases to proceed to tribal court, but could also cap damages at a low level. Over time, as the tribal court system develops more capacity, those liability limits could increase as trust in the tribal court's expertise and jurisprudence increases. In short, by utilizing different forums, procedures, and liability limits, Native nations have an array of options for developing the human capacity of their tribal court systems.

3. Jurisdiction

Tribal court jurisdiction grows and shrinks with every waiver and invocation of tribal sovereign immunity. As discussed above, all courts require jurisdiction within which to operate, and there can be a difference between a court's *de jure* jurisdiction and its *de facto* jurisdiction. A Native nation's sovereign immunity policy has a particularly strong effect on a court's *de facto* jurisdiction. Every time tribal sovereign immunity is used to prevent a case from being heard in a tribal court, that court is effectively losing jurisdiction, at least over that case.[119] And when a Native nation has a policy whereby all cases in one substantive area are subject to tribal sovereign immunity, that nation's tribal court has lost *de facto* jurisdiction over that substantive area of law—at least with respect to cases being filed against the nation itself. On the other hand, when sovereign immunity is waived and a case is allowed to proceed in tribal court, that court is expanding its jurisdiction, at least with respect to that case. And, similarly, if a Native nation alters its sovereign immunity policy to allow a tribal court to hear cases in a substantive area of law previously excluded by sovereign immunity, that trial court has substantially increased its *de facto* jurisdiction.

---

118. *See id.* at 48 (statement of Sen. Daniel Inouye) ("If the capacity of the court is diminished by inadequate funding and support, it is the sovereignty of the tribe that is diminished. If the authority of the court is diminished by lack of regard from elevated tribal officials or the membership of the tribe, it is the standing of the tribe that suffers.").

119. McCoy, *supra* note 83, at 42 (Procedurally speaking, sovereign immunity "deprives courts of subject matter jurisdiction," making them unable to hear a particular case).

To a certain extent, not waiving tribal sovereign immunity and allowing cases to proceed in a tribal court may, over the long-term, have an even more detrimental effect to tribal court jurisdiction. When a Native nation invokes sovereign immunity with respect to a specific case, it does not always follow that the case is never heard. While it is sure to never be heard in a tribal court under such circumstances, plaintiffs regularly attempt to file their claims in state or federal court. For the most part, these external court systems respect the doctrine of tribal sovereign immunity and dismiss the cases,[120] but occasionally external courts accept the case and hear it on its merits.[121] Sometimes, in the process of accepting such cases, state and federal courts have chipped away at the doctrine of tribal sovereign immunity, or tribal jurisdiction, or both.[122] Thus, every time a Native nation invokes tribal sovereign immunity—particularly in unique contexts—there is the risk of not only losing jurisdiction over the individual case involved, but also potentially losing more than that at the hands of state and federal judiciaries. That does not necessarily mean a Native nation should never invoke tribal sovereign immunity. Rather, Native nations must realize that any decision with respect to the doctrine needs to be strategic and needs to consider both the short-term and long-term effects on both the tribal court system and the nation as a whole.

4. Legitimacy

Finally, the doctrine of tribal sovereign immunity can be utilized strategically to improve both internal and external legitimacy. A strong tribal court system thrives on legitimacy, and one crucial aspect of legitimacy is perceived fairness.[123] Both Native citizens and non-Native

120. *See, e.g.,* N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1282 (10th Cir. 2012) ("Thus, the district court correctly held that the Eastern Shoshone is a sovereign and not amenable to suit, and that no exception to sovereign immunity permis its joinder. The Easter Shoshone could not, therefore, feasibly be joined."); Gilbertson v. Quinault Indian Nation, 495 F.App'x 779 (9th Cir 2012) (affirming the district court's decision to dismiss the case based on tribal sovereign immunity); Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla., 692 F.3d 1200, 1212 (11th Cir. 2012) (affirming the district court's decision to dismiss the case based on lack of jurisdiction).

121. *See, e.g.,* Maxwell v. County of San Diego, 697 F.3d 941, 955 (9th Cir. 2012) ("We . . . reverse the district court's granting of the Viejas defendants' motion to dismiss for lack of subject matter jurisdiction due to tribal sovereign immunity, and remand for further proceedings."); Agua Caliente Band of Cahullia Indians v. Superior Court, 10 Cal. Rptr. 3d 679, 682 (Cal. Ct. App. 2004) ("The Tribe claims that, as a federally-recognized Indian tribe, it is immune from suit under the doctrine of tribal immunity . . . We shall deny the Tribe's petition.").

122. *See, e.g.,* Agua Caliente Band, 10 Cal Rptr.3d at 682 (denying the tribe's assertion of tribal sovereign immunity through the creation of an exception to the tribal sovereign immunity doctrine based on the U.S. Constitution's Article IV guarantee of a republican form of government).

123. Valencia-Weber, *supra* note 113, at 237-38.

individuals want a tribal court system that is fair.[124] A fair system is substantially more likely to be treated as legitimate than an unfair one. And, ultimately, a Native nation's sovereign immunity policy plays a large role in the perceived fairness of its courts.

A fair court is one in which a wronged individual can be made whole again. Because tribal sovereign immunity gives a Native nation the ability to decide which cases proceed against it and which do not, exercising sovereign immunity too frequently, or in the wrong types of cases, can very quickly make a court seem unfair and cost it legitimacy. In a typical Native nation, citizens may wish to bring suits against the government for things like: civil rights violations, contract disputes, employment disputes (when the nation is the employer), and torts that occur on nation-owned lands. Similarly, a typical Native nation can expect non-Native individuals, corporations, and other governments to bring suits against the nation for: contract disputes, environmental law violations, torts that occur on nation-owned lands, and tax disputes. Regardless of an individual's citizenship, the expectation is for an opportunity to be heard before a judicial forum, and a Native nation's sovereign immunity policy is going to go a long way in deciding whether that expectation is met.

A fair court is also one with procedures in place to dispense justice in a fashion that treats all individuals equally. Native nations without a sovereign immunity policy are more likely to violate this aspect of fairness because policies, by design, exist to remove individuals getting special treatment. Thus, a Native nation that invokes sovereign immunity in all contract disputes and a Native nation that waives sovereign immunity in all contract disputes both have procedures in place that treat all individuals equally. Although the nation invoking sovereign immunity in all contract disputes may have to deal with the illegitimacy concerns just discussed, neither nation in this example can be accused of treating one individual differently from another. But some Native nations lack sovereign immunity policies, and for these nations invoking and waiving sovereign immunity is done on a case-by-case basis. The danger with such a policy is that it results in one contract case being heard in tribal court and another being turned away. Over time, this type of differential treatment can take a toll on a tribal court's legitimacy, the likes of which can be very difficult to recover from.

---

124. *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the S. Comm. on Indian Affairs*, 100th Cong. 702-139 (1988) (statement of Sen. Daniel Evans) ("An essential litmus test for any judicial system is the faith and respect it earns from those over whom it presides. For democracy cannot truly be served without a just and trusted judicial system.").

Finally, a fair court must dispense justice consistently—meaning similar cases must be decided similarly.[125] Fairness, in this sense, stems from a track record of respected decisions. In order to achieve this track record, a tribal court system requires: cases, time, and well-reasoned decisions. While a Native nation's sovereign immunity policy cannot guarantee the latter, it once again plays a significant role with respect to the first two requirements. The more cases a tribal court system is able to hear in a given area of law, the more likely, over time, the court system will be able to develop the track record necessary to show that fairness. Again, because tribal sovereign immunity acts as a gatekeeper over certain types of cases and whether they ever make it to court, how a nation uses the doctrine can have an immense impact on legitimacy.

VI. TRIBAL SOVEREIGN IMMUNITY AND TRIBAL COURTS: THREE CASE STUDIES

Not only is it the case that a Native nation's tribal sovereign immunity policy will affect tribal courts in a myriad of ways, but, if used strategically, the nation's policy can strengthen tribal courts and, in turn, the entire nation. In order to support this argument, I offer three case studies. Each case study was chosen based on one criterion—the Native nation discussed in the study possesses a tribal court system widely regarded as among the strongest in Indian country. Each study presents a brief overview of the Native nation's court system, a brief explanation of its codified sovereign immunity policies, and a description of at least some of the strategic thinking the nation has gone through with respect to the doctrine as well as the fruits that strategy has produced. While these case studies neither provide empirical data on the connection between tribal sovereign immunity and strong tribal court systems nor establish any causal connection between a specific tribal sovereign immunity policy and the strength of a specific tribal court, they are included because they reinforce many of the arguments put forth in this paper. Additionally, these case studies introduce the reader to some innovative ways Native nations are approaching sovereign immunity today.

A. MISSISSIPPI BAND OF CHOCTAW INDIANS

The Mississippi Band of Choctaw Indians ("Choctaw Nation") is a federally recognized tribe of approximately 8,300 members with 24,000

125. Valencia-Weber, *supra* note 113, at 237 ("The court, over time, should produce decisions that manifest a consistency with guiding principles that evoke respect and obedience.").

acres of non-contiguous land scattered throughout the state of Mississippi.[126] Little more than half a century ago, the Choctaw Nation possessed no industry, possessed no infrastructure necessary to attract economic development, had an unemployment rate over 75%, suffered from extensive and serious health issues,[127] had exceptionally low graduation rates, and saw many of its people leave the reservation lands in order to find opportunities elsewhere.[128] Today, however, the Choctaw Nation looks very different. The Choctaw Nation is now the largest employer in Neshoba County and in the state of Mississippi.[129] Unemployment has dropped substantially, and "dependen[ce] on transfer payments such as general welfare assistance from the federal government has dropped dramatically."[130] The Choctaw Nation now runs a myriad of businesses from construction services to a casino and golf course to an auto parts manufacturing facility to a printing plant.[131] The Choctaw Nation provides many governmental services to its people, including law enforcement, courts, water, sewage, housing, and roads.[132] In sum, the Mississippi Choctaw have made great strides towards their stated goal of self-sufficiency over the past five decades.[133]

---

126. *Sovereign Immunity Oversight Hearing to Provide for Indian Legal Reform: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong. 350 (1998) (testimony of Chief Philip Martin, Mississippi Band of Choctaw Indians) (hereinafter cited as "Testimony of Chief Phillip Martin"). This section draws heavily from the testimony of Chief Philip Martin, who was chief of the Choctaw nation from 1979-2007. Chief Martin's testimony took place before Congress on March 11, 1998, and in order to maintain consistency, I have elected to rely on facts and figures about the Choctaw nation from that general time frame. However, there is ample evidence that the successes of the Choctaw nation referenced in Chief Martin's 1998 testimony continue to play out to this day. *See, e.g.,* Harvard Project on American Indian Economic Development, *Choctaw Tribal Court System* , NATIVE NATIONS INSTITUTE (2006), http://nnidatabase.org/db/attachments/text/honoring_nations/2005_HN_Choctaw_tribal_court_system.pdf; Dennis Hevesi, *Philip Martin, Who Led His Tribe to Wealth, Is Dead at 83*, N.Y. TIMES, February 15, 2010, http://www nytimes.com/2010/02/15/us/15martin html?_r=0 ("Phillip Martin, a former chief of the Mississippi Band of Choctaw Indians, who guided his tribe from grinding poverty in the red clay hills of east central Mississippi to become proprietor of one of the state's leading business empires . . . .").

127. Harvard Project on American Indian Economic Development, *Choctaw Health Center*, NATIVE NATIONS INSTITUTE 1, 1 (1999), http://nnidatabase.org/db/attachments/text/honoring_nations/1999_HN_Choctaw_health_center.pdf ("In the 1960s, members of the Mississippi Band of Choctaw subsisted in miserable economic and health conditions. Nearly all tribal housing was substandard (90 percent of tribal members lived in units with no plumbing and 30 percent had no electricity), life expectancy was less than 50 years of age, and the Tribe's infant mortality rate was among the highest in the United States.").

128. *See generally* Testimony of Chief Philip Martin, *supra* note 126.

129. *Id.* at 353.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

1. Court System

The Choctaw Nation's award-winning tribal court system certainly played a role in the nation's turnaround over the past few decades.[134] The Choctaw Nation's court system was established in 1974. The court system was designed to be politically independent, with oversight equally divided between the executive and judicial branches. It was also designed to attract qualified candidates via qualifications laid out in the Choctaw Tribal Code and ethical candidates via the Rules of Ethics and Conduct that bound all judicial employees.[135] In 1997, the court system underwent a major reform process, the goal of which was "to become a full-service court system capable of handling a wide variety of cases effectively, to deepen the system's grounding in Choctaw practices and law, and to grow the pool of prospective court personnel, so that the supply of Choctaw court services could keep pace with the rising demand."[136] The reform produced the current Choctaw Nation court system—a four-branch system with a civil division, criminal division, juvenile peacemaker division, and youth division. The result of the Choctaw Nation's efforts is a judicial system that "stands as a testament to the necessary power that consistent, competent, and culturally appropriate justice systems provide to support and promote a Native nation's community and economy."[137]

2. Tribal Sovereign Immunity Policies

The Choctaw Nation's general provision on tribal sovereign immunity is found in their tribal code. The provision defines when sovereign immunity has been waived and how it can be waived. Specifically, the provision reads:

> Except as expressly abrogated by act of Congress, or as specifically waived by resolution or ordinance of the Tribal Council specifically referring to such, the Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.[138]

Additionally, the Choctaw Nation has other portions in their code that explicitly waive sovereign immunity, the most notable being the Choctaw Torts Claim Act, which reads in part: "the immunity of the Tribe for

134. *Choctaw Tribal Court System, supra* note 126, at 1.
135. *Id.* at 1-2.
136. *Id.* at 2.
137. *Id.* at 3.
138. C.T.C § 1-5-4 (2014).

monetary damages arising out of acts of the Tribe, or acts of employees of the Tribe, is hereby waived . . . provided, however, immunity of the Tribe in any such case shall be waived only to the extent of the maximum amount of liability provided for [by statute.]"[139] Later in the Act, the sole forum for such claims is defined as the Choctaw Tribal Court.[140]

3. Tribal Sovereign Immunity in Action

The Choctaw Nation has utilized the doctrine of tribal sovereign immunity to varying degrees over the years. In 1998, then-Chief, Philip Martin told Congress:

> The success the Tribe has achieved would have never been possible without tribal sovereign immunity. Tribal immunity from suit has played an essential role in the preservation of our autonomous political existence and has safeguarded our tribal assets. It has also allowed us to develop institutions of self-government, realize self-sufficiency and participate in mainstream society.[141]

But what did Chief Martin's words mean—how was the Choctaw Nation able to use sovereign immunity strategically to reach its economic goals? First, the Choctaw Nation realized that a long-term commercial relationship was "not [a question] of legal defenses or legal rights and legal immunities and jurisdiction," but rather a question of trust.[142] With this understanding, the Choctaw Nation treated sovereign immunity as a tool that could be used to garner or destroy outsider trust in the nation. According to Chief Martin, when the Choctaw Nation began pursuing economic development, they understood that "outsiders would not do business with tribes if it was not in their own economic self-interest to do so."[143] Thus, the ability to negotiate waivers of immunity with lenders, contractors, and other business entities was an essential tool in promoting trust and, ultimately, economic development. Without such waivers, "[p]arties interested in conducting business with the Choctaws would not

139. C.T.C § 25-1-3(1) (2014).

140. C.T.C. § 25-1-7(1) (2014).

141. Testimony of Chief Philip Martin, *supra* note 126, at 353.

142. *Id.* at 356.

143. *Id.* at 355. *See also Tribal Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. 694-137 (1996) (statement of Susan Williams) ("In the commercial context, tribes have a built-in incentive to waive their immunity from suit or otherwise protect non-Indians. Interested parties will not be interested in conducting business on Indian reservations without an ability to seek redress for grievances. Tribes, thus, will choose to waive immunity or take other similar steps to consummate a business deal.").

have entered into . . . agreements had there been no legal ability to seek redress for grievances."[144]

Waiving sovereign immunity to help foster a business relationship was only the start from the Choctaw Nation's perspective. After waiving immunity, the next step was to perform on the promise—not only in the sense of adhering to the terms of the contract, but also maintaining the waiver of sovereign immunity in the case of a contractual breach. The goal was to show that the trust put in the Choctaw Nation by outsiders was well-founded. Trust was essential because it was only by building a *long-term* track record with lenders and business parties that ultimately allowed the Choctaw Nation to succeed. Again, seeing sovereign immunity as a tool capable of cultivating or destroying trust is what guided the Choctaw Nation:

> Had we not lived up to our end of the deals and hid behind sovereign immunity had our partners come to seek redress, however, we would have destroyed our standing with the outside business community and could have never obtained the financing we needed to build and develop our commercial enterprises.[145]

The Choctaw Nation understood that the free-market—in the long-term—would naturally favor those entities (whether business or governmental) capable of being trusted. Waiving sovereign immunity can be, at least for some Native nations, an important tool in building that trust. Stated differently, for the Choctaw Nation, waiving sovereign immunity and adhering to their promises was not only "the right thing to do" but was also "in [the Choctaw Nation's] best interests to do so."[146]

As the Choctaw Nation grew stronger economically, institutionally, and politically, the tribe changed how it used sovereign immunity as a tool. For instance, although the Choctaw Nation had few assets to worry about protecting when they first began their economic development process, such a position soon changed. When it did, the Choctaw Nation's method of waiving sovereign immunity strategically changed as well. Instead of granting full waivers of immunity that potentially could place all tribal assets at risk with any contract—no matter how large or small the scope of the particular contract was—the Choctaw Nation began strategically limiting the immunity waiver to a specific dollar amount. For example, if the Choctaw Nation's investment in the project was set at two million

144. Testimony of Chief Philip Martin, *supra* note 126, at 355.
145. *Id.*
146. *Id.* at 354.

dollars, then the waiver would be for that amount.[147] This would allow recovery, in the case of a breach, of up to that amount in court. With such waivers, the Choctaw Nation is "working toward a win-win" because "both sides have to have a good deal" in order for business to succeed.[148] These types of waivers allow trust to be forged while simultaneously safeguarding tribal assets.[149]

In the end, the Choctaw Nation used tribal sovereignty strategically over the course of decades to realize its own cultural, economic and political goals. As the nation grew and changed, so did its use of tribal sovereign immunity. From day one, however, the strategy was always long-term in its vision, and the nation continually sought to use tribal sovereign immunity waivers to build a track record of trust that would benefit the Choctaw Nation in the future.

B. TULALIP TRIBE

The Tulalip Tribes' reservation is located in Washington state, about forty miles north of Seattle. The Tulalip Reservation was reserved for the use and benefit of Indian tribes and bands signatory to the 1855 Treaty of Point Elliott. It was established to provide a permanent home for the Snohomish, Snoqualmie, Skagit, Suiattle, Samish, and Stillaguamish Tribes and allied bands living in the region.[150] Today, the Tulalip Tribes are comprised of more than 4,000 citizens and are continuing to grow in numbers.[151]

---

147. As Philip Martin described it,

> Just as important as our ability to assert immunity from suit has been our right to negotiate waivers of immunity with lenders, contractors and other non-Indian business entities. Like all sovereigns—ranging raging from the United States of America to the City of Philadelphia, MS—we have had to necessarily waive our sovereign immunity to induce third parties to enter into contracts with us. The Choctaws believe that this basic free enterprise or freedom of contract approach to addressing the tribal immunity issue is both the most economically efficient and the best way to protect our people. A private party negotiating a contract with a sovereign tribe is in the best position to determine what terms of a deal are and are not acceptable, just as they are in negotiating a contract with anyone else . . . From our experience and standpoint, this contract approach is the most effective way for a tribe to negotiate with non-Indians and has worked very well for us.

Testimony of Chief Philip Martin, *supra* note 126, at 303

148. *Id.* at 36.

149. *Id.* at 355.

150. Harvard Project on American Indian Economic Development, *Tulalip Alternative Sentencing Program*, NATIVE NATIONS INSTITUTE 1, 1 (2006), http://nnidatabase.org/db/attachments/text/honoring_nations/2006_HN_Tulalip_alternative_sentencing_program.pdf.

151. *Tulalip Tribes*, TULALIP TRIBES, http://www.tulaliptribes-nsn.gov/.

1. Court System

The Tulalip Tribes' court system grew out of the award-winning Northwest Intertribal Court System ("NICS").[152] NICS is a consortium created in 1979 by thirteen western Washington tribes and was founded to assist Native nations in establishing tribal court systems. NICS continues to provide a variety of services to Native nations, including court services to Native nations that are unable to run their own courts and technical assistance to Native nations developing or wishing to improve their own court systems.[153] Currently, NICS "administers the judicial functions of the Tulalip Justice System including the two trial court judges and Appellate Court services."[154] The Tulalip Tribes' court system is renown for a number of reasons that have been written about extensively elsewhere. First, the Tulalip Tribes were able to have criminal jurisdiction retroceded back to it in the year 2000, which allowed the nation to begin exercising control over crime in their territory that had run rampant.[155] Second, the Tulalip Tribes were able to take that jurisdiction and exercise sovereignty over it with great skill, not only by drastically reducing criminal activity, but also by treating the causes of the criminal actions.[156] Growing out of that work, the Tulalip Tribes have also been recognized for their alternative sentencing program, which has proven to be an integral cog in the wheel of their culturally legitimate and effective justice system.[157]

2. Tribal Sovereign Immunity in Action

The Tulalip Tribes' policies with respect to sovereign immunity are extensive and are discussed *infra* as part of the study on how the nation

152. Harvard Project on American Indian Economic Development, *Northwest Intertribal Court System*, NATIVE NATIONS INSTITUTE 1, 1 (2003), http://nnidatabase.org/db/attachments/text/honoring_nations/2003_HN_NW_Intertribal_Court_System.pdf.

153. *Id.*

154. Leah Catherine Shearer, Justice in Indian Country: A Case Study of the Tulalip Tribes (2011) (unpublished M.A. thesis, UCLA), http://turtletalk files.wordpress.com/2012/02/justice-in-indian-country-a-casestudy-of-the-tulalip-tribes1.pdf.

155. 65 Fed. Reg. 75,948 (Nov. 29, 2000).

156. *Tribal Courts and the Administration of Justice in Indian County: Hearing Before S. Comm. of Indian Affairs*, 110th Cong. 576-26 (2008) (statement of Theresa Pouley) ("In five years, the Tulalip Tribal Court has gone from what some characterized as a lawless reservation with rampant drug and alcohol deaths on our highways, to a very safe community. They did that to ensure the economic development of the community, but they also did that by prioritizing the tribal justice system.").

157. Harvard Project on American Indian Economic Development, *Tulalip Alternative Sentencing Program*, NATIVE NATIONS INSTITUTE 1, 1 (2007), https://nnidatabase.org/db/attachments/text/honoring_nations/2006_HN_Tulalip_alternative_sentencing_program.pdf.

strategically uses the doctrine today. As previously discussed, invoking sovereign immunity does not always keep a Native nation out of court. Sometimes even when a Native nation invokes sovereign immunity, the nation still ends up in state or federal court. And when they do, they are often accompanied by discussions of how the Native nation is being unfair or unjust. Non-Native courts are frequently in agreement with the plaintiff's sense of injustice and frequently the courts either find ways to imply a waiver of tribal sovereign immunity so that the case can go forward[158] or, if nothing else, find time to explicitly mention the unjust use of sovereign immunity in the decision itself.[159] In response to such challenges, the Tulalip Tribes have realized that, when a nation's sovereign immunity policy is developed strategically and thoughtfully, it can address many of the concerns frequently raised in opposition to the doctrine. Specifically, well-crafted laws and codes about sovereign immunity can manage the expectations of all parties who interact with Native nations, create a system where justice is served for all, and provide absolute clarity to outside courts that may wish to waive (or uphold) tribal sovereign immunity against the nation's wishes.

While wrestling with the myriad of issues surrounding tribal sovereign immunity, the Tulalip Tribes came to the realization that *both* exercising *and* waiving sovereign immunity in different contexts can strengthen a nation's sovereignty. This philosophy is perhaps best expressed by Michael Taylor, an attorney for the Tulalip Tribes, who said:

> Sovereignty is a power. Sovereign immunity is a part of that power. And whether you're waiving it, or asserting it, or writing it into an ordinance or a contract or whatever it is, you are exercising it. And . . . waiver strengthens it. It strengthens it by actually showing that you have it and [are] putting it out there in whatever form.[160]

The idea conveyed by Taylor is simple in principle: if sovereign immunity is always waived or never waived, then the power loses much of its meaning and usefulness. It is only through the decision to exercise sovereign immunity in some instances and the decision to waive sovereign immunity in other situations that the power, as an aspect of sovereignty,

158. *See, e.g.,* C & L Enter., Inc., v. Citizen Band of Potawatomi Tribe, 532 U.S. 411 (2001).

159. *See, e.g.,* Filer v. Tohono O'odham Nation Gaming Enter., 129 P.3d 78, 84-85 (Ariz. Ct. App. 2006).

160. Michael Taylor, *Nation-Owned Enterprises: Quil Ceda Village*, NATIVE NATIONS INSTITUTE, https://nnidatabase.org/db/video/michael-taylor-nation-owned-businesses-quil-ceda-village.

really carries any value and can be used to achieve different strategic ends. With this understanding in mind, the Tulalip Tribal Codes ("TTC" or "Code") have been carefully developed to achieve the nation's own specific goals.

Even a cursory glance at the TTC provides insight into the Tulalip Tribes' strategy with respect to sovereign immunity. The 2012 version of the Code is more than 1,000 pages in length and is divided into fifteen separate titles.[161] All fifteen titles contain at least one reference to tribal sovereign immunity,[162] and, in total, more than fifty different sections throughout the Code reference the doctrine. The mere fact that a large amount of space is dedicated to tribal sovereign immunity demonstrates the importance of the doctrine to the Tulalip Tribes, an assumption supported by the text itself in TCC section 2.35.010(2), which asserts that "[t]ribal sovereign immunity serves an important function in preserving limited Tribal resources so that the Tribes can continue to provide governmental services which promote health, safety, welfare and economic security for the residents of and visitors to the lands of the Tribes."

A more careful examination of the Code provides additional insight into the Tulalip Tribes' strategies and policies surrounding tribal sovereign immunity. In some instances, the Tulalip nation is making it clear that their decision to act in a specific field of law does not equate to a waiver of sovereign immunity. For example, provisions such as TCC sections 4.10.380 and 7.15.050, which deal with sex offender registry and environmental infractions, respectively, have blanket language that clearly preserves sovereign immunity for the nation: "The sovereign immunity of the Tulalip Tribes shall in no matter be waived by this chapter."[163] These types of provisions give tribal members, outsiders, and courts notice that the Tulalip nation's sovereign immunity remains intact for suits in these areas.

In contrast, other provisions of the TCC very clearly, and carefully, waive sovereign immunity under certain circumstances. For instance, in the field of tort liability—an area where many non-Native courts and press like to attack sovereign immunity—the Tulalip Tribes first recognized its need to balance the provision of "governmental services which promote health, safety and economic security" with also providing "a remedy to private persons who are injured by negligent or wrongful acts or omissions of the

161. *Tulalip Tribal Codes: A Codification of the General Ordinances of the Tulalip Tribes*, CODE PUBLISHING COMPANY (2012), http://www.codepublishing.com/wa/Tulalip/?f (hereinafter referred to as "TCC").

162. *See, e.g.,* TCC §§ 1.25.030; 2.10.180; 3.22.490; 4.25.070; 5.25.050; 6.10.070; 7.15.050; 8.20.040; 9.05.590; 10.35.150; 11.05.170; 12.20.130; 13.05.060; 14.15.130; 15.20.070.

163. TCC § 8.20.040.

Tribes or its agents, employees or officers."[164] In order to achieve this balance, the nation established a "limited waiver of Tribal sovereign immunity"[165] that allowed "action[s] for monetary damages" to be brought in Tribal Court subject to a number of limitations,[166] most notably that "[n]o monetary damages shall be awarded . . . in excess of the limits of insurance maintained by the Tribes to compensate for [the] injury claimed."[167]

The decision to waive sovereign immunity was not an accidental one, but one that the Tulalip Tribes saw as in their own best interest. As Michael Taylor explained:

> [I]f you followed the process, and if you've been injured by the tribe, you're going to be paid something to make you whole. And as a hospitality entity we've got to do that. If people fall off the curb at the casino parking lot, and it's our fault, and they injure themselves, it's quickly going to be known around the region that you shouldn't go to the Tulalip casino because if you fall off the curb and hurt yourself, the tribe is going to raise sovereign immunity and you can't collect anything. So people aren't going to come.[168]

Additionally, even though the Tulalip Tribes decided to waive sovereign immunity, they realized that they had a choice about what forum the case would be heard in after immunity had been waived. With respect to tort claims, the Tulalip Tribes strategically chose to only waive immunity into its own tribal courts, and, again, it was not an accidental decision. "We put a lot of work into [the] tribal court," continues Taylor. "[The Harvard Project on American Indian Economic Development] gave us an award recently. Our tribal court is good. We've got good judges, we've got good court of appeals, and we've got good ordinances."[169] The Tribes' decision to use its own courts not only provides a remedy for those who are injured, but also strengthens the legitimacy of their own courts in the process.

Outside the context of torts, the Tulalip Tribes also created other areas where specific waivers of sovereign immunity have been granted by the Code.[170] Many of these waivers relate to nation-owned businesses or governmental corporations. In the TCC, title 15 covers governmental entities such as governmental corporations. Within title 15, there are

164. TCC § 2.35.010(3).
165. *Id.*
166. *See* TCC § 2.35.050.
167. TCC § 2.35.030.
168. Taylor, *supra* note 160.
169. *Id.*
170. *See, e.g.,* TCC 9.10.060; 15.05.110.

provisions related to, for example, the Tulalip Construction Company and the Tulalip Telecommunications Company, both of which are wholly owned by the Tulalip Tribes.[171] And both companies have carefully crafted waivers of immunity:

> The Tulalip Construction Company is a legal creation of the Tulalip Tribes and is subject to the jurisdiction, laws, and ordinances of the Tribes. This chapter shall be deemed to be a waiver by the Tribes of sovereign immunity from suit only with respect to the telecommunication company and its separate assets, and may only be enforced in accordance with the charter of the Tribes' Federal corporation. Nothing in this chapter shall be deemed or construed to be a waiver of sovereign immunity from suit on the part of the Tulalip Tribes, or to allow any action against any of its assets, or to be a consent of the Tribes to the jurisdiction of any state with regard to the business or affairs of the Tribes, or to any cause of action, case of controversy, or other claim, except as unequivocally and expressly set forth herein.[172]

These waivers purposefully allow the corporations to answer for any wrongs they commit or debts they owe without putting the nation's treasury at risk.

Other provisions of the TCC handle sovereign immunity in a different way still. In some instances, the Code states that there is no automatic waiver within a given context, but then goes on to state that the power to waive has been delegated to a specific entity and, furthermore, lays out the procedure the entity must follow to legally effect a waiver of sovereign immunity. For instance, chapter 6.05 vests the Tulalip Tribal Housing Department with the ability to "waive any immunity from suit" so long as the contract has first been approved by Board of Directors of the Tulalip Tribes.[173] Similarly, chapter 15.20 permits sovereign immunity to be waived with respect to the Tulalip Forestry Enterprise, an "enterprise of the Tulalip Indian Tribes,"[174] but only if an "express and unequivocal resolution of the Tulalip Board" exists, and even then, the waiver is "only to the extent specified in such resolution."[175] The strategic decision to spell out in detail how immunity may be waived in such situations ensures that all parties interacting with the nation—including non-Native courts—are

171. TCC §§ 15.15.050; 15.25.050.
172. TCC § 15.15.050.
173. TCC § 6.05.050(5)(c).
174. TCC § 15.20.70.
175. TCC § 15.20.080(12).

aware of what does and does not constitute a waiver of sovereign immunity in different contexts.

The Tulalip Tribes' decision to create places in their Code where sovereign immunity is not automatically waived, but which may be waived, gives the nation maximum flexibility to deal with different situations that arise. Generally speaking, the Tulalip Tribes waive sovereign immunity when asked to do so, but the Code's malleability allows for case-by-case determinations.[176] Thus, in the rare circumstances in which the Tulalip nation is asked to waive sovereign immunity, but doing so is seen as an affront to the nation's sovereignty, the nation will not waive their right. According to Taylor:

> When do you not waive your immunity? When . . . you see it as an attack on your tribal sovereignty[.] We're building a hotel now. [The construction company] wanted a waiver of immunity. And we said, "Fine." And we worked, and worked, and worked on this waiver of immunity, and . . . in the middle they said, "We want state court." We did an arbitration provision, which allowed disputes to be arbitrated by an appropriate arbitrator. But arbitration awards have to be enforced by a court. There has to be a court out there that will enforce the ruling of the arbitrator. The arbitrator doesn't have judicial authority. The arbitrator can, under the contract, act like a judge, make an award to one side or the other, but if one side or the other won't follow the direction of the arbitrator, the ruling of the arbitrator, you have to have a court at the end. [The company] said to us, "We won't accept your tribal court. You have to waive immunity in state court." So, we got another contractor. We just finally said, "We're not doing it." . . . Our tribal court is good.[177]

Finally, the Tulalip Tribes' sovereign immunity provisions achieve one more end. Not only do they state when sovereign immunity has been waived, when it has not, and how it might be waived in certain future instances, but the TCC also has multiple provisions clarifying which individuals and entities are covered by sovereign immunity and which are not. Littered throughout the Code are provisions that expressly extend sovereign immunity to protect, for example, the Enrollment Committee and others associated with making enrollment decisions,[178] the Tribal Gaming

176. Taylor, *supra* note 160.
177. *Id.*
178. TCC § 5.05.160.

Commission,[179] the Executive Director and Tribal staff when they are acting pursuant to Title 11 of the TCC, which relates to garbage disposal and sanitary land fill issues,[180] and the port of Tulalip, which houses the nation's marina operations.[181]

It is clear that the TCC has been carefully developed to ensure that the world is aware of when tribal sovereign immunity has and has not been waived, who is covered by tribal sovereign immunity within the Tulalip nation, and who has the power to waive tribal immunity as well as the process required for a waiver to be effective. The Tribes' decision to spell out the answers to these points in their code *and* to make their code available publicly online,[182] gives *everyone* interacting with the opportunity to understand what rights and privileges do and do not exist when dealing with the nation. When the rules are clearly spelled out and accessible, then those interacting with the nation are on notice about the state of the law. And when people are on notice of the law, concerns about due process violations, equal protection violations, and injustice begin to lessen because expectations are being managed. This management of expectations is, ultimately, one of the strongest assets the comprehensive handling of sovereign immunity in the TCC has to offer.

C. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

The Grand Traverse Band of Ottawa and Chippewa Indians ("GTB") is a federally recognized tribe located in northern Michigan. GTB has approximately 4,100 citizens, about 17% of which live on reservation land.[183] GTB was the first tribe recognized by the federal government in Michigan and opened one of the first casinos on tribal land.[184]

1. Court System

Among GTB's many accomplishments is an award-winning court system. GTB's court opened in 1988, but only served the community on a part-time basis. Little by little, GTB invested in their court system, and today it includes both a trial court comprised of two justices and an

179. TCC § 10.05.060(2).
180. TCC § 11.05.170.
181. TCC § 15.30.010(2).
182. Tulalip Tribal Codes, *supra* note 161.
183. Kristine L. Petoskey, *Grand Traverse Band of Ottawa & Chippewa Indians Waste Management Plan*, GRAND TRAVERSE BAND OF INDIANS 1 (2010), http://www.gtbindians.org/downloads/iswmpweb2.pdf.
184. Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 313 (2011).

appellate court comprised of three justices.[185] GTB also has invested resources into developing more culturally appropriate dispute resolution mechanisms to be used in specific types of cases. Ultimately, the tribal court system at GTB became its own branch of government, giving it the independence necessary to carry out its purpose.[186]

2. Tribal Sovereign Immunity Policies

GTB, unlike the other two cases examined, addresses the issue of sovereign immunity in their constitution. Article XIII of the GTB Constitution is entitled "Sovereign Immunity," and Section One of that Article states that GTB is immune from suit "except as authorized by this Article or in furtherance of tribal business enterprises upon a resolution approved by an affirmative vote of five (5) of the seven (7) members of the Tribal Council." Among the authorized waivers of sovereign immunity found in the GTB Constitution is a provision that allows suits against government officials "in the tribal court system by tribal members for the purpose of enforcing rights and duties established by this Constitution and by the ordinances and resolutions of the Tribe."[187] In addition to these constitutional statements, GTB's legal code, much like the TCC, repeatedly references sovereign immunity and whether it is reserved or waived in various circumstances.

3. Tribal Sovereign Immunity in Action

GTB, along with the majority of the Native nations in Michigan, have come to realize that tribal sovereign immunity, particularly in the taxation context, does not have to be a wedge that drives the state and Native nations further apart, as is so often the case. Instead, it can actually be a tool to bring the two parties together at the bargaining table to hash out agreements on a wide range of issues, including taxation and other types of regulation. In fact, Native nations across the country have entered into hundreds of agreements with states on taxation matters over the years.[188] These

185. Harvard Project on American Indian Economic Development, *Tribal Court of the Grand Traverse Band*, NATIVE NATIONS INSTITUTE 1, 1 (2000), https://nnidatabase.org/db/attachments/text/honoring_nations/1999_HN_Grand_Traverse_Band_tribal_court.pdf.

186. *Id.*

187. CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS (1988) art. XIII, sec. 1, http://narf.org/nill/Codes/gtcode/constitution.pdf.

188. *State and Federal Tax Policy: Building New Markets in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 619-30 (2011) (statement of Steven J. Gunn); *Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong. 303-374 (1998) (statement of Pres. Ron Allen, National Congress of American Indians) ("[M]ore than 200

agreements would likely not be possible if the doctrine of sovereign immunity did not exist. But what makes the agreements made between Michigan and several Michigan Native nations, including GTB, truly unique is that through the strategic use of sovereign immunity, GTB and the other nations were able to substantially increase their tribal court jurisdiction. This increased jurisdiction allows the GTB tribal court to hear any case where Michigan is a party and the dispute is related to the tax agreement.

Generally speaking, current law allows states to impose taxes on non-Indians who make purchases of certain commodities—such as gasoline and tobacco—when those purchases occur on Native nation lands.[189] Although there are restrictions, the state may legally require Native nations to collect those taxes on behalf of the state. While states may legally require Native nations to collect the tax, states are unable to sue Native nations in an attempt to recover that tax due to the doctrine of tribal sovereign immunity.[190] This, understandably, has caused much friction between states and Native nations. However, the fact that states cannot sue for recovery also gives states an incentive to sit down and talk to Native nations.

At first glance, it may be unclear why Native nations would want to sit down and talk to states about taxation when they could merely collect taxes on the reservation and use sovereign immunity to keep the money. Although some Native nations may gladly talk out of a spirit of cooperation or to keep positive state-tribal relationships, others would presumably see no apparent benefit in bargaining with the state. The reality of the situation, however, is that if Native nations are unwilling to consult with states, then two possible outcomes become likely. First, if Native nations are unwilling to negotiate with states, then states have shown they will take it upon themselves to try to find new ways to indirectly collect the tax revenue from Native nations or from nonmembers making purchases from Native nations, which "creates the potential for double of triple taxation" and "imposes hardships on nonmembers and tribes."[191] Second, due to the "uncertainty in existing federal law over the precise extent of state and local taxing authority over nonmembers in Indian country," lawsuits become

tribes in 18 states have created successful state-tribal compacts" as of 1998); Fletcher, *supra* note 49.

189. *Hearing*, *supra* note 188, at 31 (statement by Steven J. Gunn) ("[T]he courts have upheld state taxes on cigarette sales to nonmembers, state severance taxes on oil and gas produced by nonmembers in Indian country.").

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

191. *Hearing*, *supra* note 188, at 35 (statement by Steven J. Gunn).

common.[192] Either a Native nation is challenging a state taxation scheme or a state is challenging a Native nation's refusal to turn over revenue. In either scenario, it can take years of litigation and large amounts of time and money by Native nations (and by states) to adjudicate the claims. On top of these considerations, given that the law is uncertain, there is no way to know which side will ultimately win. For some Native nations, the time and money associated with adjudication may be neither practical nor desirable. On the other hand, when a Native nation chooses to enter into a tax agreement with a state, it provides that nation with certainty and "allows the [nation] to plan for the future in terms of business plans, project financing, and the provision of government services to tribal members."[193]

The reality is that so long as both Native nations and states are thinking in the long-term, tribal sovereign immunity in the taxation context can actually bring Native nations and states together. This is precisely what has happened in the state of Michigan over the past decade. Michigan is home to twelve federally recognized tribes.[194] Currently, ten of those twelve tribes have at least one tax agreement with the state of Michigan.[195] As is often the case, Michigan's "stated motivation to negotiate with the Michigan Tribes stemmed mostly from its inability to collect valid taxes from non-tribal members in Indian Country."[196] On the other side, the Native nations "were motivated to meet with the State because the State began to charge sales and use tax on construction contractors doing business on reservation and trust land."[197] These taxes were, naturally, being passed on to the Native nations of Michigan.[198] In short, prior to negotiations, Michigan believed that it was losing tax revenue to Native nation businesses who were "exploiting tax exemptions to garner a competitive advantage."[199] To the contrary, the Native nations believed that the state's tax scheme on construction contractors was "illegal" and

192. *Id.*

193. Fletcher, *supra* note 49, at 44.

194. *Id.* at 5.

195. According to the state of Michigan's website, agreements exist with the Bay Mills Indian Community (2002), Grand Traverse Band of Ottawa and Chippewa Indians (2004), Hannahville Indian Community (2002), Little River Band of Ottawa Indians (2002), Little Traverse Bay Bands of Odawa Indians (2002), Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (2008), Notawaseppi Band of Potawatomi Indians (2002), Pokagon Band of Potawatomi Indians (2002), Saginaw Chippewa Indian Tribe (2010), and Sault Ste. Marie Tribe of Chippewa Indians (2002). *See Michigan Taxes*, MICHIGAN DEPARTMENT OF TREASURY, http://www michigan.gov/taxes/0,4676,7-238-43513_43517—-,00 html.

196. Fletcher, *supra* note 49, at 18.

197. *Id.* at 17.

198. *Id.*

199. *Id.* at 18.

resulted in the state having collected "hundreds of thousands of dollars" from the construction of Native governmental buildings on trust lands.[200]

Despite these conflicting views, many Native nations from Michigan came to the bargaining table with hopes of reaching an agreement that could not only benefit their own Native community, but that could also improve their relationship with the state and provide stability in the realm of taxation going forward.[201] In all ten agreements, the Native nations involved are recognized as "sovereign governments"[202] with "sovereign rights," and the agreements themselves were produced "on a government to government basis," "in good faith," "in a spirit of cooperation," and with hopes of finding a "fair and workable understanding regarding the application and administration of" state tax issues.[203] During the negotiations, exemptions from six state taxes were ultimately discussed: sales and use taxes, motor fuel taxes, tobacco taxes, income taxes, and the Michigan Single Business Tax.[204] There were also discussions about a sales tax revenue sharing scheme for those Native nations that had already adopted their own sales tax codes.[205] Due to a number of unique legal issues arising in Michigan, the negotiations were extremely complex.

Ultimately, however, agreements were reached between Michigan and ten Native nations. Each of the agreements between Michigan and the Native nations have slight variations, but all share some of the same overarching structure. For instance, while all of the agreements exempt tribal members from having to pay certain state sales and use taxes, the methods for administering these exemptions vary. Some agreements employ a "refund method" that "simply allows the Tribes to seek reimbursement for sales and use taxes collected by vendors from the State."[206] Other nations, who were leery of trying to get money back from the state, utilized "certificates of exemption," which, when presented to state vendors along with an authorization letter from the state, allowed purchasers to avoid having to pay the sales and use taxes at the time of purchase.[207]

---

200. *Id.* at 17.

201. *Id.* at 44.

202. *See, e.g.,* Tax Agreement Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan (2002), http://www.michigan.gov/documents/SaultSteFinalTaxAgreement_61197_7.pdf. ("Whereas, the Sault Ste. Marie Tribe of Chippewa Indians, a sovereign government, is a federally recognized Indian Tribe located within the State of Michigan.").

203. *Id.*

204. Fletcher, *supra* note 49, at 26.

205. *Id.*

206. *Id.* at 32.

207. *Id.*

In addition to exemptions for tribal members, the Native nations of Michigan negotiated the possibility of a sales tax revenue sharing scheme. Normally, under Michigan law, Native nations who have no tribal sales tax are required to collect the state sales tax and remit all of the money collected to the state.[208] Along with the money, Native nations are required to send documentation indicating which sales were from tribal members so the state could refund that portion of the tax back to the nation.[209] Under the agreements, however, Native nations who had implemented their own sales tax provisions were able to enter into a new type of revenue sharing with the state. The sharing scheme allowed Native nations to keep two-thirds of the taxes collected on the first five million dollars in sales on their lands and half of all taxes collected thereafter.[210] The goal of this option for Native nations was to "preserve revenues for each side as much as possible."[211]

With respect to the more contentious issues of motor fuel and tobacco taxation, agreements were also reached. In both instances, Native nations essentially agreed to determine a cap on the amount of tax-free sales of these goods that would occur on their lands.[212] The specifics of how a nation administers its tax exemption can vary, however. Some Native nations employ a "refund method" by which they provide records to the state on sales made and the state refunds the nation its part of the tax. Alternatively, other nations administer the exemption by a "quota method" where "each individual Tribe and the State negotiate for a cap or quota on the amount of tobacco products or motor fuels the Tribe may purchase tax-free for a period of time."[213] The refund method ensures that only Native citizens recieve the tax break, whereas the quota method allows the individual Native nations to decide "through its allocation of [the] quota how to distribute the benefit."[214]

Although the agreements negotiated touched on a myriad of issues, the final one worth mentioning here relates to enforcement of the terms of the agreement. It was in this context that tribal sovereign immunity once again played a strategic role. Both Michigan and the Native nations knew that the agreement was meaningless if it could not be enforced, and it could not be

208. *Id.* at 30.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 34.
213. *Id.* at 33-34.
214. *Id.* at 34.

enforced unless Native nations agreed to waive their sovereign immunity.[215] Thus, Native nations were able to strategically use sovereign immunity in the negotiation process. In the end, tribal sovereign immunity was waived, but only after terms of the waiver were carefully worked out and agreed upon.[216]

The first condition of waiving tribal sovereign immunity was to only allow initial claims in tribal courts. Under the terms of the agreements, arbitration was to take place in the event of any dispute.[217] However, if arbitration did not occur, then the Native nations agreed to waive their immunity so that Michigan could file a case in tribal court to compel arbitration and to enforce any arbitration award.[218] In the event that a tribal court did not act on the state's claim within fourteen days, the state was then able to seek redress in the courts of Michigan.[219] This waiver of sovereign immunity was to survive even if a Native nation sought to terminate the agreement.[220] Otherwise, as the state argued, a Native nation could simply terminate the agreement at any time and then use sovereign immunity to prevent any recourse.[221]

Additionally, while the Native nations that signed agreements with Michigan waived their sovereign immunity with respect to the dispute resolution provisions, the nations were very careful to protect themselves from other types of legal issues that may arise in the future. Most notably, the agreements entered into included the following provisions:

> First, tribal officials may not be criminally prosecuted for violations of state law or the Agreement. Second, the State may conduct an audit of the Tribe in regards to any of the six taxes at issue, but must provide thirty days written notice. Third, the State may not seize tribal assets in order to enforce a tax liability under the Agreement. Fourth, the State may conduct unauthorized inspections of tribal facilities for the purpose of discovering only contraband, motor fuel or tobacco products, and may only seize

215. Likewise, the agreement would have no force if the state refused to waive its immunity as well. *See id.* at 37 ("The State's waiver for purposes of enforcement derives from current law, a waiver through the Michigan Court of Claims.").

216. *See, e.g.,* Tax Agreement, *supra* note 202, at sec. 1(G).

217. Fletcher, *supra* note 49, at 41.

218. *Id.* at 36-37.

219. *Id.*

220. *Id.*

221. It is also worth noting that the Native nations also waived sovereign immunity with respect to the certificates of exemption that could be used with respect to sales and use taxes. Specifically, if the state believes that the certificates of exemption are being misused, the state can bring suit to attempt to acquire the taxes owed, but only after giving the Native nation in question ten business days to respond to the state's contention prior to the suit being filed. *See id.*

> those items that can be viewed in plain sight. Finally, the State must go to tribal court for a search warrant to search and seize items in tribal facilities . . . . The parties [also] agreed to allow the State to enter Indian Country and enforce state law against non-members provided [first] that the State give notice of the enforcement action to tribal law enforcement.[222]

In sum, while there were additional issues discussed and agreed upon between Michigan and the Native nations who live there, the above examples provide a brief overview of how negotiations can often lead to better solutions for both Native nations and states than would otherwise be possible in the litigation context. As is the case with any negotiation, neither side was able to walk away with everything that they wanted, but Native nations were able to prioritize the matters most important to them and achieve some significant gains in those areas. These gains, and indeed the negotiation itself, would likely have been more difficult, if not impossible, had Native nations not thought strategically about sovereign immunity and how it could be a tool in the nations' long-term goals.

VII. CONCLUSION

In this article I have put forth arguments in favor of tribal sovereign immunity by demonstrating that it is a tool capable of helping create strong tribal court systems. Specifically, tribal sovereign immunity has a robust ability to improve tribal court systems' capacity and legitimacy, while also expanding tribal court jurisdiction. Tribal sovereign immunity has a limited, but meaningful role in improving tribal court systems with respect to accountability, funding, and independence. Native nations serious about exercising self-determination must think strategically about sovereign immunity. The three case studies discussed here help provide a more robust picture of how Native nations with strong court systems are approaching the issue. While additional research should be done to verify the various connections between tribal sovereign immunity policies and strong tribal court systems, the time has come when no Native nation serious about self-determination can ignore the ramifications of how its own policy with respect to tribal sovereign immunity is affecting the nation's future. Additionally, no Native nation serious about self-determination can ignore the reality that the strategic management of the tribal sovereign immunity doctrine can be an effective tool to bring about positive change for any Native nation.

---

222. *Id.* at 41.