

COMMENTS

The Scope of Tribal Immunity in Real Property Disputes

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*Native American tribes are sovereign nations with some degree of sovereign immunity. The exact contours of that immunity are often in flux. While the Supreme Court has established the confines of tribal immunity in cases involving torts, taxation, and contracts, it has avoided determining the doctrine's application to cases involving real property. Recently, in *Upper Skagit Indian Tribe v Lundgren*, the Court dismissed the common notion that prior precedent mandates an *in rem* versus *in personam* distinction but refused to answer whether tribes can claim sovereign immunity in *in rem* actions against tribal land. By analyzing the history of tribal sovereignty, land ownership, and immunity from suit, this Comment argues that absent explicit congressional action, tribes can claim sovereign immunity in suits involving any form of tribal property. Only tribes themselves and the legislative branch of the federal government have the constitutional authority to alter these contours.*

*The dissent in *Upper Skagit Indian Tribe* introduced a relevant legal concern: the immovable property exception to sovereign immunity. But an analogy to the historical treatment of foreign nations quickly disposes of this concern. The concurrence proposed a policy concern: the potential for sovereign immunity to be used as a sword rather than a shield. This concern is readily refuted, however. The history of sovereign immunity in the United States, especially with regard to foreign nations and Native tribes—as well as the best interest of the tribes—side with broad immunity from suit. Under this Comment's expansive approach to tribal immunity, Congress maintains its role as the sole political branch that may adjust tribal immunity, and—more importantly—tribes maintain the right to determine their own sovereignty and invoke their own immunity, protecting land that the government has so consistently taken from them throughout this country's history.*

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INTRODUCTION

Sovereign states have long been immune from suit. Although sovereign immunity in its various forms has occasionally been maligned as “beyond the pale”¹ or even unconstitutional,² the doctrine has (so far) survived the test of time.³ But different sovereigns have different immunities. Under US law, foreign nation immunity, state immunity, and territorial immunity are each varied in scope and have developed in different manners.⁴ Moreover, Native tribes are not foreign countries, states, or territories; rather, courts most frequently view them as “domestic dependent nations.”⁵ What this title means for both their sovereignty and their immunity from suit has been ever evolving. Over the years,

¹ *Michigan v Bay Mills Indian Community*, 572 US 782, 831–32 (2014) (Ginsburg dissenting) (arguing that both tribal and state sovereign immunity have become “immoderate” and will prove to lack “staying power”).

² See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan L Rev 1201, 1203–16 (2001) (explaining that there is no constitutional justification for any form of sovereign immunity and arguing it may in fact be unconstitutional under several theories, including originalism).

³ See, for example, *Franchise Tax Board of California v Hyatt*, 139 S Ct 1485, 1499 (2019) (“[T]he States’ sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution.”); *Bay Mills Indian Community*, 572 US at 785 (“[A]bsent [congressional] abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity.”).

⁴ See, for example, Foreign Sovereign Immunities Act, Pub L No 94-583, 90 Stat 2891 (1976), codified as amended in various sections of Title 28 (codifying foreign nation immunity with limited exceptions); *Hans v Louisiana*, 134 US 1, 11–14 (1890) (holding that the Eleventh Amendment makes clear that states have maintained immunity from suit); *Porto Rico v Rosaly y Castillo*, 227 US 270, 274 (1913) (noting that “the incorporated Territories have always been held to possess an immunity from suit”).

⁵ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 17 (1831); *Bay Mills Indian Community*, 572 US at 788.

the Supreme Court has established the confines of tribal immunity in cases involving torts,⁶ taxation,⁷ and contracts;⁸ however, it has avoided determining the doctrine's application to cases involving real property. For two decades, some courts applied a misguided interpretation of *County of Yakima v Confederated Tribes and Bands of the Yakima Indian Nation*⁹ to limit tribal immunity to in personam cases but not in rem cases.¹⁰ Other courts rejected *County of Yakima's* applicability and found tribal immunity applied in both types of cases.¹¹ When the Supreme Court finally confronted the question in *Upper Skagit Indian Tribe v Lundgren*,¹² Justice Neil Gorsuch confirmed that *County of Yakima* should not be interpreted as the law governing real property disputes, but then deemed that to be "work enough for the day."¹³ Instead of a new rule, he offered only a truism: "Determining the

⁶ See *Lewis v Clarke*, 137 S Ct 1285, 1289 (2017) ("That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity.").

⁷ See *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 507 (1991) ("We conclude that under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers of the tribe.").

⁸ See *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.*, 523 US 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.").

⁹ 502 US 251 (1992).

¹⁰ *County of Yakima* interpreted the General Allotment Act of 1887, Pub L No 49-119, 24 Stat 388 (1887), codified as amended at 25 USC § 331 et seq, as allowing "an ad valorem tax on reservation land patented in fee pursuant to the Act, but [not allowing] the county to enforce its excise tax on sales of such land." *County of Yakima*, 502 US at 270. The Court centered its holding on a textualist analysis of the General Allotment Act, which permits "'taxation of . . . land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.'" *County of Yakima*, 502 US at 269 (alteration in original); see also generally General Allotment Act, 24 Stat 388. Given both the narrow holding of the case and the majority's strict reading of the Act's text, it would not be prudent to expand *County of Yakima* beyond the distinction of taxing fee land within reservations versus taxing the sale of that land.

¹¹ Compare *Cass County Joint Water Resource District v 1.43 Acres of Land in Highland Township*, 643 NW2d 685, 691-94 (ND 2002) (citing *County of Yakima*, then holding that "the State may exercise territorial jurisdiction over the land, including an in rem condemnation action, and the Tribe's sovereign immunity is not implicated"), with *Hamaatsa, Inc v Pueblo of San Felipe*, 388 P3d 977, 985 (NM 2016) (determining that "in the context of tribal sovereign immunity there exists no meaningful distinction between in rem and in personam claims").

¹² 138 S Ct 1649 (2018).

¹³ Id at 1652, 1655.

limits on the sovereign immunity held by Indian tribes is a grave question.”¹⁴

Due to tribes’ unique and ambiguous status as domestic dependent nations, courts and scholars often focus on comparing tribes to other forms of sovereigns.¹⁵ Some form of sovereign immunity applies to any state—whether a foreign nation, one of the several states, or an Indian tribe—that exercises sovereignty. Moreover, the doctrine is generally a common law doctrine, with exceptions like the Foreign Sovereign Immunities Act¹⁶ (FSIA). Accordingly, determining its applicability is an exercise in tracking case law. Thus, the ways in which courts have dealt with foreign nations, states, and territories should shed some light on how they should deal with tribes in the future.

Justice Gorsuch was not wrong to call the question grave. The history of tribal land in the United States is one of theft.¹⁷ In 1823, the Supreme Court held that the United States maintained “the exclusive right of extinguishing the title” of Native land.¹⁸ In the 1880s, when the United States began allotting reservation land to individual Natives, tribal landholdings were around 140 million acres;¹⁹ 50 years later, that number was around 50 million acres.²⁰ By the 1930s, when the government repudiated allotment, around 27 million acres had been transferred to non-Native ownership.²¹ Today, more than 56.2 million acres of Native land exist,

¹⁴ Id at 1654.

¹⁵ See, for example, Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 Mont L Rev 11, 12 (2019) (“[T]he status of Native nations within federal law has almost always been defined with reference to other sovereigns.”). See also id at 12–20 (explaining the comparisons to foreign nations); id at 20–27 (same to states); id at 27–39 (same to territories).

¹⁶ Pub L No 94-583, 90 Stat 2891 (1976), codified as amended in various sections of Title 28.

¹⁷ See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv L Rev 1787, 1796–97 (2019) (“From the Founding, the national government has had a direct hand in the violent dispossession of Native peoples, the internment of Natives into reservation camps, and efforts to ‘kill the Indian and save the man’ by forcing Indian children into boarding schools run by the federal government.”).

¹⁸ *Johnson v McIntosh*, 21 US (8 Wheat) 543, 588 (1823).

¹⁹ Allotment was a government practice aimed at forcing assimilation and ending Native sovereignty. The federal government granted land to individual tribe members to be held in trust by the United States for twenty-five years, after which it would be converted to a fee simple title, and the landholders would be granted US citizenship. The policy was eventually altered to allow the secretary of the interior to issue the fee patent at any time. See Judith V. Royster, *The Legacy of Allotment*, 27 Ariz St L J 1, 10–12 (1995).

²⁰ Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 Gonzaga L Rev 517, 522 (2009).

²¹ Royster, 27 Ariz St L J at 12 (cited in note 19). In 1934, Congress passed the Indian Reorganization Act, Pub L No 73-383, 48 Stat 984, codified at 25 USC § 461 et seq, which

all of which are held in trust by the United States.²² As Justice Gorsuch noted, the scope of tribal immunity in cases involving real property “will affect all tribes, not just the one before us.”²³ A poorly thought-out rule could only exacerbate the dispossession of land held by Native Americans.

This Comment argues that Native tribes, absent congressional waiver, should be able to claim immunity to suit in any in rem actions involving real property.²⁴ Unless Congress acts, tribal immunity will remain at its peak. And although the Court voiced two major concerns with tribal immunity in this context, both can be resolved within this existing legal framework. To this end, this Comment proceeds in three parts. Part I discusses the doctrine of sovereign immunity and its various limits. To understand tribal immunity, one must first understand the origins and scope of sovereign immunity more broadly. Part II then focuses on the law surrounding tribal land, tribal sovereignty, and tribal immunity, culminating in the undecided question presented in *Upper Skagit Indian Tribe*: May tribes claim sovereign immunity in suits involving their real property? Part III answers this question. While advocating for nearly unlimited tribal immunity might appear somewhat radical, this solution provides the protection necessary to maintain tribal land and avoids the legal and practical issues suggested by the Court. Additionally, an expansive view of in rem immunity is more consistent with the general principles of tribal immunity. The Conclusion summarizes the contributions of this

prohibited further allotment, extended trust relationships indefinitely, and authorized the secretary of the interior to take new land into trust and add land to reservations. Royster, 27 Ariz St L J at 17 (cited in note 19).

²² This was the estimated amount at the time of publication. See *Frequently Asked Questions* (US Department of the Interior, Indian Affairs), archived at <https://perma.cc/H3G4-ZLMN>. Recently, in *McGirt v Oklahoma*, 2020 WL 3848063 (US), the Supreme Court confirmed that a portion of Oklahoma—which had not been treated like a reservation for decades—has actually remained one. See *id.* at *22 (“The federal government promised the Creek a reservation in perpetuity. . . . Congress has never withdrawn the promised reservation.”). This decision should add approximately nineteen million acres to this total. See Ronald Mann, *Opinion Analysis: Justices Toe Hard Line in Affirming Reservation Status for Eastern Oklahoma* (SCOTUSblog, July 9, 2020), archived at <https://perma.cc/G5NF-AL3P>.

²³ *Upper Skagit Indian Tribe*, 138 S Ct at 1654.

²⁴ In rem actions are those directly against property and enforceable against the world, while in personam actions are against another person and enforceable only against that person. The former can be against any form of property, but this Comment focuses only on those against real property, such as adverse-possession and quiet-title claims. See Henry Campbell Black, *Treatise of the Law of Judgments Including the Doctrine of Res Judicata* § 792 (West 1891).

Comment and addresses its future implications as tribes continually attempt to repossess their land.

I. SOVEREIGN IMMUNITY: DOCTRINE AND LIMITATIONS

While the in rem immunity question left unanswered in *Upper Skagit Indian Tribe* is the impetus for this Comment, a thorough understanding of sovereign immunity is necessary to come to a satisfying solution.²⁵ The doctrine has its origins in the common law. Limitations to its scope could therefore come from the government altering the law by statute²⁶ or by a judge-made exception. For the purposes of this Comment, the most relevant example of a judge-made rule is the immovable property exception, which holds that any immovable property—that is, real property and any structures attached thereto—is not subject to sovereign immunity when it is acquired within another sovereign. It is this exception that Justice Clarence Thomas cites in his *Upper Skagit Indian Tribe* dissent as the clear answer to the question of tribal immunity's scope as applied to real property.²⁷

But to answer the question posed by the *Upper Skagit Indian Tribe* majority, the applicability of the immovable property exception to tribes is “more complicated than [Justice Thomas] promises,”²⁸ and the government has not clarified the scope of tribal immunity by statute. A brief overview of the case law developing sovereign immunity is therefore useful. Although it remains a legally distinct doctrine, tribal immunity shares common principles with other forms of sovereign immunity. Consequently,

²⁵ There are two ways to conceptualize sovereign immunity. One could consider whether a sovereign is incapable of being haled into its own courts, or one could consider whether a sovereign could be brought into another sovereign's courts. *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.*, 523 US 751, 760–61 (1998) (Stevens dissenting). An individual tribe's domestic law determines a tribal court's jurisdiction, while US law determines the immunity it affords other sovereigns in federal court. See *id.* Individual tribes can and do handle their jurisdictional scope differently. See Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 *Ariz St L J* 137, 155–61 (2004). Due to both the tribes' greater authority in their own courts and the potentially vast differences in rules, this Comment only confronts the jurisdiction of US federal and state courts.

²⁶ A common example is waiver, which is when the government limits its own immunity. See, for example, Federal Tort Claims Act, 28 USC § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”).

²⁷ *Upper Skagit Indian Tribe*, 138 S Ct at 1657 (Thomas dissenting).

²⁸ *Id.* at 1654 (majority).

understanding the doctrine's development on the whole is beneficial to understanding its scope for tribes.

This Part proceeds in two steps. First, it explains how the various sovereigns recognized by the United States are granted immunity. Second, it discusses how the immovable property exception has been applied to these sovereigns.

A. Sources of Sovereign Immunity

The Constitution establishes the federal government and acknowledges the existence of four additional potential sovereigns. The Commerce Clause names “foreign Nations, . . . the several States, and [] the Indian Tribes,”²⁹ and Article IV discusses territories.³⁰ Part II of this Comment will address the sovereignty of Native tribes, but this Part describes the immunities of the other four cognizable sovereigns. Tribal immunity, while distinct in its boundaries and history, shares some key features with these other forms of immunity.

The precise origins of federal sovereign immunity are up for debate. The system likely began in England due to the intricacies of the feudal justice system before eventually being repurposed as an extension of the divine right of kings.³¹ William Blackstone promulgated the latter theory, and the phrase “the king can do no wrong” was born.³² Even though the United States has an express ban on granting titles of nobility,³³ many presumed that the US government maintained immunity upon its independence.³⁴ Indeed, when pressed on the issue, the Court has found a “universally received opinion [] that no suit can be commenced or

²⁹ US Const Art I, § 8, cl 3.

³⁰ US Const Art IV, § 3, cl 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”). The very language of Article IV suggests that territories are not their own sovereigns, and the Supreme Court has adopted that interpretation. See *Puerto Rico v Sanchez Valle*, 136 S Ct 1863, 1876 (2016) (holding that “the Commonwealth and the United States are not separate sovereigns”). Nevertheless, the territories do enjoy some immunity from suit. See note 4 and text accompanying notes 54–59.

³¹ George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La L Rev 476, 477–79 (1953).

³² William Blackstone, 1 *Commentaries on the Laws of England* 238–41 (Oxford 1765–1769).

³³ US Const Art I, § 9, cl 8.

³⁴ See Federalist 81 (Hamilton), in *The Federalist* 541, 548 (Wesleyan 1961) (Jacob E. Cooke, ed) (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent.”) (emphasis omitted).

prosecuted against the United States.”³⁵ The Court has never offered a compelling reason for sovereign immunity’s durability in a country without a feudal system or an infallible monarch, but rather admits to the puzzle: “[T]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”³⁶

State immunity was not as clear at the time of the Founding. During the debates over the ratification of the Constitution, Alexander Hamilton assured the public that immunity “is now enjoyed by the government of every state in the union,”³⁷ but others were not so certain. Some feared that the Constitution created only one sovereign—the federal government—and that the Constitution may even have explicitly permitted suits against states.³⁸ Article III of the Constitution directly references controversies “between a State and Citizens of another State.”³⁹ While one possible interpretation of this clause permitted jurisdiction only when a state consents,⁴⁰ the Court decided otherwise in *Chisholm v Georgia*.⁴¹ This led to the ratification of the Eleventh Amendment, which has been interpreted as confirming the existence of state immunity against suits by residents of other states. But it did not create state immunity.⁴² Rather, it merely clarified that “the

³⁵ *Cohens v Virginia*, 19 US (6 Wheat) 264, 411–12 (1821).

³⁶ *United States v Lee*, 106 US (16 Otto) 196, 207 (1882). But see *Nevada v Hall*, 440 US 410, 415 (1979) (citation omitted), abrogated on other grounds by *Franchise Tax Board of California v Hyatt*, 139 S Ct 1485 (2019):

The King’s immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.

We must, of course, reject the fiction. It was rejected by the colonists when they declared their independence from the Crown.

³⁷ Federalist 81, in *The Federalist* at 549 (cited in note 34).

³⁸ Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv L Rev 1559, 1581 (2002).

³⁹ US Const Art III, § 2, cl 1.

⁴⁰ Nelson, 115 Harv L Rev at 1587 (cited in note 38).

⁴¹ 2 US (2 Dall) 419, 461 (1793) (finding “nothing against, but much in favour of, the jurisdiction of this Court over the State of Georgia”) (emphasis omitted).

⁴² *Hans v Louisiana*, 134 US 1, 11 (1890) (“[The Eleventh Amendment] did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits.”). The exact meaning of the Eleventh Amendment is a contentious topic in legal academia. Some say it merely overruled *Chisholm*; others say it applies only to cases involving diversity jurisdiction; and still others support the Court’s continuous extratextual expansion of Eleventh Amendment protections to cases involving admiralty and suits brought by foreign nations and Native tribes. For a brief summary of these competing ideas, see David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv L Rev 1, 50–52 (2015). This Comment does not offer an independent analysis of the Eleventh

States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."⁴³ State immunity is not absolute, however—even when the state itself has refused consent to be sued. For example, the Court has made clear that Congress may abrogate state immunity when enacting legislation for the enforcement of the Fourteenth Amendment.⁴⁴ Additionally, for forty years, courts allowed for private suits against states in different states' courts.⁴⁵ Such nonconsensual suits, however, have recently been deemed unconstitutional.⁴⁶

Before the FSIA, foreign nation immunity was a common law doctrine centered around deference to the executive branch. The common law came from customary international law, which stated that a sovereign could not be haled into another sovereign's court, and was recognized by Chief Justice John Marshall early in this country's history: "A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation."⁴⁷ Even if framed as traditional common law, foreign nation immunity was clearly a matter of comity from the US government, specifically the executive branch.⁴⁸ That is, the president and secretary of state would determine if diplomatic negotiation was preferable to litigation, and courts, rather than assuming jurisdiction, would defer to their judgment.⁴⁹ The FSIA was passed in 1976 to remove the discretionary application of sovereign immunity.⁵⁰ The FSIA confirmed that, "[s]ubject to existing international agreements" made before

Amendment. Instead, it accepts the Court's recent rationale that the amendment did not create state immunity, but merely confirmed preconstitutional ideas of the doctrine and overruled *Chisholm*.

⁴³ *Alden v Maine*, 527 US 706, 713 (1999).

⁴⁴ *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976). See also *Seminole Tribe of Florida v Florida*, 517 US 44, 59 (1996).

⁴⁵ See *Hall*, 440 US at 426–27 (holding that state immunity in other states may be "wise policy" if provided voluntarily by states, but, if imposed by a federal court as a constitutional matter, "would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union").

⁴⁶ *Franchise Tax Board*, 139 S Ct at 1499 (holding that "historical evidence show[s] a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts").

⁴⁷ *The Schooner Exchange v M'Faddon*, 11 US (7 Cranch) 116, 137 (1812).

⁴⁸ See *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480, 486 (1983).

⁴⁹ See *Ex parte Republic of Peru*, 318 US 578, 586–87 (1943).

⁵⁰ See *Verlinden B.V.*, 461 US at 488 (noting that the FSIA was passed, among other things, to avoid "case-by-case diplomatic pressures" and ensure litigants were receiving due process).

the time of the passing of the act, foreign nations were not subject to the jurisdiction of US courts.⁵¹ There are specific exceptions made to the general rule, the most relevant of which are if the foreign nation waives the immunity⁵² or if “rights in immovable property situated in the United States are in issue.”⁵³

Lastly, territories have retained common law immunity from suit. According to Justice Oliver Wendell Holmes Jr, the source of the immunity is “not because of any formal conception or obsolete theory” but rather the doctrine comes from “the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”⁵⁴ Furthermore, a territory has the ability to “waive its exemption” if desired, just like any other sovereign.⁵⁵ But Justice Holmes did not stop there. He gave a full-throated endorsement of sovereign immunity even for partial sovereigns because they “originate and change at their will the law of contract and property,” which is where their citizens “derive their rights.”⁵⁶ He made clear that “Congress might intervene, just as in the case of a State the Constitution does,” but regardless “the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power.”⁵⁷ Thus, Congress has plenary power over the territories, and the territories lack sovereignty “in the full sense.”⁵⁸ But despite this, territorial immunity still remains at its strongest, unless Congress intervenes.⁵⁹

B. The Immovable Property Exception

When unencumbered by a statutory provision, immunity from suit is subject only to the judge-made exceptions that have

⁵¹ 28 USC § 1604.

⁵² See 28 USC § 1605(a)(1).

⁵³ 28 USC § 1605(a)(4).

⁵⁴ *Kawananakoa v Polyblank*, 205 US 349, 353 (1907). This holding only makes sense when a state is sued in its own courts. See, for example, *Hall*, 440 US at 416 (noting that Justice Holmes’s “explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent,” but when a state is haled into another sovereign’s court, the immunity “must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity”).

⁵⁵ *Kawananakoa*, 205 US at 353.

⁵⁶ *Id.*

⁵⁷ *Id.* at 353–54.

⁵⁸ *Id.* at 353.

⁵⁹ *Kawananakoa*, 205 US at 353.

developed through the common law. The most notable of these for the purposes of this Comment is the immovable property exception. The exception itself, which Justice Thomas called “hornbook law almost as long as there have been hornbooks,”⁶⁰ was quaintly invoked by scholar Cornelius van Bynkershoek: “Even if we should refrain from the arrest of a prince on account of the inviolability of his person, who could say that the property of a prince in a foreign country is equally inviolable?”⁶¹ Simply stated, immovable property acquired by a sovereign, but located within a different sovereign, is not immune from suit. Rather, it is to be treated the same as any other private property located within a sovereign’s jurisdiction. This is because “property ownership is not an inherently sovereign function”—instead, it is a private function.⁶² But the history of the immovable property exception’s application in US law is not so straightforward.

In the 1812 case *The Schooner Exchange v M’Faddon*,⁶³ the Court recognized the immovable property exception in its very first acknowledgment of foreign state immunity: “A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction[;] he may be considered as so far laying down the prince, and assuming the character of a private individual.”⁶⁴ It now remains alive and well as applied to foreign state immunity, having been codified in the FSIA as follows: “A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which . . . *rights in immovable property* situated in the United States are in issue.”⁶⁵ But despite the dicta in *The Schooner Exchange*, courts never actually invoked the immovable property exception against a foreign state.⁶⁶ Instead, the

⁶⁰ *Upper Skagit Indian Tribe*, 138 S Ct at 1657 (Thomas dissenting).

⁶¹ Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis: A Monograph on the Jurisdiction over Ambassadors in Both Civil and Criminal Cases* 22 (Oxford 1946) (originally published 1721).

⁶² *Permanent Mission of India to the United Nations v City of New York*, 551 US 193, 199–200 (2007).

⁶³ 11 US (7 Cranch) 116 (1812).

⁶⁴ *Id* at 145.

⁶⁵ 28 USC § 1605(a) (emphasis added).

⁶⁶ Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale J Intl L 1, 33 (1976) (“No . . . judicial denial of immunity appears to have been expressly based on [immovable property] grounds.”). Given that Congress passed the FSIA in 1976, Fredric Alan Weber’s article should reflect comprehensive research on the immovable property exception before the codification of foreign nation

scope of foreign state immunity depended on the executive branch. Ordinarily, the State Department “requested immunity in *all* actions against friendly foreign sovereigns,” until 1952 when the secretary of state determined private actions by foreign parties should not always be barred.⁶⁷ Even after this determination, “[o]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available” if the immovable property exception applied.⁶⁸ If the foreign nation had not engaged with the State Department in a given suit, then courts would make decisions with deference to any prior negotiations by the State Department.⁶⁹ This occasionally created inconsistent rulings, which caused Congress to intervene and pass the FSIA.⁷⁰ Historically, therefore, the rule was not that suits over immovable property were permitted, but rather that the State Department provided an ad hoc determination of the scope of a foreign nation’s immunity.

In contrast, courts have unequivocally adopted the exception within state sovereignty. In *Georgia v City of Chattanooga*,⁷¹ the state of Georgia owned a railroad within Tennessee and sought to enjoin the city of Chattanooga from appropriating some of the land.⁷² The Court rejected Georgia’s claim of sovereign immunity over the land because the state “acquired land in another State for the purpose of using it in a private capacity.”⁷³ The justification for denying state sovereign immunity was that the “terms on which Tennessee gave Georgia permission to acquire and use the

immunity. See Reply Brief for the Petitioner, *Upper Skagit Indian Tribe v Lundgren*, No 17-387, *8 (US filed Mar 12, 2018) (available on Westlaw at 2018 WL 1326147).

⁶⁷ *Verlinden B.V.*, 461 US at 486–87 (emphasis added). With the codification of the exception, however, the Court has altered its range. For example, it was found to apply in tax liens against the Permanent Mission of India to the United Nations because a tax lien implicates a “quintessential right[] of property ownership” and is therefore within the immovable property exception without being an action against the property itself. *Permanent Mission of India to the United Nations*, 551 US at 198–99. Consequently, the exception is understood to now apply whenever the property rights are at issue, even if the property itself is not directly implicated. But see *Fagot Rodriguez v Republic of Costa Rica*, 297 F3d 1, 11 (1st Cir 2002) (“[P]urely compensatory rights, without more, are insufficient to sustain jurisdiction under the immovable property exception.”). Nevertheless, these expansions all occurred after the passage of the FSIA, and thus are not contextually relevant for this Comment.

⁶⁸ *Verlinden B.V.*, 461 US at 487.

⁶⁹ *Id* at 487–88.

⁷⁰ *Id* at 488.

⁷¹ 264 US 472 (1924).

⁷² *Id* at 478.

⁷³ *Id* at 479–80.

land” constituted Georgia’s implicit consent to be susceptible to condemnation proceedings.⁷⁴

The doctrine does not appear to have ever been applied to territorial immunity, nor, as will be seen, tribal immunity.

Theoretically, the immovable property exception is straightforward: sovereigns acquire property as if they are private persons. Nevertheless, its place in US law is much muddier. While a state cannot acquire land within another state and claim immunity, a foreign nation, until the passage of the FSIA, very often could have. The exception may be found in a hornbook, but its application is varied, and may for some sovereigns only be found within policy memoranda at the State Department.

The developments of the above forms of immunity are each distinct in some manner from tribal immunity, and, accordingly, the corresponding applicability of the immovable property exception is in question. But these concepts are nevertheless related and will inform the discussion of tribal sovereignty and immunity below.

II. TRIBAL SOVEREIGNTY AND IMMUNITY

What does this all mean for tribes? They “are subject to plenary control by Congress,” but as domestic dependent nations, tribes retain whatever sovereignty they do possess until Congress exercises its plenary control to the contrary.⁷⁵ The strength of that sovereignty has historically been in flux, but this Comment contends that it has gradually grown stronger over time. One scholar has argued that, by basing this fluctuation on the uniqueness of tribal sovereignty (as opposed to other forms of sovereignty), the Court “has provided a powerful and ongoing ideological tool in constructing U.S. colonialism over Native peoples.”⁷⁶ Recently, however, the Court has seemed more inclined to recognize tribes’ sovereignty.⁷⁷ Does this potential pivot solidify a specific type of sovereign lens with which we should view tribes? And with the form of sovereignty comes the question of what sort of immunity from suit the tribes maintain. The courts have expanded and

⁷⁴ Id at 480.

⁷⁵ *Michigan v Bay Mills Indian Community*, 572 US 782, 788 (2014).

⁷⁶ Ablavsky, 80 Mont L Rev at 12 (cited in note 15).

⁷⁷ See *Herrera v Wyoming*, 139 S Ct 1686, 1699 (2019) (observing that any “treaty is ‘essentially a contract between two sovereign nations’”), quoting *Washington v Washington State Commercial Passenger Fishing Vessel Association*, 443 US 658, 675 (1979).

contracted both tribal sovereignty and the corresponding immunity over the years, resulting in a lack of clarity as to whether they may claim that immunity in in rem actions involving real property.

This Part seeks to clarify the fluctuations. Justice Anthony Kennedy has said tribal immunity has “developed almost by accident”⁷⁸ and “with little analysis.”⁷⁹ Others have argued that the doctrine is coherent as an “intentional byproduct of relationships negotiated across centuries between the United States and the . . . Indian nations.”⁸⁰ This Comment argues that the actual origin matters much less than the current status. Individual cases may twist or turn, but the historical path has proceeded toward treating tribes as fully recognized sovereigns, unless Congress uses its plenary power.

First, this Part explains the origins of tribal sovereignty and notes where it stands today. Second, it establishes how tribes hold land. Because this Comment’s purpose is to determine when tribes may claim immunity from suits involving real property, a broader understanding of what that real property looks like is necessary. Third, it addresses tribes’ ability to regain sovereignty over dispossessed land. Fourth, it explains the development of tribal immunity, focusing on the larger trend of expansion. Fifth, it recognizes the split that led to the Court’s hearing of *Upper Skagit Indian Tribe*. Finally, it offers an overview of the legal and policy concerns raised in that case.

This Part seeks to meld the doctrines related to tribal sovereignty, the development of tribal immunity, the history of tribal land classifications, and the historical treatment of tribes to contextualize the proposed rule: tribal immunity should be unlimited in real property disputes unless Congress acts.

A. The Current State of Tribal Sovereignty

Although much of federal Indian law seems subject to the whims of whichever justices may be on the bench, one can discern some basic rules of tribal sovereignty. The government’s view of tribal sovereignty has mostly fluctuated between recognition of tribal independence and autonomy and reactionary

⁷⁸ *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.*, 523 US 751, 756 (1998).

⁷⁹ *Id.* at 757.

⁸⁰ William Wood, *It Wasn’t an Accident: The Tribal Sovereign Immunity Story*, 62 *Am U L Rev* 1587, 1594 (2013).

condemnation of these same principles. Over time, however, the reactionary efforts have been quieted by clearer legal recognitions of sovereignty.

In 1831 and 1832, Chief Justice Marshall penned the two opinions—*Cherokee Nation v Georgia*⁸¹ and *Worcester v Georgia*⁸²—that have arguably had the greatest impact on how courts conceptualize tribal sovereignty. The former established the foundation for treating tribes as “domestic dependent nations,” likening tribes’ relationship to the United States to that of a “ward to his guardian,” and ruled that the tribes “occupy a territory to which [the United States] assert[s] a title independent of their will.”⁸³ The Court disparagingly held that tribes are “so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.”⁸⁴ The language is quite damning for tribal sovereignty, but the Court walked back some of it the following year in *Worcester*. After hearing a case regarding the constitutionality of a state statute criminalizing a non-Native person’s being on tribal land, Chief Justice Marshall ruled that “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time

⁸¹ 30 US (5 Pet) 1 (1831).

⁸² 31 US (6 Pet) 515 (1832).

⁸³ *Cherokee Nation*, 30 US at 17.

⁸⁴ *Id.* at 17–18. Justice Smith Thompson dissented, arguing that tribes were a foreign nation with “absolute sovereignty and self government” of their land. *Id.* at 53 (Thompson dissenting). Had he won the day, the question of tribal immunity for cases involving real property may be much easier. Consider the following from Justice Thompson’s dissent:

The Cherokee territory being within the chartered limits of Georgia, does not affect the question. When Georgia is spoken of as a state, reference is had to its political character, and not to boundary; and it is not perceived that any absurdity or inconsistency grows out of the circumstance, that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those Indians. . . . If we look to lexicographers, as well as approved writers, for the use of the term *foreign*, it may be applied with the strictest propriety to the Cherokee nation.

Id. at 55–56. If true, then the immovable property in question is not private property within another sovereign, but rather a sovereign within another sovereign, and thus retains immunity from suit.

immemorial.”⁸⁵ The Court recognized the tribe as “a distinct community occupying its own territory, with boundaries” that precluded Georgia law from applying to those within the reservation.⁸⁶ The title of domestic dependent nation was far from abrogated, but the Court did grant clearer, partial sovereignty to the tribes.⁸⁷

For over one hundred years, the Court engaged in a struggle between stripping sovereignty through various means and returning some autonomy to the tribes.⁸⁸ Eventually, however, the Court began to embrace the concept of tribal sovereignty. Notably, the cases of the twentieth century were often rooted in analogies to state and foreign nation immunity. In one case, the Court ruled that preventing the tribes from prosecuting “infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction

⁸⁵ *Worcester*, 31 US at 559. The notion from *Worcester* that state sovereignty ends at reservation borders has since been abrogated. See *Nevada v Hicks*, 533 US 353, 361–62 (2001).

⁸⁶ *Worcester*, 31 US at 561.

⁸⁷ There is a compelling legal history argument that Chief Justice Marshall actually wanted to vindicate Cherokee rights all along. He dismissed *Cherokee Nation* on jurisdictional grounds, but he both hinted in his decision that a different case could result in victory for the tribe and also encouraged dissents. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan L Rev 500, 516 (1969). But his decision in *Worcester* was not because of the sovereignty, laws, and rights of the Cherokee people; rather, it was because the laws of Georgia were “repugnant to the [C]onstitution, laws, and treaties of the United States.” *Worcester*, 31 US at 561. That is, while it may be true Chief Justice Marshall respected Native sovereignty, he mostly sought to preserve federal authority.

⁸⁸ This Comment focuses on the current status of tribal sovereignty. The path to the current doctrine is fraught with examples of governmental derogation of tribes. After Chief Justice Marshall died, the Court acted at times as if tribes had never been sovereign. See, for example, *United States v Rogers*, 45 US (4 How) 567, 572 (1846) (“The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied.”). Meanwhile, the other branches of the federal government actively sought to destroy tribal sovereignty through both seizure of property and pressure to deed land to the government. Wood, 62 Am U L Rev at 1637–38 (cited in note 80). During this period, the government committed to allotment, before eventually retreating and trying to expand tribal sovereignty in the 1930s and 1940s. See text accompanying notes 110–12. In the 1950s and 1960s, the government reverted to antisovereignty policies and pursued a policy of termination. Through a series of laws and decrees, the government ended the sovereignty of several tribes, granted states rights over some tribal land, and forced tribe members to assimilate. See Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 Stan L Rev 1181, 1184–86 (1983). Congress has since repudiated anti-tribe policies and “committed to a policy of supporting tribal self-government and self-determination.” *National Farmers Union Insurance Cos v Crow Tribe of Indians*, 471 US 845, 856 (1985).

would trench upon important state interests.”⁸⁹ In another, the Court required a “full record to be developed in the Tribal Court” before bringing a civil claim over which a tribe has jurisdiction in a federal court, enforcing a rule similar to the international legal standard of exhaustion.⁹⁰ The Court even recognized a “fundamental attribute of sovereignty”—the right to tax transactions occurring on trust lands—as “derive[d] from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction.”⁹¹ In addition, it reaffirmed that “a hallmark of Indian sovereignty is the power to exclude” non-Natives from that very jurisdiction.⁹²

Progress did not come without setbacks, but even these were contextualized with an emphasis on sovereignty. Tribes were found to lack “inherent jurisdiction to try and to punish non-Indians.”⁹³ However, they were deemed able “to prosecute nonmember Indians” under their “inherent tribal authority.”⁹⁴ Civil jurisdiction could not extend to all non-Indians on fee land,⁹⁵ but did extend to “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁹⁶ Although these cases never directly involved

⁸⁹ *United States v Wheeler*, 435 US 313, 332 (1978).

⁹⁰ *National Farmers Union Insurance Cos*, 471 US at 856. See also Stephen W. Yale-Loehr, *The Exhaustion of Local Remedies Rule and Forum Non Conveniens in International Litigation in U.S. Courts*, 13 Cornell Intl L J 351, 357 (1980) (“The International Court of Justice has noted that ‘the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.’”) (quoting *Interhandel Case (Switzerland v United States)*, 1959 ICJ 6, 27).

⁹¹ *Merrion v Jicarilla Apache Tribe*, 455 US 130, 137 (1982), citing *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134, 152 (1980) (quotation marks omitted).

⁹² *Merrion*, 455 US at 141.

⁹³ *Oliphant v Suquamish Indian Tribe*, 435 US 191, 212 (1978).

⁹⁴ *United States v Lara*, 541 US 193, 210 (2004). One reading of *Lara* could be that the majority only ruled that Congress constitutionally authorized tribes to prosecute nonmember Natives. *Id.* The decision focused on interpreting a statute passed after *Duro v Reina*, 495 US 676 (1990), in which the Court had found there was no inherent authority to prosecute nonmember Natives. *Id.* at 679. The statute in question, however, notes that “the inherent power of Indian tribes” is “recognized and affirmed.” 25 USC § 1301(2). The *Lara* majority, when confronted with whether Congress meant that the statutory power comes from “inherent tribal sovereignty” or “delegated federal authority,” ruled “that Congress intended the former.” *Lara*, 541 US at 199 (emphasis in original) (quotation marks omitted).

⁹⁵ Fee land, or fee-patented land, is one of the three ways in which tribes hold land. It is usually formally allotted land after the trust period has expired, or land that a tribe has purchased but is not held in trust by the government. See notes 122–23.

⁹⁶ *Montana v United States*, 450 US 544, 566 (1981).

real property, they offer a glimpse into how the Court through the years viewed the nature of a domestic dependent nation.

In recent years, the Court has reinforced the nature of Native tribes as full sovereigns until altered according “to the will of the Federal Government.”⁹⁷ It considers the tribes as “remain[ing] ‘separate sovereigns pre-existing the Constitution,’” who are entitled to “historic sovereign authority.”⁹⁸ It is safe to say that even with the occasional setbacks,⁹⁹ the Court seems determined to treat tribes like their own sovereigns, not too different than one of the several states or a foreign nation. Then again, differences still do exist. As long as Congress maintains plenary powers over the tribes, then the tribes can never be fully sovereign.¹⁰⁰

B. Tribal Land Classifications

As seen with the immovable property exception above, much of the concern over immunity is whether the land in question is sovereign land or privately purchased land within another sovereign’s territory. Thus, with the state of tribal sovereignty established, an understanding of the land that tribes possess is necessary.

Southern states and Native tribes clashed during the early years of the nineteenth century, culminating in the Indian Removal Act.¹⁰¹ The federal government proceeded to forcibly move tribal members from their southern lands to reservations west of the Mississippi.¹⁰² Eventually, however, the federal government came after these lands reserved for the Native tribes as well.¹⁰³

Beginning in the 1870s, Congress outlawed making treaties with tribes and officially ceased recognition of tribal independence.¹⁰⁴ In 1887, Congress passed the Indian General Allotment

⁹⁷ *Bay Mills Indian Community*, 572 US at 803.

⁹⁸ *Id.* at 788, quoting *Santa Clara Pueblo v Martinez*, 436 US 49, 56 (1978).

⁹⁹ See, for example, *Cass County v Leech Lake Band of Chippewa Indians*, 524 US 103, 113–14 (1998) (holding reservation land that was alienated but then reacquired is now subject to state taxation); *Carcieri v Salazar*, 555 US 379, 394–95 (2009) (restricting the ability of the secretary of the interior to acquire land in trust for tribes to only the tribes existing at the time of the Indian Reorganization Act’s enactment).

¹⁰⁰ For an analysis of this tension, see *Lara*, 541 US at 214–26 (Thomas concurring).

¹⁰¹ Pub L No 21-148, 4 Stat 411 (1830).

¹⁰² Lindsay Glauner, *The Need for Accountability and Reparation: 1830–1976: The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DePaul L Rev 911, 931–34 (2002).

¹⁰³ *Id.* at 934.

¹⁰⁴ *Id.*

Act,¹⁰⁵ which sought to grant reservation land to individual tribal members and “extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”¹⁰⁶ The Act “empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved.”¹⁰⁷ The allotments were held in trust by the US government for twenty-five years, and then issued to the holders as fee-patented land.¹⁰⁸ When the land was transferred to fee patent, the owners of the lot were deemed to have “the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.”¹⁰⁹ The policies of the late nineteenth and early twentieth centuries were an acknowledgement that tribal sovereignty over these lands had existed and simultaneously an effort by the federal government to quash that sovereignty.

Eventually, the United States reversed course. In 1906, Congress statutorily perpetuated some tribal governments indefinitely,¹¹⁰ and then, in 1934, ended allotment through the Indian Reorganization Act¹¹¹ (IRA). The Act recognized the “inherent sovereign power” of Native tribes (but limited its reference to document adoption by the tribal governments) as well as ensured that the constitutions of the tribes were not deemed invalid by any other part of the statute.¹¹² Most importantly, it extended the trust relationship period over allotted land indefinitely.¹¹³ This created checkerboard-like reservations,¹¹⁴ which had some lots of land owned by the tribe, some lots of Native-owned fee-patented land, some lots of allotted land held in trust by the federal government, and some lots of land owned by non-Natives.¹¹⁵

¹⁰⁵ Pub L No 49-119, 24 Stat 388 (1887), codified as amended at 25 USC § 331 et seq.

¹⁰⁶ *County of Yakima*, 502 US at 254.

¹⁰⁷ *Id.*

¹⁰⁸ 25 USC § 348.

¹⁰⁹ 25 USC § 349.

¹¹⁰ Wood, 62 Am U L Rev at 1639 (cited in note 80).

¹¹¹ Pub L No 73-383, 48 Stat 984, codified at 25 USC § 461 et seq. The purpose of the Act was “to restore ‘the principles of tribal self-determination and self-governance’ that prevailed before the General Allotment Act.” *Upper Skagit Indian Tribe*, 138 S Ct at 1653, quoting *County of Yakima*, 502 US at 255.

¹¹² 25 USC § 476(h).

¹¹³ See *Upper Skagit Indian Tribe*, 138 S Ct at 1653.

¹¹⁴ See John Collier, Office of Indian Affairs, *1934 Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of the Interior* 78, 80 (1934) (“While Congress did not specifically direct the consolidation of Indian lands broken up and checkerboarded with white holdings in the allotment process, it authorized such consolidation and set up the machinery for it.”).

¹¹⁵ See *Upper Skagit Indian Tribe*, 138 S Ct at 1653.

The policies surrounding allotment and the IRA resulted in the solidification of the three forms of tribal land today: reservations, trust land, and fee patents.¹¹⁶ Each form of ownership is from a different type of acquisition and thus entail a different bundle of rights.

The first two forms are referred to as “Indian Country,” which includes the land within a reservation, dependent Native communities within the United States, and any non-extinguished allotments.¹¹⁷ Reservations are “geographically defined . . . areas over which an [Indian tribal organization] exercises governmental jurisdiction so long as such . . . areas are legally recognized by the Federal or a State government as being set aside for the use of Indians.”¹¹⁸ This land can be diminished if explicitly intended by an act of Congress, but otherwise its boundaries cannot be altered.¹¹⁹

Trust land is land purchased by the secretary of the interior and then held in trust for the tribe, with the same legal exemptions as the reservation land.¹²⁰ This category refers to land outside of reservation boundaries, and thus should be distinguished from reservation land that is held in trust. The secretary has a number of factors to consider when a tribe asks to purchase land to hold in trust, including “the tribe’s need for additional land; ‘[t]he purposes for which the land will be used’; ‘the impact on the State and its political subdivisions resulting from the removal of

¹¹⁶ See Mary E. Saitta, Note, *The Power to Tax Is the Power to Foreclose: Reuniting Law and Logic in Tribal Immunity from Suit*, 60 *Buff L Rev* 225, 230–33 (2012) (explaining the differences between reservation land, trust land, and fee-patented land). It should be noted that both trust land and fee patents can (and often do) exist within reservation boundaries.

¹¹⁷ 18 USC § 1151. The dependent Native communities can be in “original or subsequently acquired territory.” 18 USC § 1151.

¹¹⁸ 7 CFR § 253.2.

¹¹⁹ See *Solem v Bartlett*, 465 US 463, 470 (1984) (citations and alterations omitted):

Our analysis . . . requires that Congress clearly evince an ‘intent to change boundaries’ before diminishment will be found. The most probative evidence of congressional intent is the statutory language used. . . . Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.

The Court has recently reinforced this view. See *Nebraska v Parker*, 136 S Ct 1072, 1078–79 (2016) (explaining that diminishment analyses should “start with the statutory text,” then turn to “circumstances surrounding the opening of a reservation” and “‘unequivocal evidence’ of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers.”) (quotation marks and citations omitted).

¹²⁰ 25 USC § 465.

the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise.'"¹²¹

Finally, fee-patented land includes the formerly allotted land after the trust period has expired,¹²² as well as any land simply purchased privately by tribes.¹²³

Because of the federal government's historically derogatory treatment of tribes and because the IRA did not address the issues around dispossessed land, much of this historically tribal land is now outside of Native control. Many of the cases where sovereign immunity will be most questionable may be centered on various tribes' buying back of land that was once their own.

C. Regaining Sovereignty Through Aboriginal Title

In rem disputes over real property will inevitably involve each of the above classifications of land. But the federal government, through Indian removal and the diminishment of tribal property, took most of the land that tribes owned. This, in turn, has jeopardized the tribes' claims of sovereignty. Three Supreme Court cases have addressed the potential ability to regain that sovereignty through the common law claim of aboriginal title.¹²⁴ In *Oneida Indian Nation of New York v County of Oneida*¹²⁵ (*Oneida I*), *County of Oneida v Oneida Indian Nation of New York State*¹²⁶ (*Oneida II*), and *City of Sherrill v Oneida Indian Nation of New York*,¹²⁷ the Court determined that sovereignty need not be permanently lost due solely to the dispossession of land. At the same time, the Court introduced some restrictions that will need to be taken into account when determining whether tribes can retain sovereign immunity over all of their land.

In *Oneida I*, the Oneida Indian Nation (OIN) brought a claim that land conveyed in various treaties in the 1700s was done so in violation of a number of statutes known collectively as the

¹²¹ *City of Sherrill v Oneida Indian Nation of New York*, 544 US 197, 221 (2005) (alterations in original), quoting 25 CFR § 151.10(f).

¹²² 25 USC § 349.

¹²³ See Saitta, 60 Buff L Rev at 232–33 (cited in note 116).

¹²⁴ Aboriginal title is the common law doctrine that tribes maintain rights traditionally associated with sovereignty even after colonial takings of land and arises from "the possessory rights of Indian tribes to their aboriginal lands." *Oneida Indian Nation of New York v County of Oneida*, 414 US 661, 667 (1974) (*Oneida I*).

¹²⁵ 414 US 661 (1974).

¹²⁶ 470 US 226 (1985).

¹²⁷ 544 US 197 (2005).

Nonintercourse Act.¹²⁸ In its decision, the Court ruled that it has jurisdiction over the claim that “federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.”¹²⁹ A decade later, the OIN brought a second suit claiming damages for the unlawful conveyance of this land 175 years prior.¹³⁰ The Court methodically worked through a very complex issue, eventually permitting federal common law actions for possessory rights.¹³¹ This meant that the OIN did not need a statutorily defined right for property actions, but rather could rely on the long history of the common law supporting such actions.

The Court heard a third case involving the OIN twenty years later, which has had the greatest impact on regaining sovereignty. In *City of Sherrill*, the Court revisited the same land at issue in *Oneida I* and *Oneida II* but instead focused on the refusal to pay property taxes on the land by the tribe. In an 8–1 decision, Justice Ruth Bader Ginsburg recounted the history of the land and the development of the aboriginal right to possessory claims.¹³² The Court addressed the current composition of the land: it was 99 percent non-Native, and the land had been sold to non-Natives in 1807.¹³³ The boundaries of the land lay within the former reservation and thus the OIN argued that it maintained an immunity from taxation, and the Second Circuit agreed.¹³⁴ The Supreme Court reversed, on what it saw as practical grounds: “This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the] OIN from gaining the disruptive remedy it now seeks.”¹³⁵ The Court made clear that its dismissal was only in regard to equitable relief, applying the common law doctrine of laches, or the unreasonable passage of time.¹³⁶

¹²⁸ *Oneida I*, 414 US at 664–65. The Nonintercourse Act, which forbids anyone but the federal government from purchasing lands from Natives, remains codified. See 25 USC § 177.

¹²⁹ *Oneida I*, 414 US at 677.

¹³⁰ *Oneida II*, 470 US at 229–30.

¹³¹ *Id.* at 233–36.

¹³² See *City of Sherrill*, 544 US at 203–11.

¹³³ *Id.* at 211.

¹³⁴ *Id.* at 211–12.

¹³⁵ *Id.* at 216–17.

¹³⁶ *City of Sherrill*, 544 US at 216–19.

Justice Ginsburg's infamous analysis centers on what she considered practicality. She worried that "the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences."¹³⁷ In his concurrence, Justice David Souter echoed these practical concerns, noting that "sovereign status" is not only ascertained through "background law" but also "the Tribe's behavior over a long period of time."¹³⁸ While these Justices framed their decisions as common sense, or even obvious, many members of Native tribes have justifiably criticized the opinion as "complicit in the denial of treaty-guaranteed property rights, the denigration of tribal sovereignty, and the subordination of Oneida rights to the demands of the dominant society."¹³⁹

Having decided that the tribe "cannot unilaterally revive its ancient sovereignty,"¹⁴⁰ the Court recognized in dicta that 25 USC § 465 offered the exact remedy that the tribes were looking for: revitalization, in trust, of previously tribal land and exemption from taxation.¹⁴¹ Justice Ginsburg suggested application for trust status is "the proper avenue for [the] OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."¹⁴² This may have established a presumption that tribes do not have any sovereignty over these lands until Congress or the secretary of the interior regrants it, meaning that these lands would likely be deprived of immunity from suit as well. Justice John Paul Stevens, however, remained unconvinced, believing that the Court violated the principles that only Congress may "diminish or disestablish a tribe's reservation" and that a "tribe enjoys immunity from state and local taxation of its reservation lands, until that immunity is explicitly revoked by Congress."¹⁴³

City of Sherrill, while technically about remedies, contained larger implications for sovereignty and immunity. Without sovereignty, there can be no immunity. If Justice Ginsburg's logic—that tribal sovereignty cannot be revived under certain

¹³⁷ Id at 219.

¹³⁸ Id at 222 (Souter concurring).

¹³⁹ Allison M. Dussias, *The Reports of Our Death Are Greatly Exaggerated—Reflections on the Resilience of the Oneida Indian Nation of New York*, 2018 BYU L Rev 1231, 1275 (2019).

¹⁴⁰ *City of Sherrill*, 544 US at 203.

¹⁴¹ Id at 220.

¹⁴² Id at 221.

¹⁴³ Id at 224 (Stevens dissenting).

circumstances and after a certain amount of time—is extended to prohibit the revival of sovereignty for lands dispossessed in less extreme ways and for shorter amounts of time, then tribes' claims of immunity may be fruitless. *Oneida II* provides some hope for tribes to retain sovereignty long after they lost their land; a viable solution to the scope of tribal immunity in real property suits must reconcile this hope with the implications in *City of Sherrill*.

D. Development of Tribal Immunity

When not extinguished or expired, tribal sovereignty has generally moved away from the initial ward-guardian relationship toward an expansive right, and so too has tribal immunity. The first potential glimpse of tribal immunity emerged in 1850, when the Taney Court ruled that the Cherokees were “in many respects a foreign and independent nation” and “governed by their own laws and officers.”¹⁴⁴ While the Court never explicitly mentioned sovereign immunity, it did note that “a public officer, acting for his government” cannot be sued for his actions.¹⁴⁵

The Court did not address tribal immunity for nearly another seventy years. In *Turner v United States*,¹⁴⁶ Justice Louis Brandeis recognized that the Creek Nation “exercised within a defined territory the powers of a sovereign people.”¹⁴⁷ He then ruled, however, that it was “not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace” that caused there to be no possible avenue for liability against the tribe.¹⁴⁸ Thus, while it may be a mistake to call *Turner* the foundation of tribal immunity, it has become “a slender reed for supporting the principle.”¹⁴⁹ The Court, citing *Turner*, finally did give a full-throated backing to tribal immunity in 1940:

¹⁴⁴ *Parks v Ross*, 52 US (11 How) 362, 374 (1850). This case was decided only four years after the decision discussed above in *Rogers*, see note 88, emphasizing the fickle nature of the government's treatment of tribal sovereignty.

¹⁴⁵ *Parks*, 52 US (11 How) at 374.

¹⁴⁶ 248 US 354 (1919).

¹⁴⁷ *Id* at 355.

¹⁴⁸ *Id* at 358. He also ruled the US Government had “not impose[d] any liability upon the Creek Nation” and, because the US Government was an indispensable party, “objected also to the jurisdiction of the court over it.” *Id* at 358–59. In this regard, there were many more issues than possible common law tribal immunity at play.

¹⁴⁹ *Kiowa Tribe of Oklahoma*, 523 US at 757.

The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.¹⁵⁰

This was the Supreme Court's broadest decision on tribal immunity to date and would remain the only decision for almost forty years.¹⁵¹ First, the case established tribal sovereignty as a fundamental aspect of the trustor-trustee relationship that the US government had created with the tribes.¹⁵² Second, the Court extended tribal immunity even to tribes whose governments had dissolved. This observation calls into question Justice Ginsburg's dicta in *City of Sherrill* that likens a loss of sovereignty to a loss of land. Considering both a government and land are fundamental aspects of sovereignty, it could follow that if losing government alone is not enough to lose sovereignty, then neither is losing land.¹⁵³

From then on, the Court acted as if tribal immunity were a given. It cited only three cases—*Turner, United States v United States Fidelity & Guaranty Co.*,¹⁵⁴ and *Puyallup Tribe, Inc v Department of Game of Washington*¹⁵⁵—to claim that “Indian tribes have long been recognized as possessing the common-law

¹⁵⁰ *United States v United States Fidelity & Guaranty Co.*, 309 US 506, 512 (1940) (citations omitted). The Court also cited an Eighth Circuit case, which appears to be the first published record of tribal immunity. See *Thebo v Choctaw Tribe of Indians*, 66 F 372, 375 (8th Cir 1895) (ruling that the Choctaw, while “not a sovereign state,” has been placed “on the plane of independent states” for the majority of suits, and that a “state, without its consent, cannot be sued by an individual”).

¹⁵¹ See Wood, 62 Am U L Rev at 1653–54 (cited in note 80).

¹⁵² *United States Fidelity & Guaranty Co.*, 309 US at 512.

¹⁵³ Of course, obvious counterarguments emerge. First, the OIN was absent from the land at issue in *City of Sherrill* for two centuries. This certainly distinguishes it from a tribe that may have only recently lost its government. Many Native nations, however, are absent from land for periods of time because of past actions by the US government. Penalizing their sovereignty due to colonial acts by the federal government is potentially as problematic as stripping them of sovereignty due to the recent dissolution of a government. Second, land could be considered more important than government for sovereignty purposes. This may be a compelling argument for some, but there is no objective ranking of requirements of sovereignty, and many sovereign nations may differ on which traditional aspects they hold to be more important.

¹⁵⁴ 309 US 506 (1940).

¹⁵⁵ 433 US 165 (1977).

immunity from suit traditionally enjoyed by sovereign powers.”¹⁵⁶ In this regard, Justice Kennedy appears correct when he says the doctrine is almost accidental and lacking in analysis. But the origin (or lack thereof) of the doctrine has not stopped its growth. Tribal immunity has held steady, encompassing any situation where the tribe is the “real party in interest.”¹⁵⁷

With this continuous affirmation and occasional growth, tribal immunity is now certainly the law of the land. Indeed, the Court can safely now say “an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”¹⁵⁸ Through its plenary powers, Congress can limit or abrogate any form of sovereign immunity at any time, and even has done so for some forms of tribal immunity in a limited manner.¹⁵⁹ More often, however, Congress has “reiterated its approval of the immunity doctrine.”¹⁶⁰

Furthermore, the Court has developed its justification for this deferential attitude over the years. “[T]ribal self-sufficiency and economic development” has left the Court “not disposed to modify the long-established principle.”¹⁶¹ Justice Kennedy critiqued this rationale and noted “reasons to doubt the wisdom of perpetuating the doctrine,” which “might suggest a need to abrogate tribal immunity,” but still voiced the Court’s deference “to the role [of] Congress.”¹⁶² In doing so, the Court found “instructive the problems of sovereign immunity for foreign countries” because it “began as a judicial doctrine” like tribal immunity and extended to “virtually absolute immunity” until Congress created “more predictable and precise rules.”¹⁶³

The Court did not make a definite endorsement of treating tribes the same as foreign nations. But one could infer from the

¹⁵⁶ *Santa Clara Pueblo*, 436 US at 58.

¹⁵⁷ See *Lewis v Clarke*, 137 S Ct 1285, 1289 (2017) (holding an employee of a tribe acting in the scope of his employment is not immune from suit because he, “not the tribe, is the real party in interest”).

¹⁵⁸ *Kiowa Tribe of Oklahoma*, 523 US at 754.

¹⁵⁹ See, for example, 18 USC § 1162 (authorizing states to assume jurisdiction over offenses committed by or against Natives in Indian territory located in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin). To do this, however, Congress must ensure that the waiver “be unequivocally expressed.” *Santa Clara Pueblo*, 436 US at 58 (quotation marks omitted).

¹⁶⁰ *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 510 (1991).

¹⁶¹ *Id.* (quotation marks omitted).

¹⁶² *Kiowa Tribe of Oklahoma*, 523 US at 758.

¹⁶³ *Id.* at 759 (quotation marks omitted).

Court's language that absent explicit congressional notice, tribal immunity can at least be considered similar to the foreign state immunity prior to the FSIA. In turn, such an analogy would mean the immovable property doctrine's applicability is entirely up in the air. This is because before the FSIA, the applicability of the immovable property exception was entirely determined by executive discretion. And while tribal immunity is not subject to executive determinations in the same way that foreign nation immunity had been before the FSIA, it is subject to a different branch's control—the plenary powers of Congress. Like the Court's deference to State Department rules, a deference to Congress's refusal to restrict the comity that provides tribal immunity may be the most legally sound path. That being said, legal soundness is not the only consideration at stake; as seen in Justice Ginsburg and Justice Souter's opinions in *City of Sherrill*, the Court has treated the sovereign status of tribes as a so-called practical, rather than purely legal, matter. This Comment seeks to make the case that the legally sound path of broad tribal immunity, with deference to Congress to adjust, is also quite practical—it places tribes in control of their immediate destiny, while allowing Congress to legislate as it sees fit.

E. Uncertainty Before *Upper Skagit Indian Tribe*

In *County of Yakima*, the Court justified the difference between the government's inability to collect a tax on the sale of tribal land and the ability to collect a tax directly on the land itself with an in personam and in rem distinction.¹⁶⁴ As the case was one of statutory interpretation, the Court derived its holding solely from a textualist analysis of the General Allotment Act.¹⁶⁵ Despite the limited nature of the case, this decision caused a state court and circuit court split to emerge on the broader issue of sovereign immunity. Courts wrongly began using *County of Yakima* to provide a framework for analyzing tribal immunity in cases regarding land versus those merely involving land. Some jurisdictions found immunity in both in rem and in personam cases, while others held that only in personam cases had such protection. Certain in rem actions are forbidden by law. For instance, one cannot

¹⁶⁴ See *County of Yakima*, 502 US at 268, 270.

¹⁶⁵ See note 9.

claim adverse possession against a reservation.¹⁶⁶ But that tells us nothing about other in rem claims over real property and little about tribal immunity in claims against other tribal landholdings. Lower courts, meanwhile, have been split.

The Second Circuit differentiated between sovereign authority and sovereign immunity, regardless of the type of land: “While the tax exemption of reservation land arises from a tribe’s exercise of sovereignty over such land, and is therefore closely tied to the question of whether the specific parcel at issue is ‘Indian reservation land,’ a tribe’s immunity from suit is independent of its lands.”¹⁶⁷ Such a distinction meant that although the tribe could be taxed on the non-reservation land, the tribes were immune to foreclosure because the type of land matters not for immunity. Notably, this suit dealt with the same land as *City of Sherrill*, suggesting that immunity from suit may in fact be distinguished from equitable bars.¹⁶⁸ A few years later, the same circuit “decline[d] to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings” that it was asked to draw.¹⁶⁹ In doing so, the circuit made clear that tribes have a “common-law [] immunity *from suit*—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes.”¹⁷⁰

State courts, on the other hand, have been split on whether the type of action is relevant. The Supreme Court of New Mexico found “no meaningful distinction between *in rem* and *in personam* claims . . . [b]ecause tribal sovereign immunity divests a court of subject matter jurisdiction.”¹⁷¹ A Wisconsin Court of Appeals panel saw the concern as a policy issue, arguing that “allowing in

¹⁶⁶ See *United States v 7,405.3 Acres of Land in Macon, Clay, and Swain Counties*, 97 F2d 417, 422 (4th Cir 1938):

The determinative fact is that the federal government has assumed towards [this tribe] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent.

¹⁶⁷ *Oneida Indian Nation of New York v Madison County*, 605 F3d 149, 157 (2d Cir 2010) (citation omitted), vacd and remd, 562 US 42 (2011).

¹⁶⁸ This is undetermined, as the decision was vacated and remanded by the Supreme Court because the tribe waived its sovereign immunity, making the point moot. See *Oneida Indian Nation of New York v Madison County*, 665 F3d 408, 424–25 (2d Cir 2011).

¹⁶⁹ *Cayuga Indian Nation of New York v Seneca County*, 761 F3d 218, 221 (2d Cir 2014).

¹⁷⁰ *Id* (emphasis in original).

¹⁷¹ *Hamaatsa, Inc v Pueblo of San Felipe*, 388 P3d 977, 985 (NM 2016).

rem claims against tribal property to proceed ‘would simply circumvent tribal sovereign immunity[,] allowing taking of tribal property’ and deeming this result to “be contrary to one of the primary purposes of sovereign immunity—protecting tribal treasuries.”¹⁷² In contrast, the North Dakota Supreme Court disagreed on policy grounds, noting that “[t]he Tribe has not cited any case holding that tribal sovereign immunity bars an in rem condemnation action in state court”¹⁷³ before bemoaning the potentially “far-reaching effects on the eminent domain authority of states and all other political subdivisions” if the court were to grant immunity.¹⁷⁴ The concern was that tribes could use their immunity from suit to “acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project.”¹⁷⁵

F. The Unresolved Case of *Upper Skagit Indian Tribe*

This winding road led to *Upper Skagit Indian Tribe*, but the case resulted in three different opinions that only muddied the water. Unlike some cases previously discussed, the issue at hand involved not statutes or treaties but rather common law property principles. While the majority refused to offer a solution, the legal concerns from Justice Thomas’s dissent and the policy concerns from Chief Justice John Roberts’s concurrence must be considered when crafting a solution to the unanswered question of tribal immunity’s applicability to real property disputes.

The case began when Sharline and Ray Lundgren filed a quiet-title action, invoking adverse possession against land recently purchased by the Upper Skagit Indian Tribe. The tribe in turn claimed sovereign immunity as a defense.¹⁷⁶ The Washington Supreme Court rejected the defense, citing to *County of Yakima* as ruling that “sovereign immunity does not apply to cases where a judge ‘exercises in rem jurisdiction’ to quiet title in a parcel of land owned by a Tribe, but only to cases where a judge seeks to exercise in personam jurisdiction over the Tribe itself.”¹⁷⁷ The

¹⁷² *Wisconsin Department of Natural Resources v Timber and Wood Products Located in Sawyer County*, 906 NW2d 707, 721 (Wis App 2017) (alteration in original).

¹⁷³ *Cass County Joint Water Resource District v 1.43 Acres of Land in Highland Township*, 643 NW2d 685, 691 (ND 2002).

¹⁷⁴ *Id.* at 694.

¹⁷⁵ *Id.*

¹⁷⁶ *Upper Skagit Indian Tribe*, 138 S Ct at 1652.

¹⁷⁷ *Id.* (emphasis omitted).

Supreme Court held this to be in error but also remanded to the Washington Supreme Court to determine if immunity should apply.¹⁷⁸ But the question remains unresolved: the Upper Skagit Indian Tribe quitclaimed the land to the Lundgrens before the case was taken back up.¹⁷⁹

Justice Gorsuch's majority opinion is rife with judicial restraint and barren of guidance for lower courts. He dismissed the Washington Supreme Court's analysis as "error," determining that "*Yakima* did not address the scope of tribal sovereign immunity" but rather was a case solely devoted to determining the "tax consequences of [the] checkerboard" caused by allotment.¹⁸⁰ After a detailed discussion of *County of Yakima*, Justice Gorsuch avoided deciding the actual case before him.

After the initial briefings, the Lundgrens changed their approach, and instead suggested the immovable property exception barred the tribe's sovereign immunity claim, regardless of whether *County of Yakima* applied.¹⁸¹ The majority decided that the argument was introduced too late and preferred "the Washington Supreme Court to address these arguments in the first instance."¹⁸²

Justice Thomas, however, embraced the immovable property exception. His dissent can be contrasted with Justice Ginsburg's opinion in *City of Sherrill*. She leaned heavily on practical restrictions of tribal sovereignty; Justice Thomas portrayed his opinion as grounded in a long history of legal theory. To him, the Court should have quickly "resolved this case based on the immovable-property exception to sovereign immunity," which he claimed "plainly extend[ed] to tribal immunity, as it does to every other form of sovereign immunity."¹⁸³ But Justice Thomas did not cite a single case where the exception was applied to tribes. The only cases he discussed in detail were those dealing with foreign nation immunity. In doing so, he claimed the foreign nation cases warranted "deference to the political branches" due to their "sensitive questions," but that they "do not suggest that courts can ignore longstanding limits on sovereign immunity, such as the

¹⁷⁸ Id at 1652, 1655.

¹⁷⁹ *Oertwich v Traditional Village of Togiak*, 413 F Supp 3d 963, 969 (D Alaska 2019).

¹⁸⁰ *Upper Skagit Indian Tribe*, 138 S Ct at 1652, 1653.

¹⁸¹ Id at 1653–54.

¹⁸² Id at 1654.

¹⁸³ Id at 1657 (Thomas dissenting).

immovable-property exception.”¹⁸⁴ Likewise, to Justice Thomas, the Court has a “judicial duty” to determine the applicability of tribal immunity.¹⁸⁵ This contorts the truth, however, that the Court has had a history of ignoring the immovable property exception in deferring to the executive branch.¹⁸⁶

The dissent reads like a historical dissertation. Justice Thomas cited treatises from the seventeenth century, restatements from the twentieth century, and years of caselaw in between. He explained that this doctrine is a corollary to a conflict of laws doctrine known as *lex rei sitae*, which holds that the law of a land is governed by the law of whatever sovereign governs where the land is situated.¹⁸⁷ He refuted the idea that sovereign immunity applies to in rem property disputes in US law, noting that “property ownership is not an inherently sovereign function”¹⁸⁸ and Supreme Court precedent has “expressly acknowledge[d] the immovable-property exception.”¹⁸⁹

Justice Thomas argued that tribes have limited sovereignty, and only are afforded “the common-law immunity from suit traditionally enjoyed by sovereign powers.”¹⁹⁰ While he had previously called into question the source and nature of tribal sovereignty,¹⁹¹ he seemed resigned to precedent in this decision. The common law immunity afforded to tribes is not greater than that afforded to other sovereigns, meaning that if any common law-protected sovereigns are subject to the exception, then tribes must be too.¹⁹² He dismissed the argument that sovereignty of tribes “is not coextensive with that of the States”¹⁹³ by saying that, even if true, this cannot mean that their sovereignty is “more expansive” than that claimed by the states—or the federal

¹⁸⁴ *Upper Skagit Indian Tribe*, 138 S Ct at 1662 (Thomas dissenting).

¹⁸⁵ *Id.* Justice Thomas’s desire to come to a decision is reminiscent of his general philosophy in federal Indian law. He has expressed a desire “to reexamine the premises and logic of our tribal sovereignty cases” and a disdain for the Court’s failure “to confront these tensions, a result that flows from the Court’s inadequate constitutional analysis.” *Lara*, 541 US at 214–15 (Thomas concurring).

¹⁸⁶ See text accompanying notes 66–70.

¹⁸⁷ *Upper Skagit Indian Tribe*, 138 S Ct at 1658 (Thomas dissenting).

¹⁸⁸ *Id.* at 1660 (quotation marks omitted), quoting *Permanent Mission of India to the United Nations v City of New York*, 551 US 193, 199 (2007).

¹⁸⁹ *Upper Skagit Indian Tribe*, 138 S Ct at 1660 (Thomas dissenting).

¹⁹⁰ *Id.* at 1661 (quotation marks omitted), quoting *Santa Clara Pueblo*, 436 US at 58.

¹⁹¹ See *Lara*, 541 US at 215 (Thomas concurring).

¹⁹² *Upper Skagit Indian Tribe*, 138 S Ct at 1661 (Thomas dissenting).

¹⁹³ *Id.* (emphasis and quotation marks omitted), quoting *Kiowa Tribe of Oklahoma*, 523 US at 756.

government, for that matter.¹⁹⁴ In so claiming, Justice Thomas completely ignored the fact that there are distinctions that do make tribal immunity broader than other forms of immunity—such as the lack of implied waiver for tribes.¹⁹⁵

The conclusion derided tribal immunity, with Justice Thomas repeating the oft-stated expression that it “developed almost by accident” and claiming it “does not reflect the realities of modern-day Indian tribes.”¹⁹⁶ He invoked the Framers, noting that they “would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State’s jurisdiction.”¹⁹⁷ His thesis is simple: “The Government’s unconvincing arguments cannot overcome more than six centuries of consensus on the validity of the immovable-property exception.”¹⁹⁸ But his six centuries of consensus was actually an ahistorical account of foreign nations—a qualifier he clearly did not assign to tribes. He can only point to treaties and theoretical applications of the exception to foreign state immunity in support of his claims; he ignores the history of the United States’ hesitation in applying the immovable property exception with those nations; and he conflates foreign-nation and tribal immunity, despite clear evidence that they have different scopes.

In contrast to Justice Thomas, Chief Justice Roberts joined the majority in full, but he wrote separately to express a distinct policy concern. His reasoning displays remarkable similarities to Justice Ginsburg’s practical concerns from *City of Sherrill*, while still showing sympathy to Justice Thomas’s legal argument. His concurrence focused on “[w]hat precisely [] someone in the Lundgrens’ position [is] supposed to do.”¹⁹⁹ That is, tribes must be amenable to suit, “otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a

¹⁹⁴ *Upper Skagit Indian Tribe*, 138 S Ct at 1661 (Thomas dissenting).

¹⁹⁵ See Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum L Rev 173, 179–80 (1988) (citations omitted):

[C]ourts consistently hold that a tribe’s immunity can be waived only by its express consent or the consent of Congress. In contrast to other governments, implied waivers are generally not recognized. . . . Tribal immunity is, therefore, broader in this respect than is the immunity possessed by states, the federal government and foreign countries.

¹⁹⁶ *Upper Skagit Indian Tribe*, 138 S Ct at 1662 (Thomas dissenting) (quotation marks omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1661.

¹⁹⁹ *Id.* at 1655 (Roberts concurring).

colorable claim of right.”²⁰⁰ He then critiqued the solutions proposed by the tribe.

The first suggested solution was that the parties engage in a bargain “toward a sensible settlement” after the Lundgrens admit to not being able to bring a suit against them.²⁰¹ Chief Justice Roberts dismissed this as “not a meaningful remedy,” but does not explain why.²⁰² One could assume this to be akin to a holdout problem.²⁰³ “The Tribe bought the property with an eye to asking the federal government to take the land into trust and add it to the existing reservation next door” and discovered via a survey that the land was improperly tracked.²⁰⁴ The Lundgrens “purchased their property long before the Tribe came into the picture,” but a recent survey revealed a boundary line dispute between their property and the tribe’s new purchase.²⁰⁵ The actual cost of settling this dispute could be massive, considering the Lundgrens had a strong desire to keep their land and the tribe had a strong desire to regain its land. Moreover, if the tribe were to have immunity from suit, it would have no incentive to bargain and could likely price out the Lundgrens, even if its own valuation was not that high. Government intervention may be necessary to mitigate costs.²⁰⁶

The second solution was for the Lundgrens to provoke the Upper Skagit Indian Tribe into suing the couple and waiving its own immunity.²⁰⁷ Chief Justice Roberts, however, remained “skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests.”²⁰⁸

Chief Justice Roberts ended by saying the decision of the Court may be “intolerable.”²⁰⁹ He admitted that the immovable property exception is “a settled principle of international law,”

²⁰⁰ *Upper Skagit Indian Tribe*, 138 S Ct at 1655 (Roberts concurring).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L Rev 1, 4 (2006) (“Potential sellers, knowing that their individual properties are each necessary for the entire project, could ‘hold out’ in order to obtain an inflated price.”).

²⁰⁴ *Upper Skagit Indian Tribe*, 138 S Ct at 1652.

²⁰⁵ *Id.* at 1655 (Roberts concurring).

²⁰⁶ See R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 17 (1960).

²⁰⁷ *Upper Skagit Indian Tribe*, 138 S Ct at 1655 (Roberts concurring).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

and that the only question this case presents “is whether different principles afford Indian tribes a broader immunity from actions involving off-reservation land.”²¹⁰ Although content with leaving the question unanswered for now, he worried that if the state court does extend sovereign immunity to encompass “non-trust, non-reservation property,” then the doctrine would “need to be addressed in a future case.”²¹¹

The legal implications of the dissent and the policy implications of the concurrence are no different than the concerns embedded in tribal sovereignty more generally. Are courts to apply some corpus of defined legal rules to determine the scope of domestic dependent nations? And if yes, which rules should be in the corpus? Should they be concerned with the policy implications at stake? This debate should help to resolve the indecision of *Upper Skagit Indian Tribe*.

III. THE NEARLY UNLIMITED SCOPE OF TRIBAL IMMUNITY

Where can we find the answer to the “grave question?”²¹² With the next in rem claim on tribal land, courts will only know that *County of Yakima* does not apply. This Comment argues tribes should retain immunity in all real property cases unless Congress has limited that right. Such a baseline withstands the relevant legal tests and is firmly grounded in the notion that tribes are simultaneously their own sovereigns and domestic dependent nations subject to Congress’s control. With that baseline, however, comes the more radical claim: tribes should also never be considered subject to the immovable property exception, no matter the type of property in question. If both arguments are accepted, then the scope of tribal immunity in cases involving real property is currently unlimited, but subject to change by congressional action.

First, this Part explains why the question of the scope of tribal immunity should be considered absolute unless Congress intervenes. Second, it refutes the applicability of the immovable property exception. Third, it clarifies how this solution avoids the policy issues suggested by Chief Justice Roberts.

²¹⁰ *Id.*

²¹¹ *Upper Skagit Indian Tribe*, 138 S Ct at 1656 (Roberts concurring).

²¹² *Id.* at 1654 (majority).

A. The Grave Answer: Deference to Congress

Tribal sovereignty has had twists and turns, but the general trajectory can be described as toward treatment similar to that of other sovereigns, with the caveat that Congress may abrogate its protections at any time.²¹³ Indeed, the Court has continuously found tribes have kept “their historic sovereign authority” absent congressional action.²¹⁴ Justice Thomas, on the other hand, laments that this precedential caveat “untenably hold[s] both positions” of tribal sovereignty and nonsovereignty.²¹⁵

The caveat, however, is not untenable. First, it is the fundamental meaning behind domestic dependent nation. Tribes are not part of the several states, so the Eleventh Amendment does not constitutionally protect their common law immunity.²¹⁶ It can assuredly be taken from them at any moment. Tribes are not foreign nations, so the FSIA does not supplant whatever immunity they have retained. Second, the plenary power over the tribes’ immunity is not starkly different than the Court’s previous deferrals to executive branch determinations of who to hale into court pre-FSIA. The executive branch consistently issued orders to grant absolute immunity to foreign nations, even when acting as private parties through land acquisition or possession. It was due to the significant importance of foreign relations, as Justice Thomas notes, that such immunity persisted, rather than due to any judge-made rules. This deference-based rule existed in the background until an act of *Congress* altered it, rather than a shift in *judicial* opinion. Even when the State Department did not negotiate with a particular country in a given suit, the court turned to State Department precedent. While the executive branch deals with foreign affairs, Congress did have authority to change the relationship. Meanwhile, Congress alone deals with Native nations. Just as it had the ability to qualify the protections to foreign

²¹³ Independent of Justice Thomas’s issues with this caveat, discussed below, Congress’s ability to abrogate the immunity may just appear quite large at first glance. In actuality, however, it is analogous to Congress’s expansive powers to control the jurisdictional limits of any lower federal court. See Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1365 (1953) (“Congress has plenary power to distribute jurisdiction among such inferior federal constitutional courts as it chooses to establish.”).

²¹⁴ *Michigan v Bay Mills Indian Community*, 572 US 782, 788 (2014).

²¹⁵ *United States v Lara*, 541 US 193, 215 (2004) (Thomas concurring).

²¹⁶ See note 42.

nations, Congress must have the ability to alter tribal immunity through its plenary control.²¹⁷

Indeed, the contrast of judicial versus legislative powers is clear when looking at the legal evolution of tribal immunity. Since *United States Fidelity & Guaranty Co*, the Court has never limited a tribe from claiming it. Justice Thomas's dissent in *Upper Skagit Indian Tribe* was the first time anyone on the Court had suggested any exception to tribal immunity. The reason is simple: it is not the Court's role to apply such an exception. In *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.*,²¹⁸ the Court explicitly noted that it prefers to "defer to the role Congress may wish to exercise in this important judgment," rather than decide for itself whether to limit tribal immunity.²¹⁹ Justice Thomas suggested that the Court did recently refuse to extend immunity beyond the norms of the common law, but a decision not to extend is quite different than a decision to actively limit.²²⁰ In the case he cited, the Court refused immunity for a tribal member; but, of course, individual members of *any* sovereign do not have immunity unless acting *on behalf of* the sovereign.²²¹

Congress has, in fact, occasionally invoked its plenary powers over tribal immunity. It responded to *Kiowa Tribe of Oklahoma* by considering "several bills to substantially modify tribal immunity" before adopting a "far more modest" bill that only applied to limited contract cases.²²² And Congress has not only refrained from total abrogation of tribal immunity; it has expressly preserved tribal immunity on occasion.²²³ Justice Elena Kagan wrote that any judicial action that expresses an opinion restricting the scope of sovereign immunity "would scale the heights of presumption" by "replac[ing] Congress's considered judgment with our contrary opinion."²²⁴ Indeed, the "rights that exist are not created by Congress or the Constitution, *except to the extent of certain*

²¹⁷ *Id.*

²¹⁸ 523 US 751 (1998).

²¹⁹ *Id.* at 758.

²²⁰ See *Upper Skagit Indian Tribe*, 138 S Ct at 1661 (Thomas dissenting), citing *Lewis v Clarke*, 137 S Ct 1285, 1292 (2017).

²²¹ See *Lewis*, 137 S Ct at 1291–93.

²²² *Bay Mills Indian Community*, 572 US at 801–02.

²²³ See, for example, 25 USC § 5332 ("Nothing in this chapter shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.").

²²⁴ *Bay Mills Indian Community*, 572 US at 803.

limitations of power.”²²⁵ They are rights of sovereignty itself, and their source is found in an implied agreement by Congress’s inaction.²²⁶ The very fact that Congress has so clearly invoked its limiting abilities before suggests that extending beyond those invocations would be a violation of this implied agreement.

Finally, the federal government’s long history of subjugating tribal sovereignty and theft of tribal land greatly weigh in favor of a policy of deference. As both the trustee who should be acting in the best interests of the tribes and as a politically accountable unit, Congress should be forced to carry the burden of determining whether to restrict tribal immunity.²²⁷ It may rule to strip this broad immunity, but it is and should be within its power—not the courts⁷—to decide if that is best for tribes.²²⁸

B. The Inapplicability of the Immovable Property Exception

Since tribal immunity is absolute absent congressional action, the only other exceptions that should prevent tribes from claiming it could be judge-made rules like the immovable property exception. The exception only applies to land and property permanently attached to that land, so any discussion of whether the exception should apply must be analyzed through the lens of each type of tribal land.

To start, reservation land should not be subject to the exception. First, it is not privately acquired by the tribe. It is established by the United States and only diminishable by Congress. Second, the land is largely outside the jurisdiction of state law and subject to some federal regulations designed with self-

²²⁵ *Kawananakoa v Polyblank*, 205 US 349, 353–54 (1907) (emphasis added).

²²⁶ See *Nevada v Hall*, 440 US 410, 416 (1979), citing *The Schooner Exchange*, 11 US at 136.

²²⁷ See Addison W. Bennett, Comment, *Partially Tribal Land: The Case for Limiting State Eminent Domain Power under 25 USC § 357*, 86 U Chi L Rev 945, 976 (2019) (arguing that “[a]ny taking of Native American land by a state government requires a discussion of whether such a scheme would be in the interest of justice considering the history of tribal lands”).

²²⁸ In certain circumstances, such as in exercising its eminent domain powers, Congress must choose whether it is acting as the fiduciary or the superior sovereign. To do so, the Court has adopted a test, in which it asks whether the government is making a good faith effort to exchange the tribal land for full value. See *United States v Sioux Nation of Indians*, 448 US 371, 408–09, 416 (1980), citing *Three Affiliated Tribes of Fort Berthold Reservation v United States*, 182 Ct Cl 543, 553 (1968). An applicable adaptation here would be whether Congress, by revoking tribal immunity in a real property suit, is making a good faith effort to ensure the tribe will maintain full value of the land.

government in mind.²²⁹ These two aspects allow reservation land to circumvent the immovable property exception. From the early explanations of the immovable property exception to today, the fundamental reasoning behind the exception is that “property ownership is not an inherently sovereign function.”²³⁰ The exception does not arise because of the sovereign itself, but because the sovereign has acquired land elsewhere—and engaged in private, rather than sovereign activity. As a result, reservation land is obviously not under the exception.

Land held in trust through 25 USC § 465 should also avoid the exception. The land is purchased by the secretary of the interior, and then transferred to be held in trust for the tribes. The dicta in *City of Sherrill* makes clear that the acquisition “provides the proper avenue for [tribes] to reestablish sovereign authority over territory.”²³¹ With the reestablishment of sovereign authority comes “the immunity which was theirs as sovereigns” because such immunity was “passed to the United States for their benefit.”²³² In other words, the fiduciary relationship of the United States and the tribes mandates that the trust land be treated in the best interest of the tribes, which naturally preserves sovereignty and immunity.

Finally, even land held in fee should not be considered subject to the exception. Justice Ginsburg’s opinion in *City of Sherrill* only narrowly holds that equitable relief from ancient sovereignty claims can be barred by laches.²³³ Sovereign immunity is not a form of equitable relief, but a jurisdictional bar.²³⁴ Thus, while the dicta suggests sovereignty over certain land may be regained only

²²⁹ It could be argued that the land is occasionally subject to state control due to Public Law 280. See 18 USC § 1162(a) (granting certain states jurisdiction over “offenses committed by or against Indians in [specified] areas of Indian country”). See also note 159; *Nevada v Hicks*, 533 US 353, 361–62 (2001) (“‘Ordinarily,’ it is now clear, ‘an Indian reservation is considered part of the territory of the State.’”). Nevertheless, “[t]hat is not to say that States may exert the same degree of regulatory authority within a reservation as they do without.” *Id.* at 362. Indeed, Public Law 280 makes explicit some of the limitations: “Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe that is held in trust by the United States.” 18 USC § 1162(b).

²³⁰ *Permanent Mission of India to the United Nations v City of New York*, 551 US 193, 199 (2007).

²³¹ *City of Sherrill*, 544 US at 221.

²³² *United States Fidelity & Guaranty Co.*, 309 US at 512.

²³³ See *City of Sherrill*, 544 US at 221.

²³⁴ See *Federal Deposit Insurance Corporation v Meyer*, 510 US 471, 475 (1994) (“Sovereign immunity is jurisdictional in nature.”).

through a 25 USC § 465 acquisition, the inverse that it is extinguished on fee land cannot necessarily be assumed.²³⁵ Rather, the Supreme Court has made clear that tribes retain immunity “even after dissolution of the tribal government,” implying traditional aspects associated with sovereignty need not always be present.²³⁶

Even if true, the land is certainly a private purchase by a sovereign—just the type of land acquisition to which the exception is meant to apply. The question would therefore be best solved by analogy. Should courts find tribes similar to states, thus enforcing the immovable property exception, or should they instead invoke foreign nations, and cede authority to a different branch?

The Court has already alluded to an answer. Because “tribes were not at the Constitutional Convention,” the immunity from suit must be differentiated from state immunity, as the Convention is where the “mutuality of . . . concession” was contemplated.²³⁷ For foreign nation immunity, on the other hand, the “Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction.”²³⁸ Such deferential decision-making is entirely in line with the way in which courts have treated tribes in recent years.²³⁹ The difference is that the State Department consistently gave orders to not bring foreign nations into domestic courts. Congress has not done so; but its silence in the face of other limitations on tribal immunity is unambiguous.²⁴⁰ Congress explicitly limited the scope of foreign nation immunity with the FSIA because of inconsistent judgments that resulted from various State Department rules. Unless Congress disambiguates tribal immunity, as it has on occasion, then there is no reason to assume a tribe’s private actions should be subject to exceptions.

²³⁵ That being said, Justice Ginsburg herself would likely not read her decision in such a manner. She has repeatedly questioned the very existence and depth of sovereign immunity. See *Bay Mills Indian Community*, 572 US at 832 (Ginsburg dissenting) (anticipating that “immoderate, judicially confirmed immunity” will not have “staying power”).

²³⁶ *United States Fidelity & Guaranty Co.*, 309 US at 512.

²³⁷ *Kiowa Tribe of Oklahoma*, 523 US at 756 (quotation marks omitted) (alteration in original), quoting *Blatchford v Native Village of Noatak*, 501 US 775, 782 (1991).

²³⁸ *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480, 486 (1983).

²³⁹ See, for example, *Bay Mills Indian Community*, 572 US at 788 (“[U]nless and ‘until Congress acts, the tribes retain’ their historic sovereign authority.”), quoting *United States v Wheeler*, 435 US 313, 323 (1978).

²⁴⁰ See text accompanying notes 222–26.

C. Avoiding Tribal Immunity's Sword

If, as posited, Justice Thomas's legal argument fails, then the question whether tribes retain immunity in cases involving real property must focus on policy, not law. A court should only find a way around permitting the application of immunity if it is demanded by an adequate, equitable solution, such as what Justice Ginsburg was apparently aiming for in her opinion in *City of Sherrill*. The courts have often weighed the tribe's ability to protect its autonomy (and typically its treasury) against its ability to seize land at will and avoid suit. Situated within this balancing test is Chief Justice Roberts's concern in *Upper Skagit Indian Tribe*; that is, that tribes would purchase land at will and then wield sovereign immunity like a sword. And while these concerns may be warranted, there is no clear reason to avoid applying sovereign immunity only because of them. Once again, it is easiest to address the arguments for each type of land in turn.

Chief Justice Roberts does not mention reservation land when voicing his concerns, perhaps because the facts of the case did not require it. Regardless, because Congress alone creates and diminishes reservations, there can be no apprehension of using sovereign immunity as a sword. Individual tribes may have lobbying power to try to acquire reservation land, but the absence of actual acquisitional power makes it functionally impossible for them to seize land at will solely to claim tribal immunity.

Trust land is equally immune from these concerns. Tribes cannot seize land with impunity in hope of acquiring immunity from suit; instead, tribes can only request that the secretary of the interior purchase land into trust on their behalf. In the process, they will know that the several factors discussed above must be considered if they wish to regain sovereignty.²⁴¹ These guidelines prevent the very issues proposed by Chief Justice Roberts, while maintaining the social and economic benefits of tribal immunity.

It may be argued that regardless of this governmental check, tribal immunity could actually hurt the tribes economically. Individuals and businesses may worry about being able to vindicate their rights if an overly broad protective rule is in place.²⁴² That

²⁴¹ See text accompanying note 121.

²⁴² See Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 SD L Rev 398, 416 (2009) ("Although the historical rationale for broad tribal immunity, tribal economic development and self-sufficiency, has sustained tribes' recent forays into diverse

is, people may be disincentivized from interacting with tribes if they do not know they can be compensated if they suffer a loss or injury. Inversely, if tribes were to have their immunity unilaterally limited by the government, they may be able to attract more social and economic interactions. But such an argument patronizingly ignores the fact that US courts are not the only remedial path; instead, litigants can find justice in equally viable tribal courts in which many tribes have already waived much of their immunity.²⁴³ Even if a tribe has not waived its immunity, it is disingenuous to say the tribe's economic benefit is a fundamental part of tribal immunity, but then decide the tribe itself may not determine how to achieve that benefit.²⁴⁴

Finally, Chief Justice Roberts was explicitly worried about fee land. Many may agree with Chief Justice Roberts and Justice Ginsburg that if tribes could simply snatch up new land and claim immunity, then there would be several "disruptive practical consequences."²⁴⁵ If a tribe were to purchase new land at market price and then claim immunity from suit, it could wield its immunity as a sword. But from a legal standpoint, the denial of immunity "is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty."²⁴⁶ And from a policy standpoint, with Congress's plenary powers over the tribes, Chief Justice Roberts's concerns are somewhat fantastical. A mere piece of legislation can change this rule, as it has for foreign nations and tribes in the past; a judicial decision would be overreaching and irreconcilable with centuries of jurisprudence on tribal immunity. Until Congress creates "more predictable and precise rules," the courts must abide by the foundational law of sovereign immunity at its peak.²⁴⁷

commercial activities, a rigid, inflexible assertion of tribal immunity in these endeavors can present a threat to those harmed by a recalcitrant tribe.").

²⁴³ See Struve, 36 Ariz St L J at 155–61 (cited in note 25) (surveying the remedies against tribes and mentioning tribal waiver of immunity from suit in a tribe's own courts).

²⁴⁴ See Angela R. Hoelt, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 L & Ineq 203, 257 (1995) ("The international paradigm of indigenous self-determination suggests an inverse set of presumptions: Native peoples must be presumed competent to evaluate their own needs within the context of the larger society, and non-natives must be presumed *incompetent* to make decisions regarding Native well-being.") (emphasis in original).

²⁴⁵ *City of Sherrill*, 544 US at 219.

²⁴⁶ *Id.* at 226 (Stevens dissenting).

²⁴⁷ *Kiowa Tribe of Oklahoma*, 523 US at 759.

CONCLUSION

The Court hesitated to establish a standard for tribal immunity for real property disputes—but its preference for passing the buck to another court, rather than creating a standard, should be condemned. The power to determine the scope of tribal immunity in US courts has always remained exclusively with Congress, and the Court should recognize this. With the recent confirmation in cases like *Sharp v Murphy*²⁴⁸ and *McGirt v Oklahoma*²⁴⁹ that substantial portions of Oklahoma have been part of Indian country for decades,²⁵⁰ a decision on in rem jurisdiction for tribal immunity cases is needed sooner rather than later. Unless tribal immunity is firmly established, the very nature of a tribe's sovereignty—not to mention its landholdings and possessory rights—will be constantly threatened.

This Comment seeks to establish that tribal immunity in in rem actions is absolute and should remain so unless Congress acts. This immunity is subject to congressional regulation, but such a feature is inconsequentially distinct from foreign state immunity, where deference was given to the State Department until the legislative branch stripped them of that discretion. Furthermore, tribal land has never been subject to the immovable property exception, and there is no clear policy reason for judges to suddenly change course. Any concerns over this scope are not for the courts to decide. That power starts and ends with the Native tribes and Congress.

²⁴⁸ 2020 WL 3848060 (US).

²⁴⁹ 2020 WL 3848063 (US).

²⁵⁰ See *id.* at *7 (“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”).