



SUFFER NO TYRANNY

How State-Tribal Relations Might Evolve in the Light of the Supreme Court's *Michigan v. Bay Mills Indian Community*
Reluctance to Referee Intergovernmental Disputes

By Jennifer H. Weddle

American Indian tribes, as sovereign governments within the United States' constitutional federalism, enjoy immunity from suit just as the federal and state governments do.¹ As sovereigns, tribal governments may make different policy choices than their sister sovereigns, whether they be states or other tribes. Sometimes these differing policy choices result in intergovernmental disputes. On various occasions, tribes have sought litigation remedies against states and been rejected.² Throughout the history of the United States, state governments have frequently resisted tribal governmental policy choices³ and, in recent years, increasingly have sought to override tribal political will in favor of state political will through litigation, only to have such efforts thwarted by tribal sovereign immunity.⁴

In May 2014, the U.S. Supreme Court delivered its opinion in *Michigan v. Bay Mills Indian Community*, 572 U.S. __ (2014), pleasantly surprising many in Indian country⁵ by reinforcing the Court's previous recognition of American Indian tribes' sovereign immunity and rejecting the request of more than a dozen states for Court's creation of a common law rule allowing states to sue tribes when those states were unwilling to pursue nonlitigation resolution of intergovernmental disputes.

The Substance of *Bay Mills*

Justice Elena Kagan delivered the opinion of the *Bay Mills* Court, holding:

The question in this case is whether tribal sovereign immunity bars Michigan's suit against the Bay Mills Indian Community for opening a casino outside Indian lands. We hold that immunity protects Bay Mills from this legal action. Congress has not abrogated tribal sovereign immunity from a State's suit to enjoin gaming off a reservation or other Indian lands. And we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity.⁶

In upholding Bay Mills' immunity from suit by the state of Michigan, both Kagan for the majority (Chief Justice John G. Roberts and Justices Kagan, Anthony M. Kennedy, Sonia Sotomayor, Stephen G. Breyer) and Justice Sotomayor in a separate concurrence recognized the centuries of historical and legal predicates⁷ that inform tribes as sovereigns and "domestic dependent nations" that exercise "inherent sovereign authority."⁸ The Court recognized that:

As dependents, the tribes are subject to plenary control by Congress. See *United States v. Lara*, 541 U. S. 193, 200 (2004). ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive'" to "legislate in respect to Indian tribes.") And yet they remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 (1978). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler*, 435 U. S. 313, 323 (1978).⁹

The Court explained that:

Among the core aspects of sovereignty that tribes possess—

subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U. S. at 58. That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U. S. 877, 890 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is "inherent in the nature of sovereignty not to be amenable" to suit without consent.).

Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Kiowa Tribe of Okla. v. Manufacturing Technologies Inc.*, 523 U. S. 751, 756 (1998).

In doing so, we have held that tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals.¹⁰

The Supreme Court's Suggested Alternatives to State-Tribal Litigation

When the Court ruled in favor of Bay Mills, it rejected not only the state of Michigan's arguments but those of a veritable chorus of states amici. Seventeen states joined in two distinct amicus briefs to the Court.¹¹ The states argued broadly that "federal courts should be open to resolve disputes between States and Indian tribes" on two grounds: (1) that state-tribal disputes are numerous in three "more serious areas of conflict"—Internet consumer lending, campaign finance laws, and gaming; and (2) that "suits against tribes are the only realistic means to resolve these disputes."¹² In short, Michigan and the amici states argued that state governmental concerns should be afforded a litigation hammer so they could seek to impose state governmental will upon tribal governments whenever state and tribal sovereigns might disagree.

But the *Bay Mills* Court emphatically rejected that request and instead echoed the Court's similar observation in *Oklahoma Tax Commission*¹³—that while the state of Michigan did not have the litigation remedy the state most desired, the state was not without recourse. Instead, the Court observed the most obvious path for Michigan to achieve its litigation goals was entirely within the state's power to pursue: "[I]f a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity."¹⁴

Indeed, intergovernmental agreements between tribes and states¹⁵ on matters of mutual concern—as the Court has at least twice suggested to states unsuccessful in litigation against tribes—have become fairly routine.¹⁶ Of course, the key to such compacts is the recognition by one sovereign of the other's sovereignty, and any agreement is difficult to achieve if one party's only acceptable outcome is creating a mechanism whereby it has a unilateral ability to attempt to insert its judgment in place of the other's in litigation. Perhaps that is why, in *Bay Mills*, the Court listed remedies available by negotiated agreement last among its list of alternatives that Michigan might pursue in lieu of its litigation preference.

Prior to suggesting one sovereign negotiate with another, the Court reviewed other potential avenues available to Michigan to address Michigan's concerns:

And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See § 432.220; see also § 600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young*, 209 U. S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct. See *Santa Clara Pueblo*, 436 U. S., at 59. And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment. See MICH. COMP. LAWS ANN. §§ 432.218 (West 2001), 750.303, 750.309 (West 2004).¹⁷

But these options—*Ex parte Young* relief and potential pursuit of individual criminal charges—had already been eschewed by the amici states in *Bay Mills*. They admitted that it was unlikely the states could ever prove criminal violations against individuals because, at base, the state-tribal policy disputes are simply “good-faith legal disagreements.”¹⁸ The amici states reasoned: “[L]aw enforcement measures necessarily transform good-faith legal disagreements into court proceedings about mens rea, criminal procedure and other side issues. The upshot is that a [s]tate could be correct that a tribe’s activities are unlawful, but could still lose a criminal case against a particular tribe member.”¹⁹ In other words, because states perceived they would be unable to convince a jury of any tribal member wrongdoing, they wanted the Court to craft them an alternative tool to exert state political will.

The amici states also told the Court that an *Ex parte Young* suit against a tribal official was not sufficient because such suits are “secondary” and “uncertain.”²⁰ A review of *Ex parte Young* and its application reveals that the basis for the amici states’ lack of enthusiasm for official capacity suits was the same as that for their rejection of criminal prosecution: *Ex parte Young* suits against tribal officials are unlikely to be winners for states.

What’s an *Ex parte Young* Suit, and Is One Coming a Tribal Leader’s Way Soon?

Ex parte Young suits have never been recognized as tools to conscript federal courts as referees in policy squabbles between sister sovereigns. Rather, in the more than 100 years since the Court’s decision in *Ex Parte Young*, the doctrine evinced by the Court has had straightforward results: State or tribal officials acting on behalf of their sovereign may be subject to suit for prospective injunctive relief to enjoin the sovereign’s further violation of federal law, despite the sovereign immunity of their government.²¹

Tribal sovereign immunity, including tribal official immunity, manifests itself in ways that generally mirror the immunity of states and state officers. Tribal sovereign immunity protects tribal officials acting within the scope of their authority²² as well as tribal employees.²³ In *Santa Clara Pueblo v. Martinez*, the Supreme Court suggested that the doctrine of *Ex parte Young* extends to the tribal context, allowing suits against tribal officials in their official capacities for declaratory or injunctive relief.²⁴ Numerous lower federal courts have since agreed.²⁵ The *Ex parte Young* doctrine “has been extended to tribal officials sued in their official capacity such that tribal sovereign immunity does not bar a suit for prospective relief

against tribal officers allegedly acting in violation of federal law.”²⁶ “The rationale is that when tribal officials act in violation of federal law, they are acting beyond their authority and not on behalf of the tribe and, thus, are amenable to suit without the protections of tribal sovereign immunity.”²⁷ Note, however, that as in *Santa Clara Pueblo*, the fact that tribal immunity does not bar the suit does not mean that a federal cause of action may be implied against the official where such action would infringe tribal sovereignty.

Ex parte Young suits have never been extended to allow suits against officials to enjoin their sovereign’s violation of state law or tribal law.²⁸ Instead, the Supreme Court has expressly held that the 11th Amendment prohibits federal court jurisdiction over state law claims against state court officers.²⁹ In *Young*, the Court established the principle that state officers have no authority to violate the Constitution and laws of the United States.³⁰ But in *Pennhurst State School and Hosp. v. Halderman*,³¹ the Court declined to extend the reasoning of *Ex parte Young* beyond federal law claims and held that federal courts are prohibited from enjoining state officers from violating state law. Justice Lewis F. Powell Jr. delivered the Court’s opinion in *Pennhurst* and explained: “[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment.”³² The *Pennhurst* Court held squarely that sovereign immunity precludes injunctive relief against officials for “violations of state statutes.”³³ This makes sense when one considers that the essential underpinning of *Ex parte Young* is the supremacy clause, giving rise to the paramount importance of securing compliance with federal law in federal courts. Thus, *Young* suits cannot go forward without an independent basis for federal court jurisdiction.³⁴

The limitations of *Young* continue. Where the relief sought is damages, *Ex parte Young* suits may not be maintained against tribal officials.³⁵ Similarly, a suit seeking specific performance on a tribal contract cannot be maintained against a tribal official for the same reason.³⁶ Suits for damages against employees or officers in their individual capacities are barred by immunity unless the alleged actions were not colorably within the authority delegated by the tribe.³⁷ In other words, “tribal officials are protected by sovereign immunity when they act in their official capacity and within the scope of their authority.”³⁸

Supreme Court to States: “No Soup for You!”³⁹—States Unable To Attack Tribal Sovereignty Via *Ex Parte Young*

In short, the *Bay Mills* Court’s reference to the availability of *Ex parte Young* relief really does not mean much for states. The “more serious areas of conflict” identified by the *Bay Mills* amici states—Internet consumer lending, campaign finance laws, and gaming⁴⁰—are generally all areas where state law has no force or effect on tribal entities. Rather, those areas are addressed in federal and tribal law and with respect to which tribal official authority derives from federal and tribal law—sources of authority that make tribal officials immune from state action unless the tribal official is violating a federal law.

From the earliest years of the republic, the Supreme Court and lower federal courts have recognized the political independence and self-governing status of Indian tribes.⁴¹ An Indian tribe’s sovereignty is not the result of reparations or a specific grant of authority by Congress but rather the “inherent powers” of unextinguished sov-

ereignty.⁴² Because a tribe retains all attributes of sovereignty that have not been divested by Congress, the proper inquiry with respect to a tribe's exercise of its sovereignty is whether Congress—which exercises plenary power over Indian affairs—has limited that sovereignty in any way.⁴³ Further, “in the absence of federal authorization ... tribal sovereignty is privileged from diminution by the States.”⁴⁴

And in each of area of dispute the *Bay Mills* amici states described as having “swelled and intensified” and “proliferated” since 1998⁴⁵—Internet consumer lending, campaign finance laws, and gaming⁴⁶—Congress has not acted to vest states with power over tribes. Instead, Congress has done the opposite and broadly and uniformly supported tribal self-determination, including recognizing expanding tribal economic development as the cornerstone of self-determination policy.⁴⁷

While some states may disfavor the policy determinations of tribal governments, the broad-ranging potential implications of tribal sovereignty have been routinely addressed by the Supreme Court, which has consistently left imposition of any restraints on sovereignty solely before Congress.⁴⁸ In fact, where a petitioner has specifically asked the court to “abandon or at least narrow” the doctrine of tribal sovereignty because “tribal businesses had become far removed from tribal self-governance and internal affairs,” the Court flatly declined to do so. As stated by the Court: “We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency,” and while “the rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. ... In our interdependent and mobile society, however, tribal [sovereignty] ... extends beyond what is needed to safeguard tribal self-governance.”⁴⁹ The Court declined to place limitations on tribal sovereignty so as to “defer to the role Congress may wish to exercise in this important judgment.”⁵⁰ The *Bay Mills* Court embraced the same conclusion: “[I]t is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity.”⁵¹

A Level Playing Field

In her *Bay Mills* concurring opinion, Justice Sotomayor stated that “both history and proper respect for tribal sovereignty—or comity” required the result in *Bay Mills*.⁵² She explained: “A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding.”⁵³ She further explained that the Court’s hands-off approach to tribal sovereign immunity is exactly in keeping with the policies established by Congress:

[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases “may be the only means by which a tribe can raise revenues,” Struve, 36 ARIZ. ST. L. J., at 169. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.⁵⁴

Justice Sotomayor also noted that “a legal rule that permitted States to sue Tribes, absent their consent, for commercial conduct would be anomalous in light of the existing prohibitions against Tribes’ suing States in like circumstances.”⁵⁵ Justice Sotomayor’s turn of phrase, “like circumstances,” refers to the rule of *Seminole*



Tribal economic development enterprises of all sorts fund basic services to citizens, such as (top and middle photos) recreational and (bottom photo) library facilities of the Wyandotte Nation of Oklahoma.

Tribe v. Florida, 517 U.S. 44 (1996), in which the Court held that tribes may not sue states in federal court and recognized an additional exception to *Ex parte Young*: State officers cannot be sued to enforce federal statutes that contain comprehensive enforcement mechanisms. Justice Sotomayor's premise was straightforward: If tribes cannot sue state officials for violating the Indian Gaming Regulatory Act (IGRA) (*Seminole Tribe*), then states cannot sue tribal officials for violating IGRA (*Bay Mills*).

Justice Sotomayor's *Bay Mills* reasoning applies just as strongly to the Court's prohibition on tribal *Ex parte Young* suits against state officials set forth in *Idaho v. Coeur d'Alene Tribe*⁵⁶ and decried by Professor John P. LaVelle in *Sanctioning a Tyranny*.⁵⁷

Most tribal officials are dedicated public servants who bring just as much integrity, experience, and goodwill to their jobs as regulators and leaders as their state counterparts do to theirs. But popular images of Native Americans and hundreds of years of repeated references in law to tribes as savages invade our modern legal discourse.

In *Idaho v. Coeur d'Alene Tribe*, the Court crafted another exception to *Ex parte Young*, holding that state officers cannot be sued to quiet title to submerged lands. Writing for the majority in that case, Justice Anthony M. Kennedy explained that "if the tribe were to prevail, Idaho's sovereign interests in its lands and waters would be affected to a degree as fully as intrusive as almost any conceivable retroactive levy upon funds in its treasury."⁵⁸ The *Coeur d'Alene Tribe* Court held that "[t]he requested injunctive relief would bar the state's principal officers from exercising their governmental powers and authority" over matters that were disputed.⁵⁹ Under Justice Sotomayor's *Bay Mills* reasoning, if tribes cannot sue state officials when the requested relief would have a significant impact on state government, per *Coeur d'Alene Tribe*, then states cannot sue tribal officials when the requested relief would have a significant impact on tribal government. And Internet consumer lending, campaign finance, and gaming are all subject matters that would have a profound impact on tribal governments engaged in those activities. Per Justice Sotomayor's *Bay Mills* concurrence, those subject matters are off limits for state litigation against tribal officials.

In *Bay Mills*, the state of Michigan requested that the Court level the playing field between tribes and states.⁶⁰ That is exactly what it obtained—although not in Michigan's vision of a level playing field: that the state could trump the policy choices of the tribe. Rather, with the Court's *Bay Mills* opinion and Justice Sotomayor's concurrence, the playing field is once again level between tribes and states, because there is comity between sovereigns, and neither sovereign is able to seek to impose its policy will in place of another through federal court litigation, either directly or styled as an *Ex parte Young* action. *Young* relief remains a very limited tool. Thus, the lesson from the Supreme Court is clear: Litigation should not be the primary device to resolve disputes between sovereigns.⁶¹ Rather, responsible public officials should reach out to their counterparts serving sister sovereigns, sit down and talk to each other, and, respectfully among equals, work to resolve their differences.

Needed: A Fresh Approach

States should accept that Indian tribes are increasingly and routinely recognized as governments equally as capable as states of good governance in our federal system. For example, the Violence Against Women Reauthorization Act of 2013 recognized tribal criminal jurisdiction over perpetrators of domestic violence crimes.⁶² Another example is the Hazardous Materials Transportation Act's⁶³ treatment of tribes as synonymous with states without requiring tribes to petition for that status as some other federal statutes (such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act) do. Indeed, Congress now frequently directs federal agencies to reach out to tribes to play important governmental roles

in our federal system.⁶⁴ For example, the Secure Border Act of 2012 directs the secretary of Homeland Security to pursue possible inter-governmental cooperative agreements with tribal law enforcement agencies.⁶⁵ In fact, "[i]ntergovernmental agreements between tribes and other tribal, local, state and federal governments exist in nearly every area of governance, including environmental protection, natural resources management, law enforcement, criminal justice, child welfare, taxation, and land use planning."⁶⁶

Most tribal officials are dedicated public servants who bring just as much integrity, experience, and goodwill to their jobs as regulators and leaders as their state counterparts do to theirs. But popular images of Native Americans and hundreds of years of repeated references in law to tribes as savages invade our modern legal discourse.⁶⁷

In his dissent in *Bay Mills*, Justice Clarence Thomas picked up on the areas of concern and accusations highlighted by the amici states and described all tribal consumer lenders and tribal involvements in campaign finance as equally nefarious—indeed, describing them as not the actions of tribes at all but of some outsiders manipulating tribal interests.⁶⁸ Thomas necessarily assumed that tribes are either unscrupulous or dim and allow their governmental immunity to be "exploited."⁶⁹ He also assigned the blame for any state-tribal discord squarely on tribes.⁷⁰ Indeed, Thomas' dissent finds that the *Bay Mills* majority's decision to leave tribal governments' sovereign choices on matters like consumer lending, campaign finance, and gaming unmolested by states was to leave those areas a "wilderness,"⁷¹ because he equates tribal regulation to no regulation at all:

[A]ny number of Indian tribes across the country have emerged as substantial and successful competitors in interstate and international commerce, both within and beyond Indian lands. As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including *de facto* deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike.⁷²

Other Supreme Court justices have also showcased their low opinions of tribal governments when expressing their opposition to for a Court majority's support for tribal sovereignty. In his dissent in *California v. Cabazon Band of Mission Indians*, Justice John Paul Stevens described the slippery slope of Indian depravity he envisioned as the Court let stand tribal policy choices (to operate on-reservation bingo), even though those choices conflicted with those the state of California desired:

While gambling provides needed employment and income for Indian tribes, these benefits do not, in my opinion, justify tribal operation of currently unlawful commercial activities. Accepting the majority's reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises.⁷³

While the specific debauchery Stevens feared has not come to pass with the advent of widespread tribal gaming, his underlying premise is correct. Following the *Cabazon* majority's reasoning—i.e., the position that is now the law of the land—if a tribal sovereign makes a policy choice in any area of economic activity, the tribe has the sovereign right to do so, even if some state actors find the activity shocking or unsavory.

Justice Sotomayor's *Bay Mills* concurrence is a breath of fresh air against these sorts of biased characterizations of tribal governments that have come from the Supreme Court. Her opinion is widely heralded as the basis for Indian country's restoration of faith in the Court, knowing that the Court understands what Congress has so frequently recognized: Tribal governments are sovereigns supported by the policies of the United States, and those policies in turn include the rights to evolve, to grow their economies, and to make policy choices that may differ from those of sister sovereigns. But just because tribal policy choices are not the ones states might make does not give states any right to restrict tribal government. Instead, "consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely."⁷⁴ In other words, tribes can make their own sovereign choices with respect to all matters of commerce, including Internet consumer lending, campaign finance, and gaming, just as states can make their own sovereign choices in those areas. States should not assume that tribal choices in those areas are not the result of considered governmental judgment or supported by abundant and robust federal and tribal law.⁷⁵

Conclusion

The rule flowing from *Bay Mills* is clear: Tribal sovereignty is not inferior to that of states. Despite the fact that tribes and states will rarely be able to resolve their differences by litigation, no sovereign need suffer the tyranny of another. Rather, states and tribes should take the Supreme Court's advice, save their litigation budgets, and engage in government-to-government discussions with open minds and hearts.⁷⁶ If states and tribes work together, there is much they can achieve. ☺



Jennifer Weddle is a shareholder in the Denver, Colorado, office of Greenberg Traurig LLP, where she co-chairs the firm's national American Indian Law practice group. She served two terms as chair of the Indian Law Section and currently serves as immediate past chair, having served variously on the Section Board and as the Annual Indian Law Conference chair and co-chair since 2006. She is also the past president of the Colorado Indian Bar Association, a regional affiliate of the National Native American Bar Association, and now serves on the National Native American Bar Association Foundation Board. Weddle wishes to thank Professor Elizabeth Kronk Warner and Professor Matthew L.M. Fletcher for their feedback on the draft of this article, as well as Laura Jones for her able research assistance. © 2015 Jennifer Weddle. All rights reserved.

Endnotes

¹*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

²This article's title is an homage to the excellent work of Professor John P. LaVelle: *Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L.J. 787 (1999), in which he argued that the Court's reining-in of potential relief available to tribes to sue state officials was to countenance state tyranny against tribes. This article explains that the inequity in official capacity suits decried by LaVelle has been corrected by the Supreme Court's recent opinion in *Michigan v. Bay Mills Indian Community*, 572 U.S. __ (2014).

³This is a euphemistic description. "[Indian communities] owe no allegiance to the States, and receive from them no protection. Because of the local illfeeling, the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

⁴See e.g., *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P. 3d 1099 (Colo. 2010) (rejecting state's attempt to enforce investigative subpoenas mailed to out-of-state tribal businesses); *Alabama v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161 (M.D. Ala. 2014) (rejecting state efforts to impose state law on tribal gaming operations).

⁵The official definition of Indian country is set forth at 18 USC § 1151.

⁶Slip. Op. at 1.

⁷The concurring opinion of Sotomayor, J., at 1 recalled the abundant historical support for the majority's opinion, e.g.:

"The doctrine of tribal immunity has been a part of American jurisprudence for well over a century. See e.g., *Parks v. Ross*, 52 U.S. 362, 11 How. 362, 13 L. Ed. 730 (1851); Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L. J. 137, 148-155 (2004) (tracing the origins of the doctrine to the mid-19th century); Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1640-1641 (2013) (same)."

⁸Slip Op. at 4 (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509 (1991) and quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)).

⁹Slip Op. at 5.

¹⁰Slip Op. at 5-6.

¹¹Amici states supporting the state of Michigan included: Oklahoma (filing its own brief), Alabama, Alaska, Arizona, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Louisiana, Montana, Nebraska, North Dakota, Rhode Island, South Dakota, and Utah.

¹²Amicus Brief of State of Alabama, *Michigan v. Bay Mills Indian Community*, 572 U.S. ___ (2014) (No. 12-515) at 11-19.

¹³498 U.S. at 514 (“States may also enter into agreements with the tribes to adopt a mutually satisfactory regime”).

¹⁴Slip Op. at 13.

¹⁵Examples include efforts such as those of the state of Kansas, which entered into an inter-governmental agreement with the Prairie Band Potawatomi Nation respecting excise taxes, an agreement that sought “to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction.” Brief for United States as Amicus Curiae at 3, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (No. 04-631). Michigan, too, has negotiated and concluded numerous tax agreements with various tribes dealing with everything from the purchase of motor homes by tribal members to regulation and enforcement of the state business tax on tribal businesses. See e.g., State-Tribal Tax Agreement Between Bay Mills Indian Community and the State of Michigan, available at www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html; see generally David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120 (1993); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. (1999). Numerous states have also enacted legislation enabling their local governments and agencies to enter into agreements with Indian tribes. See Joel H. Mack and Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, n.128 (1993).

¹⁶Other federal courts have picked up on the Supreme Court’s guidance that sovereigns should negotiate, not litigate. See e.g., *Oklahoma v. Hobia*, 2014 U.S. App. LEXIS 24167, *21 (10th Cir. Dec. 22, 2014) (finding “the State need only bargain for a waiver of immunity” and quoting *Bay Mills* to note that states have “more than enough leverage to obtain such terms”).

¹⁷Slip Op. at 13.

¹⁸Amicus Brief of State of Alabama, *Michigan v. Bay Mills Indian Community*, 572 U.S. ___ (2014) (No. 12-515) at 18.

¹⁹*Id.*

²⁰*Id.*

²¹The *Ex parte Young* device was crafted by the Supreme Court in 1908 as a mechanism to curtail efforts by Minnesota’s then-Attorney General Edward T. Young to enforce Minnesota laws—which he helped design—purporting to limit what railroads operating in Minnesota could charge their customers and imposing very steep fines and potential incarceration for violators. A group of railway shareholders, displeased with this restriction on commerce but fearful of challenging the law and risking its severe penalties, filed a federal court suit against Minnesota, arguing that Minnesota’s rate-setting scheme was unconstitutional for myriad reasons. They also sued their railroad to prevent its compliance with Minnesota’s laws, and also Young, seeking to prevent him from enforcing the

laws. See generally John Harrison, *Ex Parte Young*, 60 STANFORD L. REV. 989 (2008) (detailing the history, reasoning, context and progeny of *Ex parte Young*).

Young argued that the 11th Amendment, prohibiting suits against one state by citizens of another, barred any federal court consideration of the prospective injunctive relief sought against him. The lower court disagreed and issued an injunction restraining Minnesota’s attorney general from enforcing the anti-railroad laws. In response, he filed a state court suit against the railroad to require the railroad’s compliance. The federal court rejected the Minnesota attorney general’s attempt to evade the federal injunction, held him in contempt, and placed Young in the custody of the U.S. Marshals Service “until he purged himself of the contempt by withdrawing the mandamus action.” *Id.* at 993. Young then filed a petition with the U.S. Supreme Court for a writ of habeas corpus for his release, arguing that the 11th Amendment precluded any federal court from restraining state officials.

The Supreme Court disagreed, found that Minnesota’s anti-railroad laws were unconstitutional and that Minnesota’s attorney general could be properly restrained from enforcing them (in other words, the Minnesota attorney general could be subject to a common, standard anti-injunction suit), “reasoning that an officer executing an unconstitutional statute is stripped of official capacity and may be dealt with as a private wrongdoer.” *Id.*

²²See *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985).

²³*Kizis v. Morse Diesel Int’l Inc.*, 794 A.2d 498 (Conn. 2002).

²⁴*Santa Clara Pueblo*, 436 U.S. at 59; see also *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (finding that tribal officials could be sued to enjoin elections despite sovereign immunity of tribe itself).

²⁵See *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (holding “Today we join our sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity”); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993).

²⁶*Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citation and internal quotation marks omitted) (holding that tribal official charged with collecting tax could be sued to enjoin tax collection, although tribal chairman with no responsibility for collecting tax could not be sued).

²⁷*PCI Gaming Authority*, 15 F.Supp.3d 1161 (identifying the rationale for *Ex parte Young* application to tribal and state officials as identical, and citing and quoting *Ameritech Corp. v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002) (“[W]hen a state official violates the Constitution or federal law, he acts outside the scope of his authority and is no longer entitled to the State’s immunity from suit” (citing *Ex parte Young*, 209 U.S. at 155-56))).

²⁸*Edelman v. Jordan*, 415 U.S. 651 (1974) (limiting *Young* suits to claims for prospective relief against state officials accused of ongoing violations of federal law); *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (holding that “when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes”). See also *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 310 (N.D. N.Y. 2003) (finding “Although *Ex*

parte Young offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities, it only allows an official acting in his official capacity to be sued in a federal forum to enjoin conduct that violates federal law” and dismissing the case entirely because the plaintiff had raised only state law claims); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1282 (10th Cir. 2012) (observing that *Ex parte Young*’s exception to tribal sovereign immunity was “simply not applicable” in a suit that did not allege that the tribal officials “violated federal law”).

²⁹*Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1984).

³⁰See Erwin Chemerinsky, FEDERAL JURISDICTION § 7.5.1 (5th ed. (2007)).

³¹465 U.S. 89 (1984).

³²465 U.S. at 121.

³³465 U.S. at 110.

³⁴See *Santa Clara Pueblo*, 436 U.S. at 60 (holding that no cause of action against tribal official could be implied under the Indian Civil Rights Act (ICRA)); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 88 (2d Cir. 2001) (holding that an official capacity action against tribal official must be based on action that could run against tribe itself, barring ICRA and 42 U.S.C. § 2000e(b) claims).

³⁵See *Cook v. AVI Casino Enterprises Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (holding that tribal employees were immune from dram shop liability/claims that they performed their tribal duties in a grossly negligent way because “tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to the tribe itself”); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (finding no exception to sovereign immunity where the only relief sought against tribal officials was damages).

³⁶*Tamiami Partners v. Miccosukee Tribe of Fla.*, 177 F.3d 1212, 1225-1226 (11th Cir. 1999) (barring suit for enforcement of gaming contract).

³⁷See *Burrell v. Armijo*, 603 F.3d 825, 832-834 (10th Cir. 2010) (dismissing individual capacity action where evidence showed defendant was acting within his authority as governor of the Pueblo); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985) (dismissing individual capacity action against tribal officials where they acted within their delegated authority in excluding plaintiff from reservation); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1072 (D. Okla. 2007) (dismissing individual capacity actions were defendants acting with “colorable” claim of authority from the tribe); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 307 (N.D. N.Y. 2003) (tribal officials have qualified immunity unless their challenged actions “were not related to the performance of their official duties”); *Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc.*, 221 F. Supp. 2d 271, 280-81 (D. Conn. 2002) (holding that alleging that defendants’ actions were illegal was insufficient to surmount qualified immunity; instead actions must be “manifestly or palpably beyond his authority”).

³⁸*Tamiami Partners*, 177 F.3d at 1125.

³⁹This famous phrase comes from the 116th episode, “The Soup Nazi,” of the NBC sitcom *Seinfeld*, in which a restaurant purveyor harshly denies his product to customers who annoy him, despite how desperately they desire to purchase his soup. By analogy, the Supreme Court understands how greatly states desire the ability to

sue tribes and tribal officials, but that ability will be denied unless and until litigation follows within narrow parameters allowed by the Court.

⁴⁰Amicus Brief of State of Alabama, *Michigan v. Bay Mills Indian Community*, 572 U.S. __ (2014) (No. 12-515) at 11-16.

⁴¹See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (classifying tribes as “domestic dependent nations”); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that the tribes are “distinct independent political communities, retaining their original natural rights” and not dependent on federal law for their powers of self-government).

⁴²*United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); see also *Santa Clara Pueblo*, 436 U.S. at 58, 60 (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority ...”); Powers of Indian Tribes, 55 Interior Dec. 14 (D.O.I.) (1934), 1934 WL 2186.

⁴³See *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-149 n.11 (1982); Felix Cohen’s Handbook of Federal Indian Law, § 6.02[1] (2005).

⁴⁴*Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng’g*, 476 U.S. 877 (1986).

⁴⁵Prior to *Bay Mills*, the Supreme Court’s most recent treatment of tribal sovereign immunity had come in *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751 (1998).

⁴⁶Amicus Brief of State of Alabama, *Michigan v. Bay Mills Indian Community*, 572 U.S. __ (2014) (No. 12-515) at 11-16.

⁴⁷For a discussion of Congressional policies supporting, for example, Internet consumer lending, see Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, THE FEDERAL LAWYER, April 2014 at 61-63.

⁴⁸See *Kiowa Tribe* 523 U.S. 751.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹Slip Op. at 17.

⁵²Opinion of Sotomayor, J., at 11.

⁵³*Id.* at 7.

⁵⁴*Id.* at 7-8.

⁵⁵Opinion of Sotomayor, J., at 3-4.

⁵⁶521 U.S. 261 (1997).

⁵⁷*Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d’Alene Tribe*, 31 ARIZ. ST. L.J. 787 (1999).

⁵⁸521 U.S. at 287.

⁵⁹*Id.* at 281.

⁶⁰Opening Brief of the State of Michigan, *Michigan v. Bay Mills Indian Community*, 572 U.S. __ (2014) (No. 12-515) at 38.

⁶¹Strong policy grounds also support limiting *Young* suits against officials—namely the extensive social costs that *Young* suits impose. “These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will ‘dampen the ardor of all

but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.” Richard H. Fallon, *Symposium: Official and Municipal Liability for Constitutional and International Torts Today Does the Roberts Court Have an Agenda: The History and Policy of Officer Immunity in the United States: Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 485 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

It is worth noting that these policy grounds are even stronger in the tribal government context, where tribal members from communities that are often small, rural, and impoverished give their time in public service in tribal government, subjecting tribal governmental officials to the specter of state suits against them—by potentially any of 50 states—and would be more than foreboding and could have disastrous consequences for tribal governmental stability.

⁶²Pub. L. No. 113-4, 127 Stat. 54 (2013).

⁶³49 U.S.C. § 5112.

⁶⁴See Kristen M. Carlson, *Congress and Indians*, 86 *UNIV. OF COLO. L. REV.* 101, 175 (2014) (indicating that review of extensive recent congressional records indicates that Congress’s treatment of tribal governments as state governments in general legislation extends back to at least the 100th Congress).

⁶⁵Secure Border Act of 2012, H.R. 1299, 112th Cong. (2012).

⁶⁶Wenona T. Singel, *The First Federalists*, 62 *DRAKE L. REV.* 775 (2014) (citing generally COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW*, (Nell Jessup Newton et al. eds., 2012 ed.), § 6.05 at 589).

⁶⁷For a discussion of the evolution of the ethos of savagery that plagues tribal governments, see Robert A. Williams, *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION*, Palgrave Macmillan Trade (2012).

⁶⁸Opinion of Thomas, J. at 12.

⁶⁹*Id.* Thomas’s wholesale acceptance of the *Bay Mills* amici states’ arguments, using language and citations identical to that put forward by the amici states in their *Bay Mills* briefs, would appear to be part of a trend wherein the Court is “inundated with eleventh-hour, untested, advocacy-motivated claims of factual expertise.” See Alli Orr Larsen, *The Trouble With Amicus Facts*, 100 *VA. L. REV.* 1757 (2014). “And the Justices are listening,” often citing an amicus for a statement of fact, rather than the underlying factual source, as authority. *Id.*

⁷⁰*Id.* (describing Indian tribes as having “created conflict in certain States”).

⁷¹Thomas’s characterizations of tribes are consistent with Court precedent. Indeed, Marshall was the first on the Court to write that tribal governments were inferior and incapable of governance when he justified the so-called Doctrine of Discovery, whereby the United States claimed dominion over lands occupied by indigenous inhabitants:

[W]e find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them ...

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence

was drawn chiefly from the forest. *To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence ...*

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589-90 (1823) (emphasis supplied).

The Court’s “savage” characterizations of Indians continue into modern times. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955) (Opinion of Reed, J., for the majority: “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror’s will that deprived them of their land.”)

⁷²Opinion of Thomas, J at 13. It appears Thomas assumed that tribes will not be fair to tort victims. He assumed that states and tribes will not engage in government-to-government discussions, that basically it is impossible to work with tribes, and the end result of differing views of sovereigns can only be “increasingly fractious relations.” But there is abundant evidence demonstrating such assumptions to be incorrect. See Singel, *The First Federalists*, 62 *DRAKE L. REV.* 775; Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 *TULSA L. REV.* 73 (2007).

⁷³480 U.S. 202, 211 (1987).

⁷⁴25 U.S.C. § 4301(a)(4).

⁷⁵To the contrary, see for example, the extensive regulatory development undertaken by the Lac Vieux Desert Band of Lake Superior Chippewa Indians Tribal Financial Services Regulatory Authority available at lvtribal.com/tfsra.html. In the consumer lending space, tribal sovereigns, exactly like states, are weighing policy considerations with which sovereigns have long grappled in terms of consumer finance. See F. B. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 *LAW AND CONTEMPORARY PROBLEMS* 108, 110 (winter 1941), available at scholarship.law.duke.edu/lcp/vol8/iss1/11 (criticizing sovereign “condemnation without analysis” with respect to small, unsecured loans and prescribing instead sovereign balancing of social concerns, consumer economic necessity, and “the inherent necessity to permit rates of charge commensurate with the costs of making small loans”). Hubachek’s article is as vital today as it was at its publication more than 70 years ago. The reality is that in many areas of governmental policy choice, there is much to consider, and different sovereigns may reach different results. But there’s nothing inherently bad about sovereigns having different views.

⁷⁶See Tassie Hanna et al., *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 *TULSA L. REV.* 553 (2012).