SOVEREIGN IMMUNITY'S PENUMBRAS: COMMON LAW, "ACCIDENT," AND POLICY IN THE DEVELOPMENT OF SOVEREIGN IMMUNITY DOCTRINE

*Katherine Florey**

INTRODUCTION

Even as the doctrine has been the subject of withering criticism by academics, sovereign immunity has come to play new and larger roles in American law. The most familiar of these developments is the Supreme Court's controversial holding that the Constitution prohibits suits against unconsenting states[1]—a development that continues to reverberate throughout federal and state courts. Amid less publicity, however, lower courts have continued to reexamine—and, in many cases, to expand—not only state immunity, but the three other types of sovereign immunity recognized by United States courts: the immunities of domestic Indian tribes, the federal government, and foreign nations. Further, as sovereign immunity issues have arisen in a greater variety of situations, the doctrine has come to serve new purposes—from protecting the fragile finances of Indian tribes[2] to defining the limits of judicial competence to decide essentially political questions.[3]

These developments have been possible in large part because the doctrine of sovereign immunity itself contains a certain fuzziness around the edges. At its core, what the doctrine prohibits is generally clear: a suit against an unconsenting sovereign for money damages.[4] When suits fall outside this configuration,

* Acting Professor, King Hall School of Law, University of California at Davis. I would like to thank Stephen McG. Bundy, Catha Worthman, Afra Afsharipour, Courtney Joslin, and John Patrick Hunt for valuable contributions and comments.

1. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

2. *See, e.g.*, Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006).

3. *See infra* Part II (discussing these and other functions of sovereign immunity).

4. *See* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 456 (2005).

however, courts often have difficulty determining exactly how far the doctrine should extend. What should courts do, for example, when a sovereign is not a named defendant in a given suit, but will have to join the litigation if it wishes to defend its interests? What about a suit that is against a party closely affiliated with the sovereign that aims to influence the sovereign's exercise of its traditional prerogatives? In situations like these, some courts have held that sovereign immunity bars the suit from going forward even though, under the formal doctrinal definition of sovereign immunity, it is by no means clear that any obstacle to these suits exists.

The willingness of some lower courts to stretch the boundaries of sovereign immunity is, in many ways, a departure from the historical view of the doctrine,[5] under which many courts regarded sovereign immunity as an archaic relic, long considered "disfavor[ed]" by the Supreme Court.[6] Furthermore, there is no obvious doctrinal reason for this change. Even in the case of state sovereign immunity—which has been famously reinvigorated by the *Seminole Tribe* line of cases—the Supreme Court has not, for the most part, expanded the contours of the doctrine in the first instance. Instead, it has simply limited Congress's ability to abrogate state sovereign immunity in situations where it does apply.[7] Meanwhile, other forms of sovereign immunity, such as tribal or foreign sovereign immunity, have—if anything—come under increased fire from the Supreme Court and other sources in

5. The trend toward increased protections for sovereigns dates from the mid-twentieth century, although it has probably accelerated with the Supreme Court's post-*Seminole Tribe* line of cases. *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1188 (2003) (arguing that "[s]tarting in 1945 and continuing until quite recently, the Court's rulings reflected a sharp hardening and ideologization of state sovereign immunity principles").

6. *See, e.g.*, Fed. Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940) (noting the "current disfavor of the doctrine of governmental immunity from suit"); Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939) (observing that "because the doctrine [of sovereign immunity] gives the government a privileged position, it has been appropriately confined"); *see also* United States v. Nordic Vill., Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) (stating that "the doctrine of sovereign immunity is nothing but a judge-made rule that is sometimes favored and sometimes disfavored").

7. For example, *Seminole Tribe of Florida v. Florida*, the case that launched the sovereign immunity revolution, has two primary holdings: first, that Congress may not abrogate sovereign immunity pursuant to its Article I powers; second, that the *Ex parte Young* method of avoiding sovereign immunity by suing a state officer for injunctive relief does not apply when Congress has enacted a detailed remedial scheme. 517 U.S. 44, 72–73, 75–76 (1996). Neither of these holdings affects the scope of state sovereign immunity's application in the first instance.

recent years.[8] Nonetheless, in many cases, lower courts—whether responding to a more unspecific perception that sovereign immunity is a doctrine on the upswing, to litigants' increased interest in raising sovereign immunity defenses, or to long-unresolved issues regarding the doctrine itself—have been inclined to err on the side of more, rather than less, protection when adjudicating sovereign immunity issues. That is, rather than risk undue interference with a sovereign's prerogatives, courts have been inclined to create a zone of safety around the sovereign in situations where, despite a strong case that sovereign immunity does not technically apply, allowing the suit to go forward arguably may undermine sovereign immunity's policy goals. In other words, courts have gone from strictly construing the doctrine to creating a sort of common law, "penumbral" sovereign immunity that extends well beyond what are normally considered to be the doctrine's boundaries.[9]

This development is particularly worrisome because, for the most part, courts have failed to analyze the wider implications of their holdings. Sovereign immunity is a judge-made doctrine in its very origins,[10] and its reinvention in recent years has been almost exclusively driven by the judiciary.[11] Yet courts rarely speak of the doctrine in a way that acknowledges the judicial role in its formation and development. The Supreme Court's opinions on the subject are heavy with the passive voice, treating the doctrine as

8. *See, e.g.*, Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 761 (1998).

9. In *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1090 (1997), Brannon P. Denning and Glenn Harlan Reynolds use the term "penumbral" to describe the Supreme Court's "willingness [in various contexts, including the sovereign immunity context] to supplement text, precedent, and history with inferences derived from related constitutional provisions, the overall structure of the Constitution, and the principles that animated its framing." *See also* Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENT. 251, 264 (1989); Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83 (1987); Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1334–35 (1992). This Article uses the term in a slightly different sense, to refer to a situation in which the policies underlying a doctrine push toward its extension into new situations where that doctrine has not heretofore been believed to apply.

10. *See* Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970) (stating that "[c]ourts created sovereign immunity"); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 29–32 (2003) (describing sovereign immunity's dual origins in English common law and in the law of nations).

11. *See, e.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 8 (2001) (describing the "great expansion of the scope of state sovereign immunity" as one of three themes of the Rehnquist Court's federalism revolution).

something discovered rather than created. State sovereign immunity, the Court has opined, "*was universal* in the States when the Constitution was drafted and ratified,"[12] such that "the Constitution *was understood* . . . to preserve the States' traditional immunity from private suits."[13] Likewise, federal immunity "*has always been treated* as an established doctrine."[14] Such language elides the judicial role in developing sovereign immunity doctrine, treating it instead as an idea that has always been somehow vaguely in the air. The Court has gone even farther when discussing tribal sovereign immunity, which it has characterized as a doctrine that "developed almost by accident" and that was enshrined into law "with little analysis."[15] Through such language the Court has sidestepped responsibility for the doctrine's existence, even while reaffirming its continuing force.

Since sovereign immunity is also, for the most part (and with the partial exception of foreign sovereign immunity), not grounded either in text or any other specific legislative or executive policy, this judicial renunciation of responsibility has left the doctrine somewhat rudderless. Faced with the Supreme Court's vague and generalized pronouncements that sovereign immunity is a doctrine of great importance,[16] but with little guidance about what policy goals it is actually intended to serve, lower courts have frequently responded by expanding sovereign immunity without extensive analysis and in ways that often seem, on their surface, hard to justify. Thus, sovereign immunity doctrine as a whole has proven susceptible to a kind of definition creep.

This Article aims both to explore this phenomenon in its own right and to use it as a jumping-off point to consider what continuing role courts can and should have in the development of sovereign immunity doctrine. In doing so, the Article starts from two important premises. The first is that the doctrine of sovereign immunity—not merely its existence but its overall scope—has been, and will continue to be, substantially shaped by courts.[17] Although

12. Alden v. Maine, 527 U.S. 706, 715–16 (1999) (emphasis added).

13. *Id.* at 724 (emphasis added).

14. United States v. Lee, 106 U.S. 196, 207 (1882) (emphasis added).

15. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756, 757 (1998).

16. *See, e.g.*, *Alden*, 527 U.S. at 715 (recognizing that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity").

17. This is particularly true in the case of foreign sovereign immunity because the Foreign Sovereign Immunities Act was passed as a direct response to Congress's disapproval of the direction the doctrine had taken in the Court's hands. In other areas, though, Congress has also had a role. The Court has cited Congress's failure to disturb the principle of tribal sovereign immunity as

courts have been reluctant to acknowledge their role in the doctrine's creation and evolution, sovereign immunity came into being as a common law doctrine and judicial opinions are still, for the most part, the primary source of its boundaries.[18] Furthermore, because sovereign immunity confers such immense benefits on individual litigants, enormous incentives exist for potentially immune defendants to push the doctrine to its limits. Thus, courts are frequently called upon to pronounce on new and aggressive sovereign immunity arguments.[19]

The second premise that informs this Article's argument is that the various forms of "sovereign immunity" have developed along parallel paths and, for purposes of this discussion, can be fruitfully examined together.[20] This is a departure from most of the literature of sovereign immunity, which tends to focus on just one of the four types of immunity that courts recognize—a list that would have to include (at a minimum) state, tribal, federal, and foreign immunities.[21] Yet the doctrines have important similarities. On a

tacit approval for the doctrine's continuing existence; likewise, in construing the scope of federal sovereign immunity, courts look to Congress's intentions as signaled through the Federal Tort Claims Act and other congressional waivers. Even in the case of state sovereign immunity, although the *Seminole Tribe* line of cases circumscribes Congress's ability to subject states to suit, Congress can nonetheless decide how aggressively it chooses to explore the limits of its power. This is not to say, of course, that lower courts deciding difficult sovereign immunity cases have complete power to determine the direction sovereign immunity doctrine will take. The Supreme Court's holding that state sovereign immunity is constitutionally rooted has constrained courts' flexibility to modify the doctrine; non-constitutional sovereign immunities are likewise subject to redefinition by Congress as well as the courts. Moreover, it is important to note that the mere existence of continuing gray areas in established sovereign immunity doctrine—such as the well-known difficulty of determining whether relief sought is "retroactive" under *Ex parte Young*—do not in themselves necessarily translate into an increased power on the part of lower courts to shape the doctrine's course. Sovereign immunity, like all areas of law, presents difficult questions in borderline situations, but in many cases the general approach courts must take to these questions is already sharply constrained by well-established case law.

18. *See* United States v. Lee, 106 U.S. 196, 207 (1882); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

19. Chemerinsky, *supra* note 18, at 1202–03.

20. In considering the doctrines together, of course, one should not ignore their separate (if related) origins or the different directions the development of each has taken. As a result, it is important not to apply a one-size-fits-all analysis in considering any particular sovereign immunity case; different reasoning and different results may be warranted depending on what sort of sovereign immunity is at stake.

21. Arguably, related doctrines, such as the absolute or qualified immunity of government officials sued in their personal capacity, also contribute to and

theoretical level, all derive from the common notion that limited amenability to suit (with the question of how far those limits extend being, of course, a subject of debate) is an inherent attribute of sovereignty.[22] Moreover, as a practical matter, courts often speak of the various immunities interchangeably, relying on cases discussing one sort of immunity as authority in a case about another.[23] As a result, more often than not, core aspects of the doctrines have developed in tandem.[24] Precisely because this process of mutual influence is often overlooked, it is an important element in any attempt at a comprehensive understanding of sovereign immunity's development.

With these considerations in mind, this Article proceeds in four parts. Part I briefly sketches out a theory of how sovereign immunity has functioned and continues to function as a common law doctrine. It discusses the common law origins of the four major sovereign immunity doctrines that U.S. courts recognize and the ways in which those doctrines have influenced each other.

Part II evaluates the guiding policy principles that courts have considered in choosing whether to extend sovereign immunity beyond its strict doctrinal boundaries. In so doing, it discusses both the traditional justifications for sovereign immunity—sovereign dignity (and the related concept that the sovereign is somehow above reproach) and safeguarding the public treasury—as well as more "modern" rationales, including separation of powers and issues of judicial competence.

Part III surveys three of the main circumstances in which courts have formulated a penumbral version of sovereign immunity: derivative sovereign immunity doctrines that apply immunities to entities other than the sovereign itself, dismissal of cases in which courts find a sovereign not present in the litigation to be indispensable, and finally, courts' willingness to permit re-litigation of sovereign immunity issues notwithstanding traditional res judicata principles.

Finally, Part IV sets forth principles courts should consider in

draw from the sovereign immunity tradition. *See, e.g.*, Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1448 (4th Cir. 1996) (relying on the extension of federal sovereign immunity in *Boyle v. United Technologies* in justifying a grant of absolute immunity to a private contractor under analogous circumstances). Although a detailed treatment of individual immunities is beyond the scope of this article, many of the same considerations discussed herein apply.

22. *See infra* notes 36–37 and accompanying text.

23. *See infra* note 104.

24. For a well-documented argument that an analogy between foreign nations and U.S. states has influenced the recent development of state sovereign immunity, see generally Smith, *supra* note 10, at 29–32.

deciding whether sovereign immunity applies in marginal situations. It argues that courts should be more self-conscious about their decisions to expand sovereign immunity; that courts should be selective about which sovereign immunity rationales they consider when they choose to expand sovereign immunity in order to further the doctrine's policy goals; that different forms of sovereign immunity call for distinct approaches and courts should not capriciously rely on decisions in one arena when analyzing another; and finally, that courts should, where relevant, place more weight on principles and values that may cut against the further expansion of sovereign immunity (such as the right of individual litigants to a forum). In conclusion, this Article finds that, while there may be limited instances where recognizing penumbral sovereign immunity is necessary to achieving the doctrine's goals, courts should generally be reluctant to expand the doctrine beyond its traditional boundaries.

I. THE DEVELOPMENT OF SOVEREIGN IMMUNITY DOCTRINES

All forms of sovereign immunity originated as judge-made doctrine.[25] Although the various sovereign immunity doctrines have developed in different ways, they are rooted in two basic principles. As the Supreme Court explained in *Nevada v. Hall*, "[t]he doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."[26] The first concept, derived from English common law, is probably the older of the two[27] and arose in part as a practical reality: since the King was the highest authority in the feudal judicial system, by definition, no appeal existed from his decisions.[28] Thus, "[t]he King's immunity

25. *See* Davis, *supra* note 10, at 384.

26. 440 U.S. 410, 414 (1979); *see also* Smith, *supra* note 10, at 28–32 (2003) (describing the immunity ascribed to the king and foreign sovereign immunity as two "distinct, albeit related, doctrine[s]").

27. *See* Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned From King Henry III*, 49 ST. LOUIS U. L.J. 393, 434, 435 (2005); David P. Vandenberg, Comment, *In the Wake of* Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 740 (2006) (observing that concepts of foreign sovereign immunity arose in response to the 1648 Treaty of Westphalia).

28. *See Nevada*, 440 U.S. at 415 (stating that "[the King] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident") (quoting 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 518 (2d ed. 1899)); *see also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L.

rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong."[29]

The relationship between the first concept (the immunity of a domestic sovereign) and the second concept (the notion that the courts of one sovereign should respect the immunity of another) is somewhat unclear. Foreign sovereign immunity appears to have arisen in response to the Treaty of Westphalia and the newly robust notion of national sovereignty it engendered.[30] Later, the concept of foreign sovereign immunity continued to develop in tandem with the more general fiction of domestic sovereign inviolability.[31] The Supreme Court has noted that foreign sovereign immunity, unlike domestic sovereign immunity, does not apply in American courts of its own force; it requires either "an agreement, express or implied, between the two sovereigns" or "the voluntary decision of the second to respect the dignity of the first as a matter of comity."[32]

Despite these historical and theoretical differences, however, the doctrines have influenced each other at many points in their development. Furthermore, the doctrines of state and tribal immunity partake to some extent of both domestic and foreign sovereign immunity traditions because, in a federalist union of

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REV. 1, 2–5 (1972).

29. *Nevada*, 440 U.S. at 415; *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 102–03 (1996) (Souter, J., dissenting). In his dissenting opinion, Justice Souter further subdivides this principle:

> The doctrine of sovereign immunity comprises two distinct rules, which are not always separately recognized. The one rule holds that the King or the Crown, as the font of law, is not bound by the law's provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts.

Id. Justice Souter asserts that "it is clear that the idea of the sovereign, or any part of it, being above the law in this sense has not survived in American law." *Id.* at 103 n.2. Some commentators have noted that the phrase "the king can do no wrong" has had multiple meanings in English common law—among them the notion that the King cannot do wrong lawfully, a meaning almost precisely opposite to the phrase's common understanding. *See* Seidman, *supra* note 27, at 396. As Seidman also notes, much of English common law history was filtered for the colonists through Blackstone; although Blackstone ascribed to the King, in his political capacity, a sort of mystical "absolute perfection," he also noted the existence of a variety of remedies against the government for wrongful conduct. *Id.* at 477–79.

30. Vandenberg, *supra* note 27, at 740.

31. *See* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1839 (1998) (observing that the doctrine "originated in the customary international law doctrine of absolute foreign sovereign immunity," which the Supreme Court then "melded . . . with a federal common law doctrine of judicial deference to federal executive suggestions of immunity").

32. *Nevada*, 440 U.S. at 416.

states that also incorporates "domestic dependent" tribes, a state or tribe may be regarded both as a "domestic" governing sovereign in its own courts and as a quasi-independent entity outside of them.[33] The following Section thus sketches the ways in which each of the four sovereign immunity doctrines has developed along its own path and then goes on to explore commonalities between them.

A. State Sovereign Immunity

State sovereign immunity is at once the most familiar and the most contested of the various sovereign immunity doctrines. Many, but by no means all,[34] commentators believe that colonial jurisprudence recognized some notion of sovereign immunity, though exactly how and to what extent are hotly disputed issues.[35] Colonial sources certainly contain references to a concept of sovereign immunity. Most famously, Hamilton observed in the *Federalist Papers* that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent."[36] The colonial notion of sovereign immunity may, however, have been somewhat different from our present-day conception. Caleb Nelson, for example, argues convincingly that "amenability" to suit in this context meant amenability to the service of process.[37] In other words, sovereign immunity stood for something more akin to absence of personal jurisdiction than a free-standing immunity from suit.[38] Notwithstanding any differences between the colonial and modern-day conceptions of sovereign immunity, however, the Supreme Court has relied on Hamilton's and other colonial writings as support for the principle that states may not be subject to individual suits against their will.[39]

For years, the doctrine of state sovereign immunity was generally neglected,[40] and its impact was minimized through the

33. *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 878–90 (1986) (illustrating the dual nature of tribes in sovereign immunity cases).

34. *But see, e.g.*, Sisk, *supra* note 4, at 443–44.

35. *See* Alden v. Maine, 527 U.S. 706, 761, 762 (1998) (Souter, J., dissenting) (contesting the majority's assumption that a firm doctrine of sovereign immunity was widely accepted in the American colonies); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 30–46 (2002) (discussing the Framers' diverse views on sovereign immunity).

36. THE FEDERALIST NO. 81, at 414 (Alexander Hamilton) (Garry Wills ed., 1982) (emphasis omitted).

37. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1573–75 (2002).

38. *Id.*

39. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 13–14 (1890).

40. *See* William A. Fletcher, *The Eleventh Amendment: Unfinished*

Supreme Court's holding that Congress enjoyed broad power to abrogate the states' immunity.[41] In recent years, the center of controversy in the Court's treatment of the issue has been its holdings in cases like *Seminole Tribe of Florida v. Florida*,[42] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[43] and *Alden v. Maine*[44] that the Constitution, in the minds of its drafters and ratifiers, incorporated a principle of state sovereign immunity that was not subject to congressional abrogation[45] and that applied in both state and federal courts.[46] In these cases, the Court held that the Eleventh Amendment, which by its literal terms bars only "any suit . . . against one of the United States by Citizens of another State . . . [or] of any Foreign State,"[47] was in fact a more comprehensive attempt to overturn the Supreme Court's 1793 decision in *Chisholm v. Georgia*[48] (which found that the Constitution permitted suits against states) and to restore the original constitutional understanding.[49] This series of decisions has been widely criticized on textual and historical grounds by some judges and commentators who assert (among other arguments) that, by agreeing to join the Union, the states surrendered any sovereign immunity they might otherwise have possessed[50] and that the Eleventh Amendment was intended only to remove alien-state diversity as an independent basis for federal jurisdiction.[51]

Business, 75 NOTRE DAME L. REV. 843, 843–44 (2000) (commenting on the obscurity of the doctrine at the time of his 1975 graduation from law school).

41. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 16, 19 (1989), *overruled by* Seminole Tribe of Fla. v Florida, 517 U.S. 44 (1996).

42. 517 U.S. 44 (1996).

43. 527 U.S. 666 (1999).

44. 527 U.S. 706 (1999).

45. Congress is, however, permitted to abrogate state sovereign immunity under the later-enacted Fourteenth Amendment. *See* United States v. Morrison, 529 U.S. 598, 619 (2000). Recently, the Supreme Court has also suggested—although rather ambiguously—that Congress may have expanded powers vis-à-vis state sovereign immunity when it acts pursuant to the Bankruptcy Clause. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (finding that the Bankruptcy Clause "was intended . . . to authorize limited subordination of state sovereign immunity in the bankruptcy arena").

46. *See Alden*, 527 U.S. at 714.

47. U.S. CONST. amend. XI.

48. 2 U.S. 419 (1793), *superseded by* U.S. CONST. amend. XI, *as recognized in* Hans v. Louisiana, 134 U.S. 1 (1890).

49. *See Alden*, 527 U.S. at 719–24; Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69–70 (1996).

50. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 153–54 (Souter, J., dissenting); Randall, *supra* note 35, at 3.

51. *See* Fletcher, *supra* note 40, at 848.

Nonetheless, the flood of criticism has not persuaded the *Seminole Tribe* majority to change its mind, and the principle that state sovereign immunity possesses some constitutional foundation appears to be well entrenched.[52]

In finding a constitutional basis for state sovereign immunity and consequent limits on Congress's powers to abrogate the doctrine, the Court infused the doctrine with new vigor and importance and altered, to some extent, the balance of power between states and the federal government. The constitutionalization of sovereign immunity has had some wider implications, causing some courts, for example, to treat the doctrine as akin to other limits on Article III jurisdiction.[53] Furthermore, the Supreme Court has limited certain exceptions to state sovereign immunity—in particular through its suggestion in *Idaho v. Coeur d'Alene Tribe of Idaho* that the well-known *Ex parte Young* exception to state sovereign immunity, which permits suits against state officers for injunctive relief, might be limited on a case-by-case basis at courts' discretion.[54]

Nonetheless, it is important to note that, for the most part, the boundaries of the state sovereign immunity doctrine itself have remained stable. That is, even as the Court has constitutionalized the doctrine—a development with implications for Congress's abrogation power and possibly for the doctrine's jurisdictional status—it has, for the most part, not explicitly expanded the doctrine's *reach* by, for example, extending state sovereign immunity to situations in which it formerly did not apply.[55]

Indeed, in some recent cases, the Court has sharply reined in lower courts that have attempted to apply state sovereign immunity in novel situations.[56] Thus, in *Wisconsin Department of Corrections*

52. With the replacement of Justice Rehnquist by Justice Roberts and that of Justice O'Connor by Justice Alito, the five-justice majority that decided these cases is no longer intact. Nonetheless, it seems highly unlikely that either new justice would vote to overturn this long line of cases.

53. *See generally* Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CAL. L. REV. 1375 (2004).

54. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 280 (1997); *see also* Siegel, *supra* note 5, at 1184 (arguing that the Court has tightened two other exceptions to the doctrine: suits by the United States against states and state waivers of sovereign immunity).

55. For an argument that the impact of the Court's rulings has been limited, see Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 213 (2006) (arguing that "critics have exaggerated the impact and importance of the Rehnquist Court's Eleventh Amendment cases").

56. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362–63 (2006); United

v. Schacht,[57] the Court unanimously reversed the Seventh Circuit's holding that the presence of sovereign immunity issues in certain claims in a case destroyed removal jurisdiction over related claims. In *Frew v. Hawkins*, the Court also unanimously reversed the Fifth Circuit's holding that state sovereign immunity prevented federal courts from fashioning remedies rooted in state law.[58] Furthermore, the Court has imposed its own new limits on state sovereign immunity—most notably through its recent suggestion that the Bankruptcy Clause might have worked some limited abrogation of states' immunity in the original constitutional plan.[59] This succession of cases has prompted speculation that the Court is backtracking to some degree from the broad view of sovereign immunity reflected in *Seminole Tribe* and *Alden*[60]—although, particularly given the Court's recent change in membership with the addition of Justices Roberts and Alito, it seems too early to announce a definite change in direction.

B. Federal Sovereign Immunity

The concept of federal sovereign immunity derives from many of the same sources as state sovereign immunity and has been called its "jurisprudential cousin."[61] Many discussions of sovereign immunity, in both pre-constitutional sources and early case law, refer to the state and federal versions interchangeably.[62] In general, however, the doctrine of federal sovereign immunity is less explored and less understood; it has been described as a "ghost . . . haunt[ing] the early Republic"[63] and one of "the greatest mysteries" in American law.[64] Federal sovereign immunity is not mentioned in the

States v. Georgia, 546 U.S. 151, 158–59 (2006); Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 392–93 (1998).

57. *Schacht*, 524 U.S. at 392–93.

58. 540 U.S. 431, 438 (2004).

59. *Katz*, 546 U.S. at 362–63.

60. Such speculation also arises from *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726–27, 740 (2003), in which the Supreme Court affirmed the Ninth Circuit's holding that Congress had validly abrogated state sovereign immunity in enacting a provision of the Family and Medical Leave Act.

61. *See* Sisk, *supra* note 4, at 443.

62. *Id.*; *see also* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 540–41 (2003) (noting that, despite significant distinctions between state and federal sovereign immunity, the two have often been equated).

63. Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383 (1998).

64. Seidman, *supra* note 27, at 395.

Constitution and was not explicitly recognized by the Supreme Court until 1821,[65] although earlier cases, including *Chisholm*, make passing references to the doctrine.[66] Indeed, the first cases to explore the doctrine extensively dealt not with a direct suit against the government but with the somewhat distinct question of whether federal sovereign immunity barred a suit against a government agent.[67]

Nonetheless, it is currently established doctrine that, by virtue of its status as a sovereign entity, the federal government is not inherently subject to suits by individuals to which it has not consented.[68] Furthermore, many of the exceptions to state and tribal sovereign immunity do not exist in federal sovereign immunity doctrine. For example, federal sovereign immunity contains no equivalent to the exception that allows the federal government to sue otherwise-immune states and tribes,[69] and the principle of "nonstatutory review" that permits suits against federal government officers for injunctive relief is arguably somewhat less robust than equivalent doctrines permitting suits against state or tribal officers engaged in illegal conduct.[70] At the same time, however, Congress has extensively waived the federal government's immunity so that the federal government is generally more amenable to suits by individual litigants than tribes or states often are.[71] Most

65. Jackson, *supra* note 62, at 523 & n.5 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821)).

66. *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 478 (1793), *superseded by* U.S. CONST. amend. XI, *as recognized in* Hans v. Louisiana, 134 U.S. 1 (1890).

67. *See* Malone v. Bowdoin, 369 U.S. 643, 645 (1962); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 (1949); United States v. Lee, 106 U.S. 196, 199 (1882). Taken as a whole, these cases establish a bar on most suits against government officers that are, in effect, suits against the federal government. For a more extensive discussion of the doctrinal principles established by these cases, see Jackson, *supra* note 62, at 557–63 and Sisk, *supra* note 4, at 446.

68. *See* Sisk, *supra* note 4, at 456.

69. This is true simply as a matter of logic; the nature of federalism (in the case of states) and congressional plenary power over Indian affairs (in the case of tribes) puts the federal government in a structurally superior position; no equivalent authority, however, possesses a similar power over the federal government.

70. Suits may be maintained against individual government officers if the officer acted beyond his delegated statutory powers or if such powers, while validly granted by statute, exceeded constitutional limits. In other circumstances, however, courts regard a suit against an individual officer acting within the scope of his duties as one, in substance, against the government. *See* Sisk, *supra* note 4, at 456–57.

71. *See* Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 124–25 (1996).

significantly, Congress has removed most of the barriers imposed by the Court on suits for injunctive relief against the United States (and government officers acting within the scope of their duties) through provisions of the Administrative Procedure Act and has permitted suits for monetary relief brought under the Federal Tort Claims Act and the Tucker Act (for non-tort claims).[72] As a result, federal sovereign immunity is frequently a nonissue in practice—even though the Supreme Court applies a "clear statement" rule to waivers of federal sovereign immunity and generally construes waivers strictly.[73]

C. Tribal Sovereign Immunity

Although tribal sovereign immunity appears to derive from the same common law tradition that informs the Supreme Court's state sovereign immunity jurisprudence, little case law exists specifically delineating the evolution of the doctrine as it applies to tribes. In reaffirming that sovereign immunity doctrine applies to tribes, the Supreme Court has noted that the doctrine "developed almost by accident"—that is, through aggressive readings of early case law that assumed, while failing to hold explicitly, that a doctrine of tribal sovereign immunity existed.[74]

Early Supreme Court case law generally treated tribal immunity as an instance of the more general doctrine that sovereigns are immune from suit in their own courts. In a 1940 case, for example, the Court observed that tribes enjoyed sovereign immunity (in the absence of congressional abrogation) "as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."[75] By contrast, more recent cases have focused on presumed congressional will as

72. *See* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 603, 617 (2003).

73. *See* Sisk, *supra* note 4, at 460–61; *see also* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. (forthcoming 2008) (arguing that the Supreme Court's jurisprudence of statutory waivers had been evolving toward a coherent and nuanced treatment of the problem, but recent case law treating the existence of a statutory waiver as a question of subject matter jurisdiction calls that approach into question).

74. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756–57 (1998) (citing Turner v. United States, 248 U.S. 354 (1919)); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a] (Nell Jessup Newton et al. eds., LexisNexis Matthew Bender 2005) (1941) [hereinafter COHEN'S] (describing tribal sovereign immunity as "rooted in federal common law" and the Constitution's "treatment of Indian tribes as governments").

75. *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940).

the rationale for extending the doctrine to tribes.[76] Thus, in one recent case, the Court—urged to abandon or narrow tribal sovereign immunity doctrine—emphasized congressional inaction in the face of judicial opinions recognizing the doctrine: "Congress has always been at liberty to dispense with such tribal immunity or to limit it . . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine."[77] Furthermore, the Court has stressed the specific congressional purposes for approving tribal sovereign immunity, such as "encouraging tribal self-sufficiency and economic development."[78] In its most recent pronouncement on the matter, the Court expressed its apparently independent opinion that "[i]n our interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance."[79] Nevertheless, the Court announced it would continue to defer to Congress on the matter, noting parallels to the congressional role in regulating foreign sovereign immunity, a doctrine originally established by the judiciary but modified by legislation.[80]

Tribal sovereign immunity is fairly broad in scope. It applies to tribal commercial activities, including those conducted by tribal entities that are "arms of the tribes" (but not wholly independent corporations), and shields tribes from suits by states, although not by the United States.[81] Nonetheless, echoing the Court's critical comments in *Kiowa Tribe*, some commentators have argued that the doctrine of tribal sovereign immunity is outdated and should be, at the least, limited.[82] Still, many lower courts continue, in the wake of *Kiowa Tribe*, to view the doctrine as robust, calling it an "important" protection[83] that is "grounded in the fundamental nature of the tribes as sovereigns within this nation."[84]

76. *See, e.g.*, Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991).

77. *Id.*

78. *Id.* (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

79. *Kiowa Tribe*, 523 U.S. at 758.

80. *Id.* at 759–60.

81. COHEN'S, *supra* note 74, § 7.05[1][a].

82. *See* Lisa R. Hasday, Case Note*, Tribal Immunity and Access for the Disabled*, 109 YALE L.J. 1199, 1206 n.46 (2000) (surveying scholarship advocating limits on tribal sovereign immunity and concluding that "[a] considerable number of scholars believe tribal sovereign immunity should be limited").

83. Kahawaiolaa v. Norton, 386 F.3d 1271, 1273 (9th Cir. 2004).

84. Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria, No. C 01-1638 TEH, 2002 WL 33942761, at *5 n.6 (N.D. Cal. Mar. 11, 2002).

D. Foreign Sovereign Immunity

Although, as discussed, the concept of foreign sovereign immunity was present in British common law—and indeed in widely accepted notions of international relations as early as the 1600s[85]—the first comprehensive discussion of the issue in the emerging United States was in an 1812 Supreme Court decision, *The Schooner Exchange v. McFaddon*.[86] (Like federal sovereign immunity, foreign sovereign immunity is not mentioned—even obliquely—in the U.S. Constitution.[87]) *The Schooner Exchange* involved a dispute over the ownership of a French public vessel that had docked in an American port.[88] Writing for the Court, Chief Justice Marshall held that United States courts lacked jurisdiction over the dispute because sovereign states have immunity from suit under established principles of international law.[89]

As Marshall reasoned, the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. "Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction."[90] As a result, a foreign nation could not be sued in United States courts without its consent for events occurring within its own territories.[91]

For Marshall, this principle was accepted by "the whole civilized world" because of the very character of sovereignty: a sovereign nation "is not understood as intending to subject [itself] to a jurisdiction incompatible with his dignity."[92] Thus, as a matter of what the Court later called "grace and comity," American courts were bound to refrain from asserting jurisdiction over another nation for events occurring in that nation's territory.[93]

This early judge-made sovereign immunity policy proved to be an expansive one. Because the Court considered foreign sovereign immunity to be a matter of comity, it deferred for many years to the recommendation of the Executive Branch as to whether immunity

85. *See* Vandenberg, *supra* note 27, at 740.

86. 11 U.S. (7 Cranch) 116 (1812); *see also* Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (describing *The Schooner Exchange* as "the source of our foreign sovereign immunity jurisprudence").

87. *Altmann*, 541 U.S. at 689 (noting that foreign sovereign immunity is not a constitutional requirement).

88. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117.

89. *Id*. at 145, 147.

90. *Id.* at 136.

91. *Id.*

92. *Id.* at 137.

93. Verlinden B. V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).

should be granted,[94] and the Executive Branch invariably recommended immunity for friendly sovereigns.[95] In 1952, however, the Acting Legal Adviser for the Secretary of State, Jack B. Tate, recommended a switch to what he called the "restrictive theory" of foreign immunity under which a foreign sovereign would be exempt from jurisdiction for its public acts but not its private ones.[96] The so-called "Tate letter," however, generated confusion, with the courts generally continuing to adhere to the recommendations of the State Department, which did not follow the restrictive theory consistently.[97] To provide greater clarity, in 1976 Congress enacted the Foreign Sovereign Immunities Act ("FSIA"), which "codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity"[98] and explicitly assigned responsibility for deciding claims of foreign sovereign immunity to federal and state courts.[99] Most notably, the FSIA contained an exception to foreign sovereign immunity for cases involving U.S.-based commercial activities by foreign states akin to those engaged in by private parties.[100]

The application of the FSIA has not been free of controversy. Indeed, as one commentator has noted, it is "confusing even in its title" because it purports to describe the immunity to be granted to foreign sovereigns while its real purpose is to codify *exceptions* to that immunity.[101] In particular, courts have had difficulty fleshing out the somewhat vague language of the commercial activities exception—both in determining whether an activity is sufficiently commercial and whether a commercial enterprise is sufficiently connected with the United States to fall within the exception.[102] The FSIA also leaves ambiguous the question of how to treat private (and sometimes wholly U.S.-based) entities that perform quasi-sovereign functions for sovereign entities, a question that is

94. *See* Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004) (describing the history of the Supreme Court's policy of deference); *Verlinden*, 461 U.S. at 486 (describing the Supreme Court's "consistent . . . defer[ence] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities").

95. *Altmann*, 541 U.S. at 689.

96. *Id.* at 689–90.

97. *Verlinden*, 461 U.S. at 487–88.

98. *Id.* at 488.

99. 28 U.S.C. § 1602 (2000).

100. 28 U.S.C. § 1605(a)(2) (2000).

101. Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT'L L. 675, 675 (2005).

102. *See id.* at 676–77 (describing courts' widespread difficulty in interpreting these two parts of the statute).

discussed in more detail later in this Article.

E. The Process of Mutual Influence

Despite their separate histories, the various forms of sovereign immunity have much in common, from their origins in common law notions of sovereign prerogatives to the continuing mutual influence of each doctrine upon the others. Although some courts at times draw distinctions among the various sorts of sovereign immunity, other courts have shown a surprising tendency to draw on authority construing one sort of immunity when discussing another—often without any comment or qualification at all.[103] This use of one form of immunity to illuminate another has a long history. As previously noted, it is difficult to trace a distinct evolution of the doctrine of federal sovereign immunity because its history has been so intertwined with the immunity granted to states, and courts today continue to treat the doctrines as possessing important symmetries.[104] Likewise, tribal sovereign immunity maps state

103. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 417 (1979) (drawing on and discussing foreign sovereign immunity to decide an issue of state sovereign immunity).

104. *See* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 517–18 (1978) ("[I]n substance [the federal sovereign immunity doctrine] has developed as an almost exact counterpart of Eleventh Amendment-state sovereign immunity doctrines. (In fact, the theory behind the doctrines of state and federal sovereign immunity is sufficiently similar that the reasoning of cases discussing federal sovereign immunity almost always carries over to . . . state sovereign immunity cases . . . and vice versa.)"); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1090 & n.115 (2001) (noting that the Supreme Court often treats the doctrines as symmetrical and citing numerous cases in which the Court has viewed the doctrines as similar or identical in scope). For cases comparing federal and state sovereign immunity, see, for example, *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 553 n.11 (noting that "surely our federal sovereign immunity cases shed great light" on the question of whether state immunity waivers include federal tolling rules); *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000 (D.C. Cir. 1999) (finding jurisdictional status of federal and state sovereign immunity to be similar); *CSX Transportation v. Kissimmee Utility Authority*, 153 F.3d 1283, 1286 (11th Cir. 1998) (finding that "[b]ecause Florida's state sovereign immunity is only immunity from liability, it is analogous to federal sovereign immunity"); *Crump v. Department of Health & Human Services*, No. CIV. A. 92CV336, 1992 WL 456958, at *1 (E.D. Va. Oct. 9, 1992) (noting that "[i]n effect, the doctrine of state sovereign immunity parallels federal sovereign immunity"). *But see* Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the "Seabird", 19 F.3d 1136, 1142 (7th Cir. 1994) (finding that "state sovereign immunity is categorically different from federal sovereign immunity" and refusing to apply federal sovereign immunity exception in the state context). Cases discussing links among foreign, state, and tribal immunity are discussed

sovereign immunity in nearly every particular, with the sole (although significant) exception that tribal immunity has not been found to be constitutionally rooted and hence can be abrogated by Congress at its will.[105]

Although foreign sovereign immunity would appear to be the most distinctive of the immunities, it has had a surprising amount of influence on how the other doctrines, particularly state sovereign immunity, have developed.[106] In particular, the Court's characteristic concerns in its recent line of state sovereign immunity cases, such as state "dignity," echo themes that have long appeared in the foreign sovereign immunity context.[107] Furthermore, courts have found that particular aspects of foreign sovereign immunity (such as waiver) parallel other immunities doctrinally. The Supreme Court has explicitly suggested that foreign and tribal immunity waivers should be guided by similar principles,[108] and lower courts have followed suit in other contexts by using foreign sovereign immunity cases in analyzing the significance of a state "sue and be sued" clause.[109]

This habit of finding similarities among the various doctrines is

in the remaining notes to this paragraph.

105. *See* COHEN'S, *supra* note 74, § 7.05[1][a] (discussing tribal sovereign immunity's common law nature and the extension of *Ex parte Young* doctrine to tribal context); *id.* § 7.05[1][b] (discussing congressional abrogation); *id.* § 7.05[1][c] (discussing tribal waiver). For cases finding links between state and tribal immunity, see, for example, *In re Mayes*, 294 B.R. 145, 149–50 (B.A.P. 10th Cir. 2003) (noting that while "the Supreme Court has distinguished between tribal and state sovereign immunity, it has long recognized that Indian tribal immunity is similar in scope to that enjoyed by the states" and finding Eleventh Amendment law to be "instructive and persuasive in the context of matters against Indian tribes in bankruptcy"); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999) (finding that "the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should [not] extend further than the now-constitutionalized doctrine of state sovereign immunity"); *Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) ("Conceding potential differences between tribal and state sovereign immunity, we note that courts have often used similar language in defining the requirements for waiver of these [Eleventh Amendment state sovereign] immunities."); *Tribal Smokeshop v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council*, 72 F. Supp. 2d 717, 720 (E.D. Tex. 1999) (noting that "tribal sovereign immunity should have the same limits as state sovereign immunity").

106. *See* Field, *supra* note 104, at 517–18.

107. For a well-supported argument to this effect, see Smith, *supra* note 10, at 36–50.

108. *See* C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 421 n.3 (2001).

109. Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 86, 87 (2d Cir. 2001).

particularly significant when courts are asked to expand sovereign immunity or its underlying policies to new situations. Because such cases, virtually by definition, do not turn on narrow applications of sovereign immunity doctrine, courts are more likely to be swayed by broad policy arguments and the underlying justifications for sovereign immunity. In such situations, courts may regard the broad commonalities of the doctrines and their linked historical development as more significant than their current differences.

II. JUSTIFICATIONS FOR SOVEREIGN IMMUNITY DOCTRINES

The previous Section surveyed the judge-made roots of the various sovereign immunity doctrines. Also key to an understanding of those doctrines and their boundaries is an understanding of the rationales that have been advanced for sovereign immunity in the first place. These rationales are particularly important in the marginal sovereign immunity situations that this Article discusses. When courts must decide whether to extend sovereign immunity to an area not controlled by precedent, they are (and should be) guided at least in part by sovereign immunity's underlying functions and purposes.[110] This is particularly true given the absence (at least outside the foreign sovereign immunity context) of independent textual authority governing sovereign immunity's existence and scope.[111] In recognition of this fact, this Section attempts to briefly survey the justifications for a sovereign immunity doctrine that have been offered by courts and academic commentators and to discuss some of the objections to these justifications.

A. The "Sovereign Essentialist" View

The classic justification for providing any sovereign with immunity is that the nature of sovereignty renders it offensive or simply impossible for the sovereign to answer to any humbler authorities.[112] Blackstone expressed this principle memorably in pronouncing that "[t]he king . . . is not only incapable of doing

110. Courts do sometimes—although certainly not in every case—consider policy issues in determining sovereign immunity's applicability to a given situation. *See, e.g.*, Johnson v. Harrah's Kan. Casino Corp., No. 04-4142-JAR, 2006 WL 463138, at *7–8 (D. Kan. Feb. 23, 2006) (weighing policy goals of tribal sovereign immunity in determining whether it should be extended to a tribal entity).

111. *See* Field, *supra* note 104, at 522 (implying that the Constitution provides no clear textual basis for sovereign immunity).

112. *See* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923–24 (2003).

wrong, but even of thinking wrong; he can never mean to do an improper thing."[113] As previously noted, however, the original British common law view of sovereign immunity probably reflected the more mundane fact that, since the King was at the pinnacle of the judicial system, his decisions were unappealable; thus, "the King could do no wrong" only by default, in the same sense that the current Supreme Court cannot technically commit "error" in rendering its decisions.[114]

Nonetheless, Blackstone's words reflect the ease with which the distinction between this practical reality and more substantive notions of sovereign infallibility may become blurred. Furthermore, many theories of sovereign immunity rely on the more practical notion that any attempts to enforce the sovereign's laws against it are simply futile or absurd, as reflected in Holmes's famous defense of sovereign immunity "on 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."[115]

The suggestion that sovereign immunity is rooted in a belief in ultimate sovereign wisdom or invulnerability seems profoundly peculiar to modern democratic sensibilities[116] and has to some extent made sovereign immunity an easy target for its critics. At the same time, the notion that immunity inheres within sovereignty's very nature has been surprisingly persistent.[117] The Supreme Court's post-*Seminole Tribe* decisions, particularly *Alden v. Maine*,[118] have revived this concept in two ways. First, *Alden* relies on the reasoning that the early Constitution, by allowing states to preserve all aspects of sovereignty not explicitly surrendered, necessarily

113. 1 WILLIAM BLACKSTONE, 1 COMMENTARIES *246 (emphasis omitted).

114. Nevada v. Hall, 440 U.S. 410, 415 (1979). An alternative understanding of the phrase sees it as merely precatory, expressing the sentiment that the king must or should not do wrong. *See, e.g.*, Engdahl, *supra* note 28, at 2–5.

115. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Notably, this rationale applies only when a sovereign is sued pursuant to its own law, and not, for example, when a state or tribe is sued under federal law (or when the federal government is sued for violating the Constitution, which arguably derives from the higher authority of "We the people"). Even when a sovereign's own law is at issue, it remains questionable why sovereign immunity should be the default rule applied by courts in the absence of an explicit attempt by the sovereign to exempt itself from the law's reach.

116. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992) (noting the "near unanimous condemnation" for a sovereign immunity doctrine based on a theory that the king can do no wrong).

117. *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 134–39 (1812).

118. 527 U.S. 706 (1999).

incorporates a doctrine of state sovereign immunity[119]—an argument that is meaningless without an initial assumption that immunity is an inherent part of sovereignty (at least as it was understood in the early Republic). Second, the Supreme Court has increasingly invoked the concept of sovereign "dignity" in setting forth its sovereign immunity decisions—a notion that suggests that sovereigns are not like other litigants and are entitled to a special deference and respect.[120]

As archaic as it may seem, the sovereign-essentialist view nonetheless incorporates a few valuable insights about the nature of sovereign immunity. To begin with, it makes explicit something that advocates of sovereign immunity may sometimes be squeamish about saying directly—that to apply a sovereign immunity doctrine is the equivalent, in many respects, of saying that a given sovereign is above the law.[121] That is, to the extent that sovereign immunity somehow flows directly from sovereignty's essential nature, it is presumably because it is either offensive to subject the sovereign to ordinary legal process or impossible in practice to do so—a reality that other sovereign immunity defenses, such as the "public treasury" argument, tend to elide.

Second, the sovereign-essentialist view contains within it a concern (though it is rarely made explicit) for judicial credibility.[122] In other words, it recognizes that sovereign immunity doctrine serves in part to ensure that the judicial branch will not be put in the position of trying to enforce a judgment in the face of resistance by other branches of government.[123] A doctrine that acknowledges the practical powerlessness of the judiciary in such a situation can be said to preserve the authority of the judicial branch by avoiding putting it to the test.

119. *See id.* at 714, 715 (noting that when states entered the union, they reserved "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status" and that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity").

120. For an exploration of the Supreme Court's increased reliance on the "dignity" rationale, see Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 799–806 (2003). As Peter J. Smith has pointed out, the notion that sovereignty and dignity are linked has a much longer history in the international context. *See* Smith, *supra* note 10, at 37.

121. *See In re* Vance, 120 B.R. 181, 189 (Bankr. N.D. Okla. 1990) (associating sovereign immunity with being above the law).

122. *See* Jackson, supra note 62, at 539–40 (arguing that a "prudential basis for . . . sovereign immunity" is that "courts are reluctant to issue judgments that are not going to be enforced").

123. *See* Jackson, *supra* note 62, at 545 & n.99 (noting Congress's power to refuse to pay judgments against the government).

Finally, although the notion of sovereign dignity has often been criticized as silly or meaningless in the state context,[124] there are situations in which it may be appropriate for courts to invoke the concept. Particularly in the case of foreign states and (to a lesser but still important extent) tribes, the notion of sovereign dignity is bound up with international conventions of comity and respect for mutual jurisdictional limits.[125] Moreover, even in cases where such limits must be breached, it may be more appropriately left to the Executive Branch (in the case of foreign policy) or Congress (in the case of tribes) to determine when it is proper to do so. Thus, some sort of sovereign dignity rationale can be useful as a way to protect courts from confrontations with coordinate (or even subordinate) sovereign powers, confrontations that courts may not seek out and may wish to have a device for avoiding.[126]

B. Public Treasury

Especially prior to *Seminole Tribe*, courts frequently justified particular extensions and applications of sovereign immunity by the need to safeguard the public treasury as a general matter or, specifically, as a protection against large or unpredictable demands.[127] The Court has described the effects on the state treasury as the "core concern" of the Eleventh Amendment,[128] which it has seen as motivated, as a historical matter, by the need to protect the resources of indebted states in the wake of *Chisholm*.[129] Perhaps most famously, the Court has invoked the public treasury rationale as a way of explaining why prospective injunctive relief against states is permissible in *Ex parte Young* cases while "retroactive" monetary relief generally is not.[130] Thus, in *Edelman v.*

124. *See, e.g.*, Resnik & Suk, *supra* note 112, at 1946–54; Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1126–27 (2000).

125. *See* Republic of the Philippines v. Pimentel, 128 S. Ct. 2180, 2190 (2008).

126. To some extent, this argument is, of course, linked to the notion that sovereign immunity functions as an abstention device, as discussed *infra*, Part III(B).

127. *See, e.g.*, Morris v. Wash. Metro. Area Transit Auth., 781 F.2d 218, 227 (D.C. Cir. 1986) ("[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency.").

128. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 51 (1994).

129. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (describing the amendment as a response to the "alarm" of "greatly indebted" states at the prospect that they might be subject to federal jurisdiction).

130. Edelman v. Jordan, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily

Jordan, the Court took pains to explain that the past-due benefit payments sought by the plaintiffs (which, the Court found, sovereign immunity precluded them from recovering) might cause "disruptions" in the state welfare program more generally, including the re-allocation of the defined funds the state had already set aside for public aid.[131]

Even as the Supreme Court has focused on more dignitary rationales for sovereign immunity, it continues to at least pay lip service to the principle of protecting state treasuries as well.[132] The principle also has a long history in suits against federal officers, in which the Supreme Court has examined the effect on the public treasury to determine whether the suit is "really" one against the government.[133] More recently, courts have also applied the public treasury rationale in the tribal context.[134]

Many commentators, however, have found the "public treasury" rationale unsatisfying.[135] To begin with, because the various sovereign immunity doctrines are riddled with so many exceptions—generally allowing for injunctions against the sovereign even where damages are not permitted[136]—the rationale simply fails to hold up as a meaningful principle in most cases. A state may spend much more to implement a complicated injunction than it would cost to pay a modest money judgment to a tort plaintiff.[137] Yet sovereign

limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury.") (citations omitted).

131. *Id.* at 665, 666 n.11.

132. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 750 (1999) (noting that damages suits against states may "threaten the[ir] financial integrity").

133. *See, e.g.*, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 715–16 (1949) (discussing a "public treasury" limit on injunctive relief and noting that "[federal] [s]overeign immunity may . . . become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental machinery into play").

134. *See* Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006) ("Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.").

135. *See, e.g.*, Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 647–48 (2007) (noting that the Supreme Court has failed to explain why protection of the public fisc is so important in this context or why it should outweigh the cost of harm to individual victims); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1032–35 (2000) (finding it improbable that actions for damages against states would pose a serious threat to state financial integrity).

136. *See, e.g.*, *Edelman*, 415 U.S. at 677.

137. The "public treasury" rationale is generally invoked in regard to state

immunity exceptions remain focused on the technical type of relief to be granted, not the cost to the state of granting that relief.[138]

Furthermore, even assuming that sovereign immunity saves sovereigns money overall, it is not clear why sovereigns should be able to benefit at the expense of litigants who have genuinely been wronged. While it is true that money judgments cannot be precisely budgeted for in advance, this is true of many other public expenses for which no special provision is made in legal doctrine. In any case, insurance policies and measures to prevent accidents can help to mitigate the uncertainty. Likewise, the litigation process may appear to provide windfalls for individual plaintiffs at public expense—but if the state (or other sovereign) has committed an actionable wrong, why should it be shielded from paying for its harms? Indeed, it is arguably fairer for the public to pay for harms caused by the government rather than to require the victims of such harms to bear their full cost.[139] Thus, waivers of sovereign immunity, such as the Federal Tort Claims Act, may be justified as a way of spreading the burden of paying for injuries more equitably.[140]

As a result of these criticisms, the "public treasury" rationale seems inadequate in itself. It is perhaps best understood as a

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sovereign immunity and, to a lesser extent, federal immunity. Yet to the extent it has or could be used to justify other immunities, similar arguments could be made. Arguably, the rationale is most compelling when applied to tribes because some tribes have such limited resources that a large money judgment could effectively end their ability to function as governments. Yet tribal immunity, like state immunity, is subject to an *Ex parte Young*-style exception for injunctive relief that does not distinguish between expensive injunctions and easily implemented ones. Likewise, in the foreign immunity context, the "nation's treasury" argument provides no principled basis for distinguishing between suits based on commercial activity, which can be heard in American courts, and suits based on public actions (or those not centered on U.S. soil), which cannot. Either sort of suit, of course, has equal potential to cause a foreign country financial ruin.

138. For a sustained attack on the meaningfulness of the *Edelman* distinction, see Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene*,* Breard*, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 4–7 (1998). *See also* Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War Over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2524–25 (2006) (describing *Edelman*'s distinction between retroactive and prospective relief as "fundamentally fictional" and "devious"); Meltzer, *supra* note 135, at 1033 (noting that damages suits add little to the cost to states of ongoing compliance with federal law, which can be enforced through various other means).

139. *See* Gilman, *supra* note 135, at 647–48 (making this argument).

140. *See* Rayonier, Inc. v. United States, 352 U.S. 315, 319–20 (1957) (describing the purpose of FTCA).

variant of the "democratic process" or "judicial competence" rationales discussed below.

C. Sovereign Immunity as a Democratic Safeguard

A variation of the longstanding "public treasury" justification for sovereign immunity is the idea that sovereign immunity offers a protection against the potentially undemocratic effects of private litigation. In this view, the fact that litigation may force public expenditures is not a problem per se.[141] In other words, it will not bankrupt legislatures or otherwise cause a fiscal crisis. Rather, it is a problem because it allocates public funds in a way that is primarily determined by the judiciary, not the democratic process, making it more difficult to abide by the principle of majoritarian rule and to maintain the proper boundaries needed to establish separation of powers.[142]

This point of view has recently emerged as a focus of discussion in debates over state sovereign immunity.[143] In the state context, it has found expression in concerns that federal law damages suits represent a form of commandeering of state judiciaries that runs the risk of interference with internal state democratic processes.[144] The general notion that sovereign immunity serves to promote political accountability, however, has been most consistently expressed in discussions of federal sovereign immunity. Indeed, it has even been suggested (though not by the Supreme Court) that sovereign immunity is a necessary corollary to the vesting of appropriations power solely in Congress, thus providing a constitutional grounding for a federal sovereign immunity doctrine.[145]

141. *See* Meltzer, *supra* note 135, at 1033–35 (disagreeing with this viewpoint and finding it improbable that actions for damages against states would pose a serious threat to state financial integrity).

142. *See* Krent, *supra* note 116, at 1530.

143. *See generally id.*; Meltzer, *supra* note 135.

144. *See* Meltzer, *supra* note 135, at 1030–32 (presenting the viewpoint, despite his disagreement with it, that sovereign immunity is necessary to secure to states political accountability, and noting that *Alden v. Maine* rests in part on that perspective). As Meltzer notes, however, it is highly implausible that state sovereign immunity from suits under federal law makes state-court judges in any way more accountable to the voters for their decisions; state courts are still bound to apply federal law against private actors and in non-damages contexts, and further, even elected state judges are not generally intended to be subject to as close supervision by the voters as are state legislatures. *Id.*

145. *See, e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 802 (2007) ("The view that [federal] sovereign immunity has no constitutional grounding, however, overlooks the Appropriations Clause . . . ."). Rosenthal

An article by Harold Krent articulates perhaps the most comprehensive version of the theory that sovereign immunity protects the democratic process.[146] According to Krent's reasoning, sovereign immunity can be defended as a way to prevent judicial policymaking on issues that should be the proper province of the more democratically responsive legislature.[147] By applying different negligence standards than those set by Congress, for example, courts can effectively second guess policy decisions that are more properly made by the legislature; courts can also wield their power to award damages as an attempt to influence government policies to which they are opposed.[148] Though Krent concedes that some of the same reasoning may also apply where judicial decisions involve private parties,[149] he argues that judicial intervention is of greater necessity when private entities are involved than when the check would be on a particular branch of government, as each branch is subject to majority approval, in itself an effective deterrent to unlawful actions.[150]

Although Krent's argument is specifically applicable to federal sovereign immunity, similar rationales are also relevant to discussions of other forms of sovereign immunity. Nearly identical logic applies to state sovereign immunity from common law tort and contract claims,[151] even though state immunity for violations of federal law—a doctrine that presumably was developed through the democratic process—must be explained through some other rationale. Furthermore, similar issues can be said to exist even in the arguably distinct situations of tribal or foreign sovereign immunity. Even though individual tribes or foreign nations may have different political values relating to public appropriations, a judicial determination of liability nonetheless imposes an arguably illegitimate judicial fiat on a spending decision that should properly be made by the tribe or nation's political branches. (This may be especially true in the case of tribes, given that tribal sovereign immunity is often presented as one of a package of policy measures

also notes that "[m]ost state constitutions contain similar restrictions." *Id.*

146. *See* Krent, *supra* note 116, at 1531.

147. *See id.* at 1533–34.

148. *Id.* at 1537. In the contracts context, Krent argues, somewhat less convincingly, that sovereign immunity is necessary to allow future legislatures to revise contracts entered into by past (and now unaccountable) legislatures in a way that may be more in tune with current popular wishes. *Id.* at 1538.

149. *Id.* at 1539.

150. *Id.* at 1532, 1538.

151. Further, as Rosenthal points out, many states have state constitutional provisions similar to the Appropriations Clause. Rosenthal, *supra* note 145, at 802.

designed to protect tribal autonomy and the development of robust tribal institutions.[152])

Yet the democratic-process theory is also subject to criticism. Taken to its extreme, it might suggest that the judiciary has no role in policing public spending decisions. This is obviously not the case; it is part of the ordinary judicial role, for example, to proclaim a particular expenditure unconstitutional (under either state or federal constitutions) or to reconcile two spending bills that appear to be incompatible.[153] It is difficult to make a principled distinction between, say, a litigant who is wronged by a public expenditure that violates the Establishment Clause and one who is harmed more mundanely by negligent state conduct; the role of the judiciary in redressing the harm to the plaintiff would seem equally undemocratic (or equally compatible with the democratic process, depending upon one's viewpoint) in both cases.[154] Yet sovereign immunity doctrine would allow the first suit while barring the second.

Furthermore, the democratic-process rationale to some extent confuses law's substance with the way in which it is enforced. Despite courts' role in adjudicating individual cases and determining the amount of individual judgments, the law's substantive content is always under the legislature's control. Legislatures can always, for example, react to excessive judgments or judicial abuses in a particular area of law by scaling back the substantive liability or damages that courts are permitted to

152. *See, e.g.*, Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) ("Indian tribes enjoy immunity because they are sovereigns predating the Constitution . . . and because immunity is thought necessary to promote the federal policies of tribal selfdetermination [sic], economic development, and cultural autonomy.") (citations omitted).

153. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) (noting that Congress's spending power is subject "to several general restrictions articulated" by the Court).

154. Krent would argue that the tort claim does threaten the democratic process more than the Establishment Clause claim because judicial review of constitutional matters is an integral part of the process of political checks and balances in constitutional matters, but has no such justification in tort and contract actions. Krent, *supra* note 116, at 1535. While this may be true, it is also the case that a constitutional determination by a court is a much greater intrusion on the democratic process—voiding a substantive policy decision that may have been made by the legislature with great deliberation, and invalidation of which may have far wider-ranging effects. Krent's argument fails to account for the fact that judicial involvement in tort or contract matters is, while perhaps less structurally necessary, also less disruptive. Furthermore, it might be argued that fairness to individual litigants who have been harmed is *also* a necessary check on abuses of power by the legislative branch.

impose.[155] The only element that sovereign immunity adds to the equation is to permit governments to exempt themselves from a liability or obligation to which non-government entities are subject. It is questionable whether legislatures need this additional device to prevent the judiciary from encroaching on their power. Certainly the fact that the federal government has so extensively waived its sovereign immunity suggests that such "protections" may be unnecessary.

Nonetheless, the democratic-process rationale may be a meaningful guidepost by which to determine whether sovereign immunity protections are desirable in marginal cases. It is worth remembering that sovereign immunity does, in some sense, represent a transfer of power between branches of government, and in certain cases where widespread public involvement in the decision making is desirable (or, as in the case of tribes, where nurturing nascent democratic institutions is particularly important) sovereign immunity may serve a useful function. Thus, while the democratic-process rationale may not provide an overall justification for sovereign immunity's existence, it can prove useful in determining whether sovereign immunity should be extended to a given situation.

D. Judicial Competence

Questions of the judiciary's role, both as a whole and in particular cases, are at the heart of many of the concerns underlying sovereign immunity. Structurally, sovereign immunity tends to give more power to the political branches of government. In individual cases, it may function almost as an abstention or political question doctrine, allowing courts to punt difficult issues to other bodies arguably more qualified to decide them (or at least better able to absorb the controversy surrounding them).[156]

As noted above, it has been argued that sovereign immunity serves as a safeguard of the democratic process—an argument that is subject to the criticism that the sort of jurisdiction courts exercise in sovereign immunity cases is no different from courts' broader exercise of judicial review and other "undemocratic" powers that we nonetheless consider to play a valuable role in ensuring fairness and checking untrammeled legislative power.[157] A related but distinct argument, however, is that sovereign immunity helps to steer courts

155. *See, e.g.*, Arbino v. Johnson & Johnson, 880 N.E.2d 420, 432–33 (Ohio 2007) (holding that a statute limiting tort liability was a constitutional exercise of legislative power).

156. *See* Krent, *supra* note 116, at 1530, 1531.

157. *Id.*

away from cases they simply lack institutional competence to decide. In particular, administering the minutiae of state, federal, and tribal budgets might be better left to those entities' legislative bodies, which can grasp the entire fiscal picture and balance the competing needs of injured constituents, routine expenses, and long-term funding needs.[158] A slightly different—but perhaps even stronger—argument might be made in the case of foreign sovereign immunity. Foreign relations are the traditional domain of the Executive Branch (and perhaps, to some extent, the Legislative) and an area in which the judiciary has been particularly reluctant to interfere because of its lack of experience and expertise.[159] Thus, one might argue, granting sovereign immunity to a foreign power that has caused harm in the United States does not mean that its acts will not have consequences. It simply assigns the role of deciding upon repercussions to the branches most qualified to choose them wisely and with a complete grasp of the larger picture. Thus, under this theory, sovereign immunity may play a role akin to abstention in prudential or nonjusticiability grounds as embodied in the political question doctrine.

Courts have not, in fact, ignored the similarities between sovereign immunity and the justiciability doctrines. Such rationales are most frequently invoked in the foreign sovereign immunity context, where courts have deliberately chosen to circumscribe the judicial role in deference to the political branches.[160] At times, however, courts have suggested something similar in other contexts. In *Principality of Monaco v. Mississippi*, for example, the Supreme Court found that a suit against a state was barred by the constitutional "postulate" that cases to be decided by the federal courts must be of a "justiciable character."[161] Thus, the Court

158. Monaghan, *supra* note 71, at 124 (discussing a related version of this rationale). According to Monaghan, "a number of scholars have posited that sovereign immunity is necessary to prevent excessive judicial interference with executive discretion." *Id.* He adds that "[t]he crux of this argument is that the government could never accomplish its work—at least democratically—if its citizens were continually forcing it into court to account for its actions." *Id.*

159. *See* Krent, *supra* note 116, at 1536 n.16.

160. Smith, *supra* note 10, at 97. Smith offers the following rationale:

> To preserve their limited role in foreign relations and in recognition of the damage to harmonious relations that could result from a judicial declaration that a foreign nation is amenable to suit, the courts will refrain from finding that a foreign nation is subject to suit unless Congress has clearly abrogated the nation's presumptive immunity. This self-imposed limitation on judicial power in the context of foreign state sovereign immunity is a means of preserving the exclusive authority of the political branches over the field of foreign relations.

Id.

161. 292 U.S. 313, 322 (1934).

suggested, sovereign immunity rendered the case nonjusticiable.[162] Likewise, in fashioning common law immunities for federal contractors—a line of cases discussed in more detail in the next Section—the Court has relied heavily on the judicial competence rationale, declining to "second guess" federal specifications requiring "the balancing of many technical, military, and even social considerations."[163]

In addition to these abstention-like rationales for the doctrine in general, the possibility also exists that sovereign immunity could be used as a mechanism to avoid deciding individual cases in extraordinary circumstances. As will be discussed in the following Section, some cases in which courts have applied sovereign immunity in marginal situations may reflect the court's suspicion that the particular case involves complicated political issues that it is incompetent—or, at any rate, not the best party—to decide.[164] In many cases, the factors leading the court to make such a decision are understandable. By definition, sovereign immunity cases involve governments—sometimes, indeed, on more than one side of the case. As a result, these cases often also feature complicated, hot-button issues that may arguably be better resolved by the elected branches of government. Indeed, for such reasons, courts have noted resemblances between the more remote applications of sovereign immunity and the political question doctrine.[165]

Although such comparisons have a certain logic, the equation between sovereign immunity and the political question doctrine is in other ways questionable. While it may be fair to say that there are certain questions that might be more efficiently decided by the legislature or the executive, there is also a limit to the amount of attention and fair consideration that these branches can provide to individual litigants. To impose a broad policy of sovereign immunity

162. Smith, *supra* note 10, at 98, takes this interpretation of the case. He argues that the fact that the case involved a foreign state was a factor in the Court's decision to consider the immunity issues in terms of justiciability. *Id.* Other commentators have argued, however, that courts have linked state sovereign immunity requirements in federal court more broadly to questions of justiciability. *See generally* Florey, *supra* note 53.

163. Boyle v. United Techs., 487 U.S. 500, 511 (1988).

164. *See id.*; *infra* notes 166, 187; *see also infra* note 281 (arguing that the Supreme Court's recent decision in *Republic of Philippines v. Pimental*, 128 S. Ct. 2180 (2008), relied on a broad understanding of foreign sovereign immunity to achieve essentially the same effects as a forum non conveniens dismissal).

165. *See* McMahon v. Presidential Airways, 502 F.3d 1331, 1351 (11th Cir. 2007) (noting that the judicially created *Feres* exception to the federal government's waiver of federal sovereign immunity "embodies concerns about justiciability and separation of powers" and is "thus related to the political question doctrine").

as a check on the judiciary is also to eliminate the possibility of doing retail rather than wholesale justice in a broad swath of cases. Indeed, one might question whether the legislature itself, a repository of supposed competence to handle sovereign immunity cases, is really ready to take on such a responsibility.[166]

Furthermore, even if the judiciary is incompetent to decide certain matters involving sovereigns, it is unclear why sovereign immunity should be the preferred device for disposing of such cases. After all, courts have an array of well-developed devices for avoiding jurisdiction in cases that, for one reason or another, appear not to fall within the proper province of the judiciary.[167] When such devices are available, it is hard to see why courts should fall back on a new and untested procedure. Even more important, when such devices are *not* available, strong arguments exist that courts should not attempt to shirk jurisdiction. Any sort of abstention device, of course, entails tradeoffs. Although when used properly, such devices allow the judiciary to focus its efforts on determinations it is best qualified to make, they also inevitably result in the potential for arbitrary application and unfairness to individual litigants. Such collateral harms tend to be particularly acute when courts rely on sovereign immunity as their preferred mechanism for avoiding difficult issues—particularly because courts are rarely self-conscious about their decision to press sovereign immunity into this unaccustomed role—and, as a result, seldom give adequate weight to the countervailing needs of individual litigants.

Nonetheless, it is possible that in certain cases—particularly those involving multiple governments, or complicated and unsettled issues of state, tribal, or foreign law—sovereign immunity fulfills a useful avoidance function for which there exists no satisfactory equivalent. Furthermore, courts could perhaps minimize the

166. As previously observed, it is notable that the federal government has chosen to waive sovereign immunity extensively, and that many states have followed suit. This casts some doubt upon the notion that the legislature regards itself as uniquely competent to decide the sort of cases that are removed from the courts by virtue of sovereign immunity (or at least that the legislature is willing to take on such a responsibility).

167. The political question doctrine is perhaps the most obvious and straightforward mechanism for courts to transfer decision-making responsibility back to the legislature. *See* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1461 (2005) (defining the political question doctrine as a ruling that a particular constitutional issue "should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches"). Arguably, however, sovereign immunity nonetheless has a place in returning to the political process issues that are not of constitutional dimension or that otherwise fail to fall within the political question doctrine's contours.

drawbacks of using sovereign immunity in this fashion by explicitly balancing the needs of litigants against the limits of judicial competence. These issues will be explored in greater detail in Section III.

III. PENUMBRAL SOVEREIGN IMMUNITY

As previously described, sovereign immunity is primarily a judicially created doctrine and thus not amenable to legislative revision.[168] What has emerged as a result of this fact is that the margins of sovereign immunity doctrine have been unusually active.[169] In a variety of situations, courts have been asked to apply sovereign immunity in ways that are outside the boundaries of the traditional doctrine, and frequently courts have been willing to do so. This Section attempts to look at these cases and how courts have explained decisions to extend sovereign immunity beyond the classic contours of the doctrine in light of various rationales for the doctrine. This Article will refer to this concept as "penumbral sovereign immunity."

As a starting point, it is important to clearly define what kinds of situations a notion of penumbral sovereign immunity should encompass. For purposes of this Article, I use this term to capture cases that do not fit the classic contours of a suit barred by sovereign immunity—that is, a suit for monetary relief directly against an unconsenting sovereign[170]—but in which the sovereign's interests, or the rationales underlying sovereign immunity, nonetheless influence the court's decision making. This seemingly simple definition is, however, complicated in the sovereign immunity context because the boundaries of "classic" sovereign immunity are not always clear. For example, various exceptions to sovereign immunity rest on the legal fiction that government officers, even acting in their official capacity, are not the same as the sovereign, and thus may be named in suits for injunctive relief without

168. Of course, Congress could in theory take on a greater role in defining the contours of sovereign immunity (at least for forms of immunity other than state sovereign immunity, where at least since *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Congress's role has been limited by the Constitution). By tradition and convention, however, Congress has tended to leave sovereign immunity questions to the courts. This may be true even when the Supreme Court explicitly invites Congress's involvement, as it did, for example, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 759 (1998).

169. *See infra* text accompanying notes 176–78.

170. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 663 (1974) (applying sovereign immunity to "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury").

running afoul of the doctrine.[171] Moreover, exceptions exist even to these exceptions. For example, courts may deem a suit nominally against a state officer to be one "actually" against the state (and hence barred) if it demands expenditure of funds from the public treasury.[172] Thus, determining which suits do or do not fall within sovereign immunity's traditional boundaries is not always a simple matter.

Despite these qualifications, however, it is possible to say clearly that, even under the broadest possible understanding of the traditional sovereign immunity doctrine, certain kinds of suits—such as those that are neither against the sovereign nor against its officers—fall clearly outside its boundaries. Likewise, nothing in sovereign immunity doctrine itself dictates that courts should make exceptions to everyday procedural rules—such as the way in which necessary parties are treated or the application of res judicata—simply because an immune sovereign may be tangentially affected.[173]

The aim of this Section is to provide a brief sketch of those situations in which issues of extending the application of sovereign immunity doctrine have arisen most frequently. This Section looks at three situations in which lower courts have significantly extended sovereign immunity beyond its traditional bounds: first, extension of sovereign immunity to entities distinct from (although perhaps closely tied to) the sovereign itself; second, dismissal under Rule 19 of cases that, while not directly against the sovereign, are likely to have the effect of forcing the sovereign into litigation if it wishes to defend its interests; and finally, use of sovereign immunity to override the traditional principles of res judicata.

The examples discussed in this Section are instances in which courts have sought to protect sovereign prerogatives in areas where no reasonable argument can be made that sovereign immunity, by its strict terms, mandates special treatment of the case. Such cases represent applications of penumbral sovereign immunity in the strictest sense—cases in which courts have applied the policies underlying sovereign immunity to novel situations in which the doctrine ordinarily would not apply.[174] It is important to note, however, that some battles over sovereign immunity's scope that take place more clearly within the boundaries of conventional sovereign immunity doctrine also illustrate a similar drive toward

171. *See* Davis, *supra* note 10, at 387–88.

172. *See, e.g.*, *Edelman*, 415 U.S. at 663 (holding that state sovereign immunity bars "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury").

173. *See infra* text accompanying notes 230–32, 295–99.

174. *See, e.g.*, *supra* note 172.

expansion of the doctrine into new areas.[175] In the past few years, lower courts have pushed the edges of the doctrine in many ways—for example, by seeking to limit the extent to which federal courts may enforce consent decrees against immune states,[176] by mandating dismissal of entire cases when one claim is found to be barred by sovereign immunity,[177] and by requiring sovereign immunity issues to be decided before merits questions.[178] Most of these cases hew somewhat more closely to the traditional boundaries of sovereign immunity than the cases discussed here in more depth.[179] In other words, these cases involve broad applications of existing doctrine rather than efforts to extend sovereign immunity wholesale to a new class of cases. Although the Supreme Court has reversed or cast doubt upon many of these cases[180] (while, by contrast, either ignoring or approving the developments discussed in this Section), it is nonetheless significant that the cases described here represent only a partial portrait of the ways in which courts have attempted to extend sovereign immunity doctrine, suggesting that the trend is a pervasive one and one that has persisted even in the face of intermittent negative signals from the Supreme Court.

175. *See, e.g.*, *infra* note 186 and accompanying text.

176. *Compare* Jeremy Wright, *Federal Authority to Enforce Consent Decrees Against State Officials*, 6 TEX. F. ON C.L. & C.R. 401, 403–17 (2002) (describing the evolution of Fifth Circuit jurisprudence on this issue), *with* Frew v. Hawkins, 540 U.S. 431 (2004) (rejecting much of the Fifth Circuit's approach).

177. *See* Schacht v. Wis. Dep't of Corr., 116 F.3d 1151, 1152 (7th Cir. 1997), *vacated*, 524 U.S. 381 (1998).

178. *See, e.g.*, Humane Soc'y of U.S. v. Clinton, 236 F.3d 1320, 1326 (Fed. Cir. 2001); Seaborn v. Fla. Dep't of Corr., 143 F.3d 1405, 1407 (11th Cir. 1998). The extent to which this approach is in keeping with Supreme Court precedent remains unclear. *See* Florey, *supra* note 53, at 1419–21.

179. For example, in *Lelsz v. Kavanagh*, 807 F.2d 1243, 1245 (5th Cir. 1987), the case providing the foundation for *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *rev'd sub nom*, *Frew v. Hawkins*, 540 U.S. 431 (2004), the Fifth Circuit believed itself to be engaged in a fairly straightforward application of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), which holds that sovereign immunity bars federal courts from enjoining state violations of state law. In *Schacht*, the Seventh Circuit believed itself to be applying basic principles of removal jurisdiction, in which the presence of one claim over which the federal court lacks jurisdiction precludes removal of the entire case. *Schacht*, 116 F.3d at 1152. Finally, courts' confusion over ordering of sovereign immunity and merits claims stems from confusion over whether (and, if so, in what way) sovereign immunity is a jurisdictional doctrine and thus, per Supreme Court dicta, subject to being heard before merits claims. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778–79 (2000) (suggesting in dicta that it was proper to treat sovereign immunity issues before merits ones, since "[q]uestions of jurisdiction, of course, should be given priority").

180. *See Frew*, 540 U.S. at 442; *Schacht*, 524 U.S. at 392–93.

A. Derivative Immunity

For many years, courts have under some circumstances recognized a form of immunity—sometimes, but not always, described as "derivative sovereign immunity"—for individuals acting in an official capacity on behalf of a sovereign government.[181] Such cases rest on the principle that an individual may act in a way so closely associated with government works and policy that he becomes, in effect, a government agent.[182] Thus, courts have recognized "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity."[183] In *Yearsley v. W. A. Ross Construction Co.*,[184] for example, the Supreme Court held that a private contractor who constructed dikes on the Missouri River pursuant to a contract with the United States was entitled to sovereign immunity from suit for erosion on the plaintiff's land. The Court held that because the contractor had not exceeded authority validly conferred on him by the United States, there was "no liability on the part of the contractor for executing [the government's] will."[185]

The result in *Yearsley* is fairly unremarkable under ordinary principles of respondeat superior. In more recent cases, however, courts have extended considerably further the notion that private entities should share in the protections of the governments with which they do business.[186] Thus, in *Boyle v. United Technologies*, the Court held that federal military contractors could not be sued under state law for defects in military equipment produced pursuant to "reasonably precise specifications" based on the theory that to allow such liability might undermine federal interests by forcing contractors to satisfy perhaps-incompatible federal and state requirements simultaneously.[187] The Court rooted its holding in federal common law, not sovereign immunity (indeed, the majority opinion does not once use the term "sovereign immunity").[188]

181. *See, e.g.*, Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (holding that a corporation, under the authority of Saudi Arabia, was entitled to derivate sovereign immunity).

182. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 500 (1988) (holding that in areas of "uniquely federal interests," such as the procurement of military equipment, federal law immunizing government contractors trumps state law due to "identifiable federal policy or interest").

183. *Butters*, 225 F.3d at 466.

184. 309 U.S. 18, 21–22 (1940).

185. *Id.* at 20–21.

186. *See, e.g.*, *Boyle*, 487 U.S. at 505–06.

187. *Id.* at 509, 511–12.

188. *Id.* at 504–05. By contrast, the dissent saw the majority opinion

Nonetheless, because the Court's decision rested heavily on the policies underlying the Federal Tort Claims Act and on Congress's decision, in the Act, not to waive immunity for claims based on so-called "discretionary functions,"[189] the basic effect of *Boyle* is to extend such discretionary function immunity beyond the federal government to private parties who work for it. Indeed, *Boyle* can be seen, in some ways, as the archetypal formulation of the penumbral immunity concept. As the Court noted, "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[190] In other words, the Court suggested, some doctrine analogous to sovereign immunity should apply to bar liability against third parties in situations where permitting a suit to go forward might have consequences similar to allowing a suit against the government.

In some ways, *Boyle* is a significant expansion of the notion of sovereign immunity because it relies on a fairly narrow exception to a statute that is otherwise a broad *waiver* of federal sovereign immunity as the basis for extending sovereign immunity to entities completely outside the government.[191] Looked at another way, however, the principles underlying *Boyle* can potentially be fairly closely cabined. If *Boyle* is viewed against the backdrop of two factors peculiar to the federal government—first, that the federal government has very extensively waived its immunity; second, that it purchases goods extensively from contractors—then it can be seen as simply establishing parallel treatment of the government and those who work closely with the government.[192] For the Court to

explicitly as permitting government contractors to "share the Government's [sovereign] immunity from state tort law." *Id.* at 528 (Brennan, J., dissenting). Interestingly, lower courts have dismissed suits against military contractors pursuant to neither sovereign immunity nor federal common law but to the political question doctrine—highlighting the resemblances between principles of nonjusticiability and broad uses of sovereign immunity to bar consideration of a suit. *See* Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637, 638 (S.D. Tex. 2006); Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1278 n.1 (M.D. Ga. 2006). In *McMahon v. Presidential Airways*, 502 F.3d 1331, 1351 (11th Cir. 2007), the Eleventh Circuit (while rejecting the application of either under the circumstances of the case at hand) drew explicit parallels between the political question doctrine and the judicial extension of federal sovereign immunity established in *Feres v. United States*, 340 U.S. 135 (1950), noting that the rationales for the two doctrines "overlap and reinforce each other."

189. *Boyle*, 487 U.S. at 512–13.

190. *Id.* at 512.

191. *Id.* at 511.

192. *See id.* at 512.

have decided the case any other way, in other words, might have created undesirable incentives for the government to manufacture products itself rather than contracting them out.[193] Whether or not one finds this explanation satisfactory, it at least provides a basis for distinguishing the situation of federal military contractors from that of suppliers of any goods or services to any government under any circumstances.

At the frontiers of *derivative immunity*, however, lower courts have construed the logic underlying *Boyle* as a much broader license to extend sovereign immunity to private parties, including non-military federal contractors, providers of services to the federal government, and contractors who serve foreign governments.[194] The extent to which *Boyle* applies outside the military context—and even to arguably distinguishable military situations, such as that of contractors who provide services rather than equipment—remains unclear. The latter question has received renewed attention in the wake of the Iraq War and the growing number of efforts to sue private contractors providing security services in Iraq.[195] Although the Supreme Court has not directly extended *Boyle* to nonmilitary situations, the rule in many (but not all) circuits is that the decision applies to all government contractors.[196] In many cases, lower courts have explicitly invoked the notion of sovereign immunity even where

193. *See id.* at 511–12 (suggesting this rationale).

194. *See, e.g.*, McMahon v. Presidential Airways, 502 F.3d 1331, 1345 (11th Cir. 2007) (suggesting that courts would recognize derivative immunity for common law agents under appropriate circumstances where such immunity was "affirmatively justified"); Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1447 (4th Cir. 1996) (finding that governmental immunities should be extended to private contractors in circumstances "where the public interest in efficient government outweighs the costs of granting such immunity"); Alicog v. Saudi Arabia, 860 F. Supp. 379, 385 (S.D. Tex. 1994), *aff'd*, 79 F.3d 1145 (5th Cir. 1996) (finding American security guards to be protected by Saudi Arabia's sovereign immunity).

195. *See* Posting of Laura Dickinson to Tort Liability for Military Contractors, http://balkin.blogspot.com/2007/10/tort-liability-for-military-contractors.html (Oct. 7, 2007, 21:44 EST); *see also* Paul Taylor, *We're All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. CIN. L. REV. 1595, 1602 (2007) (urging legislative expansion of the contractor defense as a response to the need to fight terrorism and the threat of a flu pandemic).

196. *See, e.g.*, Carley v. Wheeled Coach, 991 F.2d 1117, 1123 (3d Cir. 1993); Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986); Burgess v. Colo. Serum Co., 772 F.2d 844, 846 (11th Cir. 1985). *But see In re* Haw. Fed. Asbestos Cases, 960 F.2d 806, 810, 812 (9th Cir. 1992) (finding that supplier of nonmilitary asbestos insulation could not assert the defense and noting that "[t]he *Boyle* Court repeatedly described the military contractor defense in terms limiting it to those who supply military equipment to the Government").

the *Boyle* majority did not.[197] As the Fifth Circuit has explained, "[t]he rationale behind the defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable."[198]

In perhaps the most notable and sweeping case, the Fourth Circuit has applied *Boyle*-like principles in the context of the FSIA—a context in which the expressed rationale of the *Boyle* court (a mandate to create federal common law based on perceived conflict between congressional policies and state law) certainly does not apply.[199] The case in question, *Butters v. Vance International, Inc.*, involved a suit by an employee against her employer, Vance International, alleging gender discrimination.[200] Vance was a Virginia-based company that provided security services to corporations and governments.[201] Butters, who had served at will as a security agent for members of the Saudi royal family, was initially recommended for a full rotation, then denied it after Saudi officers told Butters's supervisors at Vance that the assignment of a woman to such a post was contrary to Islamic law and to the wishes of the royal family.[202] The Fourth Circuit affirmed the district court's ruling that Vance was immune from suit under the FSIA because Vance's client, the Kingdom of Saudi Arabia, was responsible for Butters not being promoted.[203]

The Fourth Circuit's opinion is notable for the fact that, as justification for this result, it relied on a view of sovereign immunity not as a narrow or technical doctrine, but as a broad tool for securing sovereign prerogatives.[204] Rejecting the plaintiff's argument, which observed that the conduct in question was "commercial activity" not covered by the FSIA, the court first held "a foreign sovereign's decision as to how best to secure the safety of its leaders" was "quintessentially an act 'peculiar to sovereigns.'"[205] The Fourth Circuit then held that, because Vance was responding to the

197. *See, e.g.*, Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000); Tate v. Boeing Helicopters, 55 F.3d 1150, 1157 (6th Cir. 1995) (holding that the government contractor defense applied to failure to warn claims where government employees exercised discretion by approving a warning for users).

198. Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1045 (5th Cir. 1984) (en banc).

199. *Butters*, 225 F.3d at 466.

200. *Id.* at 464.

201. *Id.*

202. *Id.*

203. *Id.* at 466–67.

204. *Id.* at 465.

205. *Id.*

Saudi government's orders, its conduct in failing to promote Butters was protected by the FSIA even though Vance was not an arm of the Saudi government.[206] As the court held:

> Sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental functions. This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. . . . To abrogate immunity would discourage American companies from entering lawful agreements with foreign governments and from respecting their wishes even as to sovereign acts. Under the circumstances here, imposing civil liability on the private agents of Saudi Arabia would significantly impede the Saudi government's sovereign interest in protecting its leaders while they are in the United States.[207]

In its protection of the "public interest" accompanying "the exercise of certain governmental functions," the court noted, "FSIA immunity presupposes a tolerance for the sovereign decisions of other countries that may reflect legal norms and cultural values quite different from our own."[208]

The result in *Butters* has been criticized as an unwarranted extension of the FSIA without justification in the statute's text or legislative history.[209] But it is as a common law functional expansion of sovereign immunity that *Butters* is most interesting. According to the conventional definitions of sovereign immunity, the *Butters* result is hard to justify. The court exempted from liability a private party that had no structural connection to the Saudi government and no obligation to do business with it.[210] The Saudi government was not a party and there was no danger that continued prosecution of the suit would have risked subjecting the Saudi government to inappropriate American jurisdiction or even insulting Saudi dignity (except in the highly attenuated sense of imposing a standard of conduct on an American contractor that might be inconsistent with Saudi law).[211]

The result in *Butters* is instead only understandable if one

206. *Id.* at 466.

207. *Id.*

208. *Id.* at 466–67.

209. *See* Abigail Hing Wen, Note, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1553–54 (2003).

210. *Butters*, 225 F.3d at 466.

211. *Id.* at 464.

conceives of sovereign immunity as creating a zone in which a sovereign should be free to pursue its interests without interference from the judicial branch. Whereas the traditional understanding of sovereign immunity sees the doctrine's apparent toleration of sovereign lawlessness as the unfortunate price of the desire not to subject the sovereign to the affront of litigation, *Butters* seems to affirm lack of legal accountability as a positive attribute of sovereign immunity.[212] It is consistent with the logic of *Butters* to say that not only should a sovereign not be hailed into court to answer for its conduct, but that legal proceedings should be halted if they might pressure the sovereign to change its conduct or if they might have the indirect effect of causing the sovereign prejudice.[213] In *Butters*, imposing liability on Vance would have required Saudi Arabia to conduct certain core government functions in accordance with American law or else stop using American security services.[214] Under the strong version of sovereign immunity doctrine that *Butters* announces, the sovereign should not be put to such a test.

To the extent that *Boyle* may be seen as a case about derivative sovereign immunity, *Butters* represents a significant expansion of the principles underlying it. The reasoning of the two cases is, of course, clearly similar in some respects (even though, notably, the Fourth Circuit chose not to cite *Boyle* directly).[215] Nonetheless, the differences between the two cases are also significant. Unlike the *Boyle* Court, which cast its decision as a matter of federal common law rather than sovereign immunity, the Fourth Circuit explicitly embraced an expansive view of sovereign immunity's role.[216] Thus, where the *Boyle* Court relied on the need to promote specific federal interests and explicitly alluded to such factors as the likelihood that the federal government would be charged higher prices if suits against contractors were permitted to go forward,[217] the Fourth Circuit presumably was not seeking to advance Saudi Arabia's employment policies per se.[218] Rather, *Butters* takes as a given that one of the functions of sovereign immunity is to enable the sovereign to act more freely in pursuing its desired ends—whatever those ends

212. *Id.* at 467.
213. *See id.* at 465.
214. *Id.* at 466.
215. *Id.*
216. *Id.* at 467.
217. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 511–12 (noting that "[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs").
218. *Butters*, 225 F.3d at 467.

may be—and sees the role of the courts as expanding sovereign immunity where necessary to allow it to serve that function.[219] Were courts to embrace this understanding of sovereign immunity more widely, of course, the contours of the doctrine could be significantly widened and transformed.

B. The Rule 19 Cases

In a different context, courts have already gone a long way toward embracing the *Butters* court's functional understanding of sovereign immunity—although often with little, if any, self-consciousness about what they are doing. In the past couple of decades, a large body of case law has sprung up in which courts have chosen to dismiss litigation following a determination that some sovereign entity is an "indispensable party" under Rule 19 of the Federal Rules of Civil Procedure.[220] These cases represent something of an anomaly in both sovereign immunity doctrine and American procedure as a whole. In the typical case, there is no question that the court has jurisdiction over the parties and subject matter; dismissal will have unusually harsh consequences for litigants, generally depriving them of any remedy in any forum; and, absent dismissal, the sovereign party would likely have the opportunity to intervene to protect any of its interests that might be at stake.[221] Nonetheless, in such circumstances, courts routinely and often summarily order dismissal.[222]

Because the operation of Rule 19 is rather arcane subject matter for non-proceduralists, a brief explanation is in order. Rule 19 represents "an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a lawsuit."[223] Under Rule 19(a), courts must join certain so-called "persons to be joined if feasible" if they are subject to service of process and their joinder will not deprive the court of jurisdiction over the subject

219. *Id.* at 466.

220. *See, e.g.*, Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1161–63 (9th Cir. 2002).

221. *See* Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975).

222. *See, e.g.*, *Dawavendewa*, 276 F.3d at 1163 (holding that the Navajo Nation was an indispensable party whose absence required dismissal of the suit); Kickapoo Tribe of Indians in Kan. v. Babbitt, 43 F.3d 1491, 1496–1497 (D.C. Cir. 1995) (holding that the State was an indispensable party to the suit and remanding to the district court with instructions to vacate an earlier judgment).

223. MISS. R. CIV. P. 19 cmt. Well prior to its codification in the Federal Rules, the concept of indispensable parties had roots in equity practice dating back at least as far as the eighteenth century. *See* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 748 (1987).

matter of the action.[224] Such persons were originally described as "necessary" parties and still are in many court opinions, though the terminology is confusing because their presence is not strictly necessary, but merely desirable for the action's continuance.[225] Under Rule 19(b), if such persons cannot be joined, the court must determine whether it is possible to proceed "in equity and good conscience" without them; if not, the action must be dismissed.[226] A party without whom the action cannot proceed is known as an indispensable party.[227]

Under the current version of Rule 19, courts undertake a three-part inquiry to determine whether a party is indispensable, guided at each stage by factors enumerated in the rule's text and elaborated upon in case law. First, courts consider whether the absent party is "necessary" under Rule 19(a)—in other words, whether it is a "person having an interest in the controversy, . . . who ought to be made [a] part[y]."[228] If the court finds the absent party to be "necessary," it must then undertake the second step of Rule 19 analysis—determining whether it is feasible for that party to be joined.[229] If joinder is feasible, the court's analysis has ended.[230] But if it is not, the court must then determine whether that party's presence is indispensable: in other words, whether the party has an "interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[231] Again, Rule 19

224. FED. R. CIV. P. 19(a).

225. The word "necessary" is thus a "term of art in Rule 19 jurisprudence" that should be understood as meaning something more like "desirable." *See* EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005) (alteration in original).

226. FED. R. CIV. P. 19(b).

227. *Peabody*, 400 F.3d at 779–80.

228. *Id.* at 779 (quoting Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854)). At this stage in the inquiry, Rule 19 directs that courts consider one of two criteria in determining whether an absent party should be joined:

> [W]hether in the person's absence complete relief cannot be accorded among those already parties or . . . [whether] the person claims an interest relating to the subject of the action and . . . disposition of the action in the person's absence may (i) as a practical matter impair . . . the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or . . . inconsistent obligations.

FED. R. CIV. P. 19(a).

229. FED. R. CIV. P. 19(a).

230. *See id.* (dealing with joinder when feasible, Rule 19(a) is as far as the court goes unless the joinder is not feasible, then Rule 19(b) is needed).

231. *Peabody*, 400 F.3d at 780 (quoting *Shields*, 58 U.S. at 139). Thus, as

prescribes the factors courts must consider: the extent to which a judgment rendered in the person's absence would be "prejudicial to the person or those already parties"; the extent to which the court can shape relief to lessen such prejudice; whether a judgment rendered in the person's absence will be adequate; and whether the plaintiff would have an adequate remedy if the case is dismissed.[232] In *Provident Tradesmens*—the Supreme Court's only comprehensive pronouncement on the way in which the Rule 19 factors should be applied—the Court made clear that these criteria are to be interpreted practically and flexibly.[233]

In general, courts are reluctant to dismiss an action entirely on the grounds that a party is indispensable, especially if there is no other forum in which the case can be brought.[234] To be sure, certain situations exist in which courts routinely order dismissal—courts typically dismiss contract actions if a party to the contract is absent,[235] for example, or patent and copyright actions if a joint owner is not joined.[236] Even where an absent party falls into a category potentially considered indispensable, however, courts often try, as Rule 19 directs, to shape relief to permit the action to go forward in some form. For example, in actions to void a contract

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the Advisory Committee Notes to Rule 19 explains, Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." FED. R. CIV. P. 19 advisory committee's notes.

232. *See* FED. R. CIV. P. 19(b). The Supreme Court has suggested that these factors should be understood in terms of four "interests"—the "plaintiff['s] . . . interest in having a forum," the defendant's "wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another," "the interest of the outsider," and "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109–11 (1968).

233. As the Court observed, "[t]he decision whether to dismiss . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens*, 390 U.S. at 118–19.

234. In many Rule 19 cases, the entire action, including the absent party, can in fact be brought in another forum. For example, a federal court may lack jurisdiction over an absent party because its joinder would destroy diversity or because no personal jurisdiction exists over the party. In such cases, generally the action can be brought in state court instead. *See, e.g.*, Deere & Co. v. Diamond Wood Farms, Inc., 152 F.R.D. 158, 161 (E.D. Ark. 1993).

235. *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1613 (3d ed. 2001).

236. *See id.* § 1614.

involving an absent party, courts may deny the particular form of relief sought but permit an action for damages on the contract to proceed.[237] Courts may be particularly reluctant to dismiss an action when the absent party has the opportunity to intervene and can sufficiently protect its interests by doing so, but chooses not to avail itself of that right.[238]

But courts' overall reluctance to dismiss cases on Rule 19 grounds and their generally flexible approach to Rule 19 issues more broadly stands in contrast to their current practice in cases in which the party claimed to be indispensable is a sovereign entity.[239] In recent years, certain circuits have come close to developing a near-absolute rule that, if an absent sovereign's interests may be affected by allowing an action to proceed—in other words, if the sovereign meets the criteria for a "necessary" party—that sovereign is also indispensable, and the action must be dismissed.[240] Indeed, some

237. *See, e.g.*, Wood & Locker, Inc. v. Doran & Assocs., 708 F. Supp. 684, 690 (W.D. Pa. 1989).

238. More precisely, where the absent party has the opportunity to intervene, but has chosen not to, courts frequently discount the factor of prejudice to the absent party, reasoning that, if the possibility of prejudice was substantial, that party could have chosen to participate in the litigation. *See, e.g.*, United States v. Sabine Shell, Inc. 674 F.2d 480, 482–83 (5th Cir. 1982); A. L. Smith Iron Co. v. Dickson, 141 F.2d 3, 6 (2d Cir. 1944); Arthur v. Starrett City Assocs., 89 F.R.D. 542, 548 (E.D.N.Y. 1981). Interestingly, in one early case, *Staten Island Rapid Transit Railway Co. v. S. T. G. Construction Co.*, 421 F.2d 53, 58 n.6 (2d Cir. 1970), the court applied this principle against the federal government without mentioning the issue of sovereign immunity, observing that "the Government was not greatly biased by nonjoinder, for it could have intervened had it so desired in order to protect its interest." It is generally the case that parties so situated as to be potential indispensable parties meet the criteria for intervention under Rule 24. In *Provident Tradesmens*, the Court noted the possibility that failure to intervene might be held to foreclose the absent party's interests in the litigation, but ultimately declined to decide the issue. *See* 390 U.S. at 114; *see also* Nicholas V. Merkley, Note, *Compulsory Party Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary" Parties*, 56 OKLA. L. REV. 931, 963–67 (2003) (making the case for allowing indispensable-tribe cases to go forward under Rule 19 where the affected sovereign chooses not to intervene).

239. *Compare Provident Tradesmens*, 390 U.S. at 119, *with* Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1159–63 (9th Cir. 2002).

240. For example, the D.C. Circuit holds that "there is very little room for balancing of other factors' set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests 'compelling by themselves," and that, in such circumstances, a court is "confronted with a more circumscribed inquiry" than usual. Kickapoo Tribe of Indians in Kan. v. Babbitt, 43 F.3d 1491, 1496–97 (D.C. Cir. 1995)

circuits *do* dismiss *all* such cases, nearly categorically; other circuits, while nominally applying the usual Rule 19 balancing test, focus on prejudice to the absent sovereign party to the near-exclusion of all other factors that *Provident Tradesmens* directs courts to consider.[241]

Typical—and influential—among these cases is *American Greyhound Racing, Inc. v. Hull*—a case that, significantly, involved *two* sorts of sovereigns: the defendant (Arizona) and several absent Indian tribes.[242] The plaintiffs in the case, various racetrack owners and operators, sued the Governor and Attorney General of Arizona, seeking to enjoin the Governor from renewing existing gaming compacts with tribes or negotiating new ones on the grounds that Arizona law prohibited the casino-style gaming the compacts authorized.[243] The district court, in an opinion the Ninth Circuit called "meticulous and exhaustive," granted the injunction.[244] Although the defendants argued before the district court that the tribes were necessary and indispensable parties, the district court quickly disposed of the issue, finding that because the relief sought was prospective and the tribes had no legally protected interest in the contracts' renewal, the tribes were neither necessary nor indispensable.[245]

The Ninth Circuit reversed.[246] Following the usual Rule 19 order of analysis, the court found first that the tribes were "necessary" on the basis of a single factor: the tribes "claim[ed] an interest and [were] so situated that this litigation as a practical matter [would] impair or impede their ability to protect it."[247] The court noted that the existing compacts provided for automatic renewal if neither party gave notice of termination, and that this provision was an "integral part . . . of the bargain" between the tribes and state.[248] The injunction entered by the district court would, essentially, require the governor to give notice of

(citation omitted).

241. *See Dawavendewa*, 276 F.3d at 1161–63 (applying the Rule 19 four-part balancing test, but nonetheless dismissing suit based largely on potential prejudice to tribe).

242. 305 F.3d 1015, 1022 (9th Cir. 2002). In accordance with the conventions of *Ex parte Young*, the named defendants were actually the Governor and Attorney General of Arizona. *Ex parte* Young, 209 U.S. 123, 157–61 (1908), *superseded by statute*, 5 U.S.C. § 702 (2006).

243. *Am. Greyhound*, 305 F.3d at 1018.

244. *Id.* at 1021.

245. Am. Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012, 1042–50 (D. Ariz. 2001), *vacated*, 305 F.3d 1015 (2002).

246. *Am. Greyhound*, 305 F.3d at 1027.

247. *Id.* at 1023 (quoting FED. R. CIV. P. 19(a)(2)(i)) (emphasis omitted).

248. *Id.*

termination.[249] Thus, the Ninth Circuit reasoned, the tribes' interest would be impaired by the injunction because it would cause them to get less than they had bargained for.[250] On this basis alone, the Ninth Circuit found that the tribes were necessary parties, and that the district court had abused its discretion in finding otherwise.[251]

The result in *American Greyhound*—in its single-minded focus on just one of the factors courts are directed to consider before pronouncing a party indispensable—is strikingly at odds with courts' typical approach in more run-of-the-mill Rule 19 cases in which courts have emphasized the need to avoid rigidity and to carefully balance all the Rule 19 factors.[252] By this standard and others, the court's analysis in *American Greyhound* is highly unorthodox. The *American Greyhound* court held that the fact that the litigation might retroactively render the tribes' deal less valuable constituted a reason to dismiss a case for which no other forum existed—a conclusion that gives extraordinary solicitude to the absent parties' interests and that seems to consider factors outside the bounds of conventional Rule 19 analysis.[253] The route by which the Ninth Circuit arrived at this conclusion is also unusual. The court placed heavy weight on its finding that the tribes had a "protectable interest" in the compacts in determining that the tribes were necessary parties.[254] The court then relied almost entirely on

249. *Id.*

250. *Id.* ("Would the tribes have made the same bargain if the compacts had provided for automatic termination at the end of their original ten-year terms? We cannot say, but there can be no question that automatic termination renders the compacts less valuable to the tribes. . . . [N]ot being parties, the tribes cannot defend those interests.").

251. *Id.* at 1027.

252. Most notably, the Supreme Court has announced that "the decision whether the person missing is 'indispensable' . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." Provident Tradesmens Bank & Trust Co., 390 U.S. 120, 119 (1968); *see also* Soberay Mach. & Equip. Co. v. MRF Ltd., 181 F.3d 759, 765 (6th Cir. 1999) (recognizing that "long held . . . precedent stat[es] that there is no prescribed formula for determining whether a party is indispensable . . . and abundant case law supports the proposition that the rule is to be applied on a case by case basis").

253. While the court's language and result of course recalled the traditional principle that a contract may not be invalidated in the absence of an indispensable party, it represented a sweeping extension of that principle. Judge Rymer, in a brief dissent, observed as much, noting that "while unquestionably substantial and important, the tribes' interest [in renewing gaming compacts] is not a legally protected interest that may not be resolved in their absence." *Am. Greyhound*, 305 F.3d at 1027–28 (Rymer, J., dissenting).

254. *Id.* at 1023.

the potential prejudice to that interest in determining that the tribes were indispensable.[255] While the overlap of the Rule 19(a) and Rule 19(b) factors permits this type of double counting to some degree, *American Greyhound* is notable for the extent to which the court permitted a single factor to subsume all Rule 19 analysis.

Yet in the degree of weight given by the court to the absent sovereign's interests, *American Greyhound* is more typical than not of Rule 19 cases. Indeed, many courts have applied the rule that "when a necessary party is immune from suit, there is very little room for balancing of other factors, since this immunity may be viewed as one of those interests compelling by themselves."[256] Thus, in dozens of cases, courts have dismissed suits for failure to join an indispensable sovereign, notwithstanding the absence of an alternative forum in which to litigate the matter.[257]

These results seem to defy many cherished ideals of litigation, including the notion that litigants (particularly in purely private disputes) are entitled to a remedy and the idea that courts must not shirk from exercising jurisdiction once they have been found to possess it. Nowhere in the text of Rule 19 is there any authorization for such broad dismissal or even a suggestion that it might be appropriate. As one of the few scholarly articles to discuss Rule 19 put it, the rule's main purposes are "to identify nonparties whose joinder is necessary for a just adjudication and to secure that joinder."[258] In other contexts, courts apply Rule 19 on a flexible, case-by-case basis; make every effort possible to permit the case to go forward; hold that the unavailability of a different forum weighs heavily against dismissal; and hold that an absent party's failure to intervene undermines arguments of prejudice.[259] The reason for the absent-sovereign cases' exceptionalism, therefore, seems to have

255. *Id.* at 1024–25.

256. Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (citing 3A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 19.15, at 19–266 & n.6 (1984)) (internal quotation marks omitted); *see also* Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1154–55 (9th Cir. 2002) (citing Rule 19 but finding that all factors must be balanced even where a sovereign's interests are at stake); Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989) (applying Rule 19).

257. *See, e.g.*, cases cited *supra* note 256.

258. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1062 (1985).

259. *See, e.g.*, Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., 564 F.2d 816, 820 (8th Cir. 1977) (noting that, where absent party Lord's chose not to intervene, "we conclude that the District Court acted in such a way as to sufficiently protect Lord's interests" under Rule 19 analysis).

little to do with Rule 19 and a great deal to do with courts' views of sovereign immunity. Indeed, these cases are explicable only if one accepts the existence of a sort of extra-strength sovereign immunity—a notion that sovereign immunity should confer a broader protection from entanglement in litigation that goes beyond the traditional notion that the sovereign should not be involuntarily subject to suit.[260] One court has suggested, for example, that allowing an "indispensable sovereign" suit to proceed in the sovereign's absence "would . . . effectively abrogate . . . sovereign immunity by adjudicating [the sovereign's] interest . . . without consent."[261] In other words, keeping the sovereign from being adversely affected by litigation—even when the sovereign is not forced to directly participate in the suit—is a valid concern of sovereign immunity doctrine. The underlying premise is that sovereign immunity has to do with something more than simply sparing the sovereign the indignity of being involuntarily haled into court, that—as the court implicitly held in *Butters*—sovereign immunity is, more broadly, about permitting the sovereign some realm in which it can act as it wishes without the risk of adverse legal consequences.[262]

These observations are subject to one important qualification: many of the cases in which courts have articulated strong and categorical rules applicable to indispensable sovereigns have involved absent Indian tribes (as opposed to, say, absent states or the United States).[263] To be sure, in most of these cases, courts have not explicitly considered whether tribes should be considered differently from other sovereigns for Rule 19 purposes; furthermore, courts have not hesitated to apply Rule 19 principles formulated in the tribal context to other absent sovereigns, such as states.[264] Nonetheless, special factors present in the tribal context have likely influenced decisions in individual Rule 19 cases. Many tribes have severely limited economic resources, for example, and the sovereign powers of all tribes have been sharply constrained in recent years by the Supreme Court.[265] Thus, applications of Rule 19 that might seem perfectly reasonable with respect to another sort of

260. *Cf.* Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 4 (2004) (equating the decision to permit an action to proceed where an absent sovereign's interests may be affected with abrogation of that tribe's immunity).

261. *Enter. Mgmt.*, 883 F.2d at 894.

262. Butters v. Vance Int'l, Inc., 225 F.3d 462, 467 (4th Cir. 2000).

263. *See* cases cited *supra* note 256.

264. *See, e.g.*, Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 55 (D.D.C. 1999).

265. *See supra* note 137; *infra* notes 337–39 and accompanying text.

sovereign—for example, a policy that if the absent sovereign has the opportunity to intervene the court will not dismiss the case simply because it declines to participate—could have a harsh and perhaps unfair impact on tribes that may, for more practical reasons, have few resources to direct toward litigation.[266]

Yet whatever the special circumstances that may apply in Rule 19 cases involving tribes, courts have decided such cases as cases about sovereignty in general, not about tribal sovereignty in particular. In *American Greyhound*, the court gave no indication that factors unique to the tribal context influenced its decision or that its analysis would not be equally applicable to a case involving a different sort of sovereign.[267] Indeed, many suits in which a tribe is the plaintiff have been dismissed on the ground that another sovereign—the United States or a state—is an indispensable party.[268]

Thus, an ironic effect of the absent-sovereign cases is that principles that may have been developed to protect absent Indian tribes have in some cases ultimately worked to the detriment of tribes' ability to obtain justice for themselves. For example, in *Pueblo of Sandia v. Babbitt*, the court held that New Mexico was an indispensable party to an action brought by two tribes seeking a declaration that the Secretary of Interior's failure to act on approval of a tribal-state gaming compact rendered the compact valid.[269] The case is striking both for the court's reliance on various precedents from the tribal context and because the court questioned the wisdom of dismissal in light of the absent state's nonparticipation, observing that:

> In a purely practical sense, the Court might look with disfavor on the defendant's prejudice arguments for an additional reason: if the State were so worried about protecting its interests, it certainly could waive its immunity and intervene in this action (which, as the complaint currently reads, would subject the State to no risk of damages or broad-ranging judicial rulings).[270]

266. For an argument that courts should apply even *broader* policies of dismissal in Rule 19 cases involving absent tribes, see Fletcher, *supra* note 260, at 122–23.

267. *See* Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1022–25 (9th Cir. 2002).

268. *See, e.g.*, Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 747 (8th Cir. 2001); Lee v. United States, 809 F.2d 1406, 1410 (9th Cir. 1987); *Pueblo of Sandia*, 47 F. Supp. 2d at 55.

269. *Pueblo of Sandia*, 47 F. Supp. 2d at 55–56.

270. *Id.* at 54 n.3.

Nonetheless, noting that its "inquiry [was] largely constrained by appellate decisions," the court went on to find the state to be an indispensable party, while acknowledging that it did so "reluctantly" and found the state's conduct to be "disheartening."[271]

This case is hardly atypical. Indeed, one commentator has in fact suggested that "state and federal courts treat the sovereign immunity of the states and federal government with *more* deference than the immunity of tribes" in the Rule 19 context.[272] Thus, the phenomenon of dismissing cases when an absent sovereign's interests may be affected is not confined to the tribal context. Rather, the Rule 19 cases as a whole reflect a much broader view of sovereign immunity in all its forms—a view that sovereign immunity, in effect, confers upon the sovereign the right to stop litigation, the outcome of which poses a potential threat to its interests.

Notably, this view recently received at least a partial stamp of approval from the Supreme Court in a case involving foreign sovereign immunity. In *Republic of Philippines v. Pimentel*, the Court considered the relevance of absent sovereign entities in an interpleader action among claimants who sought a stake in $35 million in funds allegedly stolen by former President Ferdinand Marcos and transferred via a Panamanian company to an account at Merrill Lynch.[273] Among the claimants to the funds were a class of plaintiffs, represented by Pimental, seeking to satisfy a $2 billion judgment they had obtained and two sovereign entities: the Republic of the Philippines and the Philippine Commission on Good Governance.[274] The Republic and the Commission first successfully asserted sovereign immunity, resulting in their dismissal from the case.[275] They then moved to dismiss the entire action under Rule 19(b) on the grounds that they were indispensable parties. The Court held that, in permitting the action to proceed, the lower courts "failed to give full effect to sovereign immunity," in particular "the comity interests that have contributed to the development of the immunity doctrine."[276]

While this result was notable in itself, the Court's reasoning was equally striking. Summarizing prior case law, the Court appeared to suggest a sweeping view of courts' obligations in Rule 19 cases involving an absent sovereign, noting that "where sovereign immunity is asserted, and the claims of the sovereign are not

271. *Id.* at 54 n.3, 56.
272. Fletcher, *supra* note 260, at 5 (emphasis added).
273. 128 S. Ct. 2180, 2185 (2008).
274. *Id.* at 2186.
275. *Id.* at 2187.
276. *Id.* at 2190.

frivolous, dismissal of the action must be ordered where there is a

potential for injury to the interests of the absent sovereign."[277] *Pimental*, therefore, can be read as a broad authorization for giving the interests of absent sovereigns the sort of definitive weight that some lower courts have accorded them.

It must be noted, however, that *Pimental* presented an unusual situation in at least two respects. First, the problem that has characterized many of the lower-court Rule 19 cases—that dismissal would completely deny the plaintiff a forum in which to press its case—was present with somewhat less force in *Pimental*. Because *Pimental* was an interpleader action, the plaintiff (at least in a technical sense[278]) was not the Pimental plaintiff class, but Merrill Lynch—which, the Court noted, would have some protection of its interests in future proceedings because it would presumably continue to be entitled to a Rule 19(b) dismissal so long as the absent sovereigns continued to elect not to join.[279] Furthermore, the Court suggested, "[t]he balance of equities may change in due course," potentially permitting Merrill Lynch to renew its suit in the future.[280] For example, the issue of whether the Republic and the Commission actually had a valid claim to the funds was at the time of the Court's decision under consideration by a Philippine court, the Sandiganbayan.[281] The Court suggested that if the Sandiganbayan's decision was ultimately adverse to the Republic and the Commission, or if it delayed unreasonably in issuing its decision, the Rule 19 analysis might come out differently in a future suit.[282] Thus, in contrast to some of the lower-court Rule 19 decisions, the Court indicated that the mere presence of an absent sovereign does not *automatically* trump the plaintiff's interests; rather, factors such as the strength of potential prejudice to the sovereign should be weighed in the Rule 19(b) analysis.

Despite these qualifications, *Pimental* nonetheless suggests at least tacit approval on the part of the Supreme Court—if not outright authorization—for the approach that lower courts have taken in Rule 19 cases. If anything, then, *Pimental* is likely to

277. *Id.* at 2191.

278. *Id.* at 2193. The Court did acknowledge that "in context, the Pimentel class (and indeed all interpleader claimants) are to some extent comparable to the plaintiffs in noninterpleader cases," and that the interest of the Pimental class should thus factor in "the Rule 19(b) equitable balance." *Id.* In this case, however, any weight given to the Pimental class interests was not sufficient to overcome other aspects of Rule 19 analysis. *See id.*

279. *Id.* at 2193–94.

280. *Id.* at 2194.

281. *Id.* In this sense, the result in *Pimental* can be seen as akin to a forum non conveniens dismissal, permitting a Philippine court rather than an American one to determine the merits of the Philippine government's claims.

282. *Id.*

expand the circumstances in which courts are willing to dismiss cases to accommodate the interests of absent sovereigns.

C. Sovereign Immunity and Res Judicata

Under the Second Restatement of Judgments, a judgment in a contested action generally precludes relitigation of issues of subject matter jurisdiction unless one of three exceptions applies, including a situation where "[a]llowing the judgment to stand would substantially infringe the authority of another [government] tribunal or agency."[283] In some cases, courts have interpreted this principle to allow collateral attacks on a judgment that "improperly trenche[s] on sovereign immunity."[284] This exception stems largely from one Supreme Court case, *United States v. U.S. Fidelity & Guaranty Co.*, in which the Court permitted a tribe and the United States to attack a final judgment in bankruptcy proceedings on sovereign immunity grounds despite the fact that they had not previously raised a sovereign immunity argument.[285] The Court based this holding on the broad principle that "[a]bsent . . . consent, the attempted exercise of judicial power [over a sovereign] is void."[286] Elsewhere, the Court has also suggested in passing that sovereign immunity issues may sometimes override the policies of finality reflected in the doctrine of res judicata.[287]

Despite the Court's strong language, it is reasonable to doubt *U.S. Fidelity*'s continuing force. In the recent case of *Lapides v. Board of Regents* (a case holding that a state's removal of a suit to federal court constituted a waiver of sovereign immunity),[288] the Court cursorily distinguished the waiver holding in *U.S. Fidelity*. The Court suggested either that the presence of the Eleventh Amendment made the analysis different as to states, or that "special circumstances" such as "an effort by a sovereign . . . to seek the protection of its own courts" or "an effort to protect an Indian tribe" were at issue in the earlier case.[289] These distinctions are rather starkly unconvincing. To begin with, it is unclear why the Eleventh Amendment, which has been held to *reaffirm* the sovereign immunity of states, should be taken to restrict that immunity in

283. RESTATEMENT (SECOND) OF JUDGMENTS § 12(2) (1982). The other exceptions include cases that involve a subject matter plainly beyond the court's jurisdiction or a judgment made by a court unqualified to do so. *Id.*

284. Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104 (D.C. Cir. 1988).

285. 309 U.S. 506, 513 (1940).

286. *Id.* at 514.

287. *See* Durfee v. Duke, 375 U.S. 106, 114 (1963) (observing that the "doctrine of . . . sovereign immunity may in some contexts be controlling").

288. 535 U.S. 613, 620 (2002).

289. *Id.* at 623.

ways that tribal or federal immunities are not limited. Furthermore, it is not clear why basic policy justifications for the invocation of sovereign immunity, such as the desire to "protect" the sovereign, were not present in *Lapides* as well.[290] The Court's failure to make a more serious effort to distinguish *U.S. Fidelity* suggests an unwillingness to extend it beyond its facts.[291] Indeed, the Court has recently cast doubt more fundamentally on the principles *U.S. Fidelity* appears to articulate, citing the case as an instance of the accidental development of tribal immunity.[292]

Despite the Court's recent skepticism, however, a number of courts have continued to permit collateral attacks on judgments where sovereign immunity of various kinds—federal,[293] state,[294] and territorial[295]—is at stake, often relying on highly literal readings of *U.S. Fidelity*.[296] More than one court has deemed orders failing to recognize a party's sovereign immunity to be "vulnerable collaterally on the ground that they are void *ab initio,*" in large part because of the Supreme Court's "emphasi[s] [on] the importance of preserving sovereign immunity."[297] In *Pacific Rock Corp. v. Perez*, a district court considered and rejected the argument that *U.S. Fidelity* did not apply to the situation at hand, relying on the principle that sovereign immunity was an "unwaivable jurisdictional issue."[298] Based on this analysis, the court permitted a territorial government director to attack a writ of mandamus that would otherwise have res judicata effect on sovereign immunity grounds.[299] In *In re W.L.*,

290. Moreover, in the case of *U.S. Fidelity*, the sovereign's preference for its own courts was not at issue, since the judgment under attack had been rendered by a federal district court in Missouri. *See U.S. Fid.*, 309 U.S. at 512.

291. *See* United States v. County of Cook, 167 F.3d 381, 390 (7th Cir. 1999) (noting that *U.S. Fidelity* "vanished from the law of judgments as soon as the ink dried on volume 309 of the United States Reports" and that the Supreme Court has never expanded upon the sovereign immunity/res judicata portion of its holding).

292. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 752 (1998).

293. Neb. Pub. Power Dist. v. United States, 73 Fed. Cl. 650, 656–58 (2006).

294. Jordon v. Gilligan, 500 F.2d 701, 709–10 (6th Cir. 1974).

295. Pac. Rock Corp. v. Perez, 2005 Guam 15, *available at* http://www.guamsupremecourt.com/opinions/images/2005%20Guam%2015.pdf.

296. *See Neb. Pub. Power Dist.,* 73 Fed. Cl. at 659.

297. *Id.* at 657–58; *see also Jordon*, 500 F.2d at 710 (allowing sovereign immunity-based attack on judgment on grounds that "a void judgment is no judgment at all and is without legal effect"); TransAmerica Assurance Corp. v. United States, 423 F. Supp. 2d 691, 696 (W.D. Ky. 2006) (finding that "the absence of subject matter jurisdiction" where the United States had not waived its sovereign immunity "void[ed] the entire proceeding and all orders arising from it").

298. 2005 Guam 15, at *30.

299. *Id*. at *4.

another district court cited *U.S. Fidelity* and other authority recognizing a sovereign immunity exception to res judicata in holding that the United States was not estopped from raising a sovereign immunity defense.[300] Several circuit courts have also recognized a potential exception to res judicata where a sovereign immunity defense was not previously made or where the policies underlying sovereign immunity are otherwise threatened.[301]

The principle at work in these cases is puzzling, to say the least. As the Second Restatement of Judgments indicates, even a continuing dispute over subject matter jurisdiction does not normally suffice to deny a prior judgment on that issue preclusive effect.[302]

Even operating on the assumption that sovereign immunity is of jurisdictional import, it is difficult to see why sovereign immunity should be accorded any special status in this regard. Moreover, the notion that sovereign immunity is a matter of subject matter jurisdiction is itself widely disputed.[303] The Supreme Court has never fully embraced the subject matter jurisdiction theory and many lower courts have specifically disclaimed it.[304] In addition, in light of concerns about opportunities for litigant manipulation, some courts and commentators have recently questioned the continuing viability of a related doctrine that permits sovereigns to raise immunity issues for the first time on appeal.[305] Certainly these concerns apply with all the more force when sovereign immunity is used as a means to avoid the res judicata effect of a prior decision.

300. *In re* W.L., No. 98 C 6055, 1999 WL 33878, at *4–6 (N.D. Ill. Jan. 19, 1999).

301. Sterling v. United States, 85 F.3d 1225, 1231 (7th Cir. 1996) (Flaum, J., concurring) ("If a court reaches the merits of a claim that is barred by sovereign immunity, the judgment is simply void."); Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104 (D.C. Cir. 1988) (noting that a collateral attack on a decision that "improperly trench[es] on sovereign immunity" is permissible); *Jordon*, 500 F.2d at 709–10 (permitting a collateral attack on an attorney fee award on Eleventh Amendment grounds).

302. RESTATEMENT (SECOND) OF JUDGMENTS § 12(2) (1982).

303. *See generally* Florey, *supra* note 53, at 1401–31.

304. *See generally id.* at 1401–17. In *United States v. County of Cook*, 167 F.3d 381, 388–89 (7th Cir. 1999), for example, the Seventh Circuit specifically noted sovereign immunity's less-than-jurisdictional status in deciding that binding judgments on the sovereign immunity issue should not be subject to reexamination.

305. *See, e.g.*, Matthew McDermott, *The Better Course in the Post-*Lapides *Circuit Split: Eschewing the Waiver-by-Removal Rule in State Sovereignty Jurisprudence*, 64 WASH. & LEE L. REV. 753, 782 (2007). Many circuits, however, continue to permit late raising of a sovereign immunity defense. *E.g.*, Governor of Kan. v. Kempthorne, 516 F.3d 833, 841 (10th Cir. 2008) (permitting the sovereign immunity issue to be raised for the first time on appeal).

As with the other cases discussed in this Article, therefore, the results in the res judicata cases can be seen as a response to courts' perception that sovereign immunity enjoys a heightened status—beyond even that of core issues like subject matter jurisdiction—and that courts are obliged to act with special vigilance to ensure the sovereign does not inadvertently lose the protections the doctrine affords.

To be sure, courts have not uniformly subscribed to the notion that sovereign immunity represents an exception to res judicata; several have refused to apply the exception.[306] Courts have, in particular, warned of the "dire effect" of recognizing a principle "which would make res judicata all but disappear for claims against the United States and make many judgments advisory in the process."[307] Thus, in contrast to other instances in which courts have recognized penumbral sovereign immunity doctrines, there is at least some authority recognizing potential concerns with extending sovereign immunity in this way. Nonetheless, it is striking that—despite recent disapproving signals from the Supreme Court[308] and potentially disastrous effect as precedent[309]—at least some courts have been willing to reopen judgments in response to new sovereign immunity arguments.[310]

IV. FOUR PRINCIPLES FOR DECIDING MARGINAL SOVEREIGN IMMUNITY CASES

The previous Sections have discussed ways in which courts have extended sovereign immunity to novel situations and have sought to explore some of the potential justifications for doing so. In certain cases, for example, courts have sought to effectuate what they see as the underlying rationales for sovereign immunity by creating analogous protections in situations where the doctrine does not

306. Delta Foods Ltd. v. Republic of Ghana, 265 F.3d 1068, 1070–71 (D.C. Cir. 2001) (applying res judicata notwithstanding a sovereign immunity argument raised by the Republic of Ghana); *County of Cook,* 167 F.3d at 390 (refusing, based on a narrow reading of *U.S. Fidelity*, to allow relitigation of sovereign immunity issue by the United States). In *Black v. North Panola School District*, 461 F.3d 584, 592–98 (5th Cir. 2006), the court expressed skepticism about the appellant's claims that she was entitled to attack collaterally an otherwise binding prior judgment on sovereign immunity. Nonetheless, the court ultimately considered and rejected the appellant's sovereign immunity arguments on the merits.

307. *County of Cook*, 167 F.3d at 390.

308. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 752 (1998).

309. *County of Cook*, 167 F.3d at 390.

310. *See* Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974); Neb. Pub. Power Dist. v. United States, 73 Fed. Cl. 650, 657–58 (2006).

strictly apply.[311] In other cases, courts may—perhaps unconsciously—be reacting to the recent trend on the part of the Supreme Court of greater solicitude for sovereign interests.[312]

These impulses may, of course, sometimes be justified. The overall trend toward greater Supreme Court protection of sovereign immunity is hard to dispute.[313] Furthermore, in order to make sovereign immunity function in a meaningful way, it is arguably necessary for courts to have some devices to smoke out suits that have an effect identical to those directly against the sovereign. However, many of the penumbral sovereign immunity cases have gone too far in privileging the rights of the sovereign above those of individual litigants, resulting in a failure to do justice in individual cases.[314] In addition, many courts have demonstrated a willingness to expand sovereign immunity protections without sufficient analysis.[315] With these problems of courts' current experience in mind, this Section attempts to lay out a more comprehensive and nuanced set of principles by which courts may be guided in penumbral sovereign immunity cases.

A. Transparency and Thoughtfulness About Decisions to Expand Sovereign Immunity

One way in which courts might treat penumbral sovereign immunity cases is simply to acknowledge the role that sovereign immunity and the particular policy justifications play in their decisions. In many of the cases in which courts have opted to extend sovereign immunity to new areas, they have been surprisingly opaque about their reasoning in doing so.[316] This is particularly true in the Rule 19 context, where courts have often dealt with issues involving absent sovereigns as solely questions of a procedural technicality while nonetheless treating immune sovereigns quite differently from other similarly situated absent parties.[317] To some extent, it has also been true of the res judicata cases, in which

311. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

312. *See* Siegel, *supra* note 5, at 1211 (discussing "ideological spillover" from the Supreme Court's constitutionalization of state sovereign immunity into other areas of sovereign immunity doctrine).

313. This is not to say, of course, that this trend has been completely one-directional or uninterrupted; in a handful of recent cases, the Court has scaled back the doctrine's applicability in certain circumstances. *See id.* at 1213–18.

314. *See* Wen, *supra* note 209, at 1548.

315. *See, e.g.*, Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000).

316. *See id.* at 466–67.

317. *See* Kickapoo Tribe of Indians in Kan. v. Babbitt, 43 F.3d 1491, 1496 (D.C. Cir. 1995) (noting that there is "little room for balancing" Rule 19(b) factors "where a necessary party under Rule 19(a) is immune from suit").

courts have at times appeared willing to upend established principles of preclusion based primarily on a Supreme Court case decades old, the continuing force of which is highly debatable.[318] Such absence of analysis is problematic not only in its own right, but because it minimizes the significance such decision may have on the shape of sovereign immunity doctrine more broadly.

In particular, lack of individualized analysis tends to promote a general tendency toward overexpansion of sovereign immunity by making it more difficult for future courts to depart from precedent. In the Rule 19 cases, for example, many courts have simply laid down a general rule that cases affecting an absent sovereign's interests should almost always be dismissed without articulating a basis on which courts can find exceptions to that rule.[319] As a result, many courts have had difficulty finding grounds for departing from the rule even in circumstances where they believe its application to be unjust.[320]

Of course courts do not invariably ignore the larger implications of sovereign immunity doctrine when they decide questions at the doctrine's outer reaches; nor is a well-reasoned case a guarantee of a sensible outcome. In the *Butters* case, for example, the Fourth Circuit presented a fairly detailed explication of sovereign immunity's purposes and how they applied to the facts before it.[321] Nonetheless, the court's ultimate result represents a sweeping expansion of the FSIA's protections to private entities that is in some ways hard to defend.[322] Still, the Fourth Circuit's straightforward acknowledgement that the case represented an extension of ordinary sovereign immunity principles—and its detailed analysis in reaching that conclusion—has been helpful to critics as well as supporters of expanded protections for private contractors, enabling those disagreeing with the Fourth Circuit to

318. *See* Lapides v. Bd. of Regents, 535 U.S. 613, 620, 623 (2002); Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 752 (1998); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 510 (1939) (noting that the sovereign's preference for its own courts was not at issue because the decision was rendered by a federal district court in Missouri); *see also supra* note 291.

319. *See* Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (citing 3A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 19.15 (1984)); *see also* Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1162 (9th Cir. 2002) (citing Rule 19 but finding that all factors must be balanced even when a sovereign's interests are at stake); Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989) (applying Rule 19).

320. *See* Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 56 (D.D.C. 1999).

321. *Butters*, 225 F.3d at 466.

322. *See* Wen, *supra* note 209, at 1542–43.

explain and articulate where it went wrong.[323]

The suggestion that courts reaching questions of first impression or even noteworthy extensions of existing principles should explain their results may seem blindingly obvious. Yet because of the "accidental" quality of sovereign immunity—the fact that it arises from neither a direct legislative command nor a clear common law tradition—courts are often bereft of the traditional tools, such as maxims of statutory interpretation, that they typically use to analyze marginal situations and to decide how far a doctrine should extend.[324] As a result, there is a particular need in sovereign immunity cases for courts to justify the decision to privilege the sovereign's interests above the desire of individual plaintiffs for redress.

Furthermore, in many penumbral immunity cases, it is important that courts not merely look to the facts before them but also, if necessary, conduct a meaningful inquiry into the policy justifications underlying sovereign immunity. As discussed earlier in this Article, the policy rationales underlying sovereign immunity are many and contested, and the wisdom of extending sovereign immunity to a given situation depends in large measure on the particular explanations for sovereign immunity's existence to which the court gives credence.[325] The result in *Butters*, for example, might be said to be driven by a "sovereign essentialist" justification for immunity—the idea that a sovereign entity is entitled to a sphere in which it may act free of judicially imposed repercussions.[326] The res judicata cases may reflect a variant of the same idea—i.e., the notion that sovereign immunity is so fundamental and important a protection that normal procedural rules must be altered to permit it to be asserted to the full extent the law allows.[327] *Boyle*, by contrast, focuses more on issues of judicial competence, democratic decision making and the need to protect the public treasury in its conclusion that the courts should not second-guess choices, even by private parties, that were made pursuant to federal specifications.[328]

323. *See, e.g.*, *id.* at 1543 (identifying "methodological and substantive problems" with the court's analysis in *Butters*).

324. *See* Davis, *supra* note 10, at 384 (noting that sovereign immunity is supported by "historical accident, habit, a natural tendency to favor the familiar, and inertia").

325. *See, e.g.*, Johnson v. Harrah's Kan. Casino Corp., No. 04-4142-JAR, 2006 WL 463138, at *7–8 (D. Kan. Feb. 23, 2006) (weighing policy goals of sovereign tribal immunity in determining whether it should be extended to a tribal entity).

326. *See Butters,* 225 F.3d at 466, 467.

327. *See, e.g.*, Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974).

328. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512–14 (1988).

Likewise, *American Greyhound* and the other Rule 19 cases might be seen to stem from an impulse to keep the sovereign from becoming embroiled in litigation—a concern that may be related to a belief that the issues in question are best left to the political process.[329]

In general, however, these cases refer to fundamental rationales for sovereign immunity only in passing, if at all. Indeed, the *Boyle* majority, even as it reached a result that is in some ways the archetypal penumbral immunity case, never mentioned the words "sovereign immunity" in its analysis.[330]

Furthermore, even where—as in *Butters*—courts make at least some reference to sovereign immunity's traditional rationales,[331] they should be prepared to consider the continuing viability of those rationales and the wisdom of extending them. That is, even where extensions of sovereign immunity may appear to advance one or more of the policies underlying the doctrine as a whole, by the same token, it is also true that the results in these cases are defensible only insofar as the rationale in question holds water in its own right and is applicable to the particular set of facts before the court. Thus, for example, the sovereign essentialist rationale may simply be inappropriate when viewed in light of modern notions of both democracy and foreign relations, and analysis (like, perhaps, the court's in *Butters*) that relies on it may, in consequence, be unconvincing.

Detailed analysis of sovereign immunity's overall goals and its immediate applicability is thus valuable for two reasons: to clarify the court's own decision making and to create a richer body of precedent against which future courts can assess calls to expand sovereign immunity protections. As a result, it is an important starting point in bringing greater fairness and consistency to this line of cases.

B. Treating Differently Situated Sovereigns Differently

As this Article has repeatedly emphasized, the various sovereign immunity doctrines have both important similarities and key differences. In general, courts understand that the various doctrines have distinct histories and that the shape of each doctrine is currently governed by somewhat different sources. At the same time, however, courts have sometimes been careless in their use of cases interpreting one form of sovereign immunity in analyzing

329. Potentially, concerns about the sovereign's finances may also play a role in the desire to keep it out of litigation, particularly in the case of tribes.

330. *See Boyle*, 487 U.S. at 512–14.

331. *Butters*, 225 F.3d at 466.

another. Courts may be, in fact, particularly prone to do so in marginal sovereign immunity situations because applicable precedent may be limited and courts may wish to turn to all available sources at their disposal.

While natural, however, this tendency has at least three serious drawbacks. To begin with, it is at the margins where the differences among sovereign immunity doctrines should be most apparent. Even if sovereign immunity doctrines have somewhat similar origins and related justifications, their modern development has been different and the doctrines, as currently formulated, may have little to do with each other, particularly when it is their more novel or experimental applications that are at issue.[332] Yet because courts have not hesitated to apply precedents from other varieties of sovereign immunity in marginal situations, doctrines that are disparate at their core may converge in some of their applications for no obvious reason besides convenience.[333] This inhibits well-reasoned decision making about the direction of each sovereign immunity doctrine in general, as well as about the course of individual cases.

A second problem with conflating the various doctrines is that indiscriminate reliance on decisions involving different kinds of sovereign immunity may lead to an unwarranted expansion of the doctrine as a whole. In certain cases, for example, courts have taken the Supreme Court's reinvigoration of state sovereign immunity doctrine as a cue to reexamine—and generally strengthen—the other forms of sovereign immunity.[334] It is not clear, however, that there is any justification for such expansion, since the driving factors behind the Court's post-*Seminole Tribe* state immunity cases—beliefs about state sovereign immunity's constitutional status and concerns about federalism—are not applicable, at least in their strict form, in other sovereign immunity contexts.

Likewise, tribal sovereign immunity should also be regarded as something of a special case. In recent years, the Supreme Court has sharply limited many other attributes of tribal sovereignty.[335] In particular, the Court (and, in certain states, Congress)[336] has

332. *See supra* Part III.

333. *See supra* Part III.

334. *See* Siegel, *supra* note 5, at 1209–12 (discussing how "ideologization" of state sovereign immunity has affected courts' view of sovereign immunity doctrine more generally).

335. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 459 & n.14 (1997); Montana v. United States, 450 U.S. 544, 563 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195, 211–12 (1978).

336. In several states, including California, Minnesota, Oregon, Nebraska, Washington, and Alaska, Public Law 280 gives states civil and criminal

expanded the extent to which state, rather than tribal, law is applicable in Indian country, has restricted or curtailed tribes' ability to prosecute nonmembers of the tribe for crimes committed on the reservation,[337] and has limited the civil jurisdiction of tribal courts.[338] At the same time, the Court has left tribes' traditional immunity largely intact in the face of calls to restrict it.[339] It is thus unsurprising that advocates of strong tribal autonomy have turned to sovereign immunity as a last-resort option in promoting tribal independence since a tribe that, for example, is nominally forced to submit to state law on certain matters may, in effect, be able to avoid that law's practical operation by conducting its affairs through immune tribal corporations.[340] As a result, an argument can be made that strong and unique policy justifications exist for a vigorous doctrine of tribal immunity, and that courts should keep such policy issues in mind when considering how far tribes' sovereign prerogatives extend.[341] But the same justifications and concerns are not relevant when considering the immunity of other sovereigns. Thus, courts' efforts to rely on tribal immunity cases in other contexts have the potential to expand other doctrines of sovereign immunity well beyond what policy considerations dictate or what the Supreme Court has suggested is appropriate.

Finally, unthinking use of cases about one kind of sovereign immunity in interpreting another promotes a general carelessness about sovereign immunity's boundaries and purposes. When courts, for example, rely on reasoning developed in a case involving federal contractors in a suit touching upon the interests of a foreign power,[342] they foreclose the possibility of a more careful analysis and understanding of the particular immunity doctrine at hand. Thus, shorthand reliance on sometimes-inapplicable cases stunts

adjudicatory authority over events occurring in Indian country. *See* COHEN'S, *supra* note 74, § 6.04[3][a].

337. *See Oliphant*, 435 U.S. at 195.

338. *See Strate*, 520 U.S. at 459; *Montana*, 450 U.S. at 563.

339. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759–60 (1998).

340. For example, Fletcher, *supra* note 260, at 4, argues that courts (state as well as federal) have been too willing to permit suits to proceed when absent tribes may be affected, and that this practice constitutes, in essence, a way of "abrogating the sovereign immunity of the absent Indian tribes in an illicit and backdoor manner."

341. *See id.*

342. This example refers to *Butters*, though in fairness to the *Butters* Court, it did not explicitly invoke or rely upon *Boyle*. Nonetheless, the reasoning in the two cases is similar enough that it is hard to imagine that the *Butters* Court was not in some way influenced by *Boyle*'s analysis.

development of each form of sovereign immunity on its own terms.[343]

C. Balancing Other Important Interests

An important criticism of penumbral sovereign immunity cases—particularly in cases not involving state sovereign immunity, since in those cases courts may have more limited flexibility[344]—is that they tend to overlook how radically disruptive sovereign immunity is to the litigation process and to general ideals of what adjudication is supposed to achieve.[345] The usual corollary of a finding that sovereign protections apply in a given situation is that the plaintiff—even if he or she has genuinely been wronged—will be denied an immediate remedy.[346] Yet unlike many other doctrines that permit or require abstention or dismissal, sovereign immunity often forecloses all other remedies—in the forum at hand or in any other.[347] With some exceptions for circumstances in which the sovereign has waived its immunity to a greater extent in its own courts, most cases that are barred from federal court because of sovereign immunity cannot be heard elsewhere. Furthermore, because a case affected by sovereign immunity may be a pure individual grievance without broader political ramifications, the likelihood that the underlying wrong can be redressed through the legislature may also be small—making a typical dismissal on the basis of sovereign immunity potentially harsher for the plaintiff than a dismissal on political question or standing grounds.[348]

343. To be sure, some courts have been quite attentive to these differences, and declined to apply—or at least to apply rigidly—precedents from one sovereign immunity context in considering another. *See, e.g.*, Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the "Seabird," 19 F.3d 1136, 1142 (7th Cir. 1994).

344. Of course, these comments apply to many state sovereign immunity cases as well; as previously noted, there are many state sovereign immunity issues that do not engage the constitutional elements of the doctrine and in which courts have substantial discretion to expand or curb the situations in which state sovereign immunity applies.

345. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216 (2001) (arguing that sovereign immunity "frustrates" goals of the litigation process such as "compensation and deterrence").

346. *See* Butters v. Vance Int'l, Inc., 225 F.3d 462, 464 (4th Cir. 2000) (upholding the lower court's decision to grant summary judgment for the employer based on sovereign immunity grounds regardless of whether the employer wrongfully discriminated against the employee).

347. Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9th Cir. 2002).

348. Of course, the actual likelihood that the political process will provide redress for nonjusticiable cases is a matter of debate, and in practice the chance for a political solution may be more theoretical than real. *See* Choper, *supra* note 167, at 1476 ("While the traditional electoral process or other forms of

Given the severity of the consequences that may ensue when sovereign immunity is invoked, it is surprising how little attention courts have given to countervailing factors in penumbral immunity cases. In the Rule 19 absent-sovereign cases, for example, courts have often given no more than token consideration to the absence of an alternative forum in which the dispute can be adjudicated, despite the fact that such an absence should normally weigh heavily against dismissal under Rule 19 analysis.[349] Likewise, in the private-contractor cases, courts have tended to focus on the nature of sovereignty itself to the exclusion of other factors.[350] In *Butters*, for example, the court made passing reference to the notion that "[a]ny type of governmental immunity reflects a trade-off between the possibility that an official's wrongdoing will remain unpunished and the risk that government functions will be impaired."[351] But, in practice, governmental immunity focuses almost entirely on the government's side of the equation, devoting no analysis to the interests of the plaintiff or the potentially reduced enforceability of American law if the case failed to go forward.[352]

By contrast, under nearly every other doctrine that permits courts to stay or dismiss a case, courts give significant weight to a plaintiff's interest in having a forum in which to assert a grievance. Courts dismissing a case pursuant to the forum non conveniens doctrine, for example, will ordinarily retain jurisdiction until the plaintiff's ability to file the suit elsewhere can be established.[353] Similarly, plaintiffs in federal suits that are stayed under the *Pullman* abstention doctrine normally retain the option of returning to federal court if any federal claims remain after they have pursued state remedies.[354]

Of course, the fact that the application of sovereign immunity

direct political activity are available in theory [in political question cases], it may well be that various impediments will make them unlikely to respond very often."). Nonetheless, the possibility of legislative action is at least a factor that courts have considered and weighed in their analysis of nonjusticiability.

349. In balancing the Rule 19 factors, normally "[t]he absence of an alternative forum . . . weigh[s] heavily, if not conclusively against dismissal." Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 501 n.9 (7th Cir. 1980).

350. *See Butters*, 225 F.3d at 467.

351. *Id.*

352. *See id.* at 466 (focusing analysis on the sovereign's interests).

353. J.C. Renfroe & Sons v. Renfroe Japan Co., 515 F. Supp. 2d 1258, 1266–67 (M.D. Fla. 2007) (explaining that courts in forum non conveniens cases may retain jurisdiction until another forum agrees to accept it).

354. *See* England v. La. State Bd. of Med. Exam'r, 375 U.S. 411, 415–17 (1966) (creating a procedure by which litigants in *Pullman* abstention cases may return to federal court after state issues are decided).

denies the plaintiff an immediate remedy need not in every case require the dispute to go forward in the plaintiff's chosen forum. To begin with, sometimes an alternative forum *will* be available and for various reasons may be vastly preferable to federal court. This might be the case, for example, when the absent party is a tribe or foreign nation, and the case might otherwise be heard in, respectively, tribal court or the foreign nation's own court.[355] Although jurisdictional or logistical problems (or the sovereign's failure to waive immunity in the situation at hand) may prevent the alternative-forum solution from being a possibility in all but a very small number of cases, the existence of such a forum should greatly reassure a court about the decision to extend sovereign immunity to an unfamiliar situation. In such cases, the doctrine functions as a forum-shifting device, not a litigation-ending one.

Furthermore, there may be some sovereign immunity cases where a legislative solution is both feasible and preferable to a judicial one. *American Greyhound* in fact provides a perfect example of such a case.[356] The case involved private interests attempting to effect a major policy change—one that would disrupt a complex set of negotiations entered into by not one, but two sets of sovereign entities (i.e., the state and the affected tribes).[357] An argument can be made that a deal between a state and various tribes bears more resemblance to a matter of foreign relations than to garden-variety state legislation, rendering extensive judicial involvement inappropriate. Nonetheless, even in a situation like this, courts can balance the desirability of consigning an issue to the political process, on the one hand, against the possibility that individual litigants may fail to obtain redress, on the other. Indeed, courts are accustomed to undertaking this sort of analysis in similar contexts, such as deciding whether to apply the political question doctrine or the "generalized grievance" strand of standing doctrine.[358]

Thus, a policy of taking litigants' interests into account (and society's interests in having the law enforced) does not necessarily mean that they must always be given primacy. But it does highlight the need for courts to find particularly compelling justifications for applying sovereign immunity in cases where those interests will be

355. *See, e.g.*, Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015 (9th Cir. 2002).

356. *Id*. at 1025–27.

357. *Id*. at 1020–21.

358. *See generally* Choper, *supra* note 167, at 1476 (discussing the role that the possibility that grievances may be addressed through the political process plays in thinking about generalized grievances and the political question doctrine).

damaged.

As a final note, the res judicata cases, while representing a smaller fraction of penumbral immunity cases, present an even more compelling argument for appropriate balancing of the interests of courts and litigants against those of the sovereign. The doctrine of res judicata serves important policy goals: "considerations of fairness, the necessity for finality in litigation, and the requirements for efficient judicial administration"[359]—goals that normally trump even such important structural considerations as subject matter jurisdiction.[360] There are, therefore, many compelling arguments on the side of the ledger weighing against relitigation of sovereign immunity issues.[361] Moreover, there are virtually no arguments weighing in favor of such relitigation; it is difficult to make a case that any substantial harm will be done to the traditional doctrine of sovereign immunity simply by requiring the sovereign to litigate immunity issues in the first proceeding in which they are raised. Sovereigns are, in general, legally sophisticated entities, and it is reasonable to expect them to research and understand the defenses that are available to them. The usual exceptions to res judicata—such as an agreement between the parties or the plaintiff's lack of knowledge of the extent of its injury in the first action—are generally applied narrowly and have no applicability here.[362] Therefore, the res judicata cases present a fairly clear-cut example of a situation in which countervailing considerations plainly trump any sovereign immunity concerns.

D. Maintaining Rather Than Expanding Sovereign Immunity Protections

The issue of whether to have a sovereign immunity doctrine (or doctrines) at all has of course long been settled. In marginal sovereign immunity cases, the question courts confront is thus not whether a sovereign immunity doctrine should exist at all, but whether it is necessary to extend sovereign immunity to a given situation in order to fulfill the doctrine's overall purposes. In such cases, courts should have a clear set of justifications for why an apparent extension of sovereign immunity is necessary.

359. Chestnut Hill Dev. Corp. v. Otis Elevator Co., 739 F. Supp. 692, 696 (D. Mass. 1990) (citations omitted).

360. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12(2) (1982).

361. *See* cases cited *supra* note 306.

362. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4415 (3d ed. 2002) (noting that "[t]he Supreme Court . . . has spoken so clearly about the need to achieve justice through res judicata that there is little room left for loose exceptions").

While sovereign immunity has some staunch defenders[363]—some of them, of course, on the current Supreme Court—the doctrine has also come under sustained and withering criticism.[364] Sovereign immunity, its detractors argue, is an archaic relic of feudal Britain which, in any event, adhered to a weaker and more exception-riddled version of the doctrine than is the case in the United States today.[365] Opponents of sovereign immunity also argue that the doctrine is undemocratic,[366] promotes sovereign lawlessness and diminished accountability,[367] and forces individual plaintiffs to bear the costs of the sovereign's errors rather than permitting the cost to be spread throughout society.[368] As the author of a 1970 article pithily entitled *Sovereign Immunity Must Go* put it, "[t]he strongest support for sovereign immunity is provided by that four-horse team so often encountered—historical accident, habit, a natural tendency to favor the familiar, and inertia"; in sum, "[n]othing else supports sovereign immunity."[369]

Despite this author's sympathy for many of these criticisms, it would be retracing well-trodden ground (and delving into issues beyond the scope of this Article) to develop a sustained critique of sovereign immunity doctrine as a whole. Nonetheless, the fact that sovereign immunity is, and long has been, a controversial and much-attacked doctrine should in itself be a sufficient basis for courts to be reluctant to extend it heedlessly to new situations. Academics and judges have, for many years, raised serious and seldom-answered

363. *See, e.g.*, Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 521 (2001) (arguing that sovereign immunity was part of the constitutional plan and generally does not operate to bar effective relief); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998) (arguing that sovereign immunity works well in tandem with exceptions permitting officer suits under Section 1983).

364. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 160 (1908) (finding that the state had "no power to impart on [its attorney general] any immunity from responsibility").

365. Erwin Chemerinsky, *supra* note 18, at 1201 (criticizing the doctrine as anachronistic); *see also* Randall, *supra* note 35, at 28–30 (noting that English common law sovereign immunity left many remedies available against the government).

366. *See, e.g.*, Seidman, *supra* note 27, at 395 ("[Sovereign immunity] is an easy doctrine to attack and hard to defend. On its face, it seems clearly inconsistent with democratic government.").

367. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 631 (5th ed. 1999) (describing criticisms of sovereign immunity as "plac[ing] the government above the law").

368. *Id.* (noting that "[t]he effect of sovereign immunity is . . . to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries").

369. Davis, *supra* note 10, at 384.

criticisms of the doctrine; even its fervent supporters generally acknowledge the wisdom and usefulness of sovereign immunity's many exceptions and limits.[370] The Supreme Court, even as it has maintained a strong ideological commitment to a robust state sovereign immunity doctrine, has hemmed in many applications of the doctrine in recent years.[371] In short, sovereign immunity is hardly a doctrine crying out for unlimited expansion. Thus, while lower courts are certainly bound to follow the Supreme Court's dictates in applying the doctrine within its current boundaries, they should be reluctant to press the doctrine further and into new directions.

Courts keeping in mind these basic realities might then approach sovereign immunity issues from a fundamental posture of restraint. Once a court has recognized a given situation as involving penumbral rather than core issues of sovereign immunity, it might, for example, adopt a principle that sovereign immunity should be extended beyond its basic boundaries only in situations where it is necessary to effectuate the doctrine's core purposes by smoking out manipulative litigant tactics. Historically, courts were willing to extend sovereign immunity doctrine only to situations where the case was essentially a disguised action against the sovereign—that is, where the plaintiff had apparently attempted to subvert the doctrine of sovereign immunity by changing the form but not the substance of the lawsuit. An example of this is an early use of a doctrine known as "indispensable parties" (it is important to note that this is a doctrine distinct from many courts' use of the term "indispensable party" in the Rule 19 context).[372] Under this doctrine

370. *See, e.g.*, Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (7th Cir. 1998) (Kennedy, J., concurring) (noting the potential unfairness of not permitting courts to take states' litigation conduct into account in deciding whether to permit the assertion of an immunity defense); Jeffries, Jr., *supra* note 363, at 51 (finding that sovereign immunity, along with the exception permitting officer suits, form a useful "integrated package of liability rules").

371. *See* Siegel, *supra* note 5, at 1213–18 (describing the Supreme Court's "countertrend" of restricting the scope of sovereign immunity in certain instances).

372. Indeed, the historical use of the doctrine of "indispensable parties" in the sovereign immunity context is actually an instructive contrast to the considerations courts have taken into account in dismissing cases with absent sovereigns pursuant to Rule 19. For much of the twentieth century, the question of the government's "indispensability" was bound up in the substantive question of whether a given action was barred by the doctrine of sovereign immunity. Prior to the enactment of the Administrative Procedure Act—which waived the United States' sovereign immunity under most circumstances for purposes of challenging administrative action—various court-developed mechanisms were the primary means of challenging government action. These

mechanisms were known collectively as "nonstatutory review" because review had not been authorized by a congressional waiver of immunity in a specific statute.

Many forms of nonstatutory review hinged on a fiction similar to that underlying *Ex parte Young* in the state sovereign immunity context—that is, the idea that an officer engaged in conduct found to be unconstitutional or otherwise unlawful was not really acting on behalf of the sovereign. Thus, a suit aimed at such conduct was not barred by sovereign immunity. *See, e.g.*, Larson v. Domestic & Foreign Comm. Corp., 337 U.S. 682, 689 (1949) (permitting an injunction against a federal officer acting ultra vires); Noble v. Union River Logging R.R., 147 U.S. 165, 172 (1893) (same). Nonetheless, if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," Land v. Dollar, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act," the suit was to be considered, in actuality, to be one against the United States, and hence barred by sovereign immunity. *Larson*, 337 U.S. at 704; *see also* Dugan v. Rank, 372 U.S. 609, 620 (1963) (reciting these same criteria).

Courts applying these criteria used a range of terminology in weighing the question of whether or not a suit was barred by the doctrine of sovereign immunity. Courts spoke, for example, of whether a suit was "in substance, a suit against the Government" or "whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson*, 337 U.S. at 687–88. One of the ways in which courts approached the issue, however, was through the concept of indispensability—finding that, in certain circumstances, the case must be dismissed because the government was indispensable and not subject to joinder because of sovereign immunity. Thus, as the Court explained in *Larson*, a suit could proceed against a government officer who claimed to be acting under authority that was itself alleged to be unconstitutional. Yet, the Court also noted, "[s]overeign immunity may . . . become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental machinery into play," and thus "[t]he Government then becomes an indispensable party and without its consent cannot be implicated." *Id.* at 715 (Frankfurter, J., dissenting); *see also* Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 375 (1945) (suggesting that an action against the Undersecretary of the Navy was in reality "an indirect effort to collect a debt allegedly owed by the government" and the United States was hence an indispensable party); Morrison v. Work, 266 U.S. 481, 484, 490 (1925) (affirming dismissal of suit by class of Chippewas against federal officials on the grounds that the United States was an indispensable party).

The concept of "indispensable parties" in actions nominally against a government officer thus derives from a tradition that is both related to and fundamentally different from the set of concerns that are reflected in Rule 19. In the *Morrison/Mine Safety* sense, the "indispensable party" concept is really just an elaboration of the general rule that one may not evade the doctrine of sovereign immunity by superficially changing the form of the lawsuit. Rule 19, on the other hand, partakes of a distinct procedural tradition that emphasizes the importance, for reasons of judicial economy and fairness, of adjudicating as much as possible of one dispute in a single proceeding. Nonetheless, courts have sometimes blurred the distinct meanings of the term "indispensable party" in these two very different contexts—for example, by citing nonstatutory review

(normally invoked in suits against the federal government), even if an exception to sovereign immunity would otherwise apply, courts could find the government to be "indispensable," and the suit therefore barred, if "the relief prayed for also entail[ed] interference with governmental property or [brought] the operation of governmental machinery into play."[373] Thus, if the suit, for example, named an officer but sought to achieve precisely the same results as a direct suit against the government, courts would act to prevent the suit from going forward unless the real party in interest was joined.

Courts might apply similar principles to many of the cases discussed in this Article. One could conceive of a situation, for example (though it is hardly clear that *Butters* falls into this pattern), where the operations of a nominally private contractor are so closely intertwined with that of the government that a suit against one constitutes, in effect, a suit against the other. Under such circumstances, invoking some version of sovereign immunity doctrine may be appropriate to maintain consistent results and avoid litigant gamesmanship.

As far as it goes, this practice should be relatively uncontroversial. A variety of legal doctrines, of course, attempt to look to substance, rather than form, in determining the extent to which a particular principle should be applied.[374] A corollary to this principle, however, is that courts should be reluctant to apply sovereign immunity protections in cases where no element of disguise is involved—that is, where a suit is clearly against the sovereign neither in form nor in substance. Courts should recognize, in other words, that when no element of disguise is present, attempts to invoke sovereign immunity constitute an *expansion* of the doctrine, not merely an implementation of it. Given that it is hard to find approval for such an expansion even among the doctrine's current supporters, courts should be reluctant to license one absent extremely compelling circumstances.[375]

cases in determining that the federal government is indispensable under Rule 19. *See, e.g.*, Nichols v. Rysavy, 809 F.2d 1317, 1333 (8th Cir. 1987) (citing *Mine Safety* in the course of determining that action should be dismissed because the United States was an indispensable party under Rule 19).

373. *Larson*, 337 U.S. at 715 (Frankfurter, J., dissenting).

374. For a consideration of this problem in a different context, see Joseph Isenbergh, Review, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 863–64 (1982) (discussing the classification of transactions for tax purposes).

375. An interesting example of a case in which the court could have authorized an expansion of sovereign immunity, but chose not to, is *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774 (9th Cir. 2005). In *Peabody*, the Ninth Circuit permitted the Navajo Nation to be joined in a suit by the EEOC,

CONCLUSION

The various sovereign immunity principles arose as judge-made law—gradually and, at times, haphazardly. Those principles have now crystallized into established doctrine—a doctrine that, at times, serves at least arguably valuable goals (such as ensuring that certain decisions are made by elected bodies rather than the judiciary) but often at an even more significant price to individual litigants and to the rule of law. In considering the application of sovereign immunity in novel situations, courts have too often been persuaded to create a penumbral version of the doctrine without adequate consideration of the consequences. Because the benefits of a sovereign immunity doctrine come at so high a cost, it is important that any extensions of the doctrine be reasoned and deliberate. In contrast to the doctrine's past development, sovereign immunity's future direction should not be allowed to evolve simply by accident.

notwithstanding the absence of a direct cause of action by the EEOC against the Nation. *Id.* at 776. The court reasoned that (1) sovereign immunity did not bar suits by a federal agency, and (2) joinder under Rule 19 should be permissible even in the absence of a direct cause of action by the agency against the Nation. *See id.* at 777, 782–83. The case could have presented an occasion for the court to craft a new rule of penumbral immunity—by holding, for example, that even if joinder of a non-sovereign entity would be permissible under these circumstances, joinder of a sovereign should be allowed only if the federal agency could state a direct cause of action against it. Notably, however, the court chose not to go in this direction.