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INTENT MATTERS: ASSESSING SOVEREIGN IMMUNITY FOR TRIBAL ENTITIES

Gregory J. Wong

Abstract: Indian tribes create corporations and agencies, such as casinos and economic development organizations, to further tribal goals. When such an entity is sued, the courts must determine whether the entity shares in the tribe's inherent sovereign immunity. Like tribes, the federal and state governments also create corporations and agencies to further their governmental goals. To determine whether such a federal entity shares in the federal government's sovereign immunity, the courts ask if Congress intended to grant the entity immunity from suit. For state entities, courts ask if the state government intended to extend its sovereign immunity to the entity by examining how state law characterizes the entity. The courts have designed a variety of tests to determine when a tribal entity shares in a tribe's sovereign immunity but none of these explicitly examine the intent of the tribe. This Comment argues that courts err if they do not examine a tribe's intent to extend its sovereign immunity to a tribal entity when analyzing the entity's amenability to suit. The courts defer to federal and state intent due to their status as sovereigns. Tribes are similarly sovereign governments. Federal, state, and tribal sovereign immunity all derive from the same source. Although Congress has the power to change or abrogate tribal sovereign immunity, thus far Congress has not chosen to alter the extent to which tribal entities may benefit from a tribal government's immunity from suit.

Immunity from suit is an inherent aspect of sovereignty rooted in common law.\(^1\) Courts have abandoned the historical notion that governments possess immunity from suit because the "king can do no wrong" and today justify sovereign immunity as a means to both protect the treasury and prevent the state apparatus from being turned against itself.\(^2\) Sovereign immunity extends beyond the sovereign in the strictest sense to include government corporations and agencies that operate as an arm of the sovereign.\(^3\) However, not every entity created by a sovereign is entitled to the protections of sovereign immunity.\(^4\)

2. See infra notes 20–25 and accompanying text.
3. See, e.g., Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that a tribal community college incorporated under the tribe's constitution is entitled to sovereign immunity as an arm of the tribe); George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 180 (1st Cir. 1974) (holding that a state entity, the State University Construction Fund, shares the state's immunity from suit). For clarity, this Comment will use the word "entity" to refer to both corporations and agencies.
4. See, e.g., S.J. v. Hamilton County, 374 F.3d 416, 423–24 (6th Cir. 2004) (holding that a juvenile training facility chartered by the state but funded and operated by the county is not an arm
Because sovereign immunity defines whether or not a court has jurisdiction over a suit,\textsuperscript{5} it is the duty of the courts to determine whether sovereign immunity has been extended to an entity created by a sovereign.\textsuperscript{6} When considering the extension of federal or state sovereign immunity, courts look to whether the government creating the entity intended the entity to share in the sovereign's immunity from suit.\textsuperscript{7} In other words, courts give deference to whether the sovereign intended to extend its immunity to an entity.\textsuperscript{8} To determine the sovereign's intent, courts look to how the entity is characterized by the sovereign's law.\textsuperscript{9} If there is no explicit language in the law that either preserves or waives sovereign immunity for the governmental entity, courts will analyze various factors to determine legislative intent.\textsuperscript{10}

The U.S. Supreme Court has not established a test to determine when tribal agencies and corporations share in the tribe's sovereign immunity.\textsuperscript{11} Nevertheless, state and lower federal courts have developed a variety of tests for this analysis.\textsuperscript{12} Yet, unlike the tests employed in the
context of federal and state sovereign immunity, none of the tests in the tribal context consider the tribe's intent in creating the entity.\(^\text{13}\) Courts ignore the tribe's intent, an important factor in the federal and state contexts, and primarily assess the entity's relationship to the tribal government.\(^\text{14}\)

This Comment argues that tribal intent should be a factor in determining whether sovereign immunity extends to tribal entities. Part I of this Comment discusses the nature of federal, state, and tribal sovereign immunity, concluding that they all spring from the same source. Part II examines the courts' inability to abrogate tribal sovereign immunity. Part III outlines how courts defer to the intent of federal and state governments when determining whether a governmental entity shares in the sovereign's immunity from suit. Part IV examines how state and federal courts have not taken the tribe's intent into account when analyzing whether a tribal entity shares in the tribe's sovereign immunity. Part V argues that because courts defer to federal and state intent when examining whether a governmental entity enjoys sovereign immunity, and because tribal sovereign immunity does not differ from state or federal immunity in this context, courts should also defer to tribal intent when determining whether sovereign immunity extends to tribal entities in the absence of any congressional instruction to the contrary.

I. FEDERAL, STATE, AND TRIBAL GOVERNMENTS ENJOY INHERENT SOVEREIGN IMMUNITY

Sovereign immunity is a common law doctrine that prohibits a sovereign from being sued in its own courts.\(^\text{15}\) The federal government,

\(^{13}\) See infra Part III.C.

\(^{14}\) See id.

\(^{15}\) See Nevada v. Hall, 440 U.S. 410, 414–16 (1979) (discussing common law roots of sovereign immunity). The one variation from this rule is that states are not immune from suit in other state courts. Id. at 426–27. The U.S. Supreme Court has not interpreted tribal sovereign immunity to require an analogous rule as it has consistently allowed Indian tribes to successfully assert their sovereign immunity in the state and federal courts. See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754–56, 760 (1998) (recognizing that tribes are not limited by the Constitution in the same way states are in holding sovereign immunity applies to tribal business transactions conducted off-reservation in a suit brought in state court); Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 507–09 (1991) (holding tribal sovereign immunity applies to counterclaims brought against a tribe in federal district court).
as sovereign in the United States, enjoys immunity from suit.\textsuperscript{16} States\textsuperscript{17} and Indian nations,\textsuperscript{18} as co-sovereigns with the federal government over their respective people and territories, also enjoy inherent immunity from suit. The sovereign retains this inherent immunity absent some alteration by Congress or the sovereign itself.\textsuperscript{19}

A. Sovereign Immunity Is a Common Law Bar to Suit

Immunity from suit is an absolute and inherent right enjoyed by sovereigns\textsuperscript{20} that operates as a jurisdictional bar\textsuperscript{21} preventing a sovereign from being sued in its own courts.\textsuperscript{22} This doctrine finds its historic roots in the common law notion that the "king can do no wrong."\textsuperscript{23} The modern doctrine is generally based on the premise that a sovereign has the ability to create legal rights without having such rights claimed against it.\textsuperscript{24} Sovereign immunity is also justified today as a means for the government to fulfill its governmental duties without competing legal claims impacting the sovereign's treasury.\textsuperscript{25}

\textsuperscript{17} See Alden v. Maine, 527 U.S. 706, 713 (1999).
\textsuperscript{19} See, e.g., Santa Clara Pueblo, 436 U.S. at 58 (discussing tribal sovereign immunity); Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998) (discussing federal sovereign immunity).
\textsuperscript{21} See Meyer, 510 U.S. at 475 ("Indeed, the ‘terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.’" (alteration in original) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941))).
\textsuperscript{22} See Hall, 440 U.S. at 414–16.
\textsuperscript{23} See WILLIAM BLACKSTONE, 1 COMMENTARIES *246 ("The king, moreover, is not only incapable of \textit{doing} wrong, but even of \textit{thinking} wrong; he can never mean to do an improper thing . . . .").
\textsuperscript{24} See Hall, 440 U.S. at 415–16 ("Mr. Justice Holmes explained sovereign immunity as based '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.'" (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907))).
B. The Federal Government Enjoys Inherent Immunity from Suit

As a sovereign, the federal government and its agencies enjoy inherent immunity from suit. Suits against the United States begin with a presumption that no relief from the sovereign is available to litigants. As such, federal sovereign immunity is absolute, and can only be altered or waived by Congress. To successfully waive the federal government’s sovereign immunity, Congress must unequivocally express the waiver through the language of a statute. Congress has chosen to utilize such an unequivocal waiver in numerous areas, including, for example, subjecting the United States to suit for certain torts committed by federal employees under the Federal Tort Claims Act.

C. States Retain Their Inherent Sovereign Immunity Subject to the Supremacy of the Constitution and Federal Government

States are co-sovereigns with the federal government over their territory and citizens. As such, states retain their inherent sovereign immunity from suit. State sovereign immunity derives from the states’ status as sovereigns prior to ratification of the U.S. Constitution and is affirmed by the Eleventh Amendment.


28. See id.


30. See 14 CHARLES ALAN WRIGHT, ARTHUR P. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3656 (3d ed. 1998) (detailing the major areas the federal government has waived its sovereign immunity).


33. See id. at 713.

34. U.S. CONST. amend. XI; see Alden, 527 U.S. at 712–13. In Alden, the Court clarified that the Eleventh Amendment serves only to reaffirm the states’ inherent sovereign immunity. Alden, 527 U.S. at 712–13. The Eleventh Amendment bars Congress from abrogating state sovereign immunity using its Article I powers, but does not do so when Congress exercises powers derived from amendments subsequent to the Eleventh Amendment. See infra note 39 and accompanying text.
The U.S. Supreme Court has held that state sovereign immunity may be limited in certain circumstances. For example, states may waive their immunity by consenting to suit. Any such waiver may not be implied but must be unequivocal. In addition, state sovereign immunity may be limited or abrogated by Congress. State sovereign immunity is subject to the supremacy of the U.S. Constitution and federal statutes. For example, Congress may abrogate state sovereign immunity by enacting explicit and unequivocal legislation under the Fourteenth Amendment.

D. Indian Tribes Retain Their Inherent Sovereign Immunity Unless Waived by the Tribe or by Congress

Like federal and state governments, Indian tribes possess sovereign immunity from suit. Tribal sovereign immunity is an inherent right

35. See Alden, 527 U.S. at 755.
38. See Testa v. Katt, 330 U.S. 386, 391 (1947) ("[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or Laws of any State to the contrary notwithstanding.'" (citing U.S. CONST. art. VI, § 2)).
39. See Fitzpatrick, 427 U.S. at 456 ("We think that Congress may... for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). The "impermissible" contexts Fitzpatrick refers to arise due to the Eleventh Amendment, which precludes Congress from using its Article I powers to abrogate state sovereign immunity. See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66–67 (2000) (holding that the federal Age Discrimination in Employment Act did not abrogate state sovereign immunity); Alden, 527 U.S. at 712 (holding that Congress may not use its Article I powers to subject a state to suit in state court without its consent); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–36 (1999) (holding that neither the Commerce Clause nor the Patent Clause provided Congress with authority to abrogate state sovereign immunity); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47, 53 (1996) (holding that an action by a tribe pursuant to a statute passed under authority of the Indian Commerce Clause was precluded by the Eleventh Amendment).
40. See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (internal citations omitted)); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)
derived from the tribes’ status as sovereign nations prior to European conquest.\textsuperscript{41} As such, tribal sovereign immunity extends to all of a tribe’s governmental and commercial activities regardless of whether the activity takes place on or off its reservation.\textsuperscript{42}

As with federal and state sovereign immunity, tribal sovereign immunity may only be waived by either the sovereign itself\textsuperscript{43} or Congress.\textsuperscript{44} As in the other contexts, waivers of tribal sovereign immunity must be unequivocally expressed.\textsuperscript{45} In the absence of such an explicit waiver, Indian nations are absolutely exempt from suit.\textsuperscript{46}

Although Congress may waive tribal sovereign immunity, it has only chosen to do so in limited classes of suits.\textsuperscript{47} For example, Congress has chosen to expose tribes to suit in the areas of mandatory liability insurance\textsuperscript{48} and gaming activities.\textsuperscript{49} Nevertheless, Congress has not limited the tribes’ ability to share their inherent immunity from suit with tribal entities.\textsuperscript{50} To the contrary, the doctrine of tribal sovereign immunity has been consistently acknowledged and approved of by

\begin{itemize}
\item \textsuperscript{41} See Santa Clara Pueblo, 436 U.S. at 55–58 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. . . . Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").
\item \textsuperscript{43} See id. at 754.
\item \textsuperscript{44} See id. at 756 ("[T]ribal immunity is a matter of federal law and is not subject to diminution by the States."); Santa Clara Pueblo, 436 U.S. at 58.
\item \textsuperscript{45} See Santa Clara Pueblo, 436 U.S. at 58–59 (citing United States v. Testan, 424 U.S. 392, 399 (1976)).
\item \textsuperscript{46} See id. at 58.
\item \textsuperscript{47} See Kiowa Tribe, 523 U.S. at 759.
\item \textsuperscript{49} Id. § 2710(d)(7)(A)(ii) (2000) (giving federal district courts jurisdiction over claims by a state or tribe that class III gaming activities are occurring on tribal lands in violation of a Tribal-State gaming compact).
\item \textsuperscript{50} See Gavle v. Little Six, Inc., 534 N.W.2d 280, 285 (Minn. Ct. App. 1995), aff'd, 555 N.W.2d 284 (Minn. 1996) (reasoning in part that because "Congress has left the issue unresolved[,]" a tribal casino benefits from the tribe’s sovereign immunity).
\end{itemize}
Congress as a means to promote tribal self-sufficiency, economic development and self-government.\textsuperscript{51}

In sum, sovereign immunity bars suits against sovereigns. The federal, state, and tribal governments all enjoy inherent sovereign immunity as an aspect of their sovereignty. Federal, state, and tribal sovereign immunity may be altered either by valid congressional action or by the sovereign itself. Absent such alteration, a sovereign’s immunity from suit remains undiminished.

II. COURTS MAY NOT ABROGRATE TRIBAL SOVEREIGN IMMUNITY

Under existing U.S. Supreme Court precedent, courts may not abrogate the sovereign immunity of tribes.\textsuperscript{52} Specifically, the judiciary defers to the power of Congress on questions of tribal sovereign immunity.\textsuperscript{53} While Congress may implement comprehensive legislation to limit tribal sovereign immunity, the Court has refused to impose additional judicial limitations on the tribes’ immunity from suit.\textsuperscript{54} This is true even where the Court expresses misgivings about particular applications of the doctrine.\textsuperscript{55}

\begin{itemize}
  \item \textsuperscript{51} See Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991) (citing the Indian Financing Act of 1974 § 2, 25 U.S.C. § 1451 (2000) (“It is hereby declared to be the policy of Congress to... help develop and utilize Indian resources”) and the Indian Self-Determination and Education Assistance Act § 3 (codified as amended at 25 U.S.C. § 450a(b) (2000)) (“The Congress declares its commitment to... the establishment of a meaningful Indian self-determination policy.... In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments....”)).
  \item \textsuperscript{52} See Kiowa Tribe, 523 U.S. at 758–60; Okla. Tax Comm’n, 498 U.S. at 510 (“[W]e are not disposed to modify the long-established principle of tribal sovereign immunity.”). The federal judiciary has made it clear that only the tribe itself or Congress may abrogate tribal sovereign immunity. See Andrea M. Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty, 37 TULSA L. REV. 661, 699–700 (2002). Under the established doctrine, the courts possess “interpretive latitude” in construing when such a waiver exists, but they may not independently abrogate tribal sovereign immunity. See id.
  \item \textsuperscript{53} See Kiowa Tribe, 523 U.S. at 758–60.
  \item \textsuperscript{54} See id.
  \item \textsuperscript{55} See id. at 758 (acknowledging that “[t]here are reasons to doubt the wisdom of perpetuating the doctrine” of tribal sovereign immunity, but choosing to “defer to the role Congress may wish to exercise in this important judgment”).
\end{itemize}
In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the U.S. Supreme Court held that federal and state courts should defer to Congress on the question of tribal sovereign immunity because Congress alone is in the proper position to consider relevant policy interests. *Kiowa Tribe* considered whether a tribal business that defaulted on a commercial contract was immune from suit in state court where the original contract was entered into off the reservation. In its analysis, the Court noted that there may be strong policy reasons to doubt the wisdom of tribal sovereign immunity in an age where tribes engage in commercial activity both on and off the reservation. Nevertheless, the Court declined to abrogate the tribe’s sovereign immunity because doing so would have been a departure from prior Court precedent. Instead, the Court chose to defer to Congress due to its comprehensive ability to limit or alter tribal sovereign immunity and weigh the relevant policy considerations.

In sum, the U.S. Supreme Court has established that courts may not act to abrogate tribal sovereign immunity. Courts must instead defer to the plenary power of Congress to limit tribal sovereign immunity. Therefore, in the absence of a congressional directive, courts may not limit tribal sovereign immunity.

### III. THE SOVEREIGN’S INTENT BEARS ON WHETHER A FEDERAL OR STATE ENTITY ENJOYS IMMUNITY

Sovereigns create entities to carry out the work of the government. When a federally-created entity is sued, the courts inquire whether Congress intended to extend its sovereign immunity to the entity. Similarly, when a state-created entity is sued, courts look to state law to determine whether the state legislature intended to extend its sovereign

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57. See id. at 759–60.
58. See id. at 753–54.
59. See id. at 758.
60. See id. at 758–60.
61. See id.
63. See id. at 389 (“Congress may, of course, endow a governmental corporation with the government’s immunity. But always the question is: has it done so?”).
immunity to the state-created entity.\textsuperscript{64} Courts defer to the intent of these governments due to their status as sovereigns.\textsuperscript{65}

A. Sovereigns Regularly Create Governmental Corporations and Agencies Which May or May Not Enjoy Sovereign Immunity

Sovereigns create corporations and agencies to carry out the daily business of the government.\textsuperscript{66} These governmental entities can interact with the public and do business as any other member of the commercial world.\textsuperscript{67} Nevertheless, the mere fact that a government-created entity does the work of the government does not necessarily entitle it to share in its creator's sovereign immunity.\textsuperscript{68} When a government creates an entity and authorizes it to engage in business and commercial transactions, courts must determine whether sovereign immunity extends to the entity or whether it is amenable to suit.\textsuperscript{69}


When the United States creates a corporation or agency, the entity does not enjoy immunity from suit unless such immunity is provided by Congress.\textsuperscript{70} Although federal entities operating in a commercial context


\textsuperscript{65} See Fed. Land Bank of St. Louis v. Priddy, 295 U.S. 229, 231 (1935) (identifying the federal government's plenary power over matters that affect its sovereignty); S.J. v. Hamilton County, 374 F.3d 416, 421–22 (6th Cir. 2004) (pointing to states' sovereignty as a reason to examine the state law that created the entity in question and also as a reason to avoid limiting analysis to only ultimate state financial liability).

\textsuperscript{66} See Keifer & Keifer, 306 U.S. at 389, 390 n.3 (identifying government's historic use of corporations and agencies to conduct the work of government and identifying numerous examples, such as the creation of the American Legion, Tennessee Valley Authority, and Federal Deposit Insurance Corporation).


\textsuperscript{68} See Keifer & Keifer, 306 U.S. at 388.

\textsuperscript{69} See Burr, 309 U.S. at 244; Keifer & Keifer, 306 U.S. at 389; Standard Oil Div., Am. Oil Co. v. Starks, 528 F.2d 201, 202 (7th Cir. 1975); United States v. Edgerton & Sons, Inc., 178 F.2d 763, 764 (2d Cir. 1949).

\textsuperscript{70} See Foster v. Day & Zimmermann, Inc., 502 F.2d 867, 874 n.6 (8th Cir. 1974); accord Keifer & Keifer, 306 U.S. at 388–89.
are presumed not to receive governmental immunity.\textsuperscript{71} Congress may grant them sovereign immunity.\textsuperscript{72} The fundamental inquiry the courts conduct is whether or not Congress intended to grant the governmental entity immunity from suit.\textsuperscript{73} This deference recognizes, generally, the ultimate sovereignty of the federal government,\textsuperscript{74} and specifically, that a sovereign is the ultimate source of its own courts' jurisdiction.\textsuperscript{75}

The Seventh Circuit Court of Appeals applied these principles in \textit{Standard Oil Division, American Oil Co. v. Starks},\textsuperscript{76} holding that the U.S. Postal Service was not entitled to share in the federal government's sovereign immunity.\textsuperscript{77} In reaching this conclusion, the court pointed to express statutory language Congress included in the Postal Reorganization Act giving the Postal Service the power to "sue or be sued" and granting original jurisdiction to the United States District Courts for any actions brought against the Postal Service.\textsuperscript{78} The court also examined the enacting language of the statute to conclude that despite its creation as a federally chartered agency, Congress nevertheless intended the Postal Service to operate in a "business-like way."\textsuperscript{79} Because the statutory language indicated that Congress intended the Postal Service to operate as an autonomous agency, the court concluded that Congress did not intend for the Postal Service to share in the federal government's sovereign immunity.\textsuperscript{80}

\textsuperscript{71} See Reconstr. Fin. Corp. v. J.G. Menihan Corp., 312 U.S. 81, 84--86 (1941) (holding that Congressional authorization for the federal Reconstruction Finance Corporation to "sue and be sued" constitutes a waiver of sovereign immunity); \textit{Burr}, 309 U.S. at 245 ("It must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.").

\textsuperscript{72} See \textit{Burr}, 309 U.S. at 244 ("Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."); \textit{Keifer & Keifer}, 306 U.S. at 389 ("Congress may, of course, endow a governmental corporation with the government's immunity.").

\textsuperscript{73} See \textit{Keifer & Keifer}, 306 U.S. at 389.


\textsuperscript{75} See \textit{Burr}, 309 U.S. at 244, 251 (emphasizing Congress's ability to grant or withhold immunity from suit to its entities).

\textsuperscript{76} 528 F.2d 201 (7th Cir. 1975).

\textsuperscript{77} See id. at 204.

\textsuperscript{78} See id. at 202--03.

\textsuperscript{79} See id. at 202.

\textsuperscript{80} See id. at 202--04.
C. Out of Respect for State Sovereignty, Courts Examine the Intent of the State Legislature To Help Determine Whether a State Entity Enjoys Sovereign Immunity

State sovereign immunity bars suits not only in actions against a state but also in actions against those governmental entities considered to be an "arm of the state." To determine whether an entity is an arm of the state, and thus entitled to sovereign immunity, courts examine the state's intent in creating the entity. Courts make this inquiry into a state's intent out of deference to the state's status as a sovereign. As the primary factor in the intent analysis, courts consider how the state legislature defined or characterized the entity in state law. In order to extend state sovereign immunity, the entity must have a close relationship with the state. Entities that are mere municipal corporations or other political subdivisions, such as counties, do not benefit from the state's immunity from suit.

Although the U.S. Supreme Court has not laid down a dispositive test to determine when an entity qualifies as an arm of the state, the Court's

81. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429–30 (1997) (holding that the federal government's indemnification of the University of California for litigation costs, including adverse judgments, does not alter the University's immunity from suit under the Eleventh Amendment); S.J. v. Hamilton County, 374 F.3d 416, 419–20 (6th Cir. 2004) (holding that a juvenile training facility chartered by the state but funded and operated by the county is not an arm of the state for sovereign immunity purposes).

82. See, e.g., S.J., 374 F.3d at 420 (considering factors such as "how state law defines the entity"); Williams v. Dallas Area Rapid Transit, 242 F.3d 315, 319 (5th Cir. 2001) (relying in part on "whether the state statutes and case law characterize the agency as an arm of the state"); Haldeman v. State of Wyo. Farm Loan Bd., 32 F.3d 469, 473 (10th Cir. 1994) (looking to "the characterization of the district under state law" (quoting Ambus v. Granite Bd. of Educ., 995 F.2d 992, 994 (10th Cir. 1993))); Mitchell v. L.A. Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1989) ("To determine these factors, the court looks to the way state law treats the entity."); Morris v. Wash. Metro. Area Transit Auth., 781 F.2d 218, 223 (D.C. Cir. 1986) ("The important point for the present case is that the state's characterization counted for something."); George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 180–81 (1st Cir. 1974) (examining the state law that created the State University Construction Fund and concluding that the Fund shares the state's Eleventh Amendment immunity from suit).

83. See S.J., 374 F.3d at 421–22 (citing the states' sovereignty as a reason to examine not only the potential for state financial liability, but also the state law creating an entity).

84. See, e.g., id. at 420.

85. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (distinguishing entities that should be considered "arms of the state" from entities that are political or municipal subdivisions).

decisions have consistently deemed the intent of the state legislature an important factor. While the Court has balanced multiple factors, the list of factors has not remained constant. To determine intent, the Court analyzes the state legislature's characterization of the entity under state law. In fact, the U.S. Supreme Court has specifically noted that the state law's characterization of an entity must be considered when analyzing the applicability of state sovereign immunity.

The Supreme Court's lack of uniform guidance has allowed the lower courts to develop their own multi-factor balancing tests to determine whether a state entity enjoys state sovereign immunity. The circuit courts of appeal have articulated different tests, utilizing anywhere from two to nine different factors, to determine whether a state corporation or agency is an "arm of the state" for purposes of sovereign immunity.

87. See, e.g., Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401-02 (1979) (examining six factors in holding that a bi-state agency is not an arm of the state, including the express intent of the states to create the agency as a "separate legal entity" and a "political subdivision"); Mt. Healthy, 429 U.S. at 280-81 (examining four factors in holding that a local school board is not an arm of the state, including how state law characterizes the local school boards); see also Rogers, supra note 64, at 1243-44.

88. One legal commentator has described the Court's approach as "unintelligible," "ad hoc" and plagued by "incoherence." See Rogers, supra note 64, at 1243. In Mt. Healthy, the Court examined four factors in holding that a local school board is not an arm of the state: (1) how state law characterizes local school boards; (2) the degree of supervision the State exercises over local school boards; (3) how much funding the State provides to the school board; and (4) the board's ability to generate revenue. 429 U.S. at 280-81. This contrasts with its approach just two years later in Lake Country Estates, where the Court examined six factors in holding that a bi-state agency is not an arm of the state: (1) the express intent of the States to create the agency as a "separate legal entity" and a "political subdivision"; (2) the power of counties and cities to appoint six of ten governing members of the agency, compared to only four appointed by the States; (3) the funding of the agency from county rather than State funds; (4) the express provision that the agency's obligations shall not be binding on the States; (5) whether the primary purpose of the agency, regulation of land use, is one traditionally performed by local governments; and (6) the lack of any veto power by the States over agency rules. 440 U.S. at 401-02.

89. See, e.g., Lake Country Estates, 440 U.S. at 401-02; Mt. Healthy, 429 U.S. at 280-81.

90. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5 (1997).

91. See Rogers, supra note 64, at 1269-71.

92. See Haldeman v. State of Wyo. Farm Loan Bd., 32 F.3d 469, 473 (10th Cir. 1994) (examining two factors: (1) the degree of autonomy given to the agency, informed by the characterization of the agency by state law and the extent the state provided guidance and control; and (2) the amount of financing the agency receives independent of the state and the agency's ability to provide its own financing).


94. See Rogers, supra note 64, at 1269-71.
Nevertheless, while the lower courts examine different lists of factors, the intent of the state legislature to extend sovereign immunity consistently guides the courts’ “arm of the state” inquiry.\textsuperscript{95}

For example, in \textit{S.J. v. Hamilton County},\textsuperscript{96} the Sixth Circuit Court of Appeals held that a juvenile training facility authorized by state law, but funded mainly by a county, was not entitled to share in the state’s sovereign immunity.\textsuperscript{97} The court weighed four factors in its analysis,\textsuperscript{98} one of which considered whether the state legislature intended to extend sovereign immunity to the training facility.\textsuperscript{99} The court considered the state’s intent by examining how the state legislature characterized the facility under state law.\textsuperscript{100} Although the state law that created the facility did not explicitly address sovereign immunity, the court noted the statute labeled the entity a “single-county juvenile facility” rather than a state facility.\textsuperscript{101} The court also discussed and ultimately rejected the idea that the state’s ultimate financial liability alone could serve to determine whether or not the facility enjoyed state sovereign immunity.\textsuperscript{102} The court concluded that examining ultimate financial liability alone, without considering how the facility was characterized by state law, was an insufficient method of analysis as it did not fully respect the state’s status as a sovereign.\textsuperscript{103}

In sum, a sovereign may create a corporation or agency to carry out governmental objectives. When the federal government is the sovereign creating the entity, courts defer to Congress’s intent to determine whether the entity should benefit from the federal government’s immunity from suit. When a state government is the relevant sovereign,
courts defer to the state legislature’s intent to determine whether the entity should be considered an “arm of the state” for sovereign immunity purposes. This judicial deference to the government’s intent is based on the government’s status as a sovereign.

IV. COURTS HAVE NOT USED INTENT TO DETERMINE IF A TRIBAL ENTITY ENJOYS SOVEREIGN IMMUNITY

While courts consider the sovereign’s intent in determining sovereign immunity in the federal and state government contexts, they have not done so when considering whether tribal sovereign immunity extends to a tribal entity. The U.S. Supreme Court has not established a test to determine whether a tribal entity is entitled to sovereign immunity as an “arm of the tribe.”

State and lower courts have created multiple tests, none of which expressly or consistently consider tribal intent when determining whether a tribal entity is an “arm of the tribe.”

A. Indian Tribes Create Entities under Federal, State and Tribal Law

Pursuant to their inherent powers, tribes create entities to carry out their daily governmental activities and business. Tribes have the power to incorporate their agencies and corporations under federal, state, or tribal law. As with federal and state entities, courts are often


105. See, e.g., Runyon v. Ass’n of Vill. Council Presidents, 84 P.3d 437, 440 (Alaska 2004) (holding that ultimate financial liability is the paramount factor in determining whether or not a tribal entity enjoys tribal sovereign immunity); Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 658 N.E.2d 989, 992–93 (N.Y. 1995) (examining nine different factors to determine whether or not a tribal entity enjoys tribal sovereign immunity, none of which are related to the tribe’s intent).

106. See COHEN’S, supra note 18, at 1341–42.

107. See, e.g., Runyon, 84 P.3d at 438 (tribal corporation created under state law); Ransom, 658 N.E.2d at 991 (tribe created a nonprofit corporation under federal law); Wright, 147 P.3d at 1277 (corporation created under tribal code). Courts have not distinguished whether a tribal entity is established under tribal, state or federal law in their sovereign immunity analysis. Whether different outcomes are mandated depending on whether a tribe creates an entity under federal, state, or tribal law is beyond the scope of this Comment.

108. See, e.g., S.J., 374 F.3d at 423–24 (holding that the state-created entity at issue does not enjoy sovereign immunity and is therefore subject to the court’s jurisdiction); Standard Oil Div., Am. Oil Co. v. Starks, 528 F.2d 201, 204 (7th Cir. 1975) (holding that the federally-created entity at issue does not enjoy sovereign immunity and is therefore subject to the court’s jurisdiction); see also supra Parts III.B–III.C.
asked to assess whether such tribal entities share in a tribe’s immunity from suit.  

B. **Tribal Intent Is Neither Expressly nor Consistently Considered by the Courts in Determining Whether a Tribal Entity Enjoy Sovereign Immunity**

The U.S. Supreme Court has not established a test to determine whether tribal agencies and corporations share in a tribe’s sovereign immunity. However, other courts have held that if a tribal entity serves as an arm of the tribe, the entity enjoys the tribe’s sovereign immunity from suit. While the U.S. Supreme Court has generally recognized the “arm of the tribe” standard, it has not clarified how a tribal entity qualifies as an arm of the tribe.

Both state and federal courts have created various tests to determine whether a tribal entity is an arm of the tribe. For example, in *Ransom v. St. Regis Mohawk Education and Community Fund*, the New York Court of Appeals identified nine factors that may be used to determine whether a tribal entity enjoys sovereign immunity. This approach sharply contrasts with methods adopted by other courts. For example,

109. See, e.g., *Runyon*, 84 P.3d at 441 (holding that an Indian tribe’s sovereign immunity did not extend to a nonprofit Alaska corporation created by sovereign tribal villages).

110. See *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 293–94 (Minn. 1996); *Wright*, 147 P.3d at 1283 n.5 (Madsen, J., concurring).

111. See, e.g., *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that a tribal community college incorporated under the tribe’s constitution is entitled to sovereign immunity).

112. See *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 n.1 (2003) (“The United States maintains, and the County does not dispute, that the Corporation is an ‘arm’ of the Tribe for sovereign immunity purposes.”).

113. See *Gavle*, 555 N.W.2d at 293–94; *Wright*, 147 P.3d at 1283 n.5 (Madsen, J., concurring).


115. See id. at 992–93 (examining: (1) whether the entity is organized under the tribe’s laws or constitution; (2) the entity’s purposes; (3) the composition of the entity’s governing body; (4) whether the tribe has legal title or ownership of property used by the entity; (5) whether tribal officials exercise control over the administration or accounting activities of the entity; (6) whether the tribe’s governing body has power to dismiss members of the entity’s governing body; (7) whether the corporate entity generates its own revenue; (8) whether a suit against the entity will impact the tribe’s treasury; and (9) whether the entity has the power to bind or obligate the tribe’s funds).

the Alaska State Supreme Court has applied a single factor test, holding that if a tribe does not have ultimate financial liability for a judgment against an entity, the entity is not entitled to tribal sovereign immunity.117

Despite the existence of a wide variety of tests, no test thus far applied by a state or federal court explicitly looks to tribal law to determine whether a tribe intended an entity to enjoy sovereign immunity as an “arm of the tribe.”118 For example, in Wright v. Colville Tribal Enterprise Corp.,119 the Supreme Court of Washington recognized that the Colville Tribes created a governmental entity under the Colville Tribal Governmental Corporation Act (Act).120 The Act expressly states that entities created thereunder “shall be considered to be governmental agencies and instrumentalities . . . entitled to all of the privileges and immunities enjoyed by the Tribes; including but not limited to, immunities from suit in Federal and State courts. . . .”121 The plurality opinion quotes this section of the Act, including the section voicing the intent of the Tribes to cover the entity with their sovereign immunity, in its facts section.122 The plurality held the entity was entitled to sovereign immunity, however, not by considering the Tribes’ intent contained in the Act, but by adopting the view that “tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws.”123 A concurring opinion, however, disagreed with this broad rule and looked instead to both the Tribes’ ultimate financial liability and their intent as

117. See Runyon, 84 P.3d at 440.
118. See, e.g., id.; Ransom, 658 N.E.2d at 992–93. A few courts have examined tribal law to help ascertain whether a tribal entity has a governmental or commercial purpose, but these courts have not done so to examine a tribe’s intent to waive or extend its sovereign immunity over the entity. See, e.g., Gavle, 555 N.W.2d at 294–95 (examining a tribal gaming entity’s articles of incorporation to help ascertain whether it had a governmental or commercial purpose); Trudgeon v. Fantasy Springs Casino, 84 Cal. Rptr. 2d 65, 69–70 (1999) (examining the tribal ordinance creating a casino to help ascertain whether it had a governmental or commercial purpose while noting that a commercial purpose does not necessarily bar the entity from receiving tribal immunity).
119. 147 P.3d 1275 (Wash. 2006).
122. See Wright, 147 P.3d at 1277.
123. See id. at 1279.
expressed in the language of the incorporating Act to justify extending tribal sovereign immunity to the entity.124

In sum, the U.S. Supreme Court has not established a test to determine whether an entity is an "arm of the tribe" entitled to sovereign immunity. Lower courts have created various balancing tests to make this determination. None of these tests explicitly consider tribal intent as a pertinent factor.

V. THE TRIBE'S INTENT SHOULD BEAR ON WHETHER A TRIBAL ENTITY IS ENTITLED TO SOVEREIGN IMMUNITY

In deference to the sovereign, courts evaluating claims of federal and state sovereign immunity examine whether the sovereign intended to extend immunity to a governmental entity.125 The federal government, state governments, and Indian tribes all enjoy the same general powers of sovereignty126 and inherent immunity from suit.127 Therefore, courts should also examine the intent of the tribe to extend sovereign immunity to a tribal entity. When a court does not examine tribal intent, it may impermissibly alter the scope of tribal sovereign immunity.

124. See id. at 1284–85 (Madsen, J., concurring). It is interesting to note that the Washington State Court of Appeals decision which was reversed in Wright adopted an entirely different approach from both the plurality and concurring opinions. See Wright v. Colville Tribal Enter. Corp., 127 Wash. App. 644, 111 P.3d 1244 (2005), rev'd, 147 P.3d 1275 (2006). The Court of Appeals recognized that the Colville Tribes created the governmental entity under the Act. See id. at 646, 111 P.3d at 1246. Despite the express demonstration of intent in the Act, the court made no mention of this language when considering the extension of tribal sovereign immunity to the entity. The Washington State Court of Appeals, like the Alaska Supreme Court, looked only to the question of ultimate financial liability without weighing any other factors. See Wright, 127 Wash. App. at 654–56, 111 P.3d at 1250.

125. See Fed. Land Bank of St. Louis v. Priddy, 295 U.S. 229, 231 (1935) (deference given to the federal government’s intent due to its sovereign power); S.J. v. Hamilton County, 374 F.3d 416, 421–22 (6th Cir. 2004) (pointing to the states’ sovereignty as a reason to examine a state’s intent as demonstrated by the state law creating the entity).

126. See United States v. Wheeler, 435 U.S. 313, 322–23 (1978) (recognizing that Indian tribes exercise the inherent powers common to all sovereigns, including creating and enforcing their own laws).

127. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").
A. *Tribal Sovereign Immunity Is Entitled to the Same Treatment as Federal and State Sovereign Immunity When Assessing Whether a Governmental Entity Is Immune from Suit*

In recognition of the sovereign's right to rule, courts examine the federal and state governments' intent to extend sovereign immunity to a governmental entity. The courts defer to Congress's intent to extend federal sovereign immunity to a federal agency or corporation out of respect for these sovereign rights. Similarly, when deciding whether a state agency or corporation enjoys sovereign immunity, courts consider the intent of the state legislature.

The power of tribes to extend their sovereign immunity to tribal entities has not been altered by Congress and therefore does not operate differently than that of the federal and state governments. Unless altered by Congress, tribal sovereign immunity operates in the same manner as federal and state sovereign immunities. All three governments retain the power to extend their sovereign immunity to a governmental entity. Courts, therefore, should apply the same test when determining sovereign immunity whether dealing with a federal, state, or tribal entity.

When determining whether a tribal entity enjoys immunity from suit, some courts have looked only to the ultimate financial liability of the tribe without examining tribal intent. Courts have found such an

128. *See Priddy*, 295 U.S. at 231 (noting that deference is given to the federal government due to its sovereign power); *S.J.*, 374 F.3d at 421–22 (pointing to states' sovereignty as a reason to examine state law creating an entity and to not limit analysis to only ultimate state financial liability).


130. *See Rogers*, supra note 64, at 1288–91.


132. *See supra* Part I.

133. *See, e.g.*, *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 244 (1940) (holding that Congress has the power to determine whether or not a federal agency shares in the federal government's sovereign immunity); *Hagen v. Sisseton-Wahpeton Cnty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that a tribal community college incorporated under the tribe's constitution is entitled to sovereign immunity); *George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund*, 493 F.2d 177, 180–81 (1st Cir. 1974) (holding that a state-created entity, the State University Construction Fund, shares the state's immunity from suit).

approach to be insufficient in the context of state sovereign immunity.\textsuperscript{135} Tribal and state sovereign immunity share identical theoretical underpinnings.\textsuperscript{136} Because ultimate financial liability of the sovereign is insufficient in the state context, it should also be insufficient in the tribal context.

State and federal courts, in determining whether tribal entities are subject to suit, must examine whether the tribe intended for the entity to share in its immunity. To do so, the courts must look to the tribal law that created the entity to inform their decision. Congress has not expressly acted to change the tribes’ common law immunity from suit as it relates to entities created by tribal governments.\textsuperscript{137} Therefore, courts must interpret sovereign immunity consistently in the federal, state, and tribal contexts. The courts examine the intent of the sovereign to extend its immunity from suit when the sovereign is the federal government or a state government.\textsuperscript{138} They must do likewise when the sovereign is an Indian tribe.

Although tribal intent alone may not be sufficient to extend tribal sovereign immunity to tribal entities, it should be the touchstone courts use to begin their analysis of whether an entity is an arm of the tribe.\textsuperscript{139} If an Indian tribe stipulates that a tribal entity is immune from suit, courts err if they do not give the same deference to the tribe’s intent that they give to federal and state intent when examining entities created under federal and state law.

\textbf{B. The Judiciary Must Defer to the Power of Congress to Limit the Scope of Tribal Sovereign Immunity}

While Congress may implement legislation to limit tribal sovereign immunity, the courts may not impose judicial limitations on the tribes’
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immunity from suit.140 Barring congressional abrogation or limitation of tribal sovereign immunity, tribes are entitled to the same respect as other sovereigns. When courts deprive a tribal entity of immunity from suit without considering the tribe’s intent, they impermissibly abrogate the tribe’s sovereign immunity. Under U.S. Supreme Court precedent, courts cannot abrogate tribal sovereign immunity.141 The judiciary must defer to the power of Congress to make such an abrogation.142 Courts are not in the proper position to consider and balance relevant policy and reliance interests.143 Courts impermissibly limit the scope of tribal sovereign immunity by making it narrower than federal and state sovereign immunity when they do not consider the tribe’s intent.

VI. CONCLUSION

Federal, state, and tribal governments receive sovereign immunity as an incident of their sovereignty. Courts examine the federal and state governments’ intent to extend or deny sovereign immunity to a governmental entity out of deference to their sovereign status. Courts should similarly examine tribal intent when determining whether a tribal entity enjoys sovereign immunity from suit out of deference to the tribe’s sovereign status. When a court does not consider the tribe’s intent it limits the scope of tribal sovereign immunity. Such an abrogation of tribal sovereign immunity is impermissible in light of Supreme Court precedent and Congress’s silence on the issue.

140. See id. at 758–60.
142. See id.
143. See id. at 759.