
Federal Indian Law — Tribal Sovereign Immunity —
Michigan v. Bay Mills Indian Community

Courts have long held that Native American governments enjoy tribal sovereign immunity from suit, subject only to Congress’s plenary authority. Sixteen years ago, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,¹ the Supreme Court affirmed that tribes retain sovereign immunity when engaged in off-reservation commercial activity.² Subsequent economic development by some Indian tribes has resulted in an increasing number of legal disputes that have run up against tribal immunity, and some have argued that tribal immunity should be limited in commercial contexts to allow state and federal courts to adjudicate business disputes between nonmembers and tribes.³ Last Term, in *Michigan v. Bay Mills Indian Community*,⁴ the Supreme Court reaffirmed the broad reach of tribal immunity. The Court held that a tribe is immune from suit for commercial activities on nontribal land so long as federal law has not expressly waived immunity,⁵ but noted in dicta that a state may use alternative, state-specific enforcement measures against individuals affiliated with the commercial activity.⁶ While the Court’s decision is a victory for those who feared the abrogation of tribal immunity, its suggestion that states seek remedies in state law signals approval of leaving the resolution of legal questions central to state-tribe disputes to the states, even when the question concerns the extent of Indian land. Such a view would be inconsistent with recent trends generally favoring greater federal control and congressional support for tribal self-determination, and could result in actions that are detrimental to tribes.

In 1988, Congress passed the Indian Gaming Regulatory Act⁷ (IGRA) to regulate gaming activities on Indian land.⁸ IGRA requires Indian tribes seeking to operate casinos to enter a state-tribe compact that governs the gaming activity.⁹ The Act also allows states to sue tribes to enjoin unauthorized gaming activity on Indian lands.¹⁰ In

¹ 523 U.S. 751 (1998).

² *Id.* at 760.

³ *See, e.g.*, Brief of Alabama et al. as *Amici Curiae* in Support of Petitioner at 11–13, 15–16, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) (No. 12-515), 2013 WL 4829343, at *11–13, *15–16.

⁴ 134 S. Ct. 2024.

⁵ *Id.* at 2039.

⁶ *See id.* at 2034–35.

⁷ Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166–1168 (2012) and 25 U.S.C. §§ 2701–2721 (2012)).

⁸ *See* 25 U.S.C. § 2702(2)–(3).

⁹ *Id.* § 2710(d)(3).

¹⁰ *Id.* § 2710(d)(7)(A)(ii); *Bay Mills*, 134 S. Ct. at 2029.

1993, the Bay Mills Indian Community (Bay Mills), a federally recognized Indian tribe, entered into a tribal gaming compact with the State of Michigan that allowed class III gaming activities on Indian lands.¹¹ In 2010, Bay Mills used funds from a federally established trust to purchase off-reservation land, which was, under federal law, to “be held as Indian lands are held.”¹² Bay Mills built and operated a casino on this land, claiming that it counted as Indian land under IGRA.¹³ Michigan disagreed and, with a competing tribe, sued Bay Mills to enjoin the casino’s operation.¹⁴

The district court granted a preliminary injunction.¹⁵ The court reasoned that interpretation of the “Indian lands” requirement of IGRA was a federal question over which it had jurisdiction and that the coplaintiffs had shown sufficient likelihood of success on the merits and risk of injury to warrant a preliminary injunction.¹⁶

The Sixth Circuit vacated. In an opinion authored by Judge Kethledge, the court noted that IGRA does not grant jurisdiction unless the cause of action seeks to enjoin class III gaming activity on Indian lands.¹⁷ Michigan had alleged that the casino was improperly not on tribal lands, but if that were true, the courts would have no jurisdiction.¹⁸ The court also dismissed the remaining charges under the doctrine of tribal immunity,¹⁹ which it described as applying regardless of where the activities occurred.²⁰ Thus, even if the casino were not on “Indian lands,” as was claimed by Michigan, Michigan could not sue the tribe to shut the casino down unless either Congress expressly abrogated the tribe’s immunity or the tribe clearly waived it.²¹ The

¹¹ *Bay Mills*, 134 S. Ct. at 2029. Class III gaming activities encompass most types of casino gambling, including slot machines and card games. See 25 U.S.C. § 2703(7)(B); *id.* § 2703(8).

¹² *Bay Mills*, 134 S. Ct. at 2029 (quoting Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, § 107(a)(3), 111 Stat. 2652, 2658 (1997)) (internal quotation mark omitted).

¹³ *Id.*

¹⁴ *Id.* In the lower courts, Michigan’s case was joined with that of the Little Traverse Bay Bands of Odawa Indians, which had sued separately on a claim that Bay Mills’s Vanderbilt, Michigan casino would draw revenue away from their own casino. *Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 409–10 (6th Cir. 2012).

¹⁵ See *Michigan v. Bay Mills Indian Cmty.*, Nos. 1:10-cv-1273, 1:10-cv-1278, at 18 (W.D. Mich. Mar. 29, 2011) (order granting preliminary injunction).

¹⁶ *Id.* at 5–7, 16–17.

¹⁷ *Bay Mills*, 695 F.3d at 412.

¹⁸ *Id.* at 412–13. The court also denied on jurisdictional grounds an alternative allegation that because the land was acquired by the tribe, Bay Mills had violated a provision prohibiting gaming under IGRA from being “conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe.” *Id.* at 413 (emphasis omitted) (quoting 25 U.S.C. § 2719 (2012)).

¹⁹ *Id.* at 414–16; see also *id.* at 414 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)).

²⁰ *Id.* at 414 (“The Supreme Court has recognized tribal immunity ‘without drawing a distinction based on where the tribal activities occurred.’” (quoting *Kiowa*, 523 U.S. at 754)).

²¹ *Id.*

court concluded that IGRA included no “unequivocal expression” of abrogation²² and that the tribe’s gaming ordinance similarly did not waive immunity.²³

The Supreme Court granted certiorari to decide whether tribal sovereign immunity barred Michigan’s suit, and it affirmed.²⁴ Justice Kagan, writing for the Court,²⁵ noted its longstanding tradition of treating Indian tribes as “domestic dependent nations”²⁶ with inherent sovereignty predating the Constitution.²⁷ As such, tribes have “common-law immunity from suit traditionally enjoyed by sovereign powers,”²⁸ subject only to Congress’s control, and such tribal immunity applies even against suits brought by states.²⁹ Justice Kagan noted that *Kiowa* expressly refused to limit tribal immunity to noncommercial activities or to conduct on tribal lands.³⁰ Therefore, the Court reasoned, Michigan would prevail only if (1) tribal sovereignty had been abrogated or waived, or (2) the Court overturned *Kiowa*.³¹

The Court found that there had been no abrogation or waiver of tribal immunity under IGRA or the state-tribe charter. The Court agreed with the Sixth Circuit that IGRA allows a state to sue to enjoin only class III gaming activity on Indian lands.³² Justice Kagan rejected Michigan’s argument that “class III gaming activity” includes secondary activities, such as managing an off-reservation casino from within a reservation, because IGRA’s use of “class III gaming activity” made sense only if it referred to activities directly related to gambling.³³

The Court also refused to go beyond the text of the statute, limiting suits to those concerning gaming activity on Indian lands. Though Michigan argued that Congress did not intend to leave states with the

²² *Id.* at 415.

²³ *Id.* at 416 (noting that the tribal gaming ordinance waived only immunity against certain types of suits for the *Tribal Commission* and castigating the State for failing to mention that the ordinance in fact expressly reserved the tribe’s sovereign immunity).

²⁴ *Bay Mills*, 134 S. Ct. at 2030. However, the Court rejected the Sixth Circuit’s finding that IGRA provided no jurisdiction over suits to enjoin gaming not on Indian lands, and instead dismissed all claims under tribal immunity. *Id.* at 2029 n.2.

²⁵ Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor.

²⁶ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

²⁷ *Bay Mills*, 134 S. Ct. at 2030.

²⁸ *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)) (internal quotation marks omitted).

²⁹ *Id.* at 2031; *see also* *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (noting that tribes did not attend the Constitutional Convention and thus never ceded their immunity in the way that states had).

³⁰ *Bay Mills*, 134 S. Ct. at 2032, 2037.

³¹ *Id.* at 2032.

³² *Id.*

³³ *Id.* (noting that if “class III gaming activity” includes off-site operations, the statute’s language would “lose all meaning”).

power to regulate Indian casinos on Indian land but not on state land, precedent demanded that Congress must “unequivocally” express its intent to waive tribal immunity.³⁴ The Court also noted that Michigan has available other options to enforce its law on nontribal lands. For example, the State could deny state licenses for the casino,³⁵ bring suit against individual Indian officials,³⁶ or renegotiate its compact with the tribe to include a waiver of tribal immunity.³⁷

The Court also declined to overturn *Kiowa*. The Court emphasized the importance of stare decisis and noted that *Kiowa* was only one case in a long line of precedent upholding broad tribal immunity from lawsuits.³⁸ Even if, as Michigan argued, tribes have increased the scope of their commercial activities outside of Indian lands, many entities have relied upon the *Kiowa* line of cases when negotiating transactions with tribes, and tribes themselves have relied on this precedent when negotiating with other entities.³⁹ Further, the Court observed that Congress had amended statutes governing tribal immunity since *Kiowa* without overturning *Kiowa*'s holding.⁴⁰ Thus, the Court wrote, overturning *Kiowa* now would go against Congress's tacit approval of tribal immunity for commercial activity outside of Indian lands.⁴¹

Justice Sotomayor filed a separate concurrence that emphasized the history of tribal sovereignty. She noted that, despite the dissent's assertions, Indian nations have never been treated as foreign governments, even when they asked to be.⁴² Further, states have immunity against tribal suits, even over an alleged breach of good faith in negotiating a gaming compact under IGRA, and comity therefore demands reciprocal immunity.⁴³ Justice Sotomayor also argued that, contrary to Michigan's assertions, many tribes continue to suffer from poverty and continue to rely on gaming and other commercial activities to sur-

³⁴ *Id.* at 2034 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)). Justice Kagan also noted that IGRA's limited territorial scope could be explained by the fact that Congress had passed IGRA in response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which had held that states could not regulate gaming on Indian lands. *Id.* at 221–22.

³⁵ *Bay Mills*, 134 S. Ct. at 2035.

³⁶ *Id.* After raising its appeal to the injunction, Michigan amended its complaint to include individual tribal officers as defendants, but as they were not named on the injunction, neither the Sixth Circuit nor the Supreme Court addressed those claims. *See Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 416 (6th Cir. 2012).

³⁷ *Bay Mills*, 134 S. Ct. at 2035.

³⁸ *Id.* at 2036 (noting the existence of cases both prior and subsequent to *Kiowa*); *see also C & L Enters.*, 532 U.S. at 418; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).

³⁹ *Bay Mills*, 134 S. Ct. at 2036.

⁴⁰ *Id.* at 2038.

⁴¹ *Id.* at 2039.

⁴² *Id.* at 2040 (Sotomayor, J., concurring).

⁴³ *Id.* at 2041.

mount external barriers to raising revenue.⁴⁴ Therefore, upholding *Kiowa* was a matter not only of good law, but also of good policy.

Justice Thomas dissented.⁴⁵ He argued that *Kiowa* was a problematic and unsupported extension of tribal immunity doctrine, which itself arose “almost by accident.”⁴⁶ Doctrinally, tribal sovereignty is not like that of foreign sovereigns because foreign sovereign immunity does not apply “of its own force in the courts of another sovereign.”⁴⁷ In Justice Thomas’s view, tribal immunity in state and federal courts is not a result of inherent sovereignty, but rather due to federal or state law.⁴⁸ Further, tribes, as domestic dependent nations, logically ought to have more limited immunity than independent sovereigns and states.⁴⁹ Justice Thomas also rejected Justice Sotomayor’s policy reasoning, as the *Kiowa* Court had stated that “tribal immunity extends beyond what is needed to safeguard tribal self-governance.”⁵⁰

Justice Thomas then addressed the majority’s arguments in favor of upholding *Kiowa* out of deference to Congress and stare decisis. He argued that stare decisis can be rejected where “decisions are unworkable or are badly reasoned.”⁵¹ *Kiowa* was unworkable because tribes now manage extensive commercial activities⁵² and tribal immunity could prevent the “only feasible legal remedy” available against a tribal business.⁵³ Further, Justice Thomas expressed concern that some unsavory entities may escape state regulation by arranging to share profits with tribes in exchange for using tribal immunity.⁵⁴

⁴⁴ *Id.* at 2043–45 (noting that approximately 70% of Indian gaming revenues derived from fewer than 20% of the Indian casinos, *id.* at 2043, and that Indian poverty rates continue to be higher than the national average, *id.* at 2045 & n.4).

⁴⁵ Justice Thomas was joined by Justices Scalia, Ginsburg, and Alito. Justice Scalia wrote a separate dissent emphasizing that he had been part of the *Kiowa* majority but had since changed his position. *Id.* at 2045 (Scalia, J., dissenting). Justice Ginsburg also wrote a separate dissent to express her concern that both tribal and state immunity had been extended too far in recent Supreme Court decisions. *Id.* at 2055–56 (Ginsburg, J., dissenting).

⁴⁶ *Id.* at 2046 (Thomas, J., dissenting) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)) (internal quotation marks omitted). *Kiowa* noted that the first case cited as authority for tribal immunity by later decisions itself contained merely “an assumption of immunity for the sake of argument.” *Kiowa*, 523 U.S. at 757. *But see* William Wood, *It Wasn’t an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1651–54, 1651 n.375 (2013) (arguing that the *Kiowa* court ignored other precedential cases that expressly establish tribal immunity).

⁴⁷ *Bay Mills*, 134 S. Ct. at 2046 (Thomas, J., dissenting).

⁴⁸ *Id.* at 2047.

⁴⁹ *See id.* at 2046–47.

⁵⁰ *Id.* at 2048 (quoting *Kiowa*, 523 U.S. at 758) (internal quotation mark omitted).

⁵¹ *Id.* at 2050 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)) (internal quotation mark omitted).

⁵² *Id.* (noting that tribal revenues from gaming alone have risen from \$8.5 billion to \$27.9 billion from 1998 to 2012).

⁵³ *Id.* at 2051.

⁵⁴ *Id.* at 2052 (describing the practices of short-term payday lenders).

Justice Thomas also criticized the majority's claim that its decision defers to Congress's power over tribal sovereignty.⁵⁵ Congress had never addressed the issue, and taking its silence on court-created doctrine as tacit approval would be tantamount to allowing codification of a law without bicameral support and presidential approval.⁵⁶ Lastly, overturning *Kiowa* would not overturn a long line of subsequent case law, as only one Supreme Court decision had mentioned *Kiowa*, and then only in dicta.⁵⁷

In *Bay Mills*, the Court reaffirmed the doctrine of tribal immunity, alleviating tribes' fears that their immunity would be abrogated.⁵⁸ While the Court's holding is correct and consistent with its own precedent and congressional policy on tribal sovereignty, the opinion fails to resolve the underlying territorial dispute and instead leaves the issue up to state governments and state courts to resolve. By listing alternative remedies under state law, the Court's dicta suggest that state courts, as part of their adjudication of individual enforcement actions, may resolve the underlying legal disputes between tribes and states about the extent of tribal territory even where federal courts cannot. Such state power is inconsistent with both recent congressional policy favoring tribal development and much of the Court's own jurisprudence.

By refusing to overturn *Kiowa* and maintaining the broad contours of tribal immunity relied upon by private actors and courts, the Court's holding maintains the Court's longstanding precedent regarding tribal immunity.⁵⁹ Tribal immunity began as a recognition that Indian tribes were nations existing as "distinct, independent political communities, retaining their original natural rights" except as limited by the doctrine of discovery and tribal treaties with the federal government.⁶⁰ Tribal immunity remained largely unchanged even as the Supreme Court limited other tribal powers.⁶¹

Maintaining the doctrine of tribal sovereign immunity is important, as there has been widespread reliance on *Kiowa*'s interpretation of

⁵⁵ *Id.*

⁵⁶ *Id.* at 2053.

⁵⁷ *Id.* at 2055 (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001)).

⁵⁸ See Brief for the National Congress of American Indians et al. as Amici Curiae in Support of Respondents, *Bay Mills*, 134 S. Ct. 2024 (No. 12-515), 2013 WL 5915051 (arguing against abrogation of tribal immunity and signed by fifty-one Indian tribes and four tribal organizations).

⁵⁹ *Bay Mills*, 134 S. Ct. at 2030-31 ("[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law.'" (second alteration in original) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998))).

⁶⁰ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

⁶¹ 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, 664-65 (2002).

tribal immunity. Though Justice Thomas observed that the Court only once discussed tribal immunity after *Kiowa*, a multitude of lower courts have relied on the case to uphold tribal immunity for tribal businesses, including off-reservation businesses.⁶² Indian commercial entities have themselves also relied on tribal immunity.⁶³ Even where there has been no express reliance, parties doing business with Indian tribes have negotiated under the awareness of tribal immunity — in fact, Michigan’s compact with Bay Mills included an express acknowledgement of immunity.⁶⁴ In other agreements, Indian tribes have waived their immunity,⁶⁵ suggesting that their counterparties already account for its existence during negotiations.

Tribal immunity is also consistent with congressional policy. Courts and commentators alike have recognized that the principles of tribal sovereignty, including tribal immunity, are crucial to enhancing the economic welfare and self-sufficiency of Indian tribes.⁶⁶ In IGRA, Congress explicitly stated its goal as “promot[ing] tribal economic development, tribal self-sufficiency, and strong tribal government.”⁶⁷ Given congressional statements justifying tribal sovereignty, including tribal immunity, for economic purposes, as well as Congress’s refusal to broadly limit existing Court doctrine on tribal immunity,⁶⁸ it is not entirely accurate to declare tribal immunity merely a judge-made doctrine. Rather, tribal immunity is a doctrine that originally arose out of

⁶² Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 774–75 (2012) (noting that a 2008 study found seventy-one lower court opinions that cited *Kiowa* as part of their determinations on tribal immunity) (citing Jeff M. Kosseff, Note, *Sovereignty for Profits: Courts’ Expansion of Sovereign Immunity to Tribe-Owned Businesses*, 5 FLA. A & M U. L. REV. 131, 138–39 (2009)).

⁶³ *Bay Mills*, 134 S. Ct. at 2036.

⁶⁴ *Id.* at 2035.

⁶⁵ See, e.g., *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

⁶⁶ See, e.g., *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (describing Congress’s intent to encourage economic development as a reason Congress has continued to approve the tribal immunity doctrine); David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1591–93 (1996).

⁶⁷ 25 U.S.C. § 2701(4) (2012). Congress’s promotion of tribal self-sufficiency is not always for altruistic reasons. During the “termination” period of the 1950s and ‘60s, Congress sought to “develop reservation resources in order to end federal services to the tribes,” ultimately resulting in the loss of recognition and dissolution of several tribes. Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL’Y & L. 381, 391 (1997). Later on, Congress reformulated its tribal policies to facilitate “self-determination through economic development.” *Id.* at 393; see also *id.* 392–93.

⁶⁸ Congress began contemplating limiting the scope of tribal immunity while the Court was considering *Kiowa* but ultimately decided not to. Seielstad, *supra* note 61, at 726.

the Court's deference to congressional power over Indian affairs, and its continued vitality rests with Congress.⁶⁹

Despite the Court's decision to uphold tribal immunity, its opinion is potentially problematic for tribes. The issue is not how the Court answered the question on which it granted certiorari, but its comfort with allowing states, through individual enforcement actions, to provide the primary venue in which tribes and states resolve their differences over whether state law applies to a tribal business. While the Court may have seen this as a way to assuage its doubts regarding the wisdom of tribal immunity,⁷⁰ such a view is in tension with a major underlying justification for tribal immunity — exclusive federal control over relationships between the United States and Indian tribes — and has negative policy implications.

The *Bay Mills* opinion acknowledges that it leaves it to states to decide where and when the federal IGRA applies. This places tribal interests under greater state control and moves away from both Congress's recent policies in favor of greater tribal self-determination and much of the Court's own doctrine. The idea that tribal affairs are subject to exclusive federal control was first established by the Marshall trilogy of Indian-law decisions in the early nineteenth century.⁷¹ In the last of those three cases, Chief Justice Marshall held that the Constitution's Indian Commerce Clause "comprehend[s] all that is required for the regulation of our intercourse with the Indians."⁷² By the mid- to late twentieth century, the Court had moved away from this philosophy, for example by allowing states to reach into some tribal affairs where state action did not discriminate against the regulated group and was not precluded by federal law.⁷³ Recently, however, Congress has signaled that it favors a view of tribal sovereignty that is more state-like, such as by partially affirming tribal criminal jurisdiction

⁶⁹ See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (rejecting applicability of state law that does not conform with tribal agreements, treaty law, or acts of Congress); *Getches*, *supra* note 66, at 1599 n.116 (listing statutes through which Congress has asserted its control over Indian affairs).

⁷⁰ See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

⁷¹ In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall articulated the doctrine of discovery, an oft-criticized rule that European explorers obtained ownership of territory, superseding that of native tribes, ownership that the United States inherited from Great Britain. *Id.* at 586. Several years later, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that Indian tribes are wards of the United States. *Id.* at 17. And in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, the Court invalidated a Georgia law that attempted to regulate who could reside on the Cherokees' land in a manner that contradicted an act of Congress. *Id.* at 540–41.

⁷² *Worcester*, 31 U.S. (6 Pet.) at 559.

⁷³ See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157–58 (1973) (allowing an income tax on an off-reservation ski resort because it was a nondiscriminatory state law but blocking a use tax as precluded by federal law); see also, e.g., *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 698–99 (9th Cir. 2004) (overturning a state law against displaying lights on a tribe's law-enforcement vehicles because other nonstate law-enforcement groups were allowed to display lights).

over non-Indians.⁷⁴ The Court has followed — where the Court had previously weighed state interests in activities on tribal land against tribal interests to determine whether to allow state regulation, its more recent cases have placed greater emphasis on categorical rules establishing the boundaries of exclusive tribal sovereignty.⁷⁵

The Court's emphasis on state enforcement against individuals is also bad policy, with potential negative consequences for individuals and for tribes. Individual defendants are less likely than tribes to have the resources to effectively defend against the state.⁷⁶ Further, tribes might not be able to intervene to defend their employees — at least one court has held that a tribe could not join a suit even when the outcome affected the status of its casino and IGRA compact with the state.⁷⁷ Thus, the greater disparity between a state and individual tribal members may actually give the state a greater advantage in pursuing its interpretations of tribal rights than a suit against a tribe in the absence of tribal immunity. Even if a tribe could intervene or otherwise help cover its members' legal costs, the greater number of cases that would result from state enforcement against individuals may drain tribal resources. Tribes may also have trouble pursuing declaratory actions to protect their officers and employees from state enforcement.⁷⁸ Therefore, if a state acts against tribal individuals to enforce its side of a legal disagreement with a tribe, tribes may have no legal avenue except to defend their members against the enforcement actions in state court.⁷⁹ The resulting risk of individual liability for tribal

⁷⁴ See Recent Legislation, 127 HARV. L. REV. 1509, 1509 (2014) (discussing the Violence Against Women Reauthorization Act of 2013); see also Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 945 (2012) (noting that, in 1968, Congress repealed the portion of Public Law 280 that allowed states to acquire jurisdiction over reservations without tribal consent, and also established a method to retrocede such state jurisdiction).

⁷⁵ See Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 426–28 (2008).

⁷⁶ As noted by Justice Thomas, echoing *Kiowa*, the existence of tribal immunity can also create unpredictable results for certain people, such as tribes' tort victims, who do not choose to do business with the tribe and yet find themselves unable to sue the tribe for relief. *Bay Mills*, 134 S. Ct. at 2051 (Thomas, J., dissenting). However, this is an area that has been addressed by Congress and therefore does not require intervention by the courts. See Seielstad, *supra* note 61, at 722–26 (describing the Indian Tribal Economic Development and Contract Encouragement Act of 2000 and the Indian Tribal Tort Claims and Risk Management Act of 1998).

⁷⁷ See *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 313–14 (W.D.N.Y. 2007) (holding that an Indian tribe was not a necessary party and therefore could not join in a dispute between a private organization and the National Indian Gaming Commission (NIGC) over the validity of the tribe's compact with the state).

⁷⁸ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress does not have the power to abrogate state sovereignty to permit suit by tribes under IGRA).

⁷⁹ Tribes cannot claim diversity jurisdiction to remove to federal court, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), though in some cases they might be able to show federal question jurisdiction. Compare *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138–39 (2d Cir.

members may have chilling effects on their willingness to participate in off-reservation tribal enterprises, which harms their tribes' development efforts.⁸⁰ Lastly, *Bay Mills*'s lack of guidance on how to resolve the underlying dispute over what qualifies as Indian lands risks creating confusing and conflicting precedent in lower courts that varies tribe-by-tribe or business-by-business, which would leave tribes without a reliable basis for predicting whether their off-reservation businesses would be considered legal.⁸¹

State control also subjects tribes to greater pressure from local public opinion on their activities,⁸² a particular concern for tribes still bootstrapping themselves out of poverty. While many current tribe-affiliated businesses are considered unsavory, including both casinos and payday lenders, tribes have sponsored such activities in part due to their need for revenue. With further economic development, some tribes have been able to build less controversial businesses, such as hotels and construction companies.⁸³ Thus, the delegation of legal resolution of state-tribe disputes to the states may hinder Indian tribes' ongoing attempts to develop sufficiently to expand into more mainstream businesses.

Tribes obtained their desired outcome in *Bay Mills*, but the Court's positive portrayal of state-specific enforcement against tribal individuals suggests a great deal of sympathy for state power, even against businesses that a tribe believes lie within its own borders. As tribes increasingly attempt to reclaim historical lands for commercial and other purposes, territorial disputes will become an increasing source of tension between states and tribes. Though the Court's endorsement of state enforcement in such disputes was dicta, its opinion signals its willingness to allow state law and courts to serve as the primary battleground for future territorial disputes.

2012) (noting that arguing a casino was on Indian land is an affirmative defense and insufficient to create a federal question), *with* *Massachusetts v. Wampanoag Tribe of Gay Head*, No. 13-13286, 2014 WL 2998989, at *5 & n.7 (D. Mass. July 1, 2014) (holding that the question of whether a casino was on Indian land was sufficient to create a federal question but declining to resolve because it was not ripe). In *Bay Mills*'s case, the tribe could have challenged an earlier determination by the NIGC, but that may not be possible in other disputes.

⁸⁰ See Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Comundrum*: Michigan v. *Bay Mills Indian Community*, 123 YALE L.J. ONLINE 311, 319 (2013).

⁸¹ A similar splintering occurred after *Kiowa*, as lower courts developed their own tests for when a business qualifies as a tribal enterprise. See Martin & Schwartz, *supra* note 62, at 778.

⁸² Cf. THE FEDERALIST NO. 10, at 77-79 (James Madison) (Clinton Rossiter ed., 2003) (arguing that factionalism is muted in a large republic compared to individual states).

⁸³ See Rand & Light, *supra* note 67, at 404 (describing how one tribe is using its casino revenues to build a boat yard).