

MAXWELL, LEWIS V. CLARKE, AND THE TRAIL AROUND TRIBAL SOVEREIGN IMMUNITY

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Tribal sovereign immunity is an important tool available to American Indian tribes as they have rebuilt, restructured, and rejuvenated their communities in the era of Self-Determination following centuries of colonialism, land grabs, and cultural genocide. Sovereign immunity protects tribes by establishing a barrier to both trampling of tribal sovereignty through non-tribal courts and costly adverse judgments. Recent precedent from the Ninth Circuit has weakened tribal sovereign immunity. Maxwell v. County of San Diego, pivoting from previous decisions, held that tribal employees can be sued individually for money damages for actions taken in the course and scope of their employment—as long as the tribe is not named as a party. Allowing such individual-capacity suits to proceed allows plaintiffs to circumvent tribal sovereign immunity through a trick of pleading. The Maxwell court asserts that it merely aligns state and tribal sovereign immunity to make the doctrines “coextensive.” However, this holding ignores the distinct differences of origin and operation between tribal and state sovereign immunity. Maxwell became important on the national stage when the United States Supreme Court granted certiorari in a case posing a similar issue, the amusingly-captioned Lewis v. Clarke. This Note explores the misunderstanding of tribal sovereignty and erroneous legal conclusions which drive Maxwell’s holding. It argues that

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the Supreme Court should reject Maxwell's holding and continue to route changes to tribal sovereign immunity through Congress.

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INTRODUCTION

Tribal sovereign immunity is a doctrine of enormous importance to federally recognized Indian tribes throughout the United States. Sovereign immunity allows a sovereign entity, such as a state or a tribe, to decide under what

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circumstances it will be sued.¹ As a key piece of tribal sovereignty,² sovereign immunity is especially important to tribes because it helps spur economic development, legitimizes their governmental institutions, and helps tribes to fulfill the policies behind self-determination.³ Self-determination has allowed tribal governments to grow and to enrich and enliven their communities, leading to improvements in Indian country, though there is progress yet to be achieved.⁴

However, the Ninth Circuit has recently weakened tribal sovereign immunity. In *Maxwell v. County of San Diego*, the Ninth Circuit held that tribal employees and officials may be sued in their individual capacities for money damages for actions taken in the course and scope of their employment—if the plaintiff does not name the tribe.⁵ Previously, the Ninth Circuit held that individual-capacity suits for money damages were appropriate only if employees acted outside the course and scope of their employment.⁶ This Note focuses solely on suits against individual tribal employees for money damages. Like other governmental employees, tribal employees and officials may be sued in their individual capacities for declaratory or injunctive relief pursuant to the *Ex parte Young* Doctrine.⁷ This Note does not argue that tribal employees

1. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715–16 (1999).

2. What is meant by sovereignty here is the ability of a government to govern. This may mean the ability to make and enforce rules and adjudicate disputes as well as a host of other activities governments undertake. See *Sovereignty*, BLACK'S LAW DICTIONARY (9th ed. 2009). Unlike traditional American governments, tribal governments may also uphold traditions including those of a religious nature. Compare U.S. CONST. amend. I with 25 U.S.C. § 1302(1). The Indian Civil Rights Act, through which the tenets of the U.S. Constitution apply to tribes, lacks the establishment clause indicating that tribal governments may espouse a religion.

3. See Ryan Seelau, *In Defense of Tribal Sovereign Immunity: A Pragmatic Look at the Doctrine as a Tool for Strengthening Tribal Courts*, 90 N.D. L. REV. 121, 123 (2014).

4. CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 189–98 (2005) (characterizing self-determination as a “turning point”: “The initial self-determination statute brought reform but hardly instant revolution.”).

5. See 708 F.3d 1075, 1087–90 (9th Cir. 2013).

6. See, e.g., *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985); *Murgia v. Reed*, 338 F. App'x 614 (9th Cir. 2009) (discussed *infra* Parts I.A–B).

7. 209 U.S. 123 (1908) (holding that a suit seeking declaratory relief or an injunction against a state officer did not violate the state's sovereign immunity because the state officer could not have been acting on the state's behalf when he

should receive absolute immunity, but rather argues more narrowly that the *Maxwell* court improperly permitted suit in tort against individual tribal employees for money damages for actions taken in the course and scope of their employment.

The fact that the plaintiffs proceeded against the employees individually was essential to *Maxwell*'s holding.⁸ Before *Maxwell*, the Ninth Circuit looked past the complaint, and analyzed all relevant facts and circumstances to determine whether a suit pled against tribal employees individually should instead be an official-capacity suit.⁹ This involved a determination of whether the defendant acted within the course and scope of his or her employment, meaning the employee's actions were limited to those required or appropriate to his or her position:¹⁰ if the employee acted in course and scope, the suit should proceed against the employee in his or her official capacity; if not, a suit against the employee as an individual would be appropriate.¹¹ Suits against employees in their official capacities are said to in reality operate against the sovereign, and therefore employees are protected by sovereign immunity.¹²

Maxwell's shift, which allows tribal employees and officials to be sued individually for actions taken in the course and scope of their employment, is important because it arguably opens tribes up to significantly more liability than they had been exposed to under previous Ninth Circuit precedent. Potential plaintiffs are incentivized to sue tribal employees in these instances because employees are often indemnified by their tribal employers.¹³ The tribal employee defendants in

acted illegally).

8. *Maxwell*, 708 F.3d at 1087–88.

9. *Hardin*, 779 F.2d at 479 (finding that tribal sovereign immunity barred the plaintiffs' suit against tribal officials in their individual capacities because the officials were acting within the course and scope of their authority).

10. See *Course and Scope: It's Not Just for Workers' Compensation*, WORKERS' COMPENSATION INST. (Dec. 19, 2012), <http://www.wci360.com/news/article/course-and-scope-its-not-just-for-workers-compensation> [<https://perma.cc/B5R5-5354>] ("A reasonably good definition is that course and scope 'refers to the time, place and circumstances under which the accident occurs.'") (internal citations omitted).

11. *Cook*, 548 F.3d at 727 (citing *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004)).

12. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("An official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

13. The tribe in *Maxwell* had insurance coverage for their employees. This is of course not true of all tribes, however some tribal codes require liability insurance for tribal employees acting in the course and scope of their employment.

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Maxwell argued that this insurance coverage of the employees meant that the suit implicated the tribal treasury since the tribe would ultimately be responsible for paying the judgment in the form of increased insurance premiums.¹⁴ The *Maxwell* court dismissed this argument, stating that the tribe's voluntary extension of insurance coverage to an employee does not extend the tribe's sovereign immunity to the covered party.¹⁵ *Maxwell* thus offers plaintiffs a way to plead around tribal sovereign immunity, while still affording access to the deep pockets of tribal insurance policies.

The Ninth Circuit, by way of justifying this shift, asserted that federal, state, and tribal sovereign immunity should be on equal footing: "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles."¹⁶ At first glance, this statement appears to be correct: state and federal officials may be sued in their individual capacities provided that any relief will operate against the individual, that it will not implicate the government's treasury, and that essential state or federal functions are not impaired.¹⁷ The *Maxwell* court held that tribal officials should be treated the same.¹⁸ However, the similarities between state and tribal sovereign immunity are merely superficial. Tribal and state *sovereign immunity* have evolved into analytically distinct doctrines in part because state and tribal *sovereignty* are not equivalent.¹⁹ The *Maxwell* court made tribal sovereign immunity resemble state sovereign immunity with regard to employee liability, but in doing so ignored the many other ways in which tribal and state sovereign immunity differ.

See, e.g., MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES ch. 4, art. III, §§ 4–52 (2016), https://www.municode.com/library/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTIIMOTRINCO_CH4EM_ARTIIIIIN_OFEM_S4-52IN [<https://perma.cc/6C6Z-KTMN>] (codifying a requirement to indemnify tribal employees).

14. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1090 (9th Cir. 2013).

15. *Id.* (internal citations omitted) (stating that insuring an employee is "a purely intramural arrangement between a sovereign and its officers").

16. *Id.* at 1089. This Note focuses specifically on the comparison between state and tribal immunity because there are many redundancies between state and federal immunity frameworks.

17. *See Alden v. Maine*, 527 U.S. 706, 756–58 (1999).

18. *Maxwell*, 708 F.3d at 1089.

19. *See infra* Part II.

Because of the prevalence of Indian tribes within the Ninth Circuit,²⁰ and because the circuit is a trailblazer for Indian Law, the effects of the *Maxwell* holding have extended beyond the Ninth Circuit. After the *Maxwell* decision opened the door, similar cases have been filed across the country.²¹ Most notably, the United States Supreme Court will hear a case this term from the Supreme Court of Connecticut regarding a tribal employee who was sued individually for money damages for actions taken while in the course and scope of his employment.²² The defendant is a limousine driver for the tribal casino who was driving patrons of the casino home when he rear-ended and injured the plaintiff.²³ These facts are unsympathetic to the tribe, and it is conceivable that the Court could decide that case along the lines of *Maxwell* and severely curtail a critical defensive weapon for tribes in the name of uniformity, without regard for the unique sovereignty of tribes or the broader implications of such a change. Indeed, the *Maxwell* decision has featured prominently in this case since its initiation.²⁴

This Note analyzes *Maxwell* and concludes that other courts should reject its holding because it is flawed as a matter of law, and also because it promulgates bad policy. Specifically, this Note argues that *Maxwell* severely weakens tribal sovereign immunity by allowing the immunity to be circumvented by a trick of pleading, and justifying this holding by claiming that the court is merely treating tribes like states. Tribal and state sovereign immunity have historically been distinct doctrines, and this Note argues that there continue to

20. *Indian Reservations in the Continental United States*, NAT'L PARK SERV., <https://www.nps.gov/nagpra/DOCUMENTS/ResMAP.HTM> (last visited Nov. 23, 2016) [<https://perma.cc/JYL6-H6P3>]. Of the 566 federally recognized tribes in the United States, 422 are within the Ninth Circuit's jurisdiction. See *Federal and State Recognized Tribes*, NAT'L CONF. ST. LEGISLATURES (updated Oct. 2016), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#ak> [<https://perma.cc/P5XH-G5MQ>] (listing federally recognized tribes by state).

21. See, e.g., *Lewis v. Clarke*, 135 A.3d 677 (Conn. 2016), *cert granted*, 85 U.S.L.W. 3137 (U.S. Sept. 29, 2016) (No. 15-1500); *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

22. *Lewis v. Clarke*, 135 A.3d at 679.

23. *Id.* at 708.

24. See *id.* at 718 (rejecting *Maxwell's* reasoning explicitly); *Lewis v. Clarke*, No. KNLCV136019099S, 2014 WL 5354956 (Conn. Super. Ct. Sept. 10, 2014) (arguing that the Connecticut Supreme Court should follow *Maxwell*).

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be good reasons to treat these doctrines differently today. Importantly, weakening tribal sovereign immunity weakens tribal courts by denying tribes the right to hear these cases against their employees in tribal court.²⁵

This Note proceeds in three parts. Part I is an in-depth analysis of the *Maxwell* case including its facts, legal analysis, and a discussion of the flaws in the court's arguments. Part I argues that the *Maxwell* opinion is flawed as a matter of law and policy because it mistakenly conflates the distinctly different doctrines of state and tribal sovereign immunity. Part I concludes with a discussion of cases that have come after *Maxwell* including *Lewis v. Clarke*, a case before the United States Supreme Court this term.

Part II compares and contrasts state sovereign immunity and tribal sovereign immunity. After a full exploration of the intricacies of the doctrines, Part II concludes that they are alike neither in origin, development, nor operation. Part III argues that there are good policy reasons for treating tribal and state sovereign immunity differently and that the United States Supreme Court should decline to extend the reasoning in *Maxwell* for these reasons.

I. *MAXWELL V. COUNTY OF SAN DIEGO*

Prior to the *Maxwell* decision, the question of whether tribal employees could be sued individually for money damages appeared well-settled before the Ninth Circuit. Previous cases had held that such individual capacity suits were proper when tribal employees acted outside the course and scope of their employment.²⁶ Conversely, the Ninth Circuit treated suits against tribal employees acting within the course and scope of their employment as official-capacity suits, which were construed as actions against the tribe, and therefore implicated tribal sovereign immunity.²⁷ Because it was a significant shift, the holding in *Maxwell v. County of San Diego* that tribal employees may be sued for actions taken in the course and

25. Plaintiffs and their attorneys are incentivized to go elsewhere because of familiarity and comfort in state and federal courts. See *infra* section II.B.1.

26. See, e.g., *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985); *Murgia v. Reed*, 338 F. App'x 614 (9th Cir. 2009).

27. *Hardin*, 779 F.2d at 478–79.

scope of their employment came as something of a surprise to many Indian law practitioners.²⁸

In *Maxwell*, two tribal paramedics were sued in their individual capacities for wrongful death.²⁹ The Ninth Circuit upheld the lower court's finding that the tribe's sovereign immunity offered no shelter to the paramedics, and further, the court reasoned that this result was warranted because state and tribal sovereign immunity should be the same.³⁰ This case was the first to hold that tribal employees could be sued individually for money damages for actions taken in the course and scope of employment. However, similar cases have since arisen elsewhere, and the question of whether tribal employees can be sued for money damages in their individual capacities for actions taken in the course and scope of their employment is before the United States Supreme Court this term.³¹ This Part explores *Maxwell* first by laying out the facts and the law contained in the opinion, and then by examining the flaws in the court's reasoning more closely. The Part concludes with a discussion of the relevant case law which arose after *Maxwell* and the potential ramifications this decision could have for the doctrine of tribal sovereign immunity as a whole in the United States.

A. *The Case*

The old lawyerly lament that “tragic facts make bad law” certainly rings true in *Maxwell*. On December 14, 2006, a San Diego County Sheriff, while off duty and at home, shot his wife in the face.³² The victim remained conscious and called emergency services.³³ The first ambulance on the scene was from the Viejas Band of Kumeyaay Indians Fire Department,

28. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013); Matthew Fletcher, *Ninth Circuit Holds Tribal Workers May Be Sued for Money Damages for Official Actions*, TURTLE TALK (Sept. 14, 2012), <https://turtletalk.wordpress.com/2012/09/14/ninth-circuit-holds-tribal-workers-may-be-sued-for-money-damages-for-official-actions/> [https://perma.cc/SH8D-UU9V] (displaying comments expressing surprise at *Maxwell*'s holding).

29. *Maxwell*, 708 F.3d at 1081.

30. *Id.* at 1089.

31. *See, e.g.*, *Lewis v. Clarke*, 135 A.3d 677 (Conn. 2016), *cert granted*, 85 U.S.L.W. 3137 (U.S. Sept. 29, 2016) (No. 15-1500).

32. *Maxwell*, 708 F.3d at 1079.

33. *Id.*

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which had been instructed to transport the victim from the house to a nearby helicopter landing zone so the victim could be taken to a hospital by air ambulance.³⁴ Subsequently, confusion arose surrounding who was in charge at the crime scene, and whether the shooting victim needed to be interviewed before she was allowed to leave.³⁵ State police officers on scene delayed departure of the ambulance for approximately five to ten minutes.³⁶ Though the ambulance ultimately did depart for the landing zone, the victim died en route.³⁷ Evidence was introduced at trial that if the victim had received prompt transport to the air ambulance, she would likely have survived.³⁸ The victim's family sought damages in tort under California state law against the tribal paramedics in their individual capacities.³⁹

The Ninth Circuit reasoned that since state or federal officers are potentially liable when sued individually, the same should be true of tribal officials: "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles."⁴⁰ The court did not consider important differences in the origin and operation of state versus tribal sovereign immunity.

Breaking with precedent, the *Maxwell* court elected to follow a "remedy-sought" analysis in determining whether this suit could proceed against the tribal paramedics without the involvement of the tribe for which they worked.⁴¹ Specifically,

34. *Id.* at 1080.

35. *Id.*

36. *Id.* at 1080–81.

37. The victim began exhibiting signs of distress when she was loaded into the ambulance. *Id.*

38. *Id.* at 1081.

39. "The Maxwells seek tort damages under California law against [the tribal paramedics]." *Id.* The suit proceeded in federal court pursuant to supplemental jurisdiction because the family also sued state police officers under 42 U.S.C. section 1983, and the suit against the paramedics arose out of the same incident. *Id.*

40. *Id.* at 1089. The panel deciding the case was divided, but the dissenting judge disagreed with the majority only with regard to the fate of the state defendants. *Id.* at 1090.

41. *Id.* at 1088. A remedy-sought analysis looks not to whether employees acted in course and scope of their employment when determining whether the suit properly proceeds against employees in their individual capacity, but rather looks to where the remedy would operate. According to this analysis, if the remedy would operate against the individual, not the tribe, then the individual capacity

the court held that tribal sovereign immunity did not protect these defendants because “a remedy would operate against them, not the tribe.”⁴² To support this, the court pointed to Supreme Court precedent contemplating a remedy-sought analysis in a state sovereign immunity context.⁴³

This remedy-sought analysis has not always been the Ninth Circuit’s method of analyzing such cases.⁴⁴ Previous cases looked to the employee’s “scope of authority” to determine whether the alleged wrongful action was or was not authorized by the employee’s position.⁴⁵ In a respondeat superior context, the question is whether an employee has embarked on a “frolic and detour,” or, more precisely, has acted outside the course and scope of his or her employment.⁴⁶ If employees act within course and scope, it follows that they should be liable, if at all, only in their official capacities. Conversely, when employees deviate from the course and scope of their employment, they should be able to be held individually liable for their conduct. An examination of whether a wrongful action occurred within course and scope or outside course and scope is much more relevant to a determination of whether the employee should be liable in an individual or official capacity. However, the remedy-sought analysis essentially does away with this consideration, looking only prospectively to the relief rather than retrospectively to the actions in question.⁴⁷ This allows plaintiffs to circumvent tribal sovereign immunity and recover from a deep pocket merely by pleading against tribal employees in their individual capacities, as long as the plaintiff does not name or seek relief directly from the tribe.⁴⁸ The court claims

suit is proper. Conversely, if the remedy would operate against the tribe, an individual suit is not proper. Previous precedent includes: *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985); *Murgia v. Reed*, 338 F. App’x 614 (9th Cir. 2009).

42. *Maxwell*, 708 F.3d at 1087.

43. *Id.* at 1089 (citing *Alden v. Maine*, 527 U.S. 706, 757 (1999)).

44. See *infra* section II.B.2.c.

45. *Hardin*, 779 F.2d at 479.

46. The phrase “frolic and detour” comes from an old English case. *Joel v. Morison*, 172 Eng. Rep. 1338 (1834).

47. *Maxwell*, 708 F.3d at 1088.

48. This is because many tribal insurance policies cover employees for actions taken in the course and scope of their employment regardless of whether they are sued in their individual or official capacity. Because many tribes carry liability insurance, this is an end run around tribal sovereign immunity. See, e.g., MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES, *supra* note 13, at §§

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this is not a “mere pleading device,” but it plainly is.⁴⁹

The *Maxwell* plaintiffs argued that the defendants acted outside the course and scope of their employment, and therefore that they should be liable in their individual capacities. However, the court’s analysis diverged from its previous cases such as *Hardin v. White Mountain Apache Tribe*. There, the court looked beyond the pleadings to determine whether, as a matter of law, the suit should proceed against the defendants in their individual or official capacities.⁵⁰ Here, the defendants became ensnared in a difficult and ultimately tragic situation, and arguably through no fault of their own, a woman perished.⁵¹ The question of fault, however, should never have been reached because every action the paramedics took was in the course and scope of their duties, and they therefore should have been sued in their official capacities, and been protected by the tribe’s sovereign immunity.⁵²

Though *Maxwell* sought consistency between state and tribal sovereign immunity, its shallow analysis gutted the doctrine of tribal sovereign immunity by allowing plaintiffs to simply plead around it. As is explored below, the *Maxwell* court erred as a matter of law in arriving at this holding. Further, the *Maxwell* court ignored fundamental differences in the operation of the doctrines, causing the court to err as a matter of policy as well.

4–52 (codifying indemnification requirement for employees).

49. *Maxwell*, 708 F.3d at 1088. The *Maxwell* court all but admits that this is a pleading device, saying, “*Cook*, however, is consistent with the remedy-focused analysis discussed above. In *Cook*, the plaintiff had sued the individual defendants in their official capacities in order to establish vicarious liability for the tribe.” *Id.* (citing *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)). The *Maxwell* court thus distinguishes this precedent on the basis that it was plead differently, so it is hard to see how this is not a pleading device.

50. *Maxwell*, 708 F.3d at 1089 (discussing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)).

51. *Maxwell*, 708 F.3d at 1088. These defendants did not stop for pizza on the way to the air ambulance, nor are they the ones who shot the victim.

52. *Cf. Hardin*, 779 F.2d at 479. The *Maxwell* court also specifically rejected the argument that since the tribe insured its employees, defendants here, that the tribe was the real party in interest. The court insisted that “any damages will come from [the defendants’] own pockets, not the tribal treasury,” and that “even if an indemnification agreement exists, it would be ‘a purely intramural agreement’ between a sovereign and its officers.” *Maxwell*, 708 F.3d at 1089–90. Whether or not employees are at fault is not relevant to the analysis of whether employees acted in the course and scope of their employment.

B. *The Flaws*

Many of the *Maxwell* court's errors stem from a foundational misunderstanding of the differences between tribal and state sovereign immunity. This is most tellingly revealed by the cases the court cited in support of its discussion of the doctrines. The court overstated the similarities between the two doctrines, stating that "tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity."⁵³ Neither of the cases the court cited for this proposition provide support for the statement.

First, the *Maxwell* court cited *Santa Clara Pueblo v. Martinez*.⁵⁴ In that case, the complainant alleged that the Santa Clara Pueblo⁵⁵ unlawfully discriminated with regard to its membership criteria because the children of a Santa Clara man and a woman from another tribe were members of the Pueblo, but children of a Santa Clara woman and a man from another tribe were *not* members.⁵⁶ The Supreme Court deferred to the tribe's membership decision, holding that tribal sovereign immunity shielded the tribe from suit.⁵⁷

In so holding, the Supreme Court stated: "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."⁵⁸ As this Note explores below, it is an oversimplification of the origin of these doctrines to assume

53. *Maxwell*, 708 F.3d at 1087–88.

54. 436 U.S. 49 (1978).

55. Many tribes in New Mexico and surrounding states are called Pueblos, a holdover from when the area was under Spanish and later Mexican control. *Pueblo Indian Facts*, NATIVE AM. INDIAN FACTS, <http://native-american-indian-facts.com/Southwest-American-Indian-Facts/Pueblo-Indian-Facts.shtml> (last visited Nov. 16, 2016) [<https://perma.cc/KLM6-Z333>].

56. *Santa Clara Pueblo*, 436 U.S. at 53–55.

57. *Id.* at 72. The Court further held that the 1968 Indian Civil Rights Act did not waive the tribe's sovereign immunity. *Id.* Congress in passing the Indian Civil Rights Act would have had the power to waive the tribe's sovereign immunity by virtue of its "plenary authority." *Id.* at 56. This shows the continued vitality of the Supreme Court's holding in *Lone Wolf* of the breathtaking power Congress wields in the Indian law context. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Even people who were similarly situated litigants in the case, in that they were discriminated against in enrollment, realized the importance of the Court's holding which respected the tribe's sovereign immunity. See Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y, 97, 97–99 (2004).

58. *Santa Clara Pueblo*, 436 U.S. at 58.

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that this means that state and tribal sovereign immunity are, as the *Maxwell* court put it, “coextensive.”⁵⁹ Indeed, in the next sentence, the Court in *Santa Clara Pueblo* references one of the key differences between tribal and state sovereign immunity further explored below: “This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.”⁶⁰ Here it is clear that the *Maxwell* court erred in conflating the superficially similar, but thoroughly different, doctrines of state and tribal sovereign immunity.

The *Maxwell* court then compounded this conflation. It stated: “Normally, a suit like this one—brought against individual officers in their individual capacities—does not implicate sovereign immunity.”⁶¹ To support this proposition, the *Maxwell* court cited *Miranda B. v. Kitzhaber*, a sovereign immunity case arising in a state law context, wherein a state official was sued under 42 U.S.C. section 1983.⁶² The relevant part of the *Kitzhaber* opinion states: “Clearly sovereign immunity is not directly implicated: suits brought under section 1983 against *individual* officers in their *individual* capacity for violations of the Constitution do not implicate sovereign immunity.”⁶³ The standards in so dissimilar a situation as in *Kitzhaber* should not have dictated the outcome in the tribal context in *Maxwell*. That case involved a state, rather than tribal, official, and a section 1983 claim, which, as will be explored below, does not apply to tribal officials.⁶⁴ Thus the *Maxwell* court not only erred by relying on precedent that dealt with state sovereign immunity, a discernably different doctrine, but also by relying on a particular aspect of state sovereign immunity, namely section 1983, applies differently, if at all, in the tribal context.

The second case the *Maxwell* court cites for the proposition that federal, state, and tribal sovereign immunity derive from the same common law origin is *Cook v. AVI Casino Enterprises*.⁶⁵ The *Cook* court compared tribal and federal

59. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013); *see also infra* Part II.

60. *Santa Clara Pueblo*, 436 U.S. at 60. *See infra* Part II.

61. *Maxwell*, 708 F.3d at 1088.

62. *Id.* (citing *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003)).

63. *Kitzhaber*, 328 F.3d at 1190 (emphasis in original).

64. *Id.* *See also infra* section II.B.2.a.

65. *Maxwell*, 708 F.3d at 1088 (citing *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)).

sovereign immunity by examining whether federal employees acting within the course and scope of their authority could be protected by sovereign immunity.⁶⁶ Notably, the *Cook* court stated that both tribal and federal immunity could be extended to employees, but reemphasized that “a plaintiff cannot circumvent tribal immunity ‘by the simple expedient of naming an officer of the Tribe as a defendant rather than the sovereign entity.’”⁶⁷ The *Maxwell* court thus cited contrary authority to support its point.

The *Maxwell* court furthered its engagement with this contradiction when it distinguished the facts at issue in the case from the Ninth Circuit’s prior precedent. Essentially, the *Maxwell* court distinguished its facts from *Cook* by observing that the plaintiff there plead directly against the defendant tribal official in his official, rather than individual capacity.⁶⁸ The *Maxwell* court further distinguished its case from another similar case, *Hardin v. White Mountain Apache Tribe*, noting that the latter was in reality an official capacity suit, a conclusion the *Hardin* court reached using a scope of authority analysis.⁶⁹ Although, according to the Ninth Circuit’s own precedent, a mere trick of pleading should be unable to circumvent tribal sovereign immunity, the *Maxwell* court, in an about-face, distinguished cases based solely on the manner in which the cases were pled.

The *Maxwell* court thus erred as a matter of law when it mis-cited the aforementioned cases for the proposition that state and tribal sovereign immunity are doctrines on equal footing. Furthermore, the court contradicted itself within its own opinion when it approved of cases that clearly stated the difference between an individual and official capacity suit is more than a “mere pleading device,” while simultaneously holding that a certain method of pleading will allow the plaintiff to evade tribal sovereign immunity.⁷⁰

66. *Cook*, 548 F.3d at 727.

67. *Id.* (quoting *Snow v. Quinalt Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983)).

68. *Maxwell*, 708 F.3d at 1088.

69. *Id.* at 1089; *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–80 (9th Cir. 1985).

70. *Maxwell*, 708 F.3d at 1088–89 (citing *Cook*, 548 F.3d at 727).

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C. *The Ramifications*

In the wake of the decision in *Maxwell*, Indian Law practitioners hoped that it was merely an outlier, a mistake, and that the Ninth Circuit would return to its precedent holding that tribal employees and officials could be sued for money damages in their individual capacities only when they acted outside of the course and scope of their positions.⁷¹ Two years later, however, the Ninth Circuit issued an opinion that extended and applied *Maxwell* in appreciably different circumstances, indicating that the remedy-sought analysis from *Maxwell* is here to stay in the Ninth Circuit.⁷² Further, as word about the *Maxwell* holding spread across the country, similar suits were brought elsewhere.⁷³ This section briefly examines cases that have explored similar questions to those raised in *Maxwell*.

First, in *Pistor v. Garcia*, tribal defendants, employees at a tribal casino in Arizona, removed plaintiffs from the gambling floor after determining they were engaged in “advantage gambling.”⁷⁴ Defendants handcuffed the plaintiffs, and detained them in a non-public area of the casino.⁷⁵ Defendants also seized cash and personal property belonging to the plaintiffs, mistakenly believing they were taking back what the plaintiffs had allegedly stolen from the casino.⁷⁶ Plaintiffs brought a section 1983 action against tribal officials as well as a state police officer, arguing that the defendants, acting under color of state law, violated their Fourth and Fourteenth Amendment rights by unlawfully arresting and searching plaintiffs.⁷⁷

The Ninth Circuit affirmed the district court’s decision not to dismiss the suit on sovereign immunity grounds, because

71. Interview with Stephanie Zehren-Thomas, Attorney, Hester & Zehren, in Louisville, Colo. (Feb. 20, 2016).

72. See *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

73. See, e.g., *Lewis v. Clarke*, 135 A.3d 677 (Conn. 2016), *cert granted*, 85 U.S.L.W. 3137 (U.S. Sept. 29, 2016) (No. 15-1500); *Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157 (D. Conn. 2015).

74. *Pistor*, 791 F.3d at 1108. Advantage gambling includes legal techniques to come out ahead at gambling institutions, for example only playing games where there is a statistical advantage for the player (most games in any casino favor the house). *Id.*

75. *Id.* at 1109.

76. *Id.*

77. *Id.*

plaintiffs sued the defendants in their individual, rather than official, capacities and therefore sovereign immunity did not apply.⁷⁸ The court emphasized that the fact that the defendants were sued individually is dispositive of the sovereign immunity issue even though the defendants' actions were clearly taken in the course and scope of their official duties.⁷⁹ In fact, the court stated that the "crucial question" is whether the defendants were sued in their individual or official capacities.⁸⁰ The court cited *Maxwell's* remedy-sought analysis and pointed out that plaintiffs sought damages only from the defendants individually, and had not sued the tribe.⁸¹ This affirmation of the remedy-sought analysis doubled down on *Maxwell's* significant shift away from the "scope of authority" test, which examined whether the employee was acting within or outside of the course and scope of his or her employment. Further, this focused the court's attention on the remedy, rather than the context in which the alleged wrongful act took place: whether such acts occurred in the course and scope of the defendants' duties as employees of the tribe.⁸²

The *Pistor* court still drew a line between official- and individual-capacity suits, but as in *Maxwell*, did not engage in any analysis as to whether the plaintiffs properly sued defendants in their individual capacities.⁸³ This is in spite of the fact that the defendants' brief cited the tribe's Tribal Gaming Ordinance which detailed the duties for the officials in question, including a duty to "monitor," "investigate," and "detain" those suspected of taking part in illegal gambling

78. *Id.* at 1108 ("[T]he tribal defendants are not entitled to sovereign immunity because they were sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe.").

79. *Id.* at 1112.

80. *Id.* The court states "the crucial question . . . [is] whether plaintiffs sued these defendants . . . in their official capacities or in their individual capacities." *Id.*

81. *Id.*

82. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478–79 (9th Cir. 1985). The *Maxwell* court thought the remedy-sought analysis and scope of authority analysis could potentially co-exist, however the court did not engage in any substantive discussion of the scope of defendants' authority. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). The *Pistor* court also opted not to conduct an analysis about whether the remedy-sought and scope of authority analyses could potentially co-exist. *See* 791 F.3d 1104.

83. *See Maxwell*, 708 F.3d at 1088.

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activities.⁸⁴ Based on this job description, it would appear that the tribal officers were acting within the course and scope of their duties according to the Tribal Gaming Ordinance. Allowing this suit to proceed against these defendants individually thus goes against previous cases where the court was willing to look past the complaint and determine that the case was “in reality an official capacity suit.”⁸⁵

Finally, the *Pistor* court correctly found that a section 1983 action will not lie against tribal officials acting pursuant to tribal law, but remanded the issue for further findings regarding whether the officials were acting under tribal law, or whether their alleged cooperation with state and county law enforcement officers meant they were acting under color of state law.⁸⁶ Thus, unlike their state counterparts and fellow defendants, the tribal defendants were unable to avail themselves of section 1983’s particular brand of qualified immunity.⁸⁷

Lewis v. Clarke, a pending case with the potential to preserve or deteriorate tribal sovereign immunity, will be heard by the United States Supreme Court this term.⁸⁸ There, a limo driver for a large East Coast tribal casino, while driving casino VIPs to their homes, rear-ended the plaintiff’s automobile causing substantial injury.⁸⁹ The Connecticut Supreme Court held that tribal sovereign immunity protected the tribal employee defendants, explicitly declining to follow *Maxwell*’s holding.⁹⁰ The facts in *Lewis* are unfavorable for the

84. This issue was argued vigorously in the briefs. See Brief for Petitioners at 8, *Pistor*, 791 F.3d 1104 (No. 12-17095); Brief for Respondents at 25, *Pistor*, 791 F.3d 1104 (No. 12-17095); Brief for Petitioners at 5, *Pistor*, 791 F.3d 1104 (No. 12-17095). Briefing before the Ninth Circuit occurred based on the first issued decision of *Maxwell*. See Brief for Respondents at 25–32, *Pistor*, 791 F.3d 1104 (No. 12-17095); Brief for Petitioners at 23–24, 26–28, *Pistor*, 791 F.3d 1104 (No. 12-17095). Following a rehearing, the Ninth Circuit issued another opinion in *Maxwell* (just two days after plaintiff’s reply brief was filed), however, the sections relevant to the analysis about whether the remedy-sought and scope of authority analyses could potentially co-exist were unchanged between the two opinions.

85. *Maxwell*, 708 F.3d at 1089. In *Hardin* it was not clear whether the plaintiff had sued defendants in their individual or official capacities. See *Hardin*, 779 F.2d at 476.

86. *Pistor*, 791 F.3d at 1115.

87. *Id.*

88. 135 A.3d 677 (Conn. 2016), *cert granted*, 85 U.S.L.W. 3137 (U.S. Sept. 29, 2016) (No. 15-1500).

89. *Id.* at 679.

90. *Id.* at 684.

tribe because tribal sovereign immunity would block recovery in state court for clearly deserving plaintiffs. The particular question on which the Supreme Court granted certiorari is whether tribal officials should be liable individually for actions committed while acting in course and scope of employment.⁹¹ *Maxwell* has played a significant role in this litigation from the start, and continues to be included as foundational precedent for the plaintiff's argument.⁹² Depending on the Supreme Court's decision, *Lewis v. Clarke* has the potential to be a case of monumental significance for the doctrine of tribal sovereign immunity.

To sum up, the Ninth Circuit altered its jurisprudence in regard to tribal sovereign immunity in *Maxwell* and *Pistor* by announcing a method of pleading that successfully circumvents tribal sovereign immunity; all that is required is that the plaintiff plead in a particular fashion. Where the plaintiff pleads against tribal officials or employees in their individual capacities and does not directly seek any remedy from the tribe, sovereign immunity will not bar suit against that tribal employees or officials in the Ninth Circuit.⁹³

The Ninth Circuit further espoused a remedy-sought analysis that looks not to the scope of authority of the official in question, but rather to the remedy the plaintiff seeks.⁹⁴ This rule allows plaintiffs to choose whether to sue defendants individually or in their official capacity. Moreover, since it appears that the court is no longer willing to peer beyond the complaint to ensure that the defendant has been sued in the proper capacity—and given the strong incentives for plaintiffs to avoid any suit that could be construed as being against the tribe because such suits may be blocked by sovereign immunity—the smart plaintiff will not plead against the tribe, but will always plead against tribal defendants in their individual capacities. All this, the *Maxwell* court asserted, serves to equalize state and tribal immunity, making the

91. Petition for Writ of Certiorari at I, *Lewis*, 85 U.S.L.W. 3137 (No. 15-1500) (presenting the issue on appeal as “[w]hether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment”).

92. See *Lewis*, 135 A.3d at 684; *Lewis v. Clarke*, 59 Conn. L. Rptr. 75 (Conn. Super. Ct. 2014).

93. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1087–90 (9th Cir. 2013).

94. *Id.* at 1088.

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doctrines “coextensive.”⁹⁵

This equality is merely superficial, however. After a deeper look, it becomes apparent that tribal sovereign immunity and state sovereign immunity are as different as tribes and states themselves. Their histories are different, and the way they currently operate is different. The following Part explores these differences by comparing and contrasting the doctrines.

II. TRIBAL AND STATE SOVEREIGN IMMUNITY: DISTINCT DOCTRINES

The court in *Maxwell* characterized tribal and state sovereign immunity as “coextensive.”⁹⁶ This Part explores how this is historically and doctrinally not true, while Part III argues that the doctrines should remain analytically distinct moving forward. The following explores the differing origins and dissimilar operations of tribal and state sovereign immunity to illustrate how the *Maxwell* court erred in attempting to make the doctrines coextensive.

As a threshold matter, it is important to note the difference between *sovereign immunity* and *sovereignty*. *Sovereignty* is the authority of a government to govern, while *sovereign immunity* is a legal principle residing within the larger doctrine of sovereignty.⁹⁷

The divergence between the doctrines of state and tribal sovereign immunity in part derives from the fact that states and tribes are not on equal footing as sovereigns within the United States government. For instance, state sovereignty is one of the foundational tenets of our democracy and is an integral part of the balance that keeps our federal system afloat.⁹⁸ States have police power, giving them the authority to legislate broadly on matters relating to public health, safety, and welfare, subject to limits created by federal preemption.⁹⁹ On the other hand, tribes are “domestic dependent nations,”¹⁰⁰

95. *Id.* at 1089.

96. *Id.*

97. *See* Alden v. Maine, 527 U.S. 706, 716 (1999) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”).

98. *See* Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 230 (2005).

99. *See* U.S. CONST. amend X; *id.* art. IV.

100. *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

which are subject to Congress's "plenary authority" to legislate regarding tribes, a power which Congress has possessed since the inception of the union.¹⁰¹ Further, tribal sovereignty is subject to "complete defeasance" at the hands of Congress, and tribal sovereignty exists only at the "sufferance" of Congress.¹⁰² Congress retains the unconfined ability to legislate regarding the tribes, as well as the absolute ability to abrogate any aspect of tribal sovereignty, including sovereign immunity.¹⁰³

Congress in the 1950s was acting on this remarkable power over tribes when it sought to terminate federal recognition of Indian Tribes.¹⁰⁴ During Termination, the federal government sought to eliminate tribes as sovereign entities for the stated reason of increasing self-sufficiency among Indians, but in reality the aim was to get payments to, and support for, tribes off the federal books.¹⁰⁵ This was a low point in the United States' respect for Indian tribes.¹⁰⁶ Up to that point, the federal government had always, at a minimum, recognized the sovereignty of tribes. Tribal sovereignty's dependence on Congress for its continued existence contrasts sharply with the states' established sovereignty.

Criminal jurisdiction is another example of an attribute of sovereignty on which states and tribes differ. States maintain criminal jurisdiction over residents and those within the borders of the state.¹⁰⁷ Tribal criminal jurisdiction, to the contrary, is a patchwork. The 1884 Major Crimes Act limited tribal jurisdiction over felonious actions of their members to certain crimes, placing all other felonies under federal

101. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). "Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Id.* This sort of assertion of power is reminiscent of the determination that Indians lost title to their lands upon "discovery" of the United States by the Europeans. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

102. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or state, or by implication as a necessary result of their dependent status." *Id.*

103. *Lone Wolf*, 187 U.S. at 565; *Wheeler*, 435 U.S. at 323.

104. See WILKINSON, *supra* note 4, at 57.

105. *Id.*

106. See *id.*

107. U.S. CONST. art. IV, § 2.

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jurisdiction.¹⁰⁸ More recently, the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe* divested tribes of jurisdiction over crimes committed by non-members against other non-members on Indian land.¹⁰⁹ Thus tribal jurisdiction is limited in key ways, while state jurisdiction remains intact.

State and tribal sovereignty are distinct from each other so it should come as no surprise that their respective sovereign immunity, an aspect of that sovereignty, would differ markedly as well. The following section briefly explores the history and development of state and tribal sovereign immunity. The differences enumerated below illustrate the ways in which the doctrines of tribal and state sovereign immunity are distinct, which undercuts the *Maxwell* court's assertion that it was making the doctrines "coextensive."

A. *The Origin of State and Tribal Sovereign Immunity*

Sovereign immunity is a defense that bars suit and, in its most basic procedural form, applies to states and tribes in the same way. Sovereign immunity is a question of subject matter jurisdiction, and as such is a basis for a motion to dismiss.¹¹⁰ When a sovereign entity is named as a party in a suit to which it has not consented, the sovereign entity will invoke sovereign immunity and the court will refuse to exercise jurisdiction over the case.¹¹¹

Sovereign immunity has been woven into "the United States' legal fabric since the country's founding."¹¹² While its

108. The Major Crimes Act, 18 U.S.C. § 1153 (2012) was upheld in *United States v. Kagama*, 118 U.S. 375, 385 (1886). Crimes placed under federal jurisdiction included murder, manslaughter, assault with intent to kill, rape, arson, burglary, and larceny. *Kagama*, 118 U.S. at 376–77.

109. 435 U.S. 191, 212 (1978). In *Dolgencorp v. Mississippi Band of Choctaw Indians*, the non-Indian plaintiffs argued for a "civil Oliphant," meaning that in cases involving civil actions between non-Indians arising on a reservation, the tribe will not have jurisdiction. 746 F.3d 167, 177 (5th Cir. 2014), *cert granted*, 83 U.S.L.W. 3006 (No. 13-1496). Following the death of Justice Antonin Scalia, the Supreme Court heard the case and split 4-4, in effect upholding the Fifth Circuit ruling. *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

110. 72 AM. JUR. 2D *States, Etc.* § 101 (2016).

111. *Id.*

112. Seelau, *supra* note 3, at 141 n.103 (citing *United States v. Lee*, 106 U.S. 196, 208 (1882)) ("And while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been

origin is disputed, it is commonly understood that under English common law, the king could not be sued without his permission, or put more colorfully, “the king can do no wrong.”¹¹³ Yet state and tribal sovereign immunity have developed into analytically distinct doctrines, and, contrary to the Ninth Circuit’s holding in *Maxwell*, there continue to be good policy reasons for treating state and tribal sovereign immunity as distinct doctrines today.¹¹⁴

1. The Development of State Sovereign Immunity

State sovereign immunity predates the United States Constitution.¹¹⁵ When the states were admitted to the union, they did so “with their sovereignty intact”; and the founders agreed “that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit.”¹¹⁶ State sovereign immunity—or a state’s protection against suits without its permission—was essential to the framers’ balance of power between the state and federal governments.¹¹⁷

The contours of state sovereign immunity within the federal system developed early in the history of the Republic. Following the Revolutionary War, a citizen of South Carolina sued the state of Georgia to recover money owed for goods supplied during the war.¹¹⁸ Georgia refused to appear in court, claiming that, as a sovereign, it was immune from suit without consent.¹¹⁹ However, Article III, Section 2 of the Constitution

discussed or the reasons for it given, but it has always been treated as an established doctrine.”).

113. *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974).

114. 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, 667–69 (2002).

115. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 *STAN. L. REV.* 1201, 1202, 1205 (2001) (arguing that sovereign immunity as a whole is inconsistent with the U.S. Constitution).

116. See *Blatchford v. Native Vill. of Notak*, 501 U.S. 775, 779 (1991). *But see* Chemerinsky, *supra* note 115, at 1206 (highlighting the inconsistencies between sovereign immunity and the Constitution).

117. See *Alden v. Maine*, 527 U.S. 706, 714–15 (1999) (discussing the historical importance of the states’ ability to decide when and where they would be subject to suit).

118. *Chisholm v. Georgia*, 2 U.S. 419, 467 (1793).

119. *Id.* at 473.

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only prohibited suits by citizens against their home state, and was silent on suits by citizens against a foreign state.¹²⁰ The United States Supreme Court read this part of the Constitution literally, holding that since the suit involved a South Carolina citizen suing a separate state, the suit could proceed.¹²¹

Congress reacted swiftly, overturning *Chisholm* with the Eleventh Amendment.¹²² The Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹²³ Although state sovereign immunity is sometimes referred to as “Eleventh Amendment Immunity,” the Supreme Court has asserted that this is a misnomer, and that the Eleventh Amendment merely “confirmed, rather than established, sovereign immunity as a constitutional principle,” since state sovereignty, and therefore state sovereign immunity, predated the Constitution.¹²⁴

In the 1990s, the Supreme Court bolstered the doctrine of state sovereign immunity. In one case, *Seminole Tribe of Florida v. Florida*, the Supreme Court held that Congress may not abrogate state sovereign immunity when a suit is brought against a state in federal court.¹²⁵ Although the issue arose in an Indian law context, the issue was whether the state, as a sovereign, could be subjected to suit (by a tribe or any other entity) without its permission.¹²⁶ The Seminole tribe sued Florida to force the state to negotiate with the tribe regarding gaming pursuant to the Indian Gaming Regulatory Act.¹²⁷ The tribe relied on *Fitzpatrick v. Bitzer*, a 1976 United States Supreme Court decision holding that Congress could abrogate state sovereign immunity pursuant to the Fourteenth Amendment.¹²⁸ The Court in *Seminole Tribe*, however, held

120. U.S. CONST. art. II, § 2.

121. *Chisholm*, 2 U.S. at 479.

122. For a good history of the background and ratification of the Eleventh Amendment see *Alden*, 527 U.S. at 719–25.

123. U.S. CONST. amend. XI.

124. *Alden*, 527 U.S. at 728–29.

125. 517 U.S. 44, 76 (1996).

126. *Id.*

127. *Id.* at 51–52.

128. *Id.* at 59 (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). *Fitzpatrick v. Bitzer* held that Congress must have the power to abrogate state sovereign immunity to enforce the civil rights provisions of the Fourteenth Amendment. 427 U.S. at 456.

that Congress's power to abrogate state sovereign immunity was limited to the Fourteenth Amendment context, and therefore was inapplicable to the present case.¹²⁹ State sovereign immunity was thus protected in federal courts.

A few years later in *Alden v. Maine*, the Court held that Congress may not subject states to suit in their own courts without the states' consent.¹³⁰ The suit arose after probation officers sued the state of Maine under the Fair Labor Standards Act in federal court.¹³¹ The federal court dismissed the case on state sovereign immunity grounds, so the probation officers then brought suit in state court, appealed through the state system, and finally petitioned for and were granted certiorari in the United States Supreme Court.¹³² As in *Seminole Tribe*, the Court held that Congress's ability to abrogate state sovereign immunity is limited to the Fourteenth Amendment context.¹³³ Combined, these decisions provide that in all situations other than the Fourteenth Amendment context, the state alone may waive its sovereign immunity. Therefore, states exercise almost exclusive control over their sovereign immunity.¹³⁴

State sovereign immunity has firm roots in the Constitution, and the United States Supreme Court has ruled that, in almost every case, states alone have the power to waive their immunity. This strong constitutional footing and ability of states to control their sovereign immunity are clearly distinguishable from tribal sovereign immunity, which exists at the whim of Congress.

2. The Development of Tribal Sovereign Immunity

Like state sovereign immunity, tribal sovereign immunity predates the United States of America.¹³⁵ From the beginning of governmental relations between tribes and Europeans,

129. 517 U.S. at 47.

130. 527 U.S. 706, 759–60 (1999).

131. *Id.* at 711.

132. *Id.* at 712.

133. *Id.*

134. *Id.*; *Seminole Tribe*, 517 U.S. at 76.

135. Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 ARIZ. ST. L.J. 987, 990 (1994) (explaining that the early American government “maintain[ed] government-to-government relations with the tribes”).

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Europeans treated the tribes as sovereign entities.¹³⁶ Upon the official formation of the United States, the federal government asserted exclusive authority to negotiate with tribes, citing the Indian Commerce Clause.¹³⁷

At the outset, a glaring and fundamental difference between state and tribal sovereign immunity is that tribal sovereign immunity does not benefit from any protections within the Constitution.¹³⁸ State sovereign immunity, by contrast, is entrenched in the Constitution.¹³⁹ In fact, the United States Constitution does not even *apply* to tribes.¹⁴⁰ The tribes are held to most of the Constitution's key tenets through the Indian Civil Rights Act, but tribes are not directly bound by the United States Constitution itself.¹⁴¹ This is because tribes both existed prior to the Constitution, and were explicitly considered to exist outside the bounds of the document.¹⁴² Thus, tribes are said to be both "extra-constitutional" and "pre-constitutional."¹⁴³

The courts have offered only grudging protection of the doctrine of tribal sovereign immunity. Tribal sovereign immunity was first mentioned by this nation's highest court in a 1919 opinion in *Turner v. United States and the Creek Nation of Indians*,¹⁴⁴ but was not used substantively until 1940 to dismiss a bankruptcy suit against a tribe in *United States v.*

136. *Id.*

137. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). It is significant for tribal sovereign immunity that the tribes are listed here among foreign nations and states, meaning that tribes do not belong in either category, and that their sovereignty derives from the fact that their governments pre-date the Constitution of the United States. *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) ("In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union.").

138. Tribal sovereign immunity is nowhere in the U.S. Constitution.

139. U.S. CONST. amend. XI.

140. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). *See supra* text accompanying note 57.

141. Virtually all the tenets of the U.S. Constitution apply to the tribes through the Indian Civil Rights Act 25 U.S.C. §§ 1301–1304 (2016).

142. The federal government was meant to be the entity that dealt with the tribes. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.").

143. *See Talton v. Mayes*, 163 U.S. 376 (1896).

144. 28 U.S. 345 (1919).

*United States Fidelity & Guaranty Co.*¹⁴⁵

Today's Supreme Court derides tribal sovereign immunity as a judicially created doctrine, in contrast to the constitutionally moored and judicially protected doctrine of state sovereign immunity.¹⁴⁶ Further, the modern Supreme Court has expressed frustrations with tribal sovereign immunity. Three times in the last twenty years the United States Supreme Court has granted certiorari in cases inviting the Court to abolish or severely restrict tribal sovereign immunity.¹⁴⁷ One case, *Lewis v. Clarke*, remains undecided at the time of this writing.¹⁴⁸ In the two previous cases, however, the Court concluded that Congress, with its plenary power, has the authority and is the appropriate branch to take this action.¹⁴⁹

First, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, the Court held that tribal sovereign immunity extended to tribal actions in a commercial, rather than strictly governmental, capacity.¹⁵⁰ Plaintiffs sued the tribe for breach of contract after a tribal official signed and later reneged upon a promissory note relating to one of the tribe's commercial ventures.¹⁵¹ The Court stated that "there are reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity] In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance."¹⁵² The Court nonetheless emphasized the doctrine of tribal sovereign

145. *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 756 (1998) (citing *Turner v. United States*, 248 U.S. 354 (1919) for the proposition that "[t]hrough the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident."). See Seielstad, *supra* note 114, at 694. See also *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940) (refusing, on tribal sovereign immunity grounds, to uphold a federal bankruptcy court judgment against the Choctaw and Chickasaw Nations).

146. *Kiowa*, 523 U.S. at 759 (1998).

147. See, e.g., *id.* at 751; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014); Petition for Writ of Certiorari, *Lewis*, 85 U.S.L.W. 3137 (No. 15-1500).

148. See *Lewis v. Clarke*, SCOTUSBLOG (Feb. 24, 2017, 2:33 PM), <http://www.scotusblog.com/case-files/cases/lewis-v-clarke/> [<https://perma.cc/S57M-9MSJ>] (argued Jan. 9, 2017).

149. *Kiowa*, 523 U.S. at 758; *Bay Mills*, 134 S. Ct. at 2037.

150. *Kiowa*, 523 U.S. at 760 ("Tribes enjoy immunity from suit on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.").

151. *Id.*

152. *Id.* at 758.

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immunity's precarious existence: "Like foreign sovereign immunity, tribal immunity is a matter of federal law Congress, subject to constitutional limitation, can alter its limits through explicit legislation."¹⁵³ Ultimately, the Court declined the respondents' invitation to circumscribe tribal sovereign immunity to purely governmental actions and found that the plaintiff could not sue the tribe to recover on the note in spite of the fact that the thrust of the action occurred off the reservation.¹⁵⁴

Congress, however, refused the Court's invitation to do away with tribal sovereign immunity.¹⁵⁵ Sixteen years later, in 2014, the Supreme Court granted certiorari in *Michigan v. Bay Mills Indian Community*.¹⁵⁶ There the tribe had purchased land off of their reservation with trust funds and sought to open a casino.¹⁵⁷ Michigan objected to the off-reservation casino under a compact with the tribe reached pursuant to the Indian Gaming Regulatory Act, which provided that tribes could operate casinos on reservation land only.¹⁵⁸

The Court ultimately held that Michigan's suit was barred because of the tribe's sovereign immunity, but again invited Congress to abrogate the doctrine: "But it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity. As in *Kiowa*—except still more so—we decline to revisit our case law, and choose instead to defer to Congress."¹⁵⁹ The Court's distaste for the doctrine of sovereign immunity and the result it mandated is palpable in the opinion, and, as in *Kiowa*, references to the fact that Congress is the proper branch to do away with the doctrine are plentiful and pervasive.¹⁶⁰ The Court stated that it ruled the way it did in *Kiowa* "for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."¹⁶¹

153. *Id.* at 759.

154. *Id.*

155. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2029 (2014).

156. *Id.* at 2024.

157. *Id.* at 2029.

158. *Id.* at 2030.

159. *Id.* at 2039 (internal quotations omitted).

160. *See id.* at 2038 ("Congress has now reflected on *Kiowa* and has made an initial (though of course not irrevocable) decision to retain that form of tribal immunity.").

161. *Id.* at 2037.

In the context of these opinions, ostensibly held in favor of the tribes, but where the Supreme Court draws attention to what it believes to be an outdated doctrine, come recent cases with tribal sovereign immunity in their crosshairs. This contrasts with the general respect for state sovereign immunity that the courts exude.¹⁶²

Tribal sovereign immunity and state sovereign immunity have thus developed into fundamentally different doctrines. It is only logical that this history has molded the operation of the doctrines into different shapes as well.

B. The Operation of State and Tribal Sovereign Immunity

Sovereign immunity is a defense available to a sovereign entity that has been sued without its consent.¹⁶³ The basic operation of the doctrine is the same between states and tribes; however, important differences become apparent in comparing the nuts and bolts of tribal and state sovereign immunity. Procedurally, sovereign immunity is pertinent to subject matter jurisdiction, and is a basis for a motion to dismiss.¹⁶⁴ The party invoking sovereign immunity bears the burden of proving that they should be protected by the doctrine.¹⁶⁵

Sovereign immunity may be waived by the sovereign.¹⁶⁶ Most governments automatically waive their sovereign immunity in certain limited circumstances.¹⁶⁷ This waiver typically occurs by statute.¹⁶⁸ In the state context, Congress may abrogate state sovereign immunity in both state and federal court, but this power is limited to the Fourteenth Amendment context.¹⁶⁹ In contrast, tribal sovereign immunity

162. See *supra* section I.B.1.

163. See 72 AM. JUR. 2D *States, Etc.* § 101 (2016).

164. *Id.*

165. *Id.*

166. Kenton Keller Petit, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*, 10 ALASKA L. REV. 363, 369 (1993).

167. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2012); Colorado Government Immunity Act, COLO. REV. STAT. ANN. § 24-10-101; Warm Springs Tribal Code ch. 30, <https://warmsprings-nsn.gov/bchapter/chapter-30-waiver-of-sovereign-immunity/> (last visited Nov. 20, 2016) [<https://perma.cc/X5L6-LZFN>].

168. See, e.g., Federal Tort Claims Act § 1346(b); COLO. REV. STAT. ANN. § 24-10-101; Warm Springs Tribal Code ch. 30.

169. See *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996).

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is subject to “complete defeasance” under Congress’s plenary power.¹⁷⁰ Congress could make radical changes to—or even wholly abrogate—the entire doctrine.¹⁷¹

In general, sovereign immunity is a defense that may be invoked by an officer or employee of a sovereign government in an official-capacity suit.¹⁷² By contrast, when an employee or officer is sued individually, they shed their immunity.¹⁷³ It is important to understand the difference between official- and individual-capacity suits.

The Supreme Court has emphasized the difference between individual- and official-capacity suits, stating: “The distinction between official-capacity suits and personal-capacity suits is more than ‘a mere pleading device.’”¹⁷⁴ The Court has offered some insight into the difference between official- and individual-capacity suits with regard to state officials. According to the Court in *Hafer v. Melo*, “[O]fficial-capacity suits ‘generally represent only another way of pleading an action against an entity of which an officer is an agent’ Suits against state officials in their official capacity therefore should be treated as suits against the State.”¹⁷⁵ By contrast, “personal-capacity suits . . . seek to impose individual liability upon a government officer”¹⁷⁶

There is some confusion as to whether it is proper, when determining whether the suit should proceed against state employees in their official or individual capacities, for the court to look *back* to determine if the employee exceeded the scope of his or her authority at the time of the alleged breach or tort, or look *forward* to see where the remedy lies or which party bears the loss of an adverse judgment. On the one hand, the decision to hold an official liable “must take into account the functions and responsibilities of these particular defendants in their

170. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

171. *Id.*; see *supra* text accompanying note 102.

172. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (“[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”).

173. *Cf. Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (explaining that personal-capacity suits involve individual liability).

174. *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)).

175. *Id.* at 25 (internal citations omitted).

176. *Id.*

capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983.”¹⁷⁷ This analysis is more retrospective, considering the employee’s scope of authority.¹⁷⁸ On the other hand, the Supreme Court has articulated an alternative to the remedy-sought analysis the *Maxwell* court applied for determining whether a suit should be an individual- or official-capacity suit.¹⁷⁹ Yet, “when suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake.”¹⁸⁰ This is a forward-looking analysis.¹⁸¹ Supreme Court precedent does not provide a clear answer as to which analysis should be applied or when the analysis should be utilized.

The following briefly examines the operation of tribal and state sovereign immunity in the context of suits seeking money damages, including tort and contract suits, as well as suits alleging constitutional violations.

1. Official-Capacity Suits

First, we turn to suits against a tribal or state employee in their official-capacity. When state or tribal employees are sued in their official-capacities the suit is said to operate against the sovereign.¹⁸² Therefore, sovereign immunity will bar the suit unless the sovereign has waived its immunity.¹⁸³ In both the tribal and state contexts, any relief awarded to the plaintiff will be paid out of the governmental treasury.¹⁸⁴

For state employees sued in either state or federal court, immunity waivers typically take the form of comprehensive governmental immunity statutes, often modeled after the

177. *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

178. *Id.*

179. *Alden v. Maine*, 527 U.S. 706, 757 (1999) (“Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.”).

180. *Idaho v. Coeur D’Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997).

181. *Id.*

182. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (“Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent.”).

183. 72 AM. JUR. 2D *States, Etc.* § 101 (2016).

184. *Cf. Graham*, 473 U.S. at 167.

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Federal Tort Claims Act.¹⁸⁵ The states have adopted statutes that vary widely, but some key features are sufficiently commonplace to merit mention.¹⁸⁶ Immunity waiver statutes typically dictate the process for suing the state and its officials.¹⁸⁷ This can occur, for example, by requiring the plaintiff to give the state notice of the suit within a certain period after the injury is discovered.¹⁸⁸ Further, the statutes may dictate the types of relief a plaintiff may seek, perhaps by forbidding suits for punitive damages.¹⁸⁹ Finally, the state may set damage or liability caps that allow plaintiffs to recover only up to a certain codified dollar amount.¹⁹⁰ States thus allow suits to proceed against their officials, but these immunity statutes can make doing so procedurally complicated and limit recovery prospects.

Some tribes have followed the federal government and states' lead by enacting tribal immunity waivers.¹⁹¹ Substantively, these waivers are similar to the states', but they differ in their application. For example, when suits against governmental officials proceed in federal courts, the federal courts apply state sovereign immunity statutes as a result of

185. *State Sovereign Immunity and Tort Liability*, NAT'L CONGRESS ST. LEGISLATURES <http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx> (last updated Sept. 8, 2010) [<https://perma.cc/B6S5-26A6>].

186. For continuity's sake, this section will consider California's immunity statute: California Tort Claims Act, CAL. GOV'T CODE §§ 810–996.6 (Westlaw through 2016 legislation). For information on every state, see *State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C., <https://www.mwl-law.com/wp-content/uploads/2013/03/STATE-GOVERNMENTAL-LIABILITY-IN-ALL-50-STATES-CHART-GLW-00211981.pdf> (last updated Sept. 6, 2016) [<https://perma.cc/2TMC-R4T2>].

187. CAL. GOV'T CODE § 911.2.

188. See *id.* Notice deadlines are six months for personal injury/property claims, one year for all other claims. *Id.*

189. California does not allow punitive damages against the state. CAL GOV'T CODE § 818.

190. California does not have damage caps. For reference, though, Colorado sets damage caps of \$350,000 per person or \$900,000 per occurrence. COLO. REV. STAT. § 24-10-114 (2016). Oregon sets damage caps of \$2,073,600 per person, \$4,147,100 per occurrence. OR. REV. STAT. §§ 30.271(4), 30.272(4) (2016).

191. See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 194 (2004) (“[T]he Grand Ronde, Umatilla, Siletz, and Warm Springs Tribes in Oregon, the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan, and the Mashantucket Pequot Tribal Nation in Connecticut have all adopted tort claims ordinances.”).

the *Erie* doctrine.¹⁹² However, there is no similar doctrine whereby state courts could apply a tribal waiver of immunity. Thus tribal immunity waivers apply only in tribal court. State and federal courts previously dismissed these suits on tribal sovereign immunity grounds where a tribal court would have applied an immunity waiver.¹⁹³ Thus, the only proper venue for the suit was tribal court.

However, because suing in tribal court involves different rules, potentially more travel, and a tribal jury, plaintiffs and their attorneys may be incentivized to sue elsewhere. This is why *Maxwell's* holding is so attractive to the plaintiff's bar: It allows the plaintiff to sue tribal officers and employees individually in state or federal court, avoiding the tribal sovereign immunity question altogether while still potentially affording the plaintiff access to the deep pockets of a tribal liability insurance policy. Such an incentive weakens tribal courts by funneling cases to state and federal courts, thereby denying the tribe the opportunity to hear those cases.¹⁹⁴ This leads to atrophy of tribal courts which are an important element of tribal sovereignty.¹⁹⁵ In sum, states have a significant say in when, where, and how their employees will be liable for actions taken in the course and scope of their employment, a privilege tribal courts do not necessarily enjoy.

2. Individual-Capacity Suits

We next focus on suits against government workers in their individual capacities for money damages. In contrast with official-capacity suits, which are in effect suits against the governmental entity, individual-capacity suits are meant to operate exclusively on the individual worker.¹⁹⁶ Since no

192. See, e.g., *Aspen Orthopaedics & Sports Medicine, LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 837 (10th Cir. 2003) (holding that federal courts had subject matter jurisdiction to “hear the Hospital’s appeal from the district court’s denial of its state-law immunity from suit” as a result of the *Erie* doctrine which allows federal courts to apply state substantive law, for example an immunity waiver).

193. Cf. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16 (1987) (outlining a policy of remanding cases to tribal courts as a matter of comity).

194. See Seelau, *supra* note 3, *passim*.

195. See *id.*

196. *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (“[O]fficers sued in their personal capacity come to court as individuals.”).

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governmental entity is a party to this type of suit, employees are unable to avail themselves of the government's sovereign immunity defense.¹⁹⁷ However, in certain limited circumstances, the employee may be protected by a lesser form of immunity known as qualified immunity.¹⁹⁸ What follows focuses on key differences between individual suits against tribal and state employees.

a. Constitutional Violations and Qualified Immunity

An important twist in individual-capacity suits involves alleged constitutional violations. According to the United States Supreme Court, a suit alleging that a government officer violated a plaintiff's constitutional rights is by necessity an individual-capacity suit because the governmental entity is unable to act contrary to the Constitution.¹⁹⁹ However, since the Constitution does not apply to tribes,²⁰⁰ the operation of these suits necessarily differs between the state and tribal contexts.

In certain circumstances where government officials are sued in their individual capacities for alleged constitutional violations, they will be able to avail themselves of qualified immunity.²⁰¹ As the name suggests, this is a limited form of immunity—a gray area between absolute immunity and no immunity.²⁰² Qualified immunity is a judicially created doctrine.²⁰³ It acts to shield government employees from liability where they were performing discretionary functions if their actions did not violate “clearly established law.”²⁰⁴ Importantly, the actions must also have been taken in good

197. *Id.*

198. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); 42 U.S.C. § 1983.

199. Miranda v. Kitzhaber, 328 F.3d 1181, 1190 (9th Cir. 2003) (“Clearly sovereign immunity is not directly implicated: suits brought under § 1983 against *individual* officers in their *individual* capacity for violations of the Constitution do not implicate sovereign immunity.”).

200. *See supra* note 140 and accompanying text.

201. *See* LEGAL INFO. INST., *Qualified Immunity*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/qualified_immunity (last visited Jan. 24, 2017) [<https://perma.cc/TE6S-9LBZ>].

202. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

203. *See generally id.*

204. *Id.* at 815.

faith.²⁰⁵

Theoretically the doctrine of qualified immunity applies to tribal officials just as it does to their state and federal counterparts. At least, there is nothing that would indicate that the doctrine's application is limited to state and federal employees. Practically, however, qualified immunity has not proven as useful in the tribal context as it has in the state context.²⁰⁶ Perhaps it is because the United States Constitution does not apply to tribes as it does to states, or perhaps it is because tribal sovereign immunity had been such a complete bar to suit against tribal officials for so long, but whatever the cause, cases applying qualified immunity in a tribal context are rare.²⁰⁷

Allegations of constitutional violations against state employees usually take the form of a section 1983 suit.²⁰⁸ A section 1983 defendant must be a person, meaning a federal or state official sued in his or her individual capacity.²⁰⁹ This person must have acted "under color of state law," meaning he or she used his or her position of power within the state to undertake a wrongful action.²¹⁰ The defendant must have "subjected" the plaintiff to a "deprivation of his or her rights," indicating that there is some causal connection between the official's act or omission and the plaintiff's deprivation of rights.²¹¹ If these conditions are met, the official is potentially liable for damages.²¹² The plaintiff bears this relatively high standard of proof.²¹³

205. *Id.* at 816. The question of whether a state official acted in good faith is a question of fact. *Id.*

206. See Rob Roy Smith & Claire Newman, *Sovereign Immunity for Tribal Officials At Risk*, LAW 360 (Feb. 26, 2016, 11:06 AM), <http://www.kilpatricktownsend.com/~media/Files/newsreleases/2016/Sovereign%20Immunity%20For%20Tribal%20Officials%20At%20Risk.ashx> [<https://perma.cc/WRC8-U88R>].

207. *Id.*

208. The purpose of § 1983 was to protect citizens in southern states from abuses of power by KKK members holding prominent state official positions by allowing them to sue for a deprivation of their rights. Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, CONSTITUTION.ORG http://www.constitution.org/brief/forsythe_42-1983.htm (last visited Nov. 25, 2016) [<https://perma.cc/ZKG7-ECH6>].

209. *Id.*; 42 U.S.C. § 1983 (2012).

210. 42 U.S.C. § 1983.

211. *Id.*

212. *Id.*

213. See Forsythe, *supra* note 208.

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Suing under section 1983 is more complicated in a tribal context. Since the Constitution does not apply to tribes, plaintiffs must find a creative way to implicate tribal officials.²¹⁴ The Ninth Circuit has noted that section 1983 suits will not lie against tribal officials acting under tribal law.²¹⁵ However, the Ninth Circuit has also suggested that such a suit might lie if the tribal official had been acting under color of state law, for example by acting in conjunction with state actors.²¹⁶ Section 1983 is an important alternative to merely suing employees in their individual capacity in both the state and federal contexts. The general rule of its inapplicability to tribal officers acting pursuant to tribal law is a key difference in how tribal and state sovereign immunity operate because it leaves tribal officials completely unshielded by immunity where their state counterparts may be protected by qualified immunity.

Suits against officials for violations of the Constitution differ drastically between the state and tribal contexts. It is unclear whether or how the broader doctrine of qualified immunity applies to tribal officials, and the application of section 1983, a statute which creates an important category of qualified immunity suits, is somewhat fraught in the tribal setting.

b. Other Suits

In situations other than suits for constitutional violations, individual capacity suits operate just like a comparable suit against the employee for a wrongful action taken while not at work. In the tribal context, prior to *Maxwell*, the Ninth Circuit engaged in an analysis of whether employees acted in the course and scope of their authority. This helped the court determine whether suits should proceed against employees in their individual or official capacities.

Where a plaintiff sues a state employee individually, and the plaintiff manages to avoid immunity, the suit proceeds as if

214. See *supra* note 140 and accompanying text.

215. See *Pistor v. Garcia*, 791 F.3d 1104, 1114–15 (9th Cir. 2015). Because the Constitution does not apply to tribes, and section 1983 allows suits against government officials for constitutional violations, it follows that tribal officials cannot be held liable under section 1983 at all.

216. *Id.*

the plaintiff were suing the state employee individually.²¹⁷ Although such pleadings can circumvent sovereign immunity, recovery depends on the defendant's personal assets. If the employee does not have particularly deep pockets, it may be that he or she is insured by the state, in which case the plaintiff could gain access to an insurance payout from the state's insurance policy.²¹⁸ Courts have held in both state and tribal contexts that the existence of insurance coverage does not, by itself, implicate the government's sovereign immunity.²¹⁹

c. Suits Against Tribal Employees Prior to Maxwell

In the tribal context, until *Maxwell*, the Ninth Circuit examined cases against tribal officials by analyzing whether officials exceeded the course and scope of their employment.²²⁰ If they acted within course and scope, the action was typically characterized as an official-capacity suit regardless of how the plaintiff pleaded.²²¹ This section traces the development of this Ninth Circuit precedent and examines how similar questions are addressed in other courts.

When tribal officials were sued individually for monetary damages, the Ninth Circuit previously looked beyond the complaint to determine whether the plaintiff properly sued defendants individually or whether the plaintiff should have sued defendants in their official capacities.²²² The Ninth Circuit first alluded to this analysis in a footnote in *United States v. Oregon*.²²³ There the court held that a tribe

217. *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (“[O]fficers sued in their personal capacity come to court as individuals.”).

218. *See Jackson v. Ga. Dep’t of Transp.*, 16 F.3d 1573, 1577–78 (11th Cir. 1994) (holding that just because a state indemnifies its employees, the state’s sovereign immunity does not extend to that employee, even though the state insurance policy will pay the judgment).

219. *See Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1090 (9th Cir. 2013) (tribal context); *Jackson*, 16 F.3d at 1577.

220. *See, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–80 (9th Cir. 1985).

221. *Id.*

222. *See id.*; *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

223. 657 F.2d 1009, 1012 n.8 (9th Cir. 1981) (citing *Davis v. Litell*, 398 F.2d 83, 84–85 (9th Cir. 1968)) (finding that a tribe *may* extend sovereign immunity to

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may waive its sovereign immunity without the express permission of Congress; the court also noted that tribal immunity “extends to tribal officials when acting in their official capacity and within their scope of authority.”²²⁴ This laid the initial framework for what would become known as the “scope of authority” analysis.²²⁵

Snow v. Quinault Indian Nation explored the negative inference in *Oregon*’s footnote, namely that acting outside of the scope of one’s employment or, more broadly, outside the scope of the tribe’s powers, meant that the official would not be protected by tribal sovereign immunity: “Tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe’s sovereign powers.”²²⁶ In *Snow* plaintiffs sued tribal official defendants regarding a business license fee and tax, and the court held that the tribe’s sovereign immunity barred suit based on the inherent governmental ability to tax.²²⁷

Hardin v. White Mountain Apache Tribe affirmed the holding in *Snow* in a more discretionary context.²²⁸ *Hardin* involved a non-Indian plaintiff suing tribal officials for their decision to exclude plaintiff from the reservation after the plaintiff was convicted of a felony.²²⁹ The plaintiff sued the Tribe, Tribal Court, Tribal Council, and various officials in their individual capacities.²³⁰ Clearly, the court held, the suit against the tribe was barred by tribal sovereign immunity, and that since “defendants here were acting within the scope of their delegated authority, *Hardin*’s suit against [tribal employee defendants] is also barred by the Tribe’s sovereign immunity.”²³¹ Importantly, this holding indicated a willingness on the part of the court to look past the complaint, to determine whether the plaintiff properly sued defendants individually, or whether plaintiff should have sued the defendants in their

employees but implying that affirmative action on the part of the tribe might be required).

224. *Id.*

225. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013).

226. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983).

227. *Id.* at 1322.

228. 779 F.2d 476, 478 (9th Cir. 1985).

229. *Id.*

230. *Id.*

231. *Id.* at 479–80.

official capacities.²³² Here the court reasoned that “[b]ecause all the individual defendants here were acting within the scope of their delegated authority, Hardin’s suit against them [was] also barred by the Tribe’s sovereign immunity.”²³³

Prior to *Maxwell*, the question of whether tribal employees or officials could be sued in their individual capacities seemed settled outside the Ninth Circuit as well. The Second Circuit applied a scope of authority analysis akin to that applied in *Hardin*: “Chayoon cannot circumvent tribal immunity by merely naming officers or employees of the tribe when the complaint concerns actions taken in defendants’ official or representative capacities and the complaint does not allege [that] they acted outside the scope of their authority.”²³⁴ The Second Circuit did not distinguish between a tribal official and a tribal employee, indicating that sovereign immunity applies in either case, without regard for the relative superiority or inferiority of the employee’s status.²³⁵

In general, case law seemed settled that suits against tribal employees or officials in their individual capacities would not function as a path around tribal sovereign immunity. This is consistent with the Supreme Court’s statement that “the distinction between official-capacity suits and personal-capacity suits is more than ‘a mere pleading device.’”²³⁶ The *Maxwell* court thus deviated significantly from the Ninth Circuit’s own precedent as well as that of the Second Circuit. The next Part concludes that *Maxwell* was a retrogressive deviation, and argues that the Supreme Court should decline to follow *Maxwell* when it decides *Lewis v. Clarke*.

III. TRIBAL AND STATE SOVEREIGN IMMUNITY MOVING FORWARD

The *Maxwell* court held tribal officials and employees individually liable for actions taken in the course and scope of their employment and, in doing so, reasoned that tribal and

232. *Id.*

233. *Id.*

234. *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *cf. Hardin*, 779 F.2d at 479–80.

235. *See Chayoon*, 355 F.3d at 143.

236. *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

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state sovereign immunity should operate equally.²³⁷ The court believed it had achieved this result by allowing the Maxwells' suit to proceed against the tribal paramedics individually where the tribe was not a party to the suit.²³⁸ However, this is not equal treatment. Although the *Maxwell* court superficially shaped tribal sovereign immunity to resemble state sovereign immunity, the broader doctrines of state sovereign immunity and tribal sovereign immunity are historically not the same, and they continue to operate in different manners in spite of this newly imposed similarity.²³⁹ The *Maxwell* court thus erred by failing to consider this historical divergence and the operational differences in the application of tribal and state sovereign immunity. This Part argues that tribal and state sovereign immunity should continue to be treated as separate and distinct doctrines. Finally, this Part argues that the United States Supreme Court should reject *Maxwell's* holding when it decides *Lewis v. Clarke* this term.

A. *State and Tribal Sovereign Immunity Should Remain Doctrinally Distinct*

Asserting that tribal sovereign immunity and state sovereign immunity should be the same assumes that tribes and states are the same. This is clearly not the case, regardless of which metric is used to compare states and tribes. It therefore follows that state and tribal sovereign immunity should differ as a matter of policy, as well as in how they operate.

Tribal and state governments are fundamentally different in several ways. Crucially, states and tribes differ in their most basic status as sovereigns.²⁴⁰ Tribal sovereignty is subject to “complete defeasance” by the “plenary power” wielded by Congress.²⁴¹ In recent history, Congress has drawn on this power to attempt to terminate the federal government's relationship with and recognition of tribes.²⁴² State sovereignty, in contrast, is a foundational principle of

237. *Maxwell v. Cty. of San Diego* 708 F.3d 1089, 1090 (9th Cir. 2013).

238. *Id.*

239. *See supra* Part II.

240. *See supra* notes 98–109 and accompanying text.

241. *See supra* notes 100–103 and accompanying text.

242. *See supra* notes 104–106 and accompanying text.

federalism, and though state authority may be somewhat limited by federal policy, state sovereignty stands on unwavering ground.²⁴³

However, tribal sovereignty is a necessary element of several federal policies meant to increase tribal self-determination.²⁴⁴ A robust sovereign immunity doctrine is essential to healthy tribal courts, which in turn promote self-determination and the maintenance of the sovereignty of tribal governments. Sovereign immunity is thus important in that it allows tribes to continue to develop and grow so that they can provide for their constituents. Any way the subject is approached, tribes have faced immense difficulties as a result of their collision with the western world.²⁴⁵ Tribal sovereign immunity is important to protect the status that tribes have regained since the end of Termination.²⁴⁶ As one court, writing not long after the end of Termination, put it:

[S]overeign immunity is intended to protect what assets the Indians still possess from loss through litigation. 'That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments.' If tribal assets could be dissipated by litigation, the efforts of the United States to provide the tribes with economic and political autonomy could be frustrated.²⁴⁷

Although this court wrote at a time when tribes were in a very uncertain position post-Termination, the policy the court

243. See *supra* notes 98–99 and accompanying text.

244. See, e.g., Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 5310–5310 (2012) (originally codified in §§ 450–450(e)(3)); Indian Child Welfare Act, 25 U.S.C. §§ 1901–1931 (2012); Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–3013 (2012); Native American Languages Act, 25 U.S.C. §§ 2901–2906 (2012); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2012); and Violence Against Women Act of 1994, 18 U.S.C. § 2265 (2012), and the recent reauthorization in 18 U.S.C. §1304(b)(1) (2013).

245. From disease, to massacre, to subjugation, to racism, to Termination, Native American tribes have weathered every storm. See WILKINSON, *supra* note 4 *passim*.

246. See discussion of Termination *supra* notes 104–06 and accompanying text.

247. *Cogo v. Cent. Council of the Tlingit & Haida Indians*, 465 F. Supp. 1286, 1288 (D. Alaska 1979) (quoting *Adams v. Murphy*, 165 F. 304, 308–09 (8th Cir. 1908)).

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expresses is likewise applicable today. Modern tribes may not be quite as precariously situated as they were following Termination, but they continue to face significant struggles for which they require a strong base of sovereignty, of which sovereign immunity is an integral part.²⁴⁸

Further, generally tribal governments are smaller than states and do not have access to the same resources. Smaller, less stable governments are deserving of more protections such as sovereign immunity because it would take fewer adverse judgments to send the government over the cliff into financial insolvency. Ignoring the reality that tribal insurance will often pay judgments against tribal employees sued in their individual capacities—which courts have done in both the state and tribal settings—is more devastating to tribal governments than it is to state governments. It is common sense that tribes, on balance, have smaller operating budgets than states. The tribal defendants discussed in this Note are judgment-proof—they will not be able to pay even a small fraction of the value of the final judgment, unless they have been indemnified or will be indemnified by a wealthier third party, for example, their employer.²⁴⁹ Under the “scope of authority” analysis, at least one court within the Ninth Circuit’s jurisdiction has found that the amount in controversy, if it is high, may indicate that the

248. See Julian Brave NoiseCat, *13 Issues Facing Native People Beyond Mascots and Casinos*, HUFFINGTON POST (July 30, 2015), http://www.huffingtonpost.com/entry/13-native-american-issues_us_55b7d801e4b0074ba5a6869c [<https://perma.cc/CB8X-A9A9>] (listing problems facing Indian Country including: incarceration, unemployment, land loss, violence against women, youth suicide, poor education, housing, and health care).

249. For example, tribal paramedics in Alpine, CA, like the defendants in *Maxwell*, can expect to make \$66,000 per year. *Firefighter Paramedic Salary in Alpine, CA*, INDEED, <http://www.indeed.com/salary/q-Firefighter-Paramedic-l-Alpine,-CA.html> (last visited Aug. 28, 2016) [<https://perma.cc/PLR6-GU2S>]. Gaming Inspectors at the Mazatzal Casino, like one of the defendants in *Pistor* can expect to make \$30,000 per year. *Gaming Inspector Salary in Payson, AZ*, INDEED, <http://www.indeed.com/salary?q1=gaming+inspector&l1=payson%2C+AZ> (last visited Aug. 28, 2016) [<https://perma.cc/78T9-C765>]. Limo drivers in Uncasville, CT, like defendant in *Lewis v. Clarke*, can expect to make \$29,000 per year. *Limo Driver Salary, Uncasville, CT*, INDEED, <http://www.indeed.com/salary?q1=limo+driver&l1=uncasville%2C+ct> (last visited Aug. 28, 2016) [<https://perma.cc/ENM8-5GSF>]. The Mohegan Tribal Code requires the tribe to indemnify its employees for course and scope suits. MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES ch. 4, art. III, §§ 4–52 (2007), https://www.municode.com/library/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTIIMOTRINCO_CH4EM_ARTIIIINOFEM_S4-52IN [<https://perma.cc/LF4M-NWWR>].

tribe is the real party in interest, because it would be unreasonable to sue an individual for such a large sum.²⁵⁰ In all likelihood, based on its holding in *Maxwell*, the Ninth Circuit will reverse this finding and allow the suit to proceed against the individual tribal employee.

This is, of course, an imperfect answer because it is unfair to treat tribal governments differently than states just because they are smaller and more precariously situated. However, policy in other areas of American law grant arguably unfair advantages to historically disadvantaged groups such as racial minorities in higher education admissions. Sometimes, in light of historical injustice, giving disadvantaged groups a leg up in today's world is all that can be done.

Overall, tribes and states are not the same, so it follows that their respective sovereign immunity doctrines should be different as well. Tribal sovereign immunity is critical to the development of self-sustaining tribal communities and as such, is deserving of more protections than the *Maxwell* court was willing to give it. The Supreme Court should keep this underlying policy rationale in mind as it decides *Lewis v. Clarke*.

B. The Supreme Court Should Reject the Ninth Circuit's Holding in Maxwell

In *Lewis v. Clarke*, the United States Supreme Court this term will decide the question of whether tribal employees may be sued in their individual capacities for money damages for actions taken in the course and scope of their employment.²⁵¹ The Court may decide whether to apply a remedy-sought analysis similar to that espoused by the Ninth Circuit in *Maxwell*, or a scope of authority analysis similar to the test that the Ninth Circuit applied prior to *Maxwell*, or perhaps another analysis altogether. This Note argues that the Supreme Court should decline to follow *Maxwell*.

The *Maxwell* court eviscerated the doctrine of tribal sovereign immunity by allowing suits against individual tribal

250. *Eagleman v. Rocky Boys Chippewa-Cree Tribal Bus. Comm. or Council*, 2015 WL 7776887, at *3 (D. Mont. Dec. 2, 2015), appeal docketed, No. 15-36003 (9th Cir. Dec. 31, 2015).

251. *Lewis v. Clarke*, 135 A.3d 677 (Conn. 2016), *cert granted*, 85 U.S.L.W. 3137 (U.S. Sept. 29, 2016) (No. 15-1500).

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officials for money damages to proceed as long as the plaintiff pleads against only individuals, and only sues them in their individual capacities. As the Ninth Circuit had previously noted, and other courts have recognized, this allows plaintiffs to circumvent tribal sovereign immunity using a mere “pleading device.”²⁵² Indeed, it is not the government that commits wrongful actions, whether they be in tort, in contract, or constitutional violations; it is its officials and its employees. Actions proceeding according to the legal fiction that a suit against an individual government official or employee has no effect on the government (since it is not named as a party) are just that: fiction.²⁵³ Moreover, this fiction is particularly harmful in the tribal context because it further chips away at tribal sovereign immunity, and by extension, tribal sovereignty.

As explored above, the *Maxwell* court’s desire to treat state and tribal sovereign immunity equally rests on the faulty assumption that tribal and state sovereign immunity is equal in other respects.²⁵⁴ The doctrines of state and tribal sovereign immunity are neither historically the same, nor do they operate uniformly. Though *Maxwell* may synchronize the two doctrines in this narrow respect, the doctrines remain distinct.²⁵⁵

Maxwell’s reasoning contradicts prior Ninth Circuit jurisprudence in similar cases, and its attempt to distinguish its facts from the facts in previous cases is not convincing.²⁵⁶ The Ninth Circuit had previously held that merely suing tribal officials or employees individually was not enough, on its own, to deny the official or employee a sovereign immunity defense.²⁵⁷ Although this analysis puts tribal officials and

252. *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

253. *Ex parte Young*, 209 U.S. 123, 174 (1908) (Harlan, J., dissenting) (observing that the purpose in suing government officials in their individual capacities was in reality “to tie the hands of the state”).

254. *See supra* Part II.

255. *See supra* Part II.

256. *See* Thomas B. Nedderman & John A. Safarli, *Maxwell and Tribal Sovereign Immunity in the Ninth Circuit: Restoring a True Purpose or Ignoring Reality?* in *EMERGING ISSUES IN TRIBAL-STATE RELATIONS* 7, 10 (2016) (expressing skepticism that the *Maxwell* court effectively distinguished the facts before it from its previous line of cases on the question of whether tribal officials and employees may be sued in their individual capacities).

257. *See, e.g.*, *Cook v. AVI Casino Enters., Inc.*, 548 F.3d, 718 (9th Cir. 2008); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985); *Murgia v. Reed*, 338 F. App’x 614 (9th Cir. 2009).

employees in a slightly superior position relative to their state counterparts, it can be justified because of tribal governments' unique position within the government, and to protect and empower the tribes' unique sovereignty.

Moreover, the holding of *Maxwell* is contrary to the Supreme Court's holding in *Kiowa* and *Bay Mills* that Congress, not the courts, should be the one to alter tribal sovereign immunity.²⁵⁸ In sum, the track the Ninth Circuit has taken on suits for money damages against individual tribal officials and employees and tribal sovereign immunity is wrong because it rests on the flawed assumption that tribal and state immunities are equal and it is contrary to both the Ninth Circuit's own precedent, as well as that of the United States Supreme Court. The Supreme Court should therefore decline to follow *Maxwell*, for reasons of law and policy.²⁵⁹

CONCLUSION

Tribal and state sovereign immunity have developed into analytically distinct doctrines. The *Maxwell* court gave this fact short shrift in deciding that tribal employees could be sued in their individual capacities for money damages for actions taken in the course and scope of their employment without implicating tribal sovereign immunity. The court ignored key differences in the origin, development, and operation of tribal and state sovereignty, and, by extension, key differences between tribal and state sovereign immunity themselves. The *Maxwell* decision sprang into importance on the national stage when the United States Supreme Court granted certiorari in *Lewis v. Clarke*, a case involving a substantially similar issue. As the Supreme Court reaches a decision in *Lewis v. Clarke* this term, it should take note of the distinctions between tribal and state sovereign immunity and continue to treat them as the distinct doctrines they have become, shaped by differences between states and tribes as sovereigns, as well as their unique histories.

258. *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 758 (1998); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037–38 (2014).

259. *Kiowa*, 523 U.S. at 758; *Bay Mills*, 134 S. Ct. at 2037–38.