American students "must know and love the laws, this knowledge should be diffused by means of schools and newspapers, and an attachment to the laws may be formed by early impressions on the mind."

The Tribal Sovereign Immunity Debate through the Lens of Justices Gorsuch and Thomas

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Introduction:

One significant realm of federal Indian law, which works to legitimize Native tribes' existence as independent governments is known tribal sovereign immunity. Tribal sovereign immunity is the legal doctrine that tribes and those acting in the tribes' interests are not under the jurisdiction of courts outside of the tribe unless Congress demands it or they waive their immunity.[1] The basis for tribal sovereign immunity and exactly what the doctrine reaches present complicated legal questions and a body of law where originalist justices disagree. Different views of this doctrine can be elucidated by examining the views of Justice Gorsuch and Justice Thomas.

Justice Gorsuch:

Justice Gorsuch is very accepting of tribal sovereign immunity. He believes that there is strong precedent for its existence and treats tribal governments like any other, making a point to refer to Indian tribes as "sovereign nations" during his 2017 confirmation hearing.[2] In 2012's *Somerlott v. Cherokee Nation Distributors, Inc.,* then-Judge Gorsuch, opined on the topic in a concurrence, while operating within the vertical *stare decisis* constraints of a lower court judge.[3]

Judge Gorsuch's *Somerlott* Concurrence:

In *Somerlott v. Cherokee Nation Distributors,* Tina Somerlott sued Cherokee Nation Distributors (CND), a tribal corporation incorporated under Oklahoma law, for employment

[1]Dreveskracht, Ryan. "Doing Business in Indian Country: A Primer." Americanbar.org, 20 Jan. 2016, https://www.americanbar.org/groups/business_law/publications/blt/2016/01/05_dreveskracht/.

[2]Editor, TLR Online. "Originalism and Indians." *Tulane Law Review*, Tulane Law Review, 4 Apr. 2019, https://www.tulanelawreview.org/pub/volume93/issue2/originalism-and-indians.

[3]"Somerlott v. Cherokee Nation Distributors, Inc." Read Caselaw, Harvard Law School Library, 27 July 2012, https://cite.case.law/f3d/686/1144/.

discrimination in federal court. The tribe responded by claiming tribal sovereign immunity against the action. On appeal, the 10th Circuit disagreed, holding that tribal sovereign immunity did not apply as the corporation was formed under state law.[4]

Gorsuch issued a concurrence to clarify his position that tribal sovereign immunity is not conditional on the type or location of an activity taking place. He also argued that the same sovereignty rules applicable to any other sovereign are applicable to the Cherokee Nation and other tribes.

In his opinion, Justice Gorsuch wrote:

> "Of course, Indian tribes are entitled to sovereign immunity absent congressional abrogation. See Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). And, of course, this immunity is not limited by the type of activity involved or where it takes place. Id. at 758, 118 S.Ct. 1700. But no matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued. And it doesn't matter whether the sovereign owning the business is the federal government, a foreign sovereign, state — or tribe."[5]

Justice Gorsuch's concurrence makes clear that even though he did not believe sovereign immunity applied in this case, he supports the doctrine as a whole allowing tribes some independence from state and federal governments. In opinions since joining the Supreme Court, he has expressed staunch support for tribal sovereignty in his 2020 majority opinion in *McGirt v. Oklahoma*[6] and his 2022 dissent in *Oklahoma v. Castro-Huerta*,[7] two cases in which Justice Gorsuch voted in favor of tribal control of territory and people.

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[4]Editor, TLR Online. "Originalism and Indians." *Tulane Law Review*, Tulane Law Review, 4 Apr. 2019, https://www.tulanelawreview.org/pub/volume93/issue2/originalism-and-indians.

[5]"Somerlott v. Cherokee Nation Distributors, Inc." Read Caselaw, Harvard Law School Library, 27 July 2012, https://cite.case.law/f3d/686/1144/ (8).

[6]*McGirt v. Oklahoma* 591 U. S. ____ (2020).

[7]*Oklahoma v. Castro-Huerta* 597 U. S. ____ (2022).

Justice Thomas:

On the other hand, Justice Thomas has a far narrower view of tribal sovereignty than his junior colleague. On the tribal sovereign immunity question, as well, Justice Thomas parts ways with his junior colleague. In several cases, he has questioned whether tribal sovereign immunity is justified outside of tribal courts and argued for the reversal of precedent that recognizes such immunity.[8]

Thomas' *Michigan v. Bay Mills Indian Community* Dissent:

Justice Thomas expressed his views on the topic in his dissenting opinion in 2014's *Michigan v. Bay Mills Indian Community*.[9] In this case, the federally-recognized Bay Mills Indian Tribe opened a casino which Michigan claimed violated its Indian Gaming Regulatory Act. The state sued the tribe, arguing that the casino was not built on Indian land and therefore tribal sovereign immunity did not apply. The Supreme Court, refusing to disturb its 1998 precedent in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* held that tribes retained sovereign immunity when pursuing commercial interests outside of their lands.

In his dissent, Justice Thomas argued against the *Kiowa* precedent, claiming that tribal sovereign immunity only applies within a tribe's own court system and does not include immunity in federal or state courts. According to his position, a federal or state law would have to grant tribes immunity for such sovereign immunity to exist. Further, his dissent argued that any federal law granting tribes immunity from state courts for acts off of tribal land would violate state sovereignty. Accordingly, Justice Thomas would have overturned *Kiowa* insofar as he believed the precedent, and the Court's broader doctrine, was an "accident."

Toward the beginning of his dissent, Justice Thomas wrote, "As this Court explained in Kiowa, the common-law doctrine of tribal sovereign immunity arose 'almost by accident.'"[10]

As Justice Kennedy wrote in the *Kiowa* majority opinion:

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[8]Editor, TLR Online. "Originalism and Indians." *Tulane Law Review*, Tulane Law Review, 4 Apr. 2019, https://www.tulanelawreview.org/pub/volume93/issue2/originalism-and-indians.

[9]*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).

[10]*Id, Thomas, J., dissenting 2.*

> "The Creek Nation gave each individual Creek grazing rights to a portion of the Creek Nation's public lands, and 100 Creeks in turn leased their grazing rights to Turner, a non-Indian. He built a long fence around the land, but a mob of Creek Indians tore the fence down. Congress then passed a law allowing Turner to sue the Creek Nation in the Court of Claims. The Court of Claims dismissed Turner's suit, and the Court, in an opinion by Justice Brandeis, affirmed. The Court stated: "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." Turner, 248 U. S., at 358. "No such liability existed by the general law." Id., at 357."[11]

The following paragraph from the majority opinion puts this within the historical context:

> "The quoted language is the heart of *Turner*. It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine. One cannot even say the Court or Congress assumed the congressional enactment was needed to overcome tribal immunity. There was a very different reason why Congress had to pass the Act: "The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent." Id., at 358. The fact of tribal dissolution, not its sovereign status, was the predicate for the legislation authorizing suit. *Turner*, then, is but a slender reed for supporting the principle of tribal sovereign immunity."

The question of tribal liability under the "general law" has been the subject of different scholarly debate throughout the years. In her concurring opinion in *Michigan Bay Mills*, Justice Sotomayor confronts this controversy, citing a 2013 article published in the American University Law review by William Wood in support of the conclusion that tribal sovereign immunity was not accidental. According to Wood, Native American Tribes have always been recognized as separate nations. Before the United States gained independence, Britain, France, and Spain all

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[11] *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc*., 523 U.S. 751 (1998) 5.

regarded Native Tribes as independent sovereigns residing within their territory.[12] A question over what extent the doctrine of discovery may be relevant here remains. This doctrine encapsulates the notion that when a nation discovered a new land, they became sovereign over it, which is what European powers used to claim sovereignty over land in the New World. The Supreme Court affirmed the doctrine's validity in the common law in *Johnson v. M'Intosh* in 1823, which might add nuance to the consideration of whether the European nations really considered the Indian tribes sovereign or not.

Under the Articles of Confederation, the United States formed treaties with tribes as they would with a separate nation. With the adoption of the Constitution, Congress was given the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[13] This designates tribes as separate sovereign entities, which was cemented by the laws regarding tribes created soon after the ratification of the Constitution. This notion may be reinforced by the noscitur a sociis canon that suggests that individuals can understand the meaning of a word by looking at the other words it is grouped with. Due to all of this, according to Wood, it was the intention of the framers of the Constitution to grant sovereignty to Native American tribes.[14] In determining original public meaning, the question becomes at what level of generality courts and scholars choose to view the history.

Conclusion:

Although both justices proclaim originalism as their methodology, Justice Gorsuch and Justice Thomas hold very different views on tribal sovereign immunity. But how could they, sharing the same interpretive philosophy, have such different views on the matter? It comes down to different readings of the historical record.

Justice Gorsuch believes that tribal sovereign immunity was an intended part of constitutional law, designed to ensure tribal sovereignty, while Justice Thomas believes tribal immunity outside of tribal courts was established without sufficient common-law basis.

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[12]Wood, William. "It Wasn't an Accident: The Tribal Sovereignty Immunity Story." American University Law Review 62, no.6 (2013): 1587-1673, 1623-1625.

[13]U.S. Const. art. I, § 8, cl. 3.

[14]*Id.*

These differing views over tribal sovereignty are a question for scholars to explore as the Supreme Court takes up further high profile Indian law questions in recent terms. Justice Gorsuch views tribes as holding the same level of sovereignty as any other government, whether federal, state, or foreign, giving a basis for his staunch support of tribes spanning from his time on the 10th Circuit to the Supreme Court. Within this larger view, Justice Gorsuch's support for the idea that tribes maintain their sovereign immunity within other courts makes sense as this allows tribes to operate on a level playing field as states who retain their own sovereign immunity both from other state as well as federal courts.

In contrast, Justice Thomas believes that a sovereign's immunity against another sovereign entity is dependent upon the other entity's laws. Thus, a sovereign may take any action within their own territory, but their actions in another sovereign's jurisdiction must follow their restrictions. From Justice Thomas's point of view, any action taken outside of tribal territory is under state jurisdiction as states are independent sovereigns with unique laws under the United States Constitution. While Justice Thomas would maintain tribal control over their own courts, he disagrees with precedents previously discussed.

This paper does not examine any of the stare decisis issues at play. While there is great value to precedent insofar as it provides a baseline interpretation and may be built upon while allowing for the steady resolution of cases, it similarly accepts that stare decisis is not an inexorable command. Silence on this question should not be taken as anything more than recognition that the application of stare decisis principles to tribal sovereign immunity is still up for debate and can be further explored in the future.