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MATTHEW L.M. FLETCHER

(Re)Solving the Tribal No-Forum Conundrum: *Michigan v. Bay Mills Indian Community*

Michigan v. Bay Mills Indian Community, *a dispute over a controversial off-reservation Indian casino, is the latest opportunity for the Supreme Court to address the doctrine of tribal sovereign immunity. The Court could hand Michigan a big win by broadly abrogating tribal immunity, and in turn wreak havoc on modern tribal governance. Alternately, the Court could hand Bay Mills a victory by affirming the tribe's immunity, effectively precluding judicial review of the tribe's casino project. In this Essay, Professor Matthew L.M. Fletcher argues that neither choice is preferable to a third option that would both advance tribal self-determination* and *hold tribes accountable to outsiders. The Court could condition tribal immunity in federal or state court on whether the tribe has solved the no-forum problem by providing a tribal forum for the resolution of important disputes.*

Sovereign immunity is the creation of judges, but to hear them write lately, they have been regretting the recognition of *tribal* sovereign immunity.[1] Even so, the federal, state, and tribal judicial commitment to immunity from suit for the 566 federally recognized Indian tribes is impressive. Judiciaries of all three sovereigns recognize tribal immunity from suit by state governments to collect taxes, tribal immunity for off-reservation business transactions, and tribal immunity from the private enforcement of federal statutes, to list just a few lines of cases.[2] When the U.S. Supreme Court first recognized a nascent form

1. *See* Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 573-75, 585-87 (2012) (discussing the contours of tribal immunity and judicial responses to the doctrine in hard cases involving human rights abuses).

2. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998) (immunity from contract breach claims arising off-reservation); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (immunity from state suit to collect taxes); Dille v. Council of Energy Res. Tribes, 801 F.2d 373 (10th Cir. 1986) (immunity from Title VII claims); Sulcer

of tribal immunity in the 1850s, the decision protected internal tribal governance.[3] Consistent with that purpose, tribes use sovereign immunity to protect small tribal budgets, tribal lands, and tribal trusts for children, elders, and government programs. Nationwide, tribal governments have crafted limited waivers of immunity both statutorily and contractually that work to preserve limited tribal assets and provide a forum to resolve disputes,[4] although it should be noted that many Indian tribes have not yet established a court system.

However, courts recognize tribal immunity from suit even where no other forum exists to vindicate legitimate plaintiffs' rights against tribes, creating a no-forum conundrum. Immunity now shields tribal governments that banish or disenroll tribal members, fire tribal workers, and confiscate private property under tribal civil forfeiture statutes.[5] In recent years, federal, state, and tribal judges have expressed increasing skepticism about tribal immunity. Justice Stevens, dissenting in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, called tribal immunity "strikingly anomalous."[6] Lower courts have cited his disapproval since then, even when reaffirming the doctrine of tribal immunity.[7]

This Term, the State of Michigan is asking the Supreme Court to reconsider tribal sovereign immunity in *Michigan v. Bay Mills Indian*

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v. Barrett, 2 Okla. Trib. 76 (Citizen Band Potawatomi Tribe Sup. Ct. 1990) (immunity from wrongful termination suit).

3. *See* Parks v. Ross, 52 U.S. 362, 374 (1850) ("[T]his government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and compel them to pay the debts of their nation, either to an individual of their own nation, or a citizen of the United States.").

4. *See* Kaighn Smith, Jr., *Ethical "Obligations" and Affirmative Tribal Sovereignty: Some Considerations for Tribal Attorneys*, DRUMMOND WOODSUM & MACMAHON 3-5 (2006), http://www.dwmlaw.com/wp-content/uploads/2011/11/1ethicalobligations.pdf. *E.g.*, 6 Grand Traverse Band Code §§ 201-11, http://www.narf.org/nill/Codes/gtcode/Title_6.pdf (entitled "Waiver of Sovereign Immunity and Jurisdiction in Commercial Transactions"); Waganakising Odawa Tribal Code § 6.5005, http://www.narf.org/nill/Codes/ltraverse/codeall.pdf (waiving immunity from suits against tribal officials for claims of discrimination).

5. *E.g.*, Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007) (tribal civil forfeiture); Pendergrass v. Sauk-Suiattle Tribe, No. Sau Civ 01/12-002 (Sauk-Suiattle Tribal Ct. App. June 27, 2013) (tribal employment), http://www.nics.ws/sauksuiattle/FSC%20Opinion%20-%20Pendergrass%20v.%20SSIT.pdf; Lomeli v. Kelly, No. 2013-CI-CL-001 (Nooksack Tribal Ct. Aug. 6, 2013) (tribal member disenrollment), http://turtletalk.files.wordpress.com/2013/08/order-granting-defendants-motion-to-dismiss-second-amended-complaint-8-6-2013.pdf.

6. *Kiowa Tribe*, 523 U.S. at 765 (Stevens, J., dissenting).

7. *E.g.*, Florida v. Seminole Tribe, 181 F.3d 1237, 1245 (11th Cir. 1999).

Community.[8] *Bay Mills* involves the tribe's efforts to open a casino on lands normally ineligible for Indian gaming—tribally owned fee lands under state jurisdiction off the reservation. The tribe is the beneficiary of the Michigan Indian Land Claims Settlement Act of 1997 (MILCSA), an act designed to conclude an Anishinaabe land claim brought before the Indian Claims Commission.[9] Section 107(a)(3) of MILCSA authorizes the tribe to purchase land with the settlement funds through a tribal land trust, providing that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held."[10] The tribe argues that the lands it has purchased under the land trust in Vanderbilt, Michigan are eligible for gaming under the Indian Gaming Regulatory Act[11] and its gaming compact with the State of Michigan.[12] The Department of the Interior—and, based on its opinion, the National Indian Gaming Commission—determined that the casino was illegally located,[13] although federal law enforcement has so far declined to act on those opinions. When the State of Michigan and the Little Traverse Bay Bands of Odawa Indians sued to enjoin the operation of the Vanderbilt casino, however, the Bay Mills Indian Community raised its sovereign immunity rather than defend the casino on the merits of the MILCSA claim.[14] The tribe's position was affirmed by the Sixth Circuit, which vacated a preliminary injunction against gaming at the casino issued by the district court.[15] As a result, Michigan is asking the Supreme Court to limit *Kiowa Tribe*, one of the foundational tribal sovereign immunity precedents.[16]

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8. 695 F.3d 406 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (2013) (No. 12-515).

9. Michigan Indian Land Claims Settlement Act of 1997, Pub. L. No. 105-143, 111 Stat. 2652 (1997).

10. *Id.* § 107(a)(3), 111 Stat. at 2658.

11. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-68 (2012) and 25 U.S.C. §§ 2701-21 (2012)).

12. *See* Brief for Respondent at 12-13, Michigan v. Bay Mills Indian Community, No. 12-515 (U.S. to be argued Dec. 2, 2013), http://turtletalk.files.wordpress.com/2013/10/bmic-brief.pdf; Respondent's Brief in Opposition at 2-3, *Bay Mills*, No. 12-515, http://turtletalk.files.wordpress.com/2012/12/bay-mills-cert-opp1.pdf.

13. *See* Letter from Hilary C. Tompkins, Solicitor, Dep't of the Interior, to Michael Gross, Assoc. Gen. Counsel, Nat'l Indian Gaming Comm'n (Dec. 21, 2010), http://turtletalk.files.wordpress.com/2010/12/baymillssolopletter2.pdf; Memorandum from Michael Gross, Assoc. Gen. Counsel, Nat'l Indian Gaming Comm'n, for the Chairwoman (Dec. 21, 2010), http://turtletalk.files.wordpress.com/2010/12/baymillsjurisdictionopinionfinal.pdf.

14. *See Bay Mills*, 695 F.3d at 413 ("As to these claims, Bay Mills argues that it is immune from suit.").

15. *See id.* at 413-17.

16. *See* Brief of Petitioner at 36-41, *Bay Mills*, No. 12-515, http://turtletalk.files.wordpress.com/2013/09/michigan-brief.pdf (arguing that "the Court should take the opportunity

Indian law scholars such as Frank Pommersheim have been warning tribal leaders and counsel for decades that if they do not solve the no-forum conundrum, someone else will—either Congress or the federal courts.[17] Although Congress has remained steadfastly committed to tribal sovereign immunity, it appears the Supreme Court, to the horror of Indian Country and tribal interests, might now resolve this question with a broad stroke. Both the National Congress of American Indians (NCAI) and the Native American Rights Fund, collectively representing hundreds of Indian tribes nationally, have expressed deep concern about the potential for the Supreme Court to undermine tribal sovereign immunity for all Indian tribes, not only the Bay Mills Indian Community.[18] NCAI has even taken the unusual step of asking the National Indian Gaming Commission to assert jurisdiction over the matter in hopes of mooting the Supreme Court proceedings.[19]

Indian Country's concerns about the *Bay Mills* matter have a strong foundation. More than a decade ago, David Getches proved that even convicted criminals have a better win rate in the Supreme Court than tribal interests, which prevailed in less than twenty-five percent of relevant cases in the Rehnquist Court.[20] Those outcomes have only worsened under the Roberts Court, where victories for tribal interests are down to ten percent.[21] In the vast

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presented by the facts here and confirm that tribes do *not* have sovereign immunity from suits based on illegal, off-reservation, commercial conduct.").

To be sure, the tribe's amici have engaged in a herculean effort to persuade the Supreme Court to not reach the immunity question for numerous procedural reasons, most importantly arguing that the National Indian Gaming Commission abrogated its duty by declining to exercise jurisdiction over the Vanderbilt casino. *See* Brief of the National Congress of American Indians et al. at 10-13, *Bay Mills*, No. 12-515, http://turtletalk.files.wordpress.com/2013/11/12-515-bsac-national-congress-of-american-indians.pdf.

17. *See* Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 347-51 (1989); *see also* Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895 (2002) (discussing the no-forum conundrum).

18. *See* Jefferson Keel & John Echohawk, *Guest Post—Keeping a Close Eye on* Michigan v. Bay Mills Indian Community, TURTLE TALK (Sept. 4, 2013), http://turtletalk.wordpress.com/2013/09/04/guest-post-keeping-a-close-eye-on-michigan-v-bay-mills-indian-community-jefferson-keel-and-john-echohawk.

19. *See* Letter from Jefferson Keel, President, Nat'l Cong. of Am. Indians, to Tracie Stevens, Chairwoman, Nat'l Indian Gaming Comm'n (Sept. 10, 2013), http://turtletalk.files.wordpress.com/2013/09/ncai-letter-to-nigc-re-michigan-v-bay-mills.pdf.

20. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001).

21. *See Supreme Court*, TURTLE TALK, http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases (last visited Nov. 5, 2013) (collecting all Indian law cases decided by the Supreme Court since 1958). The Roberts Court, so far, has issued substantive opinions on ten Indian law cases, nine of them against tribal interests. The sole exception is Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181 (2012).

majority of its Indian cases, the Supreme Court only grants cert where the tribal interests have won in the court below, and the Justices look to reverse those outcomes.[22] In short, the chances of the Bay Mills Indian Community prevailing in this matter are unusually low.

This Essay proposes a fair and equitable manner by which the Supreme Court could address the *Bay Mills* immunity question, which is really a variety of the no-forum conundrum, without eviscerating tribal sovereignty: Where an Indian tribe has not legislated for the creation of a tribal justice system and/or has waived its immunity, a federal or state court with subject matter jurisdiction may abrogate tribal immunity. Consistent with modern policies concerning tribal self-determination, this proposed rule puts the onus on tribes to protect their interests, and to retain control over their sovereign prerogatives. Tribes can craft their own waivers of immunity in their own justice systems, and will thereby resolve the no-forum conundrum; such a move would relieve the external pressure to do so in a more sweeping—and more harmful—manner. Progressive and forward-thinking Indian tribes by the dozens have already enacted ordinances governing tort and contract claims, as well as civil rights statutes that offer blanket but limited waivers of immunity.[23] Business-oriented tribes have also waived immunity contractually in many instances.[24] Tribes typically waive immunity to suits in tribal courts but often waive immunity in state or federal courts' jurisdiction as well. Cases in which a tribe successfully invokes immunity to preclude judicial review in any court still make news, but have become the exception rather than the rule.

Several recent cases serve to highlight the contours of this proposal. First, consider cases involving internal tribal governance, such as claims of election fraud or tribal member disenrollments.[25] Tribes often foreclose judicial review of these internal governance issues, but federal courts usually do not have jurisdiction over them unless the Department of the Interior is involved.[26] The proposal here would leave these questions to the internal workings of tribal

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22. *See* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935-36 (2009).

23. *See* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 408-14 (2009) (surveying tribal waivers of immunity).

24. *See* John F. Petoskey, *Northern Michigan: Doing Business with Michigan Indian Tribes*, 76 MICH. B.J. 440, 442-45 (1997).

25. *See, e.g.*, Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2009) (affirming dismissal of challenge to tribal member disenrollment).

26. *E.g.*, Smith v. Babbitt, 100 F.3d 556 (8th Cir. 1996) (affirming dismissal of claims relating to internal tribal membership decisions). *But cf.* Cahto Tribe v. Dutschke, 715 F.3d 1225 (9th Cir. 2013) (rejecting claim that federal agency had authority to make membership decisions).

government, as federal and state courts only rarely have subject matter jurisdiction over these claims.

Second, consider tribal business activities that range off the reservation but implicate or even undermine state regulatory structures—such as dram shop laws—that are enforceable by individuals. Courts have mostly dismissed state dram shop actions by individuals allegedly injured by drunk drivers over-served by tribal bartenders.[27] Confronted with tribal immunity defenses, which are on their face strongly supported by Supreme Court precedent, the courts question the basis for immunity in commercial cases, sometimes going into esoteric discussions about whether tribal immunity serves an essential governmental purpose.[28] In the federalism context, the Supreme Court long ago led courts away from that highly subjective analysis,[29] but it lives on in the Indian law world. The proposal here would do away with that discussion and look instead to whether there is a forum to resolve the claims, preferably in tribal court; but if not, then in a state or federal court with competent jurisdiction.

Third, consider tribal business activities that impact state regulatory structures enforceable by the states themselves, such as consumer protection laws. States seeking to subpoena tribally owned payday lenders (as distinguished from individual payday lenders who do not enjoy immunity) to investigate possible violations have been stymied by tribal immunity in state court.[30] As with dram shop actions, state courts busy themselves with analyzing the governmental/commercial distinction, though they usually find in favor of tribal interests. The proposal here leads state regulators to tribal court forums, much like what the State of Michigan agreed to do in its tax agreements with the Michigan tribes.[31] The outcome would encourage states

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27. *E.g.*, Furry v. Miccosukee Tribe of Indians, 685 F.3d 1224 (11th Cir. 2012); Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843 (Tex. App. 1997).

28. *E.g.* Cook v. AVI Casino Enters., Inc., 548 F.3d 718, 727-28 (9th Cir. 2008) (Gould, J., concurring) (arguing that tribal immunity should be abrogated for commercial gaming purposes).

29. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542 (1985).

30. *See*, *e.g.*, Cash Advance & Preferred Cash Loans v. State *ex rel.* Suthers, 242 P.3d 1099 (Colo. 2010).

31. *See Tax Agreement between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan*, STATE OF MICHIGAN § I(G)(1)(b) (May 27, 2004), http://www.michigan.gov/documents/GTBTaxAgreement_96417_7.pdf (waiving tribal immunity from suit by the state in tribal court); *id.* § XIII(D)(9)(a) (authorizing tribal members to challenge certain state enforcement actions in tribal court); *id.* § XIII(D)(10)(b) (same, even where there is a dispute about whether the taxpayer or property is located in Indian Country); *id.* § XIII(D)(11) (authorizing tribal member to challenge state refund decision in tribal court); *id.* § XIII(D)(12)(a) (same, where there is a dispute about whether the taxpayer resides or

and tribes to develop agreements on the recognition of foreign judgments and inter-jurisdictional cooperation.[32] If tribal court jurisdiction is unavailable due to tribal immunity or the lack of a functioning court system, then the proposal would permit state courts to abrogate tribal immunity and allow the state to litigate the merits of its claims.

Lastly, consider the use of tribal immunity to avoid or circumvent federal regulatory structures, such as Indian gaming or employment. In the gaming context, as the national gaming supply increases faster than demand, Indian tribes seeking a greater share (or any share at all) of the market have engaged in more creative and risky ventures. The Bay Mills Indian Community (and the Sault Ste. Marie Tribe of Chippewa Indians in a related case) hopes to evade federal statutory limitations on off-reservation gaming under the Indian Gaming Regulatory Act.[33] Similarly, in the employment context,[34] individuals asserting employment discrimination claims dismissed in federal or state court should have a forum in tribal court. If the tribe does not provide a forum to adjudicate the merits, then courts should abrogate immunity in state or federal court.

Long-time Indian law observers may recall the Tenth Circuit's 1980 decision in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*.[35] There, the tribe allegedly physically blocked access to private property owned by non-Indians and legally blocked access to the tribal court. Faced with the no-forum conundrum, the Tenth Circuit carved out an exception to the doctrine of tribal immunity to provide a federal forum for the plaintiffs to vindicate an important legal right. No federal court, including the Tenth Circuit itself, has extended or even applied the so-called *Dry Creek Lodge* exception in the thirty-three years since, and some have stressed the minimal precedential value or

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does business in Indian Country); *cf. id.* § XIII(C)(4)(b)(i) (authorizing the state to petition for a search warrant from a tribal court); *id.* § XIII(D)(4) (authorizing the state to sue in tribal court for recognition of a state judgment); *id.* § XIII(D)(6) (authorizing the state to sue in tribal court to compel compliance with enforcement actions); *id.* § XIII(D)(7) (same, where there is a dispute about whether the taxpayer or property is located in Indian Country).

32. *E.g.*, Michael F. Cavanagh, *The First Tribal/State Court Forum and the Creation of MCR 2.615* (Indigenous Law & Policy Ctr., Working Paper No. 2007-16, 2007), http://www.law.msu.edu/indigenous/papers/2007-16.pdf.

33. *See* Michigan v. Bay Mills Indian Cmty., 695 F.3d 406 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (2013) (No. 12-515); Michigan v. Sault Ste. Marie Tribe of Chippewa Indians, No. 1:12-CV-962 (W.D. Mich. Mar. 5, 2013), http://turtletalk.files.wordpress.com/2013/03/dct-order-granting-injunction.pdf, *appeal docketed*, No. 13-1438 (6th Cir. Apr. 10, 2013).

34. *E.g.*, Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299 (D.N.M. 2009) (dismissing Title VII claims against a tribal corporation).

35. 623 F.2d 682 (10th Cir. 1980).

narrowness of the decision.[36] Perhaps the time has come to reconsider the no-forum problem and plausible solutions like the *Dry Creek Lodge* exception, at least as a means to alleviate the pressure building up nationally against tribal immunity.

It is important to note that the proposed burden-shifting arrangement is a substitute for a general abrogation of tribal immunity, and would not reach or support such an outcome. Tribal immunity continues to support the financial and economic foundations of modern tribal nation building, and scarce tribal assets are at stake. A decision in the *Bay Mills* case that places the burden on tribal governments to provide a forum for the resolution of claims against them would be consistent with the ongoing generational shift in American Indian law and policy. Beginning in the 1960s, the federal government and Indian tribes have moved together toward a robust policy of tribal self-determination.[37] Indian tribes now usually administer federal Indian affairs programs themselves, rather than relying upon the Bureau of Indian Affairs or the Indian Health Service.[38] Observers believe that self-determination has been so successful that Indian Country is moving toward an era of nation building.[39] For example, in the 2013 Violence Against Women Act (VAWA) reauthorization, Congress reaffirmed tribal authority to prosecute non-Indian domestic violence offenders, allowing tribes to opt-in to the authority so long as they provide certain minimum constitutional guarantees to defendants.[40]

Nation building means more than providing the means in the form of expertise and resources to allow tribes to self-govern. It means encouraging tribes to take the steps necessary to enhance tribal governance capacity. In VAWA, Congress established a means for tribes to acquire augmented prosecution authority by shouldering the burden of improving tribal justice systems. This is nation building, not paper sovereignty.

If the Supreme Court simply abrogates the immunity of the Bay Mills Indian Community as the State of Michigan wishes, then no one will have learned anything from the dispute. The financial futures of tribal governments nationwide will be at risk because the states and plaintiffs' lawyers will know

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36. *E.g.*, Contour Spa at the Hard Rock, Inc. v. Seminole Tribe, 692 F.3d 1200, 1209-10 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013); Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1012-13 (10th Cir. 2007).

37. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 216-24 (6th ed. 2011).

38. *Cf.* 25 U.S.C. § 450f (2012) (directing federal officials to enter into self-determination contracts that allow tribes to administer programs themselves).

39. *See* GETCHES, *supra* note 37, at 239-42.

40. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (to be codified at 25 U.S.C. § 1304).

they can directly access tribal assets designed to provide for future generations. Tribes will be forced to locate assets on-reservation to avoid the personal jurisdiction of state courts, rather than develop the important legal infrastructure—courts and codes—needed to effectively respond to legitimate claims against their governments.

If the Supreme Court finds that the Indian Gaming Regulatory Act vests jurisdiction in the federal courts, it should remand to allow Bay Mills to consider waiving immunity from Michigan's suit in tribal court. If the Supreme Court recognizes a tribal obligation to provide a forum for the resolution of disputes against tribes, such as Michigan's claims relating to the off-reservation casino, it will be engaging in the proactive business of enhancing tribal governance. Bay Mills and other tribes will then be on notice that assertions of tribal immunity are dependent on tribal decisions to waive immunity when necessary, granting tribes the authority to craft waivers best suited to their specific capacities. Tribes in the act of nation building should make careful decisions about providing a dispute resolution forum and about what the law of that forum should be. Just as a lack of immunity can undermine tribal governance, immunity without limitation can—and does—stunt nation building.

Matthew L.M. Fletcher is a Visiting Professor at the University of Michigan Law School (Fall 2013), Professor at Michigan State University College of Law, and Appellate Judge for the Grand Traverse Band of Ottawa and Chippewa Indians, Hoopa Valley Tribe, Nottawaseppi Huron Band of Potawatomi Indians, Poarch Band of Creek Indians, Pokagon Band of Potawatomi Indians, and Santee Sioux Tribe.

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