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Compulsory [Mis]Joinder: The Untenable Intersection of Sovereign Immunity and Federal Rule of Civil Procedure 19

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COMPULSORY [MIS]JOINDER: THE UNTENABLE INTERSECTION OF SOVEREIGN IMMUNITY AND FEDERAL RULE OF CIVIL PROCEDURE 19

ABSTRACT

Federal Rule of Civil Procedure 19 defines circumstances in which a court can (and must) override the plaintiff's party structure to ensure that so-called necessary and required parties are before the court, as complete justice requires. Sovereign immunity protects classes of sovereigns and their political arms from accountability in other nations' court systems. Although seemingly unrelated, conflict between these doctrines is increasingly precipitating incongruous outcomes in federal courts—as evident in a recent Supreme Court decision—eviscerating the goals of compulsory joinder and unreasonably enlarging the ambit of sovereignty's protections to shield nonsovereign parties. The failure of courts to work solutions to the Rule 19/sovereign immunity conundrum risks recreating the systemic failures of the original version of Rule 19—foregoing the Rule's intended pragmatism in favor of doctrinal adherence to labels and categorizations.

No single solution will make the conflicting aims of Rule 19 and sovereign immunity compatible in every instance. Rule 19, however, has never been amenable to universal conceptualizations or strict applications. It is quite the opposite: a rule grounded in pragmatism that commands a case-by-case application. To that end, courts need to turn unerringly to a pragmatic approach to Rule 19 and sovereign immunity, looking at a variety of solutions that exist to lessen the prejudice to sovereigns without closing the courthouse doors completely. Likewise, Congress and parties to disputes must each act to encourage outcomes that avoid complete dismissal of disputes with no alternative forum. Reformulating the status quo's approach to Rule 19 vis-à-vis sovereign immunity is not without its difficulties, but remembering the broad aims of the two doctrines and attempting a workable permutation of both is the only way to keep the Rule responsive to the needs of claimants while appropriately circumscribing—but not imperiling—the shield of sovereign immunity.

> *Thus does this ghostly character [the indispensable party] haunt the halls of justice, an apparition whose suggested existence stays the hand of the law.*[1]

INTRODUCTION

Rule 19 of the Federal Rules of Civil Procedure—joinder of "required" parties[2]—seeks to ensure that any party with an appreciable stake in the outcome of a lawsuit is adequately represented therein.[3] The Rule protects three often-overlapping classes of interests: (1) the interests of parties already present in the litigation, (2) the interests of those not yet made a party, and (3) the interests of society in the efficient and complete resolution of disputes.[4]

The Supreme Court has addressed the general workings of Rule 19 in significant detail only a handful of times, most notably in two decisions: *Provident Tradesmens Bank & Trust Co. v. Patterson*[5] and *Temple v. Synthes Corp.*[6] In both cases, the Court overturned decisions in which the appellate courts dismissed lawsuits for failure to join an indispensable party. The Supreme Court's Rule 19 jurisprudence evinces a forgiving approach to the Rule, one that favors the continuation of lawsuits despite the reasoning of lower courts and the absence of various interested parties.

In 2008 the Supreme Court decided *Republic of the Philippines v. Pimentel*,[7] its first significant Rule 19 case in decades. *Pimentel* arose out of litigation surrounding the brutal 1970s Marcos regime in the Philippines. A litany of parties sought to claim more than $30 million that Marcos deposited in the United States through a shell corporation in 1972.[8] Merrill Lynch,

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[1] Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1255 (1961).

[2] Rule 19 is more commonly thought of as controlling joinder of "necessary" and "indispensable" parties, terms which appeared in the Rule prior to a series of changes in 2007, which replaced the word "necessary" with "required" and deleted the word "indispensable" altogether. *See infra* notes 50–51 and accompanying text.

[3] *See* FED. R. CIV. P. 19 advisory committee's note on 1966 amendments ("Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.").

[4] John W. Reed, *Compulsory Joinder of Parties in Civil Actions* (pt. 1), 55 MICH. L. REV. 327, 330 (1957).

[5] 390 U.S. 102 (1968).

[6] 498 U.S. 5 (1990) (per curiam).

[7] 128 S. Ct. 2180 (2008).

[8] *Id.* at 2185–86.

which held the disputed assets, filed an interpleader action to settle ownership; two parties invoked sovereign immunity and subsequently moved for dismissal pursuant to Rule 19(b) for failure to join each as an indispensible party.[9] The district and appellate courts each denied the 19(b) motions; the Supreme Court reversed.[10]

Pimentel illuminated an oft-recurring problem emanating from a subset of Rule 19 decisions: the unintended expansion of sovereign immunity through the application of the Federal Rules of Civil Procedure, and the concurrent judicial distortion of Rule 19 and its goals as a result of strict adherence to unnecessarily rigid notions of sovereign protections.

Sovereign immunity protects foreign states and state-related entities from the jurisdiction of other countries' national courts.[11] Sovereign immunity functions as a prophylactic, allowing a nation-state and its political subdivisions to engage in self-governance without concern for the looming threat of judicial accountability outside of their own court systems.[12] It is designed both to encourage complete autonomous decision making by nation-states and to evidence common respect for the domestic justice systems of foreign nations.[13]

Although sovereign immunity immunizes *sovereigns*,[14] recent judicial treatment of Rule 19 has expanded sovereign immunity such that its emanations often protect nonsovereign entities from suits in which they would otherwise face liability.[15] At the same time, the involvement of sovereigns in Rule 19 cases stymies the effective application of the Rule, frustrating its overarching purpose and resulting in inequitable decisions that leave plaintiffs without recourse. *Pimentel*, though not the first decision to grapple with sovereigns as indispensable parties, ultimately fails to resolve the conflict between immunity and compulsory joinder in any meaningful way. It provides

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9 *Id.*

10 *Id.* at 2186–87, 2194.

11 Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 362 (1955) (noting that foreign sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 219 (4th ed. 2007).

12 THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 3 (1970).

13 *See* Austria v. Altmann, 541 U.S. 677, 688–89 (2004) (describing sovereign immunity as a mutual understanding between nations that domestic jurisdiction has certain limitations).

14 A sovereign is "[a] person, body, or state vested with independent and supreme authority." BLACK'S LAW DICTIONARY 1523 (9th ed. 2009).

15 *See infra* Part III.

inarticulate precedent and seems to sanction, rather than to rectify, the unjust outcomes wrought by the interplay of the Rule and sovereign immunity.

This Comment argues that many of the modern trends that stymie effective justice in Rule 19 sovereign immunity cases are the same problems that plagued courts applying the early inchoate version of the compulsory joinder doctrine. Just as judges of the early twentieth century became too focused on labels and formulae, tribunals of the twenty-first century forget the pragmatism Rule 19 demands. Instead, courts systematically bow to unnecessarily strict applications of doctrinal preconceptions—such as the inviolability of sovereign immunity—to the detriment of the Federal Rules. Modern judicial treatment of Rule 19 and sovereign immunity evidences a skewed balance that often sacrifices the seemingly valid and deserved rights of claimants upon the altar of judicial inflexibility with no cognizable benefit in return.

This Comment proceeds in four parts. Parts I and II discuss, in turn, the foundations of compulsory joinder and sovereign immunity, focusing on the justifications for and historical developments of each doctrine. Part III explores the intersection of Rule 19 and sovereign immunity, both of foreign nation-states and tribal sovereigns, whose presence often plagues lower federal courts. In particular, Part III explores the Supreme Court's logic in *Pimentel*, which broadly (and unfortunately) reflects the approach usually taken by courts faced with the conflict of joining sovereigns. It also explores select decisions of other federal courts both before and after *Pimentel*.

Part IV argues that the solution to the seeming incompatibility in Rule 19 jurisprudence lies in a steadfast return to form: a return to the responsive case-by-case concerns that drove the modern reformulation of Rule 19. Recalling the criticisms leveled at the ineffective early version of Rule 19, and the recent criticisms of the dissenters in *Pimentel*, modern courts must focus on case-specific pragmatism when confronted with the facially incompatible requirements of Rule 19 and sovereign immunity. Many of the suggested implementations of this pragmatism are patterned on areas of the law where Congress or the courts have already successfully abrogated immunity to effectuate joinder. Conceding that a single holistic solution to the present problem is likely impossible, this Comment traces a number of possible responses for courts, legislatures, and parties to lawsuits. Each response has its limitations, but all are part of an attempt to find creative solutions to problems that demand flexibility. Anything less than a case-by-case attempt to rectify the status quo's inadequacy risks closing the courthouse doors on aggrieved

plaintiffs—simultaneously inflating sovereign immunity while eviscerating the power and logic of compulsory joinder.

I. THE DEVELOPMENT OF RULE 19 JURISPRUDENCE

Understanding the failings of the present-day Rule 19 jurisprudence requires evaluating the basis for compulsory joinder and its evolution in American law. This Part traces the genesis of judicially imposed joinder through English and American legal traditions, including the eventual codification of scattered doctrines into Rule 19. It then discusses the inadequacies of the Rule's initial drafting and the subsequent movement to reform and refine the crumbling statutory approach. It concludes with a discussion of the seminal pre-2008 Supreme Court decisions interpreting the workings of Rule 19.

A. The Foundations of the Compulsory Joinder Doctrine

The doctrine of compulsory joinder, which seeks to ensure that parties with a substantial stake in the outcome of litigation are represented therein, predates the conceptual merger of suits in law and equity.[16] The early joinder mechanisms reflected an attempt to distinguish between parties with and without measurable interests in a proceeding.[17] Compulsory joinder evolved from the foundational idea that a "'Court of Equity, in all cases, delights to do complete justice, and not by halves'; to put an end to litigation, and to give decrees of such a nature, that the performance of them may be perfectly safe to all who obey them."[18]

The initially broad and abstract rationales for compulsory joinder coalesced into two doctrinal justifications, which together spurred the later evolution of rule-based joinder jurisprudence. First, no one should be held to an outcome if not present for—and represented in—the litigation. Second, a court should "do complete justice."[19]

The first motivation is overwhelmingly one of fairness. It undermines any common understanding of the law to say that a court can or should make

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16 For an in-depth examination of the history of joinder, see Reed, *supra* note 4.

17 *Id.* at 330–31.

18 *Id.* at 332 (quoting CHRISTOPHER ALDERSON CALVERT, PARTIES TO SUITS IN EQUITY 2 (2d ed. 1847)).

19 *Id.* at 331–32 (quoting CALVERT, *supra* note 18, at 2).

decisions that significantly imperil the interests of nonpresent parties.[20] The second justification for compulsory joinder speaks to a universal interest in making sure that court decisions are, in fact, decisive.[21] It is not hard to imagine the uncertainty engendered by a judicial system unable to resolve disputes to finality. Far from being dispensaries of justice, courts would be little more than glorified sounding boards for the aggrieved, robbed of the ability to effectively put to rest disputes upon the facts presented. Ensuring the availability of an effective judiciary is thus one of the primary goals informing a joinder doctrine that allows (and sometimes compels) courts to override the plaintiff's party structure or to dismiss an action.

B. Compulsory Joinder in the United States Prior to Rule 19

Although inchoate compulsory joinder formulations appeared to varying degrees in English common law and early Supreme Court decisions,[22] the doctrine took definite form in America during the nineteenth century with the categorical delineation of parties based on levels of interest and indispensability.[23] Central to the creation of labeled-party classes was *Shields v. Barrow*.[24] *Shields*, which prescribed for the first time contours of "necessary" and "indispensable" parties, is the most influential case in early American compulsory joinder jurisprudence.[25]

Unhappy with the payment scheme agreed upon to sell his plantation, Robert Barrow filed suit against two Mississippi citizens in federal circuit court in Louisiana.[26] Six people signed the various financial instruments associated with the sale; four were Louisiana citizens whose joinder would have defeated the suit's complete diversity basis of jurisdiction.[27] Barrow

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[20] Professor Reed discusses this question in some detail and particularly focuses on whether a court may exercise the power of joinder without having "jurisdiction" over a party. *See id.* at 332–34 (critiquing reliance on "jurisdictional" arguments couched in terms of joinder).

[21] *See supra* text accompanying note 18.

[22] Reed, *supra* note 4, at 347–51 (stating that "[t]he Court in *Shields v. Barrow* had a body of authority on which to build," and tracing Supreme Court cases). *See generally* Hazard, *supra* note 1 (tracing the doctrine through English and early American law).

[23] *See* Shields v. Barrow, 58 U.S. (17 How.) 130 (1854).

[24] *Id.*

[25] Reed, *supra* note 4, at 340.

[26] *Shields*, 58 U.S. (17 How.) at 137.

[27] *Id.* at 139; *see also* Reed, *supra* note 4, at 341–42 (summarizing the facts of *Shields v. Barrow* and noting that joinder of the Louisiana citizens "would have ousted jurisdiction under the 'complete diversity' doctrine"). The Constitution permits federal courts to adjudicate, among other things, "Controversies . . . between Citizens of different States." U.S. CONST. art. III, § 2, cl. 1. As currently codified and interpreted, this "diversity jurisdiction" requires "complete diversity"—no plaintiff can be a citizen of the

never joined the Louisiana signatories—only suing the Mississippi signatories—and the case proceeded to a circuit court decree with only Mississippi defendants represented.[28] The Supreme Court reversed,[29] holding that the circuit court could not make any decree upon the instrument because doing so would necessarily imperil the rights of absent indispensable parties.[30]

In language that would later form the building blocks of Rule 19, Justice Curtis defined indispensable parties as those having an interest "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[31] By contrast, the Court defined necessary parties as persons having an interest "who ought to be made parties" to afford "complete justice."[32] The distinction between necessary and indispensable parties was the former's ability to separate their interests from those of the parties to the action "so that the court [could] . . . do complete and final justice, without affecting other persons not before the court."[33] That is, the interests of absent indispensable parties, as opposed to those of parties that were merely necessary, could not be separated from those of parties to the action. This reality justified prioritizing the indispensable parties' rights over those of parties already present. This justification is the foundational idea of Rule 19.

Shields "embed[ded] in American procedural law the now familiar division of required parties into categories."[34] More than a century after *Shields*, the Court's language—defining as necessary those parties who ought to be present

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same state as any defendant. *See* 28 U.S.C. § 1332 (2006); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *See generally* RICHARD D. FREER, CIVIL PROCEDURE 160–95 (2d ed. 2009) (discussing the history of diversity jurisdiction and its modern strictures). Thus, a plaintiff's decision to include only certain parties at the outset is often a strategic choice to satisfy jurisdictional prerequisites. Subsequent joinder of other parties, then, can threaten diversity jurisdiction: if a court orders joinder of a party whose presence defeats complete diversity, that federal court will forfeit jurisdiction over the controversy. The initial form of the Rule, in fact, directed courts to evaluate whether joinder would defeat the jurisdiction the court already held over the parties present. FED. R. CIV. P. 19 advisory committee's note on 1966 amendments; *see also* Calcote v. Tex. Pac. Coal & Oil Co., 157 F.2d 216, 218 (5th Cir. 1946) ("In diversity cases, the question of indispensable parties is inherent in the issue of federal jurisdiction . . . .").

[28] *Shields*, 58 U.S. (17 How.) at 142.

[29] *Id.* at 139 ("Such being the scope of this bill and its parties, it is perfectly clear that the circuit court . . . could not make any decree thereon.").

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Reed, *supra* note 4, at 355. The "now familiar division" is that created by Rule 19.

in the suit, and as indispensable those parties whose interest precludes a complete resolution of the dispute—would reappear nearly verbatim in the major 1966 reformulation of Rule 19.[35]

C. The Formation and Textual Evolution of Rule 19 Prior to 1966

Before the emergence of Rule 19, the common law capitalized upon *Shields*'s labels in an attempt to force the timely disposition of cases, which resulted in courts cabining cases into staid categories with little regard for the unique facts of each dispute. It was an unfortunate "jurisprudence of labels," through which courts "tended to seize upon notions of 'separate' or 'joint' interests and concluded that a rigid class of absentees . . . could always be deemed 'indispensable.'"[36] This common law system of joinder persisted until the emergence of a textual Rule in the early twentieth century.

The Rules Advisory Committee promulgated the original version of Rule 19[37] of the Federal Rules of Civil Procedure in 1938, functionally codifying the *Shields*-era focus on labels and semantic distinctions.[38] Accordingly, the first version of Rule 19 did little to stem the tide of inequitable decisions flowing from *Shields* and its progeny.[39]

Like the disjointed common law it reified, the early Rule proved wholly "inflexible" in practice because it continued to encourage judges to force categorization of parties, rather than to evaluate and adjudicate the particulars of each dispute.[40] The Rule was rife with textual failings, which "directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted

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[35] *See supra* note 31 and accompanying text. Rule 19(b) asks whether in "equity and good conscience" an action can continue absent a necessary party.

[36] Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1075–76 (1985) (quoting C. WRIGHT, THE LAW OF FEDERAL COURTS § 70, at 458 (4th ed. 1983)) (internal quotation marks omitted).

[37] The text of original Rule 19 can be found at 308 U.S. 687 (1938).

[38] FREER, *supra* note 27, at 649; *see also* Hazard, *supra* note 1, at 1254 n.4 (discussing the codification of necessary and indispensable parties in early Rule 19 and state codes); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 363 (1967) ("Rule 19, as adopted in 1938 . . . , did not avoid the defects and frustrations of the courts' treatment of the required joinder problem during the previous century."). For more on the original version of Rule 19, see Freer, *supra* note 36, at 1076 & n.72.

[39] *See* Freer, *supra* note 36, at 1076; Kaplan, *supra* note 38, at 363 ("[T]here was little in [the original Rule's] language or mood positively to induce the courts to change their indurated habits.").

[40] FREER, *supra* note 27, at 649. For a discussion of the criticisms leveled at post-*Shields* decisions generally, see Reed, *supra* note 4, at 327.

attention from the *pragmatic considerations* which should be controlling."[41] It was, in short, a rule that led to strict formulaic and unfair outcomes rather than workable, case-by-case decisions sufficiently considerate of the facts before the court.[42]

Thirty years after Rule 19 first emerged, the Advisory Committee concluded that courts and commentators understood the theoretical doctrine of compulsory joinder, but that the Rule as drafted was "defective in its phrasing and did not point clearly to the proper basis of decision,"[43] adding that:

> In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.[44]

The Advisory Committee thus substantially revised Rule 19 in 1966.[45] The stated goal was to clarify the Rule in a way that would consistently effectuate the goals of compulsory joinder[46] by "stat[ing] affirmatively what factors [are] relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons [is] infeasible."[47] In doing so, the revision established for the first time factors by which a court could evaluate whether to compel joinder or, when necessary, dismiss a case because of a party's absence.[48]

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[41] FED. R. CIV. P. 19 advisory committee's note on 1966 amendments (emphasis added).

[42] *See id.* Many cases referred to indispensable parties under early Rule 19 as parties who would have been indispensable *prior* to the rules, invoking the common law to supplement the inarticulate rules. *See, e.g.*, Chidester v. City of Newark, 162 F.2d 598, 600 (3d Cir. 1947) ("[I]ndispensable parties under Rule 19 are those who were indispensable prior to the rules . . . .").

[43] FED. R. CIV. P. 19 advisory committee's note on 1966 amendments (discussing "Defects in the Original Rule").

[44] *Id.*

[45] *See id.*

[46] *See supra* text accompanying note 18.

[47] FED. R. CIV. P. 19 advisory committee's note on 1966 amendments.

[48] Courts saw the purpose of the change almost immediately: "The new Rule 19 is designed to ameliorate the catechistic distinction between 'necessary' and 'indispensable' parties, which had sometimes subordinated logic and reality to historical encrustations." Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 888 (5th Cir. 1968).

D. Rule 19 in the Present Day

Since 1966, Rule 19 has remained starkly unchanged. The Advisory Committee has amended it only twice: in 1987 and in 2007. The 1987 amendments were "technical" only.[49] In 2007, the Advisory Committee made "stylistic"[50] changes to Rule 19, notably removing the term "indispensable," which it considered "redundant."[51]

Thus, following minor revisions throughout the past half-century, the current form of Rule 19 reads, in relevant part[52]:

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

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[49] *See* FED. R. CIV. P. 19 advisory committee's note on 1987 amendments ("No substantive change is intended.").

[50] *Id.* on 2007 amendments ("The language of Rule 19 has been amended as part of the general restyling of the Civil Rules . . . . These changes are intended to be stylistic only."); *see also* Reed, *supra* note 4, at 328 (discussing in detail the historical semantic problem of choosing between "necessary," "indispensable," "insistible," "substantial," and more).

[51] The Supreme Court in *Pimentel* agreed, saying that the substitution of the word "required" for "necessary" and the deletion of the word "indispensable" serves only to simplify and clarify the operation of the prior rule. Philippines v. Pimentel, 128 S. Ct. 2180, 2184 (2008).

[52] Because this Comment focuses exclusively on subdivisions (a) and (b) of Rule 19, subsections (c) and (d) have been omitted.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
(2) the extent to which any prejudice could be lessened or avoided by:
(A) protective provisions in the judgment;
(B) shaping the relief; or
(C) other measures;
(3) whether a judgment rendered in the person's absence would be adequate; and
(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

E. Supreme Court Rule 19 Jurisprudence from 1966 to 2008: Exploring the Foundational Cases

Since the creation of modern Rule 19 in 1966, the Supreme Court has addressed the Rule's substantive workings and its multifactor test only a handful of times, most notably in two decisions: *Provident Tradesmens Bank & Trust Co. v. Patterson*[53] and, twenty-two years later, *Temple v. Synthes Corp.*[54]

Provident Tradesmens involved a suit over a traffic accident.[55] The Tradesmens Bank, acting as administrator for multiple estates, sued the estate of one vehicle's driver.[56] The bank did not, however, sue the *owner* of the automobile involved in the accident,[57] because his presence would have defeated the complete diversity upon which it predicated jurisdiction.[58] The lower courts dismissed, calling the automobile owner an indispensable party.[59]

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[53] 390 U.S. 102 (1968).
[54] 498 U.S. 5 (1990) (per curiam).
[55] *Provident Tradesmens*, 390 U.S. at 104.
[56] *Id.*
[57] The automobile was owned by Edward Dutcher (who was not present when the accident occurred) and was being driven by Donald Cionci, who died in the crash. *Id.*
[58] *Id.* at 105. Failure to initially join a party is often the result of a calculated decision to satisfy jurisdictional prerequisites. *See, e.g.*, *supra* note 27 and accompanying text.
[59] *Provident Tradesmens*, 390 U.S. at 106.

The Supreme Court reversed, conceding that the absent party should have been joined if feasible under 19(a) and focusing its analysis on the 19(b) factors.[60]

Warning against the use of rigid Rule 19 formulae, the Court highlighted the fact that, while the plaintiff had an appreciable interest in a particular forum, the defendant likewise wished to avoid duplicative litigation, inconsistent relief, or sole responsibility for liability that should be shared.[61] Such a dualism—with cognizable interests in favor of both the plaintiff and defendant—typified a situation demanding the pragmatism stressed by the Advisory Committee[62] in reformulating Rule 19. The Court similarly extolled the Rule's pragmatism, stating: "[Rule 19's factors] *must* be examined in *each case* to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled."[63]

The plaintiff's general interest, which the Supreme Court found compelling,[64] flows from the foundational idea that the plaintiff chooses the forum and parties to the lawsuit so that he gets the relief to which he is entitled.[65] The Court reasoned that allowing the case to proceed would best serve the interests of "complete, consistent, and efficient settlement of controversies."[66] Balancing the Rule 19 factors in light of the particulars of the case, the Court denied the motion to dismiss and allowed the case to continue, *despite the absence of the automobile owner*.[67]

Provident Tradesmens is important because it heralded the Supreme Court's first consideration of the newly amended—and purportedly more responsive and flexible—Rule 19. *Provident Tradesmens* highlighted the importance of the new Rule's pragmatic case-by-case approach, with the Court stressing the changes: "Where the new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the

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[60] *Id.* at 108. "We may assume, at the outset, that [the automobile owner] falls within the category of persons who, under § (a), should be 'joined if feasible.' . . . Hence the problem was the one to which Rule 19 (b) appears to address itself . . . ." *Id.* at 108–09.

[61] *Id.* at 109–10.

[62] *See* FED. R. CIV. P. 19 advisory committee's note on 1966 amendments ("[T]he case should be examined pragmatically . . . .").

[63] *Provident Tradesmens*, 390 U.S. at 109 (emphases added).

[64] *Id.* at 112 ("[The plaintiff's] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations . . . . Opposing considerations in this case are hard to find.").

[65] *See* Reed, *supra* note 4, at 327 ("The plaintiff in a civil cause ordinarily is permitted to select the persons with whom he will litigate.").

[66] *Provident Tradesmens*, 390 U.S. at 111.

[67] *See id.* at 112.

older version tended to emphasize classification of parties . . . ."[68] At the same time, the decision remains one of the few instances in which the Supreme Court explained in any great detail the workings of either 19(a), which controls the classification of necessary parties, or 19(b), which controls whether the necessary parties rise to the level of indispensable parties, whose presence is crucial for the continuation of the lawsuit. Simply by virtue of being the Supreme Court's first and most complete statement on the operation of Rule 19, *Provident Tradesmens* remains the most authoritative precedent on compulsory joinder, even a half-century after its disposition.[69]

The next landmark Rule 19 adjudication did not emerge until 1990, when the Court decided *Temple v. Synthes Corp.*[70]—a brief opinion that again reversed a lower court's 19(b) dismissal.[71] Temple, a Mississippi resident, suffered medical complications when a spinal device manufactured by the Synthes Corporation broke apart in his back.[72] Temple sued Synthes, which moved to dismiss pursuant to 19(b) for failure to join the doctor and the hospital associated with the procedure.[73] The district court ordered Temple to join these parties and, upon his failure to do so, dismissed the case with prejudice.[74] Temple appealed and the Court of Appeals for the Fifth Circuit affirmed.[75] The court of appeals held that it would be prejudicial to Synthes to defend against multiple lawsuits, especially since the corporation's defense might be negligence on the part of the physicians and hospital staff.[76]

The Supreme Court reversed, saying that joint tortfeasors do not qualify as parties who "should be 'joined if feasible'" under 19(a).[77] Stated another way, borrowing the familiar terminology of Rule 19, the Court held that joint tortfeasors do not, by virtue of that connection alone, rise to the level of necessary parties.[78] Finding that the Advisory Committee had not intended to change the status quo categorization of joint tortfeasors as solely permissive

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[68] *Id.* at 117 n.12.

[69] The *Pimentel* Court, for example, cited to *Provident Tradesmens* repeatedly for various issues of law. *See* Philippines v. Pimentel, 128 S. Ct. 2180, 2188 (2008).

[70] 498 U.S. 5 (1990) (per curiam).

[71] *Id.* at 8.

[72] *Id.* at 5–6.

[73] *Id.* at 6.

[74] *Id.*

[75] *Id.* (citing Temple v. Synthes Corp., 898 F.2d 152 (5th Cir. 1990)).

[76] *Id.*

[77] *Id.* at 7–8 (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108 (1968)) (internal quotation mark omitted).

[78] *Id.*

parties, the Court allowed the underlying case to proceed without ever having to make a 19(b) inquiry.[79] *Temple* is authority for the notion that the threshold question of 19(a) is a necessary prerequisite to finding 19(b) indispensability.[80] It does not, however, provide any substantial guidance as to the balancing of equities under 19(b)'s four factors, making *Provident Tradesmens* still the most informative Supreme Court case on that question.

Taken together, *Temple* and *Provident Tradesmens* are notable because each involved the Court reversing a lower court's dismissal—limiting the effectiveness of 19(b) as a tool to eject cases from the courtroom. These decisions provide a picture of Supreme Court jurisprudence that favors circumscribing the gamut of situations in which a plaintiff's failure to add a party closes the courthouse doors. The framework evidenced by the Court is one of pragmatic fairness, a framework by which its two seminal Rule 19 cases eschewed dismissal, despite the findings of the lower courts. These decisions exhibit a marked intent to ensure that plaintiffs are not exorcised from the docket unless a reasonable alternative forum for relief is evident and available.[81]

Although the Supreme Court has periodically addressed tangential issues relating to the application of the Rule,[82] *Provident Tradesmens* and *Temple* are the foundational decisions of the 19(a) and 19(b) factors post-1966. Against that background, the Supreme Court's 2008 decision in *Republic of the Philippines v. Pimentel* was of particular import to the continued development of consistent Rule 19 jurisprudence. *Pimentel*, couched in a Rule 19 motion seeking to join sovereign parties, resulted in a landmark shift away from the evidently liberal reading of the past. The decision highlighted—at the highest level—a contentious area of Rule 19 jurisprudence that defies the pragmatism of the *Provident Tradesmens* decades: the invocation of sovereign immunity by otherwise necessary and indispensable parties.

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[79] *Id.* at 7.

[80] *Id.* at 8 ("Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied.").

[81] *See Provident Tradesmens*, 390 U.S. at 109 n.3 (discussing the prominence of Rule 19(b)'s fourth factor).

[82] *See, e.g.*, Martin v. Wilks, 490 U.S. 755 (1989) (discussing the preclusive effect of Rule 19 in cases of intervention).

II. THE DEVELOPMENT OF FOREIGN AND TRIBAL SOVEREIGN IMMUNITY

The development of sovereign immunity in American law largely mimics that of joinder—originating as a common law doctrine and evolving into a statutory scheme. This Part traces the emergence and particularities of both foreign and tribal sovereign immunity in the American legal system. It concludes with a discussion of the mechanics of invoking sovereign immunity in federal courts.

A. The Foundations of Foreign Sovereign Immunity in American Courts

Foreign sovereign immunity precludes bringing suit against a foreign government without its consent.[83] Sovereign immunity in American courts initially surfaced during the nineteenth century to protect governments that were, at the time, engaged almost exclusively in traditional political activities.[84] The Supreme Court explicated the role of the judiciary in the face of sovereign immunity in its 1812 decision, *Schooner Exchange v. McFaddon*,[85] the first such recognition of the confines of the doctrine in American courts.[86]

Schooner Exchange dealt with an American citizen attempting to claim title to a French vessel moored in territorial waters for repair.[87] The Court found that the vessel, which was "in the service of a [peaceful] foreign sovereign[,] . . . must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."[88]

The logic for recognizing common law foreign sovereign immunity, explained Justice Marshall, flows from the mutual acknowledgment among nations of their shared absolute inviolability and the concomitant dignity fostered by respecting their individual boundaries:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by

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[83] Margot C. Wuebbels, Note, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(a)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1124 (1993).

[84] GIUTTARI, *supra* note 12, at 3.

[85] 11 U.S. (7 Cranch) 116 (1812).

[86] Wuebbels, *supra* note 83, at 1124.

[87] *Schooner Exch.*, 11 U.S. (7 Cranch) at 122, 135.

[88] *Id.* at 147.

> intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.[89]

The protection of governments qua political bodies heralded an era of complete—or "absolute"[90]—immunity in American courts that shielded virtually any action of a sovereign from judicial scrutiny by other nations.[91] Absolute immunity, practiced primarily by the United States and the United Kingdom, stood in contrast to the less rigid form of "restrictive" immunity recognized by other European nations at the time.[92]

Because sovereign immunity "is a matter of grace and comity rather than a constitutional requirement," nations have the ability to circumscribe it as necessary or desired.[93] Accordingly, the subsequent proliferation of government entities into otherwise private affairs throughout the nineteenth century[94] necessitated exceptions to comprehensive sovereign immunity for foreign nations in American tribunals.[95]

B. Modern Foreign Sovereign Immunity in America Since 1950

World War II served as the catalyst for changing the absolutist nature of American sovereign immunity: "After [WWII] . . . the growing role of state agencies in international trade led to the re-examination of" absolute immunity.[96] The spread of the state into private realms precipitated the "Tate letter" of May 1952, which aligned American immunity with the more limited form found in Europe.[97] The Tate letter announced that the State Department

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[89] *Id.* at 136.

[90] Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 302 (1986).

[91] GIUTTARI, *supra* note 12, at 3.

[92] Feldman, *supra* note 90, at 303.

[93] Austria v. Altmann, 541 U.S. 677, 689 (2004).

[94] "[Nations] began to compete in many instances directly with private parties in a variety of fields such as shipping, foreign trade, banking, mining and other commercial areas . . . ." GIUTTARI, *supra* note 12, at 3.

[95] *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C. (2006)); *Altmann*, 541 U.S. at 691 ("[T]he Act carves out certain exceptions to its general grant of immunity . . . .").

[96] Feldman, *supra* note 90, at 303.

[97] *Id.* At that time, questions of sovereign immunity fell within the purview of the State Department, to whom sovereigns would petition to avoid the jurisdiction of the courts. The State Department disavowed itself of this power and transferred questions of sovereignty to the courts in the 1960s. *Id.* at 303–04.

was carving exceptions to the otherwise absolute cloak of sovereignty, no longer "request[ing] immunity in all actions against friendly foreign sovereigns."[98] The resultant version of American sovereign immunity—and indeed that employed in all nations except some socialist regimes and a handful of third world countries—is the "restrictive theory" of immunity.[99]

The restrictive theory excluded from judicial amnesty a nation's "private acts,"[100] originally defined as "acts of industrial, commercial, financial, or any other business enterprises in which private persons may engage, or an act connected with such an enterprise."[101] Such acts stood in contrast to "public acts,"[102] or "those acts arising from internal administrative acts of a government, legislative acts, acts involving armed forces, acts involving diplomatic activity, and public loans," which continued to enjoy deserved protections.[103]

The Tate letter did little to articulate clear guidelines for distinguishing between private and public acts.[104] As such, the State Department continued to make case-by-case determinations with "no clear standards governing [its] decisions."[105] Courts likewise struggled to understand the requirements of the Tate letter, causing divergence between the two branches.[106] This regime of imprecise standards continued largely unabated until the codification of this restrictive theory in the Foreign Sovereign Immunities Act (FSIA) in 1976.[107]

The departure from absolute immunity reflects "not only the diverse character of the modern State and the demands of the international economy, but also the demystification of the State as a supreme being above the ordinary procedures of justice and accountability."[108] The fundamental tenet of the restrictive theory of immunity is that immunity is not absolute for the myriad activities in which a state partakes that are "private" as opposed to "sovereign,"

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98 Wuebbels, *supra* note 83, at 1125.

99 Feldman, *supra* note 90, at 302.

100 Wuebbels, *supra* note 83, at 1125 (internal quotation marks omitted).

101 *Id.*

102 *Id.* (internal quotation marks omitted).

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* at 1125–26.

107 *Id.* at 1126 ("The indecision and ambiguities presented by this divergent application in cases involving foreign sovereigns made the enactment of the [FSIA] timely. . . . The [FSIA] codifies the restrictive theory of sovereign immunity.").

108 Feldman, *supra* note 90, at 302.

such as commercial dealings with private parties.[109] Restrictive immunity is thus an attempt to recapture the original logic of sovereign immunity—protecting governing bodies as such—in the face of the increasing encroachment of sovereigns in the private realm.[110]

The restrictive theory remains, however, only a way of carving *exceptions* to the general grant of complete immunity.[111] Section 1604 of the FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States,"[112] and proceeds to define exceptions in subsequent sections.[113] Courts conclude the same: "The FSIA creates a *statutory presumption* that a foreign state is immune from suit unless one of the exceptions to immunity enumerated in [the FSIA] applies."[114] Accordingly, unless a sovereign's actions fit into a set of carefully defined exceptions, the sovereign will generally have complete immunity from the jurisdiction of the courts of the United States, insofar as its actions are still public in the traditional sense.[115]

C. Tribal Sovereign Immunity

Indian[116] tribes have been viewed as sovereigns since the European discovery of America.[117] The notion that tribes enjoy unique legal status is evident in the Constitution: "[T]he Commerce Clause of Article I indicates that Indian tribes are in some material sense comparable to foreign nations and the

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109 BORN & RUTLEDGE, *supra* note 11, at 221.

110 *See supra* notes 84, 94, and accompanying text.

111 *See* Austria v. Altmann, 541 U.S. 677, 691 (2004) ("These exceptions are central to the [FSIA's] functioning . . . ."). *See generally* Feldman, *supra* note 90 (discussing trends in the evolution of sovereign immunity).

112 28 U.S.C. § 1604 (2006).

113 *Id.* §§ 1605–1611.

114 Randolph v. Budget Rent-A-Car, 97 F.3d 319, 324 (9th Cir. 1996) (emphasis added).

115 *See* 28 U.S.C. § 1604. For further discussion of the history of sovereign immunity and its development in the FSIA and beyond, see Kevin M. Whiteley, Note, *Holding International Organizations Accountable Under the Foreign Sovereign Immunities Act: Civil Actions Against the United Nations for Non-Commercial Torts*, 7 WASH. U. GLOBAL STUD. L. REV. 619, 621–26 (2008).

116 This Comment uses the term *Indian* to refer to American Indian Tribes, also known as Native Americans. It does so without pretext or judgment as to which combination of terms is most politically appropriate. *See* Joel Bleifuss, *A Politically Correct Lexicon: Your 'How-To' Guide to Avoid Offending Anyone*, IN THESE TIMES, Feb. 2007, at 36, 37, *available at* http://www.inthesetimes.com/article/3027/ ("Indians either use their specific tribal name or use Indian . . . . You use the qualifier American when you need to distinguish from Indian Indians." (internal quotation marks omitted)).

117 Nicholas V. Merkley, Note, *Compulsory Party Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary" Parties*, 56 OKLA. L. REV. 931, 940 (2003).

states,"[118] and the Fourteenth Amendment specifically excludes from apportionment "Indians not taxed."[119] The unique legal status of tribes, "which no other group, racial or otherwise, can claim,"[120] suggests that tribes enjoy certain protections—e.g., judicial immunity—not available to other domestic actors.

That tribes are immune from suit in the nation's courts has been historically recognized and protected by the Supreme Court.[121] A suite of early Supreme Court decisions, known as "The Marshall Trilogy," laid the framework for "acknowledging and defining basic tribal sovereignty as a matter of federal law,"[122] and courts further refined the contours of tribal sovereignty throughout the nineteenth century.[123] As Professor Andrea Seielstad concludes, "What these early cases demonstrate is that the federal government has long recognized and respected what amounts to tribal immunity from suit even if the Supreme Court did not name the doctrine in so many words until 1940."[124] In the latter half of the twentieth century, the Supreme Court finally named, clarified, and cemented tribal sovereign immunity.[125]

In many ways, the current form of tribal sovereign immunity eclipses the protections afforded to foreign sovereigns. The Supreme Court has repeatedly recognized that "an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity."[126] The tribes' sovereignty is not confined to the boundaries of the tribal reservation, nor is it limited to the restrictive theory used for foreign nations: "[T]he doctrine has been upheld whether the challenged tribal activity involved commercial or governmental actions by the tribe."[127] So long as an Indian tribe is federally

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118 Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 610 (2004); *see also* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

119 Idleman, *supra* note 118, at 610 (quoting U.S. CONST. amend. XIV, § 2) (internal quotation marks omitted).

120 *Id.* (quoting Livingston v. Ewing, 455 F. Supp. 825, 831 (D.N.M. 1978), *aff'd*, 601 F.2d 1110 (10th Cir. 1979)) (internal quotation marks omitted).

121 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, 678 (2002).

122 *Id.* at 689.

123 *Id.* at 686–99.

124 *Id.* at 694.

125 *Id.* at 694–99.

126 Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) (emphasis added) (internal quotation marks omitted); *see also* Seielstad, *supra* note 121, at 699 (collecting cases).

127 Seielstad, *supra* note 121, at 699.

recognized, it enjoys the protections of sovereign immunity barring any express abrogation by Congress or clear waiver by the tribe.[128]

D. Invocations of Sovereign Immunity in Lawsuits

Often when sovereigns face suit in the United States, the defendant is only a single sovereign or a contingent comprised exclusively of sovereign parties. In *NYSA–ILA Pension Trust Fund v. Garuda Indonesia*, for example, trustees of a pension fund sued the national airline of Indonesia and a number of Indonesia's national banks to collect withdrawal liability from an Indonesian state-owned corporation.[129] The district court determined that each defendant qualified as a "foreign state" under the FSIA[130] and granted summary judgment for the defendants;[131] the court of appeals affirmed.[132] Similarly, in *Murphy v. Korea Asset Management Corp.*, investors sued a state-financed Korean corporation alleging conspiracy in purchasing debtor assets.[133] The court found that the state-backed corporation qualified as a foreign organ subject to FSIA protections and, as each defendant was a sovereign, dismissed the case.[134]

The difficulty manifest in cases where Rule 19 and sovereign immunity interact, as compared to the cases discussed above, is the presence of both sovereign and nonsovereign entities as commingled parties on one side of an action—that is, where the defendants in a suit include both sovereigns and nonsovereigns. In such a case, while a sovereign can invoke and enjoy the protections afforded to it by immunity, nonsovereigns remain liable to suit even after the sovereign's dismissal—unless the sovereign qualifies as an indispensable Rule 19(b) party. If the sovereign does meet the Rule 19(b) criteria, courts increasingly struggle to properly control the intersection of the doctrines.

III. THE INTERSECTION OF RULE 19 AND SOVEREIGN IMMUNITY

The invocation of sovereign immunity in a case fraught with compulsory joinder problems presents a set of dueling concerns for courts: to effectuate

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128 *Id.* at 700.
129 7 F.3d 35, 36–37 (2d Cir. 1993).
130 *See* 28 U.S.C. § 1603 (2006) (defining "foreign state" for purposes of the FSIA).
131 *NYSA–ILA Pension Trust Fund*, 7 F.3d at 38.
132 *Id.* at 40.
133 421 F. Supp. 2d 627, 629 (S.D.N.Y. 2005), *aff'd*, 190 F. App'x 43 (2d Cir. 2006).
134 *Id.* at 649.

joinder and, correspondingly, do complete justice, while addressing the countervailing jurisdictional problems posed by sovereignty. The impasse demands a response more nuanced than simply dismissing the sovereign, as courts are wont to do in cases with only a single sovereign defendant, or even in cases with sovereigns joined in an action but not essential to its disposition.[135] Instead, the analysis demanded by Rule 19 often declares a proper sovereign to be an indispensible party whose joinder is not feasible, and as a result, courts dismiss the entire action. This trend culminated in the Supreme Court's 2008 decision *Republic of the Philippines v. Pimentel*.[136] This Part begins with an analysis of the facts, holding, and dissent in *Pimentel*. It continues with a discussion of select federal court cases challenging actions by tribal sovereigns in which the problems evident in *Pimentel* reappear.

A. Republic of the Philippines v. Pimentel

In 2008, the Supreme Court decided its first case in almost thirty years concerning the direct application of Rule 19(b): *Republic of the Philippines v. Pimentel*. In contrast to both *Provident Tradesmens* and *Temple*,[137] which dealt with appeals in which the lower courts had granted a Rule 19 dismissal, *Pimentel* presented to the Court a case in which lower courts *denied* a 19(b) motion to dismiss. And, whereas the balancing espoused in *Provident Tradesmens* and *Temple* may have suggested that the Supreme Court would affirm and allow the case to continue, it reversed and dismissed the proceeding instead.

1. Facts and Background

Ferdinand Marcos was elected president of the Philippines in 1965 and again in 1969.[138] On September 21, 1972, just before the conclusion of his second term (the last allowable under Philippine law), Marcos declared martial law and suspended the constitution to maintain his reign.[139] After instituting a

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[135] That is, sovereigns who meet the Rule 19(a) factors (required) but not the Rule 19(b) factors (indispensable). *See* FED. R. CIV. P. 19(a)–(b).

[136] 128 S. Ct. 2180 (2008).

[137] *See supra* Part I.E (explaining the general trend suggested by *Provident Tradesmens* and *Temple*).

[138] *In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1462 (D. Haw. 1995).

[139] *Id.* The stated purpose of Marcos's proclamation was "to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by [Marcos] personally or upon [Marcos's] direction." *Id.* (quoting Narrative Statement of Reverend Joaquin G. Bernas, S.J., *In re Estate of Marcos*, 910 F. Supp. 1460 (No. MDL 840)) (internal quotation marks omitted).

new constitution, tailor-made to cement his power, Marcos held the Philippines in a virtual dictatorship and sanctioned countless acts of "torture, summary execution, disappearance, arbitrary detention, and numerous other atrocities."[140]

In 1972, as his grab for dictatorial power began, Marcos incorporated Arelma, S.A. pursuant to Panamanian law[141] as a corporate front for the wealth he amassed as president.[142] Shortly thereafter, Arelma deposited $2 million in a brokerage account administered by Merrill Lynch in New York.[143]

Marcos's brutal regime continued until 1986, when he and his family fled the Philippines for Hawaii.[144] In the mid-1990s, in response to the alleged atrocities of the Marcos regime, aggrieved citizens instituted a class action lawsuit[145] on behalf of 9,539 human rights victims against Marcos, his estate,[146] and others. After protracted litigation, the class won almost $2 billion.[147] In an attempt to satisfy that judgment, the Pimentel class sought to attach the Arelma assets held by Merrill,[148] which had grown to almost $35 million.[149]

Separate from the *Pimentel* litigation, the Philippine Presidential Commission on Good Governance (the Commission), specifically created to settle outstanding claims to Marcos's property, asked Merrill to deposit the Arelma assets into an escrow account.[150] Merrill refused.[151] Instead, to settle competing claims to the Arelma assets, Merrill filed a federal interpleader

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140 *Id. In re Estate of Marcos* details the alleged abuses in horrifying detail. *Id.* at 1463.

141 Philippines v. Pimentel, 128 S. Ct. 2180, 2185 (2008).

142 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp., 464 F.3d 885, 894 (9th Cir. 2006) ("Arelma is a shell corporation . . . ."); *US Supreme Court Allows RP Courts to Hear Arelma Case*, GMA NEWS ONLINE (June 14, 2008, 02:14 AM), http://www.gmanews.tv/story/101085/US-Supreme-Court-allows-RP-courts-to-hear-Arelma-case.

143 *Pimentel*, 128 S. Ct. at 2185.

144 *Id.*

145 Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). The district court certified the class as "all civilian citizens of the Philippines who, between 1972 and 1986, were tortured, summarily executed, or 'disappeared' by Philippine military or paramilitary groups" and deceased class members. *Id.* at 771. The class of claimants will be referred to throughout as the "Pimentel class."

146 Marcos died during the pendency of the various actions. *Id.*

147 *Id.* at 772.

148 *Pimentel*, 128 S. Ct. at 2186.

149 *Id.* at 2185.

150 *Id.* at 2186.

151 *Id.*

action[152] naming as defendants, *inter alia*, the Republic of the Philippines (the Republic), the Commission, Arelma, and the Pimentel class.[153] Both the Commission and the Republic invoked sovereign immunity pursuant to the FSIA, and each moved to dismiss the case pursuant to Rule 19(b).[154]

The district court denied the 19(b) motions, and the parties appealed to the Court of Appeals for the Ninth Circuit, which entered a stay pending the outcome of concurrent litigation in the Philippines over the Marcos assets.[155] The district court judge subsequently vacated the court of appeals' stay, awarded the Arelma assets to the Pimentel class, and rejected the requests by the Republic and the Commission to dismiss the case.[156] Four parties appealed: the Republic, the Commission, Arelma, and the Philippine National Bank (PNB).[157]

The court of appeals, dealing with the case again after the district court awarded the assets to the Pimentel class and denied the Rule 19 motions, held that dismissal was not warranted because, although the Republic and the Commission were necessary parties,[158] the Republic's claim had "no practical likelihood" of success and thus "[n]o injustice [was] done it if it now los[t] what it [could] never effectually possess."[159] The Republic, the Commission, Arelma, and the PNB each appealed, specifically challenging the denial of the 19(b) motion to dismiss, and the Supreme Court granted certiorari.[160]

2. The Supreme Court's Rule 19 Analysis

Conceding that "the application of subdivision (a) of Rule 19 is not contested,"[161] the Court spent the majority of its opinion on 19(b) analyzing

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[152] *See* 28 U.S.C. § 1335(a) (2006) ("The district courts shall have original jurisdiction of any civil action of interpleader . . . if (1) [t]wo or more adverse claimants . . . are claiming or may claim to be entitled to such money or property . . . .").

[153] *Pimentel*, 128 S. Ct. at 2186.

[154] *Id.*

[155] *Id.* at 2186–87.

[156] *Id.* at 2187.

[157] *Id.*

[158] To use the language in effect at the time of the decision, the Republic and the Commission were "necessary" parties pursuant to FED. R. CIV. P. 19.

[159] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp., 464 F.3d 885, 894 (9th Cir. 2006).

[160] *Pimentel*, 128 S. Ct. at 2187 (citing Philippines v. Pimentel, 128 S. Ct. 705 (2007)).

[161] *Id.* at 2189 ("The Republic and the Commission are required entities . . . . All parties appear to concede this."); *cf.* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108 ("We may assume, at the outset, that Dutcher falls within the category of persons who, under § (a), should be 'joined if feasible.'").

whether the interpleader action could continue without the Republic and the Commission as "required entities" under 19(a).[162] The majority chided the appellate court for addressing the merits of the Republic and the Commission's arguments after their invocation of sovereign immunity, calling that inquiry "itself an infringement on foreign sovereign immunity."[163]

The brunt of the Court's opinion focused on the first factor of Rule 19(b)—the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties.[164] The Supreme Court found a prevailing interest in engendering comity among nations by allowing a foreign state to resolve disputes in its own courts, and a concurrent dignity interest in not subverting that system without "right or good cause."[165] Accordingly, the Court found that purporting to dispose of the Arelma assets in lieu of allowing the sovereign state to proceed in its own courts would unduly prejudice the sovereigns, directly implicating the first factor of 19(b).[166] It would, in short, "fail[] to give full effect to sovereign immunity."[167]

The Court's analysis under the first factor evidences a policy strongly in favor of deferring to the protections of sovereign immunity.[168] The Court implicitly found that resolving outstanding claims to the disputed Arelma assets was not a sufficiently "right or good [enough] cause" to justify continuation of the case.[169] This is not to suggest there was *no cause* for finalizing claim to the Merrill account and disposing of the disputed assets;[170]

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[162] S*ee* FED. R. CIV. P. 19(a)(1)(B)(i) (deciding the case may "as a practical matter impair or impede the [required party's] ability to protect [its] interest"); *In re* Philippines, 309 F.3d 1143, 1152 (9th Cir. 2002) ("Without the Republic and the [Commission] as parties in this interpleader action, their interests in the subject matter are not protected.").

[163] *Pimentel*, 128 S. Ct. at 2189. Despite the fact that the appellate court issued no binding judgment as to the case's merits, the jurisdiction-stripping created by the FSIA rendered any consideration or court action other than immediate dismissal outside of the judges' purview. *Id.* The majority conceded that some evaluation of the merits may be unavoidable when evaluating Rule 19 motions, but not when the claim in question is substantive, nonfrivolous, and asserted by an absent, required entity properly invoking sovereign immunity. *Id.* at 2191–92.

[164] *Id.* at 2189 (citing FED. R. CIV. P. 19(b)(1)).

[165] *Id.* at 2190.

[166] *Id.* at 2190–92.

[167] *Id.* at 2190.

[168] *Id.* at 2189–90 ("[Sovereign immunity] is premised upon the 'perfect equality and absolute independence of sovereigns . . . .'" (quoting Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812))).

[169] *Id.* at 2190.

[170] At the very least, the use of an interpleader action suggests that the cause was to allow Merrill to definitely settle claims to money it held. *See* Ry. Express Agency, Inc. v. Jones, 106 F.2d 341, 344 (7th Cir. 1939) ("The interpleader statute was enacted for the protection of one who makes no claim to money in his

rather, the Court's finding shows the subservience of those concerns to the perceived rights inherent in sovereignty.

Despite the lack of precedent directly on point for joinder of foreign sovereigns, the Court cited two cases in which federal government immunity and Rule 19 came into conflict, and declared their overall holdings to be clear: "A case may not proceed when a required-entity sovereign is not amenable to suit."[171] While this conclusion seems to flow logically from the nature of Rule 19 and sovereign immunity applied in a vacuum, it ignores the possibility of permuting either dogmatic outcome to fashion a responsive solution, a point emphasized by Justice Stevens in his dissent.[172]

As to the second 19(b) factor—whether the court could lessen or avoid the prejudice through any means other than dismissal—the Court discerned "no substantial argument to allow the action to proceed."[173] In a single paragraph, the *Pimentel* Court explained that any complete and final judgment as to the Marcos assets would require the participation of the Commission and the Republic because settling ownership of the assets would necessitate deciding whether the Republic had a prima facie claim to the money at all.[174]

The Court found that the third factor, the adequacy of the judgment without the absent party, likewise favored the sovereigns: "Going forward with the action . . . would not further the public interest in settling the dispute as a whole because the Republic and the Commission would not be bound . . . ."[175] Finally, the Court looked to Rule 19(b)'s fourth consideration: whether the plaintiff would have an adequate remedy following dismissal.[176] This factor is of traditional importance, specifically highlighted in the Advisory Committee's notes and mentioned approvingly in *Provident Tradesmens*: "[T]he court

possession and who wishes to be relieved of liability, where diverse parties are making adverse claims to the fund.").

171 *Pimentel*, 128 S. Ct. at 2191. The Court cited *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945), and *Minnesota v. United States*, 305 U.S. 382 (1939), calling the analyses of the cases "somewhat perfunctory" but elucidating the holdings. *Pimentel*, 128 S. Ct. at 2090–91.

172 *See infra* Parts III.A.3, IV.

173 *Pimentel*, 128 S. Ct. at 2192. Justice Kennedy specifically said, "No alternative remedies or forms of relief have been proposed to us or appear to be available." *Id.*

174 *Id.*

175 *Id.* at 2193.

176 *Id.* The Court stressed that the court of appeals erroneously analyzed this factor as if the Pimentel class—who allegedly suffered a decade of brutal human rights violations—was the plaintiff, when Merrill filed the interpleader action. *Id.* The Court stated, "We do not ignore that, in context, the Pimentel class . . . are to some extent comparable to the plaintiffs in noninterpleader cases. Their interests are not irrelevant . . . ." *Id.* Regardless, the Court focused its analysis on the interests of Merrill Lynch.

should consider whether there is *any assurance* that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible."[177]

Merrill pressed that dismissal would deny it the benefit of a judgment allowing it to finally (and in a single proceeding) dispense of the assets in question[178]:

> Merrill would be left without guidance from the courts as to the proper disposition of those assets (or who properly controls the Arelma account), and could potentially be forced—after years of litigation over a *res* in which Merrill has never claimed any interest—to defend lawsuits by the various claimants in different jurisdictions, possibly leading to inconsistent judgments.[179]

The *Pimentel* majority admitted that dismissal would not provide Merrill with a judgment to settle ownership of the assets, but it would, the Court argued, protect against piecemeal litigation.[180] The Court's logic, somewhat perplexingly, worked as follows: "In any later suit against it Merrill Lynch may seek to join the Republic and the Commission and have the action dismissed under Rule 19(b) should they again assert sovereign immunity."[181] Even Justice Kennedy, writing for the majority, admitted that this is a tenuous and inarticulate solution at best, stating that it would only "to some extent" serve the interests in question.[182]

Despite functionally conceding that Merrill would be without effective recourse absent continuation of the interpleader action,[183] the Court concluded

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[177] Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109 n.3 (1968) (alteration in original) (emphasis added) (quoting FED. R. CIV. P. 19 advisory committee's note) (internal quotation marks omitted).

[178] *Pimentel*, 128 S. Ct. at 2193.

[179] Brief of Merrill Lynch, Pierce, Fenner & Smith Inc. as Amicus Curiae in Support of Neither Party at 14, *Pimentel*, 128 S. Ct. 2180 (No. 06-1204). Merrill's argument is a textbook justification for the existence and use of interpleader. *See* FREER, *supra* note 27, at 698 ("The question of ownership is litigated once, with all claimants and the present possessor of the property being bound by the judgment."); *id.* at 699 & n.2 (discussing that the purpose of interpleader is to "avoid subjecting a party to double, multiple, or inconsistent obligations").

[180] *Pimentel*, 128 S. Ct. at 2193.

[181] *Id.*

[182] *Id.*

[183] Asking Merrill Lynch to repeatedly invoke 19(b) motions to force dismissal of any future lawsuit is not a solution whatsoever: rather than help Merrill avoid spending time and money to repeatedly fight claimants in court, it only potentially shortens those battles, and only assuming the trial court correctly applies the *Pimentel* precedent. Justice Kennedy concluded in no uncertain terms that the decision "leaves the Pimentel class, which has waited for years now to be compensated for grievous wrongs, with no immediate

that the prejudice to the Republic and the Commission of letting the case continue outweighed any ill effects suffered by Merrill as the stakeholder.[184] "Dismissal," the Court stated, "under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity."[185] This conclusion gets to the troublesome heart of *Pimentel*: the logic and function of the Federal Rules are each subservient to the concerns of sovereign immunity when the latter is an issue, seemingly regardless of the consequences such adherence precipitates for either doctrine.

3. Justice Stevens's Dissent as a Case for Pragmatics

Justice Stevens concurred in part and dissented in part, arguing that the Court gave too much weight to the invocation of sovereign immunity and that, if the Court took other less drastic measures, the Republic and the Commission would be amenable to waiving sovereign immunity for further proceedings.[186] Justice Stevens illuminated a number of arguments made by the Republic and the Commission that illustrated how a court could fashion pragmatic solutions. For example, both the Republic and the Commission argued that the district court judge lacked impartiality because of certain ex parte communications he engaged in with attorneys for Merrill Lynch and because of his unwillingness to make case documents available to all parties. As such, Justice Stevens deduced that either sovereign would be willing to participate in reformed proceedings in front of a new judge because each had waived immunity in similar past proceedings.[187] Justice Stevens's analysis of the underlying proceedings typifies the sort of pragmatism and flexibility that current Rule 19 jurisprudence demands and will be explored in greater detail in Part IV of this Comment.

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way to recover . . . . And it leaves Merrill Lynch . . . without a judgment." *Id.* at 2194. Such an outcome can hardly be called a solution.

184 *Id.*

185 *Id.*

186 Justice Stevens suggested remanding the case to either stay proceedings "pending a reasonably prompt decision of the Sandiganbayan," a Philippine court of special jurisdiction that was separately attempting to determine ownership of the disputed assets at the time of the *Pimentel* case, or to reassign the case to a different district court judge. *Id.* at 2195 (Stevens, J., concurring in part and dissenting in part). Justice Souter also concurred in part and dissented in part, arguing that the case should be remanded for a stay of the proceedings to await a decision by the Philippine court. *Id.* at 2197–98 (Souter, J., concurring in part and dissenting in part).

187 *Id.* at 2196–97 (Stevens, J., concurring in part and dissenting in part).

Justice Stevens also disagreed with the majority's balancing of the Rule 19 factors.[188] In particular, he argued that the nature of the claim (settling financial accounts, rather than deciding liability), coupled with the actions of the sovereign parties in other instances, suggested affording their sovereign interests less weight than in the ordinary case.[189] Taking steps to shift the balancing, he said, would allow the Court to adequately protect the sovereigns without denying Merrill Lynch due recourse. Justice Stevens concluded that the majority's approach was ultimately "more inflexible"—less pragmatic—than Rule 19 contemplates since *all* of the parties had a formidable interest in promptly and effectively settling the dispute.[190]

B. The Similar Difficulties Presented by Rule 19 and Tribal Sovereign Immunity

The challenge of sovereign immunity vis-à-vis compulsory joinder is not an altogether new quandary.[191] Still, the reappearance of this seeming impasse in a 2008 Supreme Court decision suggests that the facial incompatibility of the two ideas continues to perplex courts. The problem is evident beyond the confines of *Pimentel*. Specifically, Rule 19(b) dismissals are a recurring problem in cases involving domestic sovereigns,[192] with the same attendant dangers as are manifest in *Pimentel*. This section traces a number of cases in lower federal courts evincing the problems undergirding the Court's holding in *Pimentel*.

1. Citizen Potawatomi Nation v. Norton

The Tenth Circuit's decision in *Citizen Potawatomi Nation v. Norton*[193] illustrates the difficulty that tribal sovereignty presents in Rule 19 cases. In *Norton*, the Citizen Potawatomi Nation, a federally recognized Indian tribe,[194] brought a mandamus action against the Department of the Interior to challenge its criteria for determining health services funding under a tribal self-

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188 *Id.*

189 *Id.* at 2197.

190 *Id.* (internal quotation mark omitted).

191 *See supra* note 171.

192 *See generally* Merkley, *supra* note 117 (discussing tribal sovereign immunity in Rule 19 cases).

193 248 F.3d 993 (10th Cir. 2001).

194 *See supra* text accompanying note 128 (discussing the availability of tribal sovereignty protections only to federally recognized tribes).

governance compact.[195] The defendants moved to dismiss for failure to join three other tribes, each of which participated in the funding agreement at issue.[196] The defendants alleged that each of the absent tribes was indispensable to the disposition of the case.[197] The district court agreed, granted the Rule 19 motion, and dismissed the case; the plaintiff-tribe appealed.[198]

Tribal sovereignty inarguably prevented joinder of the absent tribes, leaving the court of appeals with only the question of whether the absent parties were indispensable or merely necessary;[199] the court found that the absent Shawnee tribe (the one with which the Citizen Potawatomi Nation particularly took issue) was merely a necessary party.[200] The court further found that the United States, as defendant, could not adequately represent the goals and interests of the absent tribe. The tribe sought its share of funding under a shared health service scheme, while the United States had an interest only in implementing uniform national Native American policy—two goals not necessarily aligned to the same outcome.[201]

Having satisfied the prerequisite question of Rule 19(a) necessity, the court turned to Rule 19(b) indispensability to decide whether it could, in "equity and good conscience," continue the action without the absent tribes.[202] The court's stunted analysis attempted to weigh the impact of any potential decision on the absent Shawnee tribe against the fact that the Citizen Potawatomi Nation would be without an alternative forum.[203]

The Citizen Potawatomi (as plaintiff-tribe) argued that 19(b)'s fourth factor—the non-availability of alternate relief—strongly counseled in favor of allowing the case to proceed.[204] The court conceded that the Department of the

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195 *Norton*, 248 F.3d at 995–96. A self-governance compact is a "legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States." OFFICE OF TRIBAL SELF-GOVERNANCE, TRIBAL SELF-GOVERNANCE: A HANDBOOK FOR TRIBAL GOVERNMENTS 8 (2009), *available at* http://www.tribalselfgov.org/2008_subpages/2009_sgconf/SG_HandbookTribalGovts.pdf.

196 *Norton*, 248 F.3d at 996.

197 *Id.*

198 *Id.*

199 *Id.* at 997.

200 *Id.* at 1000.

201 *Id.*

202 *Id.* (quoting FED. R. CIV. P. 19) (internal quotation marks omitted).

203 *Id.*

204 *Cf. supra* note 179 and accompanying text (recounting Merrill's arguments as to the prejudice thrust upon it under 19(b)'s fourth factor).

Interior's sovereign immunity prevented pursuing the claims in any other tribunal: "[I]f the Citizen Potawatomi cannot challenge Defendants' administrative decisions, then *no one can*."[205] Despite explicitly recognizing the prejudice its decision would force on the plaintiff-tribe, the court ended its 19(b) analysis without actively seeking a way to distribute or lessen that burden, and deferred to the discretion of the district court. Relying on the unsupported base assertion that there was "no way" to lessen the prejudice suffered by the plaintiff-tribe, and noting the "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity," the court of appeals affirmed the district court's dismissal.[206]

Norton presents the same troubling quagmire as *Pimentel*: the complete denial of relief because of sovereign immunity enjoyed by *only a subset of parties*.[207] In both cases, the courts were unable to assuage sufficiently the concerns of 19(b)'s fourth factor, conceding outright that the decisions foreclosed the possibility of relief for the plaintiff, but characterizing such concerns as the natural byproducts of sovereign immunity.[208] In neither case did the courts attempt to overcome the impasse by applying anything short of strict, preconceived notions of the Rules and sovereign immunity. The lack of full 19(b) analysis from the court in *Norton* further indicates that, when confronted by the seemingly absolute protections of sovereign immunity, courts forego the chance to reconcile conflicting doctrines in search of a pragmatic solution, and fall instead to overwrought notions of protecting states at the expense of all else—including the parties to the dispute and the functioning of the Federal Rules of Civil Procedure.

2. United Keetoowah Band of Cherokee Indians in Oklahoma v. Kempthorne

Unfortunately, despite the Supreme Court's attempt to mediate the inconsistencies between joinder and sovereign immunity, the difficulties

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205 *Norton*, 248 F.3d at 1000 (emphasis added).

206 *Id.* at 1001 (quoting Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999)) (internal quotation marks omitted).

207 *Id.* (dismissing the case "even though the district court's decision meant there is no way to challenge the conduct in question"). In *Pimentel*, sovereign immunity existed only for two of the four defendants. *See supra* note 154 and accompanying text. In *Norton*, by contrast, sovereign immunity existed, for the purposes of that suit, for *only* the defendant tribes; the United States Federal Government did not assert sovereign immunity. *See Norton*, 248 F.3d at 997.

208 *Cf. supra* text accompanying note 185 (explaining that sovereign immunity contemplates dismissals despite lack of alternate forums).

created by the intersection of the two doctrines persist post-*Pimentel*. *United Keetoowah Band of Cherokee Indians in Oklahoma v. Kempthorne*,[209] decided almost a year after *Pimentel*, illustrates the ongoing problem. In *Kempthorne*, the United Keetoowah Band of Cherokee Indians in Oklahoma, an independent Indian tribe, alleged that the government failed to secure the tribe's authorization before entering into a health services contract with the Cherokee Nation of Oklahoma.[210] The defendants moved to dismiss for failure to join the Cherokee Nation of Oklahoma, arguing that, as a signatory to the contract in dispute, it was a necessary and indispensable party.[211]

The district court agreed, reiterating the notion that "a party to a contract is the paradigm of a party that is required under Rule 19(a)."[212] The Cherokee Nation thus had a "vital and immediate interest because th[e] action involve[d] the Cherokee Nation's contract."[213] The Cherokee Nation, however, was protected from suit by sovereign immunity, rendering its joinder infeasible without a clear waiver or abrogation by Congress, neither of which existed.[214]

The court determined that it could not in equity and good conscience allow the case to proceed absent this indispensable party, finding that all four factors weighed in favor of dismissal.[215] Considering the first and second factors, the court found that continuing the action would impair the interests of the Cherokee Nation in a way that the court could not lessen.[216] The court stated it had "no way to fashion a remedy that would not impact Cherokee Nation's contract," citing as support the analogous conclusion by the court of appeals in *Norton*.[217]

Weighing the 19(b) criteria, the *Kempthorne* court found that the third factor also favored dismissal because (if the case proceeded to a judgment) the Cherokee Nation, not a party to any judgment, might subsequently file suit

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209 630 F. Supp. 2d 1296 (E.D. Okla. 2009).

210 *Id.* at 1298.

211 *Id.* at 1299.

212 *Id.* at 1302. "A party to a contract is the quintessential '"indispensable party" and no procedural principle is more deeply embedded in the common than that, in any action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable.'" *Id.* at 1301 (quoting Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987)).

213 *Id.* at 1302.

214 *Id.* The *Kempthorne* court cited *Pimentel*, but only for the law of Rule 19—not for any sovereign immunity comparisons. *Id.* at 1301.

215 *Id.* at 1303–04.

216 *Id.* at 1304–05.

217 *Id.* at 1304.

against the present parties, challenging the actions required by the court's order. Such challenges, the court stated, have the distinct potential of breeding conflicting obligations and subjecting the United States to multiple lawsuits.[218] It is axiomatic that such an approach would not promote the societal goal of completely resolving disputes. Similarly, society had no tangible interest in upsetting the status quo functioning of tribal health compacts in a way that would simply engender further litigation.[219] As to the fourth factor, the availability of an alternate forum, the court—like the courts in both *Pimentel* and *Norton*—conceded that none existed and dismissed concerns about the impossibility of alternate avenues of relief as "contemplated under the doctrine of tribal sovereign immunity."[220]

Both *Norton* and *Kempthorne* are representative of a series of cases throughout the federal system in which the prophylactic severity of sovereign immunity compels Rule 19 dismissals.[221] These cases mirror the logic of *Pimentel*, where the perceived immutability of sovereign immunity forced the Court to a disconcerting outcome despite conceding the inability of the plaintiff to secure relief in any alternate forum.[222]

C. Pimentel *as Precedent and the Continued Difficulties of Sovereignty in Federal Courts:* SourceOne Global Partners *as an Example of the Ongoing Uncertainty*

Subsequent invocations of *Pimentel* as precedent suggest that it did little to clarify the workings of Rule 19 and sovereign immunity as intersecting doctrines. As of early 2011, courts had cited *Pimentel* as precedent in a limited number of circumstances and with circumscribed import.[223] Often cases with

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218 *Id.*

219 *Id.*

220 *Id.* at 1304–05. This conclusion mirrors both the logic and language of the majority in *Pimentel*. *See supra* text accompanying note 185.

221 *See supra* note 192.

222 Nicholas Merkley has roundly criticized the preponderance of Rule 19 dismissals in cases of tribal sovereign immunity, arguing that "many courts . . . giv[e] insufficient weight to the federal government's ability, and duty, to represent the interests of absent tribes" and that "litigants and courts overlook alternative procedural mechanisms that could resolve the majority of Rule 19 issues." Merkley, *supra* note 117, at 932.

223 *See, e.g.*, GE Bus. Fin. Servs. Inc. v. Sundance Res., Inc., No. 3:09-CV-00253-B, 2009 U.S. Dist. LEXIS 43753, at *4–6 (N.D. Tex. May 21, 2009) (citing *Pimentel* for the basics of how to proceed with a Rule 19 analysis); Wilson v. Can. Life Assurance Co., No. 4:08-CV-1258, 2009 U.S. Dist. LEXIS 16714, at *6–8 (M.D. Pa. Mar. 3, 2009) (same). Litigants eager to rely on recent Rule 19 Supreme Court precedent have forced a number of courts to distinguish *Pimentel*. *See, e.g.*, Humboldt Baykeeper v. Union Pac. R.R. Co., No.

remarkably analogous facts, such as *Kempthorne*, do not cite *Pimentel* for its authority vis-à-vis sovereign immunity.[224] The fact that *Pimentel* represented a departure from traditional Supreme Court jurisprudence, which favored continuing a case unless alternate relief existed, raises the specter that courts will struggle to understand and apply it in cases of joinder and sovereign immunity. And although *Kempthorne* opted not to cite *Pimentel* as authority on the question of immunity's role in compulsory joinder cases, at least one other case has done so.

In May 2009, the District Court for the Northern District of Illinois decided *SourceOne Global Partners, LLC v. KGK Synergize, Inc*.[225] SourceOne, which had been manufacturing dietary supplements, sought a declaratory judgment to establish that it did not infringe KGK's patent.[226] Prior to the commencement of litigation, two of the patent's original four owners assigned their rights in the patent to the United States government.[227] Because KGK did not own the patent exclusively, it filed a motion to dismiss for failure to join the United States as a necessary and indispensable party.[228]

Both parties agreed that the Government satisfied the 19(a) criteria for a required party and that joinder was not feasible because of sovereign immunity.[229] Weighing the harm to each party from continuation or dismissal, the *SourceOne* court used the holding of *Pimentel* to decree that the case at issue did not necessitate dismissal:

> In *Pimental* [sic], the Supreme Court stated that under Rule 19, "dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Conversely*, the absence of prejudice to the Government in this case . . . weighs strongly in favor of allowing the case to proceed.[230]

The court found no evidence that KGK, as defendant, could not fully protect the interests of the Government.[231] To the contrary, the court found that since

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C 06-02560 JSW, 2009 U.S. Dist. LEXIS 48131, at *5 (N.D. Cal. June 1, 2009) (stressing that, unlike the case before the court, the *Pimentel* decision dealt with a situation of uncontested 19(a) applicability).

224 *See supra* note 214.

225 No. 08 C 7403, 2009 U.S. Dist. LEXIS 40330 (N.D. Ill. May 13, 2009).

226 *Id.* at *2.

227 *Id.* at *4.

228 *Id.* at *2.

229 *Id.* at *15.

230 *Id.* at *22 (emphasis added) (citation omitted). The court's inference is not directly supported by the language of the *Pimentel* majority.

231 *Id.* at *20–22.

both KGK and the Government owned some of the same patent, they sought the same outcome, making the former an effective conduit for the interests of the latter, significantly easing the burdens of Rule 19 analysis.[232]

The court made quick work of 19(b)'s second factor, stating that although there was no way to shape relief to lessen prejudice to the Government, that concern was of little import because KGK adequately protected the Government's interests and because specific caselaw holds that the second factor is of little relevance in patent cases.[233] The third factor's concern with inconsistent judgments and duplicative litigation amounted to a "nonstarter" because the Government, protected from the present suit by sovereign immunity, would likewise be protected from any future suit.[234]

The court turned lastly to 19(b)'s fourth factor to decide whether SourceOne would have an adequate remedy if the case were dismissed for nonjoinder. KGK's only suggested alternate forum (the Court of Federal Claims) was barred by statute.[235] Such nonexistence of relief "weigh[ed] heavily in favor of allowing [the suit] to proceed."[236] Conversely, the defendants argued that the lack of alternate relief for SourceOne was simply "'the inevitable effect' of the United States' ability to assert sovereign immunity."[237] Their argument was, in effect, the reductionist logic brandished by the Court in *Pimentel* and reiterated in *Kempthorne*: that lack of relief was "contemplated under the doctrine of sovereign immunity."[238] The *SourceOne* court, however, found this argument unavailing, decrying the suggestion that SourceOne simply wait until the government and KGK *together* decide to sue it for infringement: "[The court] do[es] not share KGK's and the Government's comfort with that approach."[239] Faced with *Pimentel*'s conclusion that sovereign immunity contemplates unbalanced outcomes, the *SourceOne* court thus distinguished *Pimentel*.[240]

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232 *Id.*

233 *Id.* at *22–23.

234 *Id.* at *23.

235 *Id.* at *24 ("[The statute] permits private parties to bring patent infringement suits against the United States in the Court of Federal Claims for certain money damages only, and thus it would not provide an adequate forum for SourceOne's declaratory judgment claims." (citing 28 U.S.C. § 1498(a) (2006))).

236 *Id.*

237 *Id.* at *24–25.

238 *See supra* text accompanying notes 185, 220.

239 *SourceOne*, 2009 U.S. Dist. LEXIS 40330, at *25.

240 *Id.* at *26–27 ("We disagree with KGK and the Government that *Pimentel* requires a different result . . . . [T]here are important factors that distinguish this case . . . .").

The difficulty the *SourceOne* court faced in balancing the competing interests was the risk of giving too much credence to KGK's arguments and not viewing the injustice to SourceOne through the "prism of 'equity and good conscience.'"[241] KGK's suggested outcome would allow it to threaten legal action against SourceOne and others with impunity and, should any of the threatened parties resort to legal action, "KGK could retreat behind the Government's cloak of immunity" and prevent the issue "from ever being tested in court."[242] Giving KGK such "unreviewable sway in exercising its patent rights" would do little to advance public faith in the effective operation of the judiciary.[243]

The *SourceOne* court then tackled the *Pimentel* precedent directly. In *Pimentel*, no single party could adequately protect the rights of the sovereigns, unlike KGK's ability to do so in the case at bar.[244] According to the *SourceOne* court, dismissal in *Pimentel* was sanctioned because the Court found it would "not cause prejudice to Merrill Lynch."[245] Lastly, unlike in *Pimentel*, where the Philippines offered a potential alternate justice system, the *SourceOne* case did not implicate any other legal systems because the sovereigns were all domestic and tied to American courts.[246] Thus, this case did not imperil significant comity or dignity interests by usurping the proper functioning of a foreign nation's court system. The totality of these differences, the district court reasoned, allowed the case to continue absent the required sovereign.[247]

There are two ways to think about the patterns of *SourceOne*. On the one hand, the court effectively distinguished *Pimentel* and allowed the case to proceed despite the challenges of sovereign immunity. At the same time, the decision is a worrisome harbinger of the post-*Pimentel* uncertainty engendered by the Supreme Court's first perplexing foray into Rule 19 law in decades. This uncertainty is evidenced by the court's intense fact-specific wrangling to

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241 *Id.* at *25.
242 *Id.* at *25–26.
243 *Id.* at *26.
244 *Id.* at *27.
245 *Id.* at *28. This Comment disagrees with that analysis. *See supra* notes 176–85 and accompanying text.
246 *SourceOne*, 2009 U.S. Dist. LEXIS 40330, at *28.
247 *Id.* at *29.

fit *Pimentel* around a just outcome.[248] The decision also typifies the divergence among courts as to how to handle the challenges posed by sovereigns. *SourceOne* presented facts very similar to *Pimentel*, *Norton*, and *Kempthorne*, and cited to *Pimentel* as authority on questions of compulsory joinder of sovereigns despite reaching a contrary conclusion.

The importance of *Pimentel* as defining precedent is unclear in the face of *SourceOne*. The fact that the *SourceOne* court reached a conclusion analogous to the (later reversed) district and appellate courts in the *Pimentel* litigation signals a divergence between lower courts, which are tasked with fact-intensive Rule 19 inquiries, and the Supreme Court, which ultimately reviews the propriety of such determinations.[249] Such a disconnect represents but one of the reasons why Rule 19 is a veritable landmine for courts in charge of its application and why sovereign immunity only injects further uncertainty into such analyses. While this Comment agrees with the outcome of *SourceOne*, the fact that the district court had to wrestle with *Pimentel* at all suggests the dangers of the chasm between the Supreme Court's edicts and the pragmatic demands upon trial courts.

D. The Untenable Evisceration of Rule 19 and the Unintended Enlargement of Sovereign Immunity

As noted previously, the doctrine of sovereign immunity exists to protect sovereign entities from suit in foreign court systems.[250] The shield of sovereign immunity is theoretically limited to the sovereign qua actor, or to its designated subdivision.[251] Individuals living in foreign nations, for example,

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[248] *See supra* Part I.E (explaining the historical development of certain Rule 19 decisions and noting that pre-*Pimentel* Supreme Court precedent coalesced around a broad reading of Rule 19 that often resulted in the Court allowing cases to continue, rather than ordering dismissal).

[249] The Supreme Court has never declared the standard of review for a Rule 19 decision, declining the opportunity to do so in *Pimentel*: "We have not addressed the standard of review for Rule 19(b) decisions. . . . Whatever the appropriate standard of review, a point we need not decide, the judgment could not stand." Philippines v. Pimentel, 128 S. Ct. 2180, 2189 (2008). The Court did say that "[t]he case-specific inquiry [of Rule 19] . . . implies some degree of deference to the district court." *Id.* Other circuits have addressed the standard of review, and the majority give substantial deference to trial courts and their role as fact finders. *See* Tell v. Trs. of Dartmouth Coll., 145 F.3d 417, 418 (1st Cir. 1998) (discussing the differences among circuits as to the standard of review for Rule 19 decisions).

[250] *See supra* Part II.A.

[251] The Foreign Sovereign Immunities Act, for example, grants sovereignty to "foreign state[s]." 28 U.S.C. § 1604 (2006). Section 1603(a) defines "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) then limits the definition to agencies and instrumentalities that are separate legal persons, "which [are] organ[s] of a

do not generally benefit personally from their government's judicial immunity unless specifically designated by statute.[252] The sovereignty of state *A* is not supposed to protect party *B*, a nonsovereign, from suit. Likewise *A*'s sovereignty should not protect its citizen *C* or domestic corporation *D* from suit unless *C* or *D* is an organ or subdivision of the state. While the conscious choice to provide immunity to nations is suggested to anticipate (and implicitly sanction) one-sided outcomes in the area of compulsory joinder,[253] little evidence suggests that the Federal Rules of Civil Procedure should, through unscrupulous judicial action, augment sovereign immunity by protecting undeserving, nonsovereign third parties. Such a result, however, is the apparent and inevitable pattern among Rule 19 and sovereign immunity cases in the status quo.

Pimentel justifiably presents the notion that the Republic and the Commission, proper sovereigns, should be protected from a suit to which they do not waive immunity or to which an exception does not apply. However, the resulting dismissal of the entire proceeding also protected Marcos's shadow corporation (Arelma) and the Philippine National Bank from suit. The dismissal also prevented the Pimentel class from having even the chance to secure some of the billions to which it was entitled.[254] While the nature of the interpleader action likely rendered the protection from suit of little value to the PNB or the Pimentel class, it nonetheless shows the troublesome evolution of sovereign immunity under the Rules toward a doctrine protecting *nonsovereign* parties in addition to proper sovereigns.

Norton perhaps shows the problem more clearly. The Department of the Interior lacked its ordinary sovereign immunity by virtue of the Citizen Potawatomi Nation's use of a mandamus action to compel an officer of the United States to perform a statutory duty owed to the tribe.[255] The Tenth Circuit's 19(b) dismissal, however, effectively used the sovereignty of other

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foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(a)–(b).

252 *See id.* The FSIA would allow an individual to benefit from her nation's foreign sovereign immunity, but only if particularized conditions are satisfied such that the person operates at the behest of—or is closely intertwined with—the foreign nation. *Id.*

253 *See Pimentel*, 128 S. Ct. at 2194 (discussing the logic of sovereignty and its intended results, if immunity is properly invoked).

254 *See supra* text accompanying note 147.

255 Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 995 (10th Cir. 2001) ("The complaint also presented an action in the nature of mandamus to compel an officer or employee of the United States to perform a *duty owed to the Plaintiff*." (emphasis added) (citing 28 U.S.C. § 1361 (2006))).

tribal nations absent from the litigation to insulate the government from the suit—reinstating the sovereign immunity it had lost by statute. Thus, despite presumably valid claims against a government body with a *statutory duty* and corresponding congressional abrogation of sovereign immunity, the sovereignty of another party worked to benefit the properly present defendant. At the hands of the *Norton* court, Rule 19 became a tool to enlarge the ambit of sovereignty protections beyond the sovereign defendant onto third parties. Such an outcome can hardly be "contemplated" under sovereign immunity[256] or justifiable in light of the immense costs it imposes on the workings of Rule 19 and the administration of justice, precipitating situations where aggrieved plaintiffs are left without an alternate forum and defendants without sovereignty enjoy unconditional immunity from suit.

IV. TACKLING THE RULE 19/SOVEREIGN IMMUNITY IMPASSE: A RETURN TO THE RULE'S VENERATED PRAGMATISM

Rule 19 in the context of sovereign immunity presents a multifaceted challenge to reliable rulemaking. This problem likewise presents no obvious single solution. Few would suggest unduly constricting sovereign immunity, which protects admittedly admirable goals in most instances;[257] likewise, I am not suggesting a substantive revision of Rule 19 to create a complex system of special rules and exceptions for cases beset by sovereignty problems.[258] The answer, instead, is obvious from the historical criticisms of early Rule 19[259] and from the more recent critiques of the Rule 19 and sovereign immunity quagmire as espoused by Justice Stevens in *Pimentel*.[260]

The solution, stated in terms most general, is for courts to return to a pragmatic and fine-grained analysis in each case where Rule 19 confronts sovereign immunity, using a variety of tools to reconcile the doctrines in any way possible. Pragmatism should undoubtedly be the overriding concern in any compulsory joinder dispute, regardless of whether it concerns sovereign

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256 *See supra* notes 185, 220, and accompanying text.

257 *See supra* Part II.A (discussing the goals of exempting nations from American judicial review).

258 Insofar as Rule 19 presents a nonexclusive list of factors, it is intentionally designed with the flexibility to tackle challenges such as the one discussed herein. *See generally supra* Part I (discussing the Rule 19 factors over time). It is thus unadvisable to attempt to muddy the waters of the Rule with major substantive revisions that risk upsetting decades of precedent. *But cf.* Freer, *supra* note 36 (suggesting revisions to Rule 19 for other reasons).

259 *See supra* Part I.C (discussing the original Rule's textual failings and the resultant unjust errors by courts).

260 *See supra* Part III.A.3 (discussing Justice Stevens's dissent in *Pimentel*).

immunity,[261] but the evident trend toward dismissal in light of sovereignty commands special attention. The goal of any solution, whether promulgated through a statutory regime or keyed to a more responsive case-by-case approach, must be to honor Rule 19's raison d'être: effectively settling disputes.

On the ground, privileging pragmatism would entail a combination of responses by a variety of actors. Congress has the power to abrogate immunity to stem the tide of troublesome decisions in the status quo. Courts, as the forums for Rule 19 analysis, bear the primary responsibility, however, for permuting the Rule and sovereignty in equitable ways. Just as a judge must approach each case with an eye strictly attuned to pragmatics, parties on each side of a lawsuit who seek to continue a case despite a required party's absence must be willing to work with the court to facilitate reasonable outcomes.

A. The Dangers of Ignoring the Problem

The overarching problem evident in the cases discussed above is the repeated failure of courts to remember Rule 19's lauded pragmatism—a goal explicitly espoused by the Advisory Committee when formulating the modern view of compulsory joinder.[262] While the overall trend in Rule 19 jurisprudence since its revision in the 1960s has been toward flexible solutions to each unique dispute, its treatment in the context of sovereign immunity is an outlier. Instead of efficiency, rigid doctrinal adherence to facially incompatible rules results in scattered and unpredictable outcomes.

This inconsistency in application injects needless uncertainty into both Rule 19 and sovereign immunity. At the same time, it tracks the criticism lobbied at the initial 1938 version of Rule 19, with its much-vaunted—but ultimately hollow—labels, which precipitated a minefield of conflicting precedents.[263] Understanding the present day's problems as an extension of the failings that plagued the Rule a half-century ago suggests that our solution too lies in history.

Distilled to its essence, the problem that each of the proposed solutions must tackle is the failure of courts to work a resolution when no alternate

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[261] *See supra* notes 61–63 and accompanying text (explaining the role of pragmatism in Rule 19 decisions).

[262] *See supra* note 41 and accompanying text.

[263] *See supra* Part I.C (discussing the 1966 revisions to Rule 19).

forum for relief exists. It is one thing to dismiss a case knowing that a foreign nation's judiciary stands ready (or even able) to resolve the dispute; it is quite another to admit the impossibility of relief in *any* forum and to dismiss the entire action regardless, without any serious attempt to create a compromise.[264] Professor John W. Reed, who wrote one of the most prominent criticisms of early Rule 19 in 1957, discussed several factors contributing to Rule 19's failure to produce equitable, consistent, or predictable results, notably: an overreliance on labels instead of facts and a "thoughtless reiteration—instead of a critical reexamination—of the basic principles of required joinder."[265] Regardless of where one assigns blame, the problem remains: parties forced from the nation's courts stand discontented and without an opportunity for relief—a casualty of thoughtless reiterations of the sanctity of sovereign immunity, which itself is a preconception in need of critical reexamination.

Judges applying Rule 19 in the context of sovereign immunity need to look beyond the current precedent, which tends to bind their hands, and search for a solution that will give plaintiffs some manner of relief. It is inimical to the pursuit of justice to allow swaths of nonsovereign parties to skirt adjudication because a single sovereign entity has invoked sovereign immunity.[266]

B. Statutory Responses: Congress as an Actor

While courts are an obvious locus of change, Congress can also play a vital role, and congressional action presents the first area of potential resolution. Sovereign immunity is, after all, a statutory scheme,[267] and Rule 19 is part of a congressionally approved textual code that the federal courts are charged with implementing. Both tribal and foreign sovereign immunity are applicable only where Congress has not specifically abrogated the privilege.[268] Rather than attempt to craft an impossibly large statute to handle every instance of sovereignty and Rule 19 incongruence, history suggests that statutory responses work when tailored to specific types of disputes.

One example of a statutory approach is federal reclamation law, which contains a provision stating that, for certain claims arising under the Reclamation Act, the United States Federal Government, if sought to be joined

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[264] *See supra* Part III.A (discussing *Pimentel*, in which the Court admitted that no alternate forum existed but nevertheless dismissed the case).

[265] Reed, *supra* note 4, at 329.

[266] *See supra* Part III.D (discussing the enlargement of sovereign immunity under Rule 19).

[267] *See supra* note 113.

[268] *See supra* Part II.B (discussing the ability to create exceptions to sovereign immunity).

as a required party, waives sovereign immunity to facilitate the necessary joinder.[269] The clause states:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate . . . the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty . . . .[270]

The reclamation waiver clause is indicative of Congress's ability to effectuate limited abrogation of sovereign immunity in the name of a discrete goal—whether that of justice, economic development, etc. The waiver in the Reclamation Act is mated to instances of joinder but does not authorize original suits directly against the United States.[271] It is an example of how sovereign immunity can be waived, through careful statutory language, without imperiling the workings of the entire doctrine—narrow language begetting narrow results. While it is impossible to state with succinct completeness a set of situations befitting statutory responses, the reclamation waiver is a helpful model for the type of solution this Comment envisions: recognition of areas of the law where sovereign immunity counteracts the function of the Rules, and a conservative but effective response.

In *Norton*, for example, the Citizen Potawatomi Nation sued the Federal Government under a domestic statute controlling certain relations between the Government and Indian tribes.[272] The outcome of *Norton* suggests that Congress should be prepared to build into Indian governance statutes a clause mirroring that in reclamation law, but tailored to the difficulty presented by absent indispensable tribal sovereigns. Such a clause could state that engaging with the federal government under a self-governance statute waives sovereign immunity for the tribes involved. Such a statute, modest in its aims, would neither disrespect domestic tribal justice systems nor suggest that Congress should unceasingly desecrate sovereignty without cause, yet it would significantly obviate the difficulties of *Norton*.

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269 43 U.S.C. § 390uu (2006).
270 *Id.*
271 Orff v. United States, 545 U.S. 596, 602 (2005).
272 *See supra* Part III.B.1.

A statutory response could similarly help alleviate the impasse evident in *Kempthorne*, where a tribal party to a health services agreement refused to join a lawsuit, and its sovereignty resulted in dismissal of the entire proceeding.[273] Again, to the degree that such agreements between the federal government and tribes are authorized by statute, Congress should craft provisions into the statute to curtail the sovereign immunity of participating tribes—as to issues regarding the agreements only—in instances when their joinder will be necessary to the resolution of a case.

It is less immediately clear what sort of statute could have solved *Pimentel*, but as noted above, none of the proposed solutions in this Comment should be taken as a complete answer to the exclusion of others. The intricacies of the interpleader statute may provide room for Congress to delineate exceptions to the cloak of immunity where foreign nations seek title to resources held in American accounts, as happened in *Pimentel*. Congress could create an exception stating that, for the purpose of interpleader actions concerning domestic resources, sovereigns must either waive their immunity or forfeit their opportunity to claim the property at all. This proposal is especially appropriate given that settling title to property infrequently questions the *political* decisions of states, but rather implicates their broader functioning in the private realm.[274]

C. Judicial Responses: Courts and Their Participants as Actors

While Congress presents one avenue by which sovereign immunity can be curtailed for purposes of joinder, courts are the obvious forums for handling the majority of conflicts between joinder and immunity. Solutions sited in the courts can take a number of forms—including rethinking the nature of disputes, crafting areas of the law where sovereignty is de facto abrogated by the actions of a nation, or shifting the focus of Rule 19's various interests. At the same time, the parties using the court system ought to be prepared to work compromises in lieu of leaving empty handed.

1. Rethinking the Nature of Indispensability

The structure of Rule 19 itself presents a possible solution: the court can rethink and (often) reject the conclusion that an absent sovereign is either

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[273] *See supra* Part III.B.2.

[274] *See supra* Part II.B (discussing the restrictive theory of sovereign immunity, which protects only political sovereign actions).

"necessary" or "indispensable" ("required").[275] If a court decides that a sovereign is neither necessary nor required, the court can continue to hear the case in its absence. With the looming specter of dismissal, only a *substantial* threatened interest of an absent party should justify upsetting continuation of the case. This solution becomes more discerning and accommodating when courts balance the competing interests of sovereigns and plaintiffs. If courts want to truly consider the plaintiffs' interests, it cannot be enough to say that a sovereign party merely has a threatened interest. The relevant inquiry must be the nature and importance of the interest at stake.

An exemplar of such progressive thinking can be found in *Cachil Dehe Band of Wintun Indians v. California*, where the Ninth Circuit held that absent tribes who would be only financially affected by the outcome of the litigation were not required parties for complete adjudication of the dispute.[276] The idea that mere financial interest in a case's outcome does not create a concern sufficient to meet the Rule 19 factors rightly privileges affording relief over mere monetary concerns.[277] Whether such privileging is fair in every instance is irrelevant to the notion that it can, when properly applied, overcome otherwise debilitating joinder and sovereignty problems.[278]

This type of fine-grained analysis would have been particularly apropos in *Pimentel*. The Republic and the Commission's only interest was a disputed financial account held in America.[279] There was no overwhelming concern as to national functioning or governance, criminal process, sovereignty, etc. The Court's analysis—and indeed Justice Stevens contends as much[280]—could have found that the Republic and the Commission's interest, though important, did not suffice to overcome Merrill's significant interest in resolving the dispute and foreclosing the risk of ongoing litigation with inconsistent judgments. Like any proposed Rule 19 solution, it is difficult to specify with any particularity a universal course of action flowing from this suggestion.

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[275] *See supra* notes 50–51 and accompanying text (discussing stylistic changes to Rule 19).

[276] 547 F.3d 962, 971 (9th Cir. 2008) ("The mere fact that the outcome . . . may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties, however.").

[277] *See* Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990) ("[T]he court must determine whether the absent party has a *legally protected interest* in the suit. This interest must be more than a financial stake . . . .").

[278] To be clear, the point here is not whether *Cachil Dehe* represents a perfect solution, nor is it to suggest that financial interests may not be significant. It is instead to illustrate the viability of case-by-case rebalancing as a solution.

[279] As opposed to Merrill's interest in settling the dispute and avoiding protracted and conflicting litigation. *See generally* Part III.A.2 (describing the various interests at stake in *Pimentel*).

[280] *See infra* Part IV.D.

That failure, however, should not prevent courts from recognizing their role as fact finders and thus acting with greater discretion. One aspect of such discretion is taking the liberty to decide when someone's interest fails to provide a sufficient basis for dismissal when weighed against another's decidedly more important interest.

2. Highlighting Areas of the Law to Cabin Sovereign Immunity: Contract as an Example

Another possible court-based solution is to change the relevant analysis in certain classes of cases where problems are recurring—similar to the proposed statutory responses above but within the ambit of the judiciary. Although sovereign immunity is largely a statutory regime, administering a claim of sovereign immunity and deciding whether it has been waived is a function of the courts.[281] As an example, the law of contract is one area where the protections of sovereign immunity ought not be impenetrable in the face of necessary joinder.

Recognizing that the power of contract is sacrosanct, the decision to enter a contractual relationship is nevertheless a voluntary one,[282] and one to which courts can attach conditions. Decades of decisions stand for the proposition that parties to a contract are indispensable parties as to the resolution of disputes arising under that contract.[283] Because contracts create voluntary relationships, the decision to contract with another party ought to act as a waiver of sovereign immunity where necessary to effectuate joinder in cases attempting to settle claims relating to the contract. Put another way, a contractual relationship should put a party on notice that, as to the subject of the contract and any attendant disputes, it has waived sovereign immunity as a defense to joinder.[284] For example, in *Kempthorne*, the Cherokee Nation of Oklahoma, by signing a health compact with the federal government,[285] should have been held to have functionally waived sovereign immunity as to disputes

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281 *See supra* note 97 (discussing the shifting administration of sovereign immunity from the Executive to the Judicial Branch).

282 Putting aside questions of duress and the like for the sake of simplification.

283 *See supra* notes 30, 212–13, and accompanying text.

284 This is not a particularly upsetting suggestion if properly conceptualized: entering into contracts is a largely private (as opposed to a public) function, the type of activity theoretically contemplated as outside the scope of modern restrictive immunity. *See supra* notes 99–103 and accompanying text. The suggestion here is simply to refine that idea: to make contracts between sovereigns and nonsovereigns instances of waived immunity where necessary to resolve disputes related to the contract.

285 *See supra* text accompanying note 210.

arising under that contract. Such an understanding of joinder and immunity would have allowed the *Kempthorne* court to force the Cherokee Nation to litigate claims arising over its voluntary decision to enter into a contract with the federal government.

This suggestion is in line with the solution Justice Stevens offered in *Pimentel*.[286] There, Justice Stevens noted, the Republic and the Commission each willingly participated in other proceedings (where they could have properly invoked immunity but did not), and he argued that a campaign to secure the assets using American courts was inevitable at some point, ultimately concluding that these circumstances justified placing less importance on preserving sovereign immunity.[287]

This relatively simple idea would likewise ameliorate the problem posed by cases such as *Norton*.[288] If, in *Norton*, the district court had partially subjugated the sovereign immunity of the absent signatory tribes because of their contractual relationships, it could have proceeded with the case. At the same time, diluting the import of sovereign immunity in such a limited instance would hardly disrupt the cohesiveness of the doctrine. It is not unreasonable to expect signatories to a contract to anticipate liability in future litigation as to that relationship.[289]

To say that the shield of sovereign immunity can be used to allow sovereign parties to recklessly enter into contractual relationships without reprisal is *arguably* contemplated under the doctrine in the barest sense. What is not contemplated, however, is that the protections of the sovereign should render other nonsovereign signatories to the contract without relief or beyond the jurisdiction of courts when disputes develop between contracting parties. The emergence of restrictive immunity, exempting from protection a government's commercial/private acts, reflects the notion that for voluntary nongovernment action foreign sovereigns already enjoy only limited immunity, although tribes are not subject to the same limitations;[290] this Comment's

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286 For a more detailed discussion of Justice Stevens's dissent, see *infra* Part IV.D.

287 Philippines v. Pimentel, 128 S. Ct. 2180, 2197 (2008) (Stevens, J., concurring in part and dissenting in part).

288 Citizen Potawatomi Nation v. Norton, 248 F.3d 993 (10th Cir. 2001).

289 Making such a demand upon contracting parties hardly seems novel or unfair. It is analogous to the personal jurisdiction doctrine, whereby purposely availing oneself of the resources and benefits of a state rightfully subjects one to jurisdiction of the courts of that state. For an analysis of personal jurisdiction and the various tests involved therein, see FREER, *supra* note 27.

290 *See supra* text accompanying note 127.

suggestion is, by way of illustration, an offshoot of that notion. Of course, this idea's usefulness as a partial remedy is confined to cases of actual or implicit contractual relationships.[291]

Consider again *Pimentel*. Although the sovereigns had no direct contractual relationship with Merrill Lynch vis-à-vis the disputed Arelma assets, Arelma (functionally Marcos) had such a relationship when it opened the account and deposited money in the 1970s.[292] The Republic's attempts to secure those assets, then, were in effect an attempt to inherit the contractual relationship created by Arelma and to assume the legal obligations attendant to that relationship. For the purposes of *Pimentel* and similar disputes, this Comment thus suggests treating the Republic as having had a de facto contract with Merrill Lynch insofar as the Republic sought to establish ownership to contractually secured assets. While the Republic and the Commission did not seek to use American courts in that pursuit, they still sought the assets as an overall end.[293] Accordingly, they should have been presented with two options: to either waive sovereign immunity for the purposes of the interpleader suit, or to surrender their claim for refusal to use the national tribunals of the country in which the contract was formed and in which the assets resided. Faced with those options, and seeking the assets, it is likely that the sovereigns would have waived their immunity.[294] This solution is surprisingly benign as to negating the effectiveness of sovereign immunity and provides, by way of example, another potential resolution to the difficulties of immunity and joinder.

3. The Three Interests: Favoring Those Already Present

Another way for courts to effectuate a more responsive approach to Rule 19 and sovereign immunity is to remain cognizant of the classes of interests at stake. There are three relevant interests: "(1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; [and] (3) the social interest in the orderly, expeditious administration of justice."[295]

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[291] *Implicit contractual relationships* suggests that situations may arise where the relationship between parties is contractual in form if not in name.

[292] *See supra* text accompanying note 143.

[293] *See supra* text accompanying note 150.

[294] Justice Stevens makes a convincing argument that the sovereigns were in fact willing to waive sovereign immunity if the court satisfied a few benign conditions. *See infra* Part IV.D.

[295] Reed, *supra* note 4, at 330.

It is beyond contestation that public interest supports the timely, efficient, and effective use of the courts to resolve conflicts with finality.[296] The potentially conflicting interests of those parties already present and those not yet present, however, offer the opportunity for courts to change their approach to reach a more desirable outcome—one that preserves the availability of relief for those already present without substantially imperiling the interests of absent parties.

Courts should strive hardest to find an alternative to dismissal where the interests protected by joinder are only (or overwhelmingly) those belonging to the first category: parties already present. If the addition of a participant only protects the interests of the parties already represented, then the nonjoinder of the absentee will leave the defendants no worse off than they otherwise would have been. This solution was effectively used in *SourceOne* where, although each side had competing and tangible interests, the court favored the interests of the present parties and found that the defendants had failed to prove a significant harm that would outweigh the plaintiff's interests in resolving the dispute.[297]

Consciously weighing the interests against the goal of continuation is not to suggest an absolute change to Rule 19's equitable balancing, nor to state that the courts should universally favor one set of interests above others. Likewise, it is not to trivialize the burdens potentially felt by represented defendants because of a nonpresent party's absence. Instead, this suggestion illustrates how courts can reshape the current doctrine to be more responsive to the needs of plaintiffs while still giving requisite protection to parties invoking Rule 19. Keeping in mind that the plaintiff initially chooses the parties to the lawsuit, courts should strive to protect that choice unless proper adjudication demands otherwise.[298] Courts could protect the plaintiff's choice through a number of actions, including shifting the burden of proof so that the nonpresent defendants must prove significant harm, changing the threshold for what is an

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296 *See supra* text accompanying note 18 (exploring the idea that courts should afford complete justice).

297 *See supra* Part III.C (discussing the outcome in *SourceOne*).

298 Professor Reed's admonition is illuminating:

> [C]lear thinking will be materially aided if it is remembered that the real problem in any compulsory joinder case is whether the initial choice of parties by the plaintiff is to be overborne by some combination of these three countervailing interests—not by a blind adherence to an elderly formula.

Reed, *supra* note 4, at 330.

interest deserving of protection,[299] or more heavily weighing the scales in favor of the plaintiff. However achieved, this change would amount to a general (but not inviolable) favoritism for the interests of the parties already within the court's ambit so that, at worst, the absent parties claiming an interest suffer no more than they otherwise would.

4. Encouraging Flexibility and Compromise by Parties to the Suit

It is worth briefly mentioning the role that parties themselves should play in fashioning solutions. The regime of *Pimentel* and similar cases creates sufficient—albeit inarticulate and unsettling—precedent to order dismissal in a myriad of sovereignty/joinder challenges.[300] Rigidity by parties only makes such an outcome more likely. The parties of *Pimentel* exemplify the role that sovereigns and nonsovereigns alike can play in avoiding dismissal.

The sovereign *Pimentel* defendants expressed willingness to waive sovereign immunity if a number of minor conditions were satisfied. In particular, the sovereigns complained of perceived bias by the district court judge and requested that the case be reassigned.[301] The willingness of the Republic and the Commission to waive sovereign immunity for purposes of the lawsuit suggests that often sovereigns that *do* have a real stake in the outcome of the lawsuit want to be present and represented if possible. Communication between plaintiffs, defendants, and the courts can largely obviate the stalemate by shifting each side's expectations so as to appease the overall desires of the parties without dismissing the lawsuit entirely.

D. Reflecting on Potential Solutions in Practice

Recognizing that there is no simple holistic solution to the problem evident in *Pimentel* and beyond ought only to spur courts to think of creative solutions to lessen the prejudice that plaintiffs confront. In the vast majority of instances, a more or less comprehensive solution exists and can be executed without fracturing the contours of either doctrine.

The promise of these solutions is evident in two places: Justice Stevens's *Pimentel* dissent and the *SourceOne* decision. Justice Stevens presaged this Comment's criticisms in his *Pimentel* dissent when he argued that the

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299 As discussed above in Part IV.C.1.

300 *See supra* Part III (discussing *Pimentel* and its value as precedent).

301 *See supra* text accompanying notes 186–87.

majority's "inflexible" analysis[302] ignored creative solutions within the Court's purview. He suggested various alternatives to dismissal: to stay the proceedings until concurrent litigation in the Philippines concluded, to reassign the case to a different district court judge, or to soften the import afforded to the invocation of sovereign immunity by the Republic and the Commission.[303]

Like this Comment, none of Justice Stevens's suggestions pretends to be a universal solution—nowhere does he say that in situation *A*, the court ought to follow course-of-action *X* to the exclusion of other considerations. In the context of *Pimentel* and its facts, however, he identifies a number of convincing alternatives to the majority's formulaic outcome. Whether each would effectuate "complete justice" for the particular parties in *Pimentel* is, of course, a nonstarter at this point because the Court ordered dismissal of the *Pimentel* case, but the existence and plausibility of these alternatives proves that pragmatism in the face of sovereignty's challenges can often yield sufficiently equitable solutions.

The *SourceOne* court faced a situation substantially analogous to *Pimentel* but recognized the inequity wrought by dismissal.[304] Accordingly, the court managed to distinguish *Pimentel* and proceed with the case. The court's solution was in effect to rebalance the importance of the various interests—as suggested above[305]—in a way that gave primacy to the interests of the parties already before the court and recognized the plaintiff's nontrivial interest in the resolution of its dispute. The court's analysis was pragmatism at its best: it confronted precedent, thoroughly considered arguments for each side, and devised a solution that did not unfairly discriminate against the interests of either party. Thus, while *Pimentel* presents dangerously inarticulate precedent,[306] *SourceOne* is nonetheless an admirable example of a court getting it right, and represents the possibility of progress despite the precedent.

Admittedly, this Comment's proffered solutions may create situations in which the plaintiff enjoys some manner of relief other than that originally prayed for.[307] These sorts of risks are acceptable in the face of the status quo alternative: complete dismissal that leaves the plaintiff without any recourse.

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302 *See supra* note 190 and accompanying text.

303 *See supra* note 186.

304 *See supra* Part III.C.

305 *See supra* Part IV.C.3.

306 *See supra* Part III.C (discussing the difficulties *Pimentel* poses as precedent).

307 This is true of some of Justice Stevens's suggestions, such as staying the proceedings to await adjudication in the Philippines, which was not part of the relief that Merrill sought.

Elevating pragmatism over dogmatism is, even at its worst, a net beneficial approach to Rule 19 and sovereign immunity. An overuse of the power of dismissal scarcely effectuates—and more often impedes—the administration of justice. Dismissal in the face of no alternate forum and no outlet for relief, i.e., the *Pimentel* "solution," is a solution in name only,[308] and courts from the district levels to the highest appellate bodies should redefine the contours of Rule 19 vis-à-vis sovereign immunity to minimize such an outcome in any instance.

CONCLUSION

Rule 19 has, since its inception, been a source of dispute and consternation among scholars. These criticisms came to a head in the middle of the twentieth century and prompted a vast revision of the Rule with the stated goal of giving courts the flexibility to avoid unfair outcomes because of a blind adherence to labels or categorizations. The criticisms of Rule 19 tended toward solutions much like those proffered herein because Rule 19 is not now—nor was it then—amenable to encapsulation within one binding framework. It is a rule that, by its very nature, *demands* pragmatism on the part of the courts. Despite the progress evident since the 1966 revision, the treatment of Rule 19 in the face of sovereign immunity suggests that in at least one area of the law courts are backsliding toward rigidity at the expense of dispensing effective relief. It is imperative that courts and legislatures, to whatever degree relevant, avoid the temptation to allow their approaches to unique problems to become rote, predictable, and detrimental to the effectuation of justice.

The solutions proposed herein are an attempted return to pragmatism and a reminder that when the doctrine of party joinder begins to slip again into unaccommodating definitional outcomes, it jeopardizes the entire impetus for the Rule: the desire to afford adequate and complete relief. Shedding the reliance on labels and obstinate doctrines is not a revolutionary proposal; rather, it is a return to the underpinnings of modern Rule 19. It is a return to the liberal application of 19(b) to promote the continuation and eventual resolution of disputes, to the conceptualization of a court deciding a controversy whenever it "possibly can do so," and to an open-door policy of

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[308] *See supra* note 183.

justice where the shield of one party is not used to imperil the rights of the aggrieved by harboring the undeserving.[309]

ROSS D. ANDRE[*]

[309] Reed, *supra* note 4, at 337. "While it is true that . . . there will be the possibility of further litigation[,] . . . such a prospect appears unlikely and would *in any event be less undesirable than to leave the plaintiffs without a remedy*." *Id.* at 337 n.27 (emphasis added) (quoting Black River Regulating Dist. v. Adirondack League Club, 121 N.Y.S.2d 893, 904 (App. Div. 1953), *rev'd*, 121 N.E.2d 428 (N.Y. 1954)) (internal quotation marks omitted).

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