

# MAKING SOVEREIGNS INDISPENSABLE: PIMENTEL AND THE EVOLUTION OF RULE 19

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*Though Federal Rule of Civil Procedure 19 might appear to be one of the more esoteric of the Federal Rules, it is actually an exceptionally powerful device: It permits defendants to obtain dismissal of cases over which the court has valid jurisdiction, even when no other forum exists in which the action can be brought. This Article argues that, while Rule 19 was originally intended to facilitate the consolidation of litigation by requiring joinder of absent parties, it has evolved in an important subset of cases to serve a nearly opposite purpose. That is, in many cases in which a party may be affected by the litigation but cannot be joined because it is a sovereign possessing immunity from suit, courts have developed a near-categorical rule that the entire case may be dismissed—even if that means that the plaintiff is permanently denied a remedy. Further, the U.S. Supreme Court recently appeared to endorse this approach, holding that Philippine human rights victims’ claims to their former regime’s assets could not be litigated because two Philippine governmental entities could not be joined in the case.*

*In such situations, this Article argues, Rule 19 functions almost as an abstention doctrine, permitting courts to avoid decisions in cases that may raise sensitive intergovernmental or foreign-relations issues. This use of the rule is problematic for several reasons. It is not authorized by (or even discussed in) Rule 19’s text, and it appears at odds with the original purpose of Rule 19: to promote consolidated litigation of disputes, not to dispose of them entirely. Further, it permits the interests of the plaintiff—and the public interest in resolution of disputes—to be systematically slighted. Thus, although there may be situations in which an absent party’s sovereign immunity should be taken into account, courts have gone too far in their solicitude for absent sovereigns. This Article explores how this phenomenon has evolved and suggests ways in which courts’ analysis of Rule 19 factors should be modified to take account of the rule’s fundamental purposes.*

INTRODUCTION .....	668
I. RULE 19 TRADITION AND PRACTICE .....	672
A. The Development of Mandatory Joinder .....	673
B. The Current Rule 19 Inquiry .....	676

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C.	Rule 19 in Practice: Structure and Application .....	678
II.	THE ABSENT TRIBES PROBLEM AND THE CHANGING FUNCTION OF RULE 19 .....	682
A.	Sovereign Immunity and Rule 19.....	682
B.	<i>Wichita &amp; Affiliated Tribes</i> and <i>American Greyhound</i> : Rule 19 as an Abstention Doctrine .....	688
1.	<i>Wichita &amp; Affiliated Tribes</i> and Rule 19's Evolution.....	690
2.	<i>American Greyhound</i> : Staying Out of the Sovereigns' Way .....	691
3.	The Absent-Tribe Cases as a Form of Abstention.....	695
III.	RULE 19 IN THE FOREIGN-RELATIONS CONTEXT.....	698
A.	Rule 19 and Foreign Sovereigns .....	698
B.	<i>Aguinda v. Texaco</i> : Declining to "Right the World's Wrongs" .....	700
C.	<i>Republic of the Philippines v. Pimentel</i> : The Supreme Court's Validation of Rule 19 "Abstention".....	703
D.	Explaining the Result in <i>Pimentel</i> .....	706
IV.	GRAPPLING WITH <i>PIMENTEL</i> 'S EFFECTS: SHOULD COURTS INVOKE RULE 19 AS A QUASI-ABSTENTION DOCTRINE?.....	710
A.	The Case for Rule 19 "Abstention" .....	711
B.	Rule 19's Transformation: Reasons for Concern .....	712
V.	MOVING FORWARD WITH RULE 19 DOCTRINE .....	717
A.	Intervention and Dismissal .....	717
B.	Restructuring the Rule.....	719
C.	Considerations Specific to the Tribal Context .....	721
D.	Incorporating the Problem Into the Rule Explicitly .....	723
	CONCLUSION.....	724

## INTRODUCTION

This Article explores an anomaly in American civil procedure: situations in which federal courts have dismissed cases because a third-party entity with sovereign immunity is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. In other words, courts have first found that the sovereign party is sufficiently relevant to the litigation that it should be subject to mandatory joinder, and then gone on to conclude that—because the sovereign's immunity precludes such joinder—the entire case must be dismissed rather than proceed without the absent sovereign. Courts have reached such results even when no alternative forum exists in which the plaintiff can press her case, and have done so with an aggressiveness that suggests that something other than a mere procedural concern is at stake. Indeed, in certain circumstances, courts appear to have converted Rule 19 into something akin to an abstention doctrine: a device for dismissing cases that raise issues too politically sensitive for the judiciary to pronounce upon.

This practice of dismissing cases under Rule 19, which has received strikingly little scholarly examination,<sup>1</sup> is distinctive—in some ways unique—in federal procedure. Consider the facts of one high-profile but by no means atypical case: Racetrack operators, believing that competing tribal enterprises are operating illegally under state law, sue the state governor to enjoin her from prospectively entering into gaming compacts with the tribes. There is no question that the court has jurisdiction over the parties and subject matter. The tribes themselves make no effort to participate in the litigation, though there is little question that they have the right to intervene. The case of course concerns an important issue of public policy, and the plaintiffs have no forum other than the federal one in which to seek relief. Nonetheless, citing the immune tribes' absence (and the impossibility of joining them in the suit against their will), the court orders—almost summarily—the case to be dismissed.<sup>2</sup>

Such a result, at least on its surface,<sup>3</sup> seems strikingly at odds with many familiar legal principles: the idea that courts must not decline to assert jurisdiction once it has been established;<sup>4</sup> the notion that the plaintiff is “master of the complaint”;<sup>5</sup> the belief that—in the absence of justiciability concerns, anyway—rights deserve a remedy.<sup>6</sup> Moreover, Rule 19's text does not appear to authorize such a broad practice of dismissal.<sup>7</sup> Indeed, the rule's apparent purposes are uncontroversial and pedestrian—as one scholar has put it, “to identify nonparties whose joinder is necessary for a just adjudication and to secure that joinder.”<sup>8</sup>

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1. Indeed, other than student scholarship, very little has been written about Rule 19, at least outside the tribal context, since Carl Tobias's 1987 article. See Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745 (1987). For a discussion of how Rule 19 has been applied to tribes in particular cases, see Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1 (2005). This is despite the fact that Rule 19 is a frequently used procedural device, and cases involving absent sovereigns arise with some regularity. For example, in the first half of 2009 alone, there were 222 opinions available on Lexis mentioning “Fed. R. Civ. P. 19.” According to my analysis, at least seventeen of these cases involved an argument that an absent sovereign was a required party. Cumulatively, this issue has arisen in hundreds of cases: A Lexis search performed on July 30, 2010 for federal cases containing both “sovereign immunity” and “Fed. R. Civ. P. 19” yielded 604 documents.

2. These facts are closely modeled on those at issue in *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). This case and its complexities are discussed at greater length later in this Article.

3. Indeed, the result in this case, while surprising, is arguably defensible in light of the special considerations that apply in the tribal context. See *infra* Part V.C.

4. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“[Courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution.”).

5. See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (internal quotation marks omitted).

6. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

7. See FED. R. CIV. P. 19.

8. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1062 (1985).

While Geoffrey Hazard once memorably described the absent party under Rule 19 as a “ghostly character [who] haunt[s] the halls of justice, an apparition whose suggested existence stays the hand of the law,”<sup>9</sup> the Rule 19 party seldom makes such a dramatic appearance in practice. In the absence of sovereign immunity concerns, courts have historically applied Rule 19 flexibly, in a way tailored to the facts of the case,<sup>10</sup> and have interpreted Rule 19 to authorize dismissal only in rare circumstances.<sup>11</sup> In particular, the general rule is that the absence of an alternative forum should weigh strongly against dismissal<sup>12</sup> and that an absent party cannot plausibly claim prejudice when it failed to take advantage of the opportunity to intervene.<sup>13</sup> In short, in cases not involving sovereign immunity, interpretations of Rule 19 have not strayed from the rule’s original, relatively modest purposes of promoting complete adjudication of disputes and ensuring that the absence of particular parties does not disrupt the efficient resolution of cases.<sup>14</sup>

Nonetheless, in recent years, Rule 19 has taken on a role seemingly at odds with these traditional purposes when an immune party—particularly a tribe or foreign nation, but in some cases a state or the federal government—is in the offing, a situation that occurs with some frequency.<sup>15</sup> In these cases, rather than relying on Rule 19 as a way of marshaling parties and consolidating disputes, courts have put it to a radically different use as a way of dismissing cases that appear politically controversial or beyond areas of core judicial competence. Moreover, while this trend has been occurring in the lower courts for years, a

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

10. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968) (rejecting an “inflexible approach” to Rule 19 analysis).

11. See Freer, *supra* note 8, at 1078 (“Though [whether plaintiff would have an adequate remedy in the event of dismissal] is but one factor in a multifactor balancing test, federal courts have elevated it to primary importance by their reluctance to dismiss in the absence of an adequate alternative forum. Federal courts generally have been more willing to dismiss for nonjoinder when there is a state court in which all interested persons, including the absentees, can be joined than when no alternative forum is available. In such a situation, the goal of efficient dispute packaging is realized.” (footnotes omitted)).

12. See *id.*

13. See, e.g., *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982) (“Furthermore, the property owners themselves, patently aware of this litigation, never intervened either at the district or appellate court level. Presumably the property owners do not believe that the disposition of this suit will ‘impair or impede’ their ability to protect their interests.”).

14. See Freer, *supra* note 8, at 1061–62 (describing Rule 19’s purpose as promoting “packaging” of disputes); see also Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 826–37 (1989) (discussing Rule 19’s purposes).

15. In the first half of 2009 alone, for example, at least seventeen of approximately 222 reported cases involving Rule 19 concerned an absent sovereign. See *supra* note 1.

recent U.S. Supreme Court case, *Republic of the Philippines v. Pimentel*,<sup>16</sup> has given it a surprisingly strong endorsement.

Indeed, in *Pimentel*, the Court suggested that a case must *always* be dismissed when it may prejudice an absent sovereign, observing that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.”<sup>17</sup> Further, the Court tied this principle to the “comity and dignity interests” implicated in foreign-relations issues, including the right of a foreign sovereign to allow its own courts to determine its legal obligations.<sup>18</sup> Thus, the Court suggested, Rule 19 is not merely a mundane procedural device but a potentially powerful check on the judicial role in cases involving foreign relations.

*Pimentel*, as will be discussed in this Article, involved somewhat unusual facts and a particular litigation strategy aimed at framing the case as one implicating foreign-policy concerns.<sup>19</sup> It is questionable whether, in a more garden-variety Rule 19 case involving a different kind of sovereign (perhaps a tribe or a state) the Court would really adhere to the doctrine *Pimentel* appears to announce. Indeed, in *Pimentel* itself, the Court appeared to qualify some of its more extreme statements.<sup>20</sup> At the very least, however, *Pimentel* appears to solidify the trend of treating Rule 19 as far more than a device for joinder. Lower courts have already begun to read *Pimentel* as a broad license to dismiss a case the progress of which might adversely affect a sovereign’s interests.<sup>21</sup>

This outcome is peculiar in many ways. Courts already have many doctrines at their disposal—from forum non conveniens to comity to the political question doctrine—in circumstances in which the resolution of an issue seems better left to another branch of government or a different venue.<sup>22</sup> Pressing Rule 19 into service as another abstention doctrine thus does little to enhance the practical tools at courts’ disposal. Further, it has a number of disadvantages. Most obviously, at least as the rule has been applied in *Pimentel* and many lower-court cases, reliance on Rule 19 has ignored the plaintiff’s interest in being able

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16. 553 U.S. 851 (2008).

17. *Id.* at 867.

18. *Id.* at 866.

19. See *infra* notes 265–273 and accompanying text.

20. See discussion *infra* notes 245–247 and accompanying text. On the other hand, however, a recent Supreme Court case reaffirms in passing some of *Pimentel*’s statements about absent sovereigns. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010).

21. See, e.g., *Delano Farms Co. v. Cal. Table Grape Comm’n*, No. 1:07-CV-1610 OWW SMS, 2009 WL 3586056, at \*6 (E.D. Cal. Oct. 27, 2009).

22. See *infra* Part III.A. As will be discussed, some of these doctrines are inadequate and unsatisfactory in cases involving tribes in many situations. However, they could be modified to better accommodate tribal cases as well.

to bring suit in *some* forum (a notable contrast, at least in theory, to the forum non conveniens doctrine).<sup>23</sup> An even more fundamental problem, however, is the lack of transparency and straightforwardness involved when a Rule 19 dismissal is motivated by a desire to avoid troublesome issues. Such an outcome, in essence, allows courts to pass off a substantive determination about the judicial role as a procedural technicality, in the process inhibiting frank consideration of whether judicial involvement is desirable in any particular case.

This Article argues that widespread use of Rule 19 for abstention-like purposes is a misuse of the rule. To be sure, courts have an obligation to weigh the Rule 19 factors as the rule dictates—a process that may occasionally result in the dismissal of an otherwise meritorious suit—and may reasonably take sovereign immunity interests into account in that process.<sup>24</sup> But in doing so, courts should not allow Rule 19 to be converted into a free-form doctrine that permits the dismissal of any difficult case involving a foreign nation or any issue that appears best left to the political process or a coordinate branch. To do so would be both to distort Rule 19 analysis and to permit courts to exercise a broad power that the Federal Rules have not granted them.

This Article proceeds in five parts. It begins with a brief overview of Rule 19's origins and its use in more conventional cases. It then goes on to consider cases involving absent tribes in which the abstention-like use of Rule 19 first developed. Next, it discusses the extension of those cases to the international context and, in particular, the implications of the Supreme Court's decision to use Rule 19 in this fashion in *Pimentel*. Part IV argues that, in many circumstances, these novel uses of Rule 19 are inappropriate. Finally, this Article suggests ways that Rule 19 text and practice can be modified to better address disputes involving absent sovereigns.

## I. RULE 19 TRADITION AND PRACTICE

Rule 19 represents an “exception to the general practice of giving plaintiff the right to decide who shall be the parties to a lawsuit.”<sup>25</sup> Instead, it is often said to embody a countertrend in both equity practice and the Federal Rules themselves: “the common theme of equity that the court desire[s] to resolve the entire dispute in one suit . . . .”<sup>26</sup> Under Rule 19(a), courts must join certain

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23. Forum non conveniens, essentially by definition, involves dismissal in favor of another forum that has jurisdiction over the dispute. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

24. I argue that this is especially true when the absent sovereign is a tribe.

25. 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1602, at 19 (3d ed. 2001).

26. See RICHARD D. FREER, CIVIL PROCEDURE 652 n.97 (2d ed. 2009).

so-called “Persons Required to Be Joined if Feasible” if they are subject to service of process and their joinder will not deprive the court of jurisdiction over the subject matter of the action.<sup>27</sup> Under Rule 19(b), if such persons cannot be joined, the court must determine whether it is possible to proceed “in equity and good conscience” without them; if not, the action must be dismissed.<sup>28</sup> Rule 12(b)(7) permits defendants to seek dismissal for failure to join a party under Rule 19;<sup>29</sup> Rule 19 issues can also be raised on appeal even if they were not raised below.<sup>30</sup> Thus, though Rule 19 issues can be raised by any party or by the court sua sponte,<sup>31</sup> the rule tends to benefit defendants, enabling them to override the plaintiff’s decisions about how to shape the case and even, in rare situations, to obtain dismissal under Rule 19(b).<sup>32</sup> Further, it has long carried at least the potential for manipulative use by defendants, who can invoke Rule 19 concerns in hopes of securing dismissal even when they have no true interest in joining absent parties to the action.<sup>33</sup> The following Subpart discusses how the rule evolved and how it has operated in practice.

#### A. The Development of Mandatory Joinder

The rule now formalized in Rule 19 has long roots in equity practice, dating back at least as far as the eighteenth century and perhaps earlier.<sup>34</sup> The Supreme Court recognized the concept in *Shields v. Barrow*,<sup>35</sup> in which the plaintiff sought rescission of an agreement among six people but named only two of them as defendants in order to preserve diversity jurisdiction.<sup>36</sup> The Court held that the suit could not proceed in the absence of the four people who had not been

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27. See FED. R. CIV. P. 19(a).

28. See FED. R. CIV. P. 19(b).

29. See FED. R. CIV. P. 12(b)(7).

30. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (“When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below.”).

31. See *MasterCard Int’l Inc. v. Visa Int’l Serv. Ass’n*, 471 F.3d 377, 382–83 (2d Cir. 2006) (“Because Rule 19 protects the rights of an absentee party, both trial courts and appellate courts may consider this issue sua sponte even if it is not raised by the parties to the action.”).

32. See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 197 (“Rule 19 cannot provide the organizational mechanism to achieve ‘optimal aggregation,’ leaving its use in the hands of parties who strategically wish to force a suit to be dismissed rather than efficiently join all necessary parties.” (footnote omitted)).

33. See FED. R. CIV. P. 12(b)(7) (permitting defendants to move to dismiss based on the absence of a Rule 19 party).

34. See Tobias, *supra* note 1, at 748.

35. 58 U.S. (17 How.) 130 (1855).

36. See *id.* at 131–32.

named as defendants.<sup>37</sup> In so doing, the Court drew a distinction among “three classes of parties to a bill in equity”:

1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . 3. Persons who not only have an interest in the controversy, but 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.<sup>38</sup>

The *Shields* Court termed the second category “necessary” parties and the third category “indispensable” parties.<sup>39</sup> This terminology has persisted to this day in judicial usage<sup>40</sup> (though it has finally been purged from the Federal Rules<sup>41</sup>), despite the fact that the word “necessary” is somewhat confusing. A court may join “necessary” parties over whom it otherwise has jurisdiction, but the suit may proceed without such parties if, for any reason, such parties cannot be joined, making them something other than strictly necessary.<sup>42</sup> For that reason, the current version of Rule 19 refers to such parties as “required,”<sup>43</sup> though it has been observed that the new term is similarly flawed.<sup>44</sup> At least one court has suggested that such parties should be called “desirable” parties.<sup>45</sup> By contrast, “indispensable” parties are genuinely indispensable; to find a party indispensable is by definition to hold that the court may not proceed in its absence.<sup>46</sup>

Case law fleshed out the factors that courts should consider in deciding whether a party fell into the indispensable category, looking to whether the absent party’s interest was, on the one hand, “joint,” “common,” or “united” with

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37. *Id.* at 139.

38. *Id.*

39. *Id.*

40. See *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779–80 (9th Cir. 2005) (discussing terminology).

41. See FED. R. CIV. P. 19; FED. R. CIV. P. 19 advisory committee’s note (2007) (explaining the elimination of the term “indispensable”).

42. See *Peabody Western*, 400 F.3d at 779.

43. FED. R. CIV. P. 19.

44. See Issacharoff, *supra* note 32, at 196.

45. See *Peabody Western*, 400 F.3d at 779.

46. See FED. R. CIV. P. 19 advisory committee’s note (1966) (explaining that Rule 19 uses “the word ‘indispensable’ only in a conclusory sense, that is, a person is ‘regarded as indispensable’ when he cannot be made a party and . . . it is determined that in his absence it would be preferable to dismiss the action”).



the formal parties, or—on the other—separable.<sup>47</sup> Because such tests were often applied rigidly, they came under sharp criticism, with commentators arguing that they had created a “sloganeering process”<sup>48</sup> and a “jurisprudence of labels.”<sup>49</sup> In 1938, existing necessary/indispensable party jurisprudence was incorporated, in somewhat modified form, into the new Federal Rules of Civil Procedure as Rule 19.<sup>50</sup> Many scholars, however, felt that the new Rule 19 had failed to break sufficiently with the old, label-centered tradition.<sup>51</sup>

In 1966, Rule 19 was revised more comprehensively to eliminate “defect[s] in its phrasing.”<sup>52</sup> The new version was designed to deemphasize “abstract classifications of rights and obligations” and instead to stress “the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated.”<sup>53</sup> The new rule also resolved an ambiguity in the original version, clarifying that the absence of an indispensable party did not deprive the court of “power to adjudicate as between the parties already joined.”<sup>54</sup> The rule has remained in virtually the same form, with only the minor changes in terminology described above, ever since.<sup>55</sup>

One important example of the alleged inflexibility of the earlier approach was the interpretation adopted by many courts that Rule 19 required an inquiry as to whether an absent party possessed a “technically joint interest” with one of the existing parties to the suit.<sup>56</sup> This interpretation often led courts to conclude that dismissal was required whenever there existed a *possibility* of prejudice to the interests of the absent party.<sup>57</sup> The new Rule 19(b) language was intended to steer courts away from this sort of overly rigid interpretation by requiring courts to focus on “practical considerations” as part of a “functional,

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47. Tobias, *supra* note 1, at 749.

48. *Id.*

49. *Id.*

50. See 7 WRIGHT, MILLER & KANE, *supra* note 25, § 1601. Elements of the 1938 version of Rule 19 were found in Rules 25, 37, and 39 of the Federal Equity Rules of 1912, which served as Rule 19's source. *Id.* § 1601, at 7.

51. See, e.g., John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

52. FED. R. CIV. P. 19 advisory committee's note (1966).

53. *Id.*; see also *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 117 n.12 (1968).

54. FED. R. CIV. P. 19 advisory committee's note (1966).

55. See FED. R. CIV. P. 19 advisory committee's note (1987) (“The amendments are technical. No substantive change is intended.”); FED. R. CIV. P. 19 advisory committee's note (2007) (“These changes are intended to be stylistic only.”).

56. See 7 WRIGHT, MILLER & KANE, *supra* note 25, § 1607, at 86. In determining whether the absent party's interest was “joint,” courts would consider such questions as whether that party's interest was “distinct and severable.” See, e.g., *Washington v. United States*, 87 F.2d 421, 427–28 (9th Cir. 1936).

57. See 7 WRIGHT, MILLER & KANE, *supra* note 25, § 1607.

balancing approach”<sup>58</sup> under which they would, presumably, consider the actual circumstances of the case and not simply the abstract (and potentially remote) chance of prejudice.

#### B. The Current Rule 19 Inquiry

Under the current version of Rule 19, courts undertake a three-part inquiry to determine whether a party is indispensable, guided at each stage by factors enumerated in the rule’s text and elaborated in case law. First, courts consider whether the absent party is subject to mandatory joinder under Rule 19(a) as what is now called a “required” party.<sup>59</sup> At this stage in the inquiry, Rule 19 directs that courts consider whether an absent party meets one of two criteria. First, a court is to determine whether “in that person’s absence, the court cannot accord complete relief among existing parties.”<sup>60</sup> If the first criterion is not satisfied, a court should alternatively determine whether “that person claims an interest relating to the subject of the action” and whether one of two conditions is met: Disposing of the action in the person’s absence may either “as a practical matter impair . . . the person’s ability to protect the interest” or “leave any party subject to a substantial risk of incurring double, multiple, or . . . inconsistent obligations.”<sup>61</sup> The broader aim of this Subpart is to identify situations in which “the reach of a case goes beyond the formal parties.”<sup>62</sup>

If the court finds the absent party to be required under Rule 19(a), it must then determine whether it is feasible for that party to be joined. If joinder is feasible, the court’s analysis has ended, and the court makes the party part of the lawsuit.<sup>63</sup> In some cases, however, it is not possible to join the party for a variety of reasons—among others, because the court lacks personal jurisdiction over that party, because that party will destroy diversity jurisdiction, or because the party is immune from suit.<sup>64</sup> In such a situation, the court must then undertake the

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58. *See id.*

59. *See* FED. R. CIV. P. 19(a). This used to be called the inquiry as to whether the party is “necessary,” the “term[ ] of art in Rule 19 jurisprudence,” *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005) (internal quotation marks omitted), denoting “persons having an interest in the controversy, and who ought to be made parties.” *Id.* (internal citations omitted).

60. FED. R. CIV. P. 19(a).

61. *Id.*

62. *See* Issacharoff, *supra* note 32, at 195.

63. *See* *Peabody Western*, 400 F.3d at 779.

64. *See id.* (citing FED. R. CIV. P. 19(a)) (noting that problems with venue or personal or subject matter jurisdiction can preclude courts from joining a party in some cases). Note that the text of the rule does not mention sovereign immunity. Courts, however, have recognized sovereign immunity as another factor that makes joinder impossible. *See id.* at 781 (“In many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case.”).

second stage of analysis under Rule 19(b) to determine whether that party's presence is (under the officially abandoned but still-used terminology) "indispensable"<sup>65</sup>—in other words, whether the party has 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."<sup>66</sup> Again, Rule 19 prescribes the factors courts must consider: (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 the court can shape relief to lessen such prejudice; (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 case is dismissed.<sup>67</sup>

Rule 19(b) is frequently said to favor a pragmatic analysis, requiring courts to identify the actual likelihood of the possible harms considered in the Rule 19(a) determination.<sup>68</sup> The Supreme Court has suggested that the Rule 19(b) factors should be understood in terms of four interests—the plaintiff's "interest in having a forum," the defendant's "wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another," "the interest of the outsider," and "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies."<sup>69</sup>

In *Provident Bank*—the Supreme Court's only comprehensive pronouncement on Rule 19 in the past half century<sup>70</sup>—the Court made clear that the Rule 19(b) criteria are to be interpreted practically and flexibly. As the Court emphasized, "[w]hether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation."<sup>71</sup> The Court elaborated, "[T]here is no prescribed formula for determining in every case whether a person . . . is an

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65. As the 1966 Advisory Committee's note explained, Rule 19(b) used "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors . . . , it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." FED. R. CIV. P. 19 advisory committee's note (1966).

66. *Peabody Western*, 400 F.3d at 780 (internal quotation marks omitted).

67. See FED. R. CIV. P. 19(b).

68. See 7 WRIGHT, MILLER & KANE, *supra* note 25, § 1608, at 99 (noting that in applying Rule 19(b), "courts must look to the practical likelihood of prejudice and subsequent litigation, rather than the theoretical possibility that they may occur").

69. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109–11 (1968).

70. The Court has returned to Rule 19 in specialized contexts, including its application to joint tortfeasors in *Temple v. Synthes Corp.*, 498 U.S. 5 (1990) (per curiam), and, as discussed in this Article, to absent immune sovereigns in *Pimentel*, but it has never returned at any length to *Provident Bank's* consideration of the rule's overall operation.

71. *Provident Bank*, 390 U.S. at 118.

indispensable party.”<sup>72</sup> Instead, the Court stressed, “[t]he decision whether to dismiss . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.”<sup>73</sup> Thus, the Court made clear that the new version of the rule was intended to break from the overly mechanical Rule 19 analysis that had prevailed in the past and that courts should be guided largely or entirely by the circumstances of a particular case in deciding whether dismissal is necessary.<sup>74</sup>

Aside from brief mentions in a few cases,<sup>75</sup> the Court engaged in little serious analysis of Rule 19 until *Pimentel*, which deals with the specific situation of a Rule 19(a) party that enjoys sovereign immunity.<sup>76</sup> Thus, even as it represents something of a first-cut take on the revised version of Rule 19, *Provident Bank* remains a key guidepost in Rule 19 analysis, counseling courts to resist the temptation to treat Rule 19 issues mechanically or categorically. While courts have heeded this guidance in many instances, as discussed in the following Subpart, traces of the old approach, reliant on categories and labels, still persist.

### C. Rule 19 in Practice: Structure and Application

The fact that Rule 19 controversies have seldom reached the Supreme Court certainly does not mean that application of the rule has been problem-free. Rule 19 has long been vexed by criticism over the confusing “necessary” and “indispensable” party terminology, for example.<sup>77</sup> Apart from terminology, the

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72. *Id.* at 118 n.14 (internal quotation marks omitted).

73. *Id.* at 118–19.

74. At least until the recent *Pimentel* case, the Court had little more to say about Rule 19 following *Provident Bank*, though the Court applied the same fundamental approach in *Temple*, 498 U.S. 5, a brief per curiam opinion. In that case, the Court held that joint tortfeasors were not (as some courts had deemed them) automatically Rule 19(a) parties, far less Rule 19(b) parties. *See id.* at 7–8. Although *Temple* was a brief opinion with little discussion of Rule 19 beyond the immediate circumstances of the case, the result in *Temple* further underscored that Rule 19 should be guided by case-by-case analysis and not categorical rules.

75. In addition to *Temple*, Rule 19 has, for example, arisen incidentally in cases such as *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 564–67 (2005), which interpreted statutory language restricting supplemental jurisdiction over claims against parties joined under several federal rules, including Rule 19.

76. *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008).

77. *See, e.g., Provident Bank*, 390 U.S. at 117 n.12 (noting Rule 19’s “verbal anomaly” of an “indispensable person who turns out to be dispensable after all”). Despite these changes to the text of the rule, the terms “necessary” and “indispensable” remain in common judicial use. *See, e.g., Anderson v. U.S. Dep’t of Hous. & Urban Dev.*, Civil Action No. 06-3298, 2010 WL 1407983, at \*2 (E.D. La. Mar. 25, 2010) (referring to “Plaintiffs’ failure to join necessary and indispensable parties”). Further, it is far from clear that the rule’s preferred terminology of “required party” for Rule 19(a) parties is any less ambiguous than “necessary party.” *See Pimentel*, 553 U.S. at 863 (noting that, even with the revised text, some

basic structure of the rule has not been subject to universal praise. A central issue is the interplay between Rule 19(a) and Rule 19(b) factors. In a recent article, for example, Samuel Issacharoff argues that the structure of the rule seems inappropriately reversed.<sup>78</sup> That is, he maintains, the factors that courts are directed to consider under Rule 19(a) are formalistic and overly restrictive, identifying “some, but not all, of the situations in which the reach of a case goes beyond the formal parties.”<sup>79</sup> For example, Issacharoff notes, the “complete relief” criterion does not capture all situations in which joining additional parties could lead to a more efficient result; likewise, the “inconsistent obligations” prong does not apply to situations in which different juries could reach different results as to a defendant’s liability for damages.<sup>80</sup> By contrast, Rule 19(b) presents a “familiar balancing test.”<sup>81</sup> Thus, Issacharoff notes, the rule “puts courts in the unfamiliar posture of having to abide by a highly formal assessment of the parties whose joinder might be necessary, rather than proceeding immediately to a more conventional balancing of interests to manage equitably the litigation process.”<sup>82</sup> In Issacharoff’s view, the reverse—that is, a more flexible structure for Rule 19(a) and a tighter set of criteria for Rule 19(b)—would be a more sensible way of achieving Rule 19’s goals.<sup>83</sup>

The way in which courts interpret Rule 19(b) continues to evolve. Despite the seeming flexibility of Rule 19(b) factors and the Court’s pronouncement in *Provident Bank* that “[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party,”<sup>84</sup> courts nonetheless apply several broad rules (many predating *Provident Bank*<sup>85</sup>) about particular circumstances in which parties may be found to be indispensable. For example, though courts normally march through the Rule 19(b) factors, they typically hold that joint obligees to a contract are indispensable parties,<sup>86</sup> as are joint owners

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confusion in terminology remains: “Required persons may turn out not to be required for the action to proceed after all”).

78. See Issacharoff, *supra* note 32, at 195–97.

79. See *id.* at 195.

80. See *id.* In response to Issacharoff, the argument can be made that the threshold for involuntary joinder, which generally thwarts the wishes of both the absent party and the plaintiff, should be reserved for situations in which the party’s absence will cause severe prejudice or inefficiency—even if additional circumstances exist in which, all things being equal, the party’s participation would be desirable.

81. *Id.* at 196.

82. *Id.*

83. See *id.* at 195–97.

84. *Provident Trademans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 n.14 (1968) (internal quotation marks omitted).

85. See 7 WRIGHT, MILLER & KANE, *supra* note 25, § 1614, at 204–05 (noting that, prior to *Provident Bank*, courts applied “pushbutton” categorization of necessary and indispensable parties in certain categories of cases and that the older cases may continue to have at least some precedential value).

86. See *id.* § 1613, at 181.

of a patent or copyright in an action to establish invalidity.<sup>87</sup> Even when an absent party falls into a category generally considered indispensable, however, courts often try, as Rule 19 directs, to shape relief to permit the action to go forward in some form. For example, courts may permit the action to proceed for damages rather than equitable relief if the former poses less risk of harming an absent party.<sup>88</sup>

Courts also take into account certain characteristic fact patterns in indispensable party determinations. In particular, it is generally the case that parties situated so as to be potentially indispensable parties meet the criteria for intervention as of right under Rule 24, the requirements of which echo one of the criteria for determining whether someone is a Rule 19(a) party.<sup>89</sup> This overlap is often consequential: In cases in which the absent party has the opportunity to intervene but has chosen not to, courts frequently discount the factor of prejudice to the absent party, reasoning that, if the possibility of prejudice was substantial, that party could have chosen to participate in the litigation.<sup>90</sup> If intervention would cause hardship to the absent party, however, courts may take that factor into consideration as well.<sup>91</sup> Arguably, the Supreme Court has given this approach its stamp of approval: In *Provident Bank*, the Court noted the

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87. See *id.* § 1614, at 206–08.

88. See FED. R. CIV. P. 19 advisory committee's note (1966) (citing several cases and noting that courts may permit "the award of money damages in lieu of specific relief where the latter might affect an absentee adversely").

89. Compare FED. R. CIV. P. 19(a)(1)(B) (providing that one category of required party is someone who "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 . . . as a practical matter impair or impede the person's ability to protect the interest") with FED. R. CIV. P. 24(a)(2) (indicating that a party must be permitted to intervene provided that it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"). The overlap between the two rules is thus nearly complete in cases where the absent party's interest is at issue. (There are, of course, other categories of Rule 19(a) parties—such as a person necessary to permit the court to afford complete relief—who do not have equivalent rights to intervene under Rule 24(a)).

90. See, e.g., *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982) ("Furthermore, the property owners themselves, patently aware of this litigation, never intervened either at the district or appellate court level. Presumably the property owners do not believe that the disposition of this suit will 'impair or impede' their ability to protect their interests." (quoting FED. R. CIV. P. 19(a)(2)(i))); *Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 820 (8th Cir. 1977) ("In light of [the absent party's] decision not to intervene we conclude that the District Court acted in such a way as to sufficiently protect [that party's] interests."); see also *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 54 n.3 (D.D.C. 1999).

91. See, e.g., *Smith v. Am. Fed'n of Musicians of U.S. & Can.*, 47 F.R.D. 152, 155 (S.D.N.Y. 1969) (considering whether intervention by an absent party would be a hardship); see also FED. R. CIV. P. 19 advisory committee's note (1966) (noting that courts should consider whether absent parties have the ability to protect their interests by intervening but also whether intervention would cause that party hardship).

possibility that failure to intervene might be held to foreclose the absent party's interests in the litigation.<sup>92</sup>

Courts also tend to weigh strongly the presence or absence of an alternative forum in which the entire dispute can be heard. Of course, courts apply the general provision of Rule 19(b) dictating that the absence of any alternative forum in which the plaintiff can bring a case (an “adequate remedy,” in the language of the rule) weighs against dismissal, with some courts giving this factor near-dispositive weight.<sup>93</sup> But by the same token, sometimes a forum exists that appears equally or even more desirable than the federal one, and in such cases a court applying Rule 19 may be more apt to dismiss.<sup>94</sup> Perhaps the most obvious example of this phenomenon is the existence of a state court in which nondiverse parties may be joined.<sup>95</sup> But an alternative forum may be present under more unusual circumstances: In a recent Ninth Circuit employment discrimination case, for example, an absent tribe had an interest, but a proceeding against both the tribe and the present defendant could have been brought by the EEOC.<sup>96</sup>

Finally—and most relevant for purposes of this Article—in recent years, certain circuits have come close to developing a near-absolute rule that, if an absent sovereign's interests may be affected by allowing an action to proceed—in other words, if the sovereign meets the criteria for a “necessary” party—that sovereign is also indispensable, and the action must be dismissed. Notably, this rule runs counter to many principles of Rule 19 practice as applied to nonsovereigns: It tends to be rigid and categorical rather than flexible and case-specific, to focus on the possibility rather than the likelihood of prejudice, and to disregard the sovereign's potential ability to intervene. This rule is explored in depth in the following Parts.

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92. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968) (suggesting that Rule 19 analysis should ignore adverse effects on an absent party resulting from its having “purposely bypassed an adequate opportunity to intervene”).

93. See, e.g., *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir. 1980) (describing the availability of an alternative forum as a “critical consideration”); *Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1978) (stating that the question of whether the plaintiff will have an adequate remedy if the case is dismissed, along with adequacy of remedy, are the most important of the Rule 19(b) factors).

94. See, e.g., *Universal Underwriters Ins. Co. v. Tony DePaul & Sons, Inc.*, No. Civ.A. 01-0631, 2001 WL 1175146, at \*3 (E.D. Pa. July 25, 2001) (“The availability of another forum is a particularly important factor in favor of dismissal where the issue arises at an early stage of the litigation, as here.”).

95. See, e.g., *Kermanshah v. Kermanshah*, No. 08-CV-409(BSJ)(AJP), 2010 WL 1904135, at \*7 (S.D.N.Y. May 11, 2010) (“As [the absent party] is nondiverse, and therefore cannot be joined, the action is dismissed in its entirety for lack of subject matter jurisdiction without prejudice to Plaintiff bringing this action in a state court where the limitations on federal court subject-matter jurisdiction do not apply.”).

96. See *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162–63 (9th Cir. 2002).

## II. THE ABSENT TRIBES PROBLEM AND THE CHANGING FUNCTION OF RULE 19

One of the recurring situations in which an absent Rule 19(a) party cannot be joined—and in which the court must therefore proceed to Rule 19(b) analysis—is when the absent party is a sovereign of some form. Sovereigns of all kinds (states, the United States, tribes, and foreign nations) enjoy sovereign immunity, meaning that they cannot be sued without their consent.<sup>97</sup> Thus, involuntary joinder of a sovereign is by definition impossible. The sovereign may, of course, choose to consent to joinder after it has been determined to be necessary under Rule 19 (or even before this, through the mechanism of intervention), but this happens fairly infrequently. As described below, courts tend to be highly solicitous of the interests of a sovereign that chooses to assert its immunity from joinder, so it is usually to the sovereign's advantage simply to stay out of the case.<sup>98</sup>

Courts treat Rule 19(b) cases involving sovereigns in unusual ways that seem at odds with Rule 19 doctrine and practice in other contexts. In general, courts give particular solicitude to absent sovereigns' interests and are much more ready to dismiss cases under Rule 19(b) if the sovereign cannot be joined because of its immunity. The following Subpart considers the evolution of this treatment.

### A. Sovereign Immunity and Rule 19

In theory, Rule 19(b) provides no particular basis for treating cases involving absent sovereigns differently from any other situation in which the absent party cannot be joined. Neither the text of the rule nor any of the Advisory Committee's notes suggest that any special treatment should be accorded immune sovereigns who are absent parties. Indeed, because Rule 19(b) directs courts to consider the availability of an adequate remedy in deciding whether a case should be dismissed,<sup>99</sup> the text of the rule would seem to suggest that cases in which a Rule 19(a) sovereign cannot be joined are *less* likely to be dismissed than cases in which joinder is infeasible for other reasons. That is because

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97. See Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 515–17 (1978).

98. See, e.g., *Taylor v. Bureau of Indian Affairs*, 325 F. Supp. 2d 1117, 1121 (S.D. Cal. 2004) (noting that “unless the [immune tribe] has ‘waived its sovereign immunity and expressly consented to suit,’ it cannot be joined as a party to this action” (quoting *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100–01 (9th Cir. 1994))).

99. FED. R. CIV. P. 19(b)(4).



sovereign immunity generally precludes joinder in any forum,<sup>100</sup> whereas there is often another forum that has jurisdiction over all parties when a party cannot be joined for lack of personal or diversity jurisdiction.<sup>101</sup>

Nonetheless, in the past two or three decades, a number of circuits have adopted the position that, either as a categorical rule or as a strong presumption, cases in which a Rule 19(a) party cannot be joined as a result of sovereign immunity should be dismissed rather than allowed to proceed without the absent sovereign.<sup>102</sup> This has been particularly true in cases involving absent tribes. One early and influential case, *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, was an action involving entitlement to tribal income in which a defunct tribe had been succeeded by three new ones.<sup>103</sup> The case presented a complex procedural posture. One tribe, the Wichita and Affiliated Tribes, sued the Department of the Interior challenging the Department's allocation of the funds from tribal land sales.<sup>104</sup> The two other successor tribes, the Caddos and the Delawares, intervened as defendants; the Caddos then cross-claimed against the Department of the Interior for retroactive income redistribution.<sup>105</sup> The Wichitas and Delawares declined to waive their immunity as to this claim. Despite the fact that no alternative forum existed for the cross-claim, the court

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100. The principal exception would arise if a sovereign agreed to be sued in one forum but not another, permitting joinder of all parties in the forum to which the sovereign gave consent.

101. See, e.g., *Royal Travel, Inc. v. Shell Mgmt. Haw., Inc.*, Civil No. 08-00314 JMS/LEK, 2009 WL 2448495, at \*4 (D. Haw. Aug. 11, 2009) ("Plaintiffs have an adequate remedy because the state court provides an alternative forum where all of the parties may participate. . . . Plaintiffs put forth no reason why the state court is not an adequate forum. In fact, considering the complex, novel issues of state statutory law presented by the parties, the state court is well suited to resolve this dispute." (citation omitted)).

102. Several circuits have favored dismissal when the absent party is immune, although some insist that all Rule 19(b) factors should be considered nonetheless. See *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48 (2d Cir. 2004) (stating that the court should consider all Rule 19(b) factors, but immunity of the absent party is of paramount importance); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (finding that, while the court should weigh all Rule 19(b) factors, the immunity of the absent sovereign carries strong weight); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480–81 (7th Cir. 1996) (stating that a case may be dismissed if the absent party is immune even if the plaintiff will lack a remedy); *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (accord[ing] near-dispositive weight to tribal immunity in Rule 19 analysis); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) ("The dismissal of this suit is mandated by the policy of tribal immunity."). Of course, it is important to note that courts do not universally dismiss cases in which a defendant argues that an absent sovereign is a Rule 19 party. Generally, when courts allow such cases to proceed, they do so by finding that the sovereign is not required under Rule 19(a), and thus no Rule 19(b) analysis need be undertaken. See, e.g., *Washington v. Daley*, 173 F.3d 1158, 1167–68 (9th Cir. 1999) (holding that the tribes were not necessary parties under Rule 19(a), in part because existing parties adequately represented their interests).

103. 788 F.2d at 767.

104. *Id.*

105. *Id.* at 771.

held that the two “absent” tribes were indispensable parties, necessitating dismissal of the case.<sup>106</sup>

In arriving at this result, the court suggested that the sovereign immunity of the absent tribes was a decisive factor trumping ordinary Rule 19(b) considerations. As the court suggested, a failure to join for reasons of immunity was qualitatively different from other failures to join Rule 19(a) parties: “This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.”<sup>107</sup> Further, the court concluded, the Wichitas’ ability to intervene as defendants as to the cross-claim did not (as it might in other Rule 19 situations) militate against dismissal because it was “wholly at odds with the policy of tribal immunity to put the tribe to this Hobson’s choice between waiving its immunity or waiving its right not to have a case proceed without it.”<sup>108</sup>

The logic of *Wichita & Affiliated Tribes*—that to require the sovereign to waive its immunity to protect its interests undermines the doctrine of sovereign immunity more generally—certainly can be (and has been) applied to other sovereign immunity contexts.<sup>109</sup> Yet the court in *Wichita & Affiliated Tribes* relied specifically on policies underlying *tribal* immunity in reaching its result, and cases

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106. *Id.* at 780–81.

107. *Id.* at 777.

108. *Id.* at 776.

109. See Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 806–16 (2008) (discussing the rationale in cases in which Rule 19 dismissals are used as a means of protecting the immune sovereign's interests). As I have argued elsewhere, see *id.* at 832 n.372, solicitude for the sovereign's interests in the Rule 19 context may, interestingly, arise from confusion with a line of cases involving sovereigns that use the term “indispensable party” to mean something slightly different from the way it is defined in Rule 19. This line of cases, predating the enactment of the Administrative Procedure Act, 5 U.S.C. § 702 (2006), (which waived the United States’ immunity in certain situations), derived from the procedure of suing a federal officer as a way around sovereign immunity. In certain situations in which the court determined the suit to be, in substance, against the government directly rather than against the officer, the court would dismiss on the grounds that the United States was an “indispensable party” that could not be joined because of sovereign immunity. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687–88 (1949); *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371, 375 (1945). Though this rationale is related to the rationale in the current Rule 19 absent-sovereign cases, it is also different in important ways since the argument in the absent-sovereign cases is not that the suit is a disguised attempt to sue the sovereign directly but simply that the sovereign's interests may be negatively affected. See Florey, *supra*, at 832 n.372 (discussing the early indispensable party cases and characterizing them as “deriv[ing] from a tradition that is both related to and fundamentally different from the set of concerns that are reflected in Rule 19”). Courts have continued to perpetuate this confusion in some respects. In *Republic of the Philippines v. Pimentel*, for example, the Court somewhat misleadingly cited *Mine Safety*, describing it as an “authorit[y] involving the intersection of joinder and the governmental immunity of the United States.” 553 U.S. 851, 866 (2008).

from the tribal context continue to form the bulk of cases in which courts contemplate dismissal because an immune Rule 19 party cannot be joined.<sup>110</sup>

Why has this issue disproportionately arisen in cases involving tribes (as opposed to other immune sovereigns, such as states or the United States)? A few theories are plausible. First, in general, states and the United States have waived their immunity to a greater extent than have most tribes, making the problem of joinder more likely to arise when tribes are concerned.<sup>111</sup> Second, many tribes are, because of financial problems or lack of familiarity with (and trust of) the nontribal court system, reluctant participants in litigation.<sup>112</sup> While states and the federal government may welcome (or at least accept as a routine obligation) the opportunity to participate in cases that may affect their interests, tribes have more incentives to fight involvement in such litigation, particularly when their absence may lead to the case's ultimate dismissal.<sup>113</sup> Finally, the increasing prevalence of Rule 19 dismissals in cases involving absent tribes began at a time when, in many other respects, the Supreme Court had dealt severe blows to tribal sovereignty.<sup>114</sup> As a result, judges sensitive to tribes' political plight may have been particularly aware of the need to protect tribal immunity and especially ready to invoke Rule 19 in situations in which an absent tribe was involved.<sup>115</sup>

Factors unique to the tribal context may, therefore, have led judges to be more open to Rule 19 dismissals in cases in which absent tribes' interests were at stake. But they have established a strain of Rule 19 doctrine with much broader implications. In general, courts that have chosen to protect absent tribes have not limited their holdings or reasoning to the tribal context.<sup>116</sup> Indeed, the practice of dismissing cases for failure to join an immune sovereign has in some cases worked *against* tribes' interests,<sup>117</sup> resulting in the dismissal of cases brought by

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110. See Fletcher, *supra* note 1, at 14–105 (cataloguing major cases).

111. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1111–13 (2007) (discussing the extent to which tribes have—or have not—waived their sovereign immunity).

112. See *id.* at 1109 (discussing the fragile financial state of many tribes).

113. Courts' tendency to dismiss actions affecting absent tribes may therefore have the effect of providing more incentives for tribes to fight vigorously to stay out of litigation.

114. See Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 595 (2010) (discussing the phenomenon of the Supreme Court “sharply limit[ing] the regulatory powers of tribal governments and the jurisdiction of tribal courts while leaving intact the sovereign immunity that tribes have traditionally enjoyed”).

115. See, e.g., *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) (discussing the importance of policies underlying sovereign immunity in concluding that the case should be dismissed).

116. See Florey, *supra* note 109, at 813 (noting that Rule 19 cases involving tribes have been applied in other contexts).

117. Further, in cases such as *Wichita & Affiliated Tribes*, which involved a tribal plaintiff as well as tribal indispensable parties, Rule 19 may work to the benefit of some tribes but to the detriment of others in any given litigation.

tribal plaintiffs for failure to join other immune sovereigns (usually the United States<sup>118</sup> but occasionally individual states as well).<sup>119</sup> Thus, the tribal Rule 19 cases have had the effect of dramatically altering the way in which Rule 19 accommodates sovereigns, even when those sovereigns are not tribes.

To be sure, courts have to some extent attempted to fit the tribal immunity cases within the existing doctrinal rubric of Rule 19. Thus, courts have relied heavily on the Supreme Court's statement made in passing in *Provident Tradesmens Bank & Trust Co. v. Patterson* that "[t]he decision whether to dismiss [under Rule 19] . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests."<sup>120</sup> Under this formulation, some courts have held that sovereign immunity mandates special treatment because it is a compelling factor under *Provident Bank*. For example, the D.C. Circuit has held that when a necessary party has sovereign immunity, "there is very little room for balancing of other factors' set out in Rule 19(b) . . . because immunity may be viewed as one of those interests 'compelling by themselves,'"<sup>121</sup> and that, in such circumstances, a court is "confronted with a more circumscribed inquiry" than usual.<sup>122</sup> Other circuits have adopted similar reasoning.<sup>123</sup>

Despite courts' efforts to locate the rule of indispensable sovereigns within *Provident Bank's* analysis, the policy nonetheless remains both anomalous within the realm of Rule 19 jurisprudence and potentially in tension with *Provident Bank's* broader mandates. Notably, courts have recognized this divergence from ordinary Rule 19 cases, commenting on the fact that ordinarily influential factors—such as the absent party's failure to intervene and the lack of an alternative forum—are given less weight when the absent party is immune. When considering the extent of Rule 19(b) prejudice to a party, some courts have cautioned against attaching *any* weight to an immune party's failure to intervene. In *Kickapoo Tribe v. Babbitt*, for example, the D.C. Circuit found that the state of Kansas was an indispensable party in a suit by a tribe against the

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118. See, e.g., *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 747–48 (8th Cir. 2001); *Lee v. United States*, 809 F.2d 1406, 1410–11 (9th Cir. 1987).

119. See, e.g., *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 55 (D.D.C. 1999).

120. 390 U.S. 102, 118–19 (1968).

121. *Kickapoo Tribe*, 43 F.3d at 1496 (quoting *Wichita & Affiliated Tribes*, 788 F.2d at 777 n.13).

122. See *id.* at 1497.

123. See, e.g., *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (stating that the presence of sovereign immunity is a compelling factor under Rule 19(b)); *cf. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (declining to treat sovereign immunity as a compelling factor under Rule 19 but taking note of the fact that other circuits have done so).

Secretary of the Interior to validate a tribal gaming compact.<sup>124</sup> Though the district court had held that Kansas's failure to intervene could be held against it in assessing possible prejudice under Rule 19(b), the D.C. Circuit reversed, finding that the existence of an absent sovereign "cabin[ed] the district court's discretion" to consider certain Rule 19(b) factors.<sup>125</sup> Likewise, in *Pueblo of Sandia v. Babbitt*,<sup>126</sup> a tribe sued the Department of the Interior seeking enforcement of portions of tribal-state gaming compacts following stalled negotiations with New Mexico.<sup>127</sup> The court found New Mexico to be an indispensable party.<sup>128</sup> Though it noted bluntly that "if the State were so worried about protecting its interests, it certainly could waive its immunity and intervene in this action," the court nonetheless found itself "constrained by appellate decisions," notably *Kickapoo Tribe*, in considering this factor in Rule 19's prejudice calculus.<sup>129</sup>

Courts have also dismissed cases involving absent sovereigns notwithstanding the lack of an alternative remedy for the plaintiff. In *American Greyhound Racing, Inc. v. Hull*,<sup>130</sup> for example, the Ninth Circuit held that certain tribes were indispensable parties to a suit by various racetrack owners and operators seeking an injunction against the governor of Arizona to prevent her from renewing existing gaming compacts with tribes or negotiating new ones on the grounds that the type of gaming authorized by the compacts violated Arizona law.<sup>131</sup> In undertaking the Rule 19(b) analysis, the court observed that "there is no adequate remedy available to them if this case is dismissed for lack of joinder of indispensable parties," a fact that would "ordinarily favor the plaintiffs."<sup>132</sup> In this case, however, the court was unmoved, finding that "this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims."<sup>133</sup>

Courts thus have frankly acknowledged that the existence of an absent immune party alters the usual Rule 19 analysis. By the same token, courts' efforts to fit the absent-sovereign cases under the rubric of *Provident Bank* by labeling immunity a compelling factor are somewhat unconvincing. It is highly debatable whether the Supreme Court intended its mention of compelling factors to suggest that there might be cases in which Rule 19's usual multifactor

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124. *Kickapoo Tribe*, 43 F.3d at 1493.

125. *Id.* at 1500.

126. 47 F. Supp. 2d 49 (D.D.C. 1999).

127. *Id.* at 50.

128. *Id.* at 49.

129. *See id.* at 54 n.3.

130. 305 F.3d 1015 (9th Cir. 2002).

131. *Id.* at 1024–25.

132. *Id.* at 1025.

133. *Id.*

analysis might be preempted. The language supporting this view—the Supreme Court’s statement that the Rule 19 dismissal decision may be based on factors “some . . . substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests”<sup>134</sup>—appears intended primarily to emphasize the case-by-case nature of Rule 19 adjudication, quite the opposite of authorizing courts to label certain factors compelling per se. Indeed, as the Court noted in the same passage, such factors “vary[ ] with the different cases” and courts must “examine each controversy” to determine how such asserted factors play out in the actual case.<sup>135</sup> It thus seems unlikely that the Court intended the passage to be read to encourage courts to regard a single factor, such as the absent party’s immunity, as a categorically compelling one regardless of other circumstances. Further, outside the sovereign immunity context, courts have rarely if ever labeled factors compelling in the sense that they essentially foreclose further inquiry.<sup>136</sup> Indeed, rather than integrating the absent-sovereign cases into the *Provident Bank* framework, the labeling of immunity as a compelling factor might be said to highlight the uniqueness of cases involving immune sovereigns in the universe of Rule 19 jurisprudence.

B. *Wichita & Affiliated Tribes* and *American Greyhound*: Rule 19 as an Abstention Doctrine

Given that the immune-sovereign cases represent a departure—and in some ways an uneasy one—from the mainstream of Rule 19 jurisprudence, how can they best be understood? Courts have tended to explain these cases as being primarily about deference to the policies underlying sovereign immunity,<sup>137</sup> and undoubtedly, solicitude for the immune sovereign’s interests is at least a partial motivating force in some courts’ decisions.<sup>138</sup> In many of the tribal immunity

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134. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968).

135. *Id.*

136. I have not been able to locate a case in which a court has specifically labeled any factor other than sovereign immunity a compelling factor under *Provident Bank*. *Morrison v. New Orleans Public Service Inc.*, 415 F.2d 419, 424–25 (5th Cir. 1969), a four-decades-old case decided in the immediate aftermath of *Provident Bank*, suggests—but does not directly state—that Louisiana’s policy against the splitting of wrongful death actions might be a compelling factor mandating the treatment of absent survivors of a decedent as indispensable parties. Notably, however, plaintiffs in this case had an adequate remedy in state court following dismissal of the action. *Id.* at 425.

137. See, e.g., *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) (describing dismissal as “mandated” by policies of tribal immunity).

138. Indeed, I have previously written about courts’ tendency to create what I have called a “penumbral” type of sovereign immunity, in the Rule 19 context as well as others, by extending the doctrine to require the dismissal of suits that, while not prohibited by the letter of sovereign immunity doctrine, nonetheless threaten to undermine the doctrine’s underlying policies. See generally Florey, *supra* note 109.

cases, however, it might be argued that an additional factor is at play. Tribes are at least semiautonomous sovereign nations that have always fit somewhat provisionally and uneasily into the political body of the United States.<sup>139</sup> Traditionally, Congress has possessed plenary power over tribal affairs,<sup>140</sup> with courts occupying a far-distant secondary role. Tribes are not subject to the U.S. Constitution<sup>141</sup> (or mentioned in it more than incidentally<sup>142</sup>) and constitutional rights apply to them only by a statute that, for the most part, does not provide for judicial review.<sup>143</sup> American courts have always been on somewhat uneasy ground, then, when it comes to pronouncing on questions affecting tribes.

In other contexts, courts have developed doctrines that permit them to abstain from deciding questions of tribal law or tribal rights, sometimes by deferring to tribal bodies. Thus, at least in theory, a litigant must normally exhaust tribal remedies before arguing to a federal court that the tribe lacked adjudicative jurisdiction over her case.<sup>144</sup> In other circumstances, courts have gone to great lengths to avoid deciding internal tribal matters, such as the interpretation of tribal election results, by invoking tribal immunity or principles of tribal self-government.<sup>145</sup> The tribal absent-sovereign cases, then, might be seen as falling within this tradition by representing a way for courts to gracefully avoid deciding matters that are perhaps better left to other political bodies: Congress, the Department of the Interior, states, or tribes themselves.

In attempting to take a hands-off approach to tribal matters and (in some circumstances) to refrain from issuing decisions that would cause tribes grave harm, courts have reshaped Rule 19 doctrine. The following two cases are illustrations of this principle.

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139. See, for example, Justice Marshall's famous characterization of tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

140. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558–61 (1832) (discussing plenary power).

141. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

142. The U.S. Constitution mentions tribes only in granting Congress power to "regulate Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, and in its exclusion of "Indians not taxed" from the section describing the apportionment of representatives and direct taxes. *Id.* art. I, § 2.

143. The Indian Civil Rights Act (ICRA), passed in 1968, makes most (but not all) of the Bill of Rights applicable to tribes. 25 U.S.C. § 1302 (2006). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–62 (1978), however, the Court held that ICRA was not enforceable in a civil action against a tribe and could be enforced only in habeas proceedings.

144. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16 (1987). This principle remains the law, though the Court has undermined the principle somewhat by permitting challenges to tribal jurisdiction in cases in which tribal remedies were not exhausted but the tribe's lack of jurisdiction was readily apparent (even if the lack of jurisdiction became clear only with hindsight). See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

145. See, e.g., *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1459–61 (10th Cir. 1989).

1. *Wichita & Affiliated Tribes* and Rule 19's Evolution

*Wichita & Affiliated Tribes* involved three tribes that had succeeded a single tribe with valuable land holdings and disagreed about the proper way for the Interior Board of Indian Affairs (IBIA) to allocate proceeds from the land.<sup>146</sup> The land proceeds had first been distributed equally among the tribes (favoring the smaller Wichitas).<sup>147</sup> In the 1970s, however, the IBIA switched to a population-based method (favoring the larger Caddos).<sup>148</sup> The suit was initiated by one of the tribes, the Wichitas, which sued the Secretary of the Interior, challenging the method of allocation based on current population.<sup>149</sup> The other two tribes, the Caddos and Delawares, then intervened as defendants, and the Caddos cross-claimed against the government seeking reallocation of the funds according to the new rule.<sup>150</sup> Thus, all three tribes had voluntarily decided to participate in the litigation. Nonetheless, the Wichitas and Delawares declined to waive their immunity as to the Caddos' cross-claim—as to which the court found them to be Rule 19(a) required parties—and the court decided that they were Rule 19(b) parties, necessitating dismissal of that claim.<sup>151</sup>

As discussed in the preceding Subpart, the court relied heavily on the “policy of tribal immunity”<sup>152</sup> in determining that the cross-claim should be dismissed. The case can also be seen, however, as the court's effort to defer to the political branches on a matter not within core judicial expertise. As to the Wichitas' main claim, the court had only to conclude that the IBIA's new allocation formula was “rational” in order to reject the Wichitas' challenge, which the court did with little fanfare.<sup>153</sup> For the court to determine, however, whether retroactive allocation of land proceeds according to the new formula was justified would presumably have required a far more searching exploration of the United States' complicated role as trustee with fiduciary duties to all three tribes.<sup>154</sup> Further, a judicial resolution of the issue could potentially have interfered with negotiations among the tribes and the government. The Caddos had, for example, already presented their grievances to the IBIA, which was “apparently

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146. *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 767 (D.C. Cir. 1986).

147. *Id.*

148. *Id.*

149. *Id.* at 770–71.

150. *Id.* at 771.

151. *Id.* at 777–78.

152. *Id.* at 776.

153. *See id.* at 771, 778–80. Note that the court did, however, reverse the district court's grant of summary judgment to the government on the issue of whether the IBIA was required to make adjustments to population figures periodically in the future. *Id.* at 768.

154. *See id.* at 775.



willing to concede a large portion of the Caddos['] claim for retroactive relief.”<sup>155</sup> Thus, for the court to render a decision on the Caddos’ cross-claim might have appeared an inappropriate intrusion by a nonexpert branch of government into delicate issues of intertribal relations that were already under consideration by the IBIA.

Although much of the court’s reasoning focused solely on the sovereign immunity question, the importance of the policies underlying tribal sovereign immunity in this case seems open to question, given the tribes’ voluntary participation in the suit.<sup>156</sup> And indeed, the court added a conclusion to the opinion that hinted at some of the broader issues beyond sovereign immunity that it may have taken into consideration. The court noted that after the tribes’ agreement to divide the land proceeds equally had broken down, the Department of the Interior found itself in a “no-win situation” in which it was “forced to intervene and impose a solution,” thus inevitably creating “winners and losers.”<sup>157</sup> In this context, the court found, the IBIA’s “population-based allocation decision was a reasonable and basically just solution to a difficult problem.”<sup>158</sup> Given this backdrop of the IBIA’s having achieved “basic[ ] just[ice]”<sup>159</sup> in working out a solution to complex issues, the court’s decision to take as deferential a role as possible makes sense as a way of respecting the compromise already achieved.

## 2. *American Greyhound*: Staying Out of the Sovereigns’ Way

Another important example of the abstention-like use of Rule 19 is the 2002 opinion *American Greyhound Racing, Inc. v. Hull*,<sup>160</sup> the previously mentioned case in which racetrack owners sought to enjoin the governor of Arizona from renewing existing gaming compacts with tribes or negotiating new ones on the grounds that the compacts authorized forms of gaming prohibited by Arizona law.<sup>161</sup> The district court initially granted the injunction on the grounds that the statute authorizing the governor to enter into compacts was a delegation of power not permitted under the Arizona constitution and that, further, even if the delegation problem were remedied, Arizona law barred several types of

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155. *Id.*

156. In various contexts, courts have considered voluntary involvement in litigation as a factor making it more likely that sovereigns have waived their immunity. See *infra* note 324.

157. *Wichita & Affiliated Tribes*, 788 F.2d at 780.

158. *Id.*

159. *Id.*

160. 305 F.3d 1015 (9th Cir. 2002).

161. See *id.* at 1018. Of course, Arizona itself enjoys sovereign immunity; plaintiffs, however, were able to rely on the exception to state sovereign immunity for prospective injunctive relief against a state official.

gaming authorized by the compacts.<sup>162</sup> The district court decisively rejected the defendants' Rule 19 arguments as to the absent tribes who would be parties to the renewed contracts, finding that the tribes were not even Rule 19(a) necessary parties, much less Rule 19(b) parties.<sup>163</sup> Though the court's discussion of the Rule 19 issues was lengthy, it hinged on the idea that the absent tribes had "no legally protectable interest in the Governor's negotiating agenda"<sup>164</sup>—in other words, that because the injunction affected only future compacts the content of which was still uncertain, the tribes simply did not have the sort of tangible interest in them that Rule 19 sought to protect from undue prejudice.

By contrast, the Ninth Circuit found that Rule 19 was dispositive of the issues in the case and required dismissal.<sup>165</sup> The Ninth Circuit first found that the tribes were required parties, noting that the tribes "claim[ed] an interest and [were] so situated that this litigation as a practical matter [would] impair[] or impede[] their ability to protect it."<sup>166</sup> Although the district court had questioned whether the tribes possessed a cognizable interest in the matter, the Ninth Circuit noted that the existing compacts provided for automatic renewal if neither party gave notice of termination and that this provision was an "integral . . . part of the bargain" between the tribes and the state.<sup>167</sup> Thus, the Ninth Circuit reasoned, the tribes' interest would be impaired by the injunction because it would, in effect, cause them to get less than they bargained for.<sup>168</sup> On this basis alone, the Ninth Circuit found that the tribes were necessary parties with a relevant Rule 19 interest.<sup>169</sup> Even more notably, the Ninth Circuit further observed that, although the district court had not touched the current compacts, its order "amount[ed] to a declaratory judgment that the present gaming conducted by the tribes is unlawful."<sup>170</sup> Although the tribes would not be bound in any way by the judgment, the court found that it might in practice impair "[t]he sovereign power of the tribes to negotiate compacts," another relevant interest for Rule 19 purposes.<sup>171</sup>

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162. See *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1029–30 (D. Ariz. 2001).

163. See *id.* at 1049–50 (finding that tribes were not necessary parties and, even assuming arguendo that they were, concluding that they were not indispensable).

164. *Id.* at 1047.

165. *American Greyhound*, 305 F.3d at 1022.

166. *Id.* at 1023 (emphasis omitted).

167. See *id.*

168. See *id.* ("Would the tribes have made the same bargain if the compacts had provided for automatic termination at the end of their original ten-year terms? We cannot say, but there can be no question that automatic termination renders the compacts less valuable to the tribes. . . . [N]ot being parties, the tribes cannot defend those interests.").

169. *Id.*

170. *Id.* at 1024.

171. See *id.*

Having found the tribes to be necessary parties and having observed that sovereign immunity prevented their joinder, the court proceeded fairly quickly through the Rule 19(b) test. In its analysis of several relevant factors, the court assigned significant weight to the potential for prejudice to the tribes. The first factor, prejudice to the absent party, of course involved explicit consideration of this issue; here, the court noted that the analysis “largely duplicate[d]” the Rule 19(a) analysis of whether the tribes’ interests would be impaired or impeded by their absence.<sup>172</sup> Further, in analyzing the second factor, the court observed that no avenue existed for shaping meaningful relief that would reduce this prejudice.<sup>173</sup> Likewise, the third factor, adequacy of judgment, favored dismissal because a judgment shaped to safeguard the tribes’ interests would not be adequate. If, on the other hand, the plaintiffs received the full remedy they sought, “the tribes’ protectible [sic] interests [would be] impaired.”<sup>174</sup> Finally, while the fourth factor, the absence of an adequate remedy in the event of dismissal, “would ordinarily favor the plaintiffs,” this result was “a common consequence of sovereign immunity.”<sup>175</sup> The court then declared with little explanation that “the tribes’ interest in maintaining their sovereign immunity outweighs the plaintiffs’ interest in litigating their claims.”<sup>176</sup>

The court’s analysis in *American Greyhound* appears tilted toward dismissal in a few respects. To begin with, the court’s reasoning hinged heavily on the tribes’ interest in renewal of the compacts. This interest, as discussed above, constituted the principal grounds for finding the tribes to be necessary parties and also arguably figured in the court’s analysis of all four Rule 19(b) factors. Yet because the tribes’ interest in renewal of the compacts was not a legally protectable one (given that renewal was certainly not guaranteed), the decision to accord it substantial weight already placed the court somewhat at the frontiers of Rule 19 jurisprudence.<sup>177</sup> While the court’s language and result recalled the

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172. *Id.* at 1025.

173. *See id.*

174. *Id.*

175. *Id.*

176. *Id.* The court in fact observed that “some courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes.” *Id.* Nonetheless, the court reasoned, “we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.” *Id.* Given that the court did not explain this conclusion further, however, it is not clear how the Ninth Circuit approach differs much in practice from that of circuits that have abandoned the four-part balancing test since the court provided no basis on which to distinguish any case involving an immune sovereign; thus, the sovereign’s interest in its immunity would presumably always outweigh the plaintiff’s interest in obtaining relief.

177. The general rule is that a relevant interest in Rule 19(a) analysis must be a “legally protected interest, not merely [a] financial interest or interest of convenience.” *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986) (citation omitted).

traditional principle that a contract may not be invalidated in the absence of an indispensable party, it also represented a significant extension of that principle, since the contracts that would be threatened by a decision in favor of the plaintiffs had yet to be entered into.<sup>178</sup> Further, having gone out of its way to deem the tribes' interest an important one worthy of substantial weight in the Rule 19 analysis, the court then engaged in at least *triple* counting of the protectable interest factor of Rule 19(a) at the Rule 19(b) stage: (1) by holding that the "protectable interest factor" of Rule 19(a) was essentially identical to the Rule 19(b) "prejudice" factor;<sup>179</sup> (2) by noting that a judgment that provided the plaintiffs adequate relief would necessarily be prejudicial to the tribes;<sup>180</sup> and (3) by holding that the tribes' interest in staying out of the litigation outweighed the plaintiffs' interests in obtaining relief.<sup>181</sup>

As an instance of Rule 19 analysis, *American Greyhound* thus meshes poorly with much of the existing case law from contexts not involving sovereign entities. As a solution to a difficult problem of how to confront a troubling political issue, however, *American Greyhound* makes a great deal of sense. Consider the choice the *American Greyhound* court was faced with. The court was being asked to intervene in negotiations that at least two sorts of sovereigns (Arizona on the one hand and sixteen Indian tribes on the other)<sup>182</sup> desired to enter into, with the tacit blessing of a third sovereign (the federal government, by virtue of its passing the Indian Gaming Regulatory Act).<sup>183</sup> Further, the court was being asked to reach a result that might cast a pall over compacts already negotiated by these sovereign entities by suggesting that they might actually have been illegal under Arizona law. This latter effect obviously concerned the court,

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178. Judge Rymer, in a brief dissent, observed as much, noting that "while unquestionably substantial and important, the tribes' interest [in renewing gaming compacts] is not a *legally protected* interest that may not be resolved in their absence." See *American Greyhound*, 305 F.3d at 1027–28 (Rymer, J., dissenting).

179. *Id.* at 1024–25 (majority opinion). The *American Greyhound* court, of course, had a point in suggesting that the two factors overlap to some extent. If a party's legal interests might be affected by a proceeding, it is a reasonable assumption that it will also be prejudiced if the proceeding is allowed to go forward. At the same time, it makes little sense that the drafters of Rule 19 would have intended the same factor to count in identical fashion at the Rule 19(b) stage as at the Rule 19(a) stage. Notably, Rule 19(b)(1) directs courts to consider "the extent to which a judgment rendered in the person's absence might prejudice that person *or the existing parties*," FED. R. CIV. P. 19(b)(1) (emphasis added), suggesting that prejudice to the absent parties might perhaps be balanced in some way against prejudice (or lack thereof) to the existing parties if the case goes forward.

180. See *American Greyhound*, 305 F.3d at 1025.

181. See *id.* While the tribes' interest in maintaining their sovereign immunity is obviously not identical to their interest in renewing the gaming compacts, the two interests are closely related since presumably tribes would have a need to participate in the litigation (and thus waive their sovereign immunity) only to the extent their interests were threatened.

182. See *id.* at 1019.

183. See *id.* at 1018–19.

which noted that the district court's order in favor of the plaintiffs "amount[ed] to a declaratory judgment that the present gaming conducted by the tribes is unlawful."<sup>184</sup> Finally, the court was asked to do all of this not at the behest of any entity representing the public interest or Arizona voters but in response to the parochial and obviously self-interested demands of competitive gambling operations. One can readily see why a court might believe that the terms of Arizona's tribal gaming compacts constituted an issue best left to the political process and that judicial intervention would be both controversial and inappropriate. As Matthew L.M. Fletcher has noted of this case, "Indian gaming is a multi-million dollar industry in Arizona and the district court issued an order ending all Indian gaming upon the expiration of the compacts."<sup>185</sup> Had this order been allowed to stand, the tribes who were parties to the compact would have lost "the vast majority of the[ir] governmental services budget . . . includ[ing] housing, health care, employment, social services, and everything a state and local government provides its constituents."<sup>186</sup> Given these facts, it is understandable that the court was reluctant to take the drastic action of unilaterally stopping the negotiating process in its tracks.

### 3. The Absent-Tribe Cases as a Form of Abstention

Dynamics similar to those at play in *Wichita & Affiliated Tribes* and *American Greyhound*—situations in which resolving the legal questions at hand would mean delving into sensitive questions of state-tribal or, in some cases, intertribal relationships—characterize many of the other absent-tribe dismissals. As Fletcher has noted, challenges to tribal gaming tend to be "all or nothing cases, meaning that either the compacts are valid or not."<sup>187</sup> Because tribal gaming is a well-established phenomenon reflecting conscious policy choices and large sums of money on which tribes depend, any case holding—even prospectively—that some form of tribal gaming is invalid or illegal is likely to have severe unintended policy and economic consequences. Given the intergovernmental cooperation that the compacts reflect, an argument can be

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184. *Id.* at 1024.

185. Fletcher, *supra* note 1, at 81.

186. *Id.*

187. *Id.* at 82. In some of these cases, courts have also dismissed challenges to compacts under either Rule 19 or state procedural equivalents for failure to join indispensable-party tribes. See, e.g., *State ex rel. Coll v. Johnson*, 990 P.2d 1277, 1279–80 (N.M. 1999). Note that courts presented with gaming compact cases have not, however, universally opted for dismissal. In some cases, they have relied on the argument that the public has a stake in continued litigation. See, e.g., *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 486–87 (Wis. Ct. App. 2002) (applying the Wisconsin state procedural rule comparable to Rule 19 but finding that a challenge to compacts could go forward without joinder of affected tribes, in part because the "interests of the public" favored resolution of the issue).

made that a single court proceeding initiated by private parties is not the proper forum to invalidate them or to derail their negotiation.

In such cases, Rule 19 might be said to serve a function similar to that of other doctrines that permit courts to abstain from issues that are sensitive or in which they lack institutional expertise. The political question doctrine represents a particularly apt parallel. This doctrine has been defined as a holding that “constitutional issue[s] regarding the scope of a particular provision . . . should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches.”<sup>188</sup> The doctrine is most often invoked in the face of questions “either that the judiciary is ill-equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior, resolution.”<sup>189</sup> The correspondences between Rule 19 and other doctrines (such as *forum non conveniens*) that permit some form of judicial abstention from particular cases or issues will be explored at greater length later in this Article.<sup>190</sup> For the moment, however, it is noteworthy that the reasoning underlying the use of the political question doctrine might also be used to explain and justify dismissal in the cases involving absent tribes.

Courts have not, of course, generally been explicit about their reliance on Rule 19 for such purposes. Instead, they have reasoned their way to Rule 19 dismissals by citing the paramount importance of policies underlying sovereign immunity—policies that there may be particular reason to honor in the tribal context, in which sovereign immunity is a congressionally validated policy that arguably goes to the heart of tribes’ very survival. But the wider policies and considerations at stake in some of the absent-tribe cases suggest that the key factor involved is not solely that the absent party is immune from suit so much as that the absent party is a sovereign. That is, cases that affect the interests of an absent sovereign are almost by definition more likely than usual to be cases in which judicial intervention runs the risk of undue interference with issues that are best worked out through the political process or by a more accountable branch of government. Courts’ apparent solicitude for the integrity of sovereign immunity in the Rule 19 context is thus, at least in part, a means by which courts can selectively dismiss cases that raise hot-button political issues.<sup>191</sup>

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188. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1461 (2005).

189. *Id.* at 1463.

190. See *infra* Part III.A.

191. This does not mean that courts’ concern for sovereign immunity is a sham. Indeed, I have argued elsewhere that Rule 19 dismissals are simply one instance of an overall pattern in which courts have recently extended the doctrine of sovereign immunity beyond its technical doctrinal borders. See Florey, *supra* note 109, at 806–16. Concern about sovereign immunity itself, however, does not always fully

Courts have not hesitated to extend the reasoning and holdings of the absent-tribe cases to other sovereigns despite the fact that tribes arguably possess characteristics not shared by other absent sovereigns (such as fragile finances that participation in a lawsuit might put at risk). Perhaps ironically, courts have dismissed several actions by tribal plaintiffs upon finding that permitting the action to proceed might impair the interests of an absent immune sovereign (either a state or the United States).<sup>192</sup> Thus, even though the doctrine of dismissing cases involving absent sovereigns may have been developed in an effort to protect tribal interests, the doctrine has often redounded to the disadvantage of tribal plaintiffs. The flipside of *American Greyhound* is a handful of cases in which tribes have sought action from the United States with respect to gaming compacts, only to have their suits dismissed for the absence of an indispensable state. In *Pueblo of Sandia v. Babbitt*,<sup>193</sup> for example, the court dismissed a case in which certain New Mexico tribes sought to sue the Department of the Interior to compel it to approve a gaming compact negotiated between the tribes and New Mexico because New Mexico, which could not be joined because of sovereign immunity, was an indispensable party.<sup>194</sup> Likewise, in *Kickapoo Tribe v. Babbitt*,<sup>195</sup> the court held that Kansas was an indispensable party to a suit by the Kickapoo Tribe to compel the Department of the Interior to approve a gaming compact.<sup>196</sup> In both cases, the court drew heavily on precedent involving absent Indian tribes.<sup>197</sup> This result is illogical if the tribal cases are seen as specifically validating policies underlying tribal immunity, but it makes a great deal of sense as the effect of a rule allowing courts to punt the troublesome issues raised when courts are asked to consider the validity of tribal-state compacts, regardless of who the plaintiff might be.

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explain the vigor with which otherwise disparate judges and courts have pressed the sovereign immunity issue in Rule 19 settings.

192. See, e.g., *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 747–48 (8th Cir. 2001).

193. 47 F. Supp. 2d 49 (D.D.C. 1999).

194. *Id.* at 51–52. Clearly reluctant to dismiss, the court noted the state’s ability to intervene, reasoning that “[i]n a purely practical sense, the Court might look with disfavor on the defendant’s prejudice arguments for an additional reason: if the State were so worried about protecting its interests, it certainly could waive its immunity and intervene in this action (which, as the complaint currently reads, would subject the State to no risk of damages or broad-ranging judicial rulings).” *Id.* at 54 n.3. Nonetheless, noting that its “inquiry [was] largely constrained by appellate decisions,” *id.*, the court went on to find the state to be an “indispensable party,” *id.* at 52, while acknowledging that it did so “reluctantly” and found the state’s conduct to be “disheartening.” *Id.* at 56.

195. 43 F.3d 1491 (D.C. Cir. 1995).

196. *Id.* at 1493–94.

197. See *id.* at 1496; *Pueblo of Sandia*, 47 F. Supp. 2d at 54 n.3.

### III. RULE 19 IN THE FOREIGN-RELATIONS CONTEXT

Much of the logic underlying courts' dismissals of cases affecting absent tribes applies with as much or greater force when an absent foreign nation is involved. After all, foreign policy has traditionally been the domain of the executive branch, and in various contexts courts have been reluctant to render decisions that might impinge on the current administration's foreign policy.<sup>198</sup> Thus, it is easy to see why courts might have been tempted to rely on Rule 19 as a vehicle for dismissing cases possibly affecting foreign nations. Yet although courts had applied tribal precedent to other sovereign immunity contexts, few courts had dealt with the Rule 19 problem in situations in which the absent party was a foreign nation prior to the Supreme Court's decision in *Pimentel*. As the following Subpart discusses, however, the ground in this area is shifting.

#### A. Rule 19 and Foreign Sovereigns

The fact that courts have invoked Rule 19 only rarely in cases involving foreign sovereigns can perhaps be explained by the fact that existing doctrines have provided alternative avenues for courts wishing to dismiss a case involving a foreign nation that raises issues of political sensitivity or judicial competence. By far the most well-known and frequently invoked of these tools is *forum non conveniens*, the familiar doctrine that permits courts to dismiss cases when an alternative forum is available and when the plaintiff's chosen forum either "would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or . . . '[is] inappropriate because of considerations affecting the court's own administrative and legal problems.'"<sup>199</sup> (In federal court, *forum non conveniens* is invoked only when the alternative forum is in another country because the transfer of venue statute permits cases to be shifted from one federal court to another).<sup>200</sup>

In some cases, courts have also dismissed cases potentially involving the interests of foreign nations by invoking the doctrine of comity of nations.<sup>201</sup> This doctrine permits courts to "refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts

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198. The political question doctrine, for example, has frequently been applied to cases with foreign-policy implications. See Choper, *supra* note 188, at 1497–505.

199. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

200. See 28 U.S.C. § 1404(a) (2006).

201. See *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994).



and proceedings to have extraterritorial effect in the United States.”<sup>202</sup> The doctrine is flexible, one of “practice, convenience, and expediency” rather than a mandatory rule, and permits courts to weigh the interests of the United States or public policy concerns against foreign-relations issues entailed in dismissing a case.<sup>203</sup>

Finally, in the wake of *Asahi Metal Industry Co. v. Superior Court*,<sup>204</sup> it is clear that the doctrine of personal jurisdiction is malleable enough to permit consideration of sensitive foreign-relations issues in the overall reasonableness calculus involved in whether to assert jurisdiction over a particular defendant. The plurality opinion in *Asahi* urged courts to place “significant weight” on the “unique burdens placed upon one who must defend oneself in a foreign legal system” in determining whether personal jurisdiction is reasonable.<sup>205</sup> Finding a lack of personal jurisdiction over the absent party is not, of course, a solution to the Rule 19 problem because courts must still grapple with the question of whether a Rule 19(b) dismissal of the present action is warranted for failure to join that party. Cases that have the potential to affect the interests of an absent sovereign, however, will sometimes involve a foreign defendant. In such cases, courts may be able to dismiss the entire case for lack of personal jurisdiction over the defendant,<sup>206</sup> keeping in mind the reasonableness concerns that *Asahi* directs courts to take into account.

These doctrines, however, have some limitations for courts confronted with a case that has the potential to cause harm to an absent sovereign. None, obviously, is specifically tailored to the situation in which a current nonparty may have interests that will be affected by the progress of the litigation. Further, all three doctrines require some solicitude for the plaintiff’s interests and the presence of some other venue in which the issues raised can be heard. Forum non conveniens dismissals require that an alternative forum be available; comity requires a foreign proceeding to which to give deference; and personal jurisdiction requires balancing the “plaintiff’s interest in obtaining relief” against concerns of hardship to the defendant.<sup>207</sup> Finally, two of the three available

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202. *Pravin Banker*, 109 F.3d at 854.

203. *See id.* (internal quotation marks omitted).

204. 480 U.S. 102 (1987).

205. *Id.* at 114.

206. *See, e.g., Cascade Fund, LLLP v. Absolute Capital Mgmt. Holdings Ltd.*, 707 F. Supp. 2d 1130, 1141 (D. Colo. 2010) (suggesting that the “possibility of a conflict with a foreign nation’s sovereign policies” is a factor, although not a “dispositive” one, in determining whether personal jurisdiction exists over a defendant).

207. *Asahi*, 480 U.S. at 113. Rule 19, of course, theoretically incorporates concern for the plaintiff’s interests if the case is dismissed, but as previously discussed, many courts have found the absence of an alternative forum to be so insignificant in relation to the possibility of prejudice to an absent sovereign

escape routes—personal jurisdiction and forum non conveniens—are, at least ostensibly, procedural doctrines, designed primarily to ensure that certain requirements of due process and procedural efficiency are met. When a court’s true concern centers not on these issues but on questions of judicial competence or political controversy, these doctrines are less than ideal.

By contrast, the reasoning that courts have employed in the absent-tribe Rule 19 cases is potentially applicable to the international context as well. It makes sense that this would be true in theory—since tribes are, after all, comparable to foreign sovereigns in some respects—and at least a few courts and litigants have picked up on the analogy in practice as well. An important pre-*Pimentel* case, discussed below, illustrates the potential use of Rule 19 as an avoidance device in cases involving politically fraught and practically hard-to-manage foreign-relations issues.

B. *Aguinda v. Texaco*: Declining to “Right the World’s Wrongs”

*Aguinda v. Texaco, Inc.*<sup>208</sup> represented what was actually a small episode in a long and important (and ongoing)<sup>209</sup> course of litigation in which residents of Ecuador sued Texaco for “extensive relief” for injuries resulting from Texaco’s exploitation of Ecuadorian oil fields in conjunction with Petroecuador, Ecuador’s state-owned oil company.<sup>210</sup> *Aguinda* involved the plaintiffs’ first efforts to press their case in federal district court in New York.<sup>211</sup> Plaintiffs sought extensive and somewhat complex equitable relief, including “total environmental ‘clean-up’ of the affected lands in Ecuador[,] . . . a major alteration of the consortium’s Trans-Ecuador pipeline[, and] . . . the direct monitoring of the affected lands for years to come.”<sup>212</sup>

The district court initially dismissed the case on both comity and forum non conveniens grounds, citing “the need for this Court to resist intruding on matters that are already the subject of intense political debate in the affected foreign country [Ecuador].”<sup>213</sup> Yet while these were seemingly perfectly adequate grounds for dismissal, the court went on to find that the case also merited dismissal under Rule 19(b) for failure to join Ecuador, whose participation, the

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that they have essentially read that requirement out of the rule. See *supra* notes 175–176 and accompanying text.

208. 945 F. Supp. 625 (S.D.N.Y. 1996).

209. For continuing coverage of the controversy, see, for example, Bob Herbert, Op-Ed., *Disaster in the Amazon*, N.Y. TIMES, June 5, 2010, at A21.

210. *Aguinda*, 945 F. Supp. at 626.

211. See *id.* at 626–27.

212. *Id.* at 627.

213. *Id.*

court found, would be essential to the implementation of the portion of the requested relief that was to take place in Ecuador itself.<sup>214</sup> Among other things, the court noted the Second Circuit's general rule that "[w]hen a necessary party is . . . immune from suit because of sovereign immunity, that alone is ordinarily sufficient to warrant dismissal of the action."<sup>215</sup>

Beyond the specific reasons the court cited for its dismissal on Rule 19 (and other) grounds, the district court appeared generally frustrated with the complex international issue that had been tossed in its lap. The court commented that district courts' power "does not include a general writ to right the world's wrongs."<sup>216</sup> It elaborated, even more strongly, that "any order of this Court granting any material part of the Ecuador-directed equitable relief demanded by plaintiffs would be unenforceable on its face, prejudicial to both present and absent parties, and an open invitation to an international political debacle."<sup>217</sup> The court's reaching out to invoke Rule 19, seemingly redundant as it was given the other bases for dismissal, can thus be seen in part as an index of its frustration with a case that simply seemed too complex in scope, with too many multifaceted international dimensions, for an American district court to pronounce upon.

The case featured several ironic codas.<sup>218</sup> Following a change in government (and hence a change of stance toward the plaintiffs' claims), Ecuador attempted to intervene post-judgment in the action<sup>219</sup>—a motion that, had it been granted, would presumably have addressed the trial court's concerns about the difficulty of enforcing any Ecuador-centered relief without Ecuador's participation. Nonetheless, the trial court denied the motion on the grounds that it was untimely and that Ecuador had not fully waived its sovereign immunity.<sup>220</sup> On appeal, the Second Circuit reversed the *forum non conveniens* and comity dismissals, principally because the trial court had failed to ensure that plaintiffs had an alternative forum by requiring Texaco to submit to jurisdiction of an Ecuadoran court.<sup>221</sup> It also reversed the Rule 19 holding in part, holding that the court could proceed as to relief that Texaco could accomplish in the United

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214. *Id.* at 628.

215. *Id.* at 627–28.

216. *Id.* at 628.

217. *Id.*

218. See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1081 (2010) (describing the case as an example of "the old adage 'be careful what you wish for'").

219. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

220. See *id.* at 162.

221. *Id.* at 155.

States.<sup>222</sup> The Second Circuit agreed with the district court, however, that Rule 19 mandated dismissal of the Ecuador-centered demands for relief.<sup>223</sup>

The case has since unfolded in a series of complicated twists. In consequence of the mixed results in federal court and the changed political climate in Ecuador itself, plaintiffs refiled their suit in Ecuador, where in summer 2009, a court-appointed expert recommended a \$27 billion judgment against Chevron (which had since acquired Texaco).<sup>224</sup> The results in the case, however, have been complicated by allegations of bribery that may themselves have come from a less-than-credible source.<sup>225</sup> As a result, U.S. courts, which will likely have to make the decision of whether to enforce the judgment against Chevron, may ultimately find themselves back in the thick of the very foreign controversy they initially sought to avoid—presumably without benefit of Rule 19 or other grounds for abstaining from deciding the relevant issues.

Though the ensuing history suggests that the device may have ultimately backfired, the Texaco/Chevron litigation represents a notable extension of the use of Rule 19 as an avoidance tactic in the international context. A district court clearly uncomfortable with intervening in what it perceived as primarily an Ecuadoran problem reached out to use Rule 19 to emphasize its point, despite the fact that other doctrines provided perfectly sufficient independent grounds for dismissal—and the Second Circuit, while reining in the court to some degree, also ratified this result to some extent. In the process, the district court illustrated some of the reasons why Rule 19 may have unique appeal as a means of disposing of troublesome cases involving foreign interests: It does not (at least as courts have interpreted it in recent years) require extensive consideration of an alternative forum; it does not require further supervision by the court (as *forum non conveniens*, for example, sometimes may); and it is likely to come into play in any case that may affect the interests of a foreign nation. The Texaco litigation thus represents a potentially influential trend in Rule 19 litigation, one that has been given further momentum by the Supreme Court's decision in *Pimentel*.

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222. *Id.*

223. *Id.*

224. See Simon Romero & Clifford Krauss, *After 16 Years, Ecuador Oil Pollution Case Only Grows Murkier*, N.Y. TIMES, Oct. 10, 2009, at A4; *Ecuador Judge Recused in Chevron Case*, CBSNEWS.COM, Sept. 29, 2009, <http://www.cbsnews.com/stories/2009/09/29/business/main5350628.shtml>.

225. See Clifford Krauss, *Revelation Undermines Chevron Case in Ecuador*, N.Y. TIMES, Oct. 30, 2009, at A10.

C. *Republic of the Philippines v. Pimentel*: The Supreme Court's Validation of Rule 19 "Abstention"

Like the *Texaco* litigation, *Republic of Philippines v. Pimentel*<sup>226</sup> presented a complex procedural posture and the possibility of an American court wading into another nation's political controversies. In the first phase of the litigation, a class of plaintiffs sued the estate of former Philippine President Ferdinand Marcos in the District of Hawaii, alleging human rights violations by the Marcos regime.<sup>227</sup> After employing the unusual procedural device of extrapolating total harm from sample cases,<sup>228</sup> the district court ultimately awarded the plaintiffs a \$2 billion judgment.<sup>229</sup>

The more troublesome phase of the litigation arose with the plaintiffs' efforts to find some source of funds against which to collect the judgment. The class members located a \$35 million Merrill Lynch brokerage account, which had allegedly been established by a company incorporated by the Marcos regime, and attempted to attach it to satisfy the judgment.<sup>230</sup>

Because competing claims to the account existed (including a claim by the Philippine government itself), the district court directed Merrill Lynch to file an interpleader action to determine the rights to the fund.<sup>231</sup> Merrill Lynch did so. Among the named defendants (in addition to the class of *Pimentel* plaintiffs and a handful of other entities claiming the funds) were the Republic of the Philippines (the Republic) and a Philippine commission, the Philippine Presidential Commission on Good Governance (the Commission), set up to recover assets misappropriated by the Marcos regime.<sup>232</sup>

Initially, the Republic and the Commission did not protest their presence in the litigation.<sup>233</sup> After a failed attempt to seek recusal of the district judge on grounds of bias,<sup>234</sup> however, the sovereign parties attempted a different procedural maneuver: The Republic and the Commission asserted sovereign immunity from

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226. 553 U.S. 851 (2008).

227. See *Hilao v. Estate of Marcos*, 103 F.3d 767, 771 (9th Cir. 1996).

228. See *id.* at 784–87; see also Issacharoff, *supra* note 32, at 192 n.30 (noting that this is the only instance of a technique of this kind being upheld on appeal).

229. *Pimentel*, 553 U.S. at 857–58.

230. *Id.*

231. *Id.* at 859. Interpleader is a procedure by which a stakeholder—someone owning some sort of property to which title is disputed—can ask a court to determine which of the competing claimants holds title to the item or fund. See 28 U.S.C. § 1335 (2006).

232. *Pimentel*, 553 U.S. at 855, 858.

233. See *id.* at 876 (Stevens, J., dissenting in part).

234. *Id.*

the interpleader suit under the Foreign Sovereign Immunities Act,<sup>235</sup> then moved to dismiss on the grounds that they were Rule 19(b) parties.<sup>236</sup>

The Republic and the Commission failed to find a sympathetic audience in either the district court or the Ninth Circuit, which both held that the action could proceed without them.<sup>237</sup> In upholding the district court's decision, the Ninth Circuit weighed heavily the obstacles the sovereign parties faced on the merits, including the likelihood that their claims would be time-barred<sup>238</sup> and the problems they faced in asserting claims to assets held abroad.<sup>239</sup> The Supreme Court, however, reversed 7–2,<sup>240</sup> with Justices Stevens and Souter dissenting in part.<sup>241</sup>

The Court took issue with the lower courts' analysis of the strength of the sovereign parties' claims on the merits, explaining that Philippine rather than New York law might govern the claims and that the Republic and the Commission might proceed under different, more favorable theories than the lower courts had assumed they would, thus rendering their claims not time-barred.<sup>242</sup> In light of this revised analysis, the Court found that the lower courts had reached the wrong conclusion, notably "fail[ing] to give full effect to sovereign immunity when they held the action could proceed without the Republic and the Commission."<sup>243</sup> The Court phrased its basic rationale in terms familiar from the absent-tribe cases in the lower courts (although the Court did not cite any such cases), explaining that "where sovereign immunity is asserted, and the

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235. 28 U.S.C. § 1604.

236. *Pimentel*, 553 U.S. at 859 (majority opinion).

237. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 894 (9th Cir. 2006), *rev'd sub nom.* *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). The Ninth Circuit initially stayed proceedings pending the conclusion of litigation in the Sandiganbayan (the Philippine court addressing related issues), see *In re Republic of the Philippines*, 309 F.3d 1143, 1153 (9th Cir. 2002), but then held that the action could proceed after the district judge vacated the stay, see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Pimental*, No. 03-16742, 2004 U.S. App. LEXIS 28797, at \*6 (9th Cir. Feb. 20, 2004).

238. See *Merrill Lynch*, 464 F.3d at 892–93.

239. *Id.* at 892 (“[I]t is doubtful that the Republic has any likelihood of recovering the . . . assets [held by Merrill Lynch]. The res is in the United States.”).

240. *Pimentel*, 553 U.S. at 854, 873.

241. See *id.* at 875 (Stevens, J., dissenting in part) (suggesting that, as an alternative to dismissal, the case could be stayed for a reasonable time awaiting a decision by the Sandiganbayan and/or be reassigned to a different district judge); *id.* at 879 (Souter, J., dissenting in part) (same).

242. See *id.* at 867–68 (majority opinion) (noting that the sovereign parties might pursue a claim for breach of contract rather than misappropriation of public property as the lower courts had assumed and that the statute of limitations might be deemed not to have begun running “if and when Merrill Lynch refused to hand over the assets”). These theories, the Court noted, “would not be frivolous.” *Id.* at 868.

243. *Id.* at 865.

claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.<sup>244</sup>

The Court's analysis, however, was somewhat more nuanced than might appear from these sweeping statements. Although appearing to give dispositive weight to the mere possibility that the sovereign's interests might be affected, the Court nonetheless did not neglect to march through the appropriate four-part test from Rule 19(b), as follows. The Court framed the absent parties' sovereign immunity interests as a question of prejudice under the first factor in Rule 19(b), observing that the "privilege [of asserting sovereign immunity as a foreign nation] is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection."<sup>245</sup> No obvious mechanisms existed to lessen such prejudice (the second factor);<sup>246</sup> further, a judgment rendered in the sovereign parties' absence would not be "adequate" in the sense that they would not be bound by it (the third factor).<sup>247</sup>

As to the fourth factor (adequacy of the plaintiff's remedy in the event of dismissal), the Court suggested that, in the appropriate case, the absence of a viable alternative forum in which the plaintiff could obtain relief might weigh more heavily.<sup>248</sup> In this case, however, because this was an interpleader action, the nominal plaintiff was not the *Pimentel* class but Merrill Lynch.<sup>249</sup> The Court noted that Merrill Lynch's interests would not be impaired by dismissal in the same way that a typical plaintiff's might be in a Rule 19(b) case.<sup>250</sup> As a stakeholder prevented from filing an interpleader action, Merrill Lynch would normally be subject to the risk of competing claims to the \$35 million in different courts that could reach different results.<sup>251</sup> As the Court recognized, however, Merrill Lynch could no doubt obtain dismissal of any such actions on the grounds that the Republic and the Commission were Rule 19(b) parties, and

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244. *Id.* at 867.

245. *Id.* at 868–69.

246. *See id.* at 869–70.

247. *See id.* at 870–71. ("Going forward with the action without the Republic and the Commission would not further the public interest in settling the dispute as a whole because the Republic and the Commission would not be bound by the judgment in an action where they were not parties."). Note that, under this view of "adequacy" (that is, whether the judgment will bind all those parties that may have interests in the dispute), the third factor will weigh in favor of dismissal in virtually any Rule 19(b) analysis, since by definition Rule 19(b) comes into play only in situations in which a potentially affected party cannot be joined.

248. *See id.* at 871–72 (describing differences between Merrill Lynch and a typical plaintiff following a Rule 19 dismissal).

249. *See id.* at 871 ("It is Merrill Lynch, however, that has the statutory status of plaintiff as the stakeholder in the interpleader action.").

250. *See id.* at 871–72.

251. *See id.* at 871.

thus Merrill Lynch was not likely to suffer this adverse outcome.<sup>252</sup> Finally, the Court took note of the fact that the Republic's and Commission's claims were, at the time of the litigation, pending in the Sandiganbayan, a Philippine anticorruption court.<sup>253</sup> The Court left open the possibility that "[t]he balance of equities may change in due course" if the Sandiganbayan continued to stall on a decision.<sup>254</sup> While this slight concession may have been of cold comfort to the non-immune parties given that the claims at issue had been before the Sandiganbayan since 1991,<sup>255</sup> it constitutes at least a nominal acknowledgement that the absence of an alternative forum may be grounds for disfavoring a Rule 19 dismissal even in cases involving an absent sovereign.<sup>256</sup>

#### D. Explaining the Result in *Pimentel*

Does *Pimentel* signal a Supreme Court stamp of approval on the expanded use of Rule 19 in cases involving foreign relations? On the one hand, circumstances unlikely to exist in other cases involving an absent foreign sovereign counseled hesitation about going forward on the particular facts of the case. Perhaps the most important of these factors were doubts about the neutrality and the competence of the district judge. Judge Manuel Real, sitting by designation in the District of Hawaii, was a controversial figure who, at the time *Pimentel* was decided, had had numerous other cases taken away from him by appellate courts.<sup>257</sup> Further, the *Pimentel* class's victory had been obtained by somewhat unconventional means: the previously discussed "sampling" technique (whereby the class as a whole was awarded damages based on harms suffered by a

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252. See *id.* at 872 ("As matters presently stand, 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.") Although persuasive to some extent, arguably this reasoning was shortsighted in at least two respects. First and most important, the *Pimentel* class—which initiated the demand for relief—can be seen as the "true" plaintiff in this action despite the fact that Merrill Lynch, acting on the district court's orders, was the nominal one. Second, Merrill Lynch, like any stakeholder, presumably has an interest in timely determination of the title of an account it holds that goes beyond the mere defensive ability to protect itself from competing claims.

253. See *id.* at 858, 873.

254. See *id.* at 873.

255. See *id.* at 858.

256. Note, however, that despite these qualifications, the Supreme Court recently appeared to reaffirm its sweeping statements about foreign sovereigns in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), in which it noted that, even if a suit names only a foreign official, "it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party" and that if that is the case, the principles discussed in *Pimentel* may mandate dismissal. *Id.* at 2292.

257. See Pamela A. MacLean, *Controversial Judge Splits Bar: Fifteen Cases Taken Away—Five in 2008 Alone*, NAT'L L.J., Aug. 11, 2008, at 4 (quoting one lawyer describing Real as a judge who "charts his own course" and "generates more scrutiny" and another describing him as a "maniac").



computer-generated random sample),<sup>258</sup> as well as the somewhat unusual device of holding the punitive damages phase of the trial prior to the compensatory damages phase.<sup>259</sup> Two dissenting judges, Justice Stevens and Justice Souter, clearly regarded the problem with the case going forward as centering on the presence of a potentially biased judge. Justice Stevens suggested reversal and remand, noting that the lower courts had erred in viewing the sovereign parties' claims as necessarily barred by the statute of limitations. He also observed that on remand the Ninth Circuit might consider "either order[ing] the District Judge to stay further proceedings pending a reasonably prompt decision of the Sandiganbayan or order[ing] the case reassigned to a different District Judge to conduct further proceedings."<sup>260</sup> (Justice Stevens's differences with the majority centered on the Court's decision to "give near-dispositive effect to the . . . status as sovereign entities" of the Republic and the Commission.)<sup>261</sup> Justice Souter likewise felt that the best course was to stay the proceedings in hopes that the Sandiganbayan would render a timely decision; if that appeared unlikely, however, he urged that "any further proceedings in the District Court be held before a judge fresh to the case."<sup>262</sup>

Some commentators have seen *Pimentel* as a version of a *forum non conveniens* (or simply a *forum-shifting*) case, permitting claims to Marcos's ill-gotten fortune to be litigated more appropriately before a Philippine tribunal rather than in the United States.<sup>263</sup> The dissenters' concern with having further proceedings take place before a different judge highlights some of the reasons the majority may have desired to transfer resolution of the case to a different court. If Judge Real was not the right judge to handle this particular case, punting to the Sandiganbayan was one way of avoiding any specter of bias.

Some of the Court's language and the history of the case, however, suggest that the Court may have been motivated by political concerns broader than simply the appropriateness of a particular judge—specifically, by the idea that it

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258. See *Hilao v. Estate of Marcos*, 103 F.3d 767, 784–85 (9th Cir. 1996).

259. See *id.* at 782.

260. See *Pimentel*, 553 U.S. at 875 (Stevens, J., dissenting in part). Stevens noted that the record suggested that the Republic and the Commission might be willing to waive their immunity and participate if they were before a different judge, thus obviating any unfairness caused by their nonparticipation. See *id.* at 876 ("The Republic did not invoke its sovereign immunity until after the District Court denied its motion seeking . . . recusal of the District Judge. In support of that motion they advanced a factual basis for suspecting that the District Judge's impartiality could be questioned." (citation omitted)).

261. *Id.* at 875.

262. See *id.* at 879 (Souter, J., dissenting in part).

263. See, e.g., GEOFFREY C. HAZARD ET AL., *PLEADING AND PROCEDURE* 755 (10th ed. 2009) ("The Court's decision . . . can be viewed as a version of a *forum non conveniens* dismissal, triggered by a particular form of inconvenience, the inability to join one or more key litigants.").

might be inappropriate to litigate matters affecting the Philippine government's interests in *any* United States court.<sup>264</sup>

In litigating before the Supreme Court, lawyers for the Republic adopted a deliberate strategy of stressing the notion that the United States had no business permitting its courts to resolve a matter implicating delicate questions of Philippine politics and history. Charles Rothfield, special counsel to Mayer Brown (which was representing the Republic), later noted that the litigation team decided to adopt such a strategy in hopes of improving prospects of attracting the Court's attention to what otherwise appeared an obscure issue with no circuit split.<sup>265</sup> As Rothfield noted, the firm drafted the certiorari petition "in such a way to suggest [that the Court] should care what the U.S. government thought. . . . We posed the issue in such a way that it had foreign relations overtones."<sup>266</sup> In keeping with this strategy, Mayer Brown also enlisted the support of the solicitor general and of the Swiss government (which, because some Marcos assets had been held in Switzerland, was concerned about a possibly precedent-setting decision).<sup>267</sup> The solicitor general ultimately contributed an amicus brief urging that the case be dismissed under Rule 19(b), noting among other issues "the Republic's critical sovereign interest in repatriating funds illegally obtained by its former president's misuse of his office," an endeavor in which it had received "international cooperation" from Switzerland.<sup>268</sup>

The line of argument pursued by Mayer Brown and the solicitor general appears to have strongly influenced the Court's decision. The Court's reasoning in holding that the case should not proceed without the sovereign parties rested strongly on those parties' "[c]omity and dignity interests[, which] take concrete form in this case."<sup>269</sup> The Court noted that the immune parties' claims "arise from events of historical and political significance for the Republic and its people."<sup>270</sup> Further, the Court suggested, the Philippines had a right to

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264. Moreover, the Court's statements in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), a more recent case, suggest that it does intend for *Pimentel's* pronouncements on sovereignty and Rule 19 to be taken seriously. See *supra* note 256.

265. See Pamela A. MacLean, *Insight Into Court's Thinking Paid Off: Fight Over Marcos' Loot Appealed to the Justices*, NAT'L L.J., Apr. 6, 2009, at 16.

266. *Id.*

267. *See id.*

268. Brief for the United States as Amicus Curiae Supporting Petitioners at 23, Republic of the Philippines v. Pimentel, 553 U.S. 851 (2008) (No. 06-1204), 2008 WL 225206.

269. *See Pimentel*, 553 U.S. at 866.

270. *Id.*

resolve these claims for itself, without interference from the United States. The Court stated:

There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause. Then, too, there is the more specific affront that could result to the Republic and the Commission if property they claim is seized by the decree of a foreign court.<sup>271</sup>

The Court thus framed the issue in terms of the fundamental inappropriateness of litigating claims to the Merrill Lynch fund in the United States rather than the Philippines. While the concerns about the district judge may have played a role in these concerns, the Court appeared to suggest that the larger problem concerned adjudication by a United States court, not adjudication by any particular American judge.

Notably, the Supreme Court in *Pimentel* did not discuss the immune-tribe cases or other lower-court cases involving an absent Rule 19 sovereign. Yet the decision seems motivated by similar concerns—and it is difficult to imagine that the results in the lower-court cases did not influence both Mayer Brown’s litigation strategy and the Supreme Court’s ultimate reasoning. The solicitor general’s brief cited several of the absent-tribe cases, including *Wichita & Affiliated Tribes*, in urging that sovereign immunity should be regarded as a compelling factor under *Provident Bank*<sup>272</sup> and in arguing that lesser weight should be accorded to the plaintiff’s lack of remedy in cases where an absent sovereign is involved.<sup>273</sup>

But in explicitly introducing concerns about the foreign-relations dimension of permitting claims to the Marcos assets to be litigated in the United States (and, conversely, of denying the Philippines the privilege of adjudicating such claims in a domestic forum), the Court went well beyond the stated rationales in most of the absent-sovereign cases already decided by lower courts. In reasoning that the Philippines had a dignity interest in not being subject to the decree of a foreign court for the disposition of its own misappropriated national assets, the Court gestured to concerns not easily located within the text of Rule 19. To be sure, Rule 19(b) permits the consideration of “prejudice” to the absent party, but solicitude for a foreign country’s interest in deciding controversial matters at home goes well beyond the usual understanding of that term. Further, the Court was much more direct than any lower court had been in announcing that concerns of comity and deference to U.S. foreign policy were an explicit part of

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271. See *id.*

272. Brief for United States as Amicus Curiae Supporting Petitioners, *supra* note 268, at 21.

273. *Id.* at 31.

its decisionmaking calculus. In doing so, the Court brought to the foreground the idea that seems to have motivated some of the absent-tribe and other absent-sovereign decisions: the notion that Rule 19 can be a way for the judiciary to avoid deciding cases that might have troublesome implications for the relationship between the United States (or, in the case of tribes, individual states as well) and the absent sovereign.

It is of course not surprising that the Supreme Court chose to take seriously the foreign-relations concerns expressed by the solicitor general in deciding a case with a potential impact on the Philippines. But it is perhaps troublesome that the Court used Rule 19 as a vehicle for doing so—in the process potentially transforming the rule from a narrow and specific procedural device designed primarily for consolidating cases to a far more wide-ranging license for dismissing politically difficult ones. The next Part explores this progression in greater detail.

#### IV. GRAPPLING WITH *PIMENTEL*'S EFFECTS: SHOULD COURTS INVOKE RULE 19 AS A QUASI-ABSTENTION DOCTRINE?

Taken out of context—and in some cases, even read in context—much of the language in *Pimentel* appears to endorse dismissal of cases in nearly every situation in which a Rule 19(a) party cannot be joined because of sovereign immunity. A number of lower courts have applied *Pimentel* in this fashion. For example, in *Delano Farms Co. v. California Table Grape Commission*,<sup>274</sup> the court relied on *Pimentel* to dismiss claims in which the relief plaintiffs requested would have invalidated patents held by the United States.<sup>275</sup> Citing *Pimentel*, the court concluded that “[b]ecause the proceedings in this case threaten both the property and sovereign immunity of the United States, the United States’ failure to waive its immunity from suit strongly supports dismissing this litigation in its absence.”<sup>276</sup> Likewise, in *Northern Arapaho Tribe v. Hansberger*,<sup>277</sup> the court dismissed an action brought by a tribe seeking injunctive relief from allegedly unlawful taxation on the grounds that it had failed to join required parties—the United States and the Eastern Shoshone Tribe.<sup>278</sup> The court found that “the discretion otherwise afforded this Court in balancing the equities under Rule 19(b) is to a great degree circumscribed, and the scale is already heavily tipped in favor of dismissal.”<sup>279</sup> These cases suggest that the Court’s apparent stamp of

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274. No. 1:07-CV-1610 OWW SMS, 2009 WL 3586056 (N.D. Cal. Oct. 27, 2009).

275. *Id.* at \*27–33.

276. *Id.* at \*6.

277. 660 F. Supp. 2d 1264 (D. Wyo. 2009).

278. *Id.* at 1268–70, 1287.

279. *Id.* at 1280.

approval in *Pimentel* has exacerbated the already existing tendency in many courts to dismiss more or less automatically any case in which a sovereign is a required Rule 19(a) party.<sup>280</sup> The following Subpart considers the implications of an expanded role for Rule 19 in permitting courts to dispose of cases involving foreign or other sovereigns.

#### A. The Case for Rule 19 “Abstention”

Assuming that the trend toward ready dismissal of cases implicating absent sovereigns’ interests is real, it is nonetheless worth asking this question: What exactly is it that is problematic about the immune-sovereign cases, either before the Court’s decision in *Pimentel* or after it? Courts have, after all, long employed abstention and forum-shifting doctrines in situations involving difficult foreign-relations issues. While the application of these doctrines has not been wholly free of controversy,<sup>281</sup> it is generally accepted that there may be situations in which the resolution of a sensitive issue involving foreign policy (or certain other types of questions thought to be beyond core judicial competence) is best left to the political branches.<sup>282</sup> The political question doctrine likewise embodies a belief that issues of foreign relations are generally outside the scope of the judicial role. Relations with tribes have likewise long been considered an area in which courts should defer to Congress’s preeminent role (though this philosophy has been somewhat eroded in recent years).<sup>283</sup> Viewed in this context, the Rule 19 absent-sovereign cases might simply be seen as a modest extension of a long tradition.

Further, perhaps there is a justification for the expanded use of Rule 19 on grounds that it is necessary to safeguard the doctrine of sovereign immunity in all

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280. See *supra* note 102 and accompanying text.

281. Cassandra Burke Robertson, for example, argues that courts have improperly relied on forum non conveniens doctrine to restrict foreign plaintiffs’ access to U.S. courts. See Robertson, *supra* note 218, at 1084–114.

282. See, e.g., Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 794 (2010) (noting that “the Judiciary has a long tradition of deferring to the political branches on foreign affairs by various means (e.g., the political question doctrine)”); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 119 YALE L.J. 1762, 1820 (2009) (arguing that various Supreme Court decisions in which the Court refrained from deciding a case can be explained by the view that “irrespective of the merits, [the Court] simply ought not as a policy matter issue a decision that would (or might) muck up an important foreign policy action”); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 77–78 & nn.32–33 (2009) (observing that courts have used the political question doctrine, ripeness, mootness, standing, and personal jurisdiction doctrine to dismiss cases implicating foreign affairs).

283. See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 7 (1999) (criticizing some recent Supreme Court decisions for interfering with Congress’s historical exercise of plenary power in the tribal arena).

its forms, even when no obvious foreign-relations issue is at stake. In *Pimentel*, the Supreme Court chose to respect a sovereign's decision to stay out of litigation rather than waive its immunity and allow itself to be joined<sup>284</sup>—much as courts have done in the tribal-immunity cases. It can be argued that any other outcome would undermine sovereign immunity by putting the sovereign to a coercive choice: either suffer prejudice to its interests through nonparticipation or participate and lose the immunity to which it would otherwise be entitled.<sup>285</sup> In the tribal context, some courts and commentators have long argued that forcing a tribe to waive immunity on the threat of substantial harm to its interests is simply not in keeping with policies underlying tribal sovereign immunity.<sup>286</sup> *Pimentel* underlines the fact that such arguments are also relevant in the international context where foreign sovereign immunity is concerned.<sup>287</sup>

These arguments may be persuasive to some degree. Ultimately, however, they cannot justify the degree to which courts have extended the use of Rule 19. For a variety of reasons, Rule 19 is a less-than-ideal device for weighing the issues before the court in cases in which an absent sovereign's interests may be at stake.

#### B. Rule 19's Transformation: Reasons for Concern

To begin with, a central concern with any transformation of Rule 19 into a quasi-abstention doctrine is the lack of concern that courts have shown for the plaintiff's interests. This is at odds with the text of Rule 19, which instructs courts to consider “whether the plaintiff would have an adequate remedy” if the action is dismissed.<sup>288</sup> Further, various courts have underlined the principle that, in most Rule 19(b) analyses, this factor is a central—if not *the* central—consideration in determining whether dismissal is appropriate.<sup>289</sup> Solicitude for the interests of absent sovereigns, however, requires reading this factor essentially out of existence because by definition it will virtually always be true that a plaintiff whose case is dismissed for failure to join an immune sovereign is out of

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284. Republic of the Philippines v. Pimentel, 553 U.S. 851, 855–69 (2008).

285. See *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986) (noting that, if the case were to proceed without an absent tribe, it would face a “Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it”).

286. See *Fletcher*, *supra* note 1, at 4 (arguing that proceeding with a case in which an absent tribe's interests may be affected under Rule 19 amounts to a decision to “abrogat[e] the sovereign immunity of the absent Indian tribes in an illicit and backdoor manner”).

287. I have previously argued that such a view of sovereign immunity overstates the doctrine's scope and purposes. See *Florey*, *supra* note 109.

288. FED. R. CIV. P. 19(b)(4).

289. See *supra* note 93 and accompanying text.

luck as to remedy, at least in the absence of substantial restructuring of her suit.<sup>290</sup> Thus, absent-sovereign Rule 19 jurisprudence tends to emphasize that the plaintiff's lack of an alternative forum, while unfortunate, is a necessary price to pay for protection of the sovereign's interests. As the court in *American Greyhound* noted with little apparent concern, the lack of a remedy for the plaintiff in this scenario simply reflects "a common consequence of sovereign immunity."<sup>291</sup> *Pimentel*, indeed, took this habit of discounting the plaintiff's interests a step further by defining the plaintiff as Merrill Lynch (the nominal plaintiff in the interpleader action) rather than as the *Pimentel* class (the entity that, because it was asserting an affirmative right to relief, more clearly fit the traditional role of plaintiff in the action).<sup>292</sup>

Notably, this is in sharp contrast to some other abstention and similar doctrines that permit courts to refrain from hearing cases potentially implicating the interests of other countries. Forum non conveniens, for example, is fundamentally a doctrine of abstention in favor of another forum—it presupposes that another, more suitable forum exists.<sup>293</sup> Thus, courts frequently make forum non conveniens dismissals conditional on the defendant's agreement to submit to jurisdiction in the other forum (as, for example, by waiving a statute of limitations defense).<sup>294</sup> Likewise, comity is primarily a doctrine of deference to existing proceedings abroad.<sup>295</sup> Ironically, then, Rule 19—even as it appears to incorporate an explicit protection for the plaintiff's interests—in practice has failed to constrain courts to undertake an adequate balancing of the plaintiff's interests against policies that may militate in favor of abstention or forum-shifting.

It might be argued, of course, that the Court in *Pimentel* was in fact primarily motivated by the desire to defer to the ongoing efforts by the Sandiganbayan to resolve the fate of the Marcos assets. But in most respects, the fact that

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290. One possible exception might be the circumstance in which a sovereign has waived immunity in its own courts to a greater extent than it has in foreign courts—which might in theory provide the plaintiff with an alternative forum in which to press his case. In actuality, however, in virtually all absent-sovereign cases, no alternative forum exists. See *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (noting that "we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs").

291. See *id.*

292. See *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 871 (2008).

293. See Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1060 (2010) (defining forum non conveniens as a dismissal of a case when "for the convenience of the litigants, the witnesses, or the public, it appears that the action should proceed in another forum where the action might originally have been brought").

294. See Robertson, *supra* note 218, at 24–30 (criticizing courts for recent undermining of this traditional rule).

295. See *Pravin Banker Assocs., Ltd. v. Banco Popular Del Perú*, 109 F.3d 850, 854 (2d Cir. 1997) (describing comity as a doctrine under which "United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries").

vaguely parallel litigation had been ongoing in the Philippines seems like an afterthought to the Court's decision. The Court devoted little meaningful scrutiny to the issues and process at play in the Philippine litigation and conspicuously ignored the question of whether it was likely to conclusively resolve the issues at stake, especially given the failure of the Sandiganbayan to reach a timely decision.<sup>296</sup> Further, the Court certainly did not suggest that the existence of the Sandiganbayan proceedings was a conclusive factor, instead focusing on the potential harm to U.S. foreign policy interests if the case were to proceed.<sup>297</sup> Many Rule 19 cases involving absent sovereigns will not feature any sort of alternative forum or other means of resolving the issues (certainly the absent-tribe cases generally have not). *Pimentel* gives courts that are so inclined almost complete license to ignore this factor completely.

This is particularly problematic not merely because a worthy individual plaintiff may be denied a needed remedy—though of course, in some circumstances, this has the potential to occur—but also because the plaintiff may represent concerns important to the broader public that would otherwise go unheard. In this vein, it is notable that a handful of courts once recognized what became known as the “public rights” exception to Rule 19 cases in situations in which a public interest organization has sued the United States but failed to join entities that might potentially be affected.<sup>298</sup> The example given by Carl Tobias, who published the definitive discussion of the doctrine in 1987, is a suit by an environmental organization whose suit involves the leasing of public lands but fails to join oil companies whose interests may be affected by the result.<sup>299</sup> The public rights exception has never really caught on; Tobias urged its abolition on the grounds that protective measures already existed to take account of the issues it was designed to address,<sup>300</sup> and courts have applied it rather rarely<sup>301</sup> and often construed it narrowly.<sup>302</sup> Yet the fact that some courts have seen the need for such an escape hatch suggests that, even without the broad interpretation

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296. The Court mentioned that litigation had been pending in the Sandiganbayan since 1991 but did not comment on the timing. See *Pimentel*, 553 U.S. at 858.

297. Indeed, the Court's discussion of the fourth Rule 19(b) factor (the existence of an adequate remedy in the event of dismissal) did not mention the Sandiganbayan proceedings at all; instead, the Court focused on the protection Rule 19 would provide Merrill Lynch by enabling it to secure dismissal of any future claims on the assets. See *id.* at 871–72.

298. See Tobias, *supra* note 1, at 746.

299. See *id.* at 745–46.

300. See *id.* at 792. Among other things, Tobias noted that potentially affected groups could take advantage of the ability to intervene. See *id.* at 783.

301. For example, a Westlaw search for “public rights exception” and “Rule 19,” performed on July 22, 2010, yielded only nineteen results.

302. See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025–27 (9th Cir. 2002) (holding that the public rights exception did not apply because plaintiffs had a private stake in the dispute).



that some courts have given the rule in the immune-sovereign context, Rule 19 carries the potential to thwart plaintiffs attempting to vindicate the public interest. Certainly *Pimentel* can be seen as, among other things, a case in which the operation of Rule 19 served to block or at least delay justice for human rights victims.

A second problem with this use of Rule 19 is a lack of transparency and straightforwardness. The doctrines of comity and forum non conveniens are aimed at finding the appropriate forum for litigation potentially involving foreign interests;<sup>303</sup> indeed, both doctrines reflect this concern to some extent in their names. Even dismissals of cases against foreign defendants based on lack of personal jurisdiction—sometimes criticized as covert forum non conveniens cases<sup>304</sup>—are premised on due process and reasonableness concerns, and thus allow open and explicit weighing of the plaintiff's desire to proceed in a particular forum against the interest a foreign party or foreign nation may have in having the matter decided outside the United States.<sup>305</sup> By contrast, courts usually frame Rule 19 analysis as a procedural technicality in which they lack choice or agency. The *Aguinda v. Texaco, Inc.*<sup>306</sup> court's frankness about its reasons for invoking Rule 19 in the Texaco case aside,<sup>307</sup> many courts have dismissed cases involving absent sovereigns with little or no explicit acknowledgement of the substantive judgments about the judicial role that such cases involve.<sup>308</sup> Indeed, many courts have seen themselves—or at least presented themselves in their analysis—as having virtually no choice in the decision to dismiss, despite the fact that the text of the rule itself presents no explicit basis for considering sovereign immunity in the Rule 19(b) calculus.<sup>309</sup> Opinions granting Rule 19 dismissals, therefore, are often lacking in the analytical rigor and clarity of motive that should characterize a result that carries such potentially harsh consequences for plaintiffs.

Finally, dismissals under Rule 19 in anything other than extreme cases, or cases that can be more appropriately heard in a forum other than the federal one, seem at odds with the rule's ostensible purposes of promoting the complete

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303. See *supra* note 207 and accompanying text.

304. See generally Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351 (1992).

305. See, e.g., *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 114 (1987) (weighing “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system” against “the interests of the plaintiff and the forum in the exercise of jurisdiction”).

306. 945 F. Supp. 625 (S.D.N.Y. 1996).

307. See *supra* note 216 and accompanying text.

308. See *supra* Part II.B.3 (discussing courts' unacknowledged concerns in absent-tribe cases).

309. See, e.g., *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1496–97 (D.C. Cir. 1995) (noting courts' “more circumscribed” discretion in cases in which an absent sovereign is involved).

resolution of disputes. Rule 19 is designed primarily as a tool for consolidating litigation, not for squelching its progress entirely.<sup>310</sup> According to that view, the majority of cases affected by Rule 19 should be ones in which an additional party is successfully added under Rule 19(a)—not cases in which a Rule 19(a) party cannot be joined and the (generally quite rigorous) standard for Rule 19(b) dismissal is met. Thus, unwarranted expansion of Rule 19(b) dismissals turns the rule's fundamental purposes on their head.

Of course, it might be argued that this is a simplistic view and that facilitating complete resolution of disputes is only *one* purpose of Rule 19. Rule 19, it could be argued, is also intended to permit the dismissal of cases that cannot be resolved in their entirety in federal court where it would be harmful, either to the absent party or to existing ones, to go forward with piecemeal litigation. But while it is certainly true that Rule 19 contains a sort of escape valve, it is stretching the point to see this as central enough to Rule 19's goals to justify its expansion without strong justification. Both the Advisory Committee's notes to Rule 19 and the Supreme Court's traditional interpretation of the rule in cases like *Provident Bank* indicate that Rule 19(b) criteria for dismissal are intended to be limited to the relatively few situations in which the absence of an affected party will create serious problems<sup>311</sup> and that, even in that instance, the court does not lack jurisdiction to proceed.<sup>312</sup>

Precisely because Rule 19 is intended principally as a device for joinder—and not at all as a device for abstention—its language and focus were designed with complete judicial resolution of disputes in mind. Rule 19(a) is, after all, devoted in its entirety to enumerating situations in which joinder should be attempted.<sup>313</sup> Even Rule 19(b), while in theory providing a basis for dismissal, looks to the availability of some kind of alternative relief elsewhere, both by asking whether the plaintiff will be able to obtain relief in the event of dismissal and by considering whether the judgment will be adequate in the required party's absence, a factor that reflects the “public stake in settling disputes by

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310. See, e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110–11 (1968) (noting that one of the key values at stake in applying Rule 19 is “the interest of the courts and the public in complete, consistent, and efficient settlement of controversies” and in “settling disputes by wholes, whenever possible”).

311. See, e.g., *id.* at 121 (“In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree upon its merits.”).

312. See FED. R. CIV. P. 19 advisory committee's note (1966) (noting that “[e]ven if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process”).

313. See FED. R. CIV. P. 19(a) (describing circumstances under which a person not yet before the court “must be joined as a party”).

wholes.”<sup>314</sup> The factors that Rule 19 directs courts to consider are thus aimed at least predominantly toward finding some means—whether in or out of federal court—by which the dispute can be resolved conclusively.<sup>315</sup> As a result, they do not encompass all the issues courts should properly be expected to take into consideration were they to use Rule 19 regularly as a means of dismissing politically troublesome cases.<sup>316</sup> Arguably, then, Rule 19 is simply unsuited for use as an abstention device because it has never been tailored for use for that purpose.

## V. MOVING FORWARD WITH RULE 19 DOCTRINE

The preceding Subpart pointed to some of the potential dangers inherent in the expansion of Rule 19(b) dismissals under *Pimentel* and its predecessor lower-court cases. The following Subpart considers ways in which both Rule 19’s text and its interpretation might be modified to avoid some of the pitfalls of too-hasty absent-sovereign dismissal.

### A. Intervention and Dismissal

An initial suggestion is to explicitly incorporate consideration of an absent party’s ability to intervene into the Rule 19(b) factors, such that prejudice to an absent party weighs more heavily in the Rule 19(b) context in cases in which it is difficult for that party to intervene than when it is readily possible. As previously discussed, many courts already take this factor into consideration in cases not involving sovereigns and are less likely to dismiss to protect an absent party when that party could easily have intervened.<sup>317</sup> In absent-sovereign cases, however, many courts have expressed hesitation about the extent to which this factor should weigh, or even whether it is proper for them to consider it at all.<sup>318</sup>

Considerations of a party’s ability to intervene need not focus solely on whether the technical requirements for intervention are satisfied. In Rule 19

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314. See *Provident Bank*, 390 U.S. at 109–11.

315. See *id.* at 116 (noting that courts should also take “efficiency” into consideration and that, in the case at hand, “[i]t might have been preferable, at the trial level, if there were a forum available in which [all affected parties] could have been made defendants, to dismiss the action and force the plaintiffs to go elsewhere”).

316. Such factors might include, for example, the expressed preferences of the executive branch (in cases involving foreign relations) or state and tribal officials (in cases involving tribal gaming), the likelihood of ultimate resolution by a coordinate political body, the institutional competence of the judiciary in resolving the issues at stake, and the public interest in permitting the litigation to proceed.

317. See *supra* note 90 and accompanying text.

318. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998)—in which the court denied an admittedly late motion by the absent sovereign entity to intervene while engaging in a Rule 19(b) dismissal, *see id.* at 162–63—is an extreme illustration of this view.

cases, they nearly always will be because of the significant overlap between the Rule 19(a) factors and the requirements for intervention as of right.<sup>319</sup> (And, indeed, sovereign parties deemed to be “required” under Rule 19(a) do not normally have to go through the potentially cumbersome process of attempting intervention at all; once the Rule 19(a) determination has been made, they can simply waive their immunity and submit to joinder by the court). Rather, the court can conduct a totality of the circumstances analysis, in which it can consider the implications of putting the sovereign to the choice of intervening to protect its interests or remaining out of litigation with a potentially prejudicial outcome.<sup>320</sup>

Such an analysis can potentially take into account both the policies underlying sovereign immunity in general and the immunity of the sovereign at issue in particular. The policies underlying tribal sovereign immunity, for example, might weigh especially strongly in favor of dismissal in cases in which an absent tribe’s interests might be affected. An often-cited purpose of tribal immunity is to protect fragile tribal finances.<sup>321</sup> If intervention or a waiver of immunity would require extensive involvement by the tribe in costly litigation for which it is unprepared, such practical impediments to the tribe’s participation should weigh in favor of dismissal. Likewise, in cases involving foreign nations, an official position by the solicitor general that a sovereign entity has compelling reasons for wishing to exercise its immunity and remain uninvolved in the litigation should also carry strong sway with the court.<sup>322</sup>

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319. Federal Rule of Civil Procedure 24(a) permits intervention as of right for a party who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FED. R. CIV. P. 24(a)(2). This tracks Rule 19(a)’s provision requiring joinder for a party who “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 . . . as a practical matter impair or impede the person’s ability to protect the interest.” See FED. R. CIV. P. 19(a)(1)(B). While Rule 19(a) deems parties required in other circumstances, such as a situation in which the court cannot accord complete relief in their absence, FED. R. CIV. P. 19(a)(1)(A), Rule 24 would seem to permit intervention in all cases in which the basis for deeming a party required is that the interest of that party may be impaired, which is usually the situation in cases involving sovereign immunity. (The only situation in which Rule 24 would not permit a Rule 19(a) party to intervene is when that party’s interests are adequately represented by existing parties to the action).

320. See *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986) (describing this as a “Hobson’s choice”).

321. See Riley, *supra* note 111, at 1109 (noting that sovereign immunity has a special role in enabling poverty-stricken tribes to remain solvent).

322. Thus, this factor should certainly have been taken into consideration in *Pimentel* and may in fact justify the result. The Court, however, should not have phrased its opinion as broadly as it did, relying on the mere fact that the absent party was an immune sovereign in deciding that the case should be dismissed. See *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (asserting that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign”). Further,

By contrast, there may be situations in which the sovereign's position is less sympathetic. A state, the United States, or a prosperous tribe may be perfectly situated to intervene—and intervention in the particular case at hand may require little in the way of time or resources—and may have chosen not to waive its immunity only because it is aware that nonparticipation will likely lead to dismissal, the best possible outcome from the point of view of protecting its own interests. Alternatively, the harm that may ensue should the sovereign choose to retain its immunity and remain a nonparticipant in the litigation may be modest. In such circumstances, a court may choose to discount somewhat the possibility of prejudice to the absent sovereign in conducting the Rule 19(b) analysis.

It is important to note that such a determination need not amount to “abrogating” the sovereign's immunity, as this situation has sometimes been described.<sup>323</sup> The absent sovereign is not required to participate; it simply must weigh the costs of entering the litigation against the potential prejudice if the litigation goes forward without it. This is a decision that sovereigns make all the time when they choose not to become plaintiffs, to remove cases to federal court, or to intervene in cases that may have implications for them down the line (even if those implications are not substantial enough for the sovereign to be deemed a Rule 19(a) party).<sup>324</sup> Nor does such an approach require slighting the importance of sovereign immunity altogether. The possibility of prejudice to a sovereign entity can still be a substantial factor in the court's analysis, and depending on the circumstances, the court may determine that dismissal is necessary in order to protect the sovereign's decision not to intervene. At the same time, however, the absent party's sovereign status will, appropriately, not always be a decisive consideration.

## B. Restructuring the Rule

A second possibility, in addition to the explicit incorporation of a party's ability to intervene or participate, is to engage in a broader reconsideration of Rule 19's language and structure. As previously discussed,<sup>325</sup> Rule 19(a) and Rule

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even giving the solicitor general's brief appropriate weight, the Court arguably went too far; as the dissenters argued, the interests of the Philippines would likely have been adequately protected by granting a stay or shifting the case to a different judge. *See id.* at 875 (Stevens, J., dissenting in part); *id.* at 879 (Souter, J., dissenting in part).

323. *See, e.g.,* *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (failing to dismiss a case in such circumstances “would . . . effectively abrogate . . . sovereign immunity by adjudicating [the sovereign's] interest . . . without consent”).

324. Voluntarily submitting a dispute to federal court can have the effect of waiving sovereign immunity. *See, e.g.,* *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002) (holding that the state waives immunity by filing a complaint in federal court or removing to federal court).

325. *See supra* Part I.C.

19(b), while theoretically working in tandem, operate very differently in practice. Rule 19(a) serves the rule's initial purposes of facilitating joinder and consolidation. Rule 19(b) in theory functions as a safety valve and a forum-shifting device, permitting dismissal when it would be inappropriate for the case to go forward in a piecemeal fashion and/or when a preferable forum exists that can accommodate the entire dispute. Increasingly, however, Rule 19(b) is used manipulatively by litigants (either parties or nonparties<sup>326</sup>) to secure dismissal of cases in circumstances in which it is unlikely that another forum will be able to hear the dispute.

A thorough look at the ways in which Rule 19(a) might be retooled is beyond the scope of this Article. It may suffice for now to say that Issacharoff's suggestions that this portion of the rule might be made less specific and more open to the discretion of the trial judge<sup>327</sup> are intriguing.<sup>328</sup> Where Rule 19(b) is concerned, however, a promising direction for revision would be to strengthen the rule's focus on finding another forum that has jurisdiction over all claims. The current version of Rule 19 addresses this issue to some degree by instructing the court to consider "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."<sup>329</sup> While the plaintiff's interests in obtaining relief are important and should be highlighted in any version of the rule, the current Rule 19 fails to incorporate the judicial system's overall interest in complete, efficient, and effective resolution of disputes. The fact that another forum exists in which the plaintiff can obtain relief should be a factor weighing, all else being equal, in favor of dismissal. A still stronger argument for dismissal exists when the alternative forum will not only permit the plaintiff to obtain relief but will allow related claims to be heard and minimize the likelihood of multiplying litigation or conflicting determinations by more than one court on the same issue.

When absent sovereigns are concerned, of course, the sovereign's immunity from suit normally means that such a forum will not exist. This is not always the case, however. Sovereigns may have already waived immunity to a greater

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326. It is possible that parties not joined to the action might, for example, be able to appeal a judgment that they are not indispensable. In *Pimentel*, the Republic and the Commission attempted to seek review of such a judgment. Because other parties had standing to appeal, the Court did not need to rule on this issue but was careful not to "imply[] that respondents are correct in saying the Republic and the Commission could neither appeal nor become parties here." See *Pimentel*, 553 U.S. at 861.

327. See Issacharoff, *supra* note 32, at 192–98.

328. Note that such changes might not come without costs, however. In particular, unless Rule 24 were similarly revised (which may or may not be desirable), the symmetry between the two rules would be lost, and the assumption that a required party would normally be permitted to intervene on its own request would no longer be tenable.

329. FED. R. CIV. P. 19(b)(4).

extent in certain courts, such as their own, or they may agree to waive immunity in the particular suit in which they are a required party if certain conditions are met.<sup>330</sup> By taking such concessions into account in considering whether dismissal is warranted, courts can strike a balance between the sovereign's prerogatives and the judicial system's overall needs, which include providing the plaintiff with some form of satisfaction.

Finally, when the main motivating force behind a court's use of Rule 19 is the desire to avoid a politically troublesome decision, courts should resist the temptation to put Rule 19 to abstention-like uses. Established doctrines of comity and *forum non conveniens* already exist to permit federal courts to take account of foreign-relations issues and the relative competencies of various forums in deciding whether to hear a case. Such doctrines are preferable for several reasons. First, they incorporate a long tradition of case law in which there is substantial protection for the plaintiff's interests. If, for some reason, they are not suitable for a particular situation or do not provide a basis for the court to dismiss a particular case, it is probably because there is some good reason for the case to remain in the federal forum. In using Rule 19 as a substitute in cases in which these doctrines are unavailable, courts risk treading on longstanding concerns and exceptions already incorporated into the law.<sup>331</sup> Further, as previously discussed,<sup>332</sup> Rule 19 undermines judicial straightforwardness by permitting courts to mask a political decision as a procedural one.

### C. Considerations Specific to the Tribal Context

This caution about the expansion of Rule 19 comes with one caveat, however. While existing doctrines remain serviceable in cases implicating a foreign sovereign's interests, such doctrines may require some expansion and adaptation to suit the tribal context, in which they are not currently applied to the same degree. Although tribes possess many characteristics of sovereign nations, principles of comity have not been applied to them as extensively as in the foreign context.<sup>333</sup> Nor has *forum non conveniens* or any other specific doctrine that courts have used to dismiss cases in favor of foreign forums been

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330. See, e.g., Riley, *supra* note 111, at 1111–13 (arguing that tribes should consider waiving immunity from suit on the condition that the suit be heard in tribal court).

331. See *supra* notes 293–295 and accompanying text.

332. See *supra* notes 303–309 and accompanying text.

333. I have not, for example, been able to locate any opinion in which a court dismissed a case involving a tribe on the same broad comity principles that have been applied to foreign nations. It should be noted, however, that some doctrines peculiar to federal Indian law (such as the rule that objections to a tribal court's jurisdiction should be raised in that court first, see *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987)) are motivated by similar concerns.

adapted to cases involving tribes.<sup>334</sup> Further, substantial obstacles to such adaptation exist. Any doctrine—forum non conveniens, comity, or otherwise—that calls for a federal court to dismiss in favor of a more appropriate forum is problematic where cases that touch Indian country are concerned. In general, tribal courts have limited or nonexistent jurisdiction over nonconsenting non-Indian defendants even when events giving rise to the underlying cause of action occur on reservations.<sup>335</sup> While courts could adapt to this reality by requiring defendants to waive objections to tribal jurisdiction as a condition of dismissal (as they have sometimes done in forum non conveniens cases), defendants not associated with the tribe may be reluctant to agree to such a waiver, and managing various parties' consent to jurisdiction in tribal court may be burdensome in multiparty litigation.

Indeed, precisely because few procedural mechanisms exist to permit the funneling of cases to a tribal forum, the use of Rule 19 to dismiss cases involving prejudice to absent tribes is perhaps more defensible than its use for similar purposes in cases in which other sovereigns are involved. When tribes are concerned, there simply may be no other forum in which the complete dispute can be better accommodated, and dismissal may be a better alternative to allowing the case to proceed piecemeal in federal court without the participation of an unwilling tribe.

The fact that Rule 19 may be the best of several bad possibilities in this situation, however, does not mean that its use for this purpose is ideal. A better alternative would be for courts, insofar as is possible, to develop doctrines specifically geared toward encouraging consolidation of cases in a tribal forum (or other forum in which the absent tribe is willing to participate) within existing jurisdictional limitations. Further, it is important to note that the special features of the tribal context should be taken into account when courts contemplate expanding Rule 19 doctrines developed in the tribal context into the foreign arena. Although courts have relied upon Rule 19 precedents involving tribes in cases that concern other sorts of absent sovereigns,<sup>336</sup> they should recognize that the distinctive features of tribes' situation—and the absence of workable abstention or forum-shifting devices that exist in other contexts—counsel against the

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334. Again, I have been unable to locate such a case, and it seems unlikely that any exists because of obstacles to tribal jurisdiction.

335. For an account of the Supreme Court's recent restrictions on tribal jurisdiction over nonmembers, see Frickey, *supra* note 283.

336. See, e.g., *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1499–1500 (D.C. Cir. 1995) (relying on tribal cases to find that the State of Kansas was an indispensable party under Rule 19(b)).



wholesale importation of tribal precedent to cases in which the absent sovereign is a state, the United States, or a foreign nation.<sup>337</sup>

#### D. Incorporating the Problem Into the Rule Explicitly

A final, far more tentative possibility is to incorporate some explicit consideration of the absent sovereign problem into Rule 19(b) so that sovereign immunity *per se* can be weighed alongside the other Rule 19(b) factors. The argument in favor of this approach is simply that absent-sovereign cases have become a predictable and widespread subset of the situations that give rise to Rule 19 consideration in general. There are now hundreds of published opinions addressing the problem of how to treat absent sovereigns under Rule 19;<sup>338</sup> this is a serious and widespread issue on which the rule fails to provide adequate guidance.

This suggestion is not without its potential dangers. First of all, it might be argued that sovereign immunity and the policies underlying it are substantive issues that are inappropriate to address under the rubric of a procedural rule. Moreover, there are practical problems with this approach as well. Sovereign immunity doctrines are ever-changing and vary depending on context. To take just one example, the doctrine of state sovereign immunity has constitutional underpinnings (at least according to the current Supreme Court),<sup>339</sup> while tribal and foreign sovereign immunity are subject to congressional modification.<sup>340</sup> To enshrine a particular view of sovereign immunity and its relationship to other factors in Rule 19(b) itself might deprive courts of necessary flexibility and slight the nuances that attend assertions of sovereign immunity in any particular situation.

Explicit mention of sovereign immunity in Rule 19's text may thus have some undesirable consequences and may not be necessary if courts can find other ways to negotiate the competing demands of protection for sovereign interests on the one hand and providing plaintiffs meaningful relief on the other. Nonetheless, the existence of a routine Rule 19 situation unaddressed by the text

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337. See Florey, *supra* note 109, at 824–26 (arguing that the distinctiveness of tribal immunity weighs against applying it without modification to cases involving other sorts of immune sovereigns).

338. For example, a Lexis search performed on July 30, 2010 for cases containing both “sovereign immunity” and “Fed. R. Civ. P. 19” yielded 604 documents.

339. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (holding that the Eleventh Amendment confirms that sovereign immunity is a restriction on the judicial power under Article III).

340. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759–60 (1998) (noting a parallel congressional role with respect to tribal and foreign sovereign immunity).

of the rule—despite the fact that the Supreme Court has commented upon it<sup>341</sup> and many courts have developed sweeping rules related to it<sup>342</sup>—remains potentially problematic and is something the Advisory Committee should perhaps continue to monitor in considering potential changes to the rule.

#### CONCLUSION

Although Rule 19's most important purpose is as a consolidation device, the fluid text of Rule 19(b) has given courts great discretion in deciding whether to dismiss cases for failure to join an absent party. Increasingly—and, since *Pimentel*, with the blessing of the Supreme Court—courts have used that discretion to formulate what is at least a presumptive rule that cases that may harm the interests of an absent sovereign should be dismissed. In many ways, this rule functions as an abstention technique akin to something like the political question doctrine, given the substantial overlap between cases affecting absent sovereigns and cases the judiciary may question its competence to decide (or the wisdom of doing so).

Although some Rule 19 dismissals involving absent sovereigns are understandable, the rule of near-universal dismissal needs to be more carefully defined and hemmed in. Rule 19, a simple procedural device, is unsuited to being pressed into service for this purpose, and important interests of the plaintiff are almost inevitably slighted when courts do so. In approaching Rule 19 cases involving sovereigns, courts should not resort to automatic dismissal but should consider in a more precise, refined way the real harm to the sovereign and how it must be balanced against the other interests involved. If the text of Rule 19 can be refined to facilitate this change from current doctrine, the effects will be all the better.

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341. See *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (suggesting that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign”).

342. See *supra* note 102 and accompanying text.