Article

Article III and Indian Tribes

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Among the most basic principles of our federal courts is that they are courts of limited jurisdiction, exercising only those powers delegated to them in Article III. In 1985 the Supreme Court inexplicably created an exception to this constitutional tenet and unilaterally declared a plenary judicial power to review the exercise of an Indian tribe's inherent sovereign authority. This exception is unmoored from all other Supreme Court precedent outside Indian law and unjustifiably assumes the judicial power in direct contrast to the Court's ordinarily thoughtful jurisprudence on Article III and deference to the separation of powers.

This Article concludes that the Supreme Court was wrong in 1985 when it assumed a plenary judicial power over Indian affairs. The consequences are profound and suggest a reconceptualization of the entire field of Indian law. Canon-creating cases like Oliphant*,* Montana*, and* Cabazon *should never have been decided because the exercise of a tribe's inherent authority does not create a federal question conferring subject-matter jurisdiction on the federal courts. The inherent power of Indian tribes to criminally prosecute or civilly regulate non-Indians in Indian country should not subject them to the judicially imposed limits set by the Supreme Court because the Court lacks subject-matter*

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jurisdiction to decide those cases. Until a treaty or statute creates an affirmative basis for federal court review, an Indian tribe's inherent powers are subject to the checks and balances imposed by tribal government and no others.

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INTRODUCTION

Since 1896 the Supreme Court has been clear that "the existence of the right in Congress to regulate the manner in which the local powers of [an Indian tribe][1] shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States."[2] When Congress has remained silent, the federal courts lack the authority to examine the exercise of an Indian tribe's inherent power even when an Indian tribe is alleged to have violated an individual's constitutional rights. Because tribes exercise a sovereignty that antedates the Constitution, absent a treaty or statute the exercise of inherent tribal power does not create a federal question subject to the jurisdiction of the federal courts.[3]

Congress does not always remain silent. For example, in 1968 Congress enacted the Indian Civil Rights Act (ICRA), requiring tribal governments to respect a set of individual rights.[4] But in 1978 the Supreme Court held that even when Congress recognizes individual rights, the violation of those rights by an Indian tribe does not raise a federal question subject to the jurisdiction of the federal courts unless Congress has also crafted a federal remedy to vindicate that federal right.[5] The Court reasoned that "however useful"[6] a federal remedy might be to "securing compliance"[7] with the federally created right, the creation

1. The Author recognizes that the word "Indian" has a number of problematic and even overtly racist connotations. Its use in this Article is as a legal term of art. The term is regularly used in the law (for example, Chapter 25 of the U.S. Code is the chapter dealing with "Indians") and as the term is used in the U.S. Constitution contradistinguishing "Indian tribes" from fellow sovereigns: "states" and "foreign nations." U.S. CONST. art. I, § 8. The term is used to codify the definition of "Indian country" in 18 U.S.C. § 1151 and is used to determine which tribes share in a government-to-government relationship through the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791. For a discussion of how the term "Indian" is more problematic in other contexts, see H.P. GLENN, LEGAL TRADITIONS OF THE WORLD 60 n.1 (5th ed. 2014).

2. Talton v. Mayes, 163 U.S. 376, 384 (1896).

3. *See id.* at 384–85 (stating that, instead, the exercise of tribal power is under the jurisdiction of that tribal nation).

4. Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304.

5. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (stating that while Congress retained broad authority over "Indian matters," Congress had not clearly intended federal adjudication of tribunal rights).

6. *Id.* at 64.

7. *Id.*

of a common law judicial remedy "plainly would be at odds with the congressional goal of protecting tribal self-government."[8]

Despite this precedent, in 1985 the Court held in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* that whether a tribal court has jurisdiction over a non-Indian for conduct occurring on its reservation creates a justiciable federal question that arises under the federal common law.[9] The right not to be subject to the exercise of a tribe's inherent power, and the concomitant federal court remedy permitting federal judges to construct tribal court jurisdiction whole cloth without any limiting principle by Congress, apparently raised an implied federal question.[10] The Court went so far as to suggest that when Indian tribes are involved it is not just Congress, but also the federal courts that have "plenary" authority.[11]

This Article takes the position that Article III of the United States Constitution does not extend the judicial power to review a tribe's exercise of its inherent authority absent a positive source of federal law, and therefore *National Farmers* was wrongly decided. The exercise of a tribe's inherent power does not create a federal question until Congress has intervened to affirmatively create a right to contest the exercise of that power in a federal court. This restrained interpretation of federal question jurisdiction properly limits the exercise of the judicial power by the federal courts while also accomplishing Congress's clearly articulated goals of respecting tribal sovereignty and encouraging tribal self-determination.[12]

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8. *Id.*

9. 471 U.S. 845, 852–53 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action 'arising under' federal law within the meaning of § 1331." (footnote omitted)).

10. *See id.* (allowing petitioners to seek relief in federal court).

11. *Id.* at 851.

12. The Supreme Court has regularly recognized a strong federal interest in encouraging tribal self-government, at times suggesting that the federal interest is sufficient to preempt state regulation or jurisdiction in Indian country. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (stating that "federal interest in encouraging tribal self-government is at its strongest" when conduct involves tribal member on the reservation). For an academic

The consequences of properly limiting the use of the judicial power to review the exercise of an Indian tribe's inherent sovereignty are profound: it would fundamentally remake Indian law. Perhaps most importantly, the Supreme Court lacked subject-matter jurisdiction under Article III to decide some of the most important parts of the Indian law canon; from *Oliphant*'s prohibition on tribal court criminal jurisdiction over non-Indians,[13] to *Montana*'s implied limitation on civil jurisdiction over non-tribal lands,[14] to *Cabazon*'s recognition of a tribe's right to operate gaming facilities that violate a state's gambling ordinances.[15] I argue not that *Oliphant*, *Montana*, and *Cabazon* were wrongly decided—but that they should not have been decided at all.

An exploration of the federal courts' jurisdiction over Indian tribes is long overdue. Professor Judith Resnick has been calling for a more exacting examination of the judicial power in cases involving Indian tribes for years: "The bountiful literature of federal courts' jurisprudence does not, however, consider problems of the relationship between Indian tribes, the federal government, and the states."[16] This has allowed the creation of a judicial plenary power to go unnoticed and virtually uncritiqued despite its clear violation of the limiting principles of Article III.[17] This Article responds to Professor Resnick's call for more exploration of the tribal sovereign and is intended to provoke questions at the core of federal courts theory and scholarship about

discussion of these federal interests, see Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 754–57 (1989) (discussing the prominent role tribal courts play in our federal system and the federal courts' duty to respect of tribal sovereignty).

13. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

14. Montana v. United States, 450 U.S. 544, 564–65 (1981).

15. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221–22 (1987).

16. Resnick, *supra* note 12, at 676.

17. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 218 (2002) ("In no other context have the federal courts crafted, *totally without the benefit of any supporting statute*, an appellate review process supervising the courts of another sovereignty. Judicial Indian plenary power apparently contains few limitations on judicial activism and creativity, just as it failed to limit Congressional excesses during the height of American colonialism in Indian country.").

the meaning of Article III and the role of tribes as a third sovereign in American jurisprudence.[18]

Part I of this Article begins by explaining the inherent Article III limitations over cases involving Indian tribes and their exercise of inherent power. Because Indian tribes are not persons, the addition of an Indian tribe as a party in federal litigation destroys diversity jurisdiction. This leaves federal question jurisdiction as the exclusive Article III basis for cases involving Indian tribes in a federal court. Part II applies this analysis to *National Farmers*. It argues that Article III jurisdiction does not extend to common law claims that generally question the ability of a tribe to exercise its inherent sovereignty. While recognizing that federal courts have the authority under Article III to review a tribe's assertion of its inherent powers when the claim raises a constitutional question, allegedly violates a treaty provision, or is authorized by a federal statute—the federal courts do not have the power to create causes of action or implied remedies that are not authorized by some positive source of law. Part III justifies this limitation on the basis of the *sui generis* nature of tribal sovereignty, which raises countervailing congressional interests in promoting both sovereignty and tribal self-government. In short, tribes are unique and the judicial power of the federal courts to create the common law is inimitably circumscribed in deference to the competing sovereign interests of tribal government. Part IV applies these conclusions to the existing Indian law canon. The Article suggests three principal implications resulting from Article III's denial of subject-matter jurisdiction related to the inherent exercise of tribal power. First, that some of the foundational Indian law cases in the canon should have been dismissed for lack of jurisdiction. Without judicial intervention, a space is created permitting Indian tribes to exercise their inherent powers unless Congress takes affirmative steps to authorize judicial review. Second, permitting Indian tribes to exercise their inherent powers absent intervention by Congress restores the traditional federalism balance between tribal, state, and federal sovereigns that was first articulated by Chief Justice Marshall in the 1830s. Finally, appropriately limiting the use of the judicial power under Article III will change the questions we ask in

18. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) (naming the Indian Tribes as a third sovereign entity alongside the federal government and the states).

Indian law cases that make their way to the federal courts. The Article finishes with a few conclusory observations.

I. FEDERAL COURT JURISDICTION OVER INDIAN TRIBES IS LIMITED TO FEDERAL QUESTIONS

Article III of the United States Constitution limits the scope of the federal judicial power, broadly referencing nine categories of "cases" or "controversies" over which the federal courts assert their jurisdiction.[19] In 1821 Chief Justice Marshall broadly divided these categories into "two classes of cases," those where "jurisdiction depends on the character of the cause" and those where "jurisdiction depends entirely on the character of the parties."[20] Today those claims that arise under the federal law and thus have an inherently federal character constitute the federal court's federal question jurisdiction,[21] while those depending entirely upon the character of the parties precisely because they don't arise under a source of federal law constitute the court's diversity jurisdiction.[22] Federal courts do not discriminate between the categories or classes of cases. With few exceptions,[23]

19. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

20. Cohens v. Virginia, 19 U.S. 264, 378 (1821).

21. 28 U.S.C. § 1331.

22. *Id.* § 1332.

23. A few kinds of claims deal so intimately with questions of law reserved to the states that even when they would otherwise appear to qualify for diversity jurisdiction, the federal courts disclaim the power to resolve the dispute. The two most common are those dealing with domestic relations (divorce, custody, alimony, etc.) and those dealing with the law of probate (validity or enforcement of a will, competency, etc.). For a discussion of the domestic relations exception, see Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131 (2009); Bradley G. Silverman, Note, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364 (2016). For a discussion of the probate exception, see Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479 (2001); Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984).

any claim that qualifies for the federal judicial power may be brought in a federal court.

Cases to which an Indian tribe is a party, however, can never qualify for diversity jurisdiction. When the Constitution was written the drafters thought deeply about the division of powers between the federal and state sovereigns.[24] The result is a system where the federal government exercises those limited powers surrendered to it by the states.[25] Indian tribes were not a party to the Constitutional Convention,[26] and with limited exceptions not relevant to Article III, are broadly omitted from the Constitution.[27] Article III effectively omits Indian tribes as entities who may be parties to a claim in federal court on the basis of diversity jurisdiction,[28] leaving federal question jurisdiction as the sole basis of federal judicial power in a case to which an Indian tribe is a party.

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24. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 326–27 (1997) (discussing the Framers' iterative process in drafting the Constitution such that federal authority would be constrained).

25. *See id.* at 326 ("Framers of other federations have used different strategies for this division of power. The American constitutional plan is a familiar one. The American solution was to specify, or 'enumerate' the powers of the national government, leaving the residue to the states." (footnotes omitted)).

26. *See* Michigan v. Bay Mills Indian Community, 572 U.S. 782, 789–90 (2014) ("While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity . . . ." (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991))).

27. Indian tribes are mentioned only twice in the Constitution. They are contradistinguished from states and foreign nations in the Commerce Clause, and "Indians not taxed" are excluded from the number of persons used to apportion the number of seats each state gets in Congress. U.S. CONST. art. I, §§ 2, 8. *See generally* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495 (2020) (analyzing political implications of constitutional references to Indians). The Constitution also does not bind tribal governments. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) ("Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes." (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring))).

28. *See* Graham Safty, Comment, *Federal Diversity Jurisdiction and American Indian Tribal Corporations*, 79 U. CHI. L. REV. 1593, 1601 (2012) ("Indian tribes are not covered by any of the sources of diversity jurisdiction set forth in § 1332(a) because they are neither foreign states nor citizens of a US or foreign state.").

A. THERE IS NO DIVERSITY JURISDICTION OVER INDIAN TRIBES

Diversity jurisdiction opens the federal courts up to claims made under state law when there is a complete diversity of parties and the amount in controversy exceeds $75,000.[29] The statute speaks to disputes between "citizens of different States,"[30] "citizens of a State and citizens or subjects of a foreign state,"[31] and "citizens of different States and in which citizens or subjects of a foreign state are additional parties."[32] The traditional theory underlying diversity jurisdiction is that "diversity is necessary to avoid a fear of state-based bias."[33] By providing "a neutral federal forum as an escape from the reality, or at least the fear, of bias in state courts," diversity jurisdiction creates an even playing field for litigants from different states, overseen by a federal judge who is entitled to life tenure and is therefore, presumably, less influenced by the status of the parties or the need to seek reelection.[34]

While an individual Indian person is a citizen of both the state in which they live and the tribe of which they are a

29. *See* 28 U.S.C. § 1332. The amount in controversy is set by statute and has been revised repeatedly, most recently in 1988 to the current $75,000 from $50,000. For a discussion of the amount in controversy requirement, including a detailed history of the amount, see Steven Gensler & Roger Michalski, *The Million-Dollar Diversity Docket*, 47 BYU L. REV. 1653, 1666–72 (2022).

30. 28 U.S.C. § 1332(a)(1).

31. *Id.* § 1332(a)(2).

32. *Id.* § 1332(a)(3).

33. Richard D. Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CAL. L. REV. 1083, 1091 (2021) (emphasis omitted).

34. *Id.* at 1087.

member,[35] an Indian tribe is not a citizen of any state,[36] nor is it a foreign state, but instead Indian tribes are distinct sovereigns contradistinguished from either states or foreign states.[37] Chief Justice Marshall justified this unique sovereign position in *Cherokee Nation v. Georgia* using the explicit language of the Commerce Clause:

> In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.[38]

Neither states nor foreign states, Indian tribes stand alone as a distinct sovereign within the American federal system. Diversity jurisdiction doesn't account for Indian tribes anywhere in

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35. *See* Clinton, *supra* note 17, at 247–48 ("[T]hey are today American citizens, who may (but often do not) participate in, and theoretically consent to, American governance. The argument, therefore, is that Indian tribes, originally existing outside of the federal system, were brought into the federal union by the conferral of citizenship on their members through the Indian Citizenship Act of 1924. Given the way many Indians view themselves today and their patriotic pride in dual American citizenship and tribal membership, there is some practical, grass roots force to this potential argument. Nevertheless, this seemingly simple answer to the consent/delegation question ultimately fails to justify the exercise of federal plenary power over Indian tribes and their members . . . ." (footnotes omitted)). For judicial authority, see Henry-Bey v. Champery Real Est. 2015, No. 18-cv-80953-MIDDLEBROOKS, 2018 WL 7824480, at *3 (S.D. Fla. Aug. 17, 2018) ("Moreover, to the extent that Plaintiff intends to claim that he is a 'dual citizen' of the United States and an Indian tribe, 'an individual who is a dual citizen of the United States and another nation is only a citizen of the United States for the purposes of diversity jurisdiction under § 1332(a).'" (quoting Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1341 (11th Cir. 2011))).

36. *See* Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 710–12 (2003) (holding that, unlike an individual tribal member, the tribal sovereign is not a "person" under the law).

37. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.'" (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))).

38. 30 U.S. 1, 18 (1831).

the text of the statute nor in Article III. That leaves federal courts devoid of diversity jurisdiction when an Indian tribe is a party to a lawsuit in federal court.

This omission, and the concomitant result that the presence of a tribal sovereign destroys diversity, has been robustly defended in the federal courts with limited exception.[39] The First Circuit has held that "a tribe is analogous to a stateless person for jurisdictional purposes. It follows that, notwithstanding the joinder of other diverse parties, the presence of an Indian tribe destroys complete diversity."[40] The Second Circuit emphasized

> [T]hat the conclusion that an Indian tribe is not a citizen of any state is reinforced by the requirement that we strictly construe the diversity statute. . . . [I]n light of Indian tribes' . . . "unique status as . . . aboriginal entit[ies]" antedating the federal government, it is doubtful at best whether an Indian tribe could be considered a citizen of any state.[41]

The Eleventh Circuit has added that the "majority view—followed by every court of appeals that has addressed the issue—is that unincorporated Indian tribes cannot sue or be sued in diversity under 28 U.S.C. § 1332(a)(1) because they are not citizens of any state."[42] The federal circuits further west have unanimously agreed with their East Coast sisters. The Ninth Circuit has held that "unincorporated Indian tribes cannot sue or be sued in

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39. *See* Akins v. Penobscot Nation, 130 F.3d 482, 485 (1st Cir. 1997) (holding that while ordinarily Indian tribes are not subject to diversity jurisdiction, the Maine Indian Claims Settlement Act stated that Maine's tribes "may sue and be sued in the courts of the . . . United States to the same extent as any other entity or person residing in the State of Maine," and therefore the Maine tribes may be subject to diversity jurisdiction). While no federal appellate court has held that a tribal sovereign assumes the citizenship of a state absent explicit congressional approval, a couple of district courts have suggested that diversity jurisdiction might exist. *See* Warn v. Eastern Band of Cherokee Indians, 858 F. Supp. 524, 526 (W.D.N.C. 1994) (holding that a breach of contract claim against the Eastern Band of Cherokee and its council members could be heard on the basis of diversity).

40. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27 (1st Cir. 2000) (citation omitted).

41. Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir. 1997) (fourth and fifth alteration in original) (quoting Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 178 (2d Cir. 1996)).

42. Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co., 607 F.3d 1268, 1276 (11th Cir. 2010) (quoting and reversing Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co., No. 04-22774-CIV-UNGARO-BENAGES, 2007 WL 9701836, at *2 n.3 (S.D. Fla. May 25, 2007)).

diversity because they are not citizens of any state,"[43] the Eighth Circuit concluded that "it is clear that an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction,"[44] and the Tenth Circuit repeated that "available authority holds that Indian tribes are not citizens of any state for purposes of diversity jurisdiction."[45]

Consistent with Supreme Court precedent since 1831, and aligned with federal appellate authority, an Indian tribe is neither a citizen of a state nor a foreign state. It is a sovereign entity whose addition to federal litigation destroys diversity. With diversity jurisdiction foreclosed, in order for a federal court to assert the judicial power over an Indian tribe it must be asserting federal question jurisdiction: resolving a case "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[46]

B. INDIAN TRIBES MAY BE PARTIES IN A FEDERAL COURT ON THE BASIS OF FEDERAL QUESTION JURISDICTION

Although diversity jurisdiction is foreclosed, the tribal sovereign, like any sovereign, may appear as either a plaintiff or defendant in a federal court on the basis of federal question jurisdiction.[47] Article III states that the judicial power of the federal courts extends to cases "arising under this Constitution, the Laws of the United States, and Treaties."[48] Federal courts have federal question jurisdiction over Indian tribes when they are a party to a case that raises any of these federal questions under § 1331, although Indian tribes may admittedly continue to exercise sovereign immunity as a defense to even these claims in federal court.[49]

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43. Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1095 (9th Cir. 2002).

44. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974).

45. Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993).

46. U.S. CONST. art. III, § 2, cl. 1.

47. *See* Safty, *supra* note 28, at 1594 (stating that a federal court can hear cases where an Indian tribe is a party so long as the court has subject-matter jurisdiction in the form of federal question jurisdiction).

48. U.S. CONST. art. III, § 2, cl. 1.

49. *E.g.*, Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a

1. The U.S. Constitution

Indian tribes are not bound by the Constitution. As Justice Marshall explained: "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[50] Consistent with this proposition, some claims that when brought against a state or federal government would allege a constitutional violation do not implicate a constitutional right when brought against an Indian tribe. Instead, tribes respect these rights either on the basis of inherent tribal law[51] or because Congress has required them to do so by federal statute.[52] For example, a claim alleging that the tribal government has violated one of its member's rights to equal protection is a statutory claim instead of a constitutional claim.[53]

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reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."); Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788 (2014) ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.'" (first quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); and then quoting Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890 (1986))).

50. *Santa Clara Pueblo*, 436 U.S. at 56.

51. For example, the Sixth Amendment guarantee of a right to counsel does not exist in tribal court, but many tribes have an autochthonous tradition of providing representation and so guarantee the right through tribal law. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1600 (2016) ("Historically, law enforcement functioned largely through ceremonial societies and clan affiliations. Having someone speak on your behalf and ensuring fairness are both 'deeply rooted in Yaqui indigenous tradition and practice,' and are based in tribal cultures that 'pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law.'" (footnotes omitted)).

52. Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304. For an important discussion and partial critique of the Indian Civil Rights Act, including the disconnect between a Western set of values premised on individual rights and chthonic laws and traditions, see Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007).

53. *See Santa Clara Pueblo*, 436 U.S. at 51 (challenging a tribal enrollment ordinance for discriminating on the basis of sex and ancestry in violation of equal protection rights conveyed by the Indian Civil Rights Act, rather than the Constitution).

Cases arising under the U.S. Constitution to which Indian tribes are parties are therefore considerably less common than cases brought against their state or federal counterparts. Although rare, federal courts have subject-matter jurisdiction when they arise. Among the more notable is *Seminole Tribe v. Florida*.[54] In *Seminole Tribe*, the State of Florida claimed that the Eleventh Amendment prevented a federal statute from waiving state immunity to suits brought by Indian tribes to enforce the Indian Gaming Regulatory Act.[55] The Supreme Court agreed: "The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court."[56]

2. The Laws of the United States

An entire title of the U.S. Code (Chapter 25) deals with federal laws that apply to Indian tribes.[57] These statutes create rules ranging from the management of timber resources on Indian reservations,[58] to the protection of Indigenous gravesites and patrimony,[59] to the operation and management of tribal casinos.[60]

Indian tribes are regularly parties to lawsuits that allege a violation of one or more federal statutes. Tribes are often plaintiffs. The Ysleta del Sur Pueblo just had the federal courts recognize their right to engage in some gaming operations because the Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act did not bar the tribe from exercising its

54. 517 U.S. 44 (1996). The case was originally positioned as an interpretation of whether the State of Florida had violated a provision of the Indian Gaming Regulatory Act when it refused to negotiate a gaming compact in good faith. *Id.* at 51–52. On an interlocutory appeal through the federal appellate courts, Florida raised an Eleventh Amendment question which reached the Supreme Court. *Id.* at 52–53.

55. *Id.*

56. *Id.* at 76.

57. *See* Morton v. Mancari, 417 U.S. 535, 552 (1974) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

58. National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101–3120.

59. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013.

60. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721.

rights under the Indian Gaming Regulatory Act.[61] Tribes are also defendants. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Tribe was sued by a non-Indian landowner under the Administrative Procedures Act objecting to tribal lands being taken into trust by the Secretary of Interior.[62]

The laws of the United States may also refer to federal common law, as "'claims founded upon federal common law' arise under the laws of the United States and support federal-question jurisdiction."[63] The Supreme Court has previously found subject-matter jurisdiction over cases involving Indian tribes based upon the federal common law.[64] The thesis of this Article is a refutation of these cases.[65]

3. Treaties

Cases based on rights or obligations conferred by treaty and involving an Indian tribe are regularly litigated in the federal courts.[66] The United States has ratified more than 350 treaties with tribal sovereigns[67] between the Constitution's ratification and the end of Indian treaty-making in 1871.[68] Article VI of the

61. Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1944 (2022).

62. 567 U.S. 209, 212 (2012).

63. E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec., 950 F.3d 177, 193 (3d Cir. 2020) (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)).

64. *E.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852–53 (1985) (holding that whether a tribal court has subject-matter jurisdiction over a non-Indian corporation for activity occurring on the tribe's reservation raised a federal question under federal common law).

65. *See infra* Part II.

66. *See generally* Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805 (2018) (providing a survey of cases decided by the courts in 2017, including more than a dozen that involve questions of treaty rights).

67. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1810 (2019) ("Because Indian affairs dominated the federal policymaking docket, the over 350 treaties between the United States and Native Nations constituted more than half of the treaties ratified by the United States in its first hundred years."). Interestingly, the United States negotiated more than 800 treaties with Indian tribes, but fewer than half of them were ultimately ratified by Congress. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 62 n.21 (1999).

68. David H. Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treatymaking*, 97 N.Y.U. L. REV. 137, 140 (2022) ("Congress passed a rider to the 1871 Appropriations Act that effectively halted any expansion of the federal-

U.S. Constitution includes treaties as part of the "supreme Law of the Land,"[69] and cases that raise claims based on Indian treaties qualify for federal question jurisdiction in federal courts.[70]

Tribes litigate a range of treaty provisions in the federal courts, from cases to secure their usufructuary hunting and fishing rights,[71] to claims seeking clarification and recognition of their reservation's land base.[72] In a particularly interesting example of a tribe asserting a claim under a treaty provision, the Cheyenne and Arapaho Tribes brought a case in the Court of Federal Claims alleging that opioid manufacturers, distributors, and their agents were "bad men among the whites" and so the United States was liable for their actions contributing to the opioid epidemic pursuant to both the Medicine Lodge Treaty of 1867 and the Fort Laramie Treaty of 1868.[73]

Taken together, the above examples in this Section demonstrate that Indian tribes regularly and properly avail themselves of the federal courts to assert claims under the Constitution, laws of the United States, and treaties pursuant to Article III. The next Part explores the Supreme Court's justification for further expanding federal question jurisdiction for certain cases that arise in Indian country on the basis of the federal common law.

II. THE SUPREME COURT'S ARTICLE III BASIS FOR JURISDICTION INVOLVING INDIAN TRIBES

In accordance with the precedent discussed in Part I, the addition of an Indian tribe to federal litigation destroys diversity jurisdiction, leaving only federal question jurisdiction as an

Indian treaty relationship. The 1871 Act prohibited future treatymaking with the tribes by statutorily dictating that tribes would no longer qualify as treaty partners." (footnotes omitted)).

69. U.S. CONST. art. VI, cl. 2.

70. *See* Brooke L. Myers, Note, *Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court*, 40 LOY. L.A. L. REV. 1449, 1457–58 (2007) ("[I]t has long been held that treaties have the same force as federal statutes . . . . As such, judges are required to give effect to treaties, and treaties are included within Article III courts' express jurisdiction." (footnotes omitted)).

71. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

72. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

73. Cheyenne & Arapaho Tribes v. United States, 151 Fed. Cl. 511, 514 (Fed. Cl. 2020).

Article III basis for a federal court's exercise of judicial power.[74] Federal courts may constitutionally assert the judicial power over Indian tribes in any case that arises under the "Constitution, the Laws of the United States, and Treaties."[75] This is functionally federal question jurisdiction.[76] When a party wants to challenge a tribe's exercise of its inherent powers, does that challenge arise under a source of federal law? A single Supreme Court precedent holds that such a question arises under the common law, which is among the laws of the United States, and therefore qualifies for federal question jurisdiction.[77] This Part explores that precedent, and the nature of the federal common law, to support this Article's conclusion: the clear presumption of Article III is that the federal courts of the United States lack subject-matter jurisdiction over a tribe's exercise of its inherent powers.

A. *NATIONAL FARMERS* AND THE BASIS OF FEDERAL QUESTION JURISDICTION IN INDIAN COUNTRY

Although the U.S. Constitution does not bind Indian tribes, a federal court can assert the judicial power over the case to resolve the dispute when the tribal sovereign allegedly violates a right protected by federal statute.[78] While tribes regularly

74. The Author recognizes that once there is a federal question under 28 U.S.C. § 1331, the federal courts would also have subject-matter jurisdiction over state or tribal law claims related to the same case or controversy under pendant or supplemental jurisdiction per 28 U.S.C. § 1367.

75. U.S. CONST. art. III, § 2, cl. 1.

76. For a discussion of how Article III creates a constitutional ceiling, as well as how Congress may statutorily limit the exercise of the judicial power as long as it does not exceed Article III's limits, see Lumen N. Mulligan, Gully *and the Failure to Stake a 28 U.S.C. § 1331 "Claim*,*"* 89 WASH. L. REV. 441, 454–56 (2014) ("[J]urists and scholars agree that the lower court jurisdiction granted by Article III of the Constitution is not self-executing and that Congress retains near plenary power to vest the lower federal courts with as much or as little of that Article III power as it sees fit.").

77. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852–53 (1985). For criticism of the Supreme Court's extension of the federal common law to questions of tribal jurisdiction, see generally Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010).

78. *See, e.g.*, Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 967 (2002) ("[T]he Indian Civil Rights Act (ICRA) contains a habeas provision that

invoke sovereign immunity as a bar to the subject-matter jurisdiction of federal courts,[79] parties may use the principles first established in *Ex parte Young*[80] and continue their suit against tribal officials (rather than the tribe itself) for the allegedly unlawful conduct.[81]

A question involving the violation of a statutory right, a treaty provision, or the U.S. Constitution is a question arising under the laws of the United States and therefore falls squarely under the remit of Article III.[82] The corollary of this doctrine is

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grants federal courts subject matter jurisdiction to review tribal court determinations that result in the 'detention' of persons . . . .").

79. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

80. 209 U.S. 123 (1908). This case established a way for parties to sue government officials responsible for enforcing the law and seek injunctive relief either preventing enforcement of an unlawful state law or requiring compliance with a valid federal law without their case being dismissed pursuant to state sovereign immunity. *Id.* at 125. The Court reasoned that when a government official acts lawfully in their official capacity they are entitled to immunity, but if the official were to refuse to comply with a valid federal law, or attempt to enforce an unconstitutional state law, their actions would no longer be protected because violating the federal law or Constitution could not be part of their official responsibility. *Id.* at 159–60. Remedies in these actions are limited to injunctive relief and prospective action. *Id.* at 155–56. For a more detailed discussion of this case and its impact, see generally John Harrison, Ex Parte Young, 60 STAN. L. REV. 989 (2008) (advancing that *Young* did not create a new cause of action, but rather utilized an anti-suit injunction, which is a traditional tool of equity); Vicki C. Jackson, Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997) (exploring how subsequent Supreme Court decisions stand to limit the federal courts' ability to enjoin state officials).

81. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) ("As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit."). Lower courts have also consistently held that tribal sovereignty does not extend to its officers. *See, e.g.*, Vann v. Kempthorne, 534 F.3d 741, 750 (D.C. Cir. 2008) ("[T]ribal sovereign immunity does not bar the suit against tribal officers. *Santa Clara Pueblo*, which relied on *Ex parte Young* to hold a tribal officer 'not protected by the tribe's immunity from suit,' dictates this result." (quoting *Santa Clara Pueblo*, 436 U.S. at 59)); Burlington N. & Santa Fe Ry. Co. v. Vaughn, 509 F.3d 1085, 1092–93 (9th Cir. 2007) (permitting an action against a tribal tax collector in her official capacity even when the tribe could allege immunity).

82. U.S. CONST. art. III, § 2, cl. 1; *see also* Baker v. Carr, 369 U.S. 186, 198 (1962) ("In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a 'case or controversy' within

that when a case raises a question that does not fall within any of these categories—the federal courts do not have the authority to exercise the judicial power.[83]

Precisely because Indian tribes are a "separate sovereign,"[84] the question of the proper exercise of their inherent powers should be non-justiciable. As Professor David Williams explains, "[f]or a state or a tribe to be outside the sphere of the Constitution, then, is to be outside the federal community, and the tribes are outside both."[85] In 1985 the Supreme Court altered this assumption, holding that whether an Indian tribe may assert its judicial power over a non-Indian for conduct occurring on the reservation raised a federal question under the federal common law.[86]

National Farmers Union Insurance Cos. v. Crow Tribe began when a careless motorcyclist struck a student at Lodge Grass Elementary School resulting in a $3,000 medical bill.[87] Because the injury occurred on the Crow Indian Reservation, the child's guardian brought suit against the school district in Crow Tribal Court.[88] Service was made upon the chairman of the school board and "[f]or reasons that have not been explained" the chairman failed to notify anyone of the lawsuit.[89] A default judgment was issued, and the judgment was passed along to National Farmers Union Insurance Company by the school's principal for payment under the school district's insurance policy.[90]

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the meaning of that section; or the cause is not one described by any jurisdictional statute.").

83. Professor David Dow makes this point most clearly. David R. Dow, *Is the "Arising Under" Jurisdictional Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS. J. 1, 6 (2016) ("[M]ost exercises of federal jurisdiction require enabling legislation; . . . in the absence of enabling legislation, federal courts lack the power to act; . . . a federal court's power to act is defined by, and limited to, the enabling legislation.").

84. United States v. Lara, 541 U.S. 193, 197 (2004).

85. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 464–65 (1994) (footnote omitted).

86. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

87. *Id.* at 847 (seeking $3,000 in medical expenses and $150,000 in punitive damages).

88. *Id.*

89. *Id.*

90. *Id.* at 847–48.

National Farmers Union Insurance Company refused to pay on the judgment, and, joined by the school district, filed a complaint in the U.S. District Court for the District of Montana seeking a temporary restraining order.[91] The district court granted the order and eventually entered a permanent injunction.[92] The Ninth Circuit reversed, reasoning that the district court lacked subject-matter jurisdiction over the dispute because it fell outside the scope of Article III, and thus "the exercise of jurisdiction could not be supported on any constitutional, statutory, or common-law ground."[93] The Supreme Court granted certiorari and unanimously reversed.[94]

In an opinion written by Justice Stevens, the Court first reiterated that the federal common law was a sufficient basis to raise a federal question and confer jurisdiction upon the federal courts: "It is well settled that this statutory grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'"[95] The Court explained that it had "frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians,"[96] and then reasoned that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."[97]

As part of its conclusion, the Court explained that the non-Indian petitioners argued that the Crow Tribe had "been divested" of that aspect of its sovereignty that permitted its courts to enter a default judgment against a non-Indian insurance company, and that "[b]ecause petitioners contend that federal law

91. *Id.* at 848. The school district is operated and maintained by the State of Montana and not the Crow Tribe, which likely explains its willingness to join with the insurance company and contest the jurisdiction of the tribal court. *See Welcome to Lodge Grass Public Schools*, LODGE GRASS PUB. SCHS., https://www.lgschools.org/apps/pages/index.jsp?uREC_ID=373421&type=d [https://perma.cc/9LH2-ENJY].

92. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 848–49.

93. *Id.* at 849.

94. *Id.* at 857.

95. *Id.* at 850 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)).

96. *Id.* at 851.

97. *Id.* at 852.

has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference."[98]

Finally, the Court held that even though the appellants had alleged a federal question, as a prudential matter they were required to first exhaust their tribal court remedies before the federal court could decide the merits of the petition.[99] The Court reasoned:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy . . . , and administrative or judicial decisions.
>
> We believe the examination should be conducted in the first instance in the Tribal Court itself.[100]

Doing so, the Court explained, supports the greater congressional "policy of supporting tribal self-government and self-determination" by having the federal court "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction."[101]

National Farmers formally opened the door to federal court review of the tribal exercise of its inherent power as a sovereign even when a petitioner could not allege the case arose under the Constitution, a federal statute, or treaty. Contrary to its supposed justifications, by recognizing that the extent of a tribe's inherent power over a non-Indian raised a question under the federal common law, *National Farmers* significantly undermined tribal sovereignty and invited federal court intrusion upon sovereign decisions that had previously been unreviewable.

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98. *Id.* at 852–53.

99. *Id.* at 856. The Court also recognized that there may be several instances in which exhaustion is not required:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Id. at 856 n.21 (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)). For an academic discission of the exhaustion doctrine, see generally Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 744–47 (1997). The author now writes as Melissa L. Tatum.

100. *Nat'l Farmers Union Ins. Cos.,* 471 U.S. at 855–56 (footnote omitted).

101. *Id.* at 856–57.

Although the Court suggested that this case was not substantially different than its other jurisprudence in the area of federal common law, it was in fact a radical departure because it claimed a federal power to invalidate the exercise of another sovereign's inherent authority not based upon any positive law, but upon a new cause of action invented by the Court itself.[102] Professor Bob Clinton was among the first to describe this assertion as judicial plenary power in the area of Indian affairs.[103] Because by its very nature, the Constitution vests the federal government with limited powers, the assertion of a judicial plenary power is anathema to our traditional understanding of the role of the Constitution in creating the branches of federal government.[104]

B. THE FEDERAL COMMON LAW

Since at least 1972 federal courts have been able to exercise the judicial power over cases that allege questions of the federal common law divorced from the Constitution, treaty, or statute.[105]

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102. The Court required the exhaustion of tribal court remedies but clearly implied that it was proper, upon exhaustion, for the federal court to act to review the tribal court's interpretation of its own jurisdiction and, if necessary, declare the assertion of tribal jurisdiction unlawful. *Id.* at 853 ("[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."); *see also* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1525 n.161 (2013) ("*National Farmers*, of course, requires exhaustion of tribal remedies before a federal court can consider the question of whether a tribal court exceeded its jurisdiction; it nonetheless clarifies, however, that some external limits on tribal court jurisdiction do exist, and that federal courts may eventually be called upon to police them.").

103. Clinton, *supra* note 17, at 214 ("Relying on the claimed supremacy of federal law created by the Indian plenary power doctrine, the federal judiciary has unilaterally exercised judicial plenary power over Indian affairs, assisted by opponents of Indian sovereignty, and sometimes by the tribes themselves, who continue to present and argue such cases to the federal courts.").

104. *See* THE FEDERALIST NO. 81, at 543 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("In the first place, there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect, than may be claimed by the courts of every state. . . . There can be no objection therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.").

105. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("We see no reason not to give 'laws' its natural meaning and therefore conclude that § 1331

Writing for the Court in *Illinois v. City of Milwaukee*, Justice Douglas recognized that "the remedies which Congress provides are not necessarily the only federal remedies available."[106] He cited previous precedent, explaining that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned."[107] It is precisely this link between the federal right and the creation of the common law that was absent in *National Farmers*. When reviewing the actions of an Indian tribe, which are otherwise completely unrestrained by the Constitution, there is no nexus between a federal right and the assumption of jurisdiction, nor between a federal right and the alleged remedy—a federal court order restricting the authority of an Indian tribe to exercise its own inherent power.

1. The Federal Question Statute 28 U.S.C. § 1331

While Article III provides that the judicial power of the United States shall extend to "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,"[108] Congress did not write a statute authorizing the federal courts to assume that jurisdiction until 1875.[109] That statute is today codified at 28 U.S.C. § 1331 and is the statutory basis for the federal courts' assumption of federal question jurisdiction.

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jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." (citation omitted)). *See generally* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006) (describing federal common law as "a puzzle" and attempting to create a clearer, more comprehensive definition and theoretical understanding); Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014) (advancing that courts should rely on a constitutional mode of analysis, rather than federal common law, when determining the scope of sovereign authority); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1251 (1996) (arguing that several federal common law rules have "been mischaracterized by courts and commentators" and that a structural reading of the Constitution helps resolve many constitutional issues raised by this doctrine).

106. *Illinois*, 406 U.S. at 103.

107. *Id.* (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957)).

108. U.S. CONST. art. III, § 2, cl. 1.

109. For a discussion of the history of federal question jurisdiction, see generally Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 22–42 (1984).

Professor Andrew Hessick explains that the purpose of the statute, enacted in the wake of the Civil War, was to "vest jurisdiction in the federal courts to the full extent authorized by the clause in Article III that extends the federal judicial power to all cases 'arising under' the Constitution, federal law, and treaties."[110] The need for such expansive jurisdiction, Professor Hessick continues, is because of "the perception in the wake of the Civil War that state courts could no longer be trusted to vindicate federal and constitutional rights, and that federal district courts should be the principal guardians of those rights."[111]

Despite the purpose of the 1875 statute, federal courts have not interpreted the statutory grant as providing the full authority potentially conferred by Article III, but have instead proceeded to read some limitations into the exercise of federal question jurisdiction. Among the most important are the well-pleaded complaint rule and the substantiality requirement. The well-pleaded complaint rule requires that the plaintiff's right to recover must arise from a source of federal law and that the federal law must appear on the face of the plaintiff's well-pleaded complaint.[112] A claim does not raise a federal question just because there is an anticipated federal defense, or because resolution of the claim may tangentially require the application of federal law.[113] The substantiality requirement provides that not all suits authorized by the federal law are "sufficient to vest jurisdiction" in the federal courts.[114] Only those claims that involve the construction of the federal law "arise under" the federal law

110. F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 897 (2009).

111. *Id.* at 908.

112. Tennessee v. Union & Planters' Bank, 152 U.S. 454, 460 (1894) ("Even under the act of 1875, the jurisdiction of the Circuit Court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the Constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim.").

113. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.").

114. Shoshone Mining Co. v. Rutter, 177 U.S. 505, 513 (1900).

for the purpose of federal question jurisdiction.[115] The federal law cannot be merely an ingredient of the case, for if that was all that was required, "every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws."[116]

The Supreme Court has further held that when state law creates the underlying cause of action, even if an issue of federal law is present, there is no federal question jurisdiction: "A suit arises under the law that creates the cause of action."[117] In *American Well Works* the Court explained that "[a] suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law," and that therefore the plaintiffs had not stated a claim that arose under the federal law.[118]

Admittedly, the Supreme Court has been intermittent with its application of this principle of federal question jurisdiction, particularly when the United States or one of its agents is itself a party.[119] Consider the tension between *Merrill Dow* and *Grable*. In *Merrill Dow*, the Court upheld the principle from *American Well Works* and held that federal question jurisdiction is only proper where federal law creates the cause of action.[120] In contrast, in *Grable* the Court held that there was a "less frequently encountered" version of "arising under" jurisdiction where "federal-question jurisdiction will lie over state-law claims that implicate significant federal issues."[121] In these cases, federal

115. *Id.* at 507 ("The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved." (quoting Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1878))).

116. Shulthis v. McDougal, 225 U.S. 561, 569–70 (1912).

117. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

118. *Id.* at 259.

119. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314–20 (2005) (holding that although the cause of action involved a quiet title action under Michigan law, the resolution of the controversy was almost solely predicated on an interpretation of federal laws related to the IRS's power and procedure to seize and sell property to pay back taxes).

120. Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 808 (1986) ("This much, however, is clear. The 'vast majority' of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a 'suit arises under the law that creates the cause of action.' Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 8–9 (1983))).

121. *Grable*, 545 U.S. at 312.

question jurisdiction exists when it "appears from the [complaint] that the right to relief depends upon the construction or application of [federal law]."[122]

Regardless of how *Merrill Dow* is ultimately reconciled with *Grable*, it is clear that the federal question jurisdiction statute is considerably more limited than the Article III grant of the judicial power. The federal courts themselves have seemingly limited their own jurisdiction by carefully reading into the statute jurisprudential limits on the exercise of federal question jurisdiction. These limits have clear implications for the exercise of federal question jurisdiction based not on a statute, treaty, or constitutional provision—but instead upon the common law.

2. The Federal Common Law and Federal Question Jurisdiction

Federal common law is an admittedly limited field. Famously, in *Erie Railroad v. Tompkins* the Supreme Court even suggested that "[t]here is no federal general common law,"[123] although, as many scholars are apt to point out, on the same day that the Court decided *Erie* it also held that the federal common law governed the apportionment of waters to an interstate river.[124] Whatever *Erie* actually stands for, "[t]he received academic tradition on federal common law assumes that there are particular enclaves in which federal common law is in fact appropriate, but that after *Erie*, federal common law power is the exception, not the rule."[125]

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122. *Id.* at 313 (alteration in original) (quoting Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 199 (1921)).

123. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

124. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); *see also* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 620 (2008) ("On the same day *Erie* was decided, for example, the Court applied federal common law to an interstate border dispute, and Brandeis wrote both majority opinions."); Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1871–74 (2017) (discussing competing or overlapping claims of interested states in the context of *Hinderlider*); Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1203 (2016) ("The Court [in *Hinderlider*] neither mentioned *Erie* nor recognized any tension between it and *Hinderlider*.").

125. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885 (1986) (footnotes omitted).

Professor Martha Field nicely summarizes the two-part test said to characterize when the federal common law may apply to govern a dispute:

> [F]irst, a court should ask whether the issue before it is properly subject to the exercise of federal power; if it is, the court should go on to determine whether, in light of the competing state and federal interests involved, it is wise as a matter of policy to adopt a federal substantive rule to govern the issue.[126]

She describes this analysis as first conducting an inquiry into the "power" of the federal courts to assert the common law and then inquiring whether the "choice" to assert the power is a wise one.[127]

Most scholarship on the federal common law focuses on the second prong of the analysis, arguing over when federal courts should adopt a federal substantive rule to resolve a dispute.[128] It is, however, at the first stage—the power of the federal courts to hear a challenge to the assertion of an inherent power by a sovereign Indian tribe—where the Supreme Court has so fundamentally misapplied the federal common law.[129] This Article takes the position, so thoughtfully articulated by Professor Field, that "the primary limit on power to make federal common law is that there must be a source of authority for any given federal common law rule."[130] That source of authority may be a constitutional provision, a treaty, or a federal statute, but it must be something more than a statute conferring jurisdiction on the federal courts.[131] When the federal common law is recognized to

126. *Id.* at 886.

127. *See id.*

128. *Id.* ("Although the two-prong approach to creating federal common law is generally accepted, the academic writing concentrates on the discretionary phase, the second prong. There is little analysis of the boundaries of courts' power to make federal common law. Commentators typically simply list areas in which federal common law is acceptable without providing any animating principle to unify the categories." (footnotes omitted)).

129. *E.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853–57 (1985) (noting that where there is no constitutional, treaty, nor statutory basis for the creation of a common law remedy, the federal courts should lack the power to proceed to the merits).

130. Field, *supra* note 125, at 928.

131. *Id.* ("[U]nder *Erie*, statutes granting jurisdiction to federal courts do not necessarily constitute enabling authority. From the point of view of federal power to make federal common law, the significant holding of *Erie* is that the grant of diversity jurisdiction cannot be the basis for creating any federal

require some enabling authority, the propriety of the federal courts to assert the judicial power over an Indian tribe on a common law basis is lost.

This principle, that to use the federal common law to create a new cause of action requires the federal court to find some enabling authority, is broadly supported by other scholars and finds its origins in Supreme Court precedent. In 1975 Professor Henry P. Monaghan's summary of American constitutional law recognized that federal courts "must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law."[132] Subsequent legal commentary is broadly in agreement. Professor James Weinstein writes: "it is crucial with respect to federal common law rules to carefully identify the source of authority for any exercise of federal common law."[133] Professor Michael Van Alstine writes: "any valid exercise of lawmaking power by the federal judiciary must have a foundation in some other, independent source of authority."[134] Professor Henry Monaghan writes: "federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law."[135] And Matthew Slovin writes: "Federal law, for its part, must be promulgated under the 'finely wrought and exhaustively considered' process set forth in the Constitution."[136]

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common law rule. Other bases, of course, may exist. Federal common law may appropriately govern issues in diversity cases, as well as others, but the authority for it must stem from some enactment — constitutional or statutory — other than the grant of diversity jurisdiction or the Rules of Decision Act." (footnotes omitted)).

132. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 (1975).

133. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 289 n.438 (2004).

134. Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 931 (2004).

135. Monaghan, *supra* note 132, at 11–12; *see also* Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 705 n.40 (2009) (summarizing other scholars' commentary on the procedural limitations on federal exercises of common law power).

136. Matthew J. Slovin, *Stipulating to Overturn* Klaxon, 97 N.Y.U. L. REV. ONLINE 127, 136 n.75 (2022) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

Admittedly there are rare voices in the academy, like Professor Louise Weinberg, that would broaden the power of the federal courts to announce the common law whenever there is a "legitimate national governmental interest."[137] However, even Professor Weinberg recognizes that "[r]ecently, a new confidence seems to inform the literature that there is a need for some sort of authorization before federal common law can be fashioned."[138]

The scholarly approach described above now finds support directly in Supreme Court precedent: "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress."[139] While the Court was speaking specifically to an implied right to seek money damages against federal officers, the principle can be applied more broadly. The Court suggested that "[i]n both statutory and constitutional cases, our watchword is caution."[140] Specifically, when cases involve relations with other sovereigns, and when those sovereigns have competing and legitimate interests, the judicial branch should not create implied remedies.[141] Admittedly, the Court in *Hernandez* decided only that the federal courts *should not* exercise the judicial power, not that they *could not*. However, it is not an unreasonable extension to apply the language and reasoning from the Court to support the implied limitation on the power of the federal courts.[142]

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137. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 813 (1989) ("Courts must act, of course, within their constitutional and statutory jurisdiction. But no other 'authorization' is required.").

138. *Id.*

139. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020).

140. *Id.*

141. *Id.* at 745. Admittedly, the competing sovereign interests at issue in *Hernandez* are between the United States and Mexico. Relations between the United States and Indian tribes also involve diplomacy and competing interests, but the relationship between competing sovereigns is one between the United States and a domestic dependent nation. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.").

142. *See, e.g.*, Nebraska v. Parker, 577 U.S. 481, 493 (2016) (suggesting that evidence of subsequent treatment of disputed land by government officials has

C. THERE IS NO SUBJECT-MATTER JURISDICTION OVER A TRIBE'S EXERCISE OF ITS INHERENT POWERS, AND SO *NATIONAL FARMERS* WAS WRONGLY DECIDED

The Supreme Court in *National Farmers* did not articulate any concrete source of authority for its proposition that the assumption of jurisdiction by a tribal court over a non-Indian insurance company was authorized, based upon, or promulgated under the federal law.[143] The Court merely recognized that "[f]ederal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes."[144] The Court then noted that it has previously exercised jurisdiction over appeals involving the assertion of tribal power,[145] and therefore reasoned that the "question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."[146]

While the exhaustion requirement implemented by the Court in *National Farmers* was nominally a victory for tribes,[147]

"limited interpretive value" in determining whether Congress diminished an Indian reservation). Just four years later, in *McGirt v. Oklahoma*, the Court made clear that subsequent treatment of land wasn't just disfavored but improper. 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."). It is not just that lower courts *should not* consider the subsequent treatment of the land, it was that they *could not*. For an academic discussion of the Court's evolution on this language in relation to diminishment, see Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 282–87 (2022) (discussing the Court's evolution on this language in relation to diminishment).

143. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

144. *Id.*

145. *Id.* ("This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.").

146. *Id.* at 852.

147. I note that the victory was nominal because the Tribe would certainly have preferred an opinion advanced by this article that the federal courts had no jurisdiction to hear the claim brought by the National Farmers. For an academic discussion of the exhaustion doctrine that highlights the expansion of tribal sovereignty in *National Farmers* while also recognizing a growing role for federal courts, see Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling*

the case should never have reached the Supreme Court, and certainly should never have been decided on the merits.[148] Absent some enabling authority, federal courts lack subject-matter jurisdiction to review the decisions of tribal courts. The only constitutional course of action was dismissal.[149]

The opinion in *National Farmers* pointed to no treaty, statute, or constitutional provision enabling the Court to develop the federal common law at the heart of the insurance company's challenge. National Farmers asserted "a right to be protected against an unlawful exercise of Tribal Court judicial power" and claimed that the right "has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians."[150] The Court agreed, reasoning that "the power of the Federal Government over the Indian tribes is plenary."[151]

The Court's opinion is remarkable for how disingenuous these propositions of law are, and how inconsistent with prior precedent and with the principles of federal question jurisdiction the federal court review of tribal court opinions has become. The doctrine of plenary power has long been criticized and challenged by both scholars[152] and members of the Court.[153] In June of 2023

Tribal Sovereignty While Expanding Federal Jurisdiction, 73 N.C. L. Rev. 1089 (1995).

148. For a critique that abstention and not exhaustion is the true constitutionally appropriate means to deal with *National Farmers*, see generally Frank Pommersheim, *Tribal Courts and Federal Courts: A Very Preliminary Set of Notes for Federal Court Teachers*, 36 ARIZ. ST. L.J. 63 (2004).

149. *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–54 (1908) (ordering dismissal of a lawsuit, despite the parties willingness to be in federal court to resolve the merits, because a breach of contract claim was not a federal question even if it invited a federal statute as a defense and an allegation that the federal statute was an unconstitutional taking); *see also* Jessica Berch, *Waiving Jurisdiction*, 36 PACE L. REV. 853, 862 (2016) (describing the *Mottley* case as "[p]robably the most famous (or infamous) example of dismissal for lack of subject-matter jurisdiction").

150. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 851.

151. *Id.*

152. *See generally* Clinton, *supra* note 17, at 115 (arguing that the Constitution does not give Congress plenary power over Indian tribes); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 669 (2016) (arguing that the political question doctrine limits the plenary authority of the courts to review Indian law questions).

153. *See, e.g.*, United States v. Lara, 541 U.S. 193, 214–15 (Thomas, J., concurring) ("It seems to me that much of the confusion reflected in our precedent

the Court provided its strongest critique of congressional power in the area of Indian affairs in at least a generation.[154] In a forceful concurrence Justice Gorsuch explained:

> Surely many of [the Supreme Court's] so-called "plenary power" cases reached results explainable under a proper reading of the Constitution's enumerated powers. . . . But as sometimes happens when this Court elides text and original meaning in favor of broad pronouncements about the Constitution's purposes, the plenary-power idea baked in the prejudices of the day.[155]

The Court used a challenge to the Indian Child Welfare Act to reaffirm that the federal government's power over Indians must have some basis in a constitutionally enacted power: "Today, the Court takes further steps in the right direction. It recognizes that Congress's powers with respect to the Tribes 'derive from the Constitution, not the atmosphere.'"[156]

However, even if some version of plenary power survives through ties to the Indian Commerce Clause and prior precedent,[157] the plenary power in the area of Indian affairs has been limited to the power of Congress through Article I.[158] Not before, nor since, has the Court assumed for itself or for the judiciary the plenary judicial power to review decisions of the tribal sovereign. As Felix Cohen wrote in 1942[159]:

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arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members." (citations omitted)); United States v. Bryant, 579 U.S. 140, 160 (Thomas, J., concurring) ("Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress' power to 'regulate Commerce . . . with Indian Tribes,' not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority." (alteration in original) (quoting *Lara*, 541 U.S. at 224–25)).

154. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1658–60 (2023) (Gorsuch, J., concurring).

155. *Id.* at 1658.

156. *Id.* at 1660 (quoting *id.* at 1627 (majority opinion)).

157. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.").

158. *Id.*

159. Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 MICH. J. RACE & L. 65, 100 n.156 (2020) ("Felix Cohen is widely considered the father of modern Indian law."); *see also* Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian*

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished*.[160]

Plenary power aside, the judicial power of the United States is clearly limited by Article III.[161] Justice Stevens, writing the opinion in *National Farmers*, makes it clear that it is only the federal common law and not any treaty, statute, or constitutional provision that authorized the court's assertion of jurisdiction.[162] For the judicial power of the United States to extend to the creation of the federal common law, there must be some enabling authority upon which the judiciary is permitted or instructed to create new substantive rights that would afford the basis for National Farmers' federal claim.[163] Ignoring that Article III places limits on the use of the judicial power,[164] the Court assumes that the "plenary" authority of the federal government in Indian affairs is a justifiable basis for the whole cloth creation of new causes of action.[165] It is not.

The federal courts may undoubtedly create causes of action under the common law, but their power to create a common law right must be traced back to a source of positive law.[166] No

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Law, 38 CONN. L. REV. 649, 650 (2006) (discussing the seminal importance of Felix Cohen and his *Handbook of Federal Indian Law*).

160. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942).

161. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 n.2 (1990) ("[A]rticle III limits Congress's power to restrict the Supreme Court's jurisdiction." (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953))).

162. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985) ("[I]t was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution.").

163. *See supra* Part II.B.2.

164. Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1160 (1989) ("It is elementary that Article III describes the potential reach of federal court jurisdiction and that Congress, which the Constitution gave the choice whether to create lower federal courts at all, has control over how much of that judicial power to give. Thus, the Article III limits on judicial power also are necessarily limits on Congress' power to confer jurisdiction." (footnote omitted)).

165. *See Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 850–53.

166. Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751,

treaty, constitutional provision, nor federal statute permits the federal courts to create the common law cause of action National Farmers sought.

1. No Treaty Power Enables Federal Court Review

Treaty-making with tribes ended in 1871,[167] well before the widespread federal recognition of tribal courts which followed the Indian Reorganization Act in 1934.[168] No treaty with the Crow permitted the federal courts to review tribal court judgments, or to place limits on the tribe's regulatory or adjudicatory authority.[169] Early treaties with other tribes actually affirmatively disclaimed the federal authority to regulate the judicial power of tribal sovereigns. These early treaties, made contemporaneously with the drafting and ratification of Article III, show that the founders did not intend the federal courts of the United States to review the inherent powers of Indian tribes.[170] Consider the Treaty of Hopewell, negotiated with the Cherokee in 1785. In Article V the treaty suggests that non-Indians who refused to leave the lands reserved by the Cherokee would be punished in accordance with tribal custom:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty,

757–58 (1998) ("In classic federal common law cases, the first step is to identify the source of federal power. . . . The absence of relevant state law does not create federal power. . . . [E]very so- called *Erie* case should begin not with a discussion of the nature of the state law, but instead with a discussion of the source of federal authority.").

167. Moore & Steele, *supra* note 68, at 140 ("Congress passed a rider to the 1871 Appropriations Act that effectively halted any expansion of the federal-Indian treaty relationship.").

168. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 36 (1991) ("[T]he policy of the Indian Reorganization Act [was] to revitalize tribal governments, including tribal courts.").

169. There are at least two treaties to which the Crow are the primary parties, and neither treaty mentions a tribal court or places limits on the Tribe's regulatory or adjudicatory powers to govern its own lands. Treaty with the Crow Tribe, Crow Tribe-U.S., Aug. 4, 1825, 7 Stat. 266; Treaty with the Crow Indians, Crow Tribe-U.S., May 7, 1868, 15 Stat. 649.

170. *See generally* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1035–48 (2018) (discussing the role of Indian tribes contemplated by the founders as separate from actors acted upon by the Constitution).

> such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please.[171]

"[F]orfeit the protection of the United States" is not the kind of language that would enable the federal courts to create common law rules placing limits on the jurisdiction of tribal courts.[172] Certainly not all Indian treaties share this deep textual aversion to federal interference in the exercise of a tribe's inherent powers—most are silent—but Indian treaties are not general grants of power to the United States with a reservation of limited powers of the tribal sovereign.[173] When a tribe signs a treaty, the treaty is a cession of those powers clearly granted and a reservation of all other powers not expressly surrendered.[174] Indian treaties therefore do not provide the federal courts with the enabling authority to announce a common law rule permitting federal court review of the jurisdiction of an Indian tribe.

2. The Constitution of the United States Does Not Enable Federal Court Review

The Constitution does not bind the tribal sovereign.[175] Therefore when a tribe acts, whether creating laws or exercising its judicial power to resolve disputes, its structures are not bound by the Constitution.[176] It follows that the Constitution

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171. Treaty with the Cherokee, Cherokee Nation-U.S., art. V, Nov. 28, 1785, 7 Stat. 18.

172. *Id.*

173. United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."); *see also* Idaho v. United States, 533 U.S. 262, 274 n.5 (2001) (affirmatively citing *Winans*).

174. *See Winans*, 198 U.S. at 381. For an academic discussion of the treatment of Indian treaties in this way, see Katherine M. Cole, Note, *Native Treaties and Conditional Rights After* Herrera, 73 STAN. L. REV. 1047, 1067–68 (2021).

175. *See supra* Part II.B.1 (discussing the tribes' exemption from the U.S. Constitution).

176. Although tribes are not bound by the Constitution, Congress has enacted the Indian Civil Rights Act to require tribes to provide some protections for the individual rights of persons interacting with tribal government. *See* 25 U.S.C. § 1303. Congress only permits the federal courts to enforce these protections through a writ of *habeas corpus* and declined to extend all of the Constitution's individual rights. For a discussion of the ways in which tribes are permitted to act in ways unlike the federal or state governments, see Riley, *supra* note 52, at 810 ("Congress declined to extend to tribes the requirement of grand jury indictment, jury trials in civil cases, and the right to counsel for indigent defendants. Perhaps most importantly, Congress acceded to the desires of tribal

cannot form the basis for the extension of federal court review of the decisions of tribal courts.

In precedent predating *National Farmers*, the Supreme Court has recognized that the Constitution does not enable the creation of a federal common law remedy to enforce even quasi-constitutional rights. In *Santa Clara Pueblo v. Martinez*, the Pueblo enforced its tribal membership ordinance that permitted male members who had children outside the Pueblo to enroll those children but denied the right of female members to enroll their children fathered by men who were not members.[177] Ms. Martinez was a Santa Clara woman who had children with a Navajo man and was therefore prohibited from enrolling her children.[178] After exhausting her tribal court remedies[179] Ms. Martinez brought a claim in federal court alleging that the Pueblo had denied her due process and had violated her equal protection rights.[180] The Supreme Court held that because the U.S. Constitution did not bind the Pueblo, and because the statutory remedy provided by the Indian Civil Rights Act was limited to habeas, the federal courts lacked the power to grant Ms. Martinez any relief.[181]

Santa Clara Pueblo makes clear that the U.S. Constitution cannot serve as the basis for federal court review of a tribe's decision to assert its inherent authority. Instead, parties who are adversely affected by the decision of the tribal court may avail themselves of only two avenues of review: (1) they may appeal to the tribe itself, using tribally created remedies to advance their

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elders and removed restrictions regarding tribal establishment of religion." (footnotes omitted)).

177. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978). For an excellent and insightful discussion of the cultural issues at the center of this dispute from a female member of the Santa Clara Pueblo, see Rita Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004).

178. *Santa Clara Pueblo*, 436 U.S. at 52–53.

179. *Id.* at 53.

180. *Id.*

181. *Id.* at 72 ("Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.").

position,[182] or (2) they may use the federal courts but only for those causes of action and demands for relief which Congress has expressly authorized.[183] The Santa Clara Pueblo did eventually decide to adjust its membership rules,[184] but that decision was taken without any direction from the federal courts of the United States precisely because the judicial power does not extend to federal court review of tribal court decisions absent an affirmative grant from Congress.

3. No Federal Statute Enables the Creation of a Common Law Right to Review Tribal Court Jurisdiction

Federal statutes involving Indians must be read with considerations of tribal sovereignty as the backdrop against which rights and remedies may be interpreted.[185] In *Santa Clara*, the Court held that these sovereignty considerations play a critical role in "determining whether a cause of action is implicit in a statute not expressly providing one."[186] It acknowledged that, although the Court's precedent has frequently recognized "the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms,"[187] those precedents were "not dispositive"[188] when Indian tribes were involved because "a judicially

182. *Id.* at 54 ("[T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day." (alterations in original) (quoting Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18 (D.N.M. 1975))).

183. *Id.* at 71 ("[G]iven Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings.").

184. Addie Rolnick, *Rewriting the End of a Sovereignty Story: Santa Clara Pueblo Members Vote to Change Patrilineal Membership Rule*, PRAWFSBLAWG (June 18, 2012), http://prawfsblawg.blogs.com/prawfsblawg/2012/06/rewriting-the-end-of-a-sovereignty-story-santa-clara-pueblo-members-vote-to-change-patrilineal-membe.html [https://perma.cc/9XWW-HJM4].

185. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

186. *Santa Clara Pueblo*, 436 U.S. at 60.

187. *Id.* at 61.

188. *Id.*

sanctioned intrusion into tribal sovereignty"[189] is contrary to the intent of Congress in the area of Indian law.

When Congress creates statutes in the area of Indian law, it does so with "dual objectives"[190]: the federal governance interest and the protection of tribal sovereignty and self-government. In *Santa Clara Pueblo*, the Court was mindful not to create a new cause of action that would advance the federal goal of protecting individual rights if doing so would undermine the protections of the tribal sovereign: "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other."[191]

The Court's sovereign immunity jurisprudence provides additional insight and justification for the lack of a judicially created right to review tribal powers. Sovereign immunity is a subject-matter jurisdiction defense but does not rely on Article III, coming instead from the inherent nature of sovereignty itself.[192] In *Michigan v. Bay Mills Indian Community*, the Court refused to read a federal waiver of tribal immunity to be broader than the language used by Congress, reasoning, "this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address."[193] Writing for the majority, Justice Kagan explained that in Indian law in particular "Congress exercises primary authority in this area"[194] and so "it is fundamentally Congress's job, not [the Court's], to determine whether or how to

189. *Id.*

190. *Id.* at 64; *see, e.g.*, John v. Baker, 982 P.2d 738, 746–47 (Alaska 1999) (stating the Indian Child Welfare Act was enacted with the dual objectives of protecting Indian children and promoting tribal sovereignty); Nebraska v. Parker, 577 U.S. 481, 484 (2016) (describing the purpose of several treaties between the U.S. Government and the Omaha Nation as both seeking to open land to non-Indian settlement and also ensure a reservation for the protection of the Omaha).

191. *Santa Clara Pueblo*, 436 U.S. at 64.

192. *See* Alden v. Maine, 527 U.S. 706, 724 (1999) (contrasting the language in Article III with the subsequently adopted Eleventh Amendment to conclude that state sovereign immunity was not limited by the Constitution and that "[t]he more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits").

193. 572 U.S. 782, 794 (2014).

194. *Id.* at 799.

limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress."[195]

In *Bay Mills*, Michigan urged the Court to adopt a commercial activities exception that would judicially lift immunity for commercial activities undertaken by tribal sovereigns outside of Indian reservations.[196] The Court refused.[197] It recognized that Congress had restricted immunity in a handful of statutes and that it was up to Congress, not the courts, to extend any additional exceptions.[198] It was the duty of the courts to "accept Congress's judgment."[199] As with sovereign immunity, the federal courts cannot create their own implied causes of action when an inherent tribal power is at the center of a federal filing. Unless and until Congress has provided a statutory basis for federal court review, the federal courts must dismiss the suit.

Writing for the Court in 2020's *McGirt v. Oklahoma*, Justice Gorsuch was even more pointed.[200] Holding that courts should not act to enforce the intent of Congress when Congress did not make its intent clear from the face of the statute, the Justice explained:

> Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.[201]

If Congress wants to permit federal courts to hear cases involving the exercise of a tribal sovereign power, it knows how to do so. Absent that express language from Congress, the federal courts are obligated to refrain from exercising the judicial power to review the actions of a tribal sovereign.

Santa Clara Pueblo, *Bay Mills*, and *McGirt* provide critical context to the creation of federal rights involving Indians

195. *Id.* at 800.
196. *Id.* at 797–98.
197. *Id.* at 804.
198. *Id.* at 800.
199. *Id.* at 801.
200. McGirt v. Oklahoma, 140 S. Ct. 2462 (2020).
201. *Id.* at 2462.

stemming from federal statutes.[202] They caution that even when the Courts might otherwise favor the creation of a federal court remedy based upon a right secured by a federal statute, and therefore use that statute as the enabling basis upon which the common law right rests, that federal statutes involving Indian tribes will seldom if ever provide the enabling authority, because to create a common law cause of action questioning the authority of the tribal sovereign undermines tribal self-governance. If Congress wants to provide a federal court remedy, it knows how to do so explicitly.[203] In the Indian Civil Rights Act,[204] for example, Congress considered de novo review in the federal courts but settled upon "review by way of habeas corpus,"[205] reasoning that habeas review "would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments."[206]

This authority is all that is required to recognize the disingenuousness of the decision in *National Farmers*. The Court points to no statute enabling the federal courts to create a federal cause of action reviewing the jurisdiction of the tribal court.[207] Just seven years earlier the Court not only expressly disfavored the creation of common law causes of action in the area of Indian affairs,[208] but affirmatively cited evidence from Crow tribal leaders:

> The Crow Tribe representative stated:
>
> > This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government. . . . [B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*]

202. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); *Bay Mills Indian Community*, 572 U.S. at 782; *McGirt*, 140 S. Ct. at 2452.

203. Ziglar v. Abbasi, 582 U.S. 120, 133 (2017) ("When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action.").

204. 25 U.S.C. §§ 1301–1304.

205. *Santa Clara Pueblo*, 436 U.S. at 67. *See also* 25 U.S.C. §§ 1303–1304 (establishing the availability of habeas corpus and habeas review under the Indian Civil Rights Act).

206. *Santa Clara Pueblo*, 436 U.S. at 67.

207. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).

208. *Santa Clara Pueblo*, 436 U.S. at 67–68.

> to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action. 1965 Hearings 235 (statement of Mr. Real Bird).[209]

It is remarkable that the Court, having recognized the interests of the Crow Tribe to exercise its inherent power free from federal oversight as the basis for denying the creation of a common law right of action in an Indian law case would, just seven years later, find a common law right of review. It follows that the Court should have dismissed *National Farmers* on its own initiative (*sua sponte*) because the federal courts of the United States lack subject-matter jurisdiction over the insurance company's claim.

III. TRIBAL SOVEREIGNTY AND THE LIMITS OF FEDERAL COURT JURISDICTION

That tribes are sovereign is "settled law."[210] As Justice Gorsuch has powerfully observed, "Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns."[211] The nature of this sovereignty has been at the core of Indian law scholarship,[212] but both courts and scholars are adamant that "Indian tribes are not states" and instead hold a "status higher than that of states."[213] By ratifying the Constitution, states have given up a portion of their sovereignty to create the federal government.[214] Indian tribes, not a party to the Constitutional

209. *Id.* at 68 (alterations in original).

210. Michigan v. Bay Mills Indian Community, 572 U.S. 782, 789 (2014).

211. Oklahoma v. Castro-Huerta, 597 U.S. 629, 667–68 (2022) (Gorsuch, J., dissenting).

212. *See generally* Resnik, *supra* note 12 (discussing the relationships between tribal nations, federal courts, and state courts, as well as the history of how those relationships developed); Clinton, *supra* note 17 (exploring tribal-federal relations and arguing that tribes are not subject to federal supremacy); Singer, *supra* note 168 (critiquing the Supreme Court's treatment of Indian property and arguing it is an extension of the Court's negative views of tribal sovereignty).

213. Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).

214. Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184, 191 (1964) ("The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." (quoting United States v. California, 297 U.S. 175, 184 (1936))), *overruled by* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

Convention nor sovereigns which have been invited to ratify the document, have not surrendered their inherent sovereignty.[215]

When an Indian tribe acts it is therefore acting pursuant to its inherent authority.[216] These actions include not just policy-making in the legislative or regulatory sense, but empowering their courts or justice structures to hear cases and resolve conflicts that arise in Indian country.[217] Tribes therefore do not need to trace the exercise of their inherent power to a treaty or an act of Congress because treaties and statutes do not delegate power to the tribal sovereign; they are limitations upon the tribal sovereign's inherent authority.[218] As Felix Cohen observed: "The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty."[219] Unless a tribe has surrendered its power through treaty or has had the exercise

215. *Bay Mills Indian Community*, 572 U.S. at 789–90 ("While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity . . . ." (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991))).

216. *See* Riley, *supra* note 52, at 810–13 (discussing the Supreme Court's recognition that tribes may act pursuant to their inherent powers even in ways that may be discriminatory or to enact and enforce policies that would be unlawful if attempted by state or federal governments).

217. Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Rsrv., 231 F.2d 89, 96 (8th Cir. 1956) ("We accordingly hold that not only do the Indian Tribal Courts have inherent jurisdiction over all matters not taken over by the federal government, but that federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts."). For an insightful discussion of the varied ways tribal courts use their inherent power, see Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

218. *See* Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 82 (2011) ("Despite the historical impacts, proscriptions, and impositions on tribal justice systems, tribal courts still represent an exercise of inherent tribal sovereignty, sovereignty that predates the formation of the United States and its Constitution. Operation and application of inherent sovereignty requires recognition of tribal justice systems as separate and distinct.").

219. COHEN, *supra* note 160, at 122.

of its inherent power affirmatively limited by Congress, it retains full and plenary authority.[220]

The consequence of the exercise of inherent power is that the actions and decisions of tribal courts are largely outside the review of the federal courts. The Supreme Court has long ago established that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders."[221] While states in Article III surrendered to the federal courts the power to hear certain cases and controversies involving state law,[222] or even the jurisdiction of state courts,[223] Indian tribes have never made a concomitant cession.

That the federal courts are not tribal appellate courts is not a radical suggestion.[224] The Ninth Circuit has held plainly that "[t]ribal courts are not vertically aligned under the federal judicial hierarchy."[225] The limits of Article III are clear. When a party raises a federal question in a claim related to the exercise of a tribe's inherent power, Article III extends the judicial power over that case. This analysis is intuitive because it is functionally asking whether the exercise of tribal power has been properly limited by a treaty or statute. However, when a party raises a claim arising from Indian country regarding the propriety of the exercise of tribal power, but cannot base their objection

220. The explanation for this legal proposition is nicely provided by Justice Thompson in *Cherokee Nation*: "[A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting).

221. Wilson v. Girard, 354 U.S. 524, 529 (1957).

222. The states surrendered diversity jurisdiction, but arguably not their inherent immunity. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 913 (2020) ("Although the States arguably surrendered their right to sovereign immunity by adopting the Citizen-State diversity provisions in Article III, the Eleventh Amendment instructs that Article III 'shall not be construed' to constitute such a surrender.").

223. Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731, 738–50 (discussing situations where federal courts have jurisdiction in concurrent state jurisdiction cases and state-law cases).

224. Christensen, *supra* note 66, at 930.

225. Eagleman v. Rocky Boys Chippewa-Cree Tribal Bus. Comm. or Council, 699 F. App'x 599, 600 (9th Cir. 2017).

upon an affirmative limitation provided by the federal law,[226] the federal courts lack the authority to provide any requested relief. Essentially, the judicial power of the United States does not extend to a case or controversy involving the exercise of an inherent tribal power absent an affirmative restriction imposed by the Constitution, treaty, or explicit act of Congress.

A. INDIAN TRIBES ARE SOVEREIGN AND EXERCISE THEIR OWN INHERENT POWERS

As a fundamental aspect of their sovereignty, Indian tribes have the right to "make their own laws and be ruled by them."[227] A review of tribal sovereignty is like a review of the Indian law canon. The inherent powers of the tribal sovereign are not limited only to their members. Indian tribes may exclude non-Indians from their lands[228] or condition their entry upon compliance with tribal laws.[229] Tribes may impose tribal taxes upon non-Indians doing business on the reservation,[230] may require non-Indians to comply with tribal hunting and fishing rules,[231] and with probable cause may stop, search, and detain a non-Indian suspected of committing a crime in Indian country.[232] The

226. These affirmative limitations flow directly from federal question jurisdiction. For discussion of federal question jurisdiction, see *supra* Part I, and for the argument that the common law is not an affirmative limitation, see discussion *supra* Part II.B.

227. Williams v. Lee, 358 U.S. 217, 220 (1959).

228. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) ("[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax.").

229. *See, e.g.*, Montana v. United States, 450 U.S. 544, 557 (1981) ("We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.").

230. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985) (holding that a tribe's right to tax non-Indians was part of its inherent sovereignty and did not derive from permission granted by Department of Interior); *see also Merrion*, 455 U.S. at 137 ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.").

231. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 342–44 (1983) (holding that the Tribe could impose its own hunting and fishing requirements on non-Indians on tribal lands, including the obligation to obtain a tribal license).

232. *See* United States v. Cooley, 593 U.S. 345, 345 (2021) (involving a non-Indian criminal defendant who was detained and searched by tribal police and

inherent power of an Indian tribe may even extend outside of its reservation, at least when it comes to regulating the conduct of tribal members engaged in tribal business.[233]

B. THE EXERCISE OF INHERENT POWERS DOES NOT GENERALLY RAISE FEDERAL QUESTIONS

The very nature of a federal judiciary of limited powers suggests that the federal courts must desist from deciding cases over which they may not exercise the judicial power. Even if the parties consent to jurisdiction in a federal court, the federal courts should act *sua sponte* and dismiss a suit when there is no subject-matter jurisdiction.[234] This is what makes the Supreme Court's assertion of judicial plenary power in *National Farmers* so extraordinary,[235] and directly contrary to well-established precedent.[236]

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holding that a "tribal police officer has authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law").

233. *See* Kelsey v. Pope, 809 F.3d 849 (6th Cir. 2016) (holding that the tribal court had jurisdiction over a tribal member committing criminal acts on land owned by the Tribe but outside of the Reservation—and so therefore outside of Indian country—as a reasonable extension of tribal sovereignty). For further discussion of the implications of *Kelsey v. Pope* on extra-territorial jurisdiction of tribes, see Grant Christensen, *The Extraterritorial Reach of Tribal Court Criminal Jurisdiction*, 46 HASTINGS CONST. L.Q. 293 (2019).

234. *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (holding that the circuit court lacked jurisdiction in the given case despite neither party raising a jurisdictional issue). For an interesting commentary on limited judicial powers, see Caroline Bermeo Newcombe, *Textualism: Definition, and 20 Reasons Why Textualism Is Preferable to Other Methods of Statutory Interpretation*, 87 MO. L. REV. 139, 171 (2022) ("While some might suggest that 'playing king' may be appropriate for state court common law judges, it is not appropriate for federal court judges with no electoral mandate and only limited judicial power.").

235. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985) ("Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes." (footnote omitted)).

236. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1571 (2000) ("The constitutional text simply cannot be read to support the assertion of a plenary judicial power to vest precedent with quasi-legislative force."); Clinton, *supra* note 17, at 226–28 (critiquing the notion of plenary judicial power in the area of federal Indian law).

The statutory grant of federal question jurisdiction in § 1331 is narrower than the powers Article III would permit the federal courts to assert.[237] The Supreme Court itself has repeatedly recognized that the statute is more limited than the constitutional expression:

> [Section 1331] has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the [statute's] function as a provision in the mosaic of federal judiciary legislation. *It is a statute, not a Constitution, we are expounding*.[238]

So where does that leave the federal question jurisdiction analysis? It must be determined whether Congress, in enacting § 1331, intended for the federal courts to create federal common law rights and remedies related to a tribe's exercise of its inherent powers. The answer—clearly established by generations of precedent—is no.

It has already been established that Indian tribes are unique because of their sovereign status[239] and that considerations of Indian sovereignty must be considered as the backdrop against which federal statutes are interpreted when applied to Indian tribes:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues . . . but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.[240]

With the lone exception of *National Farmers*, the Supreme Court has consistently adhered to deference to Congress and refused to create federal common law rights or remedies when the tribal sovereign is involved. The Supreme Court held that there was no federal forum available to a tribal member who argued that his prosecution in tribal court violated his Fifth Amendment rights,[241] that a tribe seeking to invalidate a cession of land by congressional act was a non-justiciable political question,[242]

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237. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 494–95 (1983).

238. *Id.* (second and third alterations in original) (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)).

239. *See supra* Part III.A (discussing the nature and attributes of tribal sovereignty).

240. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

241. Talton v. Mayes, 163 U.S. 376, 381–82 (1896).

242. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

that there was no express or implied cause of action permitting a federal prosecutor to bring charges against an Indian committing a crime against a member of his own tribe in Indian country[243] until Congress wrote a law providing a legal basis for the prosecution,[244] that tribal courts are the exclusive forum for a non-Indian to collect on a debt owed by Indians that was assumed in Indian country,[245] that tribal courts are the exclusive forum for custody disputes involving Indian children domiciled in Indian country,[246] that federal courts may not create a remedy when a tribe denies its citizens their due process or equal protection rights,[247] and that the prosecution of an Indian by a tribe exercising its inherent authority is the prosecution by a separate sovereign than the United States.[248]

Bolstering this mountain of precedent are the Indian law canons of construction, requiring that "[a]mbiguous expressions must be resolved in favor of the Indian parties concerned"[249] and that federal statutes "benefitting Native Americans generally are construed liberally in their favor."[250] The canons suggest that even if a federal court was inclined to create a common law cause of action or fashion a common law remedy to permit federal interference in a tribe's exercise of its inherent powers, § 1331 may not be extended elastically to permit the expansion of the common law. The statute itself is of course quite silent regarding

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243. *Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883).

244. United States v. Kagama, 118 U.S. 375, 382–84 (1886).

245. Williams v. Lee, 358 U.S. 217, 223 (1959).

246. Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont., 424 U.S. 382, 388–89 (1976).

247. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

248. United States v. Wheeler, 435 U.S. 313, 331–32 (1978); Denezpi v. United States, 596 U.S. 591, 597–98 (2022).

249. Yankton Sioux Tribe of Indians v. Nelson, 521 F. Supp. 463, 465 (D.S.D. 1981). For the Supreme Court's development of this canon, see McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 174–75 (1973); Carpenter v. Shaw, 280 U.S. 363, 366–67 (1930); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 617–18 (1975).

250. Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1257 (9th Cir. 1994); *see also* Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943); Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 320–23, 336–44 (2021) (discussing the canons and the Court's recent application of them to statutes and treaties).

Indian tribes or the common law,[251] making it ambiguous at best whether the statute alone provides a basis for the exercise of judicial power without other authorization. The Indian canons then firmly shut the door, foreclosing the use of federal common law to the detriment of tribal sovereignty.

Indian tribes do not want federal courts questioning how they exercise their inherent powers or limiting the application of tribally imposed rules to any persons within their territory.[252] Adherence to the Indian law canons, so recently reaffirmed by the Supreme Court,[253] leaves dismissal for want of subject-matter jurisdiction as the only constitutional recourse.

C. FEDERAL COURT REVIEW OF A TRIBE EXERCISING ITS INHERENT AUTHORITY IS LIMITED BY ARTICLE III

The Supreme Court has substantially limited the authority of the federal courts to create implied causes of action. "When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis."[254] The Court has asked whether the entity making the decision on whether a cause of action is available should be "Congress or the courts?"[255] It has determined that Congress is in the best position "to consider if 'the public interest would be served' by imposing a 'new substantive legal liability.'"[256]

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251. The statute is a single sentence long: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

252. The Supreme Court has itself documented tribal objections to federal interference with tribal affairs. *See Santa Clara Pueblo*, 436 U.S. at 66–70 (discussing the legislative history of the ICRA with special attention to tribal critiques of intrusive provisions).

253. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020) (stating that courts may not "favor contemporaneous or later practices *instead of* the laws Congress passed"); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) ("[W]e must 'give effect to the terms as the Indians themselves would have understood them.'" (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999))).

254. Ziglar v. Abbasi, 582 U.S. 120, 135 (2017).

255. *Id.*

256. *Id.* at 136 (quoting Schweiker v. Chilicky, 487 U.S. 412, 426–27 (1988)).

While the Court was speaking in *Ziglar v. Abbasi* about a *Bivens* remedy,[257] and discussing whether the federal courts should imply a cause of action against federal officials for violations of petitioners' rights under the Fifth Amendment, the general principles are applicable to the extension of the judicial power over the assertion of claims related the use of a tribe's inherent authority. The Court recognizes the importance of separation of powers principles when creating implied remedies or extensions of the federal common law,[258] and urges that the primary impetus is on Congress to be "explicit if it intends to create a private cause of action."[259] If a statute does not explicitly create a private cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[260]

The Court is clear that if there is any ambiguity regarding the propriety of creating a common law right, the courts should not imply one:

> [I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal court jurisdiction under Article III.[261]

This is particularly true when tribal sovereigns are a party to the proceeding and where the appropriateness of judicial review to the balance between the federal and tribal sovereign is subject to the limitations of Article III.[262]

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257. *Bivens* remedies are judicially created causes of action to vindicate a federal official's violation of an individual's constitutional rights. The right was first articulated by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390–98 (1971). For a discussion of this judicially created remedy, see Gene R. Nichol, Bivens*,* Chilicky*, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

258. Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) ("Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal"' when Congress has addressed the problem." (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978))).

259. *Ziglar*, 582 U.S. at 133.

260. *Id.* (quoting Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)).

261. *Id.* at 137.

262. *See* Clinton, *supra* note 17, at 115 ("[An originalist constitutional interpretation of] federal power over Indian affairs compels the need to reexamine several basic Indian law doctrines, most notably the so-called federal Indian

Supreme Court precedent in the area of Indian affairs other than *National Farmers* confirms the general principle that the federal courts will not create federal causes of action, even when an Indian tribe appears to be violating quasi-constitutional rights. As far back as 1896, the Supreme Court held that an Indian, criminally convicted in a tribal court after being indicted by a five-person grand jury, was unable to avail himself of federal court review for an alleged violation of their Fifth Amendment rights.[263] The Court reasoned that:

> [T]he right of the Cherokee nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that nation power to make laws defining offences and providing for the trial and punishment of those who violate them.[264]

In *Talton*, the Court recognized that the Constitution of the United States did not bind Indian tribes, and that the federal courts of the United States would not create new federal causes of action capable of adjudication in a federal court when a tribal court acted in a manner that was inconsistent with a party's rights—even if those rights were otherwise protected in the Constitution.[265]

Rather than assume that the federal courts have judicial plenary power over Indian tribes, the Court in *Talton* placed the responsibility for creating limitations on the exercise of judicial power by Indian tribes directly with Congress: "[I]n many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self-government, when exercising their tribal functions, all such rights are subject

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plenary power doctrine. It also suggests that such scrutiny is consistent with perhaps the most revered principle of the United States Constitution—namely, that all legitimate governmental authority derives from the consent of the people who have chosen to delegate only certain limited powers to the federal government (a theory often called 'popular delegation' or 'popular sovereignty').").

263. Talton v. Mayes, 163 U.S. 376, 382–85 (1896).

264. *Id.* at 379–80.

265. *Id.* at 385 ("The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, were solely matters within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States.").

to the supreme legislative authority of the United States."[266] The holding from *Talton* is clear: when an Indian tribe exercises one of its inherent powers, the exercise of that power does not create a federal question absent some affirmative intervention by Congress.[267]

Nearly a century later the Court reaffirmed this respect for tribal sovereignty. In *Santa Clara Pueblo v. Martinez*, the Court held that it was improper for the federal courts to create a federal cause of action when an Indian tribe allegedly violated the equal protection rights of one of its members and the member sought only declaratory or injunctive relief.[268] The Court reasoned that even if the creation of a federal cause of action would be useful in securing compliance with rights created by federal statute, if Congress does not provide a federal remedy, the judicial construction of a common law cause of action "[n]ot only would . . . undermine the authority of tribal forums, but it would also impose serious financial burdens on already 'financially disadvantaged' tribes."[269]

Not before *National Farmers* or since has the Court relied upon federal plenary power in the area of Indian affairs. To the contrary, over a century of precedent consistently finds that challenges to a tribe's exercise of its inherent power do not pose a federal question until Congress has explicitly authorized the cause of action. Even when Indian tribes interfere with rights created by Congress or that would otherwise be protected by the Constitution, that interference does not create a case or controversy capable of adjudication by a federal court absent the express creation of a federal cause of action in treaty or statute.

266. *Id.* at 384 (citing Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 653–57 (1890)).

267. *Id.* ("[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.").

268. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52–55, 72 (1978).

269. *Id.* at 64 (citation omitted).

IV. THE IMPLICATIONS OF A RESTRAINED INTERPRETATION OF FEDERAL QUESTION JURISDICTION IN INDIAN COUNTRY

Because the federal courts lack the judicial power to create new substantive rights or common law remedies that intrude upon the exercise of an Indian tribe's sovereign power without enabling authority, Indian law could, and should, look substantially different.[270] My argument is not that there ought not to be checks on the exercise of a tribe's inherent power. Tribal governments have their own structures that provide for appeal, reversal, or reconsideration of the use of a tribe's inherent powers.[271] Moreover, Article III provides federal question jurisdiction for a party to contest the exercise of a tribe's inherent authority when the party's claim alleges a violation of a treaty, statute, or the Constitution, or makes a plausible argument for the creation of a federal common law cause of action based upon some enabling authority.[272] But without that enabling authority upon which the federal court could fashion a substantive right or remedy, questions of the exercise of a tribe's inherent power remain outside the federal court's Article III power.[273]

The implications of construing the subject-matter jurisdiction of federal courts to the actual limits imposed by Article III would dramatically remake federal Indian law. This Part discusses the consequences of the interpretation of Article III developed in the prior Part. First, large chunks of the Indian law canon, including restrictions on the criminal and civil

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270. *See supra* Part II.B.2.

271. For a discussion of tribal justice systems, see Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts and the Future *Revisited*, 84 U. COLO. L. REV. 59, 66–95 (2013) (discussing the role of tribal courts in creating justice in Indian country); Lindsay Cutler, Comment, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1763–71, 1777–83 (2016) (discussing how tribal justice systems may, but are not required to, mirror state and federal rules); Robert Yazzie, "*Life Comes from It*": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177–89 (1994) (explaining how Navajo conceptions of justice are constructed by language and culture and may be very different from concepts of justice that exist in other American judicial forums); Alex Tallchief Skibine, *Troublesome Aspects of Western Influences on Tribal Justice Systems and Laws*, 1 TRIBAL L.J. 1, 3–14 (2000) (exploring how Indigenous conceptions of justice have been changed by their interactions with state and federal courts).

272. *See supra* Part I.B.

273. *See supra* Part II.C.

jurisdiction of tribal courts, would be reversed—creating a space for the resumption of tribal sovereignty over a range of jurisprudential and legislative spheres. Second, the federalism principles that underlie the division of powers between federal and tribal sovereigns would be restored to a proper balance, and finally, cases that reach the federal courts will ask different questions than they do today.

A. SOME IMPORTANT PARTS OF THE INDIAN LAW CANON SHOULD NEVER HAVE BEEN DECIDED

If the federal courts cannot exercise the judicial power to hear challenges to the use of a tribe's inherent powers absent some affirmative authorization, then some of the canonical cases in federal Indian law should never have been decided on the merits. While there are any number of cases that have reached the Supreme Court on the basis of jurisdiction articulated by *National Farmers*, this Section discusses three opinions that are today at the very core of the Indian law canon. Federal courts should have dismissed each challenge for want of subject-matter jurisdiction because each involves an Indian tribe asserting its inherent power without any constitutional, treaty, or statutory basis permitting federal court review.

The cases have been selected intentionally. Not only are they the progenitors of hundreds of federal court cases that follow, but they represent questions of both civil and criminal jurisdiction, and they include cases where the tribe's use of its inherent power was both upheld and overturned by the Court. Together they provide the reader a sense of just how discipline-altering this proposal is, upending the settled expectations of much of Indian law in order to correct an unconstitutional assumption of jurisdiction by the federal courts.

1. *Oliphant*—The Court Should Not Have Placed Limitations on the Criminal Jurisdiction of Tribal Courts

Oliphant v. Suquamish Indian Tribe limited the authority of tribal courts to assert their general criminal jurisdiction over non-Indian persons.[274] Oliphant and Belgarde were both non-Indians who visited the Suquamish Indian Reservation during the

274. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

Tribe's Chief Seattle Days celebration.[275] While on the Reservation, Oliphant got into an altercation with tribal law enforcement and was criminally charged with assaulting a tribal officer and resisting arrest.[276] Belgarde engaged in a high-speed chase on the Reservation, which ended only when he collided with a tribal police vehicle.[277] He was arrested by tribal police and charged under the Tribal Code with "'recklessly endangering another person' and injuring tribal property."[278] Both Oliphant and Belgarde sought the assistance of the U.S. District Court for the Western District of Washington, collaterally attacking the jurisdiction of the Suquamish Indian Provisional Court on the basis that it lacked criminal jurisdiction over them because they were non-Indians.[279]

Justice Rehnquist wrote the *Oliphant* opinion for a 6-2 majority.[280] The opinion held that tribal courts lack criminal jurisdiction over non-Indian persons not because any treaty or statute enacted by Congress had taken away the power,[281] but because the exercise of criminal jurisdiction over non-Indians had been implicitly divested by virtue of their incorporation into the United States.[282] *Oliphant* has done untold and unrecounted harm to tribal sovereignty and to law enforcement in Indian country. Indian law scholars repeatedly call for an *Oliphant*-fix,

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275. *Id.* at 194. For an academic discussion of *Oliphant* and its implications, see generally Adam Crepelle, *Shooting Down* Oliphant*: Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1316–30 (2018); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993).

276. *Oliphant*, 435 U.S. at 194.

277. *Id.*

278. *Id.*

279. *Id.* at 194–95.

280. *Id.* at 191 (listing the Justices who joined the majority opinion and the dissenters).

281. *Id.* at 204 ("Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians.").

282. *Id.* at 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents." (alteration in original) (citation omitted)).

either a judicial reversal or a congressional response.[283] Unfortunately for tribal sovereignty, *Oliphant* remains the law—but it should never have been decided.[284]

The question in *Oliphant* was whether an Indian tribe could exercise its inherent criminal jurisdiction over non-Indian persons.[285] The Rehnquist majority recognized that the Treaty of Point Elliott, the only treaty pointed to by the parties to which the Suquamish Tribe was a signatory "would appear to be silent as to tribal criminal jurisdiction over non-Indians."[286] Congress has never before prohibited Indian tribes from asserting criminal jurisdiction over non-Indians. As the dissent makes clear, "[i]n the absence of affirmative withdrawal by treaty or statute

283. M. Brent Leonhard, *Closing a Gap in Indian Country Justice:* Oliphant*,* Lara*, and DOJ's Proposed Fix*, 28 HARV. J. RACIAL & ETHNIC JUST. 117, 118–24 (2012) (discussing a proposed "legislative fix" which would recognize concurrent tribal jurisdiction to prosecute non-Indians, and highlighting the troubling rate of violent crime in Indian country that calls for such a fix); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 168–69, 177–79 (2006) (proposing adoption of a "consistent-with-federal-policy test" and then assessing how the decision in *Oliphant* would be deemed wrongly decided under such a rule); Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 589–604 (2009) (arguing that a proposed statutory abrogation of *Oliphant* should be seen as a reaffirmation of tribal sovereignty rather than a delegation of federal power); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant*-Fix*, 93 MINN. L. REV. 1902, 1935–40 (2009) (arguing that law and policy give justification to Congress to overturn *Oliphant* via legislation); Robert Laurence, Martinez*,* Oliphant*, and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 415–27 (1988) (arguing that Congress should overrule *Oliphant* by amending the ICRA and that this would be consistent with Supreme Court precedent); *see also* Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 720–26 (2013) (proposing that a framework that balances traditional tribal procedures with constitutional requirements could support the permissibility of tribal jurisdiction); N. Bruce Duthu, Crow Dog *and* Oliphant *Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 176–77 (1997) (calling for active tribal participation in a federal gambling commission's evaluative process so as to avoid another divestiture of tribal sovereignty like that which occurred in *Oliphant*).

284. Oklahoma v. Castro-Huerta, 597 U.S. 629, 650 (2022) ("That is because, with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-Huerta, even when non-Indians commit crimes against Indians in Indian country." (citing *Oliphant*, 435 U.S. at 195)).

285. *Oliphant*, 435 U.S. at 195.

286. *Id.* at 206.

. . . Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."[287]

Even the majority could not find an affirmative congressional withdrawal of criminal jurisdiction: "While Congress was concerned almost from its beginning with the special problems of law enforcement on the Indian reservations, it did not initially address itself to the problem of tribal jurisdiction over non-Indians."[288] The majority then relied on some language from the Western Territories Bill, which never became law, and called the lack of tribal jurisdiction over non-Indians an "unspoken assumption."[289] It should go without needing additional commentary that language in a statute never enacted by Congress cannot form the basis of a federal cause of action or a valid justification for the affirmative withdrawal of jurisdiction.

The petitioners did not allege that the assertion of tribal court criminal jurisdiction over them violated the Treaty of Point Elliott or any other federal statute conferring substantive rights. Their argument was entirely focused on asking the federal courts to remove the inherent criminal jurisdiction of a tribal sovereign without any congressional authorization.[290] Procedurally, the case reached the federal courts from a writ of habeas corpus.[291] The Suquamish tribal court was never even permitted to decide its own jurisdiction or to reach the merits of the criminal charges.[292] All tribal court proceedings were stayed pending federal review.[293]

Consistent with this Article's thesis, an Indian tribe has all of those inherent powers that have not been expressly removed by treaty or statute. Because no treaty or statute has ever taken away an Indian tribe's authority to criminally prosecute a non-

287. *Id.* at 212 (Marshall, J., dissenting).

288. *Id.* at 201 (majority opinion).

289. *Id.* at 201–03.

290. *Id.* at 194 ("Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians.").

291. *Oliphant*, 435 U.S. at 194–95.

292. *Id.* at 194 ("Tribal court proceedings against both petitioners have been stayed pending a decision in this case.").

293. *Id.*

Indian, the prosecutorial power is retained as part of a tribe's inherent sovereignty.

The federal habeas statute allows a federal court to grant the writ where "any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[294] The defendants were being restrained not under the authority of the federal or state government, but on the authority of the Suquamish Indian Tribe, and therefore there was no statutory basis for federal court review of the petitioner's detention. The Tribe is not bound by the Constitution, and therefore the petitioner's detention could not have violated any constitutional right.[295] The Court itself recognized that the Treaty of Point Elliott was silent as to the authority of the tribe over non-Indian persons, and so the petitioners could not have asserted a right protected by treaty.[296] The Indian Civil Rights Act is admittedly a statute that protects the rights of criminal defendants in tribal courts regardless of whether they are Indians,[297] but the petitioners didn't allege that their due process rights were violated under the Act.[298] They alleged only a common law principle that the Tribal Court "does not have criminal jurisdiction over non-Indians."[299] The Supreme Court lacked subject-matter jurisdiction over that question, and should never have determined that tribal courts have or lack criminal jurisdiction over non-Indians.

2. *Montana*—The Court Should Not Have Placed Limitations on the Civil Regulatory Powers of Indian Tribes

Montana v. United States is arguably the civil jurisdiction corollary to *Oliphant*.[300] In *Montana*, the Court was asked whether an Indian tribe had civil regulatory jurisdiction over a non-Indian fishing on non-Indian land within the boundaries of

294. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385; *see also* 28 U.S.C. § 2241(c)(3) (containing the modern-day federal habeas statute).

295. *See supra* Part I.B.1 (discussing how tribes are a separate sovereign and not bound by the U.S. Constitution).

296. *Oliphant*, 435 U.S. at 206.

297. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304.

298. *See Oliphant*, 435 U.S. at 194 (identifying the rationale behind petitioners' application for a writ of habeas corpus).

299. *Id.*

300. Montana v. United States, 450 U.S. 544 (1981).

the Crow Reservation.[301] The Crow Tribal Council had prohibited all non-members from hunting and fishing, but the State of Montana asserted its ability to regulate hunting and fishing on lands it owned within the Reservation.[302] The Tribe sought a declaratory judgment and an injunction in federal court.[303] While the Declaratory Judgment Act is a federal statute,[304] it does not expand the jurisdiction of the federal courts,[305] nor may it be used as an independent basis for federal question jurisdiction.[306]

The Court ultimately held that the inherent power of an Indian tribe does not extend to the regulation of the conduct of nonmembers operating on land held by non-Indians, even in Indian country, unless it is necessary to protect tribal self-government or control internal relations.[307] The Court then proceeded to provide guidance to lower courts by articulating two exceptions where tribal jurisdiction would be necessary.[308] First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[309] Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[310]

Montana was a cudgel, and it has been used by courts and others to dramatically curtail the inherent powers of Indian

301. *Id.* at 547.

302. *Id.* at 548–49.

303. *Id.* at 549.

304. Declaratory Judgment Act, ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. § 2201).

305. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950) (explaining that federal courts must possess both the requisite constitutional power and statutory authority over a declaratory judgment action).

306. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986) (observing that federal substantive law must create the cause of action relied upon).

307. *Montana*, 450 U.S. at 564.

308. *Id.* at 565–66.

309. *Id.* at 565.

310. *Id.* at 566.

tribes.[311] In the Supreme Court alone it has been used to reject the adjudicatory power of tribes to hear cases against state law enforcement entering the reservation to serve a warrant,[312] to hear a tort case involving negligence on a highway running through an Indian reservation,[313] and to resolve a claim of racial discrimination by tribal members against a non-Indian bank.[314] It has also been used to limit the inherent power of an Indian tribe to impose taxes against non-Indian businesses on fee lands within the reservation, even when those businesses rely on tribal services.[315]

Like *Oliphant*, the merits question in *Montana* related to the tribal power to regulate non-Indian hunting and fishing on the reservation should never have been decided.

The *Montana* opinion was divided into several parts. In Part II of the opinion, the Court interpreted the treaties of 1851 and 1868 and determined that, because the treaties did not use sufficient "clear and especial words," the lands under the Big Horn River belonged to the State of Montana and were not reserved for the Crow Tribe.[316] This question was squarely within the Court's subject-matter jurisdiction, interpreting treaty language to determine whether the treaty reserved the lands for the Tribe.[317]

The Court then proceeded to discuss whether the Tribe had the inherent power to regulate hunting and fishing on the

311. There is no shortage of critique of the *Montana* decision. For just some of the most important literature dealing with the inherent civil regulatory and adjudicatory powers of Indian tribes post-*Montana*, see Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 790–842 (2014) (tracing the influences of *Montana* on other cases, then arguing for a two-step common law entailing a rebuttable presumption in favor of tribal jurisdiction on tribal lands); Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631, 633–47 (2006) (discussing how *Montana* has been applied as a precedent, and critiquing the idea of replacing membership status for land status as the crucial factor in tribal jurisdiction); Koehn, *supra* note 99, at 713–62 (discussing the tribal exhaustion doctrine, which grew in part out of the *Montana*-test).

312. Nevada v. Hicks, 533 U.S. 353, 364–65 (2001).

313. Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997).

314. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 317–19 (2008).

315. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 645–46 (2001).

316. Montana v. United States, 450 U.S. 544, 550–56 (1981) (quoting Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411 (1842)).

317. *See* U.S. CONST. art. III, § 2, cl. 1.

riverbed owned by Montana.[318] But what basis did the federal court have for proceeding to discuss the extent of the Tribe's inherent power? The lower court had recognized that "no treaty or Act of Congress" had conferred upon the Tribe, or denied the Tribe, the inherent right to extend its power over non-members.[319] That should have been the end of the Court's inquiry. The Supreme Court, however, proceeded to discuss whether the Crow Tribe's inherent sovereignty was sufficiently broad as to permit the Council's resolution prohibiting non-members from hunting and fishing on the Crow Reservation.[320] This question clearly falls outside of the judicial power conferred by Article III. It is based neither on treaty nor statute and therefore falls outside the subject-matter jurisdiction of the federal courts and should never have been decided. Absent a limiting source of federal law, a tribe's exercise of its inherent authority is non-justiciable.

Had *Montana* not limited the inherent power of Indian tribes to civilly regulate and/or adjudicate the activity of non-Indians on the reservation, tribes would have considerably more tools to promote economic development and to control their reservation communities. Without having to fit into the *Montana* exceptions, tribes should have the inherent power to regulate non-Indians except in a manner contrary to treaty or statute without federal judicial interference. This includes the ability to tax non-Indian activity, to zone all land in Indian country, to require compliance with tribal hunting and fishing rules, and to adjudicate civil suits between non-members. The judicial power of the United States, given in Article III to the federal courts, simply does not permit this kind of regularized judicial interference in tribal affairs without some affirmative act from Congress.

3. *Cabazon*—The Court Should Not Have Affirmed the Legality of the Exercise of an Indian Tribe's Inherent Power to Oversee Gambling

Unlike *Oliphant* and *Montana*, in *California v. Cabazon Band of Mission Indians* the Court upheld the inherent power of

318. *Montana*, 450 U.S. at 557–67.

319. *Id.* at 549–50.

320. *Id.* at 563.

an Indian tribe.[321] The State of California had a statute limiting the playing of bingo to charitable organizations with pots not to exceed $250, and Riverside County had local ordinances regulating bingo and other card games.[322] The Cabazon Band opened a card club on its reservation where it engaged in high-stakes bingo (pots exceeding $250) and used the proceeds to fund the tribal government.[323] The Band's card club clearly violated the state and local law.[324]

The Band filed suit in federal court seeking a declaratory judgment that the County had no authority to apply its ordinances to the card club and an injunction preventing the enforcement of state or local law to the card club's gaming operations.[325] California and Riverside County argued that Public Law 280 permitted the State to enforce its bingo regulations in Indian country,[326] and alternatively, that the Organized Crime Control Act (OCCA) authorized state regulation of tribal gaming facilities.[327]

In a 6-3 opinion the Court first determined that neither federal statute gave California the right to enforce its bingo rules on the games played at the Band's card club.[328] It reasoned that Public Law 280 only permitted states to enforce prohibitions of conduct in Indian country and that because California regulated, but did not prohibit, the bingo games in question, Public Law

321. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 202–03 (1987).

322. *Id.* at 205–06.

323. *Id.* at 205–06, 216.

324. *Id.* at 205 n.3.

325. *Id.* at 206 ("The Tribes sued the county in Federal District Court seeking a declaratory judgment that the county had no authority to apply its ordinances inside the reservations and an injunction against their enforcement.").

326. *Id.* at 207–12. Public Law 280 is a federal statute that permits states to assume some jurisdictional powers in Indian country. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. For an excellent academic discussion of Public Law 280 and its application in California, see Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1415–37 (1997).

327. *Cabazon*, 480 U.S. at 212–14; Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at scattered sections of 18, 28 U.S.C.).

328. *Cabazon*, 480 U.S. at 202–03.

280 could not be used to enforce state law against the Band.[329] It then decided that the Organized Crime Control Act was a federal criminal statute that could only be enforced by the United States.[330] The Court went on to hold that even if it were enforceable by the State, the Act would only criminalize activity that is a "violation of the law of a state," which for the purposes of the OCCA means a violation of the state's "public policy."[331] Because California regulates but does not prohibit bingo, the Band's card club did not violate the public policy of California and therefore was not unlawful under the OCCA.[332]

The Tribe argued that the Court's analysis should end after determining that no statute allowed for California to assert its bingo laws: "Because the state and county laws at issue here are imposed directly on the Tribes that operate the games, and are not expressly permitted by Congress, the Tribes argue that the judgment below should be affirmed without more."[333] The Court, however, continued to inquire into the origins of the Tribe's inherent power to set its own gaming rules and to balance them against the State's alleged interests in imposing its own regulations on the tribe.[334] The Court recognized that this analysis proceeds "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[335] It ultimately held that the strong federal interest in encouraging tribal sovereignty coupled with the Tribe's creation of a new form of economic development that provided a large share of the tribal government's budget outweighed

329. *Id.* at 211 ("In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.").

330. *Id.* at 213–14 ("There is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect.").

331. *Id.*

332. The Ninth Circuit "concluded that bingo is not contrary to the public policy of California." *Id.* at 209–11, 213.

333. *Id.* at 214.

334. *Id.* at 214–22.

335. *Id.* at 216 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334–35 (1983)).

California's concerns about organized crime infiltrating the State through bingo clubs on Indian reservations.[336]

While the ultimate outcome was a victory for the Tribe, the Court should have stopped its analysis after determining that neither federal statute (Public Law 280 or the OCCA) permitted California to enforce its gaming laws against the Band. Admittedly *Cabazon* is different than *Oliphant* in that it was the Tribe that initiated the lawsuit, and it did so under the Declaratory Judgment Act.[337] The Declaratory Judgment Act is a federal statute that permitted the federal court to "declare the rights and other legal relations of any interested party."[338] It is a federal statute, and determining the Cabazon Band's rights under the Act created a federal question.

The Declaratory Judgment Act, however, requires "a case of actual controversy" within the court's jurisdiction.[339] In *Cabazon* there was no question that the Band's bingo activities violated any constitutional or treaty provision.[340] Once the statutory barriers had been disposed of by the Court, there was no longer "a case of actual controversy" for the Court to resolve. An Indian tribe retains all of those inherent powers not explicitly surrendered by the Tribe or affirmatively restricted by an Act of Congress.[341] Because the Court had already determined that the Tribe's inherent right to create its own gaming operations was not barred by Public Law 280 or the OCCA, the Court should have given the Band the relief sought without continuing to inquire about the origin or limitation of the Tribe's inherent power.

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336. *Id.* at 221–22 ("We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them.").

337. Declaratory Judgment Act, ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. § 2201).

338. 28 U.S.C. § 2201 (corresponds to the Declaratory Judgment Act, ch. 512, 48 Stat. 955 (1934)).

339. *Id.*

340. *Cabazon*, 480 U.S. at 205 n.3.

341. *See* United States v. Winans, 198 U.S. 371, 381 (1905) (framing a treaty as a limitation of larger rights that Indians already possessed, and indicating that rights not mentioned in the treaty remained with the Indian Tribe).

B. LIMITATIONS ON THE SUBJECT-MATTER JURISDICTION OF FEDERAL COURTS RESTORES THE FEDERALISM PRINCIPLES BETWEEN TRIBES AND THE UNITED STATES IMPLICIT IN ARTICLE III

Despite the discussion above, removing judicial plenary power from the federal courts by appropriately interpreting Article III does not mean that all cases involving Indian tribes or their exercise of inherent powers are beyond the review of the federal courts. Overturning *National Farmers* would merely restore the mutual sovereign respect between tribes and the United States. As Justice O'Connor so aptly remarked: "The three sovereigns [tribes, states, and the United States] can learn from each other, and the strengths and weaknesses of the different systems provide models for courts to consider."[342]

While cases like *Oliphant* and *Montana* should have been beyond the jurisdiction of the federal courts, these courts play an important role in interpreting statutes and treaties and providing forums to resolve claims based on these positive sources of law—even when those claims arise in Indian country and involve a tribe's exercise of its inherent sovereignty. For example, in *South Dakota v. Bourland*, the State argued that the Flood Control Act of 1944 and the Cheyenne River Act had removed the Cheyenne River Sioux Tribe's inherent power to regulate hunting and fishing and manage recreational activity on lands within the reservation that had been flooded by the construction of a series of dams.[343] Regardless of whether the Court reached the right outcome,[344] there can be no doubt that the federal court had subject-matter jurisdiction. It was interpreting whether a pair of federal statutes were intended to limit the inherent powers of an Indian tribe—a constitutional use of the judicial power.[345]

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342. O'Connor, *supra* note 18, at 6.

343. South Dakota v. Bourland, 508 U.S. 679, 683–85 (1993).

344. For an academic discussion and critique of the merits of the *Bourland* decision, see Veronica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indians:* South Dakota v. Bourland, 27 CREIGHTON L. REV. 605, 634–58 (1994).

345. Determining whether Congress has assumed the judicial power is a regular exercise for the federal courts, even in Indian law cases. For example, see Patchak v. Zinke, 583 U.S. 244, 246 (2018) (determining whether the Gun Lake Trust Land Reaffirmation Act was a valid exercise of legislative power or usurped the judicial power). For a more academic discussion of the use of the judicial power to interpret federal statutes, see Robert J. Pushaw, Jr., *The*

From a federalism perspective, the appropriate use of the federal courts extends to questions of whether a state may impose its regulations in Indian country—but only when interpreting a congressional grant of that authority. In *Rice v. Rehner* the Court was asked whether a licensed Indian trader was required to obtain a state liquor license to sell distilled spirits for off-premises consumption in Indian country.[346] In a 6-3 opinion the Court held that Congress had permitted state regulation of alcohol in Indian country and that the trader could be compelled to obtain the state license.[347] Again, regardless of whether the Court reached the right decision, there was clearly a statutory basis for the federal courts to assert their subject-matter jurisdiction.[348]

The discussion here could continue chronologically through the Supreme Court's Indian law canon. The federal courts had jurisdiction over whether the use of a tribe's inherent power to create criminal law used in a Court of Indian Offenses (C.F.R. Court) was a delegated federal power pursuant to a set of C.F.R. regulations,[349] whether the Muscogee Tribe or the State of Oklahoma had the inherent power to prosecute an Indian on land that had been allotted pursuant to a federal allotment act,[350] whether the Omaha Indian Tribe could require non-Indian businesses to obtain a tribal liquor license pursuant to a federal allotment act,[351] whether the Indian Gaming Regulatory Act waives a tribe's sovereign immunity,[352] and so on. None of these

Inherent Powers of Federal Courts and the Structural Constitution, 86 IOWA L. REV. 735 (2001).

346. Rice v. Rehner, 463 U.S. 713, 715 (1983).

347. *Id.* at 733 ("By enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the discriminatory federal prohibition.").

348. For a discussion of tribal sovereignty and its treatment in *Rice*, see Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 602–05 (1989).

349. *See* Denezpi v. United States, 596 U.S. 591, 596–605 (2022) (finding that tribes and the federal government derive their respective authority from different sovereign sources and therefore offenses defined by their distinct laws are not the same).

350. McGirt v. Oklahoma, 140 S. Ct. 2452, 2460 (2020).

351. Nebraska v. Parker, 577 U.S. 481, 487–94 (2016).

352. Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788–804 (2014).

cases raise the constitutionally suspect assumption of the federal power precisely because each of them was grounded in a federal question based upon a source of positive law.

By only permitting the federal courts to extend the judicial power in cases where there is a constitutional, treaty, or statutory basis for the underlying claim challenging the assertion of a tribe's inherent authority, the federal courts will have achieved the balance of sovereign interests contemplated by the Constitution and the Court from its earliest decisions. By distinguishing these cases from those discussed elsewhere in this Article where only the common law provided a basis for jurisdiction and therefore the Court should have denied review,[353] the Court will have created a workable balance between respect for the tribal sovereign and the creation of a forum to review legal questions that require the Court's interpretation of federal law.

C. A PROPER CONSTRUCTION OF ARTICLE III WILL CHANGE THE QUESTIONS THE FEDERAL COURTS ASK

Finally, adopting the restrained interpretation of Article III urged by this Article will not merely limit the Indian law cases heard in the federal courts, it will fundamentally change the questions that federal courts ask. Instead of asking whether a tribe has the inherent power to act, the federal courts will focus on the consequences of a tribe's use of its inherent authority and examine the implications for the federal court system. The Court's recent 2021 opinion in *United States v. Cooley* provides an excellent example.[354]

James Saylor, a highway safety officer with the Crow Police Department, investigated a vehicle stopped on the side of a road running through the Crow Reservation.[355] Joshua James Cooley, seated in the driver's seat, lowered the tinted driver's side window six inches and informed the officer that everything was all right and that he had just pulled over because he was tired.[356] Officer Saylor noticed that Cooley's eyes were watery and

353. *See* discussion *supra* Part IV.A.

354. United States v. Cooley, 593 U.S. 345, 355 (2021).

355. United States v. Cooley, 919 F.3d 1135, 1139 (9th Cir. 2019), *vacated*, 593 U.S. 345.

356. *Id.*

bloodshot and observed two semiautomatic weapons on the passenger side seat.[357]

After noticing a loaded semiautomatic pistol near Cooley's right hand, Officer Saylor ordered Cooley out of the vehicle.[358] A pat down search yielded several small empty plastic bags that in the Officer's experience were often used in the transportation or sale of methamphetamines.[359] After County and Bureau of Indian Affairs agents arrived at the scene, the BIA officer directed Officer Saylor to conduct an additional search of the truck, which yielded more methamphetamine.[360]

Cooley was charged in federal court with one count of possession with intent to distribute methamphetamine and one count of possession of a firearm in furtherance of a drug trafficking crime.[361] He moved to suppress the evidence collected by Officer Saylor on the basis that Cooley is a non-Indian and so Officer Saylor lacked the authority to stop and search him after he had concluded that Cooley was probably not an Indian person.[362] The District Court granted the motion, and the Ninth Circuit affirmed, reasoning that a tribal officer could not detain a non-Indian person on state or federal rights of way unless it was "apparent at the time of the detention that the non-Indian has been violating state or federal law."[363]

The unanimous Supreme Court opinion, written by Justice Breyer, reaffirmed an Indian tribe's inherent power to authorize its officers to stop, detain, and search a non-Indian on the reservation with sufficient probable cause.[364] It relied on the second *Montana* exception to suggest that the power utilized by tribal officers to investigate suspected criminal activity in Indian country fits *Montana* "almost like a glove."[365] The alternative, Justice

357. *Id.* at 1139–40.

358. *Id.* at 1140.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 1141.

364. United States v. Cooley, 593 U.S. 345, 355 (2021).

365. *Id.* at 350–51 ("The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the 'health or welfare of the tribe.' To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves

Breyer explained, would be that after determining a drunk driver was a non-Indian, the tribal officer would be forced to let the driver get back in the car and continue operating the vehicle.[366] Because drunk drivers pose a threat to Indians and non-Indians on public roads, the exercise of a tribe's inherent power to stop such a driver is perfectly consistent with the exercise of power over non-Indians whose conduct has a direct effect on the health or welfare of the tribe.[367]

Consistent with the arguments made above, the Supreme Court had no Article III basis for determining whether the tribal police officer could exercise the inherent power of the Crow Tribe to stop, detain, and search Cooley. Because no constitutional provision, treaty right, or federal statute expressly removes the inherent power of tribal officers to search non-Indians, the question of whether the Crow officer had the power is not a question that arises under the laws of the United States.

That conclusion does not mean that the *Cooley* case could not have reached the Supreme Court. Instead, the questions asked and answered by the federal courts need to change. Instead of asking whether the tribal officer could exercise the tribe's inherent power to search Cooley, the Court could have asked whether evidence obtained from a search of a non-Indian performed by a tribal officer on the reservation was admissible in federal court. Cooley was, after all, prosecuted by the United States and not by the Crow Tribe in a Crow tribal court. The admissibility of evidence in a state proceeding is a federal question when the defendant alleges "circumstances impugning fundamental fairness or infringing specific constitutional protections,"[368] and could raise a federal question directly in a federal proceeding by alleging that the admission of evidence secured by

against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.").

366. *Id.* at 351 ("As the Washington Supreme Court has noted, '[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.'" (alteration in original) (quoting State v. Schmuck, 805 P.2d 1332, 1341 (Wash. 1993))).

367. *Id.*

368. Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir. 1960).

a tribal officer violated the petitioner's due process rights or are otherwise violative of the Federal Rules of Evidence.[369]

Alternatively, the ICRA provides a statutory right (i.e., a federal question) that protects the rights of any person when interacting with the tribal sovereign, including the right to be free from unreasonable searches,[370] and the right to due process of law.[371] Although the due process rights conferred by statute and the due process rights conferred by the Constitution might be different,[372] Cooley could allege a violation of those statutory rights in a federal court if he had been incarcerated by the tribe.[373] Which questions were asked would ultimately depend on the jurisdictional position of the case when it reached the federal court, but *Cooley* provides an excellent example of how Indian law would adapt if Article III were given its proper limiting role.

CONCLUSION

Federal courts are courts of limited jurisdiction. They are permitted to exercise the judicial power only over those cases and controversies contemplated by Article III. There is no judicial plenary power. Adhering to this simple constitutional maxim will fundamentally alter Indian law by limiting the overreach of the federal courts and remaking the field with appropriate deference to the tribal sovereign. The federal courts cannot create or imply a federal common law cause of action absent some enabling authority from a source of positive federal law:

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369. Gray v. Union Cnty. Intermediate Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975) (holding that a violation of petitioner's due process rights raised a federal question).

370. 25 U.S.C. § 1302(a)(2).

371. *Id.* § 1302(a)(8).

372. Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 83 (2002) ("The opinion [in *Nevada v. Hicks*] briefly mentions the Indian Civil Rights Act to note its guarantees are not identical to the Constitution. . . . Ignored in both *Hicks* and *Oliphant* is that the Indian Civil Rights Act ensures that federal law affords all defendants (especially non-Indians) greater rights in tribal criminal courts than in state courts." (citing Nevada v. Hicks, 533 U.S. 353, 384 (2001))); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 (1978) (stating that the ICRA imposes "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment").

373. The only remedy provided in ICRA for a violation of an individual's statutory rights is a writ of habeas. *See* 25 U.S.C. § 1303.

the Constitution, a treaty, or federal statute. *National Farmers* was wrong when it was decided, and it should be reversed in favor of a more restrained interpretation of Article III.

By limiting federal question jurisdiction over Indian tribes exercising their inherent rights to those cases that present questions of clearly established federal law, the federal courts would be respecting the longstanding congressional preference for protection of tribal sovereignty while appropriately limiting the exercise of the judicial power to those cases and controversies contemplated by Article III. While that limitation will necessarily keep some cases out of the federal courts and will change the questions asked by others, it will reestablish the original tribal-state-federal federalism envisioned by Chief Justice Marshall and restore a proper and supportable interpretation of the Constitution's grant of judicial power to the federal courts.

Absent some enabling authority the federal courts may not create new federal causes of action when those causes of action threaten the exercise of an Indian tribe's retained sovereignty. Unwarranted judicial intrusions upon tribal power are judicial activism at its worst and have been championed by those Justices who otherwise profess to believe in a more limited role for the federal courts. Reinvigorating Article III challenges to prevent federal court review of the exercise of tribal inherent power is consistent with both the text of Article III and the intent of Congress.