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ARTICLE

AMERICAN-STYLE JUSTICE IN NO MAN'S LAND

Peter Nicolas*

I. INTRODUCTION

For much of the nineteenth century, the geographic region known today as the Oklahoma Panhandle and bounded on the east by the hundredth meridian of longitude, on the south by Texas, on the west by New Mexico, and on the north by Colorado and Kansas, was commonly referred to as the Public Land Strip, the Neutral Strip, or more ominously, "No Man's Land." The region was so-named

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1 See Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81, 81-82 (describing territory "commonly called No Man's Land"); Cook v. United States, 138 U.S. 157, 165 (1891) ("[T]he Public Land Strip, . . . commonly called No Man's Land, . . . is 167 miles in length, 34½ miles in width, lies between the 100th meridian of longitude and the Territory of New Mexico, and is bounded on the south by that part of Texas known as the Panhandle, and by Kansas and Colorado on the north."); JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES, 1866-1906: COURTS, GOVERNMENT, AND THE MOVEMENT FOR OKLAHOMA STATEHOOD 4 (1995) ("West of the hundredth meridian is a neck of land containing 5,672 square miles now known as the
because, for much of the nineteenth century, it fell outside of the jurisdiction of any state or territorial, and, seemingly, any federal court. This unusual circumstance was the result of a geographic gap created by the federal statutes defining the boundaries of Texas, Colorado, New Mexico, Kansas, and Indian Territory.

Given the evident lack of any court with jurisdiction over No Man's Land, it was perhaps inevitable that the region became the setting for a notorious murder, known as the Massacre of Wild Horse Lake. On July 25, 1888, a group of Kansans associated with one faction of local Kansas politics, led by one Cyrus E. Cook, ambushed and murdered four other Kansans associated with a rival political faction inside the boundaries of No Man's Land. After the
incident occurred, the perpetrators made no secret of their act and indeed boasted of it, believing themselves to be immune from prosecution since the killing occurred in No Man's Land. The incident thus raised an interesting jurisdictional question: Can you literally get away with murder if you kill someone in No Man's Land?

Throughout this country's history, as American trade and expansionism have taken Americans westward and around the globe, Congress has used its authority to create and define the jurisdiction of the federal courts to fill jurisdictional gaps in geographic enclaves where the alternative is no forum at all. In some instances, Congress has simply extended the territorial reach of an existing Article III federal district court. In the case of No Man's Land, for example, shortly after the Massacre of Wild Horse Lake, Congress vested the U.S. District Court for the Eastern District of Texas with judicial jurisdiction over the region, even though it fell outside the boundaries of the State of Texas. In other instances, Congress has created new, specialized federal courts having jurisdiction over disputes arising within a particular geographic region, as it has done for most of the U.S. territories.

In addition to using the federal courts to serve this geographic gap-filling function, Congress has also used its authority over the courts to provide a federal forum where the existing fora, while theoretically available, were perceived by Congress as inadequate to protect the rights of particular parties either due to parochial bias or other actual or perceived deficiencies. In some such instances, Congress has vested existing Article III federal courts with jurisdiction over disputes involving particular parties, as in the case of

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STORY OF A LANDED ORPHAN 198-204 (Enid, Oklahoma, privately published 1937).

7 RAINNEY, supra note 6, at 204.

8 Act of Mar. 1, 1889, ch. 333, § 17, 25 Stat. 783, 786. The following year, Congress made No Man's Land a part of the newly created Oklahoma Territory, thus placing it under the jurisdiction of the Oklahoma territorial courts. Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81, 81-82.

9 See Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783, 783 (defining Indian Territory boundaries, thus describing it as including region known as No Man's Land).

10 See, e.g., 48 U.S.C. § 1821(a) (1994) ("There is established for and within the Northern Mariana Islands a court of record to be known as the District Court for the Northern Mariana Islands.").
diversity and alienage jurisdiction, where the risk of state court bias\textsuperscript{11} prompted Congress to provide for federal court jurisdiction over most disputes between citizens of different states\textsuperscript{12} and between a citizen of a state and a citizen of a foreign state.\textsuperscript{13} In other instances, Congress has created new, specialized federal courts to adjudicate disputes arising in foreign countries involving American citizens, such as the United States Court for China,\textsuperscript{14} which was established to protect U.S. nationals from what was perceived to be "barbarous and cruel punishments inflicted" by the courts of non-Christian countries.\textsuperscript{15}

\textsuperscript{11} See The Federalist No. 80, at 495 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) ("[T]he peace of the whole ought not to be left at the disposal of a part."); id. at 497.


\textsuperscript{13} Id. § 1332(a)(2)-(3).

\textsuperscript{14} See Act of June 30, 1906, ch. 3934, § 1, 34 Stat. 814, 814 (establishing United States Court for China and providing for its "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China. . . .").

\textsuperscript{15} In re Ross, 140 U.S. 453, 463 (1891).

The intense hostility of the people of Moslem faith to all other sects, and particularly Christians, affected all their intercourse, and all proceedings had in their tribunals. . . . For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials.

\textsuperscript{16} Charles Sumner Lobinger, American Courts in China 2 (1919) (stating treaty of Wang-Hiya provided for absolute exemption of Americans from Chinese jurisdiction and was negotiated to prevent China, as non-Christian state, from exercising control over life and
Despite these historical efforts by Congress, "no forum" and "biased forum" problems continue to arise today in the United States in civil disputes arising in Indian Country\(^9\) and in civil disputes arising elsewhere to which Indian tribes, tribal members, or tribal entities are party. People are typically drawn to the field of Indian Law\(^17\) because of their interest in and commitment to the substantive rights of Native Americans with respect to land, water, hunting and fishing, religious expression, and the like.\(^18\) However, Supreme Court decisions in the field, especially recent ones, have focused much attention on questions of adjudicative jurisdiction.\(^19\)

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\(^{15}\) The term "Indian country" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.


And while courts, practitioners, scholars, and students have long struggled with complicated questions of subject matter jurisdiction, abstention, sovereign immunity, and the like, in no area of law are these issues so complex and unsettled, the outcomes so harsh and counterintuitive, as in civil actions arising in Indian Country or those actions arising elsewhere involving Indian tribes, tribal members, or tribal entities. The jurisdictional inquiry necessitates


23 See, e.g., Owens Valley Indian Hous. Auth. v. Turner, 185 F.3d 1029 (9th Cir. 1999) (affirming dismissal of eviction action brought by Indian housing authority against tribal member for lack of subject matter jurisdiction, even though state and tribal courts lacked subject matter jurisdiction and thus there was no forum in which to prosecute action), withdrawn and rehe'g granted, 192 F.3d 1330 (9th Cir. 1999), appeal dismissed, 201 F.3d 444 (9th Cir. 1999); Schantz v. White Lightening, 502 F.2d 67, 68-70 (8th Cir. 1974) (affirming dismissal of tort action arising on Indian reservation brought by non-Indian plaintiffs against Indian defendant for lack of subject matter jurisdiction, even though state and tribal courts lacked subject matter jurisdiction and thus there was no forum in which to prosecute action).

24 Compare Richardson v. Malone, 762 F. Supp. 1463, 1466-67 (N.D. Okla. 1991) (finding no federal diversity jurisdiction over dispute between non-Indian plaintiff from Oklahoma and defendants who are members of Osage Indian Tribe where latter's reservation is physically located within geographic boundaries of Oklahoma), with Poitra v. Demarrias, 602 F.2d 23, 24, 29 (8th Cir. 1974) (holding diversity jurisdiction exists in dispute between two members of Standing Rock Reservation where reservation crosses state boundaries and plaintiff lives on North Dakota side while defendant lives on South Dakota side).
an examination of the judicial power of three different sovereigns—the federal, state, and tribal governments—against the backdrop of a modern-day congressional policy that eschews state and federal incursions into tribal sovereignty (yet leaves many tribes without the resources and expertise necessary to create or develop their own judicial systems), the federal judiciary's historically narrow view of its statutory grants of diversity and federal question jurisdiction, congressional inaction, and a confusing and often contradictory body of federal Indian Law that has developed in layer-cake fashion over two centuries.

The explosive growth in tribal gaming over the past decade—attributable in large part to the Supreme Court's holding

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29 See, e.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) (limiting jurisdiction over declaratory judgment actions to those suits that could have been filed in federal court absent the existence of the Declaratory Judgment Act); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (reading “well-pleaded complaint” rule into statute granting federal courts federal question jurisdiction); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 201-02 (1877) (same).


32 Stephanie Dean, Getting a Piece of the Action: Should the Federal Government be Able to Tax Native American Gambling Revenue?, 32 COLUM. J.L. & SOC. PROBS. 157, 168 (1999);
in *California v. Cabazon Band of Mission Indians*\(^3^3\) that even tribes subject to state criminal jurisdiction are exempt from state laws regulating gaming activity\(^3^4\)—has increased the importance of civil adjudicative jurisdiction over actions involving Indian tribes, tribal entities, and tribal members. The primary effect of Indian gaming has been a dramatic increase in the commercial interaction between Indians and their non-Indian neighbors,\(^3^5\) increasing the number of legal disputes between them\(^3^6\) and raising issues of tribal sovereign

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\(^{34}\) *Id.* at 220-22. Subsequent to the Supreme Court's decision in *Cabazon*, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1994), which provides in pertinent part that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." *Id.* § 2701(5).


immunity, supra note 37, subject matter jurisdiction, abstention, and forum
bias. Moreover, an important secondary effect of Indian gaming and the concomitant
growth in tribal economic resources has been an increase in the economic interaction
between tribal governments and their members, both in a proprietary role (e.g., hiring casino
employees) as well as a sovereign role (e.g., providing subsidized housing). This
increased interaction between tribes and their tribal members has added to the civil
caseload of the judicial system, and has likewise raised complicated jurisdictional
questions.

See, e.g., GNS, Inc. v. Winnebago Tribe, 866 F. Supp. 1185, 1186, 1191 (N.D. Iowa
1994) (holding tribal sovereign immunity bars contract action brought in federal court by non-
Indian casino managers against tribe); Trudgeon v. Fantasy Springs Casino, 84 Cal. Rptr. 2d
65, 66 (Ct. App. 1999) (holding corporation organized by tribe to operate casino is entitled to
sovereign immunity); Gross v. Omaha Tribe, 601 N.W.2d 82, 82 (Iowa 1999) (affirming
sovereign immunity bars suit against tribe by patron who was knocked down by another
patron at tribe’s gambling casino); Gavle v. Little Six, Inc., 555 N.W.2d 284, 287 (Minn. 1996)
(holding sovereign immunity bars suit against tribe by employee alleging employment
sovereign immunity bars suit against tribe when patron at tribe’s gaming resort hotel was
pierced by hypodermic needle); see also Tribal Casino Immune from Wrongful Termination
Lawsuit, 4th Cir. Says, 3 No. 9 ANDREWS GAMING INDUS. LITIG. REP. 11 (1999)
discussing unpublished opinion in which Fourth Circuit dismissed Title VII action against tribe
brought by non-Indian former employee on sovereign immunity grounds).

See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 506-08
(11th Cir. 1993) (finding no federal question jurisdiction over contract dispute between non-
Indian operator of gaming facility and tribe); Calumet Gaming Group-Kan., Inc. v. Kickapoo
action brought by non-Indian gaming consultant against tribe); Abdo v. Fort Randall Casino,
and contract action brought by non-Indian former casino manager against tribe).

See, e.g., Calumet Gaming, 987 F. Supp. at 1326-30 (discussing reasons for court’s
decision that tribal court should decide issue first); Abdo, 957 F. Supp. at 1112-14 (staying
court’s proceedings pending tribal court’s determination).

See generally Newton, supra note 36, at 285-295 (discussing perception that Indian
Courts are biased against non-Indians).

See Eugene Martin Christiansen, Gambling and the American Economy, 556 ANNALS
AM. ACAD. POL. & SOC. SCI. 36, 44-45 (1998) (noting economic benefits to tribal members of
Indian gambling); Kathryn R.L. Rand & Steven A. Light, Virtue or Vice? How IGRA Shapes
the Politics of Native American Gaming, Sovereignty, and Identity, 4 VA. J. SOC. POLY’
& L. 381, 402-04 (1997) (describing how Indian gaming increases standard of living in tribes and
contributes social good to impoverished Native Americans).

See, e.g., Owens Valley Indian Hous. Auth. v. Turner, 185 F.3d 1029, 1034 (9th Cir.
1999) (finding no federal subject matter jurisdiction over eviction action brought by tribal
housing authority against tribal members); Minn. Chippewa Tribal Hous. Corp. v. Reese, 978
F. Supp. 1258, 1267 (D. Minn. 1997) (same); Round Valley Indian Hous. Auth. v. Hunter, 907
Unfortunately, when such disputes arise, some parties find themselves without a forum in which to prosecute their claims.\(^4\) Federal statutory\(^4\) and common law,\(^4\) as well as state law,\(^4\) deprive most state courts of jurisdiction over such disputes; federal constitutional,\(^4\) statutory,\(^4\) and decisional law\(^4\) limit federal court jurisdiction; and tribal courts either do not exist\(^5\) or lack jurisdiction as a matter of tribal law.\(^6\) Moreover, when suit is brought against an


\(^5\) See 25 U.S.C. § 1326 (1994) (providing state court jurisdiction in Indian Country only if approved by majority of Indian voters in special election); 28 U.S.C. § 1360(b) (1994) (restricting "alienation, encumbrance or taxation of any real or personal property" belonging to Indians or Indian tribes).

\(^6\) See Williams v. Lee, 358 U.S. 217, 223 (1959) (denying state jurisdiction over non-Indian store owner plaintiff and Indian customer defendants because such jurisdiction would undermine tribal court authority).

\(^7\) See Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 478-93 (1979) (holding that disclaimers of jurisdiction over Indian Territory in state constitutions, although have no force as matter of federal law, retain force as matter of state law); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 369 & nn.181-84, 374 & n.229 (Rennard Strickland et al. eds., 1982) (describing failure of some states to assume jurisdiction over matters in Indian Country).

\(^8\) See, e.g., U.S. CONST. art. III, § 2, cl. 1 (setting forth scope of federal judicial power).

\(^9\) See, e.g., Okla. Tax Comm’n v. Graham, 489 U.S. 838, 839-42 (1989) (finding well-pleaded complaint rule bars federal court from exercising federal question jurisdiction where question of tribe's federal right of sovereign immunity comes in as defense); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-20 (1987) (requiring federal courts that would otherwise have diversity jurisdiction to abstain in favor of tribal court jurisdiction over such dispute); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831) (holding Indian tribes are not foreign states for purposes of diversity jurisdiction); Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir. 1997) (holding Indian tribes are not state citizens for purposes of diversity jurisdiction).

\(^{10}\) See, e.g., Owens Valley Indian Hous. Auth. v. Turner, 185 F.3d 1029, 1034 (9th Cir. 1999) (noting plaintiff's complaint of no forum since Indian tribe lacks competent tribal courts and state courts are statutorily precluded from hearing case); Richardson v. Malone, 762 F. Supp. 1463, 1469 (N.D. Okla. 1991) (noting lack of tribal court in Indian territory created choice between creating "zone of civil lawlessness" or "federal common law" to adjudicate); see also Reynolds, supra note 27, at 576 (noting tribal courts may not exist).

\(^{11}\) See, e.g., Schantz v. White Lightning, 502 F.2d 67, 69-70 (8th Cir. 1974) (explaining tribe's statutory code precludes jurisdiction); Minn. Chippewa Tribal Hous. Corp. v. Reese,
Indian tribe itself, the tribe enjoys sovereign immunity from suit in any court—state, federal, or tribal.\textsuperscript{52} Faced with this "no forum" dilemma, most courts reluctantly dismiss the case,\textsuperscript{53} leaving the dispute to nonjudicial resolution and running seemingly counter to the legal maxim that "where there is a legal right, there is also a legal remedy."\textsuperscript{54} In some such instances, the failure of any court to exercise jurisdiction has caused the parties to resort to violence or at least the threat of violence.\textsuperscript{55} A few courts, finding the "self-help" alternative untenable, strain to interpret statutory and decisional law so as to allow them to exercise jurisdiction.\textsuperscript{56} The result is that

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\item 978 F. Supp. 1258, 1260-61 (D. Minn. 1997) (finding tribal court in question had no provisions to hear civil actions other than prosecution of game and fish violations on Reservation); Neadeau v. Am. Family Mut. Ins. Co., No. C7-93-691, 1993 WL 302127, at *3-*4 (Minn. Ct. App. Aug. 10, 1993) (Schumacher, J., dissenting) (opining because tribal court has no jurisdiction over Indians bringing suit against non-Indian corporations majority should find that state court jurisdiction would not interfere with tribal sovereignty); see also Reynolds, supra note 27, at 576 (noting that if tribal court exists, it may still lack jurisdiction).
\item See Owens Valley Indian Hous. Auth., 185 F.3d at 1034 (dismissing case for lack of subject matter jurisdiction); Schantz, 502 F.2d at 70; Minn. Chippewa, 978 F. Supp. at 1264 (finding that absence of available forum is insufficient to invoke federal question jurisdiction); Neadeau, 1993 WL 302127, at *1 (affirming dismissal for lack of subject matter jurisdiction); Jean Pendleton, Iowa Mutual Insurance Co. v. LaPlante and Diversity Jurisdiction in Indian Country: What if No Forum Exists?, 33 S.D. L. REV. 528, 543 (1988) ("The North Dakota Supreme Court, explicitly recognizing that the non-Indian litigants were left without a forum, nevertheless held that only a legislative remedy was proper."); Reynolds, supra note 27, at 576 ("Some courts steadfastly refuse to alter their analysis of adjudicatory jurisdiction even when confronted with the possibility that no alternative forum exists. For those courts, non-Indian adjudication of the dispute would constitute an impermissible infringement on tribal sovereignty.").
\item See Owens Valley Indian Hous. Auth., 185 F.3d at 1034 (dismissing case for lack of subject matter jurisdiction); Schantz, 502 F.2d at 70; Minn. Chippewa, 978 F. Supp. at 1264 (finding that absence of available forum is insufficient to invoke federal question jurisdiction); Neadeau, 1993 WL 302127, at *1 (affirming dismissal for lack of subject matter jurisdiction); Jean Pendleton, Iowa Mutual Insurance Co. v. LaPlante and Diversity Jurisdiction in Indian Country: What if No Forum Exists?, 33 S.D. L. REV. 528, 543 (1988) ("The North Dakota Supreme Court, explicitly recognizing that the non-Indian litigants were left without a forum, nevertheless held that only a legislative remedy was proper."); Reynolds, supra note 27, at 576 ("Some courts steadfastly refuse to alter their analysis of adjudicatory jurisdiction even when confronted with the possibility that no alternative forum exists. For those courts, non-Indian adjudication of the dispute would constitute an impermissible infringement on tribal sovereignty.").
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\item See Gold, supra note 27, at 1428-31 (noting that in one instance, tribal members, unable to carry out eviction of suspected drug dealer in judicial proceeding, armed themselves and nearly resorted to violence to ensure eviction of someone they believed to be threat to community).
\item See, e.g., Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes, 623 F.2d 682, 684-85 (10th Cir. 1980) (deeming tribal sovereign immunity abrogated where alternative is no forum has jurisdiction over dispute); Richardson v. Malone, 762 F. Supp. 1463, 1467-70 (N.D. Okla. 1891) (holding federal subject matter jurisdiction arises as matter of federal common law where alternative is that no forum has jurisdiction over dispute); All Mission Indian Hous. Auth. v. Silvas, 690 F. Supp. 330, 331-32 (C.D. Cal. 1987) (holding eviction action by tribal
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these courts effectively take on the role of creating their own jurisdiction\(^5\) and, in some instances, abrogating a tribe's sovereign immunity.\(^6\) In attempting to do justice in an individual case, these courts eradicate what could otherwise be viewed as a lawless situation only by acting themselves in an arguably lawless manner.

In still other situations, a dispute arises between an Indian tribe, tribal entity, or tribal member and a non-tribal member or state, and a state or tribal forum is available to the parties, but a federal forum—due to jurisdictional limitations\(^7\) or principles of abstention\(^8\)—is not. The Supreme Court presumes these non-federal courts to be fair,\(^9\) but the same rationale which underlies diversity jurisdiction appears to be equally present in these

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\(^5\) See, e.g., Richardson, 762 F. Supp. at 1467-70 (holding federal subject matter jurisdiction arises as matter of federal common law where alternative is no forum has jurisdiction over dispute).

\(^6\) See, e.g., Dry Creek Lodge, 623 F.2d at 684-85 (deeming tribal sovereign immunity abrogated where alternative is no forum has jurisdiction over dispute).

\(^7\) See, e.g., Okla. Tax Comm'n v. Graham, 489 U.S. 838, 839-42 (1989) (finding no federal question jurisdiction in suit between state tax commission and Indian tribe where question of tribe's sovereign immunity arises only by way of defense to suit brought by state tax commission); Weeks Const., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 672-74 (8th Cir. 1986) (finding no diversity jurisdiction between non-Indian plaintiff and tribal defendant where defendant's reservation is located within plaintiff's state).


situations, making the availability of a federal forum desirable in the face of this potentially “biased forum” scenario.

A number of scholars have written about the “no forum” problem, and have warned that if tribal governments do not take steps to solve the problem, Congress will. But assuming this prediction to be correct, what exactly is it that Congress can do? On this point, the existing literature offers little in the way of discussion, only suggesting in passing that Congress could give tribes the support necessary to develop their judicial systems, repeal federal laws depriving state courts of civil jurisdiction over Indian country, or create a suitable federal forum. Of these, the first is rather obvious (and doctrinally uninteresting), and the second would not only be a major setback for tribal sovereignty, but would eliminate the “no forum” only by exacerbating the “biased forum” problem. It is the last of these potential congressional responses that raises the most interesting doctrinal questions, yet the existing literature is silent as to the constitutional bases for either granting existing federal courts subject matter jurisdiction over such disputes or creating new federal courts empowered to hear such disputes. This Article seeks to fill the gap in the existing literature by exploring the constitutional limits on federal court subject matter jurisdiction in the context of civil disputes arising in Indian Country and civil disputes arising elsewhere involving Indian tribes, tribal entities, and tribal members.

Part II of this Article catalogues the universe of “no forum” and “biased forum” jurisdictional quagmires with respect to civil
disputes arising in Indian Country or those arising elsewhere involving Indian tribes, tribal entities, and tribal members, examining the existing legal obstacles that prevent federal, state, and tribal courts from exercising jurisdiction over the "no forum" cases, and those obstacles to federal jurisdiction over "biased forum" cases. Part III of this Article examines the constitutional authority for and the ways in which Congress has historically expanded the jurisdiction of Article III courts and created specialized, non-Article III courts both to address geographic gaps in adjudicative jurisdiction and to provide a check against local court bias. Part IV of this Article applies these principles to the "no forum" and "biased forum" problems in Indian Law, and demonstrates that Congress has the authority to eradicate these problems by either creating specialized, non-Article III courts or expanding the jurisdiction of the existing federal courts. This Article concludes that if Indian tribes wish to avoid further ad hoc erosion of their sovereignty by federal and state courts, they must work with Congress to create federal solutions to the "no forum" and "biased forum" problems.

The goal of this Article is by no means to advocate a particular method of solving these jurisdictional problems. Rather, this Article seeks to accomplish two goals, one policy-oriented and the other jurisprudential. The policy goal is to provide an exhaustive analysis of the constitutional scope and limitations of federal judicial power so as to enable tribal and congressional leaders to solve the "no forum" and "biased forum" problems with full knowledge of the available options. The jurisprudential goal is to provide a much-needed catalyst for increasing cross-pollination between the parallel fields of Federal Courts and Indian Law, in the hopes that the

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67 See infra notes 71-603 and accompanying text.
68 See infra notes 604-1019 and accompanying text.
69 See infra notes 1020-1102 and accompanying text.
70 See Pommersheim, supra note 21, at 467-68.

Even a cursory survey of texts and casebooks on the federal courts reveals the complete lack of any discussion of tribal courts within the federal system. The marginalization of tribal courts within the canon of federal courts textbooks and scholarship only makes it more likely that they will continue to be marginalized in federal courts' jurisprudence itself. If there is no discussion of tribal courts within the standard federal courts
latter will not only continue to develop in its own right but will be integrated into and will enrich the former.

II. THE INDIAN LAW "NO FORUM" AND "BIASED FORUM" PROBLEMS

A. THE "NO FORUM" PROBLEM IN INDIAN LAW

As indicated above, the "no forum" problem in Indian Law is a result of federal, state, and tribal constitutional, statutory, and common law restrictions on the jurisdiction of federal, state and tribal courts. This section provides some examples of the "no forum" problem in Indian Law, examines the underlying causes of the problem, and explores how Congress and the courts have dealt with the "no forum" problem thus far.

1. Illustrations of the "No Forum" Problem in Indian Law. The "no forum" cases reported to date have involved three different basic fact patterns: an auto accident occurring in Indian Country, a wrongful detainer action brought by a tribal housing authority, or a suit against an Indian tribe. Schantz v. White Lightning and Neadeau v. American Family Mutual Insurance Co. involved auto accidents which occurred, respectively, within the North Dakota portion of the Standing Rock Sioux Indian Reservation, and the Red Lake Indian Reservation Minnesota. In Schantz, the plaintiffs were non-Indian citizens of North Dakota suing Indian defendants residing on the North Dakota portion of the Standing Rock Sioux

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1 See supra notes 43-52 and accompanying text.
2 502 F.2d 67 (8th Cir. 1974).
4 Schantz, 502 F.2d at 68-69.
5 Neadeau, 1993 WL 302127, at *1.
Indian Reservation. In Neadeau, the plaintiff was an Indian suing her non-Indian auto insurance company for uninsured motorist benefits. In both cases, the tribal courts on the respective reservations lacked jurisdiction over the disputes as a matter of tribal law. Also in both cases, suits filed in the state courts were dismissed on the ground that they lacked subject matter jurisdiction over the disputes as a matter of federal law. Finding no statutory basis for exercising jurisdiction, the federal courts in both cases dismissed the suits with full knowledge that the litigants lacked an alternative forum in which to pursue their claims.

Owens Valley Indian Housing Authority v. Turner and Minnesota Chippewa Tribal Housing Corp. v. Reese involved unlawful detainer actions brought by tribal housing authorities engaged in the development and provision of low-income housing for Indian families on reservations. In Owens Valley, the Housing Authority, acting as landlord, sought to evict an Indian tenant from a housing unit located on reservation lands. In Minnesota

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76 Schantz, 502 F.2d at 68. One of the defendants was an enrolled member of the Standing Rock Sioux Tribe, while the other an enrolled member of the Three Affiliated Tribes. Id.
77 Neadeau, 1993 WL 302127, at *1-*2. The uninsured motorist was also a resident of the Red Lake Indian Reservation. Id. at *1.
78 See Schantz, 502 F.2d at 69 & n.2 (noting jurisdictional statute of Standing Rock Sioux's tribal court vested it with jurisdiction over suits brought by non-Indians only if they had resided on or done business on reservation for at least one year prior to bringing suit, and even then, only if amount in controversy was less than $300); Neadeau, 1993 WL 302127, at *2-*4 (Schumacher, J., dissenting) (noting Red Lake Court of Indian Offenses lacked jurisdiction over dispute).
80 See Schantz, 502 F.2d at 70 ("The legal anomaly is therefore obvious—the non-Indian litigants are left without a forum in which to pursue their claim."); Neadeau, 1993 WL 302127, at *2-*4 (Schumacher, J., dissenting) (noting absence of alternative forum where claimant could pursue claim).
81 185 F.3d 1029 (9th Cir. 1999). Because the appellee died while the appeal was pending, the court withdrew its opinion, Owens Valley Indian Hous. Auth. v. Turner, 192 F.3d 1330 (9th Cir. 1999), and dismissed the case as moot. Owens Valley Indian Hous. Auth. v. Turner, 201 F.3d 444 (9th Cir. 1999). The decision is nonetheless important, however, as it reflects what the court likely would do in a similar future case.
83 Owens Valley, 185 F.3d at 1031; Minn. Chippewa, 978 F. Supp. at 1260.
84 Owens Valley, 185 F.3d at 1031-32.
Chippewa, the Housing Authority, acting as mortgagor, sought to evict Indian defendants who failed to perform under a loan agreement with the Housing Authority that required the defendants to develop low-income housing on reservation lands.\textsuperscript{85} In both cases, the state courts refused to exercise jurisdiction over the actions on the ground that they lacked subject matter jurisdiction over the disputes as a matter of federal statutory law.\textsuperscript{86} In Owens Valley, the reservation on which the subject property was located had not established any tribal courts that could adjudicate eviction cases.\textsuperscript{87} In Minnesota Chippewa, the Housing Authority attempted to bring suit in the appropriate tribal court, but the court dismissed the action on the ground that it lacked jurisdiction to entertain unlawful detainer actions under the tribal code.\textsuperscript{88} In both cases, the federal courts refused to exercise jurisdiction on the ground that there was no statutory basis for federal court jurisdiction.\textsuperscript{89} As with the auto accident cases, the courts dismissed the cases with full knowledge that the disputes would otherwise go unresolved in a judicial forum.\textsuperscript{90}

Finally, in Calvello v. Yankton Sioux Tribe,\textsuperscript{91} James Calvello, the former manager of a casino owned and operated by the Yankton Sioux Tribe, sought arbitration in accordance with his employment contract after the Tribe terminated his employment.\textsuperscript{92} The Tribe participated in the arbitration proceeding, and the arbitrator awarded damages to Calvello, but the Tribe refused to honor the award.\textsuperscript{93} Calvello attempted to bring suit against the Tribe in federal, state, and tribal courts, but all three courts refused to exercise jurisdiction over his claims.\textsuperscript{94}

\textsuperscript{85} Minnesota Chippewa, 978 F. Supp. at 1259-60.
\textsuperscript{86} Owens Valley, 185 F.3d at 1031-32, 1034 (citing 28 U.S.C. § 1360(b)); Minnesota Chippewa, 978 F. Supp. at 1260 (citing 28 U.S.C. § 1360(b)).
\textsuperscript{87} Minnesota Chippewa, 978 F. Supp. at 1260-61.
\textsuperscript{88} Id. at 1032-33; Minnesota Chippewa, 978 F. Supp. at 1266.
\textsuperscript{89} Id. at 1032-32.
\textsuperscript{90} Owens Valley, 185 F.3d at 1034; Minnesota Chippewa, 978 F. Supp. at 1263-64.
\textsuperscript{92} Id. at 433-34.
\textsuperscript{93} Id. at 434.
\textsuperscript{94} See id. at 434-36 (noting there was no diversity jurisdiction, reasoning tribe is not citizen of any state for purposes of diversity statute, and that breach of employment contract claim did not fall within court's federal question jurisdiction); Calvello v. Yankton Sioux


2. Causes of the “No Forum” Problem in Indian Law. For a state to be admitted into the United States, two enactments by Congress are typically required: an organic act, often used to establish a territorial government and conditions for admittance and to provide for a constitutional convention; and an enabling act, admitting the state to the Union after the state’s constitutional convention and popular vote ratifying the state constitution. For several of the states admitted between 1889 and 1959, Congress conditioned admission on the states disclaiming all “right and title” to Indian Tribe, 584 N.W.2d 108, 111 (S.D. 1998) (noting sovereign immunity barred suit against tribe in state court); Lynn, Jackson, Schultz & Lebrun, P.C., supra note 43, at 3 (noting tribal court dismissed suit on grounds of tribal sovereign immunity).


When a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Coyne v. Smith, 221 U.S. 559, 573 (1911). Since Congress has discretion to admit or refuse to admit states into the union, it can condition its admission of states on their taking certain action. See id. at 568 (“The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone it would follow . . . Congress may require, . . . that the organic laws of a new State at the time of admission shall be such as to meet its approval.”). However, once admitted into the Union, only those conditions that fall within one of Congress’s constitutionally delegated powers are enforceable. Id. at 573. Thus, provisions in many state enabling acts limiting state jurisdiction over Indian reservations would appear to be enforceable, as Congress could so legislate under the Indian Commerce Clause. See id. at 570.

[S]tipulations . . . in respect to the control by the United States of large Indian reservations and Indian population of the new State, are found in the Oklahoma enabling act. Whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state.

Id.; see also id. at 574.

[I]t may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State . . . which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of
lands within the exterior borders of the state and providing that Indian lands remain under the "absolute jurisdiction and control" of the federal government in their proposed constitutions. These states included Alaska, Arizona, Idaho, Montana, New Mexico, North Dakota, South Dakota, Washington, Oklahoma, Utah and Wyoming.

One might view these conditions as potentially significant restrictions on the ability of the state courts in these states to

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Cohen's Handbook of Federal Indian Law, supra note 46, at 368 & n.175.

See Alaska Const. art. XII, § 12 (disclaiming right to Indian lands, which remain under federal jurisdiction); Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (providing for admission of Alaska into Union).

See Ariz. Const. art. XX, § 4; Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569.

See Act of Mar. 3, 1863, ch. 117, § 1, 12 Stat. 808, 809. Idaho did not have an enabling act, Cohen's Handbook of Federal Indian Law, supra note 46, at 368 n.175, but it submitted a Constitution containing a disclaimer clause, Idaho Const. art. XXI, § 19, and its constitution was accepted by Congress. Act of July 3, 1890, ch. 656, 26 Stat. 215.


See Act of July 25, 1868, ch. 235, § 1, 15 Stat. 178. Wyoming did not have an enabling act, see Cohen's Handbook of Federal Indian Law, supra note 46, at 368 n.175, but it submitted a Constitution containing a disclaimer clause, Wyo. Const. Art. XXI, § 26, and its constitution was accepted by Congress in a statehood act. Act of July 10, 1890, ch. 664, 26 Stat. 222.
exercise jurisdiction over actions arising in Indian Country within the state. However, the Supreme Court has held otherwise, reasoning that the disclaimer of "right and title" was a disclaimer of the state's proprietary, not its governmental, interest in the Indian lands and that "absolute" federal jurisdiction refers to undiminished federal jurisdiction, as distinguished from "exclusive" federal jurisdiction.\(^{109}\)

In any event, when Congress sought to expand state court jurisdiction over Indian Country in 1953, it consented, by statute, to the states taking any action necessary under state law to remove legal impediments to this exercise of jurisdiction over offenses committed on reservations involving Indians, notwithstanding anything to the contrary in the states' enabling acts.\(^{110}\) The 1953 Act effectively eliminated the force of these restrictions as a matter of federal law. Nonetheless, the provisos are a part of these states' constitutions, and in that capacity, they retain such force as is given to them by state law\(^{111}\) to the extent they are not pre-empted by federal law.\(^{112}\)

In the 1953 Act, Congress charted a new policy of terminating the special relationship between the tribes and the federal government and subjecting Indian tribes to state legislative and judicial jurisdiction.\(^{113}\) In part, Congress carried out this policy by "terminating" 109 tribes from 1954 through 1962 in Wisconsin,\(^{114}\)


\(^{111}\) Yakima Indian Nation, 439 U.S. at 478-93; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 46, at 369 & nn.181-84, 374 & n.229.

\(^{112}\) See Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 883-85 (1986) ("Wold II") (holding North Dakota's disclaimer of jurisdiction was preempted by federal statute governing state assumption of jurisdiction over Indian lands).

\(^{113}\) See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) ("[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.").

Oregon, Texas, Utah, California, Oklahoma, South Carolina, and Nebraska. The effect of this action was to terminate the trust relationship between the tribes and the federal government, to extinguish tribal sovereignty, and to subject the members of the tribes and tribal lands to the legislative and adjudicative jurisdiction of the states within whose boundaries the reservations were located.

That same year, in part due to its perception that law and order did not exist on certain reservations, Congress passed Public Law 280 to address what it perceived to be a "no forum" problem. While not terminating the sovereignty of individual tribes, Public Law 280 expressly granted a handful of states civil and criminal jurisdiction over all or nearly all of the Indian reservations located within their states. In addition, Public Law 280 gave other states the option of assuming criminal and civil jurisdiction over Indian reservations within their states by taking affirmative legislative action without the need to obtain tribal consent. Ten states opted...
to accept some degree of jurisdiction over Indian reservations under that provision. Further, Public Law 280 provided that, notwithstanding anything to the contrary in a state's enabling act, Congress granted the states permission to take whatever action was necessary under state law to remove any legal impediment to the state's exercise of jurisdiction over offenses involving Indians committed on reservations.

Shortly after Congress enacted Public Law 280, the Supreme Court, in *Williams v. Lee*, set forth an important background limitation on a state court's ability to exercise jurisdiction over disputes arising in Indian Country in the absence of a congressional delegation of authority, such as Public Law 280. In *Williams*, a non-Indian operator of a general store on the Arizona portion of the Navajo Indian Reservation brought suit in an Arizona state court against a Navajo Indian and his wife, both of whom resided on the reservation, to collect for goods sold to them on credit. The state supreme court upheld jurisdiction, reasoning that since no federal statute expressly prohibited their doing so, the Arizona courts were free to exercise jurisdiction over civil suits arising on Indian reservations and brought by non-Indians against Indians.

The U.S. Supreme Court reversed, holding that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make
their own laws and be ruled by them.” The Court concluded that “to allow the exercise of state jurisdiction [there] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” In addition, the Court indicated that Congress legislates with the assumption that states lack jurisdiction over Indian affairs and that when Congress intends to vest the states with civil or criminal jurisdiction over tribal lands, it does so by statute. The Court recognized that Public Law 280 did give states such as Arizona the opportunity to exercise civil and criminal jurisdiction over Indian reservations but noted that Arizona had not opted to accept jurisdiction in accordance with the terms of Public Law 280.

While Williams involved a suit brought by a non-Indian against an Indian, the Supreme Court has extended its reasoning to include suits brought by one Indian against another. The Court has also held that, under Williams, there is no infringement when a state court exercises jurisdiction over a suit brought by an Indian against a non-Indian. Moreover, the exercise by a state court of jurisdiction over a suit between two non-Indians arising in Indian Country would probably not be deemed to result in infringement.

132 Id. at 220.
133 Id. at 223.
134 Id. at 220-21 & n.6.
135 Id. at 222-23.
136 See Fisher v. Dist. Ct., 424 U.S. 382, 386 (1976) (stating at least same standard must be met before the state courts may exercise jurisdiction). Although Williams and Fisher failed to draw a distinction between those Indians who are members of the tribe and those who are not, the Court drew such a distinction in the criminal context, holding that tribal courts lacked criminal jurisdiction over nonmember Indians. Duro v. Reina, 495 U.S. 676 (1990). Although Congress has overturned this ruling with respect to tribal court criminal jurisdiction, 25 U.S.C. § 1301(2) (1994), it has not taken any action with respect to tribal court civil jurisdiction. Modern Supreme Court cases considering tribal court civil jurisdiction make a tribal member/nonmember distinction instead of an Indian/non-Indian one. See, e.g., Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) (suggesting potential limitation on Williams and its progeny).
137 See Three Affiliated Tribes v. Wold Eng’g, 467 U.S. 138, 148-49 (1984) (“Wold I”) (finding such exercise neither conflicts with federal law nor undermines Indian self-government). Although Wold I used language that could be construed as limiting its holding to the special situation in which the plaintiff was the Indian tribe itself and the tribal court lacked jurisdiction over the dispute, id., it has not been so limited in subsequent lower court decisions. See, e.g., State v. Zaman, 946 P.2d 459, 461-62 (Ariz. 1997) (upholding state court jurisdiction over non-Indian father in child support suit).
The Williams non-infringement test appears to be a rather modest limitation on state court jurisdiction, given that Public Law 280 gave states the option of taking total civil and criminal jurisdiction over Indian Country. However, it takes on greater importance in light of the Indian Civil Rights Act of 1968 ("ICRA"), in which Congress made a series of amendments to Public Law 280, one of which is of particular relevance to the "no forum" problem in Indian Law.

ICRA amended Public Law 280 to require that subsequent assumptions of jurisdiction by states could take place only with the consent of the Indians effected in a special election. Under this provision, it is not sufficient that the tribe's legislative body consents to the exercise of state jurisdiction; consent must be manifested by a majority vote of the enrolled Indians within the affected area. Since the enactment of this amendment, no tribe has voted to consent to state court jurisdiction. In addition, Public Law 280 was amended to provide that states that had previously opted to exercise jurisdiction over Indian Country could retrocede, i.e., disclaim, such jurisdiction, subject to acceptance by the federal government.

In its two opinions in Three Affiliated Tribes v. Wold Engineering ("Wold I" and "Wold II"), the Supreme Court addressed the effect of these amendments and the scope of the Williams non-infringement test. Three Affiliated Tribes of the Fort Berthold Reservation was a federally recognized Indian tribe located within North Dakota. The tribe contracted with Wold Engineering, a North Dakota corporation, for the design and construction of a water-

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140 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 46, at 363 & n.127.
supply system on the reservation. A dispute arose regarding Wold’s performance, and the tribe brought suit against Wold in state court for negligence and breach of contract. At the time the suit was filed, the tribal court of the Fort Berthold Reservation lacked jurisdiction over the dispute, as the tribal code extended jurisdiction over suits by an Indian against a non-Indian only by consent of all the parties. Wold moved to dismiss the suit, arguing that the state court lacked subject-matter jurisdiction over claims arising in Indian country, and the state supreme court agreed.

The U.S. Supreme Court, believing that the state court’s determination of its jurisdiction under state law may have been influenced by its erroneous interpretation of Public Law 280, reversed and remanded the case. The Court noted that although North Dakota’s enabling act required it to disclaim jurisdiction over Indian Country located within the state, and its original constitution so provided, the federal restrictions on the state’s jurisdiction over Indian Country were eliminated in 1953 by Public Law 280. The Court then noted that in 1957, the North Dakota Supreme Court, in Vermillion v. Spotted Elk, had held that the existing jurisdictional disclaimers in both its enabling act and the state constitution foreclosed civil jurisdiction over Indian Country only in cases involving interests in Indian lands themselves. In 1958, the state’s constitution was amended to authorize the legislature to accept any jurisdiction over Indian Country delegated to it by the federal government. In 1963, the state enacted a statute that in subsequent cases—all involving suits brought in state court against Indians—was construed by the state supreme court as a disclaimer of the jurisdiction over civil actions arising in Indian Country

143 Wold I, 467 U.S. at 141.
144 Id.
145 Id. at 141-42.
146 Id. at 142.
147 Id. at 140-41; Wold II, 476 U.S. at 878.
148 Wold I, 467 U.S. at 151-59.
149 Id. at 142-43; see also supra notes 110-11 and accompanying text (discussing statutory grant of permission to states to exercise jurisdiction contained in Public Law 280).
150 85 N.W.2d 432 (N.D. 1957).
151 Wold I, 467 U.S. at 143-44.
recognized in *Vermillion* absent tribal consent.\(^{152}\) A suggestion was made in those cases that the state might be required to obtain tribal consent under Public Law 280 as amended in 1968.\(^{153}\)

In *Wold I*, the state supreme court expressly held that the holding applied with equal force in suits brought by an Indian against a non-Indian for claims arising in Indian Country.\(^{154}\) The Supreme Court noted that, although encompassing suits between Indians (and thus invalid to that extent under *Williams*), *Vermillion* did not infringe upon tribal sovereignty to the extent it allowed state courts to exercise jurisdiction over claims by Indians against non-Indians, particularly where the suit was brought by a tribe itself and the tribal court lacked jurisdiction over the dispute.\(^{155}\) The Court further held that the exercise of such jurisdiction was not foreclosed by the state's enabling act.\(^{156}\)

According to the Court, Public Law 280 neither required the state to disclaim the jurisdiction over Indian Country recognized by the North Dakota Supreme Court in *Vermillion* nor authorized the state to do so.\(^{157}\) Although *Vermillion* was decided after the enactment of Public Law 280, the Court characterized *Vermillion* as a confirmation of the North Dakota state courts' pre-existing jurisdiction, and it held that Public Law 280 did not divest states of their pre-existing and otherwise lawfully assumed jurisdiction.\(^{158}\) The Court further held that the 1968 amendment to Public Law 280 requiring tribal consent was not made retroactive, and thus did not displace jurisdiction previously assumed under Public Law 280 or jurisdiction assumed prior to and apart from Public Law 280.\(^{159}\) In addition, Public Law 280, including the 1968 retrocession amendment thereto, did not authorize states to retrocede jurisdiction that pre-existed Public Law 280.\(^{160}\)

\(^{152}\) *Id.* at 144-45.

\(^{153}\) *Id.* at 145-46 (citing *Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975)).

\(^{154}\) *Id.*

\(^{155}\) *Id.* at 148-49.

\(^{156}\) *Id.* at 149.

\(^{157}\) *Id.* at 150.

\(^{158}\) *Id.* at 150-51 & n.9.

\(^{159}\) *Id.* at 150-51.

\(^{160}\) *Id.*
On remand, the North Dakota Supreme Court held that the 1963 state statute of its own force disclaimed any pre-existing jurisdiction that the state courts had over claims arising in Indian country brought by Indians against non-Indians and that, under state law, the tribe could not bring suit in state court absent tribal consent and a waiver of its sovereign immunity.\footnote{Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 882 (1986) ("Wold II").}

The case returned to the U.S. Supreme Court, where the Court held in \textit{Wold II} that the 1963 state statute as construed by the North Dakota Supreme Court was pre-empted by Public Law 280.\footnote{Id. at 883-85.} The Court noted that under Public Law 280 as it was originally enacted, no provision was made for the retrocession of jurisdiction, and that the 1968 amendment, while authorizing the United States to accept retrocession of jurisdiction, limited that authorization to the retrocession of jurisdiction assumed under the 1953 version of Public Law 280.\footnote{Id. at 886.} The Court concluded that since Public Law 280 occupied the field of state retrocession of jurisdiction—whether acquired pursuant to Public Law 280 or pursuant to the state's pre-existing jurisdiction—the fact that the disclaimer contained in the 1963 state statute was not authorized by Public Law 280 meant that it was barred by it.\footnote{Id.} In the Court's view, this was consistent with tribal sovereignty and self-government, since any jurisdiction assumed prior to the enactment of Public Law 280 was lawful only to the extent that it was consistent with the \textit{Williams} non-infringement test, and any jurisdiction assumed after the 1968 amendment could be secured only upon receipt of tribal consent.\footnote{Id. at 886-87.}

While some courts have construed \textit{Wold II} as effectively \textit{requiring} state courts to exercise jurisdiction over suits brought by an Indian against a non-Indian where there is no alternative forum,\footnote{See Reynolds, supra note 27, at 577 ("Moreover, these courts conclude that tribal sovereignty cannot be infringed by non-Indian adjudication of a dispute that would otherwise go unresolved.").} or even more broadly as allowing state courts to exercise such jurisdiction regardless of whether or not an alternative forum exists,\footnote{State v. Zaman, 946 P.2d 459, 461-62 (Ariz. 1997); see also Neadeau v. Am. Family Ins. Co., 462 N.W.2d 273, 276-77 (Minn. 1991).} it would
be a mistake to give the case such a broad reading. Under Williams, which, as indicated above, states the applicable background principle in the absence of an act of Congress to the contrary, North Dakota's pre-Public Law 280 exercise of state court jurisdiction over suits brought by Indians against non-Indians was permissible. Having lawfully exercised such jurisdiction prior to the enactment of Public Law 280, North Dakota could only retrocede such jurisdiction in accordance with Public Law 280, which occupied the field on retrocession and which did not permit the retrocession of jurisdiction acquired prior to the enactment of Public Law 280. If a state had not exercised jurisdiction that would be permissible under Williams prior to the 1968 Amendment to Public Law 280, it would appear to be barred from unilaterally doing so thereafter, since the amendment requires tribal consent for any subsequent effort by a state to exercise civil or criminal jurisdiction over Indian Country, making no distinction between infringing and non-infringing exercises of jurisdiction. Indeed, the Supreme Court in Wold II seemed to hold that the Williams non-infringement test is relevant only for the purpose of determining the validity of jurisdiction assumed by a state prior to the enactment of Public Law 280 and that all jurisdiction assumed after the 1968 amendment could be secured only upon receipt of tribal consent.

The 1968 Amendment to Public Law 280, requiring tribal consent to subsequent exercises of state court jurisdiction over Indian Country, would thus appear to have the effect of freezing state court jurisdiction at the extent to which it was exercised by the state courts prior to 1968. Accordingly, it is this provision that is substantially responsible for state courts lacking jurisdiction in the

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168 See supra notes 129-37 and accompanying text (discussing limitations on state jurisdiction over disputes in Indian country in absence of congressional delegation of authority).
170 Wold II, 476 U.S. at 886.
"no forum" examples set forth above.\textsuperscript{173} In \textit{Schantz},\textsuperscript{174} the state court lacked jurisdiction over the dispute because the Standing Rock Sioux Tribe had not consented to the state's exercise of judicial jurisdiction over actions arising within the boundaries of the reservation in accordance with the 1968 Amendment.\textsuperscript{175} And in \textit{Neudeau}, the original Public Law 280—vesting Minnesota with civil and criminal jurisdiction over reservations in the state—had specifically excluded the exercise of jurisdiction over the Red Lake Indian Reservation.\textsuperscript{176} Thus, the "no forum" problem arises in these cases because tribal consent to the exercise of state court jurisdiction is required regardless of whether or not the tribe has its own tribal court or has vested its tribal court with jurisdiction over such disputes.

A final jurisdictional roadblock created by Public Law 280 is its encumbrance proviso, which provides that nothing contained in Public Law 280 should be construed as authorizing the alienation, encumbrance, or taxation of any Indian trust property or property subject to a restriction against alienation imposed by the federal government, including the ability to adjudicate the ownership or right to possession of such property or any interest therein.\textsuperscript{177} This proviso caused the state courts in \textit{Owens Valley}\textsuperscript{178} and \textit{Minnesota Chippewa}\textsuperscript{179} to refuse to exercise jurisdiction over the unlawful detainer actions brought therein. In both cases, the courts reasoned that the proviso deprived them of the authority to adjudicate the right of ownership or possession of trust property and that the effect of adjudicating an unlawful detainer action would be to do just that.\textsuperscript{180} Other courts that have interpreted the proviso have similarly construed it as barring state court jurisdiction over

\footnotesize{\textsuperscript{173} See \textit{supra} notes 72-94 and accompanying text.}
\footnotesize{\textsuperscript{174} \textit{Schantz v. White Lightning}, 502 F.2d 67 (8th Cir. 1974).}
\footnotesize{\textsuperscript{175} \textit{Id.} at 68-70 (citing 25 U.S.C. § 1322(a) (1970); \textit{Gourneau v. Smith}, 207 N.W.2d 256 (N.D. 1973)).}
\footnotesize{\textsuperscript{177} 18 U.S.C. § 1162(b) (1994); 25 U.S.C. §§ 1321(b), 1322(b) (1994); 28 U.S.C. § 1360(b) (1994).}
\footnotesize{\textsuperscript{178} \textit{Owens Valley Indian Hous. Auth. v. Turner}, 185 F.3d 1029 (9th Cir. 1999).}
\footnotesize{\textsuperscript{179} \textit{Minn. Chippewa Tribal Hous. Corp. v. Reese}, 978 F. Supp. 1258 (D. Minn. 1997).}
\footnotesize{\textsuperscript{180} \textit{Owens Valley}, 185 F.3d at 1034; \textit{Minn. Chippewa}, 978 F. Supp. at 1260.
unlawful detainer actions or any other disputes regarding an individual tribal member's right to possess tribal trust land, even under a lease. Thus, this proviso stands as an independent barrier to the exercise of state court jurisdiction over unlawful detainer actions: A court that did not obtain jurisdiction over Indian Country in accordance with Public Law 280 certainly has no jurisdiction over such actions, and even one that did is nonetheless barred from exercising such jurisdiction under the proviso.

In addition to these many limitations on state court jurisdiction, another significant cause of the "no forum" problem in Indian Law is that a tribal court simply does not exist, or, if one does, it lacks jurisdiction over a particular type of dispute as a matter of tribal law. In Schantz, Neadeau, Minnesota Chippewa, and Owens Valley, it was the lack of a tribal court or the absence of jurisdiction as a matter of tribal law that resulted in the "no forum" problem, rather than any external limitation imposed by federal law. The most straightforward solution to this problem—and the one that would be most consistent with encouraging tribal sovereignty and self-determination—would be for the tribes themselves to create a forum or extend jurisdiction to cover such circumstances.

However, the absence of a tribal forum usually results when a tribe lacks the resources and expertise necessary to establish a tribal court. The lack of a tribal forum is generally not the result of a deliberate tribal legislative decision to preclude judicial remedies. In some instances, however, the lack of a tribal forum is due to provisions in tribal constitutions or codes, often recommended to the tribes by the federal government, that condition civil jurisdiction in suits between Indians and non-Indians on the consent of all the

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182 Reynolds, supra note 27, at 576.
183 See Goldberg-Ambrose, supra note 27, at 1428-31 (discussing danger of lack of jurisdiction); Pendleton, supra note 53, at 543-44 (arguing most satisfactory solution is for tribe to provide forum); Pommersheim, supra note 56, at 351 (suggesting lack of tribal jurisdiction decreases permissible range of matters for tribes to control).
184 All Mission Indian Hous. Auth., 680 F. Supp. at 33; Reynolds, supra note 27, at 577.
parties—something that no defendant is likely to consent to when his alternative is to be free from suit in any forum.\(^{186}\)

Yet a third significant cause of the “no forum” problem in Indian Law are the limitations on federal court jurisdiction. Federal courts are courts of limited jurisdiction, subject to the constraints imposed by Article III of the U.S. Constitution.\(^ {187}\) The federal courts are further limited to exercising the statutory grants of power given to them by Congress.\(^ {188}\) Unlike personal jurisdiction and sovereign immunity, the parties cannot waive subject matter jurisdiction.\(^ {189}\)

Potential sources of statutory subject matter jurisdiction over civil actions involving Indian tribes, tribal members, tribal entities, and cases arising in Indian Country include federal question jurisdiction,\(^ {190}\) diversity jurisdiction,\(^ {191}\) alienage jurisdiction,\(^ {192}\) foreign state defendant jurisdiction,\(^ {193}\) foreign state plaintiff jurisdiction,\(^ {194}\) and Indian tribe jurisdiction.\(^ {195}\) However, in *Cherokee Nation v. Georgia*,\(^ {196}\) the Supreme Court held that an Indian tribe is not a “foreign State” within the meaning of Article III,\(^ {197}\) which provides that the federal judicial power extends to actions “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”\(^ {198}\) This provision of Article III provides the basis for the statutory grants of alienage,\(^ {199}\) foreign state plaintiff,\(^ {200}\) and foreign state defendant jurisdiction. *Cherokee Nation* thus
forecloses the exercise of federal court jurisdiction over actions involving Indian tribes, tribal entities or tribal members on the basis of these statutory provisions. Accordingly, the rest of this section focuses on the remaining, potentially applicable statutory sources of subject matter jurisdiction—federal question, Indian tribe, and diversity jurisdiction. As these jurisdictional limitations on the federal courts are equally applicable in the "no forum" and "biased forum" scenarios, the limitations discussed in this section will likewise be applicable to this Article's subsequent discussion of the "biased forum" problem in Indian Law.

Section 1331 provides statutory federal question jurisdiction only over those civil actions "arising under" federal law. However, the meaning of "arising under" for purposes of section 1331 is different from and substantially narrower than the meaning of the identical phrase as used in Article III. As a general rule, a suit "arises

U.S.C.C.A.N. 6604, 6611, 6632. Strictly speaking, however, foreign state defendant jurisdiction—which is provided for in the Foreign Sovereign Immunities Act—is based only in part on this language in Article III. It is also based on that portion of Article III, § 2, cl. 1 extending the judicial power to cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 491-92 (1983). Yet reliance on the "arising under" clause has nothing to do with the nature of the defendant as a foreign state, but has rather to do with the plaintiff being a citizen of a foreign state, which would not be covered by the grant of judicial power over actions "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Id. Accordingly, the foreign state defendant provision's reliance on the "arising under" clause does not alter the definition of "foreign State" derived from Cherokee Nation.

See, e.g., Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1226 (9th Cir. 1989) ("Regarding the citizenship of the tribal parties for the purposes of diversity jurisdiction, first, it is perhaps clear that an Indian tribe is not a foreign state."); Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 923 (2d. Cir. 1972) ("Neither can plaintiffs establish diversity jurisdiction under § 1332(a)(3). . . . [t]he Oneida Nation of New York is not a foreign state.' This was established as long ago as Cherokee Nation v. Georgia. . . .") (citation omitted), rev'd on other grounds by 414 U.S. 661, 682 (1974); Romanella v. Hayward, 933 F. Supp. 163, 166 (D. Conn. 1996) ("[T]he Supreme Court long-ago held that an Indian tribe is not a foreign state. . . . Consequently, this court may exercise diversity jurisdiction over this action only if the Tribe is a citizen of [a state different from that of the opposing parties].") (citation omitted), aff'd, 114 F.3d 15, 16 (2d Cir. 1997). But see Krempel v. Prairie Island Indian Cmty., 888 F. Supp. 106, 107-08 (D. Minn. 1995) (finding jurisdiction under § 1332(a)(2) where plaintiff is citizen of Wisconsin and defendants are citizen of Minnesota and Indian tribe, thus deeming tribe to be citizen of foreign state), rev'd on other grounds by 125 F.3d 621, 622 (1997).


204 Verlinden B.V., 461 U.S. at 494-95.
under" federal law for purposes of section 1331 only when the cause of action itself is created by federal law,\textsuperscript{205} including federal common law.\textsuperscript{206} Thus, the mere fact that one of the parties to the suit is a tribal member,\textsuperscript{207} an Indian tribe,\textsuperscript{208} or a tribal entity\textsuperscript{209} is insufficient to invoke a federal court's statutory federal question jurisdiction. Likewise, federal question jurisdiction will not extend to a cause of action simply because tribal trust lands are involved in the controversy,\textsuperscript{210} or because the case involves Indian property or a contract to which a tribe is a party.\textsuperscript{211} In the view of some lower federal courts, a contrary holding would mean that "the federal courts might become a small claims court for all such disputes."\textsuperscript{212} Thus, under existing case law, section 1331 would not provide

\textsuperscript{205} Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). In addition, the Court has recognized that a suit may be deemed to arise under federal law for purposes of § 1331 even if the cause of action itself is created by state law, so long as a substantial question of federal law is an essential component of the state law cause of action. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807 (1986); Franchise Tax Bd. v. Const. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983); Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 199 (1921). In addition, the Supreme Court has recognized that in certain cases in which federal law creates the cause of action, but merely incorporates state law in toto, the suit may be deemed not to arise under federal law for purposes of § 1331. Shoshone Mining Co. v. Rutter, 177 U.S. 505, 508 (1900).


\textsuperscript{207} Martinez v. S. Ute Tribe, 273 F.2d 731, 734 (10th Cir. 1960); Deere v. St. Lawrence River Power Co., 32 F.2d 550, 551 (2d Cir. 1929).

\textsuperscript{208} Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 507-08 (11th Cir. 1993); Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225-26 (9th Cir. 1989); GNS, Inc. v. Winnebago Tribe, 866 F. Supp. 1185, 1191 (N.D. Iowa 1994) (citing Tamiami, 999 F.2d at 507-08; Stock West, 873 F.2d at 1225; Martinez, 249 F.2d at 917).

\textsuperscript{209} See Weeks Const., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 672 (8th Cir. 1986) (noting that mere fact that housing authority is created by and operates on behalf of Indian tribe does not mean that disputes involving housing authority raise federal question) (citing Martinez, 249 F.2d at 917).


\textsuperscript{211} Stock West, 873 F.2d at 1225-26; GNS, Inc., 866 F. Supp. at 1191 (citing Tamiami, 999 F.2d at 507-08; Stock West, 873 F.2d at 1225; Martinez, 249 F.2d at 917).

\textsuperscript{212} Stock West, 873 F.2d at 1225-26 (quoting Gila River Indian Comty. v. Henningson, Durham & Richardson, 626 F.2d 708, 715 (9th Cir. 1980)).
jurisdiction over actions involving simple tort, contract, or landlord-tenant disputes—such as those involved in Schantz, Neadeau, Minnesota Chippewa, and Owens Valley—merely because the dispute arose in Indian Country or one of the parties is a tribe, tribal entity or tribal member.

A related limitation on section 1331 is the well-pleaded complaint rule, which provides that a suit "arises under" the Constitution and laws of the United States only when "the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." Thus, the mere fact that a federal question is raised in the dispute by way of a defense is insufficient to invoke federal question jurisdiction. As with the construction of "arising under" for purposes of section 1331, the well-pleaded complaint rule is a gloss on section 1331 itself and not an Article III requirement.

The Supreme Court has thus made clear that the fact that an Indian tribe raises the defense of sovereign immunity does not allow for removal of the case from state to federal court. In Oklahoma Tax Commission v. Graham, Oklahoma filed suit in state court against the Chickasaw Tribe, seeking to collect unpaid state excise taxes on the sale of cigarettes and taxes on the receipts from bingo games at an inn owned and operated by the tribe. The tribe removed the suit to federal court, and the district court denied the motion to remand and dismissed the suit on the merits, finding it barred by the federal right of tribal sovereign immunity. The court of appeals affirmed and reaffirmed after a remand from the U.S. Supreme Court. The case then returned to the Supreme Court for a second time. The Court held that even though tribal sovereign immunity may provide a complete defense, and even though the scope of tribal sovereign immunity is governed by federal

213 Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); see also Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203-04 (1877) (citing to Chitty to determine what allegations are proper in well-pleaded complaint).
214 Mottley, 211 U.S. at 152.
217 Id. at 839.
218 Id.
219 Id. at 839-40.
law, the suit did not "arise under" federal law for purposes of section 1331 in light of the well-pleaded complaint rule.\textsuperscript{220} The Court noted that Congress has provided by statute for removal when it desires federal courts to adjudicate defenses based on federal immunities, and Congress had not so legislated with respect to tribal sovereign immunity.\textsuperscript{221} Accordingly, under the well-pleaded complaint rule if a party sues an Indian tribe in state court on a state-law claim, the federal defense of tribal sovereign immunity is an insufficient basis for the tribe to remove the action to federal court; likewise, the plaintiff cannot anticipate the defense of tribal sovereign immunity and file the case in federal court in the first instance.\textsuperscript{222}

Faced with the prospect that a failure to exercise jurisdiction over an Indian Law dispute will result in the "no forum" problem, most federal courts have nonetheless dismissed these suits, reasoning that the lack of an alternative forum does not suffice to raise a federal question.\textsuperscript{223} A few lower federal courts have rejected this reasoning and have strained to find federal question jurisdiction in what facially appear to be run-of-the-mill tort disputes.

In \textit{Oneida Indian Nation v. County of Oneida},\textsuperscript{224} two Indian tribes brought suit in federal district court against two New York counties, alleging that the tribes' cession of land to the state in the late 1700s lacked the consent of the federal government and was thus contrary to the tribes' federal right of possession.\textsuperscript{225} The district court dismissed the action for want of subject matter jurisdiction, holding that the cause of action was created under state law and required only allegations of the tribes' possessory rights and the state's interference therewith and that the possible need to interpret a

\textsuperscript{220} Id. at 841-42.

\textsuperscript{221} Id. (citing 28 U.S.C. § 1442(a)(1) (federal officer removal statute) and 28 U.S.C. § 1330(a) (foreign sovereign immunities act removal statute)).

\textsuperscript{222} Id. at 841.

\textsuperscript{223} See, e.g., Owens Valley Indian Hous. Auth. v. Turner, 185 F.3d 1029, 1034 (9th Cir. 1999) ("It is not at all anomalous that § 1360(b)'s preclusion of state jurisdiction would be greater than § 1331's grant of federal jurisdiction. Congress limits state jurisdiction over Indians in order to protect tribal sovereignty.")., withdrawn, 192 F.3d 1330 (9th Cir. 1999); Minn. Chippewa Tribal Hous. Corp. v. Reese, 978 F. Supp. 1258, 1263-64 (D. Minn. 1997) (ruling that lack of alternative forum is insufficient to invoke federal subject matter jurisdiction).

\textsuperscript{224} 414 U.S. 661 (1974).

\textsuperscript{225} Id. at 663-65.
federal statute or treaties to resolve a potential defense was insufficient to sustain jurisdiction under section 1331.226 The Court of Appeals affirmed,227 noting that, under the well-pleaded complaint rule, a case does not "arise under" federal law unless reliance on a federal right appears on the face of a well-pleaded complaint.228 The court of appeals characterized the tribes' action as "basically [one] in ejectment" under state law, and cited to a series of Supreme Court cases holding that a complaint in an ejectment action presents no federal question (even when a plaintiff's title is founded on a federal statute, patent or treaty) and stating that the basis on which one's title is founded is not a necessary element to a complaint in ejectment.229

The Supreme Court granted certiorari and reversed.230 The Court found that the tribe was asserting a right to possession arising under federal and not merely state law, and thus that federal law created the tribe's cause of action.231 The Court distinguished Taylor v. Anderson,232 an earlier case on which the court of appeals relied heavily, where the Court had found jurisdiction lacking in a suit by individual Indians concerning lands patented to them individually with a temporary restriction on the right of alienation.233 Unlike Taylor, the dispute in Oneida involved land to which the claimant Indian tribes held aboriginal title guaranteed by treaty and protected by federal statute.234 Accordingly, the Court reasoned that, while local property law governs the incidents of ownership of land that has been patented to individual Indians, a tribe's possessory interest in tribal lands is an interest that has been continuously protected by federal law wholly apart from any protections available under local law.235

226 Id.
227 Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 924 (2d Cir. 1972).
228 Id. at 920.
229 Id. (citing Florida Cent. & Peninsular R.R. Co. v. Bell, 176 U.S. 321 (1900); Filhiol v. Maurice, 185 U.S. 108 (1902); Filhiol v. Torney, 194 U.S. 356 (1904); Taylor v. Anderson, 234 U.S. 74 (1914); White v. Sparkhill Realty Corp., 280 U.S. 500 (1930)).
230 Oneida, 414 U.S. at 666.
231 Id.
232 234 U.S. 74 (1914).
233 Id. at 74-76.
234 Oneida, 414 U.S. at 676.
235 Id. at 677.
The Tenth Circuit has given an expansive reading to the scope of the federal right of possession, extending it beyond ejectment actions of the sort involved in *Oneida*—where the parties are actually disputing title to the subject property—to trespass actions\(^\text{236}\) and even nuisance actions\(^\text{237}\) brought by an Indian tribe in which there is no dispute as to the tribe’s title to the property but only a dispute as to liability for damages. The Tenth Circuit’s broad interpretation of the federal right of possession appears in part to be motivated by a fear of relegating the tribes to state court, where their ability to vindicate their claims is subject to some doubt.\(^\text{238}\) The Tenth Circuit’s view of the federal right to possession under *Oneida* thus clearly provides jurisdiction over some tort actions brought by Indian tribes that one would not have thought sustainable in federal court prior to *Oneida*, and thus, to some extent, reduces the “no forum” and “biased forum” Indian Law problems.

In *All Mission Indian Housing Authority v. Silvas*,\(^\text{239}\) one federal district court—facing a potential “no forum” dilemma in the context of an unlawful detainer action—sought to extend substantially the Supreme Court’s decision in *Oneida*. In *All Mission*, the Housing Authority—a federally funded entity organized by seventeen California Indian tribes to provide low-income housing for Indian families on the tribes’ reservations—brought an unlawful detainer action to evict Indian tenants who had failed to pay their rent.\(^\text{240}\) The property at issue was unallotted tribal trust land of one of the tribes that had been leased to the Housing Authority which, in turn, leased it to the families.\(^\text{241}\) Evidently for economic reasons, none of the tribes had established a tribal court with jurisdiction over such

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\(^\text{236}\) See *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336, 337-38 (10th Cir. 1974) (finding right to sue in trespass is itself possessory right, and refusing to draw distinction between ejectment and trespass actions).

\(^\text{237}\) See *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300, 300-02 (10th Cir. 1978) (finding suit brought by tribe against company that had engaged in blasting activities outside of reservation boundaries that resulted in damage to property within reservation’s boundaries was possessory right).

\(^\text{238}\) See id. at 302 (“If we were to relegate these plaintiffs to State court, . . . there is no assurance that they would be allowed to assert their rights there.”).


\(^\text{240}\) *Id.* at 331.

\(^\text{241}\) *Id.*
matters, and the encumbrance proviso in Public Law 280 precluded jurisdiction in the state court.

To avoid the "no forum" problem, the All Mission court broadly read Oneida as standing for the proposition that "an action asserting a right to possession of Indian lands arises under federal law." From this the court reasoned that, since the unlawful detainer action brought by the Housing Authority was asserting a right to possess Indian trust lands, it too arose under federal common law for purposes of section 1331 and, accordingly, that the federal court could exercise subject matter jurisdiction over the dispute.

Most courts have rejected the All Mission court's application of Oneida to run-of-the-mill unlawful detainer actions. These courts, relying on the Oneida Court's distinction of Taylor, reason the federal common law cause of action identified in Oneida covers only suits in which the tribe itself is asserting its right of possession, and not where some other entity or individual is asserting a right to possess tribal trust land. The stumbling block for these courts appears to be the fact that it is an intermediary—the tribal housing authority—and not the tribe itself that is seeking to regain possession of the tribal trust property. This suggests that they might hold otherwise were the tribe itself operating the rental property directly involved in tenant disputes.

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242 Id.
243 See 28 U.S.C. § 1360(b) (1994) (providing that nothing contained in § 1360 "shall confer jurisdiction upon the State to adjudicate . . . the ownership or right to possession of such property [i.e., property of any Indian tribe held in trust by the United States] or any interest therein."). See supra notes 177-81 and accompanying text (discussing encumbrance proviso in Public Law 280).
244 All Mission, 680 F. Supp. at 332.
245 Id. at 331-32. The court also concluded that, in applying federal common law, it could look to and incorporate by reference state law on the subject. Id. at 332.
246 See Owens Valley Indian Hous. Auth. v. Hunter, 185 F.3d 1029, 1032-33 (9th Cir. 1999) (tribal housing authority seeking to regain possession of housing unit from individual Indian tenant who had failed to pay rent); Minn. Chippewa Tribal Hous. Corp. v. Reese, 978 F. Supp. 1258, 1266 n.9 (D. Minn. 1997) (tribal housing authority that had loaned money seeking to take possession of mortgaged property for failure to satisfy loan agreement); Round Valley Indian Hous. Auth. v. Hunter, 907 F. Supp. 1343, 1346-49 & n.4 (N.D. Cal. 1995) (same); supra notes 232-35 and accompanying text (discussing Supreme Court treatment of Taylor in Oneida opinion).
247 Owens Valley, 185 F.3d at 1032-33.
In *Richardson v. Malone*, a non-Indian plaintiff brought suit against two members of the Osage Indian Tribe, alleging that they fraudulently induced him into loaning them money to purchase a trailer house and an automobile, both located on tribal lands. A tribal court did not exist on the Osage Reservation, so the plaintiff brought suit in federal district court, seeking judgment and a constructive trust. The court first held that the Oklahoma state courts lacked jurisdiction over the dispute. According to the court the state had disclaimed all jurisdiction over Indian lands in the Oklahoma Enabling Act, the state had never asserted jurisdiction over Indian lands when given the opportunity to do so without tribal consent under the original Public Law 280, and since the 1968 amendments to Public Law 280 requiring tribal consent, the Osage Tribe had not consented to the exercise of state jurisdiction over the reservation.

The court strained to find federal jurisdiction on policy grounds, noting that a failure to find jurisdiction would discourage commercial interaction between Indians and non-Indians and create a "zone of piracy." The Court found that the case arose under federal common law. The court reasoned that Congress's statutory scheme—whereby it has given states the option to assert both criminal and civil jurisdiction over tribal lands, provided for the

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249 Id. at 1464.
250 Id.
251 Id. at 1465-66.
252 See id. at 1466 & n.3.

Native Americans could enter into contracts to purchase goods outside Indian Country, renege on payment, remove the property to Indian Country, claim immunity from state process and sit "unmolested" legally, inside the bounds of Indian Country. If such a zone of legal immunity were recognized non-Indians would soon be loathe to contract with Native Americans, fearing breach of contract and loss of purchased property upon its removal to Indian Country. More to the point, a ruling which declines federal jurisdiction effectively creates a jurisdictional vacuum where neither state nor federal courts will tread. Such a vacuum could well become a virtual "zone of piracy" where civil law does not exist. Such a result is clearly contrary to the fundamental principles which undergird this nation, and, as evinced by a long line of Congressional legislation.

*Id.* at 1466.
253 *Id.* at 1467.
creation of C.F.R. courts, \textsuperscript{254} and legislated with the backdrop
knowledge that the Supreme Court has recognized tribal authority
to establish tribal courts—evinced a congressional intent to ensure
that \textit{some} entity could always exercise judicial jurisdiction and thus
to avoid leaving a jurisdictional vacuum. \textsuperscript{255} The court recognized
that it had two options: to recognize a narrowly defined zone of
federal common law in those situations in which neither the federal,
state, nor tribal court had jurisdiction or to create a "zone of civil
lawlessness." \textsuperscript{256} Finding that the federal courts had the authority
to create federal common law to fill the interstices of the statutory
and constitutional scheme in place for federal governance of Indian
territories, \textsuperscript{257} the court concluded that:

[i]n the absence of the exercise of jurisdiction by the
state courts, or the existence of C.F.R. or Tribal
courts, there nevertheless exists a residue of federal
common law which the judicial branch can recognize
to fill the vacuum created by 'the inevitable incom-
pleteness presented by [this body of] legislation. \textsuperscript{258}

No federal court to date has followed Richardson. \textsuperscript{259} Moreover,
it\textsuperscript{'s precise holding is unclear. The court did not definitively
establish whether it was asserting jurisdiction over this type of
dispute as a matter of federal common law or whether federal
common law governed the underlying substantive dispute, giving
the court federal question jurisdiction. If the former interpretation

\textsuperscript{254} For a discussion of C.F.R. courts, see \textit{infra} notes 453-78 and accompanying text.
\textsuperscript{255} \textit{See Richardson}, 762 F. Supp. at 1468-69.
Under Pub. L. 280, Congress gave States the option to assert both
criminal and civil jurisdiction over those trust lands. ... Congress did \textit{not}
intend there to be a vacuum, where no law held sway. Thus the Court
may properly find that Congressional intent was quite clearly \textit{not} the
creation of a jurisdictional vacuum .... Congress intended that there be
a continuous exercise of law.
\textit{Id.}; see \textit{also} \textit{id.} at 1469 ("Congress intended there to be rule of law in such lands ....").
\textsuperscript{256} \textit{Id.} at 1469.
\textsuperscript{257} \textit{Id.} at 1467-68.
\textsuperscript{258} \textit{See id.} at 1468-69 (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580,
593 (1973)).
\textsuperscript{259} The \textit{Richardson} court itself acknowledged that its holding was out-of-step with cases
such as \textit{Schantz}. \textit{Id.} at 1469 n.8
is correct, the case is certainly suspect, for it fails to identify a constitutional basis for exercising federal jurisdiction. However, the decision may have some merit if the court was asserting that federal common law governed the underlying dispute. The Supreme Court has found it appropriate to fashion federal common law in areas involving "uniquely federal interests." The Court has hardly been clear on what qualifies as a "uniquely federal interest"; however the Court has identified U.S. foreign relations as being such an area, due to the uniformity needed in relations with other countries. It would thus appear as though Indian commerce, the regulation of which is committed to the federal government in the Constitution, might likewise be an area involving a "uniquely federal interest," thus justifying the federal courts creating federal common law in this area. However, if that is the case, it would seem to justify a federal common law rule of decision in all cases, not merely in those cases in which no alternative forum exists, unless the federal interest is merely the assurance of some forum in which to adjudicate disputes involving Indians.

Of the remaining statutory provisions, section 1362, the Indian tribe provision, would appear to be the most promising means of exercising subject matter jurisdiction over run-of-the-mill actions involving Indian tribes. Yet section 1362 grants jurisdiction only where the Indian tribe is a plaintiff, the tribe is recognized by the Secretary of the Interior, and the dispute "arises under" federal law. Accordingly, it would appear at first glance to add little more


262 See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes . . . .").

263 See 28 U.S.C. § 1362 (1994) ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). A tribe that has incorporated as a federally chartered corporation under the Indian Reorganization Act of 1934, infra notes 344-46 and
than what is already available under section 1331, which provides for federal question jurisdiction. At one time, however, the provision served a rather important purpose. At the time section 1362 was adopted, section 1331 contained a jurisdictional amount-in-controversy requirement of $10,000. The purpose of section 1362 was "merely [to] authorize the additional jurisdiction of the [federal] court[s] over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount." Although today, section 1331 contains no jurisdictional amount, thus seemingly making section 1362 obsolete, a series of decisions leaves open the possibility that section 1362 may reach some cases that section 1331 does not.

One way in which section 1362 may differ from section 1331 is that the former, unlike the latter, may not be subject to the well-pleaded complaint rule. Recall that the well-pleaded complaint rule is not required by Article III—it is merely a longstanding interpretation of section 1331. Recall further that the Supreme Court has interpreted other statutory grants of federal question jurisdiction as not being subject to the well-pleaded complaint rule. In the Oneida case, discussed above, the Indian tribes had invoked both sections 1331 and 1362. The court of appeals, in affirming the district court's dismissal of the suit, assumed that the only difference between the two sections was that section 1362 contained no jurisdictional minimum. Because the Supreme Court reversed the accompanying text, is still considered to be an "Indian tribe" within the meaning of § 1362.

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268 See supra notes 224-35 and accompanying text.
case on the ground that the tribe's cause of action was derived from federal law, the Court found it unnecessary to reach the question of whether jurisdiction pursuant to section 1362 is broader than jurisdiction under section 1331 and thus, *inter alia*, not subject to the well-pleaded complaint rule.\textsuperscript{271}

One court of appeals decision appears to have implicitly determined that the well-pleaded complaint rule does not apply to actions brought pursuant to section 1362. In *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*,\textsuperscript{272} the State of Oklahoma brought suit against a tribe in state court to enjoin the tribe's operation of a gaming hall, which violated Oklahoma gaming laws.\textsuperscript{273} The tribe responded by bringing suit in federal district court, seeking a declaratory judgment that the state was without legislative jurisdiction and seeking an injunction against further proceedings in the state court.\textsuperscript{274} The federal court held that where the tribe asserts immunity from enforcement of state laws, it states a controversy within section 1362 that arises under federal law.\textsuperscript{275}

To be sure, the suit brought by the tribe in *United Keetoowah* raised a federal question on its face—whether the state had legislative jurisdiction over the tribe.\textsuperscript{276} Typically, however, when suit is brought pursuant to the Federal Declaratory Judgment Act,\textsuperscript{277} the presence or absence of federal jurisdiction is determined by looking to whether the federal court would have had jurisdiction over the coercive suit that could have been brought absent the existence of the Act under the Supreme Court's decision in *Skelly Oil Co. v. Phillips Petroleum Co.*\textsuperscript{278} The purpose of this rule is to

\begin{footnotesize}
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  \item\textsuperscript{271} *Oneida Indian Nation*, 414 U.S. at 682 n.16.
  \item\textsuperscript{272} 927 F.2d 1170 (10th Cir. 1991). Two other courts of appeals cases have squarely faced the matter since *Oneida*. One left the question open while the other simply assumed without deliberation that the well-pleaded complaint rule applied to section 1362. Mescalero Apache Tribe v. Martinez, 619 F.2d 479, 481 (10th Cir. 1979) (leaving question open); Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1383-84, 1386 (9th Cir. 1988) (applying well-pleaded complaint rule to section 1362).
  \item\textsuperscript{273} *United Keetoowah Band*, 927 F.2d at 1171-72.
  \item\textsuperscript{274} Id. at 1172.
  \item\textsuperscript{275} Id. at 1173-74.
  \item\textsuperscript{276} Id. at 1173.
  \item\textsuperscript{277} 28 U.S.C. §§ 2201-2202 (1994).
  \item\textsuperscript{278} 339 U.S. 667, 671-72 (1950) (The operation of the Declaratory Judgment Act is procedural only. Congress enlarged the range of remedies available in the Federal courts but
\end{enumerate}
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prevent a party from circumventing the well-pleaded complaint rule via the Declaratory Judgment Act. Since in *United Keetoowah*, the coercive suit that could have been brought in the absence of the Act was the very state enforcement proceeding that the tribe sought to enjoin, and since the federal question of the state's legislative jurisdiction likely would enter such a dispute only by way of a defense, there would normally be no federal court jurisdiction over the declaratory judgment action under *Skelly Oil*. But since the rule in *Skelly Oil* is a mere extension of the well-pleaded complaint rule, the fact that *United Keetoowah* found jurisdiction over the case implies that the well-pleaded complaint rule does not apply to actions brought pursuant to section 1362.

Yet even assuming that section 1362 would allow for federal court jurisdiction where a federal question enters the dispute only by way of a defense, it is unclear that it would have a significant effect on federal court jurisdiction, particularly where contract or tort actions are concerned. Suppose that any party other than an Indian tribe wishes to institute a contract or tort action against an Indian tribe and anticipates that the tribe will raise the defense of tribal sovereign immunity. The absence of a well-pleaded complaint rule would appear to allow such a case to be brought in federal court. However, the plain language of section 1362 precludes such actions for it provides jurisdiction over only those cases brought by a tribe—it does not provide jurisdiction over actions brought by tribal members, tribal entities, or non-Indians. Conversely,

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279 See id. at 673-74.

280 To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited purpose of the Declaratory Judgment Act.

281 United States v. State Tax Comm'n, 505 F.2d 633, 638 (5th Cir. 1974); Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 656 (9th Cir. 1966).

282 See Navajo Tribal Util. Auth. v. Ariz. Dep't of Revenue, 608 F.2d 1228, 1230-33 (9th Cir. 1979) ("We are convinced that section 1362 does not cover subordinate, semi-autonomous tribal entities."); All Mission Indian Hous. Auth. v. Silvas, 680 F. Supp. 330, 331 (C.D. Cal. 1987). However, where a tribe and a tribal entity jointly bring suit, one federal court has held...
where a tribe wishes to sue someone in contract or in tort, the lack of a well-pleaded complaint rule under section 1362 is not likely to make a difference. Unless the tribe is suing another sovereign, the defendant is not going to have the federal defense of sovereign immunity, and thus no federal question will arise either on the face of the complaint or as a defense.\footnote{284}

A second way in which section 1362 may differ from section 1331 is suggested by language in a Supreme Court opinion intimating that the former provides jurisdiction over any suit by a tribe that \textit{could} have been brought on the tribe's behalf by the United States as its trustee. In \textit{Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation},\footnote{285} the Supreme Court held that section 1362 creates an exception to the Tax Anti-Injunction Act\footnote{286} where a tribe wishes to challenge a state's levy or collection of taxes against a tribe.\footnote{287} The basis for this holding was the Court's finding that section 1362 was designed not only to eliminate the jurisdictional minimum, but that its implicit purpose was that "a tribe's access to federal court... would be at least in some respects as broad as that of the United States suing as the tribe's trustee."\footnote{288}

Seeking to extend this logic, two Alaskan native villages argued in \textit{Blatchford v. Native Village of Noatak}\footnote{289} that section 1362 overrides the Eleventh Amendment bar to a tribe's ability to bring suit against a state.\footnote{290} The villages contended that, because the Eleventh Amendment does not bar the United States from bringing suit against a state\footnote{291} and the United States has standing to sue a

\footnotesize{jurisdiction over the suit proper under § 1362. Tohono O'Odham Nation v. Schwartz, 837 F. Supp. 1024, 1028 (D. Ariz. 1993).}


\footnotesize{\textit{Moe} \textit{v. Confederated Salish & Kootenai Tribes of Flathead Reservation}, to have been brought on the tribe's behalf by the United States as its trustee. In \textit{Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation}, the Supreme Court held that section 1362 creates an exception to the Tax Anti-Injunction Act where a tribe wishes to challenge a state's levy or collection of taxes against a tribe. The basis for this holding was the Court's finding that section 1362 was designed not only to eliminate the jurisdictional minimum, but that its implicit purpose was that "a tribe's access to federal court... would be at least in some respects as broad as that of the United States suing as the tribe's trustee." Seeking to extend this logic, two Alaskan native villages argued in \textit{Blatchford v. Native Village of Noatak} that section 1362 overrides the Eleventh Amendment bar to a tribe's ability to bring suit against a state. The villages contended that, because the Eleventh Amendment does not bar the United States from bringing suit against a state and the United States has standing to sue a
state on behalf of an Indian tribe, and because Moe held that the purpose of section 1362 was to allow a tribe to bring suit where the United States could sue as the tribe's trustee but opted not to, the logical conclusion was that state sovereign immunity could not bar a suit brought under section 1362 by a tribe. The Supreme Court distinguished Moe, noting that in that case section 1362 was held to override a limitation contained in another congressional statute, while in Blatchford, the villages were asking the Court to read section 1362 so as to override a provision of the Constitution.

While distinguishing the special case of state sovereign immunity from the rule announced in Moe, the Blatchford Court did not otherwise suggest a limited reading of Moe or section 1362. Some lower federal courts have thus construed section 1362 as providing federal courts with jurisdiction over any suit that could have been brought by the United States as trustee but was not, save for those instances in which suit is brought against a state. Of course, when the United States is a party to a suit, the federal courts always have subject matter jurisdiction, unless excepted by statute, so this reasoning would substantially expand federal court jurisdiction over suits brought by Indian tribes.

In Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., a tribe brought suit in federal court against a group of defendants, alleging that they trespassed on reservation lands. The defendants moved to dismiss, contending that the case raised no federal question. The district court refused to dismiss the action. The Court noted that, under federal law, the U.S. Attorney has authority to represent tribes in lawsuits, but that its exercise of this authority is discretionary. The Court concluded

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293 Moe, 425 U.S. at 473.
294 Blatchford, 501 U.S. at 782-84.
295 Id. at 784-85.
296 Id. at 785.
299 Id. at 1098.
300 Id. at 1099.
301 Id. at 1100.
302 Id. at 1099.
303 Id. (citing Rincon Band of Mission Indians v. Escondido Mut. Wat. Co., 459 F.2d 1082
that since the federal government declined to exercise its discretionary authority to bring an action the tribe could thus bring the suit. Based on the legislative history of section 1362, the court reasoned that “[u]nder § 1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys.”

In a subsequent case, Fort Mojave Tribe v. Lafollette, the Ninth Circuit appeared to endorse this logic. There, the Court of Appeals found that a federal court had subject matter jurisdiction over a quiet title action involving Indian lands, stating “Congress intended by § 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally deprived property rights in those situations where the United States declines to act.” Yet, perhaps in realization of the fact that this view of section 1362 could allow virtually all claims involving Indian tribes into federal court, the Ninth Circuit subsequently pulled back. In Gila River Indian Community v. Henningson, Durham & Richardson, a tribe brought suit against an architectural firm and a building contractor for damages caused by the defendants’ alleged negligent design and construction of a youth center built on the reservation. The Ninth Circuit distinguished the Tenth Circuit’s decisions in Mescalero and Pueblo as well as the district court’s decision in Salt River and its own prior decision in Fort Mojave on the ground that they all fell within the federal right of possession identified in Oneida. Characterizing the case before it as “a simple breach of contract case,” the court refused to read these precedents so broadly as to

(9th Cir. 1972); United States v. Gila River Pima-Maricopa Indian Cnty., 391 F.2d 53 (9th Cir. 1968); Siniscal v. United States, 208 F.2d 406 (9th Cir. 1953)).

304 Id. at 1100.

305 Id.

306 478 F.2d 1016 (9th Cir. 1973).

307 Id. at 1018.

308 626 F.2d 708 (9th Cir. 1980).

309 Id. at 709.

310 See discussion supra notes 236-38 and accompanying text.

311 Gila River, 626 F.2d at 712-14.
encompass any case that could have been brought by the United States but was not.\textsuperscript{312}

The domestic diversity statute—28 U.S.C. § 1332(a)(1)—appears to provide a means by which run-of-the-mill tort or contract actions involving tribes, tribal entities, or tribal members can be heard in federal court. Under section 1332(a)(1), a federal court can exercise subject matter jurisdiction over a non-federal cause of action, provided that the suit is between “citizens of different States” and the amount in dispute exceeds $75,000.\textsuperscript{313} While the Achilles heel of federal question jurisdiction is the well-pleaded complaint rule, that of diversity jurisdiction is the “complete diversity” rule, under which no plaintiff can be from the same state as any defendant.\textsuperscript{314}

In the context of disputes involving tribes, tribal entities, and tribal members, there are two major questions regarding a federal court’s ability to exercise diversity jurisdiction. First, for purposes of the diversity statute, what is the citizenship of tribes, tribal entities, and tribal members? Second, what effect, if any, do the limits imposed on state courts by the \textit{Williams} non-infringement test and Public Law 280 have on the ability of a federal court sitting in diversity to exercise jurisdiction over a dispute arising in Indian Country?

Every federal court of appeals that has considered the matter has held that an Indian tribe is not a citizen of any state, and thus cannot sue or be sued in federal court under the statutory grant of diversity jurisdiction.\textsuperscript{315} Yet few of these decisions provide much rationale for their holdings, instead relying directly or indirectly on

\textsuperscript{312} Id. at 714.


the Second Circuit's decision in *Oneida Indian Nation v. County of Oneida* to justify their result. Accordingly, it is worth re-examining the *Oneida* decision.

In *Oneida*, the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin brought suit against the counties of Oneida and Madison in New York state. In assessing diversity jurisdiction, the district court assumed without deciding that the Oneida Indian Nation of Wisconsin was a citizen of Wisconsin, and focused its discussion on the citizenship of the Oneida Indian Nation of New York. The court found diversity jurisdiction lacking, analogizing an Indian tribe to an unincorporated association. The result was that, under the Supreme Court's decision in *United Steelworkers of America v. R.H. Bouligny, Inc.*, diversity was defeated because some of the Nation's members were citizens of New York. Because the defendant-counties were both citizens of New York for purposes of the diversity statute, complete diversity would be destroyed if any member of the plaintiff-tribes were a citizen of New York.

In *Bouligny*, a North Carolina corporation brought a defamation suit in a North Carolina state court against the United Steelworkers

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317 See *Gaines*, 8 F.3d at 729 ("[A]vailable authority holds that Indian tribes are not citizens of any state for purposes of diversity jurisdiction.") (citing *Standing Rock*, 505 F.2d at 1140 and *Oneida*, 464 F.2d at 922-23); *Standing Rock*, 505 F.2d at 1140 ("[I]t 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.") (citing *Oneida*, 464 F.2d 916); *Calumet Gaming*, 987 F. Supp. at 1324-25 ("Indian tribes are not citizens of any state for purposes of diversity jurisdiction.") (quoting *Gaines*, 8 F.3d at 729; citing *Standing Rock*, 505 F.2d at 1140); *Abdo*, 957 F. Supp. at 1112 ("There is no diversity jurisdiction in this case because Indian tribes are not citizens of any state for purposes of diversity jurisdiction.") (citing *Gaines*, 8 F.3d at 729; *GNS, Inc.*, 866 F. Supp. at 1191 ("[T]he Tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction.") (citing *Gaines*, 8 F.3d at 729; *Oneida*, 464 F.2d at 922-23).

318 The basic facts in *Oneida* are recounted above. See supra notes 224-35 and accompanying text.

319 *Oneida*, 464 F.2d at 918.

320 Id. at 922.

321 Id.


323 *Oneida*, 464 F.2d at 922.

324 See *Moor v. Alameda County*, 411 U.S. 693, 720 (1973) (treating California counties as corporations for citizenship determination).
labor union. The union, which alleged its principal place of business to be in Pennsylvania, claimed diversity and removed the case to federal court. However, because some of the members of the union were North Carolina residents, complete diversity would be lacking if the citizenship of the individual union members were taken into account. Accordingly, the question before the Supreme Court was whether an unincorporated labor union is to be treated as a citizen in its own right for purposes of federal diversity jurisdiction, without regard to the citizenship of its members, akin to the treatment of corporations. The Court concluded that although there were sound policy reasons for so treating unincorporated associations, that decision should be left to Congress. The Court distinguished its prior decision regarding corporations on the ground that the state of incorporation was a natural choice for the citizenship of corporations, while there was no correlative natural choice for labor unions.

In Oneida, the Oneida Indian Nations of New York and Wisconsin contended on appeal that the district court's analogy to the labor unions at issue in Bouligny was a false one because an Indian nation is something unique that is entitled to be treated differently from a run-of-the-mill labor union. The Second Circuit, without deciding whether the citizenship of the tribe would be based on the citizenship of its members, concluded that complete diversity would be lacking in any case:

The Oneida Nation of New York is surely not a citizen of a state different from New York, and the case under § 1332(a)(1) thus fares no better on plaintiffs' theory than on that of the district judge since the

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326 Id.
327 Id.
328 Id. at 147.
329 Id. at 150-51.
330 Id. at 152-53.
Nation's lack of citizenship in a state other than New York would equally defeat diversity jurisdiction.\textsuperscript{332}

\textit{Oneida} is thus more interesting for what it did not decide than for what it did. It did not even question, let alone decide, whether an Indian tribe could sue or be sued in federal district court under diversity jurisdiction. It also did not decide whether the citizenship of an Indian tribe for the purposes of diversity jurisdiction would be determined by the citizenship of its individual members (akin to an unincorporated association) or without regard to the citizenship of its individual members (akin to a corporation). It merely applied the long-standing rule that complete diversity is required, and found it lacking regardless of how the citizenship of an Indian tribe is determined.\textsuperscript{333}

At least one court has rejected treating Indian tribes like counties or other political subdivisions of a state for purposes of diversity jurisdiction. The Supreme Court held in \textit{Moor v. Alameda County}\textsuperscript{334} that political subdivisions of a state are citizens of that state for purposes of diversity jurisdiction, unless they are merely the alter ego of the state.\textsuperscript{335} In \textit{Gaines v. Ski Apache},\textsuperscript{336} a plaintiff brought suit against the Mescalero Apache Tribe, relying on the \textit{Alameda County} Court's focus on the independent status of a political subdivision relative to the state for the general proposition that any independent self-governing entity within a state is a citizen of that state.\textsuperscript{337} However, the \textit{Gaines} court concluded that the focus in

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\item \textsuperscript{332} \textit{Id.} at 923. When \textit{Oneida} was reviewed by the Supreme Court, the Court did not review the lower courts' holdings with respect to diversity jurisdiction. \textit{Oneida Indian Nation v. County of Oneida}, 414 U.S. 661, 664 n.2 ("Jurisdiction under \$ 1332 was rejected by the District Court and the Court of Appeals and is not at issue here.").
\item \textsuperscript{333} \textit{Oneida}, 464 F.2d at 922-23. One district court case that predates the Supreme Court's decision in \textit{Bouligny} appears to have treated the citizenship of an Indian tribe as akin to that of an unincorporated corporation. In \textit{Deere v. State of New York}, 22 F.2d 851 (N.D.N.Y. 1927), a member of the St. Regis Tribe brought suit in federal court on behalf of all members of the tribe against several corporations, which were deemed to be citizens of New York. \textit{Id.} at 851-52. The court noted that Indians were citizens of the state in which they reside. \textit{Id.} at 862 (citing Boyd v. Nebraska, 143 U.S. 135, 162 (1892), and \textit{In re Heff}, 197 U.S. 488 (1905)). Because all of the tribal members resided in New York, diversity was lacking. \textit{Id.}
\item \textsuperscript{334} 411 U.S. 693 (1973).
\item \textsuperscript{335} \textit{Id.} at 717-20.
\item \textsuperscript{336} 8 F.3d 726 (10th Cir. 1993).
\item \textsuperscript{337} \textit{Id.} at 730.
\end{itemize}
Alameda County on the county’s independent status was merely to show that the county was not a mere alter ego of the state. Thus, Alameda County did not stand for the broader proposition that “any independent self-governing entity should be treated as a citizen for purposes of diversity jurisdiction.”

Even assuming the validity of those lower court decisions that have determined that an Indian tribe is not a citizen of any state for purposes of diversity jurisdiction, the case law suggests that this is at most a gloss on the diversity statute and not a restriction mandated by Article III. For example, in Akins v. Penobscot Nation, the court, after stating the general “rule” that Indian tribes are not usually subject to the diversity jurisdiction of the federal courts, went on to hold that Congress—in enacting the Settlement Act between Maine and Indian tribes within the boundaries of Maine—had subjected such tribes to the diversity jurisdiction of the federal courts by deeming them to be citizens of the State of Maine.

While the weight of current authority is against the exercise of diversity jurisdiction over tribes themselves, the courts have shown a far greater willingness to treat tribal entities as citizens of the states in which they are incorporated or have their principal place of business. The Indian Reorganization Act of 1934 enables a...
tribe to incorporate as a federal corporation (known as a Section 17 corporation) that is subordinate to and distinct from the constitutional body governing the tribe itself (which simultaneously may be organized as a Section 16 organization). To the extent a tribe is acting in its capacity as a Section 17 corporation, it is deemed to be a citizen of the state of its principal place of business for purposes of diversity jurisdiction. Alternatively, a tribe may charter corporations pursuant to its own tribal laws (instead of pursuant to federal law), in which case, the corporation is likewise deemed to be a citizen of the state of its principal place of business, and according to one court, the state in whose borders the tribal reservation is located.

As to the citizenship of individual Indians, Congress enacted a statute in 1924 declaring all Indians born in the United States to be citizens of the United States, and the courts have since held that

to the tribal court was required, see generally infra notes 365-91 and accompanying text, it was not necessary for it to hold that the tribal corporation was not a citizen of a state for diversity purposes, as the question whether a federal court has subject matter jurisdiction over a dispute and the question whether it should exercise that jurisdiction are distinct.

348 See Stock West, Inc v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1226 (9th Cir. 1989) ("[A]n Indian corporation is a citizen of the state in whose borders the reservation is located."). There is good reason to believe that the Stock West court was not creating an alternative means of exercising jurisdiction over a corporation organized under tribal law but rather merely misstated existing law. In support of its conclusion, it cited to R.C. Hedreen Co., 521 F. Supp. at 602-03, R.J. Williams Co., 719 F.2d at 982 n.2, and Parker Drilling Co., 451 F. Supp. at 1138, all of which state that a tribal corporation is a citizen of the state of its principal place of business and none of which state that it is a citizen of the state in whose borders the reservation is located. As a practical matter, this made little difference in these particular cases, as in each of them, the state of the tribal corporation's principal place of business and the state in whose borders the reservation is located are one in the same. However, there may be instances in which treating a tribal corporation as a citizen of the state in whose borders the reservation is located could raise difficult questions. Consider, for example, a corporation chartered by the Navajo Nation. The Navajo reservation is located within four states—Utah, Colorado, Arizona, and New Mexico. Would a Navajo corporation be deemed to be a citizen of all four states?

individual Indians are citizens of the state in which they reside.\textsuperscript{350} Treating individual Indians as citizens of the states in which they reside, however, produces some rather perverse results to the extent that the goal of the diversity statute is to prevent local court bias. For example, in a dispute between two members of the Standing Rock Reservation, which straddles the border between North Dakota and South Dakota, a suit brought by a member of the tribe residing on the North Dakota side of the reservation against a member of the tribe residing on the South Dakota side of the reservation falls within the diversity jurisdiction of the federal courts,\textsuperscript{351} even though there is unlikely to be a significant risk of local bias. On the other hand, no federal diversity jurisdiction exists in a dispute between a non-Indian plaintiff from Oklahoma and defendants who are members of the Osage Indian Tribe where the latter's reservation is physically located within the geographic boundaries of Oklahoma,\textsuperscript{352} although the likelihood that either a state or tribal court will be biased in favor of one or the other party in such a situation is far more likely.

In \textit{Erie Railroad Company v. Tompkins},\textsuperscript{353} the Supreme Court held that a federal court sitting in diversity must apply the substantive law of the state in which it sits and not general federal common law, reasoning that if the federal courts did not apply the same law to state-created causes of action as did the state courts, the result would be an unfair advantage to those parties able to invoke the diversity jurisdiction of the federal courts.\textsuperscript{354} In \textit{Guaranty Trust Co. v. York},\textsuperscript{355} the Court further explained that "since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect,

\begin{footnotesize}
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\item Poitra, 502 F.2d at 24, 29.
\item Richardson, 762 F. Supp. at 1466-67.
\item 304 U.S. 64 (1938).
\item Id. at 78-79.
\item 326 U.S. 99 (1945).
\end{enumerate}
\end{footnotesize}
only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State."356

In Woods v. Interstate Realty Co.,357 the Supreme Court considered the effect of Erie and York where a party had a state-created right but no available state judicial forum. In Woods, a Tennessee corporation brought a diversity action on a real estate contract against a Mississippi resident in a federal court in Mississippi to collect on a real estate commission due for a sale that took place in Mississippi.358 As a matter of Mississippi law, the plaintiff would have been barred from enforcing the contract in the state courts—even though it had a right to that commission under state law—as a sanction for being an out-of-state corporation doing business in the state that had failed both to register with the state and to designate an agent for service of process pursuant to state law.359 Citing York, the Woods Court concluded that:

a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court.360

The Woods court reasoned that a contrary result would lead to the same unfairness that Erie was designed to eliminate.361

The Woods decision led to a great deal of confusion over the ability of federal courts sitting in diversity to exercise jurisdiction over state-created causes of action where one of the parties to the suit is a tribal entity or a tribal member. As discussed above,362

356 Id. at 108-09.
358 Id. at 535-36.
359 Id. at 536 n.1.
360 Id. at 538.
361 Id.; accord Angel v. Bullington, 330 U.S. 183, 191-92 (1947) ("If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the prescriptions of diversity jurisdiction for a federal court in that state to give such a deficiency judgment.").
362 See supra notes 113-81 and accompanying text.
state courts in many instances lack judicial jurisdiction over actions arising in Indian Country involving Indian parties under federal statutory and common law, to wit, the Williams non-infringement test and Public Law 280. The question thus arose whether Woods barred a federal court sitting in diversity from exercising jurisdiction over such suits. One line of lower court cases held that it did, reasoning that where a state court is barred from exercising jurisdiction under Williams and Public Law 280, a federal court sitting in diversity is likewise ousted of jurisdiction. But a competing line of lower court decisions held otherwise, reasoning that where, as here, no state substantive policy closes the state courthouse doors to litigants, a federal court sitting in diversity is not barred from exercising jurisdiction over the dispute, even though a federal policy may bar state court jurisdiction over the dispute.

In Iowa Mutual Insurance Co. v. LaPlante, the Supreme Court rejected the applicability of Woods where Williams and Public Law 280 bar state court jurisdiction, but simultaneously created a new barrier to the exercise of federal diversity jurisdiction over suits arising in Indian Country. LaPlante, a member of the Blackfeet tribe in Montana and an employee of the Wellman Ranch Co. (a Montana corporation located on the reservation) was injured in an accident at work. Iowa Mutual, the insurer of Wellman Co. and the Wellman family, unsuccessfully attempted to settle the case through Midland Claims Service, its agent. The LaPlantes filed suit in the Blackfeet tribal court against the Wellman Ranch, the Wellman family, Iowa Mutual, and Midland. Iowa Mutual and Midland moved to dismiss the suit for lack of subject matter jurisdiction, but the tribal court held it had jurisdiction over suits arising in Indian Country involving Indian parties under federal statutory and common law, to wit, the Williams non-infringement test and Public Law 280.

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363 Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir. 1997); Begay v. Kerr-McGee Corp., 582 F.2d 1311, 1317 (9th Cir. 1986); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982-83 (9th Cir. 1983); Hot Oil Serv., Inc. v. Hall, 366 F.2d 285, 297 (9th Cir. 1966); Little v. Nakai, 344 F.2d 486, 489-90 (9th Cir. 1965).
366 Id. at 11.
367 Id.
368 Id.
involving the conduct of non-Indians engaged in commercial relations with Indians on the reservation.\footnote{Id. at 12.}

While the tribal action was pending, Iowa Mutual filed suit in federal district court against the LaPlantes, the Wellmans, and the Wellman Ranch, invoking the district court’s diversity jurisdiction and seeking a declaration that it had no duty to defend or indemnify the Wellman family or the Wellman Ranch because the injuries were outside of the scope of the insurance coverage.\footnote{Id. at 12-13.} The LaPlantes moved to dismiss the case for lack of subject matter jurisdiction.\footnote{Id.} The district court held that the tribal court must first be given an opportunity to determine its own jurisdiction.\footnote{Id.} It further held that since the Montana state courts lacked jurisdiction over the suit because Public Law 280 required tribal consent to state civil jurisdiction, and the tribe had not consented, the federal court likewise lacked subject matter jurisdiction over the dispute under \textit{Woods}.\footnote{Id. at 13 & n.4.} The Ninth Circuit affirmed.\footnote{Id. at 13.}

In affirming the Ninth Circuit, the Supreme Court noted that, like the exercise of state-court jurisdiction at issue in \textit{Williams}, a federal court’s exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts.\footnote{Id. at 15.} The Court thus concluded that the federal court should abstain and let the tribal courts, all the way through the appellate tribal courts, first determine their own jurisdiction.\footnote{Id. at 16-17.} The Court stressed that the decision did not deprive the federal courts of subject matter jurisdiction; rather, it merely set forth an exhaustion rule as a matter of comity.\footnote{Id. at 16 n.8.} The Court noted that if tribal courts ultimately determine that they have jurisdiction, that determination can be challenged in a federal district court,\footnote{Id. at 19.} but that if the federal court determines that the tribal court indeed had jurisdiction, the merits
of the underlying dispute could not be relitigated in the subsequent federal court proceedings.\textsuperscript{379}

Finally, in a "dismissive footnote,"\textsuperscript{380} the Court considered the effect of \textit{Woods} in such cases. The Court noted that the lower courts had assumed that \textit{Woods} barred the exercise of diversity jurisdiction as long as the courts of the state in which the federal court sits could not entertain the suit.\textsuperscript{381} The Court noted that this conclusion presupposes that the exercise of federal jurisdiction would contravene a substantive state policy, but that in this case, it is not clear that such a state policy exists, since state court adjudication is precluded by the application of the federal noninfringement policy and not any state substantive policy.\textsuperscript{382} The Court thus concluded that the district court had subject matter jurisdiction over the dispute but, as a matter of comity, it should defer in favor of tribal court adjudication.\textsuperscript{383}

Lower courts have held that the abstention rule articulated in \textit{Iowa Mutual} applies with equal force where an Indian plaintiff seeks to bring suit against a non-Indian defendant in a federal forum.\textsuperscript{384} Where the suit is between two non-Indians, the courts are not unanimous, with some deeming this a factor that weighs against abstention\textsuperscript{385} and others finding abstention appropriate where the suit has a strong connection to the tribe.\textsuperscript{386} Moreover, while \textit{Iowa Mutual} involved a diversity action filed directly in federal court, the

\begin{flushright}
\textsuperscript{379} \textit{Id.}
\textsuperscript{381} \textit{Iowa Mut. Ins. Co.}, 480 U.S. at 29 n.13.
\textsuperscript{382} \textit{Id.}
\textsuperscript{383} \textit{Id.} at 15; see also Lynn H. Slade, \textit{Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts}, 71 N.D. L. REV. 519, 524 (1995) ("Justice Marshall's opinion makes clear, however, that the federal district court had subject matter jurisdiction under the diversity statute. Ninth Circuit cases rejecting diversity jurisdiction over cases cognizable in tribal court were "[r]elegated to a dismissive footnote of \textit{Iowa Mutual.}"") (quoting Brown & Desmund, supra note 380, at 259-60).
\textsuperscript{384} See Wellman v. Chevron U.S.A., Inc., 815 F.2d 577, 578-79 (9th Cir. 1987) (abstaining in suit brought by member of Blackfeet Indian Tribe against non-Indian Pennsylvania corporation for breach of contract in which plaintiff was to build access road for defendant on reservation).
\textsuperscript{386} Tom's Amusement Co., Inc. v. Cuthbertson, 816 F. Supp. 403, 405-06 (W.D.N.C. 1993).
\end{flushright}
abstention rule applies with equal force when a case arrives in federal court by way of removal from a state court.\textsuperscript{387}

One commentator has noted that the Supreme Court's rejection of the applicability of Woods should make little difference in practice: since Iowa Mutual requires exhaustion of tribal remedies, tribal courts will be insulated from competing federal court jurisdiction when parties to an action have diverse citizenship.\textsuperscript{388} But since the Iowa Mutual exhaustion rule can without question be modified by Congress, while an argument can be made that the Woods rule—as an outgrowth of Erie—cannot be modified (to the extent that Erie is in any sense constitutionally required), this decision makes it easier for Congress to vest such disputes in a federal court should it choose to do so. Moreover, LaPlante does not require abstention by a federal court where no tribal court exists\textsuperscript{389} or where no tribal court action is pending,\textsuperscript{390} while under Williams and Public Law 280, state courts are barred from exercising jurisdiction without regard to the existence of a tribal court or the pendency of a tribal court action.\textsuperscript{391}

The final significant cause of the "no forum" problem in Indian Law is the doctrine of tribal sovereign immunity. As a matter of federal law, Indian tribes enjoy sovereign immunity and are thus immune from suit in any court—federal, state, or tribal—unless Congress has authorized the suit or the tribe itself has waived its sovereign immunity.\textsuperscript{392} While Congress has plenary authority to

\begin{thebibliography}{99}
\item Crawford v. Genuine Parts Co., Inc., 947 F.2d 1405, 1406, 1408 (9th Cir. 1991).
\item Brown & Desmund, supra, note 380, at 259-60.
\item Krempel v. Prairie Island Indian Cmt’y., 125 F.3d 621, 622-23 (8th Cir. 1997).
\item See Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir. 1993) (finding abstention unwarranted where no pending tribal court action, no issue of tribal law is raised, and no attack is being made on tribal court jurisdiction); Vance v. Boyd Miss., Inc., 923 F. Supp. 905, 911 (S.D. Miss. 1996) (finding abstention unwarranted where no pending tribal court action, no attack is being made on tribal court jurisdiction, no issue of tribal law, and suit is between two non-Indians). \textit{But see} United States \textit{ex rel. Kishell v. Turtle Mountain Hous. Auth.}, 816 F.2d 1273, 1276 (8th Cir. 1987) (holding exhaustion of tribal remedies is appropriate); Tom’s Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 407 (W.D.N.C. 1993) (abstaining pending determination by tribal court of whether it has jurisdiction).
\item See supra notes 113-81 and accompanying text.
\end{thebibliography}
abrogate a tribe’s sovereign immunity (in contrast to its authority vis-à-vis the states), Congress must “unequivocally” express that purpose before the courts will find abrogation. Similarly, a waiver of sovereign immunity by a tribe will be found only when that waiver is “clear.” Moreover, by bringing suit, a tribe does not open itself up to counterclaims, even if they are “compulsory” counterclaims. As with state sovereign immunity, however, tribal sovereign immunity is not a shield from suit brought against the tribe by the United States. Moreover, suit can be brought to enjoin individual tribal officials who are alleged to be violating federal law under the *Ex parte Young* doctrine.

The Supreme Court has held that tribes have sovereign immunity for their on-reservation as well as their off-reservation activities, and has refused to distinguish between the governmental and commercial activities of a tribe. Accordingly, absent a waiver of sovereign immunity or abrogation of the same by Congress, tribes that operate casinos are immune in any court from tort actions brought against the tribes for personal injuries sustained by patrons.
at their gaming facilities, as well as from suit by casino employees alleging employment discrimination.

Arguably, market forces will give tribes an incentive to waive their sovereign immunity when they enter into contractual relations. If tribes earn a reputation for dishonoring contracts and then invoking the defense of sovereign immunity when sued on the contract, it will impact their business reputation, and those contracting with them will either demand a contractual waiver of sovereign immunity or a higher contract price. However, even assuming perfect information and markets with respect to such

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401 See Doe v. Oneida Indian Nation, 717 N.Y.S.2d 417, 418 (App. Div. 2000) (holding sovereign immunity barred suit against tribe when patron at tribe's gaming resort hotel was pierced by hypodermic needle); Gross v. Omaha Tribe, 601 N.W.2d 82, 82-83 (Iowa 1999) (holding sovereign immunity barred suit against tribe by patron who was knocked down by another patron at tribe's gambling casino); Trudgeon v. Fantasy Springs Casino, 84 Cal. Rptr. 2d 65, 66 (Ct. App. 1999) (holding tribal sovereign immunity extended to for-profit corporation organized by tribe to operate casino, where patron sought damages for injuries he sustained from fight in casino parking lot). See generally Krista L. Twesme, Let the Games Begin: Proposed Amendment to Indian Gaming Regulation Act Limiting Native American Tribes' Sovereign Immunity, 17 HAMLINE J. PUB. L. & POly 187 (1995) (discussing tribal sovereign immunity as it applies to Native American casinos).

402 Gavle v. Little Six, Inc., 555 N.W.2d 284, 294-96 (Minn. 1996); Twesme, supra note 401, at 196.

403 See Bank of Okla. v. Muskcogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992) (rejecting plaintiff's argument that dismissal of their suit on sovereign immunity grounds would chill commercial relations between Indian tribes and non-Indians, reasoning "[t]his policy argument precisely misses the point of sovereign immunity, which is the power of self-determination. We decline the Bank's invitation to second-guess the wisdom of the Nation's business decisions under the guise of judicial review."); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 32 F. Supp. 2d 497, 506 (D.R.I. 1999) ("[P]laintiff contracted to settle its contract disputes utilizing the Narragansett Tribe's justice system. Now plaintiff must live with its bargain, just as the Tribe will have to live with its reputation when it deals with outside contractors in the future."); vacated by 207 F.3d 21, 30 (lst Cir. 2000); Calvello v. Yankton Sioux Tribe, 899 F. Supp. 431, 438 (D.S.D. 1995).

[T]he Court's decision . . . reaches an inequitable result. Plaintiff Calvello conferred valuable services upon the Tribe for which he did not receive adequate compensation. The Tribe's refusal to abide by the arbitration decision after its counsel participated fully in the entire proceeding . . . shows a lack of good faith. This kind of action although not prohibited by law, may well increase the cost and diminish the availability of qualified contractors to perform services desired by the Tribe. Id.; Laurie Reynolds, Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction, 73 N.C.L. REV. 1089, 1155 (1996) ("Moreover, many tribes are actively seeking non-Indian partners in economic development projects; the availability of a tribal forum perceived as fair and efficient by outsiders will enhance the marketability of those projects.").
contractual relations as employment, it is not clear that market forces will necessarily work as well in the context of tort actions brought against the tribe. However, market forces could work even in that context to the extent that casino patrons—realizing that they will not be compensated for injuries sustained at the casino—may choose to take their business elsewhere, assuming, of course, that competitors exist.

In *Talton v. Mayes*, a Cherokee who was convicted in a Cherokee Nation tribal court of murdering another Cherokee and sentenced to death filed for a writ of habeas corpus in a federal district court in Arkansas, alleging that the Cherokee grand jury that indicted him did not conform to the due process requirements of the Fifth Amendment. Noting that the Fifth Amendment applies only to the exercise of federal powers, the court reasoned that whether the Fifth Amendment would apply turned on whether or not the powers of government exercised by the Cherokee Nation were federal powers created by the Constitution. While noting that the right of Indian tribes to self-govern remains subject to plenary congressional authority, the Court concluded that tribal powers of self-government nonetheless antedated the Constitution. Therefore, tribal legislative actions did not constitute the exercise of federal power, and thus were not subject to the strictures of the Fifth Amendment. Subsequent lower court decisions have extended the rationale of *Talton* to other provisions of the Constitution.

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405 163 U.S. 376 (1896).

406 Id. at 376-79.

407 Id. at 382.

408 Id. at 382-83.

409 Id. at 384.

410 Id.

411 See id. However, if Congress extinguishes a tribe's sovereign authority to prosecute crimes and later reenacts its authority to prosecute crimes, some cases have viewed the reenactment as a delegation of federal power, and the Double Jeopardy clause bars a federal prosecution subsequent to a tribal prosecution for the same offense. *E.g.*, *United States v. Long*, 183 F. Supp. 2d 1106, 1113-15 (E.D. Wis. 2002).

412 See, *e.g.*, *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 1134-35 (10th Cir. 1969) (holding freedom of religion protection under First Amendment inapplicable to Indian
In 1968, Congress enacted Title I of the Indian Civil Rights Act ("ICRA"), whereby it imposed certain restrictions on tribal governments analogous, but not identical to, the restrictions contained in the Bill of Rights. The goal of these restrictions was to provide individuals with similar protections against the wrongful actions of tribal governments as they are afforded vis-à-vis state and federal governments, thus, to some extent, blunting the force of the *Talton* decision. In addition, ICRA provided the federal courts with jurisdiction to hear claims brought by individuals against tribal governments. The Act differs from the Bill of Rights itself in that it does not prohibit the establishment of religion, does not require jury trials in civil cases, does not require the appointment of counsel for indigents in criminal cases, does not require indictment by grand jury, and does not provide for any of the protections contained in the Second, Third, and Seventh Amendments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 & n.14 (1978).

*Id.* The Act differs from the Bill of Rights itself in that it does not prohibit the establishment of religion, does not require jury trials in civil cases, does not require the appointment of counsel for indigents in criminal cases, does not require indictment by grand jury, and does not provide for any of the protections contained in the Second, Third, and Seventh Amendments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 & n.14 (1978).

*See Martinez*, 436 U.S. at 61 ("[T]he central purpose of the ICRA and in particular of Title I was to 'secure[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'") (quoting S. Rep. No. 90-841, at 5-6 (1967)).
with jurisdiction to entertain writs of habeas corpus for those challenging the legality of their detention by a tribal government.\footnote{See 25 U.S.C. § 1303.}

In *Santa Clara Pueblo v. Martinez*,\footnote{436 U.S. 49 (1978).} the Supreme Court considered the enforceability of ICRA in federal court. At issue was a tribal ordinance which barred from membership children of female members of the tribe who marry outside the tribe, but permitted membership to children of male members who marry outside the tribe.\footnote{Id. at 52-53 & n.2.} The effect of the ordinance was to preclude the children of a female member who marries outside the tribe from voting in tribal elections, holding secular office, or inheriting their mother's home and possessory interest in tribal communal lands.\footnote{Id.} After unsuccessfully attempting to persuade the tribe to change the ordinance, a member of the tribe who had married outside the tribe and had two children, brought a class action suit against the tribe and its officials, seeking injunctive and declaratory relief and claiming that the ordinance, by discriminating on the basis of both gender and ancestry, denied equal protection of the laws in violation of ICRA.\footnote{416 See 25 U.S.C. § 1303.}

The Court concluded that suits against a tribe for violations of ICRA were barred by the doctrine of tribal sovereign immunity.\footnote{417 436 U.S. 49 (1978).} The Court noted that Indian tribes possess common-law immunity from suit.\footnote{418 Id. at 51-53. See also 25 U.S.C. § 1302(8) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws . . . ").} While Congress has the power to override this immunity, legislative intent to do so must be express, and there was no such express intent in ICRA.\footnote{419 Id.}
A number of tribal courts have held that ICRA does not abrogate a tribe's sovereign immunity in tribal court and have declined to entertain suits brought against tribes under ICRA.\textsuperscript{424} Accordingly, even for violations of ICRA, injured parties find themselves without a forum in which to adjudicate their claims against these tribes. In \textit{Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes},\textsuperscript{425} the Tenth Circuit sought to remedy this "no forum" problem. In \textit{Dry Creek}, non-Indian owners of land within the boundaries of the tribes' reservation in Wyoming built a guest lodge for hunting after receiving assurances from tribal authorities that there would be no problems with access from the principal highway running through the reservation to their property via an existing access road.\textsuperscript{426} The day after the lodge opened for business, the tribes closed the access road, and as a result, the plaintiffs' property was eventually foreclosed upon.\textsuperscript{427} Before resorting to federal court, the non-Indian plaintiffs sought a remedy in the tribal court, but were refused access.\textsuperscript{428}

In \textit{Dry Creek} the Tenth Circuit narrowly construed \textit{Santa Clara}. The court characterized that case as being "entirely an internal matter concerning tribal members," noting that "[t]he members of the Tribe who were seeking relief also had access to their own elected officials and their tribal machinery to settle the problem" and that "there were no non-Indians concerned."\textsuperscript{429} According to the Tenth Circuit, \textit{Santa Clara} placed great emphasis on the availability of tribal courts and on the intratribal nature of the problem. The

\textsuperscript{425} 623 F.2d 682 (10th Cir. 1980).
\textsuperscript{426} Id. at 683-84.
\textsuperscript{427} Id. at 684.
\textsuperscript{428} Id.
\textsuperscript{429} Id. at 685.
court held that “in the absence of such other relief or remedy,” or “when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian,” the limitations of *Santa Clara* disappear.\(^4\) Since there was no remedy in state or tribal court, the *Dry Creek* court concluded that the limitations of *Santa Clara* could not apply. The court rejected self-help or no forum as a suitable alternative, concluding that “[t]here has to be a forum where the dispute can be settled.”\(^4\)

Subsequent cases in the Tenth Circuit have narrowed the scope of *Dry Creek*, holding that it only applies when there is *no* tribal remedy, judicial or otherwise, and that mere allegations of futility would not suffice. In order for *Dry Creek* to apply, the aggrieved party must have actually sought and been denied a tribal remedy.\(^4\) No other circuits have followed the decision, either rejecting it outright\(^4\) or leaving the question open.\(^4\)

3. *Prior Congressional Efforts to Eradicate the “No Forum” Problem in Indian Law.* In the past, Congress has taken a variety of measures to remedy the “no forum” problem in Indian Law, including allowing state courts to exercise jurisdiction over disputes arising in Indian Country, vesting existing Article III courts with jurisdiction over such disputes, and providing for the creation of specialized courts for Indian Country.

As discussed in detail above,\(^4\) Congress sought to eradicate the “no forum” problem in Indian Country to some extent by allowing the state courts to exercise civil and criminal jurisdiction over

\(^4\) Id.

\(^4\) *See id.* ("To hold that they have access to no court is to hold that they have constitutional rights but have no remedy. The self-help which was suggested . . . does not appear to be a suitable device to determine constitutional rights.").

\(^4\) Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170 (10th Cir. 1992); White v. Pueblo of San Juan, 728 F.2d 1307, 1311-12 (10th Cir. 1984).


\(^4\) Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256, 1260 n.5 (9th Cir. 2000); Poody v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 884 n.14 (2d Cir. 1996); see Boudman v. Aroostook Band of Micmac Indians, 54 F. Supp. 2d 44, 49 n.3 (1999) (noting First Circuit has not created such exception); Williams v. Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, 625 F. Supp. 1457, 1459 n.3 (D. Nev. 1986) (leaving open possibility of exercising jurisdiction over ICRA claim should tribal court opt not to exercise jurisdiction over claim).

\(^4\) *See supra* notes 113-81 and accompanying text.
disputes arising there. However, the 1968 Amendments to Public Law 280 requiring tribal consent to future acquisitions of jurisdiction by the states pursuant to Public Law 280, and the failure of any tribes subsequently to consent to such acquisitions of jurisdiction, has eliminated this as an effective means of remediing the existing "no forum" problem. Moreover, as discussed below, Public Law 280 serves at best to replace the "no forum" problem with a "biased forum" problem.

By steadily expanding federal court jurisdiction over crimes committed in Indian Country, Congress has, in the past, practically eliminated the "no forum" problem with respect to criminal jurisdiction. General federal criminal statutes of nationwide applicability, such as the Racketeer Influenced and Corrupt Organizations Act, are applicable to crimes committed by Indians and non-Indians alike in Indian Country. In addition, however, Congress has taken measures to ensure that the many types of crimes typically punished throughout the nation in state courts under state law are likewise punishable when committed in Indian Country but generally subject to enforcement in federal court.

Early on, Congress protected Indians from crimes committed against them by non-Indians in Indian Country, providing for the punishment of the non-Indians in federal court. In 1817, Congress enacted the Indian Country Crimes Act, which provides that federal criminal laws are applicable to federal enclaves—i.e., post offices, federal courthouses, forts, and other areas falling within the sole and exclusive jurisdiction of the federal government—are likewise applicable to offenses committed in Indian Country. The statute exempts crimes committed by one Indian against another in Indian Country when the Indian has been punished by local tribal law or where, by treaty stipulation, such offenses are within the exclusive jurisdiction of the tribe.

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436 See infra notes 479-97 and accompanying text.
437 U.S. v. Juvenile Male, 118 F.3d 1344, 1347 (9th Cir. 1997).
440 18 U.S.C. § 1152. This exception applies only to federal enclave law, and not to federal criminal laws of general application. U.S. v. Yannott, 42 F.3d 999, 1003 (6th Cir. 1994); U.S.
Among the "general laws of the United States" made applicable to Indian Country by the Indian Country Crimes Act is the Assimilative Crimes Act, which incorporates state substantive criminal law into federal criminal law for any matter not already unlawful under federal law but that would be unlawful under the law of the state within which the reservation or other federal enclave is located.\(^4\) Law so incorporated becomes "federal law" for purposes of Article III "arising under" jurisdiction,\(^4\) and the federal courts are not bound by state case law in interpreting such state laws.\(^4\) While the statute contains no explicit exception for crimes committed by one non-Indian against another in Indian country, a line of cases has held that such matters fall within the exclusive jurisdiction of the state courts.\(^4\)

The Supreme Court has held that, absent federal law to the contrary, Indian tribes have exclusive jurisdiction over crimes committed by one Indian against another.\(^4\) In response to this holding, Congress enacted the Major Crimes Act, which provides for the punishment of certain major crimes committed by an Indian within Indian Country under federal enclave law or, if no such law exists, under incorporated state law.\(^4\) Thus, this provision acts as

v. Blue, 722 F.2d 383, 384 (8th Cir. 1983); U.S. v. Cowboy, 694 F.2d 1228, 1234 (10th Cir. 1982).

\(^4\) 18 U.S.C. § 13(a) (1994); Acuna v. U.S., 404 F.2d 140, 142 (9th Cir. 1968); U.S. v. Sosseur, 181 F.2d 873, 874-75 (7th Cir. 1950).


Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [rape and other like offenses], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under
an exception to the proviso in the Indian Country Crimes Act that gives tribal courts exclusive jurisdiction over crimes committed in Indian Country by one Indian against another.\textsuperscript{447} The Major Crimes Act has been upheld as constitutional, based on Congress's plenary power over Indians.\textsuperscript{448}

As discussed above,\textsuperscript{449} Public Law 280 allows certain states to exercise criminal jurisdiction over all crimes committed in Indian Country. Public Law 280 provides that neither the Indian Country Crimes Act nor the Major Crimes Act apply within those sections of Indian Country that were given criminal jurisdiction in the original Public Law 280.\textsuperscript{450} Under the Indian Civil Rights Act ("ICRA"), Congress limited the authority of tribal courts to punish criminal offenders, with a maximum sentence of one year's imprisonment, a $5,000 fine, or both.\textsuperscript{451} In theory, this is not a problem, since Congress has the authority under the Major Crimes Act to punish crimes committed by one Indian against another. However, U.S. Attorneys, unlike state prosecutors, typically decline to prosecute in a far greater percentage of cases. Thus, in practice, ICRA's limits on tribal authority to punish criminal offenders results in the underenforcement of criminal laws in Indian Country.\textsuperscript{452}

In 1883, the Bureau of Indian Affairs ("BIA") commenced a practice of establishing Courts of Indian Offenses on reservations, with judges selected by the Indian agent assigned by the BIA to the

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  \item \textsuperscript{447} United States v. Antelope, 430 U.S. 641, 648 n.9 (1977).
  \item \textsuperscript{448} United States v. Kagama, 118 U.S. 375, 383-84 (1886).
  \item \textsuperscript{449} See supra notes 113-81 and accompanying text.
  \item \textsuperscript{450} See 18 U.S.C. § 1162(c) (1994) ("The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."). While it is not clear from the text of the Act, it would seem as though this provision should apply with equal force to those states that otherwise accepted Public Law 280 jurisdiction.
  \item \textsuperscript{452} See GETCHES ET AL., supra note 17, at 475-76 (quoting NATIONAL AMERICAN INDIAN JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 33-35 (1978) (David Getches, ed.)).
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reservation for the purpose of providing adequate machinery of law enforcement where tribal agencies had broken down and no substitute had been provided under state or federal law. The legitimacy of these courts has historically been questioned, as they have never been expressly authorized by Congress. Additionally, such courts have historically been attacked as an effort forcibly to assimilate Indians and to destroy tribal customs and institutions. In 1888, however, Congress implicitly recognized the legitimacy of these courts when it began appropriating funds to operate them. An early court challenge to the authority of the BIA to establish the courts was rejected on the ground that Congress's statutory delegation to the President of general authority to manage Indian affairs was sufficiently broad to encompass the authority to create such courts.

Today, the legitimacy of the BIA courts is based on long-standing congressional ratification and acquiescence, but this still leaves open the constitutional authority of Congress to establish such courts. Their judges lack life tenure and guaranteed longevity.

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454 See Tillett v. Lujan, 931 F.2d 636, 638 (10th Cir. 1991) (citing 25 C.F.R. § 11.1(b)); see also 25 C.F.R. § 11.100(b) (2001) ("[T]he purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established . . . ").
457 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 46, at 333 n.15; Tasso, Note, supra note 456, at 697.
compensation as required by Article III.\textsuperscript{460} They have been held not to be Article III courts,\textsuperscript{462} and, although no court has directly considered the matter, they likely would be upheld as legislative courts under Congress's powers under the Indian Commerce and Treaty Clauses.\textsuperscript{463} A few commentators have argued that they are not federal courts at all, but derive their authority from the inherent sovereignty of the tribe, with the federal government merely providing financial and structural support.\textsuperscript{464} If such is the case, Article III arguably imposes no constraints whatsoever.

In 1900, there were Courts of Indian Offenses on nearly two-thirds of the reservations under the BIA's jurisdiction.\textsuperscript{465} Today, they operate on just a handful of reservations.\textsuperscript{466} Each such court is composed of a trial and an appellate division,\textsuperscript{467} with appeals heard by a panel of three magistrates who were not involved in the trial.\textsuperscript{468} There is no appeal available from the decisions of the appellate division.\textsuperscript{469} A tribe can supplant the Court of Indian Offenses located on its reservation by adopting a legal code that establishes a court system.\textsuperscript{470} A tribe can also enact laws that, if approved by

\textsuperscript{460} The Courts of Indian Offenses are composed of magistrates appointed by the Assistant Secretary for Indian Affairs and confirmed by a majority vote of the governing body of the tribe over which the court will exercise jurisdiction. 25 C.F.R. \textsection{} 11.201(a) (2001). In the case of multi-tribal courts, confirmation is by a majority of the tribal governing bodies of the tribes under the jurisdiction of the court. \textit{Id.} They serve for a term of four years, \textit{id.} \textsection{} 11.201(b), \textit{and} the Assistant Secretary for Indian affairs may suspend or remove a magistrate for cause in his own discretion or based on a recommendation by the tribe's governing body. \textit{Id.} \textsection{} 11.202.

\textsuperscript{461} U.S. CONST. art. III, \textsection{} 1.

\textsuperscript{462} United States v. Clapox, 35 F. Supp. 575, 577 (D. Or. 1888) ("These 'courts of Indian offenses' are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to 'ordain and establish'.")


\textsuperscript{464} COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 46, at 251 & n.69; Kevin J. Worthen, \textit{Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction}, 75 MINN. L. REV. 65, 84 n.90 (1990).

\textsuperscript{465} Valencia-Weber, \textit{supra} note 455, at 235.

\textsuperscript{466} For a list of the tribes which continue to have Courts of Indian Offenses, see 25 C.F.R. \textsection{} 11.100(a) (2001).

\textsuperscript{467} 25 C.F.R. \textsection{} 11.200(a) (2001).

\textsuperscript{468} \textit{Id.} \textsection{} 11.200(c).

\textsuperscript{469} \textit{Id.} \textsection{} 11.200(d).

\textsuperscript{470} \textit{Id.} \textsection{} 11.100(c); COHEN, \textit{supra} note 453, at 333-34.
the Secretary of the Interior, will supplant those in the Code of Federal Regulations.

Both the criminal and civil jurisdiction of the Courts of Indian Offenses are severely limited. Their criminal jurisdiction is limited to crimes committed by an Indian that occurred within that portion of Indian Country subject to the court's jurisdiction. Furthermore, they cannot impose prison sentences of more than six months or fines in excess of $500. Their civil jurisdiction extends to civil actions arising within the territorial jurisdiction of the court where the defendant is an Indian, as well as to all other civil actions between an Indian and a non-Indian, but only if the parties all agree to have the case adjudicated in the court. It is this latter proviso that has contributed to the "no forum" problem in those civil cases discussed above, since it is unlikely that a defendant will consent to jurisdiction when the alternative is to have no suit brought against him. Moreover, tribes may not be sued in a Court of Indian Offenses unless the tribal governing body has explicitly waived its sovereign immunity, likewise contributing to the no forum problem. Thus, although the establishment of the Courts of Indian Offenses has to some degree reduced the likelihood of a "no forum" situation, the limited scope of their jurisdiction limits their effectiveness in remedying the "no forum" problem.

B. THE "BIASED FORUM" PROBLEM IN INDIAN LAW

1. Illustration of and Causes of the "Biased Forum" Problem. As demonstrated above, absent federal law to the contrary, under the Williams non-infringement test tribal courts will have jurisdiction

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471 25 C.F.R. § 11.100(e). As a default, the Federal Rules of Evidence and the Federal Rules of Civil Procedure also apply to proceedings taking place in the Courts of Indian Offenses. Id. §§ 11.503, 11.504.
472 Id. § 11.102(a).
473 Id. § 11.315(a)(1)-(2). They may, however, require a convicted defendant to perform labor for the benefit of the tribe and to pay restitution to the victim. Id. § 11.315(a)(3), (b).
474 Id. § 11.103(a).
475 Id. § 11.103(a).
476 See supra notes 182-86 and accompanying text.
477 25 C.F.R. § 11.104(e).
478 See supra notes 392-434 and accompanying text.
exclusive of the state courts in some civil suits between Indians and non-Indians arising in Indian Country.\textsuperscript{479} Additionally, as a result of Public Law 280, some state courts will have jurisdiction over civil disputes between Indians and non-Indians arising in Indian Country, as well as criminal jurisdiction over Indian defendants alleged to have committed crimes against non-Indians.\textsuperscript{480} Moreover, state courts have civil jurisdiction over all disputes involving Indians that arise outside of Indian Country\textsuperscript{481}—including those between an Indian and a non-Indian—as well as criminal jurisdiction over Indian defendants alleged to have committed crimes outside of Indian country\textsuperscript{482}—including those committed by an Indian against a non-Indian.

At least in the civil context, to avoid the risk of state court bias against out-of-state citizens,\textsuperscript{483} Congress has provided for federal diversity jurisdiction over most disputes between citizens of different states.\textsuperscript{484} Given the historical backdrop of deep-seated animosity and distrust between Indians and their non-Indian neighbors,\textsuperscript{485} the rationale for diversity jurisdiction is at least as strong in suits between Indians living on reservations and citizens

\begin{footnotes}
\footnotetext[479]{Williams v. Lee, 358 U.S. 217, 223 (1959).}
\footnotetext[480]{See supra notes 113-81 and accompanying text.}
\footnotetext[481]{See, e.g., Smith Plumbing Co. v Aetna Cas. & Sur. Co., 720 P.2d 499, 506 (Ariz. 1986) (holding suit involving tribe's business activities outside reservation made case proper for adjudication by state courts); see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 46, at 348-49 (explaining state jurisdiction over Indians outside of Indian Country).}
\footnotetext[482]{See Hagen v. Utah, 510 U.S. 399, 421-22 (1994) (upholding exercise of state court jurisdiction over Indian who committed crime outside of Indian Country).}
\footnotetext[483]{See THE FEDERALIST No. 80, at 497 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.").}
\end{footnotes}
of states. Therefore, a neutral federal forum ought to be available in civil suits between Indians and non-Indians, and in criminal actions in which the victim is an Indian and the perpetrator is a non-Indian, or vice-versa. State court judges, lacking life tenure and often subject to popular election, are more likely to be influenced by populist sentiments,\textsuperscript{486} including local anti-Indian sentiment. Similarly, tribal court judges are also subject to political pressure to dispose of cases in particular ways.\textsuperscript{487}

To be sure, the Indian Country Crimes Act provides a form of federal court criminal "diversity" jurisdiction over criminal offenses committed in Indian Country by an Indian against a non-Indian, or by a non-Indian against an Indian.\textsuperscript{488} However, the Indian Country Crimes Act does not apply in those sections of Indian Country over which the state courts were given criminal jurisdiction by Public Law 280.\textsuperscript{489} Furthermore, in the civil context, no diversity jurisdiction exists where a suit is between a non-Indian and an Indian where the latter's reservation is physically located within the boundaries of the former's state.\textsuperscript{490} Moreover, even if diversity exists as a formal matter, where the action arises in Indian country, the tribal abstention doctrine announced in \textit{LaPlante} usually requires federal courts to abstain from the exercise of diversity jurisdiction over the dispute.\textsuperscript{491}

There are other structural limitations that prevent disputes between Indians and non-Indians that raise federal questions from being adjudicated in a federal court. The well-pleaded complaint rule, for example, deprives federal district courts of jurisdiction over disputes where the federal issue comes in only by way of a defense. As an example, this could force an Indian tribe sued in state court

\textsuperscript{486} See generally Henry J. Friendly, \textit{The Historic Basis of Diversity Jurisdiction}, 41 HARV. L. REV. 483, 484, 493 (1928) (explaining Framers supported diversity jurisdiction to avoid state prejudice).

\textsuperscript{487} \textit{REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT} 44 (June 1991).

\textsuperscript{488} See \textit{supra} notes 440-44 and accompanying text. Of course, unlike in civil diversity jurisdiction, federal rather than local law is applied (unless it is local law incorporated as the federal rule of decision). \textit{Id.}

\textsuperscript{489} 18 U.S.C. § 1162(c) (1994).


\textsuperscript{491} See \textit{supra} notes 365-91 and accompanying text.
to raise its defense of sovereign immunity in state court and to appeal an adverse determination all the way through the state's appellate system, even when the suit is brought against it by the state itself or by an arm of the state.\textsuperscript{492} Although the decision is theoretically subject to Supreme Court review,\textsuperscript{493} the potential for a grant of certiorari is an inadequate substitute for original federal jurisdiction.\textsuperscript{494} And of course, no Supreme Court review is available of state court decisions in which no federal issue is raised.\textsuperscript{495} Moreover, the federal removal statute makes no provision for the removal of cases from tribal to federal court, even where the suit arises under federal law or the parties are diverse,\textsuperscript{496} and the Supreme Court has not been given statutory authority to review the decisions of tribal courts, even when a federal question is raised.\textsuperscript{497}

2. The Judicial Response to the "Biased Forum" Problem. The Supreme Court's response to the "biased forum" problem has itself been biased. While making no efforts to rectify the "biased forum" problem when a threat of bias exists against an Indian party, the Supreme Court has been very active in taking measures to protect non-Indian parties from the threat of bias in tribal courts. Some decisions have attempted to rectify the problem by allowing for collateral federal court attack on tribal court decisions. Others have addressed the problem by substantially cutting back on the scope of tribal court jurisdiction, a line of reasoning which threatens severely to erode tribal sovereignty.

In \textit{National Farmers Union Insurance Co. v. Crow Tribe of Indians},\textsuperscript{498} a child who was a member of the Crow Tribe was hit by a motorcycle in his school parking lot while returning from a school

\textsuperscript{493} \textit{See generally} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (providing for Supreme Court review of state court judgments in certain circumstances).
\textsuperscript{495} 28 U.S.C. § 1257(a) (1994); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875) (stating whether federal question is raised is essential to Supreme Court jurisdiction).
\textsuperscript{497} Hicks, 121 S. Ct. at 2323.
\textsuperscript{498} 471 U.S. 845 (1985).
activity. The child, through his guardian, brought suit in the tribal court and obtained a default judgment against the school district (a political subdivision of the state). The school district and National, the district's insurer, filed suit in federal district court, naming as defendants the tribe, the tribal council, the tribal court, judges of the tribal court, the chairman of the tribal council, and subsequently, the child and his guardian. In this attempted collateral attack, the district court issued a temporary restraining order and later a permanent injunction, finding that the tribal court lacked subject matter jurisdiction over the suit. On appeal, the Ninth Circuit reversed, finding that the district court erred in exercising jurisdiction.

The Supreme Court granted certiorari and held 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 a 'federal question' under § 1331," and accordingly that federal district courts had subject matter jurisdiction over such challenges. However, the Court further held that the federal courts should refrain from adjudicating the matter until the tribal courts, including the tribal appellate courts, have considered the question of their jurisdiction. Accordingly, to remedy the lack of direct Supreme Court review of tribal court decisions in which a challenge is raised as to the tribal courts' jurisdiction over the dispute, the Supreme Court created de facto appellate review by way of a collateral proceeding brought in federal district court.

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499 Id. at 847.
500 Id.
501 Id. at 847-48.
502 Id. at 848-49.
503 Id. at 849.
504 Id. at 852-53. The Court's rationale for this was that the petitioners had alleged that federal law deprived the tribal courts of this aspect of their sovereignty. Id.
505 Id. at 855-57. The Court went on to hold, however, that exhaustion would not be required "where the assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' where [it] is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." Id. at 856 n.21 (citing Juidice v. Vail, 430 U.S. 327, 338 (1977)). The Court has subsequently added that "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule," such that the exhaustion requirement "would serve no purpose other than delay," exhaustion is not required. Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997).
Under the Price-Anderson Act, federal district courts have original and removal jurisdiction over all suits for liability arising out of or resulting from a nuclear incident. In El Paso Natural Gas Co. v. Neztsosie, two members of the Navajo Nation filed a tort action in a Navajo tribal court against two companies that had operated open pit uranium mines on the reservation, alleging that the mines contaminated their drinking water and caused them injuries. The companies collaterally attacked the tribal court action by filing suit in federal court to enjoin the tribal court action. The case eventually reached the Supreme Court, which held that Congress's statutory scheme under the Price-Anderson Act "expressed an unmistakable preference for a federal forum, at the behest of the defending party." The Court rejected the argument that a negative inference could be drawn from Congress's failure statutorily to provide for removal from tribal to federal court (as opposed to its provision for allowing removal from state to federal court), reasoning that "Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like these." The Court concluded that the appropriate remedy was to allow the defendant to obtain an injunction against the tribal proceedings in federal court and require the plaintiffs to refile their suit in state or federal court. In effect, the Court thus provided for a de facto form of removal from tribal to federal courts in an effort to replicate the statutory scheme providing for removal from state to federal courts.

Other cases seek to protect non-Indian parties from bias in tribal courts through cutbacks in tribal court jurisdiction. For example, in Oliphant v. Suquamish Indian Tribe, the Supreme Court considered the scope of tribal court criminal jurisdiction over non-Indians. In Oliphant, two non-Indians were arrested and arraigned...
in tribal court for violations of the Suquamish Indian tribe’s law and order code for offenses committed on the tribe’s Port Madison Reservation. Under the tribe’s law and order code only Suquamish tribal members could serve as jurors in tribal court.

The defendants filed petitions for writs of habeas corpus in federal district court, contending that the tribal court lacked criminal jurisdiction over non-Indians, but their petitions were denied by the lower federal courts. The Supreme Court granted certiorari and reversed. The Court held that, in submitting to the overriding sovereignty of the federal government, Indian tribes gave up any inherent power they possessed to try non-Indians in their courts for criminal offenses. The Court concluded that, absent an affirmative Congressional delegation of such power, the tribal courts lack any criminal jurisdiction whatsoever over non-Indians. The Court recognized that there was an increase of non-Indian crime being committed on reservations, but concluded that it was for Congress to decide how to remedy this problem.

A series of Supreme Court decisions have likewise eroded the civil “jurisdiction” of tribes. Those trained in the law often speak loosely of the existence of “jurisdiction” or lack thereof without specifying precisely which among the myriad forms of jurisdiction they mean to reference, and an understanding of the various categories of “jurisdiction” aids in the analysis of cutbacks in tribal court jurisdiction in the civil context. Under International Law,

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515 Id. at 192-94.
516 Id. at 194 & n.4.
517 Id. at 194-95.
518 Id. at 195.
519 Id. at 207-10.
520 Id.
521 Id. at 212. In Duro v. Reina, 495 U.S. 676 (1990), the Court extended Oliphant, holding that tribal courts also lacked jurisdiction over nonmember Indians (i.e., Indians of other tribes), but Congress overrode Duro and specifically provided for tribal criminal jurisdiction over nonmember Indians. 25 U.S.C. § 1301(2) (1994).
522 Although the relationship among the federal, state, and tribal governments in the United States is not itself dictated by International Law, the categories of jurisdiction described therein are analogous to the separation of powers and federalism principles inherent in the United States Constitution, and domestic law is generally construed to conform with international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 cmts. a, b (1987). Thus while the categories of power are the same in the domestic context, the constraints on that power are imposed by constitutional, statutory,
there are three broad categories of jurisdiction—prescriptive, adjudicative, and enforcement—that roughly correspond to the traditional division of governmental authority in the United States into legislative, judicial, and executive power. Prescriptive, or legislative, jurisdiction refers to a sovereign’s power to make its laws apply to particular persons and circumstances. Adjudicative jurisdiction refers to a sovereign’s power to subject persons or objects to the process of its judicial tribunals. Lastly, enforcement jurisdiction refers to a sovereign’s power to induce or compel compliance or to punish noncompliance with its laws. In the United States, adjudicative jurisdiction is further broken down into two major categories: subject matter jurisdiction and personal jurisdiction, with the former referring to a court’s power to hear particular categories of disputes and the latter referring to a court’s power over the defendant’s person and his assets.

The seminal Indian Law cases of *Cherokee Nation v. Georgia* and *Worcester v. Georgia* aptly demonstrate the distinction among the many categories of jurisdiction. In *Cherokee Nation*, the Cherokee Nation brought suit against the State of Georgia in the U.S. Supreme Court to enjoin Georgia from executing and enforcing its laws against the Cherokee people. The Court dismissed the action for want of jurisdiction. According to the Court, it lacked adjudicative jurisdiction over the dispute because the Cherokee
Nation was neither a "State" nor a "foreign State" within the meaning of Article III, section 2—more specifically, the Court lacked subject matter jurisdiction. In contrast, the merits of the case raised the questions whether the State of Georgia could exercise legislative and enforcement jurisdiction over the Cherokee territory, and whether its courts could exercise adjudicative jurisdiction over disputes arising in the Cherokee territory.

Worcester, decided the following year, picked up where Cherokee Nation left off, and likewise demonstrates the distinctions among adjudicative, legislative, and enforcement jurisdiction. In Worcester, Samuel Worcester and Elizur Butler—missionaries on the Cherokee territory—were arrested, convicted and sentenced to four years in a Georgia penitentiary for violating a Georgia law prohibiting non-Indians from residing in the Cherokee territory unless licensed by the state. After their case made its way through the Georgia state courts, Worcester and Butler petitioned the U.S. Supreme Court for a writ of certiorari, contending that Georgia's application of its laws to the Cherokee territory violated the Constitution, laws, and treaties of the United States.

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533 Article III, § 2, cl. 2 provides that "In all Cases... in which a State shall be Party, the Supreme Court shall have original jurisdiction." However, the Supreme Court had previously held that its original jurisdiction over actions in which a State is a party did not extend to every case in which a State is a party, but only to those instances in which clause 1 grants power over a case because a State is a party. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398 (1821). Thus, the mere fact that a federal question is involved is not enough to invoke the Court's original jurisdiction merely because a State is a party to the action. Article III, § 2, cl. 1 provides in relevant part that "The judicial Power shall extend... to Controversies between two or more States... and between a State... and foreign States." The Court had no difficulty in holding that Georgia, as a state, "could unquestionably be sued in [the Supreme Court]," leaving open only the question whether the Cherokee nation could bring an original suit in the Supreme Court. Cherokee Nation, 30 U.S. at 15-16.


535 See id. at 7-8 (noting "[t]he effect of [the challenged] laws... [is] to extend all the laws of Georgia over [the territory of the Cherokees]").

536 See id. at 8 (noting challenged laws "authoriz[e] the calling out of the militia of Georgia to enforce process").

537 See id. (noting that challenged laws "extend[ ] the jurisdiction of the justice of the peace of Georgia into the Cherokee territory").


539 Id. at 516.
The Supreme Court found that because a federal question was involved, it could review the case.\textsuperscript{540} In other words, the Court had adjudicative jurisdiction—specifically subject matter jurisdiction—over the dispute. On the merits of the case, the Court ruled that the laws of Georgia had no force in the Cherokee territory\textsuperscript{541}—in other words, that Georgia lacked legislative jurisdiction over the Cherokee territory. Finally, due to procedural defects in the Judiciary Act of 1789, the Supreme Court lacked the ability to order the federal marshals to release Worcester and Butler from prison.\textsuperscript{542} The procedural limitations on the Court’s ability are an example of limitations on enforcement jurisdiction: there was no means by which the Supreme Court could order the marshals to release Worcester and Butler, and no basis for the marshals to do so absent an order.

In the Indian Law context, we are concerned primarily with the distinction between legislative jurisdiction and subject matter jurisdiction. The difference between these two forms of jurisdiction has aptly been summarized as follows:

\textsuperscript{540} \textit{Id.} at 561-62. Unlike the parties in \textit{Cherokee Nation}, the Worcesters were not attempting to invoke the original jurisdiction of the Supreme Court, but rather were invoking its appellate jurisdiction. \textit{Id.} at 515-16. Among the grants of judicial power contained in Article III, \S\ 2, cl. 1 is that over cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Although this is not one of the types of cases for which the Supreme Court has original jurisdiction, see supra note 533, it is one for which the Court has appellate jurisdiction. \textit{U.S. Const.} art. III, \S\ 2, cl. 2. The Court had previously held that the 11th Amendment, which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state," \textit{U.S. Const.} amend. XI, did not effect the Supreme Court's appellate review over state-court judgments involving federal questions. \textit{See} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405-30 (1821) (establishing superiority of federal judiciary over state courts in federal questions). Accordingly, had the Cherokee Nation brought suit against Georgia in the Georgia state courts, the Supreme Court would similarly have been empowered to review the case.

\textsuperscript{541} \textit{Worcester}, 31 U.S. at 539.

\textsuperscript{542} \textit{Getches et al., supra} note 17, at 122 (citing Burke, \textit{The Cherokee Cases: A Study in Law, Politics, and Morality}, 21 \textit{Stan. L. Rev.} 500, 525-26 (1969)). In fact, it is this case of which President Andrew Jackson is alleged to have said, "John Marshall has made his decision; now let him enforce it." \textit{Id.} at 523 (citing \textit{Horace Greeley, American Conflict} 106 (1864)).
Subject matter jurisdiction is a court’s power to hear a category of disputes without necessary regard to the substantive rules that are applied. In contrast, legislative jurisdiction deals with the power of a state to prescribe substantive law, without necessary regard to the forum in which that law is applied.\textsuperscript{543}

Typically, it is perfectly permissible for the courts of one sovereign, such as those of a given U.S. state, to exercise adjudicative jurisdiction over a dispute even though it lacks the power under the due process clause to apply its own substantive laws to the dispute.\textsuperscript{544} Yet, in the Indian Law context, the Supreme Court has recently tied tribal adjudicative jurisdiction to tribal legislative jurisdiction, making an understanding of the limits on tribal legislative jurisdiction salient to an understanding of the scope of tribal adjudicative jurisdiction.

In \textit{Montana v. United States},\textsuperscript{545} the Supreme Court considered the scope of a tribe’s civil legislative jurisdiction over non-Indians on tribal lands. In \textit{Montana}, the Crow Tribe enacted an ordinance prohibiting hunting and fishing on the reservation by anyone not a member of the tribe.\textsuperscript{546} The Supreme Court upheld the tribe’s authority to prohibit nonmembers of the tribe from hunting or fishing on land owned by the tribe or held in trust for the tribe by the federal government.\textsuperscript{547} However, the Court concluded that the tribe lacked legislative authority to regulate hunting and fishing by non-Indians on lands within the tribe’s reservation owned in fee simple by non-Indians.\textsuperscript{548} The Court held that, with respect to nonmembers of an Indian tribe, the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the

\textsuperscript{543} \textit{Born}, \textit{supra} note 529, at 2.
\textsuperscript{544} \textit{E.g.}, \textit{Phillips Petroleum Co. v. Shutts}, 472 U.S. 797 (1985) (holding Kansas courts can exercise judicial jurisdiction over nationwide class action, but cannot apply Kansas law to all claims).
\textsuperscript{545} 450 U.S. 544 (1981).
\textsuperscript{546} \textit{Id.} at 548-49.
\textsuperscript{547} \textit{Id.} at 557.
\textsuperscript{548} \textit{Id.} at 566-67.
tribes, and so cannot survive without express congressional delegation."\(^{549}\)

The Court construed \textit{Oliphant} as standing for the general proposition that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."\(^{550}\) Still, the Court set forth two exceptions to this general proposition, situations in which the tribe retains inherent authority to regulate non-Indians on their reservations, even with respect to activities taking place on non-Indian fee lands.\(^{551}\) First, tribes retain inherent regulatory authority over non-Indians who enter into consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.\(^{552}\) Second, tribes retain inherent authority to regulate the conduct of non-Indians that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.\(^{553}\) Moreover, Congress may expressly delegate civil legislative jurisdiction over non-member conduct to the tribes.\(^{554}\) Finding no delegation by Congress and that the instant regulation did not fall within either of the two announced exceptions, the Court held that the tribe lacked legislative jurisdiction over hunting and fishing by non-members on land owned in fee by non-Indians.\(^{555}\)

In \textit{Strate v. A-1 Contractors},\(^{556}\) the Supreme Court tied its holding in \textit{Montana} with respect to the civil legislative jurisdiction of tribal courts to the limits on the adjudicative jurisdiction of tribal courts. \textit{Strate} involved a traffic accident between two non-Indians that occurred within the boundaries of the Fort Berthold Indian Reservation, but on a portion of a public highway maintained by the State of North Dakota under a federally granted right-of-way through the reservation.\(^{557}\) The tribal court ruled that it had jurisdiction over

\(^{549}\) Id. at 564.
\(^{550}\) Id. at 565.
\(^{551}\) Id. at 565-66.
\(^{552}\) Id. at 565.
\(^{553}\) Id. at 566.
\(^{554}\) Id. at 566.
\(^{555}\) Id. at 566-67.
\(^{556}\) 520 U.S. 438 (1997).
\(^{557}\) Id. at 442-43.
the case, and the tribal court of appeals affirmed. The tribal court defendants then filed suit in federal district court, seeking declaratory and injunctive relief, contending that, as a matter of federal law, the tribal court lacked adjudicative jurisdiction over the dispute. The district court found that the tribal court had jurisdiction, and the court of appeals affirmed, but the court of appeals en banc reversed, holding that Montana precluded the tribal court from exercising subject matter jurisdiction over the dispute.

The Supreme Court granted certiorari and affirmed. According to the Court, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, and thus the restrictions in Montana with respect to tribal court civil regulatory adjudication likewise limit a tribal court's civil adjudicative jurisdiction. The Court classified the right-of-way as analogous to alienated, non-Indian fee land and held that tribal regulation of nonmember conduct over that land was thus subject to the restrictions in Montana. The Court held that the tortious conduct alleged in the case did not fall within the first Montana exception reaching the activities of nonmembers who enter consensual relationships with the tribe or its members.

Turning to the second Montana exception, the Court conceded that those who drive carelessly on a public highway running through the reservation endanger tribal members in the vicinity, but held that "if Montana's second exception requires no more, the exception would severely shrink the rule." Therefore, the Court limited the second exception, holding that it goes only to those activities that threaten tribal self-government or the tribe's ability to control internal relations, including its power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members of the tribe, and to prescribe rules of inheritance for members. The Court made clear that it was leaving open the question whether the tribal court would have had

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558 Id. at 444.
559 Id.
560 Id. at 444-45.
561 Id. at 453.
562 Id. at 454-56.
563 Id. at 456-57.
564 Id. at 457-58.
565 Id. at 458-59.
adjudicative jurisdiction had the accident occurred on a tribal road,\textsuperscript{566} and noted that the plaintiff in this case was free to pursue her claim in state court.\textsuperscript{567}

The \textit{Strate} Court clearly seemed concerned with the lack of removal jurisdiction, noting that the defendants should not be required to defend the claim in an "unfamiliar court," and that when an analogous situation occurs outside of a reservation, \textit{i.e.}, when nonresidents are the sole defendants in a suit filed in state court, the defendants may remove the case to federal court.\textsuperscript{568}

The Supreme Court returned to the issue of tribal court civil adjudicative jurisdiction over non-member conduct on tribal lands in \textit{Nevada v. Hicks}.\textsuperscript{569} In \textit{Hicks}, a member of the Fallon Paiute-Shoshone Tribes brought suit in tribal court against state game wardens who had searched his home for evidence of an off-reservation crime pursuant to search warrants obtained by both state and tribal courts, alleging trespass to land and chattels, abuse of process, and federal civil rights claims under section 1983.\textsuperscript{570} The tribal court held that it had jurisdiction over the claims, and the tribal appeals court affirmed.\textsuperscript{571} The state officials then filed suit in federal district court, seeking a declaratory judgment that the tribal court lacked jurisdiction.\textsuperscript{572} The district court held that the tribal court had jurisdiction and that the state officials were further required to exhaust any claims of qualified immunity in tribal court.\textsuperscript{573} The court of appeals affirmed, finding that the fact that Hicks's house was located on land owned by the tribe within the reservation was sufficient to support tribal jurisdiction over civil claims against nonmembers of the tribe arising from their activities on that land.\textsuperscript{574} The Supreme Court granted certiorari.\textsuperscript{575}

\textsuperscript{566} Id. at 442.
\textsuperscript{567} Id. at 459.
\textsuperscript{568} Id. at 459 & n.13. There was a dispute in the case over whether the tribal court plaintiff, a non-Indian widow of a member of the tribe, resided on the reservation at the time of the accident. \textit{Id.} at 443 n.2.
\textsuperscript{569} 121 S. Ct. 2304 (2001).
\textsuperscript{570} Id. at 2306.
\textsuperscript{571} Id.
\textsuperscript{572} Id.
\textsuperscript{573} Id.
\textsuperscript{574} Id.
\textsuperscript{575} Id.
The Court first considered whether the tribal court had jurisdiction over the claims arising under tribal law.\textsuperscript{576} The Court noted that under \textit{Strate}, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, and thus that if it found that the tribe lacked authority to regulate—either as an exercise of its inherent sovereignty or delegated federal authority—state wardens executing search warrants for evidence of an off-reservation crime, then the tribal court clearly lacked adjudicative jurisdiction.\textsuperscript{577}

Turning to the \textit{Montana} analysis, the Court rejected the argument that \textit{Montana} applied only to conduct occurring on non-Indian fee land.\textsuperscript{578} The Court held that "the general rule of \textit{Montana} applies to both Indian and non-Indian land," and that "the ownership status of land . . . is only one factor to consider," with the absence of tribal ownership being "virtually conclusive of the absence of tribal civil jurisdiction," but tribal ownership not implying the opposite.\textsuperscript{579} Noting that its previous decisions had held that states have criminal jurisdiction over reservation Indians for crimes committed off the reservation,\textsuperscript{580} the Court held that this jurisdiction entails a "corollary right to enter a reservation . . . for enforcement purposes,"\textsuperscript{581} and that tribal authority to regulate state officers in executing process related to the violation of state laws committed by tribal members off of the reservation is not essential to tribal self-government or internal relations.\textsuperscript{582} Thus, under \textit{Montana} and \textit{Strate}, the tribe lacked inherent authority to legislate with respect to such conduct, and the tribal court lacked inherent authority to adjudicate civil actions arising out of such conduct.\textsuperscript{583} The Court noted that tribal ownership of the land on which the incident took place may at times be dispositive,\textsuperscript{584} but in this case,
the Court did not find that factor dispositive when weighed against the state's interest in pursuing off-reservation violations of its laws.\footnote{585}  

Turning to the section 1983 claim, the court rejected the argument that tribal courts, like state courts, are courts of general jurisdiction with authority to entertain federal claims, noting that there was a "historical and constitutional assumption" associated with concurrent state-court jurisdiction that was "completely missing with respect to tribal courts."\footnote{586} Because a tribe's inherent adjudicative jurisdiction can be no broader than its inherent legislative jurisdiction, the section 1983 claim dealing with the same conduct as the claims arising under tribal law—which the Court found to be outside the scope of the tribe's inherent legislative jurisdiction—could not fall within the tribal court's jurisdiction absent a congressional grant of jurisdiction to tribal courts over section 1983 claims, which the Court found lacking.\footnote{587} In making its determination, the Court was clearly troubled by the lack of removal jurisdiction from tribal courts to federal courts when a federal claim is brought in state court,\footnote{588} and declined to extend its holding in \textit{El Paso Natural Gas Co. v. Neztsosie}\footnote{589} to the instant situation, holding that its decision in that case was an interpretation of the provisions of the Price-Anderson Act rather than the general federal removal statute.\footnote{590}  

In dicta, the Court suggested that tribal courts might not ever have jurisdiction over nonmember defendants. The Court stated that it had "never held that a tribal court had jurisdiction over a nonmember defendant," noting that its cases dealing with tribal court jurisdiction, such as \textit{Williams}, have typically involved suits brought against tribal defendants, and stated that it was "leav[ing]
open the question of tribal-court jurisdiction over nonmember defendants in general.”

The Court noted that the holding in *Strate* that “‘[a]s to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction’ . . . leaves open the question whether a tribe’s adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction.”

Justice Souter, writing for himself and Justices Kennedy and Thomas, concurred. Justice Souter would have gone further than the majority opinion in one respect and would have held that, “as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers,” subject to the *Montana* exceptions. He would thus emphasize that the primary jurisdictional fact is the membership status of the parties, and that the status of the land on which the acts took place matters only secondarily in applying the *Montana* exceptions. Justice Souter noted that tying the tribal court’s authority to land status “would produce an unstable jurisdictional crazy quilt,” and stressed that a number of factors made certainty important for nonmembers: that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to tribes; that while ICRA provides analogous protections, they are not identical, and that in any event there is a trend in tribal courts of interpreting the provisions of ICRA without regard to the Supreme Court’s precedents for the analogous constitutional rights; and that tribal courts differ from state and federal courts in their structure, the substantive law that they apply, and the independence of their judges from the political branches of the tribes. Moreover, he stressed the fact that there is no effective mechanism in place to review a tribal court’s decisions on matters of state or federal law,

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591 *Id.* at 2309 n.2.
592 *Id.* at 2309 (emphasis added). Justice Ginsberg wrote a separate concurrence, making clear her understanding that the Court’s decision was leaving open the question of tribal-court jurisdiction over nonmember defendants in general, including state officials engaged “in a venture or frolic of their own.” *Id.* at 2324 (Ginsberg, J., concurring).
593 *Id.* at 2318 (Souter, J., concurring).
594 *Id.* at 2318.
595 *Id.* at 2318. Justice Souter pointed out that because the Court was dealing with inherent authority, and not that authority expressly delegated to the tribes by statute, the *Duro* distinction between members and nonmembers applied. *Id.* at 2319 n.2.
596 *Id.* at 2322 & n.4.
597 *Id.* at 2322-23.
since cases can neither be removed to nor reviewed by federal or state courts.\(^5\)

Justice Stevens, joined by Justice Breyer, wrote a separate concurrence.\(^6\) Justice Stevens disagreed with the Court's conclusion that tribal courts may not exercise their jurisdiction over claims seeking relief under section 1983, arguing that they should be free to do so, and that such claims could be "removed," as suggested by the government, by allowing a defendant to obtain a federal-court injunction against the action, which has the effect of forcing the suit to be refiled in federal court.\(^7\) In his view, absent federal law to the contrary, the question of whether a tribal court is one of general jurisdiction is, as with state courts, a matter of state law.\(^8\)

The dicta in *Hicks* is no doubt a preview of things to come, and it is thus only a matter of time before the lower courts rely on that dicta to conclude that tribal courts lack jurisdiction over nonmember civil defendants. To avoid such a blow to tribal sovereignty, tribal leaders must work with Congress to integrate the tribal courts into the federal system to allay the sorts of concerns motivating the Supreme Court's decisions in *Strate* and *Hicks*. Accordingly, Part III of this Article examines the ways in which Congress has addressed the "no forum" and "biased forum" problems in the past.\(^9\) Part IV then suggests specific solutions to the "no forum" and "biased forum" problems in Indian Law.\(^10\)

\(^{556}\) *Id.* at 2332.

\(^{559}\) *Id.*

\(^{560}\) *Id.* at 2332-33.

\(^{561}\) *Id.* at 2333. Justice O'Connor wrote a concurrence, joined by Justices Stevens and Breyer, in which she agreed with the majority that the *Montana* analysis governed nonmember conduct both on and off tribal land, but wrote separately to express her disagreement with the application of *Montana* in the case before the Court. *Id.* at 2325 (O'Connor, J., concurring). Justice O'Connor believed that the majority's decision gave too little weight to the fact that the state officials' activities occurred on land owned by the tribe and incorrectly treated as dispositive the fact that the nonmembers in this case were state officials enforcing state law. *Id.* at 2327. Justice O'Connor would have resolved the case by treating the qualified immunity defenses of the defendants as "jurisdictional," and thus allowing the lower federal court to dispose of the case by deciding the question of qualified immunity, which would allow it to avoid reaching the question of tribal court jurisdiction per se. *Id.* at 2330-32.

\(^{562}\) See infra notes 604-1019 and accompanying text.

\(^{563}\) See infra notes 1020-1102 and accompanying text.
III. CONGRESSIONAL SOLUTIONS TO THE NO-FORUM AND BIASED FORUM PROBLEMS IN OTHER CIRCUMSTANCES

Historically, Congress has shown itself to be creative in making use of the existing Article III courts and creating specialized federal courts where necessary both to fill jurisdictional gaps and to provide a neutral federal forum where there exists a risk of bias in local courts. This Part examines the various ways in which Congress has provided a federal forum to adjudicate disputes arising in U.S. territories and possessions, in foreign countries, and in federal enclaves within the boundaries of U.S. states, as well as the ways in which Congress has provided for federal court adjudication of cases that would otherwise be adjudicated in state courts. In addition to examining the various models used by Congress to fill jurisdictional gaps and to provide a neutral federal forum, this Part also examines Congress's constitutional authority to vest the existing Article III courts with such jurisdiction, as well as its authority to create specialized, non-Article III courts to adjudicate such disputes.

A. CREATION OF NEW, SPECIALIZED FEDERAL COURTS

1. U.S. Territories and Possessions. The text of Article III of the U.S. Constitution provides a limitation on the sorts of tasks and cases that Congress can ask the federal courts to take on as well as certain protections for the judges who sit on such courts. First, Article III speaks of "[t]he judicial power" being vested in the U.S. Supreme Court and the inferior federal courts created by Congress. The Supreme Court has held that this limits Congress to vesting federal courts with "judicial," as opposed to administrative or legislative power.

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606 See Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 469 (1930) ("[T]he Court] cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative."); Keller v. Potomac Elec. Power
Second, Article III limits the scope of the "judicial power" to particular, enumerated categories of cases and controversies, including cases "arising under" federal law and controversies between citizens of different states. Thus, the plain text of Article III would seem to limit Congress's ability to vest federal courts with suits not falling within the enumerated categories, such as a dispute between two citizens of the same state that is grounded solely in state law.

Third, Article III contains important protections for the judges appointed to the federal courts. Article III provides that the judges of the Supreme Court and the inferior federal courts have life tenure and that their salaries cannot be decreased during their tenure in office. While the direct effect of these provisions is to provide federal judges with a high degree of security, their purpose is to insulate federal judges from political and popular pressure and thus to ensure their independence and objectivity.

Yet the Supreme Court has upheld the authority of Congress to create specialized federal courts for the territories—so-called "legislative courts"—that adjudicate matters falling outside of the enumerated categories in Article III, and whose judges lack the protections of life tenure and guaranteed compensation. In American Insurance Co. v. Canter, the Supreme Court reasoned that Congress derives its authority to create courts for the territories from the Territory Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful

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607 U.S. Const. art. III, § 2.
608 U.S. Const. art. III, § 1.
609 See The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("In a monarchy [life tenure] is [an] . . . excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."); The Federalist No. 79, at 472 (Alexander Hamilton) ("A Power Over a Man's Subsistence Amounts to a Power Over His Will.").
610 26 U.S. 511 (1828).
Rules and Regulations respecting the Territory or other Property belonging to the United States,611 not from Article III. Thus the restrictions contained in Article III do not apply to the territorial courts.612 While the Supreme Court has more recently attempted to set limits on Congress's authority to create non-Article III courts, in doing so, it has re-affirmed Congress's authority to create specialized courts for the territories free of the constraints imposed by Article III.613

When Congress has created specialized courts for the adjudication of disputes arising in the U.S. territories and possessions, it has employed one of three models. The first model, perhaps best described as the "classic" model, is to create a single, non-Article III

611 U.S. CONST. art. IV, § 3, cl. 2.

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

Id.; see also Glidden Co. v. Zdanok, 370 U.S. 530, 544-45 (1962) (plurality opinion) ("[T]he territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.").

613 See N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-64, 75-76 (1982) (plurality opinion) ("[T]here are a series of cases in which this Court has upheld the creation by Congress of non-Art. III 'territorial courts.' This exception from the general prescription of Art. III dates from the earliest days of the Republic .... "). Not every justice agreed that the case law necessarily supports "a general proposition and ... tidy exceptions." Id. at 91 (Rehnquist, J., concurring). The dissent viewed the issue generally as requiring a balancing of the values Congress hopes to serve through the use of Article I courts against the value of judicial independence expressed in Article III. Id. at 113-18 (White, J., dissenting).

Subsequent cases appear to endorse the balancing test. See generally CFTC v. Schor, 478 U.S. 833 (1986) (holding Congress's empowerment of Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings did not violate Article III); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (holding Article III did not prohibit Congress from selecting binding arbitration with limited judicial review as mechanism for resolving disputes among participants in pesticide registration scheme of Federal Insecticide, Fungicide, and Rodenticide Act). However, none of these subsequent cases question Congress's authority to create non-Article III courts for geographic areas outside of the states.
federal court and vest it with the regular jurisdiction of a typical federal district court along with the general jurisdiction typically exercised by a state court. Such courts not only exercise jurisdiction over disputes raising federal questions and diversity cases, but also adjudicate run-of-the-mill tort, contract, and other disputes between two non-diverse citizens arising in the territory. A prototypical example of the "classic" model arose in the District of Alaska, where Congress created a territorial court in 1884.614 This federal court was vested with both Article III powers and with general jurisdiction.615 Unlike typical Article III judges, its judges were appointed for four-year terms.616 Because Alaska, like many other western territories, lacked a pre-existing local sovereign government, it was necessary for Congress to create a forum with jurisdiction to adjudicate matters that typically would have been brought in state court.

Congress took a somewhat different approach—herein referred to as the "state" model—when creating federal courts for the territories of Hawaii and Puerto Rico. Unlike the largely uninhabited and ungoverned western territories, prior to its annexation as a U.S. territory, Hawaii was an independent Republic with a three-tiered judicial system consisting of district courts for minor cases, courts of general jurisdiction known as circuit courts, and a supreme court.617 After Hawaii was annexed as a territory to the United States,618 Congress provided for the continuation of Hawaii's three-tiered system of local territorial courts,619 except that the President had the authority to appoint the judges, subject to Senate approval,

615 See McAllister v. United States, 141 U.S. 174 (1891) ("[T]he district court for Alaska was invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon . . . ").
616 § 9, 23 Stat. at 24.
618 J. Res. 55, 55th Cong., 30 Stat. 750 (1898).
619 See Act of Apr. 30, 1900, ch. 339, § 81, 31 Stat. 141, 157 ("[T]he judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish . . . ").
and to remove justices of the Hawaiian Supreme Court. In addition, Congress established a district court for the Territory of Hawaii, vested with the powers of a typical Article III federal district court, with judges appointed for six-year terms. Congress further provided that the relationship between the local territorial courts in Hawaii and the federal courts was to be governed by the same rules as the relationship between state and federal courts, thus providing for removal of cases from the local courts to the federal territorial court in diversity and federal question cases. This scheme made Hawaii one of the few organized territories in the United States at the time to have separate court systems for local territorial matters and Article III matters.

Congress took a similar approach in providing for the territory of Puerto Rico. In 1898, Puerto Rico was ceded to the United States by Spain in a treaty between the two nations, and became an unincorporated territory of the United States. In 1900, Congress enacted a statute providing for the establishment of local territorial courts for Puerto Rico as well as a federal district court. The Act provided for the appointment of a single judge for the

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620 Id. § 82; see also id. § 80 (discussing appointment, removal, tenure, and salaries of officers). The terms of the local judges and justices and the manner in which they were appointed was a sharp departure from the practice that existed when Hawaii represented an independent republic. Tavares, supra note 617, at 18-20.

621 Act of Apr. 30, 1900, ch. 339, § 86, 31 Stat. at 158 (calling for establishment of district court with judge appointed by President for six-year term and having same jurisdiction and powers of United States district and circuit courts).

622 Id.

623 Tavares, supra note 617, at 18 n.5.

624 Until 1932, Puerto Rico was referred to as “Porto Rico,” at which point its name was changed by Congress. S.J. Res. 36, 72d Cong. (1932).

625 Treaty of Peace, Dec. 10, 1898, U.S.-Spain, art. II, 30 Stat. 1754, 1755 (ceding to United States “Porto Rico” as well as other West Indies islands then under Spanish rule).

626 Under the incorporation doctrine, the U.S. constitution is fully applicable only in those territories that have formally been “incorporated” into the United States. In unincorporated territories, only so-called “fundamental” constitutional rights are applicable. See Balzac v. Porto Rico, 258 U.S. 298, 313 (1922) (deciding Congress did not incorporate Puerto Rico). All of the modern U.S. territories are deemed to be unincorporated. See Stanley K. Laughlin, Jr., The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa, 13 U. HAW. L. REV. 379, 424 (1991) (discussing incorporation doctrine).

627 See Balzac, 258 U.S. at 312-13 (deciding Congress did not incorporate Puerto Rico); Downes v. Bidwell, 182 U.S. 244, 287 (1901) (holding Puerto Rico is territory appurtenant and belonging to United States, but not part of United States).

628 Act of Apr. 12, 1900, ch. 191, §§ 33-34, 31 Stat. 77, 84.
federal court by the President for a term of four years. The Act also provided that the relationship between the local and federal courts in Puerto Rico for removal and the like was to be governed by the same rules operating as between the federal and state courts.

In most respects, the U.S. District Court for the District of Puerto Rico exercised no more jurisdiction than a typical Article III district court. However, diversity jurisdiction was broader in one significant respect. In 1901, Congress vested the district court with jurisdiction over any civil case in which the amount in controversy exceeded $1,000 and any party was a U.S. or foreign citizen. In 1917, Congress slightly modified the statute, granting the District of Puerto Rico jurisdiction over all controversies where the amount in dispute exceeded $3,000 and all the parties on either side of the dispute were non-domiciliaries of Puerto Rico. Under this scheme, jurisdiction was proper between two aliens and in many other instances not typically covered by diversity jurisdiction. The statute was thus held by the Supreme Court to allow jurisdiction over disputes wherein both parties were citizens of Spain, even though traditional Article III courts would lack jurisdiction over such matters because of the Diversity Clause of Article III. The Supreme Court has never discussed the constitutional issue, but lower federal courts have construed this as permissible on the ground that the District of Puerto Rico is an Article IV legislative

\[629\] Id. § 34. In 1913, Congress provided that when the district judge of the district of Puerto Rico was absent from the district or disqualified from a case, the governor of Puerto Rico had the authority to designate a justice of the Puerto Rico Supreme Court to act as a temporary or special judge for the federal court. Act of Jan. 7, 1913, ch. 6, 37 Stat. 648. In 1917, Congress shifted the responsibility for appointing a temporary replacement to the President. Act of Mar. 2, 1917, ch. 145, § 41, 39 Stat. 966. Congress extended the term to eight years in 1938. Act of Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118.

\[630\] Act of Apr. 12, 1900, ch. 191, § 34, 31 Stat. 77, 84.


\[633\] See Sanfeliz v. Bank of N.S., 74 F.2d 338, 338-39 (1st Cir. 1934) (noting Federal District Court for Puerto Rico is not court of United States, but legislative court, so Congress can confer unlimited judicial power upon it).


\[635\] Ortega v. Lara, 202 U.S. 339, 344 (1906). The Court, however, found itself without appellate jurisdiction over the matter. Id.

court and thus not constrained by the limiting clauses in Article III.\textsuperscript{637}

Congress has since made a number of changes to the District Court for the District of Puerto Rico that have made it indistinguishable from typical Article III district courts. In 1966, Congress provided that the judges of the District of Puerto Rico would have life tenure,\textsuperscript{638} and, in 1970, provided that their salaries would not be diminished and made the court's jurisdiction identical to that of the Article III district courts in the states.\textsuperscript{639} As a result, several commentators and courts now refer to the court as an Article III court,\textsuperscript{640} although the matter has yet to be conclusively determined.

With three of the territories in existence today—Guam,\textsuperscript{641} the Virgin Islands,\textsuperscript{642} and the Northern Mariana Islands\textsuperscript{643}—Congress

\textsuperscript{637} Sanfeliz, 74 F.2d at 338; see also Balzac v. People of Porto Rico, 258 U.S. 298, 312 (1922) ("The United States District Court is not a true United States court established under Article III of the Constitution . . . . The resemblance of its jurisdiction to that of true United States courts . . . does not change its character as a mere territorial court.");


has employed what is herein referred to as a "transitional" model. Congress created a District\(^{644}\) Court of Guam,\(^{645}\) a District Court of the Virgin Islands,\(^{646}\) and a District Court for the Northern Mariana Islands\(^{647}\) and vested them all with both the jurisdiction of a regular Article III federal district court and with general original jurisdiction over all local causes of action over which no local court estab-


\(^{644}\) Congress chose to refer to the federal court as the "District Court of Guam" instead of the "United States District Court of Guam" since it was created under Article IV, § 3 rather than Article III, and was vested with original jurisdiction to decide both Article III and local matters. See Guam v. Olsen, 431 U.S. 195, 196 n.1 (9th Cir. 1977) (citing S. Rep. No. 81-2109, 12 (1950)). A similar rationale no doubt justifies the naming of the District Court of the Virgin Islands and the District Court for the Northern Mariana Islands.


\(^{646}\) 48 U.S.C. §§ 1611(a), 1612(a)-(b) (1994).

\(^{647}\) Id. §§ 1821(a), 1822(b).
lished by the territorial legislature had jurisdiction. Under this scheme, the jurisdiction of the federal territorial court gradually shrinks as local territorial courts are created to adjudicate local matters until its docket becomes indistinguishable from that of a typical Article III district court. Such a model is thus respectful of local territorial self-government, yet simultaneously avoids the risk of jurisdictional gaps while the territorial government takes time to organize itself.

Similarly, Congress has created an appellate division of the District Court of Guam, the District Court of the Virgin Islands, and the District Court for the Northern Mariana Islands to which appeals can be brought from the local courts created by the territorial legislatures until such time as the local legislatures establish local appellate courts. Again, while respecting the right of the territorial legislatures to create their own appellate courts to hear appeals from the local territorial courts, this model ensures that some form of appellate jurisdiction exists pending the creation of a local appellate court.

The local territorial courts created by the territorial legislatures in the Virgin Islands, the Northern Mariana Islands, and Guam are, like most state courts, courts of general jurisdiction, with the ability to exercise jurisdiction not only over purely local disputes, but also over diversity and federal question cases. As a result, Congress has provided for removal from the local territorial courts to the

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648 For example, in 1990, the Virgin Islands legislature vested in the Territorial Court of the Virgin Islands original general jurisdiction in all civil actions, regardless of the amount in controversy. 4 V.I. CODE ANN. § 76(a) (1997). As of 1994, the legislature vested in the Territorial Court original jurisdiction over all criminal actions. Id. § 76(b). Accordingly, the District Court of the Virgin Islands is divested of its jurisdiction over any civil actions that would not otherwise fall within the concurrent jurisdiction of a federal district court (such as diversity and federal question suits), Brow v. Farrelly, 994 F.2d 1027, 1033 (3d Cir. 1993), except that it retains jurisdiction, pursuant to a special statutory grant over, local criminal offenses that are part of the same transaction as a criminal offense for which the District of the Virgin Islands is vested with jurisdiction. 48 U.S.C. § 1612(c) (1994) (investing in District Court of Virgin Islands concurrent jurisdiction with courts established by local law over acts which are felonies or misdemeanors).

649 48 U.S.C. §§ 1424-1(a), 1424-3(a), (d).

650 Id. § 1613a(a).

651 Id. § 1823(a).

652 See e.g., id. § 1611(b) (authorizing legislature of Virgin Islands to vest Courts of Virgin Islands with "local law jurisdiction").
federal territorial courts in those instances in which the general jurisdiction of the local territorial courts overlaps with the core Article III jurisdiction of the federal territorial court.\footnote{Id. § 1424-2 (Guam); id. § 1613 (Virgin Islands); id. § 1824(a) (Northern Mariana Islands); see also Brown v. Francis, 75 F.3d 860, 864 (3d Cir. 1996) (discussing jurisdictional prerequisite to removal).}

As with most of the federal territorial courts, the judges of the District Court of Guam,\footnote{See 48 U.S.C. § 1424b(a). The statute also gives the Chief Judge of the Ninth Circuit and the Chief Justice of the United States authority temporarily to assign judges to serve on the District Court of Guam. \textit{Id.}} the District Court of the Virgin Islands,\footnote{Id. § 1614(a). The act also gives the Chief Judge of the Third Circuit and the Chief Justice of the United States authority temporarily to assign judges to serve on the District Court of the Virgin Islands. \textit{Id.}} and the District Court for the Northern Mariana Islands\footnote{Id. §§ 1821(b)(1)-(2). The act also gives the Chief Judge of the Ninth Circuit, and the Chief Justice of the United States authority temporarily to assign judges to serve on the District Court for the Northern Mariana Islands. \textit{Id.} § 1821(b)(2).} lack life tenure and are appointed only for a term of ten years.

2. \textit{District of Columbia.} Just as Congress has the authority to create specialized, non-Article III courts for the outlying territories, so it has similar jurisdiction to create specialized, non-Article III courts for the District of Columbia. However, the constitutional authority justifying Congress's creation of non-Article III federal courts in the District of Columbia is found in Article I. Congress has created both Article III and Article I courts in the District of Columbia, and an examination of the history of the federal courts in the District of Columbia is in order to understand the current status of these courts and Congress's constitutional authority to create them.

In 1801, Congress created a circuit court for the District of Columbia.\footnote{Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105.} The court served as an original court of general jurisdiction,\footnote{Id. § 5, 2 Stat. at 106.} and its judges were appointed for life.\footnote{Id. § 3, 2 Stat. at 105.} In 1863, Congress abolished the circuit court for the District of Columbia\footnote{Act of Mar. 3, 1863, ch. 91, § 16, 12 Stat. 762, 764.} and created the Supreme Court of the District of Columbia as an original court of general jurisdiction.\footnote{Id. § 1, 12 Stat. at 762-63. The Court was vested with the powers of the former circuit
sor, the judges of the Supreme Court of the District of Columbia were appointed for life. In 1893, Congress established a District of Columbia Court of Appeals, with appellate jurisdiction over the decisions of the Supreme Court of the District of Columbia and with its judges appointed for life.

In a series of early twentieth century cases, the U.S. Supreme Court held that the Supreme Court of the District of Columbia and the District of Columbia Court of Appeals were legislative courts created pursuant to Congress's Article I power over the District of Columbia. As such, those courts could be vested with the authority to undertake administrative as well as judicial tasks. In 1933, however, the Supreme Court did an about-face, holding in O'Donoghue v. United States that both the District of Columbia Court of Appeals and the Supreme Court of the District of Columbia were Article III courts and that the judges of those courts were entitled to the protections of the Tenure and Compensation Clauses.

O'Donoghue involved a suit brought by a justice of each of the two courts, challenging the application to them of a congressional statute reducing the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." The Court held that both courts were in fact Article III courts, and thus that the judges

court for the District of Columbia, and any single justice of the court was given the power of a district court of the United States. Id. § 3, 12 Stat. at 763.

662 Id. § 1, 12 Stat. at 763.
664 Id. § 7, 27 Stat. at 435-36. The Act further provided for appeal from the District of Columbia Court of Appeals to the United States Supreme Court. Id. § 8, 27 Stat. at 436.
665 Id. § 1, 27 Stat. 434, 434-35.
666 See U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ").
667 See Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 468 (1930) ("[T]he function assigned to the courts of the District in the statutory proceeding was not judicial in the sense of the Constitution, but was legislative and advisory . . . it is recognized that the courts of the District of Columbia are . . . legislative courts, . . . ").
668 289 U.S. 516 (1933).
669 Id. at 551.
670 Id. at 525-29.
appointed to these courts held their offices during good behavior and that their compensation could not be diminished. The Court distinguished the territories from the District of Columbia on the ground that the former are transitory in character (as they would inevitably become states) while the District of Columbia is to remain in perpetuity in its special status. The Court rationalized its prior holdings approving the vesting of administrative authority in the District of Columbia courts on the ground that these courts were vested with both Article III authority and authority pursuant to the District Clause, thus giving them the authority to exercise both Article III and Article I jurisdiction.

Shortly after the O'Donoghue decision, Congress changed the name of the District of Columbia Court of Appeals to the United States Court of Appeals for the District of Columbia. The court's name was later changed to the United States Court of Appeals for the District of Columbia Circuit. Congress also changed the name

671 Id. at 551.
672 Id. at 536-38.

A sufficient foundation for these decisions in respect of the territorial courts is to be found in the transitory character of the territorial governments... it is not unreasonable to conclude that the makers of the Constitution could never have intended to give permanent tenure of office or irreducible compensation to a judge who was to serve during this limited and sometimes very brief period under a purely provisional government which, in all cases probably and in some cases certainly, would cease to exist during his incumbency of the office. How different are the status and characteristics of the District of Columbia.... The District, as the seat of the national government, is as lasting as the States from which it was carved or the union whose permanent capital it became.

673 U.S. CONST. art. I, § 8, cl. 17.
674 O'Donoghue, 289 U.S. at 546.

But the clause giving plenary power of legislation over the District enables Congress to confer such jurisdiction in addition to the federal jurisdiction which the District courts exercise under Art. III, notwithstanding that they are recipients of the judicial power of the United States under, and are constituted in virtue of, that article.... The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District.

of the Supreme Court of the District of Columbia to the United States District Court for the District of Columbia. In addition to these courts, prior to 1970, there existed in the District of Columbia a separate, local court system of limited jurisdiction created by Congress with three different types of trial courts and an intermediate appellate court; however, the U.S. District Court and the U.S. Court of Appeals for the District of Columbia continued to exercise jurisdiction over purely local matters.

In 1970, Congress enacted the District of Columbia Court Reform and Criminal Procedure Act, in which it substantially restructured the judicial system of the District of Columbia. The Act replaced the pre-existing trial courts in the local court system with the Superior Court of the District of Columbia, which was vested with original jurisdiction over nearly all civil and criminal matters arising under laws applicable solely to the District of Columbia (i.e., local matters). The Act provided for the continuation of the District of Columbia Court of Appeals, vested it with appellate jurisdiction over the Superior Court, and provided for U.S. Supreme Court review of its decisions. The Act also removed much of the jurisdiction that the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit exercised over local criminal and civil matters. The Act specifically designated the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia as Article III courts and designated the District of Columbia Court of Appeals and the Superior Court of the District of Columbia as Article I courts. The Act further provided that judges of the District of Columbia Court of Appeals and the Superior

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680 Id. at 482 (codified at D.C. CODE ANN. § 11-901 (2001)).
681 D.C. CODE ANN. §§ 11-921, 11-923(b).
682 Pub. L. No. 91-358, 84 Stat. 473, 478 (codified at D.C. CODE ANN. § 11-701(a)).
683 84 Stat. at 480 (codified at § 11-721).
684 84 Stat. at 475 (codified at § 11-102).
Court of the District of Columbia were to be appointed by the President for a term of 15 years.

The Supreme Court upheld the constitutionality of this arrangement in *Palmore v. United States.* The Court distinguished *O'Donoghue* on the ground that, with respect to the courts at issue in that case, Congress evinced an intent to create an Article III court, as contrasted with the congressional intent with respect to the creation of the Superior Court at issue in *Palmore.* The Court also distinguished *O'Donoghue* on the ground that the court there had jurisdiction over both purely local matters as well as truly federal matters, while here, the court at issue had jurisdiction solely over local matters. The Court concluded that "the requirements of Art. III, which are applicable where law of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." Accordingly, notwithstanding the long and somewhat complicated history of the District of Columbia courts, it is clear that Congress has the authority under the District Clause to create specialized federal courts for the District of Columbia that are not subject to the constraints of Article III.

3. **Foreign Countries.** Congress has also created a number of courts in foreign nations including a legislative court in China. Beginning in 1842, China adopted a system of granting foreign nationals a right of extraterritoriality by treaty, under which China relinquished criminal and most civil jurisdiction over foreign nationals, leaving to the foreign national's own government responsibility for punishing its nationals for crimes committed in China and for adjudicating most civil disputes involving their own nationals. In 1844, the United States entered into the Treaty of

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687 84 Stat. at 491 (codified at § 11-1501(a)).
688 Id. (codified § 11-1502).
690 Id. at 406-07.
691 Id. at 405-07.
692 Id. at 407, 408.
693 LOSINGIER, supra note 15, at 1.
Wang Hiya, which secured the right of extraterritoriality for U.S. citizens residing in China. The rationale for entering into the treaty was to protect U.S. nationals from what was perceived to be "barbarous and cruel punishments inflicted" by the courts of non-Christian countries, such as China.

Under the terms of the treaty, citizens of the United States who committed any crime in China could be tried and punished only by U.S. authorities. The treaty further provided that civil disputes between U.S. citizens in China would be adjudicated by U.S. authorities and that China would not involve itself in civil disputes between a U.S. citizen and another foreign national, leaving the resolution of such disputes to treaties entered into between the United States and the foreign national's own government.

In so-called "mixed cases"—those civil disputes arising between U.S. and Chinese citizens—the treaty provided that such cases would be "examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction." In practice, the procedure was somewhat unclear, although it typically meant that a U.S. citizen with a civil claim against a Chinese citizen would bring suit in a Chinese "mixed court" presided over by a Chinese official but with a U.S. official in attendance to "watch the

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695 See In re Ross, 140 U.S. 453, 463 (1891) ("[B]y reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, . . . from the arbitrary and despotic action of the local officials."); Lobinger, supra note 15, at 2; Ohlinger, supra note 15, at 339-42.

696 Treaty of Peace, supra note 694, art. XXI, 8 Stat. at 596-97.

697 Id. at XXV, 8 stat. at 598. As a matter of comity, the U.S. consular courts in China entertained suits against U.S. nationals brought by other foreign nationals in China. Dunnell, supra note 694, at 833 ("No such treaties exist[ed between the United States and other nations] but by comity all consular courts in China entertain[ed] suits against their nationals by foreigners.").

698 Ohlinger, supra note 15, at 343.

699 Treaty of Peace, supra note 694, art. XXIV, 8 Stat. at 597.
proceedings in the interests of justice." Likewise, a Chinese citizen with a civil claim against a U.S. citizen would bring suit in a proceeding administered by a U.S. official.

To give effect to the Treaty of Wang Hiya, Congress enacted statutes creating consular courts and vesting the U.S. minister and consuls in China with full civil and criminal jurisdiction over U.S. citizens in China. U.S. consular courts also existed in Siam, Turkey, Persia, Tripoli, Tunis, Morocco, Muscat, Egypt.

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700 See Dunnell, supra note 694, at 833. When a foreigner wishes to prosecute a Chinaman the treaties are indefinite and conflicting as to the proper procedure and the actual practice varies in the different ports. At Shanghai there is a so-called mixed court presided over by a local Chinese official who has sitting with him a consular officer as an advisor or assessor. Officers from the British, American and German consulates take turns in this service. The Chinese judge pronounces the judgment and in theory the consular officer sits only to protect foreign interests.

Id.; Ohlinger, supra note 15, at 343-44 ([A] suit brought by the subject of a treaty power against a Chinese is tried before the native magistrate, who applies the law of the land. The plaintiff’s consul, or other official representative attends the hearing, but only to ‘watch the proceedings in the interests of justice.’ ); id. at 345 (“The magistrate is supposed to pronounce judgment, the assessors merely watching the proceedings ‘in the interests of justice.’ But in practice the American representatives are the only ones who attempt to observe this treaty stipulation.”).

701 See Dunnell, supra note 694, at 833; Gustavus Ohlinger, supra note 15, at 344.

702 Act of Aug. 11, 1848, ch. 150, 9 Stat. 276; Act of June 22, 1860, ch. 179, 12 Stat. 72. See generally LOBINER, supra note 15, at 2-3 (describing drafting of treaty); David J. Bederman, supra note 694, at 461-62 (describing U.S. consular courts in China); Dunnell, supra note 694, at 831-32 (describing power given to consuls in China); Ohlinger, supra note 694, at 344-45 (describing extraterritorial jurisdiction of consuls and ministers). The statutes were made applicable to U.S. consuls in Japan, Siam, Turkey, Persia, Tripoli, Tunis, Morocco, Muscat, the Samoan Islands, and to any other country with which a similar treaty was entered into. Bederman, supra note 694, at 461 n.43.

703 Act of June 22, 1860, ch. 179, §§ 1, 21, 28-29, 12 Stat. 72, 72, 76, 78 (creating consular courts in Siam, Turkey, Persia, Tripoli, Tunis, Morocco, and Muscat).

Madagascar,705 the Samoan Islands,706 and Japan,707 exercising jurisdiction comparable to that of the U.S. consular courts in China.

After several unsuccessful attempts,708 Congress enacted a statute creating a U.S. Court for China in 1906.709 The statute provided that the U.S. consular courts in China would retain jurisdiction over civil cases where the amount in controversy was $500 or less and criminal cases where the potential punishment did not exceed a $100 fine or 60 days imprisonment710 but gave the U.S. Court for China exclusive original jurisdiction over all other disputes formerly falling within the jurisdiction of the U.S. consular courts.711 Judges of the U.S. Court for China were appointed for ten-year terms, subject to removal by the President.712 The U.S. Court for China functioned in large part as a typical federal district court would in the United States, although it differed in that it assumed jurisdiction over a broader range of suits, including probate and family law matters.713 In 1943, China and the United States

705 Act of July 1, 1870, ch. 194, § 1, 16 Stat. 183, 183 (creating consular court for Madagascar).
708 See LOBINGIER, supra note 15, at 4 (describing early attempts to establish U.S. Court for China); Dunnell, supra note 694, at 836 (describing 1884 bill providing for U.S. Court for China that passed Senate but failed House).
710 Id. § 2, at 814.
711 Id. § 1, at 814.
712 Id. § 7, at 816.
entered into a new treaty whereby the United States relinquished its extraterritorial rights in China, and in 1948, Congress repealed the statute creating the U.S. Court for China.

The constitutionality of the U.S. Court for China was approved of in dicta by the Supreme Court in *Ex Parte Bakelite Corp.* There, the Court reasoned that the court was not a "constitutional" court subject to the strictures of Article III, but was instead a "legislative court," established by Congress as a means of effecting the powers conferred in the Constitution respecting treaties and foreign commerce. The Court identified two sources of constitutional authority—the Foreign Commerce Clause of Article I and the Treaty Clause of Article II—that together justified Congress's creation of federal courts to adjudicate disputes abroad involving U.S. citizens.

B. USE OF EXISTING ARTICLE III COURTS

1. Original Jurisdiction, Including Removal. As demonstrated in the previous section, Congress has the authority to create non-Article III courts to adjudicate disputes arising in U.S. territories and other geographic enclaves falling under the exclusive jurisdiction of the federal government. However, creating new, specialized courts is expensive and time consuming. In some instances, it may make sense simply to make use of the Article III courts already in existence. Accordingly, this section examines the ways in which Congress has harnessed the existing Article III courts to adjudicate matters for which it might otherwise create specialized, non-Article III courts and considers the limitations on Congress's ability to do so.

The Constitution gives Congress the authority to exercise exclusive legislative authority, with the consent of the relevant

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716 279 U.S. 438, 451 (1929).
717 Id. at 450-51.
718 U.S. CONST. art. I, § 8, cl. 3.
719 U.S. CONST. art. II, § 2, cl. 2.
720 The states, while stripped of legislative jurisdiction over such enclaves, nonetheless
state legislature, over all places located within a U.S. state that are purchased by the federal government for the erection of forts, federal buildings, and the like. Congress clearly has the authority to enact specific, detailed laws to govern criminal and civil matters arising in such federal enclaves, and Congress has done so as to certain matters, such as by defining the crime of and punishment for murder occurring within such enclaves. But Congress has also enacted two statutes—one for criminal and one for civil matters—that seemingly provide for the application of the law of the state surrounding the enclaves. As to criminal matters, the Assimilative Crimes Act provides for the incorporation of state substantive criminal law as a matter of federal criminal law as to any matter not already made criminal under federal law but that would be unlawful under the law of the state within which the federal enclave is located. Similarly, in the civil context, Section 457 provides that the law of the state within whose exterior borders an area subject to the exclusive jurisdiction of the United States is located will govern private tort disputes occurring within that area.

With this background, consider the case of Yellowstone National Park. Congress created Yellowstone in 1872, prior to the admission of Wyoming, Idaho, and Montana as states. The federal statute admitting Wyoming as a state contained a reservation of exclusive federal jurisdiction over Yellowstone National Park, subject to a proviso that the State of Wyoming could serve civil and

possess concurrent adjudicative jurisdiction over disputes arising in such enclaves. See Ohio River Contract Co. v. Gordon, 244 U.S. 68, 72 (1917) (holding Kentucky courts had jurisdiction over area under legislative jurisdiction of Congress); Stokes v. Adair, 265 F.2d 662, 665-66 (4th Cir. 1959) (describing federal jurisdiction when exclusive jurisdiction over territory ceded by statute to federal government).

U.S. CONST. art. I, § 8, cl. 17.


criminal process within the Park.\textsuperscript{726} Idaho\textsuperscript{727} and Montana\textsuperscript{728} both ceded legislative jurisdiction over those portions of Yellowstone National Park falling within their borders.\textsuperscript{729} In addition, Congress has provided that the U.S. government exercises exclusive jurisdiction over Yellowstone.\textsuperscript{730} Congress did not, however, create a specialized, non-Article III court to adjudicate civil and criminal disputes arising in Yellowstone. Even though parts of the park are located in the states of Wyoming, Idaho, and Montana, Congress has provided that the District of Wyoming—which is an Article III federal district court—consists of the state of Wyoming and those parts of Yellowstone located in the states of Montana and Idaho, and that the Districts of Montana and Idaho consist only of those portions of those states that do not include the park.\textsuperscript{731} Since the enactment of the Judiciary Act of 1789, the District of Wyoming has been described as the only federal district court whose boundaries do not conform to state borders,\textsuperscript{732} although, as shall soon be demonstrated, other federal district courts, historically and even today, fail to conform to state borders.

Suppose that an accident occurs in that portion of Yellowstone falling within the boundaries of Wyoming. The U.S. District Court for the District of Wyoming would have subject matter jurisdiction over a tort action brought by one driver against the other, and the

\textsuperscript{726} Act of July 10, 1890, ch. 664, § 2, 26 Stat. 222; WYO STAT. ANN. §§ 36-10-106, 36-10-108 to -109 (Michie 1997).
\textsuperscript{727} IDAHO CODE § 58-701 (Michie 1994).
\textsuperscript{728} MONT. CODE ANN. §§ 2-1-207, 2-1-208 (2001).
\textsuperscript{729} Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644, 646 (9th Cir. 1929) ("[S]uch acceptance is necessarily implied from the Act of May 7, 1894, 28 Stat. 73 . . . .").
\textsuperscript{730} Act of May 7, 1894, ch. 72, § 1, 28 Stat. 73, 73 (codified at 16 U.S.C. § 24 (1994)).
\textsuperscript{731} 28 U.S.C. § 131 (1994) ("Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho constitute one judicial district."); id § 106 ("Montana, exclusive of Yellowstone National Park, constitutes one judicial district."); id. § 92 ("Idaho, exclusive of Yellowstone National Park, constitutes one judicial district."). The boundaries of the District of Wyoming have been so defined since 1894. Act of May 7, 1894, ch. 72, § 2, 28 Stat. 73, 73. Thus, while the Tenth Circuit is defined as including only the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, 28 U.S.C. § 41, it technically also includes parts of Montana and Idaho. Thomas E. Baker, An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals, 28 GA. L. REV. 863, 898 n.142 (1994).
dispute would be governed by the laws of Wyoming, including its choice of law rules. Now suppose further that the dispute is between two non-diverse citizens: does this mean that Congress has authorized an Article III federal court to adjudicate a non-diversity case turning on a state-law rule of decision, thus potentially exceeding the limits imposed by Article III? If characterized as the enforcement of state law in federal court in cases in which diversity is lacking, there would be a potential Article III concern.

In fact, however, such disputes do “arise under” federal law, at least for Article III purposes. As with many other federal statutes, Congress has, both in the Assimilative Crimes Act and in Section 457, incorporated by reference state law into federal law and, in so doing, has enacted federal law. To be sure, characterizing such law as federal law enacted by Congress requires the courts to entertain the legal fiction that Congress has considered each of the incorporated state laws and determined that they comport with

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733 See Ford v. Allied Mut. Ins. Co., 72 F.3d 836, 837 n.1 (10th Cir. 1996) (“The accident occurred in Yellowstone National Park, a federal territory. In such circumstances, the applicable law is that of the state, Wyoming, in which the national park is located”).


736 Cf. Timothy M. Sullivan, Inadequate Analysis Leading to an Accurate Conclusion: The Ninth Circuit's Cursory Treatment of the Constitutionality of the Lacey Act in United States v. Senchenko, 29 ENVTL. L. 743, 750-51 (1999) (criticizing characterization of Lacey Act, which prohibits movement in interstate commerce of wildlife taken in violation of federal, state, foreign, or tribal laws, and provides for enforcement of Act in federal court, as means of enforcing state law in federal court, on ground that such characterization raises Article III concerns).

737 See, e.g., 18 U.S.C. §§ 1961-68 (1994) (incorporating state felonies as predicates for RICO violation); id. § 1153 (providing that certain crimes committed in Indian country “shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense”); Act of May 25, 1900, ch. 553, 31 Stat. 187-89 (codified at 16 U.S.C. §§ 701, 3371-78 (1994)) (incorporating state law relating to fish and wildlife); 18 U.S.C. § 42 (1994) (incorporating state and tribal wildlife laws).

738 E.g., Johnson v. Yellow Cab Transit Co., 137 F.2d 274 (10th Cir. 1943), aff’d, 321 U.S. 383 (1944).
federal policy. See Sullivan, supra note 736, at 754-55 (discussing incorporation of state law in Lacey Act).

Indeed, the federal courts themselves, when incorporating state law as a matter of federal common law, refuse to incorporate state law deemed by the courts to be hostile to federal policy. See United States v. Little Lake Misere Land Co., 412 U.S. 580, 594-97 (1973) (refusing to incorporate Louisiana law of retroactive imprescriptibility); De Sylva v. Ballentine, 351 U.S. 570, 581 (1956) (incorporating state law in copyright case but asserting state could not use word “in a way entirely strange to those familiar with its ordinary usage”); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1946) (asserting state definitions of real property are to be incorporated as long as state does not discriminate against government “or patently run counter to the terms of the Act”).

See Yellow Cab Transit Co., 321 U.S. at 391 (asserting federal courts are not bound by rulings of state courts in interpretations of federal criminal statute); Kay v. United States, 255 F.2d 476, 479 (4th Cir. 1958) (asserting that state interpretation of statutes adopted under Assimilative Crimes Act not binding upon federal court); United States v. Hopp, 943 F. Supp. 1313, 1315 (D. Colo. 1996) (“Even when a Colorado criminal statute is utilized under the [Assimilative Crimes Act], this Court is not bound by decisions of the Colorado Supreme Court concerning that statute.”). See generally Little Lake Misere, 412 U.S. at 594-97 (refusing to incorporate Louisiana law of retroactive imprescriptibility). But see United States v. Smith, 965 F. Supp. 756, 791 (E.D. Va. 1997) (holding federal court is bound by state substantive criminal case law when applying Assimilative Crimes Act); United States v. Guyette, 382 F. Supp. 1265, 1268 (E.D. Va. 1974) (asserting federal court must, in interpreting state law under Assimilative Crimes Act, “apply the principles that it believes would be used by the Supreme Court of Virginia”).


[A] federal claim that invokes incorporated state law is still a federal claim because the geographic area to which it applies is within exclusive federal legislative and judicial jurisdiction. Regardless of the reference to state law, the rights and obligations relied upon in the claim are entirely creatures of federal law.

Id.
held that, in some circumstances, a suit brought pursuant to a federal statute incorporating state law does not "arise under" federal law for purposes of the general statutory grant of federal question jurisdiction, but that is not an Article III restriction. Additionally, nearly every court that has considered the matter has held that suits brought pursuant to Section 457 "arise under" federal law for purposes of statutory federal question jurisdiction.

Were it not for the fact that Congress exercises exclusive legislative jurisdiction over Yellowstone National Park, an interesting Erie question would arise due to the way in which the boundaries of the District of Wyoming are defined. Under Erie Railroad v. Tompkins, a federal district court sitting in diversity is supposed to apply the law of the state in which it sits, and under Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., that includes the state's choice of law rules. Under a literal interpretation of Erie and Klaxon, if an accident took place within the Montana portion of Yellowstone, Wyoming law would apparently govern. Such a result would seem contrary to the very purpose of Erie, as that would lead to forum shopping as between the state courts in Montana (which would apply Montana law) and the federal courts.

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743 See Shoshone Mining Co. v. Rutter, 177 U.S. 505, 513 (1900) (concluding "mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts").


If, in the first Judiciary Act, Congress had established multistate judicial districts with process effective anywhere within a particular district, and with venue privileges scanty or nonexistent . . . it would be intolerable under such a system that the policy of the state in which the federal court happens to sit should automatically prevail notwithstanding the possibly vital interests of other states in the subject of the litigation.

Id. 304 U.S. 64 (1938).


748 313 U.S. 487 (1941).

749 Id. at 496.
district court in Wyoming, which would, perhaps, be required by 

Erie to apply Wyoming law.

As discussed in the Introduction, after the Massacre of Wild Horse Lake, in 1889 Congress attempted to rectify the "no forum" problem in No Man's Land by placing it within the judicial jurisdiction of the U.S. District Court for the Eastern District of Texas, an Article III federal district court, even though No Man's Land fell outside the territorial boundaries of Texas. After an unsuccessful attempt by the U.S. attorney for the Northern District of Texas to claim jurisdiction over the crime, the defendants were indicted and convicted in the Eastern District of Texas. The prosecution was based on a federal criminal statute providing for the death sentence for murder committed in a place under the exclusive jurisdiction of the United States, coupled with the provision in the 1889 Act that placed No Man's Land within the jurisdiction of the U.S. District Court for the Eastern District of Texas. The defendants challenged the conviction in the Supreme Court, asserting that Congress did not and could not constitutionally vest the Eastern District of Texas with retroactive jurisdiction over crimes occurring in No Man's Land prior to the enactment of the 1889 Act.

The Supreme Court rejected their arguments, interpreting the 1889 Act as granting the Eastern District of Texas retroactive jurisdiction, and rejecting the claim that the act so construed was unconstitutional. The defendants claimed that the Act was inconsistent with the Sixth Amendment's requirement that the accused is entitled to a trial in "the state and district wherein the crime shall have been committed, which district shall have been
previously ascertained by law." According to the Court, this language was applicable only to those crimes that occurred within a state. The court also rejected the claim that so interpreting the statute violated Article III, Section 2 of the Constitution, which requires that "the trial of all crimes... shall be held in the state where the said crimes shall have been committed; but, when not committed within any state, the trial shall be at such place or places as the congress may by law have directed." The Court held that for crimes occurring outside of a state, nothing in this provision requires that Congress determine the place of trial before the crime occurs.

The Court further held that the 1889 Act in no way violated the Ex Post Facto Clause, as it related only to venue and did not in any way touch on the substantive offense or change the punishment therefor—the substantive offense being defined in the federal criminal statute, enacted prior to the date of the offense, providing for the sentence of death for murder in areas within the exclusive jurisdiction of the United States. In so holding, the court thus implicitly decided that No Man's Land fell within the exclusive jurisdiction of the United States. Because the law being applied to No Man's Land by the Eastern District of Texas was federal criminal law enacted by Congress, pursuant to its Article IV power of exclusive legislation over territories and other property within its exclusive jurisdiction, criminal prosecutions under those laws clearly "arose under" federal law for Article III purposes. Therefore, vesting the existing Article III federal court in Texas with jurisdiction over such prosecutions presented no Article III problem.

In 1868, Congress enacted a statute that extended all federal laws governing customs, commerce, and navigation to the Territory of Alaska, outlawed the killing of fur-bearing animals in Alaska, and gave the President the authority to restrict, regulate, and

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757 U.S. Const. amend. VI (emphasis added).
758 Cook, 138 U.S. at 181.
759 U.S. Const. art. III, § 2.
761 Id. at 183.
763 Id. § 6, 15 Stat. at 241. See also Act of July 1, 1870, ch. 189, 16 Stat. 180 (amending provisions regarding killing of fur-bearing animals in Alaska territory).
prohibit the importation and use of firearms, ammunition, and alcohol in Alaska. However, Congress did not create an Article IV court to adjudicate such claims in 1868. Rather, it granted original jurisdiction over any such violations to the existing Article III district courts in the states of California and Oregon and the existing non-Article III district courts in the territory of Washington. Just as in the case of the Eastern District of Texas's exercise of adjudicative jurisdiction over No Man's Land, this clearly fell within the Article III "arising under" jurisdiction of the federal district courts in California and Oregon, as they were applying federal statutory law to disputes arising in the Territory of Alaska enacted by Congress pursuant to its Article IV powers.

As the United States moved westward in the 1800s, Congress took steps to provide for federal court jurisdiction over civil as well as criminal disputes occurring in Indian Country, initially vesting the existing Article III federal courts with jurisdiction over such disputes but eventually creating a specialized, non-Article III federal court to adjudicate such matters. In 1819, Congress created the Territory of Arkansas and established a territorial judiciary. In 1834, while Arkansas was still a territory, Congress extended federal laws governing the punishment of crimes committed any place within the exclusive jurisdiction of the United States to Indian Country (excepting crimes in which the victim and the assailant were both Indians), with most of Indian Country annexed to the Territory of Arkansas for judicial purposes.

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765 Id. § 7, 15 Stat. at 241-42.
766 See Act of Mar. 2, 1819, ch. 49, § 1, 3 Stat. 493, 494 (establishing territorial parameters of Arkansas Territory).
767 Id. § 7, 3 Stat. at 495.
768 Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733. "Indian Country" is defined in the act as referring to "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished . . . ." Id. § 1, 4 Stat. at 729. Congress subsequently made clear that the Act of 1834 did not extend to Indian territory those federal laws enacted specifically for the District of Columbia. Act of Mar. 27, 1864, ch. 26, § 3, 10 Stat. 269, 270.
Arkansas was admitted as a state in 1836, and a federal district court and circuit court were established for the District of Arkansas. After the statutes creating these federal courts were held not to extend the jurisdiction of said courts beyond the territorial limits of Arkansas, Congress passed a statute giving the Article III federal courts sitting in Arkansas territorial jurisdiction over Indian Country. In 1851, Congress divided the state into the Eastern and Western Districts of Arkansas, and placed Indian Country in the Western district. In 1883, Congress took away part of the jurisdiction that the Western District of Arkansas had over Indian Territory and vested it in the District of Kansas and the Northern District of Texas, in part to reduce the burden on the Western District of Arkansas and in part to provide greater access to those residing in the western and southern areas of Indian Territory. Throughout this period of time, the Article III federal courts serving Indian Territory exercised almost exclusive criminal jurisdiction there. Civil disputes among Indians were left to the tribal courts, but there was no court with jurisdiction over civil disputes between non-Indians in Indian Country. No Article III problem presented itself, for these Article III federal district courts were applying federal criminal statutes, and thus all such prosecutions "arose under" federal law for purposes of Article III.

In 1889, Congress created a new federal court—the United States Court in Indian Territory—with jurisdiction over all of Indian Country, which was here for the first time defined to include "No

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770 Act of June 15, 1836, ch. 100, § 1, 5 Stat. 50, 50.
771 Id. § 4, 5 Stat. at 51.
775 Act of Mar. 3, 1851, ch. 24, § 1, 9 Stat. 594, 594.
776 Act of Jan. 6, 1883, ch. 13, §§ 2, 3, 22 Stat. 400, 400; BURTON, supra note 1, at 121 (showing map of division of Indian territory among three district courts as result of Act of January 6, 1883)
777 THE FEDERAL COURTS OF THE TENTH CIRCUIT, supra note 2, at 180.
778 See BURTON, supra note 1, at 72-82, 109 (discussing laws and jurisdiction over Indian Territory throughout period).
779 Id.
780 See supra notes 737-44 and accompanying text.
Man's Land. The new court was given exclusive jurisdiction over minor crimes, as well as civil jurisdiction in suits involving more than $100 (excluding suits between Indians). Major crimes, however, continued to fall within the jurisdiction of the federal district courts in Arkansas, Texas, and Kansas, except that the jurisdiction of the Northern District of Texas was eliminated and transferred to the Eastern District of Texas, as was a portion of the territorial jurisdiction previously exercised by the Western District of Arkansas. The new court's creation was necessary to provide a forum of general jurisdiction for civil disputes arising in Indian Territory, as such disputes, where diversity was lacking, would not appear to fall within the Article III jurisdiction of the federal district courts in the surrounding states that were exercising criminal jurisdiction over Indian Country.

In 1890, Congress enacted a statute in which it created the Territory of Oklahoma out of a large portion of what was formerly Indian Country. The act provided for the creation of a territorial judiciary and stripped the federal courts in Texas, Arkansas, and Kansas of any jurisdiction over those areas. It defined Indian Country as now including the portion of Indian Country that was not used to create the Territory of Oklahoma, and limited the jurisdiction of the U.S. Court in Indian Territory to that area. The civil jurisdiction of the federal court in Indian Territory was expanded to include all civil disputes save for those falling within the exclusive jurisdiction of the tribal courts, which was defined as all cases in which all parties to the dispute were members of the

781 Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783, 783. The judge of the court was to be appointed by the President for a term of four years. Id. See also supra note 8 and accompanying text.
783 Id. § 6, 25 Stat. at 783-84.
784 See BURTON, supra note 1, at 151-54 (discussing jurisdiction over major and minor crimes committed on Indian lands).
786 See BURTON, supra note 1, at 72-82, 109.
787 Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81, 81.
788 Id. § 9, 26 Stat. at 85.
789 Id. § 9, 26 Stat. at 86.
790 Id. § 29, 26 Stat. at 93.
791 Id.
same Indian nation, and all contract disputes on contracts between a member of a tribe and a U.S. citizen. The statute also expanded the civil and criminal jurisdiction of the U.S. Court in Indian Territory to include any case in which the parties, while all Indians, were members of different tribes. Because the court was a legislative court and not an Article III court, it was not bound by the restrictions of Article III and could thus be vested with this special form of "diversity" jurisdiction.

In 1895, Congress enacted a statute dividing Indian Territory into three judicial districts and provided for the appointment of two additional judges. The act also provided for the appointment of commissioners with exclusive jurisdiction in civil cases where the amount in controversy was less than $100. In addition to the jurisdiction previously conferred on the United States court in Indian Territory, the judges of the three judicial districts were given appellate jurisdiction over decisions of the commissioners where the amount in controversy exceeded $20 and, after eighteen months, original jurisdiction in all criminal cases arising in Indian Territory that had previously been exercised by the Western District of Arkansas, the District of Kansas, and the Eastern District of Texas. Thus, while six different federal courts exercised jurisdiction over the area then known as Indian Territory for a transition period of eighteen months, thereafter all federal court jurisdiction over Indian Country was vested in the three non-Article III district courts for Indian Country. In addition, the judges of the three judicial districts of Indian Territory were constituted as a court of

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792  Id. § 30, 26 Stat. at 94.
793  Id. § 29, 26 Stat. at 93-94.
794  Id. at § 36, 26 Stat. at 97. In 1897, Congress expanded the jurisdiction of the U.S. Court in Indian Territory to include all civil and criminal cases in Indian Territory, making no exception for suits involving members of the same tribe. Act of June 7, 1897, ch. 3, 30 Stat. 62, 83.
795  See Wallace v. Adams, 204 U.S. 415, 422 (1907) ("The United States Court in Indian territory is a legislative court . . .").
796  Act of Mar. 1, 1895, ch. 145, § 1, 28 Stat. 693, 693.
797  Id. § 2, 28 Stat. at 694.
798  Id. § 4, 28 Stat. at 695-96.
799  Id. § 9, 28 Stat. at 697.
800  See BURTON, supra note 1, at 217-19 (discussing transformation from six federal courts to three courts).
appeals for Indian Territory with appeals therefrom to the Eighth Circuit but with no further appeal to the Supreme Court. In 1906, Congress passed an enabling act providing for the merger of the Oklahoma and Indian Territories and their admission collectively as the State of Oklahoma. The enabling act provided for the creation of two federal judicial districts in the new state, with the former Indian Territory constituting the eastern district and the former Oklahoma Territory constituting the western district and provided for the transfer of Article III cases from the territorial courts of Oklahoma and Indian Country to the newly created federal courts. The following year, the enabling act was accepted by the Constitutional Convention for Oklahoma, and the President proclaimed Oklahoma admitted as a state.

2. Defining Islands as Vessels on the High Seas: The Pacific Possessions and Guano Islands. In 1856, Congress enacted a statute providing that, when a U.S. citizen discovered a deposit of guano on any unoccupied island, rock or key not within the

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801 See Act of Mar. 1, 1895 § 11, 28 Stat. 693, 698. In 1905, Congress provided that appeals from the U.S. Court of Appeals in Indian Territory to the Eighth Circuit would be governed by the same rules governing appeals from the U.S. circuit courts to the Eighth Circuit. Act of Mar. 3, 1905, ch. 1479, § 12, 33 Stat. 1048, 1081. Because there were only three judges in Indian Territory who also sat as the U.S. Court of Appeals in Indian Territory, there were never enough judges to sit as a court of appeals without involving on that panel one of the judges whose decision was being appealed. See Burton, supra note 1, at 233 (discussing appointment of additional judge to appellate court to allow for review without including judge who presided over case under review). Therefore, in 1897 Congress provided for the appointment of a fourth judge for Indian territory who would sit on the court of appeals and would also serve as a district judge where needed. Act of June 7, 1897, ch. 3, 30 Stat. 62, 84. In 1902, Congress carved out of the northern district of Indian Territory a western district, and assigned a floating judge to that district. Act of May 27, 1902, ch. 888, § 8, 32 Stat. 245, 275. In 1904, Congress provided for the appointment of a second judge in each of the four districts, although none of them were to sit on the Court of Appeals. Act of Apr. 28, 1904, ch. 1824, § 1, 33 Stat. 573, 573.

804 Id. § 13, 34 Stat. at 275.
805 Id. § 16, 34 Stat. at 276.
808 Guano is made up of the bird droppings of the white-breast cormorant, the gray pelican, and the white-head gannet or piqueros, amassed over hundreds of years and considered a prized commodity in the 19th century world-wide for use as a fertilizer. See
jurisdiction of any government, it would, in the discretion of the
President, be considered a part of the United States.809 The act
further provided for U.S. criminal jurisdiction by extending
admiralty law over such islands, rocks, and keys, stating that acts
committed on them or in the surrounding waters would be deemed
to have been committed on board a U.S. merchant ship on the high
seas.810

On September 14, 1889, on Navassa Island, an island in the
Caribbean Sea that had been appertained to the United States in
accordance with the act, one Henry Jones murdered one Thomas N.
Foster with an axe.811 Under the Constitution, a crime committed
within any state must be tried in that state and in a district
previously ascertained by law, but a crime not committed within any
state may be tried at any such place as Congress directs.812
Congress by statute had directed that all offenses committed outside
of any state would be tried in the district where the offender is
found or in the district where he is first brought.813 Under federal
law, murder committed on the high seas or on any land within the
exclusive jurisdiction of the United States was a capital offense.814
The defendant was indicted in the district of Maryland, the first
district into which he was brought from Navassa Island, and was
convicted of murder and sentenced to death.815

In Jones v. United States, the Supreme Court upheld Jones's
conviction against a challenge that the 1856 Act was an unconstitu-
tional expansion of federal admiralty jurisdiction816 to offenses

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(1994)).
810 Id. § 6, 11 Stat. at 120 (codified at 48 U.S.C. § 1417 (1994)).
812 Id. at 211 (citing U.S. CONST. art. III, § 2 & amend. VI). See also supra notes 757-60
and accompanying text.
813 Jones, 137 U.S. at 211.
814 Id. at 211-12.
815 Id. at 204, 209.
816 See U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of
admiralty and maritime Jurisdiction . . . ").
taking place on land.\textsuperscript{817} The Court held that the act was, in effect, incorporating pre-existing statutes governing offenses occurring on the high seas into one statute that provided for the punishment of crimes on territory within the exclusive jurisdiction of the federal government,\textsuperscript{818} thus falling under the federal courts' "arising under" jurisdiction. Congress was not unconstitutionally expanding the scope of the federal courts' grant of admiralty jurisdiction but was in effect legislating for a U.S. territory within its exclusive jurisdiction pursuant to its Article IV powers. Thus, just as in the case of federal enclaves—where Congress has enacted federal law that incorporates by reference the law of the state in which the federal enclave is located—here Congress, instead of creating a specialized set of criminal laws for Guano Islands, chose instead to incorporate by reference federal admiralty law.

A similar statutory scheme exists for the United States' Pacific Possessions. Congress has defined the District of Hawaii as including not just Hawaii, but also a group of islands in the Pacific Ocean,\textsuperscript{819} some of which are thousands of miles away from Hawaii,\textsuperscript{820} that are U.S. possessions administered by the U.S. Department of the Interior.\textsuperscript{821} In addition, Congress has vested the U.S. District Court for the District of Hawaii with nonexclusive jurisdiction\textsuperscript{822} over all civil and criminal actions taking place on these islands and has provided that such actions shall be governed by federal

\textsuperscript{817} Jones, 137 U.S. at 209, 224.

\textsuperscript{818} See id. at 211 ("This section ... unequivocally extends the provision of the statutes of the United States for the punishment of offenses committed upon the high seas to like offenses committed upon guano islands [appertenant to the United States.").


To achieve this result, the statute, like the act governing the Guano Islands, "requires a court to entertain the fiction that [each island] is, essentially, a vessel on the high seas." Also similar to the statute for the Guano Islands, this statute has been construed not to expand the definition of the admiralty jurisdiction of the federal courts on the ground that Congress could not constitutionally do so. This scheme can be justified on the same basis as the statute for the Guano Islands. These Pacific possessions, as U.S. territories, fall within Congress's exclusive legislative jurisdiction under Article IV, and rather than legislating directly, Congress has incorporated federal admiralty law by reference. Under this statute, the District of Hawaii has thus upheld its authority to entertain a breach of contract dispute on one such island possession that did not satisfy the requirements of the diversity statute.

3. Protection of Particular Groups from State Court Bias.

Congress has, through a variety of statutes, provided existing Article III courts with jurisdiction over certain categories of cases that would otherwise be adjudicated in state courts where Congress believed that state courts may lack impartiality. At first glance, many of these cases do not appear to fall within any of the Article III categories of jurisdiction—typically, the parties are not diverse and the claims raised in the suit are grounded in state law. Yet, in each case, the Supreme Court has upheld Congress's authority to provide for jurisdiction in an Article III court. Because each of these holdings provides guidance as to the limits of Congress's authority to make use of the federal courts to protect parties from local court bias, they are examined here.

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825 See Yandell v. Transocean Air Lines, 253 F.2d 622, 624 (9th Cir. 1957) ("Congress has no power to extend the admiralty and maritime jurisdiction of the courts of the United States beyond the concepts solidified at the time of the adoption of the Federal Constitution. . . ."). However, the court declined to reach the issue of whether Congress had the power to enact such legislation. See id. at 624 n.4.
The language of section 1331, the general federal question jurisdiction statute, parallels that of the "arising under" clause of Article III. However, the Supreme Court has held that the latter is substantially broader than the former. Thus, jurisdictional rules restricting the reach of section 1331, such as the well-pleaded complaint rule, are considered interpretations of the statute and are not required by Article III. The "controlling decision" on the scope of Article III "arising under" jurisdiction is Chief Justice Marshall's opinion in Osborn v. Bank of the United States and its companion case, Bank of the United States v. Planters' Bank of Georgia. Both suits were initially filed in a federal circuit court by the Bank of the United States pursuant to a special federal jurisdictional statute that granted to the federal courts jurisdiction over any suit to which the Bank was a party. The suit in Osborn—the main case in which the court's holding was announced—involves a suit by the Bank for an alleged violation of the U.S. Constitution and thus contained a clear question of federal law on its face. Planters', by contrast, involved a mere breach of contract claim brought by the bank to collect on negotiable notes issued by a state bank.

828 Verlinden, 461 U.S. at 492.
829 22 U.S. 738 (1824).
830 22 U.S. 904 (1824).
831 See Osborn, 22 U.S. at 817-18 (highlighting text of statute that provided "that the Bank shall be 'made able and capable in law,' to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."). See also Verlinden, 461 U.S. at 492 ("In Osborn, the Court upheld the constitutionality of a statute that granted the Bank of the United States the right to sue in federal court on causes of action based upon state law.").
832 Osborn, 22 U.S. at 739-44, 859-71.
833 Planters', 22 U.S. at 904. See also Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) (noting that in Osborn "Chief Justice Marshall sustained federal jurisdiction in a situation—hypothetical in the case before him but presented by the companion case of . . . Planters' Bank . . . involving suit by a federally incorporated bank upon a contract.").
The Osborn Court sustained the constitutionality of the statute granting jurisdiction to the federal courts over all actions brought by or against the Bank of the United States. The Court noted that all of the Bank's capacities—such as its capacity to sue and its capacity to enter into a contract—were derived from federal law, to wit, its charter of incorporation enacted by Congress, and were thus federal questions. These remote, hypothetical federal questions, even if they remained in the background of the case and were not in fact raised during the case, were nonetheless "original [federal] ingredient[s]" in the case sufficient to justify Article III "arising under" jurisdiction. Under the broad conception of "arising under" jurisdiction as interpreted by Chief Justice Marshall in Osborn, "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law."

While the breadth of Osborn has subsequently been questioned, its original ingredient test was reaffirmed by the Court recently in American National Red Cross v. S.G. There, the Court construed an analogous "sue and be sued" provision in the Red Cross' federal charter as a statutory grant of jurisdiction to the federal courts over all suits to which the Red Cross was a party and held—by analogy to Osborn—that the statutory grant of jurisdiction fell within the permissible bounds of Article III.

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834 Osborn, 22 U.S. at 828.
835 Id. at 823-24.
836 See id.

The basic premise was that every case in which a federal question might arise must be capable of being commenced in the federal courts, and when so commenced it might, because jurisdiction must be judged at the outset, be concluded there despite the fact that the federal question was never raised . . . [it] permits assertion of original federal jurisdiction on the remote possibility of presentation of a federal question.

839 See 36 U.S.C. § 2 (1994) (noting that Red Cross's federal charter authorized organization "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States").
840 Am. Nat'l Red Cross, 505 U.S. at 248-63.
841 See id. at 264-65 ("As long ago as Osborn, this Court held that Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction"
An even broader conception of Article III "arising under" jurisdiction is the theory of protective jurisdiction, first proposed by Herbert Wechsler. Under Wechsler's interpretation of Osborn and Article III, Congress, at a minimum, has the power under Article III to confer jurisdiction over any case that might involve a federal question. In his view, however, Congress's power extended further. Reasoning that providing jurisdiction over a dispute is one way by which Congress can exercise its regulatory powers under Article I, Wechsler reasoned that in any case in which Congress could take the (arguably) greater step of enacting substantive federal law to govern the dispute or incorporating state law as the federal rule of decision, it could instead take the (arguably) lesser over actions involving federally chartered corporations. We have consistently reaffirmed . . . that holding . . . and this case gives us no reason to contemplate overruling it.

[Herbert Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law 
& Contemp. Probs. 216, 224-25 (1948).]
[Id. at 224.]

The notion that protective jurisdiction is a lesser intrusion by Congress than simply creating the substantive law to govern the area is a disputed one. See Goldberg-Ambrose, supra note 742, at 591.

Accountability is disturbed by the confusion of authority and control. Protective jurisdiction . . . results in loss of control by state citizens over the development of state law . . . . When federal courts undertake the interpretation and application of state statutes, the development of state common law, and the review of decisions by state administrative agencies, federal judges deny state citizens the opportunity to influence such decisions through the direct or indirect selection of state court judges . . . . What distinguishes protective jurisdiction from diversity, pendant or ancillary, and other-state jurisdiction . . . is its systematic displacement of state courts . . . . It is unlikely that jurisdiction asserted on any of these bases will encompass a substantial portion of the litigation in any given field of state law . . . . By contrast, protective jurisdiction often invites and sometimes compels all litigants with state law claims in particular areas to choose a federal forum . . . . While an occasional departure from state policy by a federal diversity court can be corrected in a future state court action . . . the repeated displacement of state courts under protective jurisdiction can fundamentally alter the texture of state policy.

[Id.; see also John T. Cross, Congressional Power to Extend Federal Jurisdiction to Disputes]
step of enacting a jurisdictional statute providing for the adjudication of the dispute in a federal forum in which state substantive law would be applied. According to Wechsler, such cases satisfy Article III by "arising under" the federal jurisdictional statute.


Under most of its variants, protective jurisdiction results in a federal court construing claims arising under state law. This state law, however, is probably defined in large part by the same state judiciaries that caused Congress such concern. Because the federal court is required by Erie to follow state law, it is unclear exactly how that federal court is to "protect" some unidentified federal interest from the intrusion of state judiciaries.


The power to interpret a state's laws, however, is not subordinate to the power to create those laws; it is not a lesser power, but a separate power. A state has "an ongoing interest in how the law it creates is applied" because it is through adjudication that state courts articulate and shape into law the understandings and ideals that make the state a distinctive political community. Indeed, divesting states of the power to construe their own laws impairs their democratic integrity more than does preempting their legislative powers.


State law grows and evolves in the state courts, a process frozen when state rules are enforced by federal courts. Whether the imposition of a federal rule, a rule amenable to growth and interpretation in the federal courts, is a greater intrusion upon principles of federalism and legal evolution than the freezing of state rules seems a debatable question, certainly a question incapable of resolution in the abstract.... [T]he power to create jurisdiction derives from the necessity to advance article I interests, whether those interests be forum-based or substance-based.

When Congress enacts a federal rule of decision, there are substance-based reasons for federal jurisdiction over that rule; some federal court ought to have the power to ensure the enforcement of the rule and impose upon it a uniform construction. When Congress does not enact a federal rule of decision, there are no substance-based reasons for federal jurisdiction; in the absence of forum-based grounds for jurisdiction, there are no reasons for jurisdiction at all. The mere existence of unexercised power to enact substantive rules is irrelevant to the issue of jurisdiction and is, therefore, an insufficient reason to support the power to grant jurisdiction.

Id.

Wechsler, supra note 842, at 224-25.

Id. at 225. However, under Wechsler's theory, not every jurisdictional statute would "arise under" federal law, but only those that represent subject areas for which Congress could legislate. See Goldberg-Ambrose, supra note 742, at 586.

Critics of this approach have dismissed it as circular, claiming that enactment of the jurisdictional statute cannot by itself make the
Professor Mishkin has proposed a narrower conception of protective jurisdiction. In Mishkin's view, a suit could not "arise under" the jurisdictional statute itself, as the Diversity Clause provides the only basis for asserting federal jurisdiction to protect a party from prejudice. However, under Mishkin's theory, where Congress has "an articulated and active federal policy regulating a field," the "arising under" clause of Article III allows Congress to confer jurisdiction on the federal courts in all cases in that field, even those substantively governed by state law. According to Mishkin, the case would "arise under" the federal program itself. The purpose would not be so much to protect the individual litigant as to protect the federal program, which might be better served if all litigation relating to it were handled by the same courts, well versed in and not hostile to the national policies established by the legislation. The Supreme Court has on several occasions been given the opportunity to consider the theory of protective jurisdiction, but on each occasion, it has carefully avoided reaching the issue.

jurisdiction constitutional under article III. There is in fact an independent limitation on Congress' power to enact such jurisdictional statutes: they must fall within the article I powers. Thus, not every jurisdictional statute would automatically create a valid protective jurisdiction because not every jurisdictional statute would necessarily constitute a federal law under which a case could properly "arise."

Id. Wechsler's view that a suit can "arise under" the jurisdictional statute itself has been rejected by the Supreme Court. Mesa v. California, 489 U.S. 121, 136 (1989); Verlinden B.V. v. Cen. Bank of Nig., 461 U.S. 480, 495-96 (1983); Mossman v. Higginson, 4 U.S. 12 (1800). However, the Court has not rejected the theory of protective jurisdiction.

Although Professor Mishkin is generally credited for this narrower version of protective jurisdiction, the roots of this alternative theory were first suggested by Professor Forrester. Forrester, The Jurisdiction of Federal Courts in Labor Disputes, 13 LAW & CONTEMP. PROBS. 114, 128-31 (1948). Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 475-76 (1957) (Frankfurter, J., dissenting).


See Mesa, 489 U.S. at 137-38; Verlinden B.V., 461 U.S. at 491 n.17 (finding it unnecessary to "consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called "protective jurisdiction." "). Verlinden has been criticized for repudiating reliance on the theory of protective jurisdiction when the result could only be justified as such. See Linda S. Mullenix, Complex Litigation and Article III Jurisdiction, 59 FORDHAM L. REV. 169, 201-02, 205 (1990) (describing Verlinden as "fancy footwork regarding
In Textile Workers Union of America, the Court considered a challenge to the constitutionality of the Taft-Hartley Act, which conferred on the federal courts jurisdiction over all suits alleging violations of contracts between labor and management, without regard to diversity or the amount in controversy, so long as the labor organization represented employees in an industry affecting commerce. Justice Douglas, writing for a six-justice majority, side-stepped the issue of protective jurisdiction by construing the statute as directing the federal courts to create a body of federal common law to govern such contracts. Justice Burton, concurring for himself and one other justice, disagreed with the majority's conclusion that federal common law governed such contracts but concluded that it was nonetheless permissible for Congress to grant the federal courts jurisdiction over such disputes under the theory of protective jurisdiction. Justice Burton reasoned that some federal rights may be involved in cases brought under the Act, thus endorsing Mishkin's theory of protective jurisdiction.

Justice Frankfurter penned a lengthy dissent, in which he first challenged the majority's construction of the Taft-Hartley Act as inconsistent with both the text of the Act and its legislative history and then characterized it as a disingenuous attempt to avoid addressing the difficult Article III problem posed by the Act. Having construed the Act as vesting the federal courts with

article III arising under jurisdiction and the theory of protective jurisdiction.); Comment, The Supreme Court, 1982 Term: Federal Jurisdiction and Procedure: Article III Federal Question Jurisdiction, 97 HARV. L. REV. 208, 213 (1983) (criticizing Court's characterization of sovereign immunity as substantive issue, suggesting Court's reference to legal standard applicable to federal and state courts alike as "a more satisfactory, functional way of approaching the distinction"). For a discussion of the Court's holding in Verlinden, see infra notes 869-77 and accompanying text.

353 U.S. 448 (1957).
61 Stat. 156, § 301(a) (codified at 29 U.S.C. § 185(a) (1994)).
See Textile Workers, 353 U.S. at 456.
Id. at 459, 460 (Burton, J., concurring).
Id. at 460-69 (Frankfurter, J., dissenting) ("The Court has avoided the difficult problems raised by § 301 of the Taft-Hartley Act... by attributing to the section an occult content. This plainly procedural section is transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for... collective bargaining."). Justice Frankfurter's dissent was somewhat critical of the notion of federal common law, viewing law-making as a legislative function and suggesting, by a citation to Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), that it might fall outside of the judicial power. Id. at 464-65.
jurisdiction to adjudicate cases based entirely on state law and in
the absence of diversity, Justice Frankfurter then addressed the
Article III question, \(^{858}\) characterizing the broad reading of Article III
set forth in *Osborn* and later applied in the *Pacific Railroad
Removal Cases*, \(^{859}\) as standing for the proposition that "the 'arising'
clause of the Constitution, though limited to cases involving
potential federal questions, has such flexibility that Congress may
confer it whenever there exists in the background some federal
proposition that *might* be challenged, despite the remoteness of the
likelihood of actual presentation of such a federal question." \(^{860}\) He
then noted that the Court has upheld Congress's vesting authority
in the federal courts to hear private causes of action arising under
and wholly governed by state law between bankruptcy trustees and
adverse claimants, and indicated that this was likely due to the
presence of a remote federal question in the background. \(^{861}\)

In his dissent, Justice Frankfurter considered the various
theories of protective jurisdiction. He first considered and rejected
Wechsler's theory of the greater including the lesser, \(^{862}\) noting that
in both *Osborn* and the bankruptcy cases, some question of substan-
tive federal law was present in the background. \(^{863}\) He concluded
that those cases could not be read to support the theory of protective
jurisdiction, as it is not clear that Congress has the constitutional
authority to create the substantive rules of decision governing every
transaction of a person who subsequently becomes bankrupt or all
disputes involving the Bank of the United States. \(^{864}\) Justice

\(^{858}\) *Textile Workers*, 353 U.S. at 469-70.


\(^{860}\) *Textile Workers*, 353 U.S. at 471 (Frankfurter, J., dissenting).


\(^{862}\) *Textile Workers*, 353 U.S. at 473.

\(^{863}\) *See id.* (noting Court cannot argue what Congress has not legislated).

\(^{864}\) *Id.* at 474 (citing Mishkin, *supra* note 850, at 189).
Frankfurter then considered the alternative theory of protective jurisdiction proposed by Professor Mishkin and expressed doubt that Mishkin's theory comported any more with Article III than did Wechsler's, absent the existence of federal rights in the background of suits brought under section 301.  

Finally, Justice Frankfurter considered the "original federal ingredient" test of Osborn.  

He conceded that suits brought under section 301 of the Taft-Hartley Act could be construed as containing a remote federal ingredient, to wit, that federal law vested labor unions with the right to enter into collective-bargaining agreements on behalf of their members and the right to sue on those contracts.  

However, he questioned the extension of those precedents to the instant case, although in so doing, he based his opinion on cases interpreting the scope of section 1331 "arising under" jurisdiction instead of Article III "arising under" jurisdiction.  

In Verlinden B.V. v. Central Bank of Nigeria, the Court again side-stepped the theory of protective jurisdiction in considering whether the Foreign Sovereign Immunities Act ("FSIA") comported with the strictures of Article III. The FSIA provides foreign states with a statutory grant of sovereign immunity to suit in any U.S. court, state or federal, subject to various statutory exceptions.  

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655 See id. at 475-77.  
The second "protective jurisdiction" theory has the dubious advantage of limiting incursions on state judicial power to situations in which the State's feelings may have been tempered by early substantive federal invasions. Professor Mishkin's theory of "protective jurisdiction" may find more constitutional justification if there is not merely an "articulated and active" congressional policy regulating the labor field but also federal rights existing in the interstices of actions under § 301.  

Id.; see also Goldberg-Ambrose, supra note 742, at 593.  

It is difficult to understand why a federal interest expressed in tangentially-related federal legislation should be any more effective to cause a case to arise under federal law than the federal interest expressed by the creation of federal jurisdiction. Congress may articulate that interest quite distinctly in enacting a jurisdictional statute, and the interest expressed may be a strong and active one.  

Id.  

666 Textile Workers, 353 U.S. at 480.  
667 Id.  
668 Id. at 481-84 (citing Gully v. First Nat'l Bank, 299 U.S. 109 (1936)).  
Under the FSIA, any suit against a foreign state permitted under one of the statute's exceptions to sovereign immunity may be brought in federal court in the first instance or, if filed initially in state court, may be removed to federal court.

In *Verlinden*, the Court interpreted the FSIA as authorizing a foreign plaintiff to sue a foreign state in federal court on a non-federal cause of action and then considered whether the statute so construed violated Article III. The Court noted that the Diversity Clause of Article III was insufficient to sustain the FSIA, as it did not extend to suits between a foreign plaintiff and a foreign state. However, the Court found that the FSIA could be sustained under the "arising under" clause, noting that every case brought under the Act contains a question of substantive federal law at the outset, to wit, whether the foreign state is entitled to the federal statutory defense of sovereign immunity or whether some exception to the statutory grant of sovereign immunity applies. The Court affirmed its prior decisions, holding that a jurisdictional statute itself could not serve as the federal law under which the suit arises for purposes of Article III's "arising under" clause. However, the Court distinguished the FSIA on the ground that the Act did not merely concern access to the federal courts—it also governed the types of actions for which foreign states could be held liable in any U.S. Court, state or federal, which it deemed to be a separate, substantive question of federal law.

Although the Supreme Court has avoided reaching the question of whether Congress has the authority to vest the federal courts with protective jurisdiction, an argument can be made that the Supreme Court has, through its endorsement of the development of federal common law, endorsed a form of protective jurisdiction. Indeed, in *Textile Workers* itself, the constitutionality of the statute was saved by construing it as a directive to the federal courts to

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871 Id. § 1330(a).
872 Id. § 1441(d).
873 *Verlinden*, 461 U.S. at 482, 489-91.
874 Id. at 491-92.
875 Id. at 492-94.
876 See id. at 495-96 (citing The Propeller Genesee Chief v. Fitzhugh, 53 US. (12 How.) 443, 451-53 (1852); Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800)).
877 Id. at 496-97.
develop substantive federal common law to govern such disputes. When the Supreme Court decides that federal common law will govern a particular dispute, the Court typically incorporates state law as the federal common law rule of decision. This is properly characterized as protective jurisdiction in disguise. Thus, Congress can effectively provide for protective jurisdiction by directing the federal courts to create substantive federal common law to govern disputes for which Congress could itself legislate under Article I, alternatively, Congress can itself provide by statute that federal law will apply to such disputes and can, by statute, incorporate state law as the federal rule of decision.

Yet another expansive theory of the jurisdiction of Article III courts is found in a decision by the Supreme Court sustaining a

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876 See, e.g., Wilson v. Omaha Indian Tribe, 442 U.S. 653, 658-60, 670-79 (1979) (concluding that state law should be incorporated as the federal rule of decision).

879 See Rosenberg, supra note 844, at 1001-02 (“The Court applied federal common law in Wilson not because of any interest in the substantive law applied . . . but because of a forum-based interest in federal jurisdiction . . . in doing so the courts apply a forum-based theory of protective jurisdiction.”).

880 See Cross, supra note 844, at 1220-22.

Congress can delegate to the federal courts the power to craft federal common law rules. Therefore, Congress can “protect” all of its Article I powers by delegating lawmaking authority to the federal courts, even if it has not otherwise exercised one or more of those powers by creating substantive law . . . . In contrast to protective jurisdiction, federal courts do not always need specific congressional authorization to create federal common law . . . . A number of Supreme Court decisions indicate that Congress can require federal common law to mirror state law, unless a particular state-law rule interferes with a federal interest. Although the governing law in such a case is “federal,” the outcome of the vast majority of cases is no different than it would have been under state law . . . . Indeed, the federal common law approach provides a much more efficient—and honest—way for Congress to provide a federal flavor to a particular area than does the doctrine of protective jurisdiction.


Justice Frankfurter’s similar criticisms of both the federal common-law and protective jurisdiction theories indicates that it is not always easy to separate the two theories. Indeed, judicial reference to, or reliance on, nonfederal law in the creation of federal common-law causes of action differs little from the adoption of nonfederal causes of action under protective jurisdiction. Perhaps, then, the legitimacy of jurisdiction over federal common-law cases also supports judicial authority under the protective jurisdiction theory.

Id.

881 See supra notes 720-49 and accompanying text.
statutory grant of “diversity” jurisdiction to the federal courts in suits involving citizens of the District of Columbia. In the Judiciary Act of 1789, Congress vested the lower federal courts with diversity jurisdiction over suits “between a citizen of the State where the suit is brought and a citizen of another State.” In 1805, the Supreme Court in *Hepburn v. Ellzey* held that the word “State” in the Act did not include the District of Columbia. The Court did not further decide whether the word “State” in the Diversity Clause included the District of Columbia, but the Court indirectly decided that it did not. In construing the meaning of the word “State” as used in the Judiciary Act of 1789, the Court turned to the text of the Constitution—reasoning that the term as used in the Act was used in the same sense as the term is used in the Constitution—and concluded that the meaning of the word “State” as used in the Constitution included only those entities that were members of the Union. The Court conceded that this produced an unusual result, but held that resolution of the matter was for the legislative branch.

As a result of the Court’s decision in *Hepburn*, Article III courts remained closed to citizens of the District of Columbia in diversity cases for 136 years. Congress then amended the diversity statute explicitly to provide that the District of Columbia and the U.S. territories were “States” for purposes of the diversity statute. In *National Mutual Ins. Co. v. Tidewater Transfer Co.*, the Supreme Court considered the constitutionality of the amended statute in the context of a suit brought by a District of Columbia corporation

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882 Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.
884 See id. at 452-53.
885 Id.
886 See id. at 452 (“[A]s the act of congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument.”).
887 Id. at 452-53.
888 See id. at 453 (“[T]his is a subject for legislative, not for judicial consideration.”).
891 337 U.S. at 582.
against a Virginia corporation in a federal district court and grounded solely on diversity.\footnote{Id. at 583 (opinion of Jackson, J.).} Justice Jackson, writing for himself and for Justices Black and Burton, upheld the constitutionality of the statute.\footnote{Id. at 604.} The trio first held that the District of Columbia was not a "State" within the meaning of the Diversity Clause of Article III, reasoning that Hepburn was effectively an interpretation of the Diversity Clause itself.\footnote{Id. at 604 (opinion of Jackson, J.).} Four other justices agreed with Justice Jackson on this point.\footnote{Id. at 590.}

Justice Jackson's opinion, however, went on to hold that the amended diversity statute was valid,\footnote{See id. at 653-54 (Frankfurter, J., joined by Reed, J., dissenting); id. at 626 (Vinson, C.J., joined by Douglas, J., dissenting).} grounding the decision on Congress' broad power to legislate for the District of Columbia under both the District\footnote{U.S. CONST. art. I, § 8, cl. 17.} and the Necessary and Proper Clauses\footnote{Id. cl. 18.} of Article I.\footnote{Tidewater Transfer, 337 U.S. at 589 (opinion of Jackson, J.).} He then noted that these provisions have long been held to give Congress the authority to vest federal courts within the District of Columbia with such jurisdiction as a state may confer on its own local courts—that Congress could thus unquestionably vest federal courts located within the District with jurisdiction over suits between a citizen of the District and a citizen of another state.\footnote{Id. at 590.} He
further posited that Congress likely had the power under these provisions to set up special legislative courts throughout the United States to adjudicate disputes involving citizens of the District of Columbia.\footnote{See id.} Justice Jackson conceded that Congress could not vest the Article III federal courts with non-judicial functions,\footnote{Id. at 591.} but held that the enumerated categories of cases and controversies contained in Article III did not exhaust the types of cases which Congress can vest in the Article III federal courts.\footnote{Id. at 591-99.} In Justice Jackson's view, where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship.\footnote{Id. at 600.}

Thus, in Justice Jackson's view, Congress had the authority under the Necessary and Proper Clause to vest the existing Article III courts with jurisdiction over all disputes involving citizens of the District.\footnote{See Tidewater Transfer, 337 U.S. at 602-03.} Justice Jackson went on to establish what appears to be a greater-includes-the-less rationale somewhat akin to that employed in the theory of protective jurisdiction: since Congress has the admitted (arguably) greater power to create a non-Article III court to adjudicate such disputes, it has the (arguably) lesser power of vesting the existing Article III courts with jurisdiction over such disputes.\footnote{As we have pointed out, the power to make this defendant suable by a District citizen is not claimed to be outside of federal competence. If Congress has power to bring the defendant from his home all the way to a forum within the District, there seems little basis for denying it power to require him to meet the plaintiff part way in another forum. The practical issue here is whether, if defendant is to be suable at all by District citizens, he must be compelled to come to the courts of the District}
In separate opinions, six Justices rejected Justice Jackson's view that Congress can vest the Article III courts with jurisdiction over cases beyond those enumerated in Article III. However, two of those Justices also held that the District of Columbia was a "State" within the meaning of the Diversity Clause, reasoning that the Sixth Amendment—which also uses the word "State"—has been construed as applying to prosecutions in the District of Columbia and that the word "State" could not mean different things in different parts of the Constitution. Accordingly, the Justices who dissented to both rationales for upholding the constitutionality of the statute collectively provided the five votes necessary to uphold it.

Lower court decisions have, with little discussion, extended the rationale of Tidewater to uphold the constitutionality of Congress extending the statutory grant of diversity jurisdiction to include citizens of the then-territory of Hawaii and Puerto Rico. No
decisions have considered the constitutionality of extending the diversity statute to citizens of the other territories, although the rationale would likely be the same. These decisions are viewed as even harder to justify than *Tidewater* itself, for the territories are said to look even less like states than the District of Columbia.912

The *Tidewater* theory has also been considered in one case considering the scope of federal court jurisdiction over disputes involving aliens.913 In 1988, Congress amended the diversity statute to include a proviso that “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.”914 Interpreted literally, the plain text of this provision would appear to have two different effects. The first would be to contract diversity jurisdiction. Consider a suit brought

The *National Mutual* case upheld the constitutionality of the Act involved here as applied to an action between a citizen of the District of Columbia and a citizen of a state. We think that decision is controlling where the action is between the citizens of a state and a citizen of the Territory of Hawaii...

*Id.*


Coming now to the issue... as to whether Article IV, Section 3, provides the requisite constitutional authority for the 1956 amendment [providing that Puerto Rico is a State within the meaning of the diversity statute], we conclude that our answer must be “yes.” We find the conclusion of *Siegmund*... and *Lummus*... to be correct. The *Siegmund* opinion pointed out that the power of Congress to “make all needful Rules and Regulations respecting the territory... belonging to the United States” was expressly given by Article IV, Section 3 of the Constitution. Although the *Siegmund* case dealt with Hawaii, *Lummus* concerned the applicability of these principles to Puerto Ricans.

*Id.; Lummus* Co. v. Commonwealth Oil Refining Co., 195 F. Supp. 47, 49-51 (S.D.N.Y. 1961) ("The Court is persuaded that the *Siegmund* conclusion that the *Tidewater* holding is equally applicable in the instance of territories is sound... Congress, in enacting section 1332(d) to include the Commonwealth of Puerto Rico, acted within its constitutional power... "); *Detres* v. Lions Bldg. Corp., 234 F.2d 596, 603 (7th Cir. 1956) ("We think the *Siegmund* case was correctly decided and that the principles there announced apply also to the citizens of Puerto Rico."); *see also* Act of July 26, 1956, Pub. L. No. 808, ch. 740, 70 Stat. 658 ("The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.").

912 See Rosenberg, *supra* note 844, at 984 & n.256 ("The lower federal courts have extended the *Tidewater* rationale to the territories as well as the District of Columbia—an uncomfortable result, for however little the District might look like a state, the territories certainly look less so.").

913 Singh v. Daimler Benz, AG, 9 F.3d 303 (3d Cir. 1993).

by a citizen of New York against a citizen of France residing in New York and admitted to the United States as a permanent resident alien. Under section 1332(a)(2), this would be a suit between a citizen of a state and a citizen of a foreign state, and there would be diversity jurisdiction. However, since the proviso would now deem the permanent resident alien to be a citizen of New York, the suit would now be between two citizens of New York, and diversity would be lacking. In this sense, the proviso seems to be akin to the dual citizenship proviso for corporations, which treats them as citizens of both the state in which they are incorporated and that in which they have their principal place of business.915

At the same time, the plain text of the amendment would also appear to expand diversity jurisdiction. Consider a suit brought by a citizen of Germany residing in Pennsylvania who is admitted to the United States as a permanent resident alien against a citizen of Japan residing in Virginia who is admitted to the United States as a permanent resident alien. Normally, diversity jurisdiction would be lacking, since it is a suit brought by a citizen of a foreign state against another citizen of a foreign state. Under the proviso, however, it would now appear to be a suit brought by a citizen of Pennsylvania against a citizen of Virginia, and diversity jurisdiction would exist. Alternatively, if the citizen of Japan were not a permanent resident, it would be a suit between a citizen of a state and a citizen of a foreign state. The problem, however, is that the Supreme Court has previously held that Article III does not allow for diversity suits brought by a citizen of a foreign state against another citizen of a foreign state.916 The question, then, is can Congress, by simply providing by statute that they are not citizens of foreign states but are instead to be deemed citizens of the states in which they reside, overcome this Article III limitation?

One court in dicta has drawn an analogy to the Tidewater situation, noting that the Tidewater Court upheld Congress's definition of "States" as including the Territories, the District of

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Columbia, and Puerto Rico, which likewise had the effect of expanding diversity jurisdiction. The court suggested that even if the Diversity Clause does not support jurisdiction in this circumstance, Congress might be able to justify it based on its Article I powers or under the "arising under" clause of Article III. The court noted further that the requirement that a citizen of a state must also be a citizen of the United States is only an interpretation of the diversity statute, not Article III. Most courts, however, have avoided the Article III issue by finding a legislative intent to contract, not expand, diversity jurisdiction, and have thus concluded that the statute does not extend jurisdiction to suits between two permanent resident aliens or between a permanent resident alien and a citizen of a foreign state.

4. Appellate Jurisdiction. Although the well-pleaded complaint rule prevents the removal of a case from state to federal court when a federal question comes in only by way of a defense, the Supreme Court's review by writ of certiorari of federal questions decided by the states' highest courts—as well as the in terrorem effect of the possibility of such review—is an alternative means of safeguarding parties from local court bias or hostility. Thus, an alternative to creating or providing a federal forum of original jurisdiction to protect parties against local court bias is to allow the local courts to adjudicate the matters in the first instance but to provide for appellate review of their decisions in a federal forum, such as the

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917 Singh, 9 F.3d at 310-12.
918 Id. Singh involved a suit brought by a citizen of India who was a permanent resident alien domiciled in Virginia against a German corporation as well as a Delaware corporation with its principal place of business in New Jersey. Id. at 304. Since there was at least minimal diversity and because complete diversity is not an Article III requirement, the court was able to sidestep the question whether the suit would be valid if all parties were permanent resident aliens. Id. at 311-12.
United States Supreme Court. Of course, appellate review is not a perfect substitute for providing an original federal forum. Appellate courts typically defer to the factual findings of trial courts, so any bias in fact finding is unlikely to be cured by appellate review. Moreover, the Supreme Court grants certiorari in so few cases that its in terrorem effect may not be substantial.\(^2\) In addition, because the Supreme Court's jurisdiction is limited to reviewing questions of federal law,\(^3\) it is not an effective substitute for diversity jurisdiction\(^4\) or other cases involving purely questions of local law.

However, Congress has provided for—and the Supreme Court has seemingly approved—federal court appellate review of the decisions of both the local territorial courts as well as the non-Article III federal territorial courts, even in nondiversity cases involving local territorial law. In so doing, Congress has managed to surmount the limits on the Supreme Court's capacity to review more than a handful of cases each year. An examination of these different methods of providing for appellate review in federal courts—as well as the constitutional basis for exercising such appellate review—is constructive in considering methods of providing for appellate review of the decisions of tribal courts, and accordingly is examined here.

Throughout the nineteenth century, Congress vested the Supreme Court with jurisdiction to review, by way of either appeal or writ of certiorari, the decisions of the federal, non-Article III territorial courts established by Congress.\(^5\) In addition, just as the

\(^2\) Indeed, it is the unlikelihood of Supreme Court review that in part serves as a justification for federal habeas review by the lower federal courts. See supra note 494 and accompanying text.

\(^3\) See 28 U.S.C. § 1257 (1994) (giving Supreme Court appellate jurisdiction over highest state court decisions involving federal law); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1874) (holding Supreme Court's appellate jurisdiction over state court decisions is limited to decisions involving federal law).

\(^4\) Although the Supreme Court by statute has always lacked jurisdiction over diversity suits that are adjudicated in state courts, Article III gives Congress the authority to vest the Supreme Court with appellate review over such cases. See David P. Currie, The Constitution in the Supreme Court: The Power of the Federal Courts, 1801-1835, 49 U. CHI. L. REV. 646, 685 n.253 (1982).

\(^5\) See, e.g., Act of June 23, 1874, ch. 469, § 3, 18 Stat. 253, 254 (Utah territory); Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 463, 455-56 (same); Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 449-50 (New Mexico territory); Act of Aug. 14, 1848, ch. 177, § 9, 9 Stat. 323, 326-27 (Oregon territory); Act of July 14, 1832, ch. 239, § 2, 4 Stat. 600, 600 (Florida territory); Act
Supreme Court has jurisdiction over the decisions of the highest state courts, in the territories of Hawaii and Puerto Rico—in which Congress allowed for parallel local and federal territorial courts—Congress provided for Supreme Court review of the decisions of the supreme courts of both territories. Finally, Congress has provided that the Supreme Court will eventually have jurisdiction to review the decisions of the highest local appellate courts established in Guam, the Northern Mariana Islands, and the Virgin Islands in the same manner in which it currently reviews the decisions of the highest state courts.

Congress has also provided for federal appellate review of local territorial courts in federal courts other than the Supreme Court. Congress created an appellate division of the District Court of Guam, the District Court of the Virgin Islands, and the District of Apr. 17, 1828, ch. 29, § 7, 4 Stat. 261, 262 (Arkansas territory); Act of Feb. 5, 1825, ch. 6, § 5, 4 Stat. 80, 81 (Michigan territory); Act of Apr. 20, 1818 ch. 127, § 1, 3 Stat. 468, 468 (Alabama–territory).


Id. § 1284(a).

Id. § 1613.

The appellate division of the District Court of Guam consisted of a panel of three judges, id. § 1424-3(b), typically made up of the single District Court Judge of Guam, the District Judge of the District for the Northern Mariana Islands, and either a Circuit or District Court Judge from the Ninth Circuit. REP. OF THE PAC. ISLANDS COMM. OF THE JUD. COUNCIL OF THE NINTH CIR. TO THE SEN. COMM. ON ENERGY AND NATURAL RES. AND THE H. COMM. ON NATURAL RES. ON THE SUP. CT. OF GUAM 2 (2001) [hereinafter REP. OF THE PAC. ISLANDS COMM.]. Congress also authorized the Guam legislature to create an appellate court, 48 U.S.C. § 1424-1(a), and provided that the appellate jurisdiction of the District Court of Guam over the local territorial courts would cease at such time as the Guam legislature created an appellate court. Id. § 1424-3(c). The Supreme Court had construed the Organic Act as not allowing the Guam legislature to divest the District Court of Guam of appellate jurisdiction by the creation of a territorial appellate court, as Congress had not provided for review of such a territorial appellate court by an Article III court, thus potentially raising constitutional questions regarding jurisdiction-stripping. Territory of Guam v. Olsen, 451
Court for the Northern Mariana Islands with appellate jurisdiction over the decisions of the local courts of these territories until such time as the respective territorial legislatures create their own local appellate courts. In addition, Congress provided that the judges of the District of Indian Territory were to constitute a U.S. Court of Appeals for Indian Territory and vested it with appellate jurisdiction over the U.S. Court in Indian Country. To be sure, Congress's authority to create such non-Article III federal courts to exercise appellate jurisdiction over the decisions of either the federal non-Article III trial courts or the trial courts created by the local territorial legislatures seems beyond question. To the extent that Article IV gives Congress authority to create non-Article III courts of original jurisdiction to adjudicate criminal and civil matters arising in the territories, there is no principled reason why it should not likewise be able to create non-Article III courts of appellate jurisdiction to review the decisions of either local or federal territorial courts.

But both of these options—vesting the U.S. Supreme Court with appellate jurisdiction over the territorial courts or creating specialized federal appellate courts—have their drawbacks. The former

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U.S. 195, 204 (1977). Congress subsequently revised the Act to provide for review of the local appellate court's decisions by an Article III court. See infra note 951. The Guam legislature has created the Superior Court of Guam as a court of general, original jurisdiction, 7 GUAM CODE ANN. §§ 3105, 4101(a) (1992), as well as a Supreme Court with appellate jurisdiction over the decisions of the Superior Court of Guam, id. § 3103(a), designated as the highest court of Guam. Id. § 3102. Accordingly, the District Court of Guam no longer exercises appellate jurisdiction over the local courts of Guam.

932 See 48 U.S.C. § 1613a(a) (1994 & Supp. V 1999). The appellate division of the District Court of the Virgin Islands consists of a panel of three judges. Id. § 1613a(b). Since the legislature of the Virgin Islands has not yet established an appellate court, the District Court of the Virgin Islands continues to exercise appellate jurisdiction over the local courts of the Virgin Islands.

933 See 48 U.S.C. § 1823(a) (1994). The appellate division of the District Court for the Northern Mariana Islands consists of a panel of three judges. Id. § 1823(b). In 1989, the Commonwealth of the Northern Mariana Islands established the Supreme Court of the Northern Mariana Islands, with appellate jurisdiction over the decisions of the local trial courts of the Northern Mariana Islands. Commonwealth Judicial Reorganization Act of 1989, Pub. L. No. 6-25, 1 C.M.C. Div. 3, §§ 3101-08. In so doing, the appellate jurisdiction of the District Court for the Northern Mariana Islands over the decisions of local trial courts in the Northern Mariana Islands terminated. See Northern Mariana Islands v. Kawano, 917 F.2d 379, 381 (9th Cir. 1990).

option overburdens an already heavy Supreme Court docket and makes it unlikely that there will be any realistic appellate review in most cases. The latter option can be costly and time consuming, as it requires the creation of new courts. Thus, a third option employed by Congress is to vest the lower, Article III federal courts with appellate jurisdiction over not only the decisions of the federal non-Article III territorial courts but also with appellate jurisdiction over the local territorial courts established by the territorial legislatures.

As to lower court appellate review of federal, non-Article III territorial courts, the First Circuit has historically and continues to exercise appellate jurisdiction over the decisions of the U.S. District Court for the District of Puerto Rico; the Third Circuit currently has jurisdiction over the decisions of both the trial and appellate divisions of the District Court of the Virgin Islands; the Fifth Circuit historically exercised jurisdiction over the decisions of the U.S. District Court for the District of the Canal Zone.

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934 48 U.S.C. § 1613a(c).
935 See Act of Aug. 24, 1912, ch. 390, § 9, 37 Stat. 560, 565. In 1903, the United States and Panama entered into a treaty whereby the United States was granted a permanent lease of the Panama Canal and a zone of land extending five miles on either side of the Canal over which the United States was given the power to exercise its sovereignty. Isthmian Canal Convention, Nov. 18, 1903, U.S.-Panama, arts. II, III, 33 Stat. 2234-2235. Congress gave the President authority to administer the Canal Zone, Act of Apr. 28, 1904, ch. 1758, 33 Stat. 429, 429, and later gave the President the authority to appoint a governor to administer the Canal Zone, Act of Aug. 24, 1912, ch. 390, § 4, 37 Stat. 560, 561. Congress provided for the establishment of magistrate courts with exclusive original jurisdiction over certain minor civil and criminal actions, id. § 7, 37 Stat. at 564, as well as the establishment of a United States District Court for the District of the Canal Zone with original jurisdiction over all actions in equity, all felony cases, all violations of laws regarding the use and obstruction of the Panama Canal, and all actions at law or admiralty where the amount in controversy exceeded $300. Id. §§ 8, 10, 37 Stat. at 565-66. The District Court was also given appellate jurisdiction over the decisions of the magistrate courts. Id. § 8, 37 Stat. at 565. The judge of the District Court was to be appointed by the President with the concurrence of the Senate for a four-year term, id., and the magistrate were to be appointed by the governor for four-year terms. Id. § 7, 37 Stat. at 564. Like most territorial courts, the District Court for the District of the Canal Zone exercised jurisdiction over various matters not typically falling within the jurisdiction of typical Article III district courts, such as cases involving divorce, property distribution, alimony, and child support. See, e.g., Egle v. Egle, 715 F.2d 999, 1001 (5th Cir. 1983) (affirming district court's modification of custody order). In 1977, Congress entered into a new treaty with Panama which abrogated the 1903 treaty and provided for Panama to resume sovereign authority over the Canal Zone as of October 1, 1979. The District Court ceased
Eighth Circuit historically exercised appellate jurisdiction over the decisions of the U.S. Court of Appeals for Indian Territory; the Ninth Circuit was historically vested with jurisdiction to review the decisions of the U.S. District Courts for the Territories of Alaska and of Hawaii, the U.S. Court for China, the appellate division of the District Court of Guam, and the District Court for the Northern Mariana Islands, and today continues to review the decisions of the District Court of Guam and the District Court for the Northern Mariana Islands. In addition, the U.S. Circuit Court for the District of California was historically vested with appellate jurisdiction over the decisions of the consular courts in China and Japan.

In addition, several of the U.S. Courts of Appeals have historically exercised and continue to exercise appellate jurisdiction over the decisions of the local territorial courts. Thus, the First Circuit historically exercised appellate jurisdiction over the decisions of the Supreme Court of Puerto Rico, and the Ninth Circuit historically

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Act of Mar. 1, 1895, ch. 145, § 11, 28 Stat. 693, 698. In 1905, Congress provided that appeals from the U.S. Court of Appeals in Indian Territory to the Eighth Circuit would be governed by the same rules governing appeals from the U.S. district courts to the Eighth Circuit. Act of Mar. 3, 1905, ch. 1479, § 12, 33 Stat. 1048, 1081. No further appeal was available therefrom to the U.S. Supreme Court. Laurel Oil & Gas Co. v. Morrison, 212 U.S. 291, 296 (1909).


Id. § 1823(c).


Act of Mar. 3, 1891, ch. 517, § 4, 26 Stat. 826, 827; Ohlinger, supra note 14, at 345 (noting appeal provided for civil cases involving more than $2,500).

Act of July 1, 1870, ch. 194, §§ 3-8, 16 Stat. 183, 184.

exercised appellate jurisdiction over the decisions of the Supreme Court of Hawaii. Moreover, the Ninth Circuit currently has jurisdiction to review by writ of certiorari the decisions of the Guam Supreme Court and to review by appeal the decisions of the Supreme Court of the Commonwealth of Northern Mariana. Additionally, the Third Circuit will, at such time as the legislature of the Virgin Islands establishes a territorial appellate court, have jurisdiction to review those decisions by writ of certiorari.

It may seem odd to see lower federal courts exercising appellate jurisdiction over the decisions of non-federal courts. This impression is likely due to the Rooker-Feldman doctrine, which holds that the federal district courts lack jurisdiction over collateral attacks on judgments rendered in state court proceedings. The rationale for the doctrine is that the statutory grant of subject matter jurisdiction to the federal district courts is strictly original. For them to entertain actions to reverse or modify the judgments of state courts due to errors, even those of a constitutional nature, would be an exercise of appellate jurisdiction, and only the United States Supreme Court has been granted appellate jurisdiction over judgments rendered by the states' highest courts.

However, the Rooker-Feldman doctrine is merely a matter of statutory interpretation and not an Article III limitation. Indeed, in the Federalist Papers, Hamilton indicated that Congress did have the authority under the Constitution to vest the lower federal courts with appellate jurisdiction over the state courts. The few courts

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51 48 U.S.C. § 1424-2 (1994). See also 9TH CIR. R. 6-2 (providing for review by writ of certiorari to the Supreme Court of Guam). In its first report to Congress, the Judicial Council of the Ninth Circuit has recommended that Congress proceed immediately to provide for direct U.S. Supreme Court review of the decisions of the Guam Supreme Court. See REPORT OF THE PAC. ISLANDS COMM., at 26-27.
52 48 U.S.C. § 1824(a); 9TH CIR. R. 6-1 (providing for appellate review of the decisions of the Supreme Court of the Commonwealth of the Northern Mariana Islands).
55 Rooker, 263 U.S. 413, 416.
56 See THE FEDERALIST NO. 82 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888). But could an appeal be made to lie from the State courts to the subordinate federal judicatories? . . . And this being the case, I perceive at
and commentators to consider the issue seem to agree that Congress has the authority to vest lower federal courts with such jurisdiction.\textsuperscript{567} One court has suggested, moreover, that the \textit{Rooker-Feldman} doctrine has no application in circumstances in which the Supreme Court lacks jurisdiction to review the state court's decisions.\textsuperscript{568} Furthermore, in all of the cases cited above, Congress clearly has vested the U.S. Courts of Appeals with appellate jurisdiction over the decisions of the local territorial courts, so there is no question as to congressional intent.

Although Congress has provided for some form of federal court appellate review of the highest court of most of the territories, it has not done so for all of them. American Samoa is a cluster of islands in the South Pacific, which became a U.S. territory when the islands were ceded to the United States by treaties with indigenous chiefs.\textsuperscript{569} By Executive Order, President McKinley granted the Department of the Navy full authority to govern American Samoa.\textsuperscript{560} The Navy promptly created the High Court of American Samoa and appointed a Navy Commander to serve as chief justice.\textsuperscript{561} Congress present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the Union.

\textit{Id.}\textsuperscript{567} See, e.g., \textit{In re Meyerland Co.}, 910 F.2d 1257, 1261 n.5 (5th Cir. 1990) ("Although Congress generally forbids the lower federal courts from entertaining appeals from state courts . . . there is no constitutional prohibition against it doing so.") (citing \textit{Feldman}, 460 U.S. 462, \textit{Rooker}, 263 U.S. 413, and \textit{THE FEDERALIST NO. 82}); Vicki C. Jackson, \textit{Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy}, 86 Geo. L.J. 2445, 2470-71 (1998) (citing Federalist No. 82 for proposition that "there are substantial reasons to doubt that \textit{Rooker-Feldman} is constitutionally required").

\textit{See Cruz v. Melecio}, 204 F.3d 14, 21 n.5 (1st Cir. 2000) ("Denying jurisdiction based on a state court judgment that is not eligible for review by the United States Supreme Court simply would not follow from the jurisdictional statute that invigorated the Rooker-Feldman doctrine in the first place.") (citing \textit{ASARCO, Inc. v. Kadish}, 490 U.S. 605, 622 (1989)).


\textit{AM. SAMOA CODE ANN.} \textit{§ 6 (1988)}.

\textit{See Laughlin, supra note 626, at 385 (citing 1 AM. SAMOA, Forward, p. v. (1977)).
subsequently ratified the treaties, and provided that, until it acted to establish a government for American Samoa, "all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct."

In 1951, President Truman issued an Executive Order transferring all authority over American Samoa to the Secretary of the Interior. This Executive Order has been construed as granting the Secretary of the Interior "plenary authority over the judicial system of American Samoa." Under the supervision of the Secretary of the Interior, American Samoa adopted a constitution, which the Secretary approved after making certain amendments. Under that constitution, the Secretary of the Interior appoints the chief justice and the associate justices of the High Court and has statutory authority to remove them.

As in the case of tribal courts, no federal court has appellate jurisdiction over the decisions of the High Court even where a federal constitutional question is raised. However, the Secretary of the Interior, in the exercise of his supervisory authority over the territory, retains authority to "review and reverse" the High Court's decisions. Because the Secretary of the Interior has such authority and has a duty to administer the government of American Samoa in a manner consistent with the U.S. Constitution, a litigant who has exhausted his remedies in the High Court may collaterally attack the Court's judgment by bringing suit directly against the

965 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 376 (D.C. Cir. 1987).
967 REV. CONST. OF AM. SAMOA, art. III, § 3.
969 See Hodel, 830 F.2d at 385.
970 Id. at 383.
Secretary of the Interior in the U.S. District Court for the District of Columbia, where the Secretary is located.\footnote{See id. at 385 & n.68 ("As in this case, [litigants from American Samoa] are remitted to collateral attack in an independent, indeed an Article III, court"); King v. Morton, 520 F.2d 1140, 1144 (D.C. Cir. 1975) ("[T]he United States District Court for the District of Columbia, . . . is competent to judge the Secretary's administration of the government of American Samoa by constitutional standards and, if necessary, to order the Secretary to take appropriate measures to correct any constitutional deficiencies.").}

The notion that territorial courts created by Congress are not subject to the limitations of Article III, that they can be staffed with judges lacking life tenure and salary protection, and that they can adjudicate matters falling outside of the enumerated categories in Article III is certainly firmly grounded.\footnote{Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (holding judges in legislative courts not entitled to Article III salary and tenure protections); see also Glidden Co. v. Zdanok, 370 U.S. 530, 544-45 (1962) (plurality opinion) ("[I]n the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article. . . .")}. The Supreme Court has held that Congress clearly has the authority to create non-Article III courts to adjudicate cases in geographic areas outside of the boundaries of any U.S. state.\footnote{See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-64, 75-76 (1982) (plurality opinion) (recognizing that "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers"). Not every justice agreed that the case law necessarily supports "a general proposition and three tidy exceptions," id. at 91 (Rehnquist, J., concurring), with the dissent instead viewing the issue as requiring a balancing of the values Congress hopes to serve through the use of Article I courts against the value of judicial independence expressed in Article III. See id. at 113-18 (White, J., dissenting) (favoring balancing test to determine whether Congress properly created Article I court instead of Article III court). Subsequent cases appear to endorse the balancing test, although none of these subsequent cases question Congress's authority to create non-Article III courts for geographic areas outside of the fifty states. See generally Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (using balancing test to affirm non-Article III delegation of adjudicative functions to CFTC); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985) (using balancing test to validate binding arbitration provision of Federal Insecticide, Fungicide, and Rodenticide Act).} It would thus seem perfectly acceptable for the non-Article III courts that Congress has created and vested with appellate jurisdiction over the decisions of local territorial courts, such as the appellate divisions of the District Courts in Guam, the Northern Mariana Islands and the Virgin Islands, to review all decisions, regardless of whether or not there is a federal question, diversity, or some other type of case falling...
within the "judicial power" of Article III, since such courts are not bounded by the restrictions set forth in Article III.

Yet historically, most of the federal appellate jurisdiction exercised over the territorial courts has been exercised by the U.S. Supreme Court or the lower Article III courts. Can these Article III courts hear appeals from the territorial courts on matters falling outside of the enumerated categories set forth in Article III? Although the statutory grants of appellate jurisdiction to the Supreme Court and the lower federal courts over the decisions of the federal non-Article III territorial courts and the local territorial courts have typically contained an amount in controversy requirement, they have not contained any subject matter limitation, such as a requirement that there be a federal question, diversity, or the like.974 The grants would thus seem to authorize review of cases coming from the territorial courts based entirely on local territorial law and for which there is no diversity of citizenship, thus falling

974 48 U.S.C. § 1424-2 (1994) ("[T]he United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by unit of certiorari all final decision of the highest court of Guam from which a decision could be had."); Act of Feb. 13, 1925, ch. 229, § 126(a), 43 Stat. 936, 936.

The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions . . . . In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings.

Id.; Act of Mar. 3, 1905, ch. 1465, § 3, 33 Stat. 1035, 1035 ("Writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."); REvised Statutes of the United States § 702 (2d ed. 1878).

The final judgments and decrees of the supreme court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute . . . exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the Territory of Washington the value of the matter in dispute must exceed two thousand dollars . . . . And any final judgment or decree of the supreme court of said Territory in any cause [when] the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner.

Id. But see 28 U.S.C. § 1258 (1994) (limiting Supreme Court review over decisions of Supreme Court of Puerto Rico to issues of federal law).
outside the "judicial power" as defined in Article III. Although this presents no problem when a non-Article III court adjudicates the dispute, can it be permissible where an Article III court reviews the decisions of a local or federal territorial court?

Throughout its history, the Supreme Court has heard appeals from territorial courts involving local territorial matters. In addition, the Supreme Court has repeatedly held that when it or a lower federal court reviews the decision of a territorial court, the Court has the authority to reverse the decision solely on the basis of the territorial court's interpretation of territorial law, although such review is limited to cases of "manifest" or "clear" error by the territorial court, i.e., a decision plainly inconsistent with established principles of local law. To be sure, if a case otherwise fell within the judicial power, Article III would not necessarily block review by the Supreme Court or the lower federal courts on a question of local law. However, none of these cases identify any way in which the case falls within any of the categories of judicial power enumerated in Article III.

Moreover, the Ninth Circuit has construed its jurisdiction to review by writ of certiorari the decisions of the Supreme Court of

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If the rule thus announced by the insular court is one which is not plainly inconsistent with established principles of the local law, ... it will be rejected only on a clear showing that the rule applied by the local court does violence to recognized principles of local law or established practices of the local community.

Id.; Benot v. Texas Co., 308 U.S. 463, 470-71 (1940) ("[T]o justify reversal in [purely territorial] such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."); Waialua Agric. Co. v. Christian, 305 U.S. 91, 109 (1938) ("Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii."); William W. Bierce, Ltd. v. Waterhouse, 219 U.S. 320, 338 (1911) (reversing decision of Supreme Court of Hawaii for clear error).

977 Cf. United Mine Workers v. Gibbs, 383 U.S. 715, 728 (1966) ("We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim."); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, . . .").
Guam as substantially broader than that of the United States Supreme Court exercising jurisdiction over the decisions of state courts by extending jurisdiction to pure questions of local Guamian law, although it has thus far only granted certiorari in cases raising federal questions. In addition, the Ninth Circuit has held that it has jurisdiction to review the decisions of the non-Article III appellate division of the District Court for the Northern Mariana Islands reviewing the local courts of the Northern Mariana Islands, even on questions of purely local law. Additionally, when Alaska was still a territory and the Ninth Circuit had appellate jurisdiction over the federal territorial court in Alaska, it claimed to have jurisdiction to review de novo the decisions of the territorial court on questions of territorial law.

978 See EIE Guam Corp. v. Supreme Court, 191 F.3d 1123, 1125-27 (9th Cir. 1999) (“Unlike the Supreme Court in its review of state court decisions, however, this circuit has authority to review not only federal issues, but also all issues of local law.”); see also Guam v. Fejeran, 687 F.2d 302, 306-07 (9th Cir. 1982) (deciding Guam case based on issues of Guam law); Chase Manhattan Bank, N.A. v. Gems-By-Gordon, Inc., 649 F.2d 710, 712 (9th Cir. 1981) (same); Guamatotao v. Guam, 322 F.2d 580, 582 (9th Cir. 1963) (same).

979 REP. OF THE PAC. ISLANDS COMM., supra note 930, at 6-7. Unlike its authority with respect to the Supreme Court of Guam, however, the Ninth Circuit has construed its jurisdiction to review the decisions of the Supreme Court of the Northern Mariana Islands as limited to cases raising federal questions. See N. Mariana Islands v. Bowie, 243 F.3d 1109, 1111 (9th Cir. 2001) (“Our jurisdiction over the appeals from judgments of the CNMI Supreme Court is similar to United States Supreme Court's jurisdiction over the final judgments and decrees of the highest state courts in cases involving the Constitution, treaties, or laws of the United States.”); Manglona v. Tenorio, No. 96-15259, 1997 WL 268384, at *1 (9th Cir. May 15, 1997) (“While the jurisdictional statute refers to ‘all cases’ ..., we have construed the statute to limit our jurisdiction on an issue-by-issue basis.”). Cases that involve only the Constitution or laws of the Northern Mariana Islands are not cases involving the laws of the United States. Sablan v. Manglona, 938 F.2d 970, 971 (9th Cir. 1991). However, like the Supreme Court, the Ninth Circuit will review interpretations of local law where they are a mere subterfuge designed to avoid federal review of a federal constitutional violation. Sonoda v. Cabrera, 189 F.3d 1047, 1050 (9th Cir. 1999).

980 See Camacho v. Civil Serv. Comm'n, 666 F.2d 1257, 1259-62 (9th Cir. 1982) (citing Corn v. Guam Coral Co., 318 F.2d 622, 628 (9th Cir. 1963)).

981 See Carscadden v. Territory of Alaska, 105 F.2d 377, 382-83 (9th Cir. 1939). The Supreme Court of the United States has never declared the “manifest error” rule applicable to Alaska. ... We should continue to exercise our independent judgment with respect to appeals from the District Court of the Territory of Alaska, on all questions, whether federal, general or local, until required to ‘abdicate’ from that practice by a statute or a decision of the Supreme Court of the United States to the contrary.

Id.; see also id. at 383 (“The settled practice in this court has been to exercise an independent judgment with respect to both general and local questions, probably because of the chance of conflicting decisions by the Alaska judges, without other remedy in the court to avoid the
In holding as it has, the Supreme Court appears to have taken the argument that Article III does not limit the jurisdiction of non-Article III territorial courts and extended it to appellate jurisdiction over these non-Article III courts, without stopping to consider the fact that the lower Article III courts reviewing such territorial court decisions and, indeed, the Supreme Court are themselves Article III courts and thus presumably subject to the constraints of Article III. The Supreme Court has not carefully analyzed its authority to exercise appellate jurisdiction over the decisions of territorial courts, merely stating that its authority to do so is unquestioned.

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982 See De la Rama v. De la Rama, 201 U.S. 303, 308 (1906) ("[T]he general rule . . . has no application to the jurisdiction of the territorial courts, or of the appellate jurisdiction of this court over those courts . . . "); Simms v. Simms, 175 U.S. 162, 167-68 (1899).

983 See Sharon Elizabeth Rush, Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective, 69 NOTRE DAME L. REV. 1, 4 n.16 (1984) ("Oddly, the Simms Court did not address the fact that the Supreme Court was itself an article III court, even when reviewing a territorial court's alimony award.").

984 See United States v. Coe, 155 U.S. 76, 84, 86 (1894).

[W]herever the United States exercise the power of government, whether under specific grant or through the dominion and sovereignty of plenary authority as over the Territories, that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government. There has never been any question in regard to this as applied to territorial courts.

985 However, at issue in Coe was an appeal from the Court of Private Land Claims, a non-Article III court established to adjudicate private land claims against the United States government as to lands derived by the United States from Mexico within the western states and territories. Id. at 84. Accordingly, this authority would have fallen within the Article III power in any event as a suit against the United States government. U.S. CONST. art. III, § 2.
On the other hand, the Supreme Court has elsewhere stated that the Court cannot review cases falling outside of the judicial power as defined in Article III. Indeed, in two cases involving review of the decisions of the District of Columbia courts exercising administrative power, the Supreme Court held that it was without jurisdiction to review those parts of the decisions involving non-judicial power. These cases can be distinguished on

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986 See Glidden Co. v. Zdanok, 370 U.S. 530, 545 n.13 (1962) (plurality opinion) ("Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so.")

987 See supra note 606 and accompanying text.
the ground that they involved an exercise of non-judicial power, as opposed to an exercise of judicial power falling outside of the boundaries enumerated in Article III, but that seems to be a distinction without a difference.

An attempt could be made to justify the exercise of appellate jurisdiction by the Article III courts over the territorial courts based on the theory of protective jurisdiction. The argument would be that Congress's arguably greater plenary power to enact all substantive law to govern disputes arising in the territories includes the lesser power to allow the territorial governments to enact the substantive law to govern such matters, while vesting the Article III federal courts with jurisdiction over the disputes. Alternatively, the Tidewater theory could be employed, to wit, that the arguably greater power to create a distinct, non-Article III court with appellate jurisdiction over the decisions of the territorial courts includes the lesser power to instead vest the existing Article III courts with such jurisdiction.

But there is a simpler way to justify review of the territorial courts by Article III courts. First, a distinction must be drawn between those territories and geographic areas in which local territorial governments are enacting local law and those areas in which no local legislature exists. In the case of appeals from the consular courts in China and Japan, the U.S. Court for China

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988 Tidewater, 337 U.S. at 600.

989 See Act of June 22, 1860, ch. 179, § 4, 12 Stat. 72, 73.

[appendices removed for brevity]
and the District of the Canal Zone,\textsuperscript{992} there is no Article III problem because Congress either legislated directly for those areas, delegated to a government official the authority to enact regulations for those areas, or provided by statute that such courts were to apply federal common law to all disputes. Thus, in such cases, the dispute could truly be said to "arise under" federal law because federal law provided the rule of decision.\textsuperscript{993} It is true that Congress has specified that any federal statutes made applicable solely to the District of Columbia do not "arise under" federal law for purposes of section 1331.\textsuperscript{994} However, that is simply a matter of statutory "arising under" jurisdiction, and the laws enacted by Congress specifically for the District of Columbia, as well as those enacted by Congress specifically for the territories, clearly "arise under" federal law for Article III purposes.\textsuperscript{995} Likewise, the Supreme Court has

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\textsuperscript{992} See Act of June 22, 1850, ch. 179, § 4, 12 Stat. 72, 73 (describing jurisdiction of consular courts in China and Japan).
\textsuperscript{993} See Act of June 30, 1906, ch. 3934, § 4, 34 Stat. 814 (describing original and appellate jurisdiction of U.S. Court for China); Biddle, 156 F. at 760-61.
\textsuperscript{994} See United States v. Husband R. (Roach), 453 F.2d 1054, 1057-58 (5th Cir. 1971) (discussing law and government of Canal Zone).
\textsuperscript{995} See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 424 (1821).
held that, as a matter of policy, it will defer in its exercise of appellate jurisdiction over the District of Columbia Court of Appeals on matters of local concern,\textsuperscript{996} including its interpretation of federal statutes made applicable by Congress solely to the District of Columbia, except for exceptional situations where an egregious error has been committed.\textsuperscript{997} However, the Court has made clear that this is a matter of policy only, and that review of such issues clearly falls within the scope of its Article III "arising under" jurisdiction.\textsuperscript{998}

In other instances, Congress has provided that the laws of a particular state will apply throughout a territory. Thus, for example, Congress provided by statute that the laws of Virginia and Maryland, as they existed at the time of the cession of land from those states to the federal government to form the District of Columbia, would apply to the District of Columbia;\textsuperscript{999} that the laws

\textsuperscript{996} Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103, 103-105. This, in part, remains the rule today. Act of Mar. 3, 1901, ch. 854, § 1, 31 Stat. 1189, 1189 (codified at D.C. CODE ANN. § 45-401 (2001)).


\textsuperscript{998} Id. at 367.

\textsuperscript{999} See Whalen v. United States, 445 U.S. 684, 687-88 (1980) ("[T]he approach described in the Pernell opinion is a matter of judicial policy, not a matter of judicial power.").
of Oregon would apply in the Territory of Alaska;\textsuperscript{1000} that the laws of Nebraska would apply in the Territory of Oklahoma;\textsuperscript{1001} and that the laws of Arkansas would apply in Indian Territory.\textsuperscript{1002} More generally, Congress has provided that the laws of the state in which federal property is located will apply on that federal property.\textsuperscript{1003} Although at first glance suits brought pursuant to such state laws would seem to arise under state law, this is an instance of federal incorporation. Under Article IV, Section 3, Congress has plenary authority to legislate with respect to all matters in the territories. Yet instead of legislating in detail, Congress often takes shortcuts by borrowing provisions from existing state codes and applying them to the territories. Such incorporated state law is federal law, at least for Article III purposes.\textsuperscript{1004}

However, those laws enacted by the local legislatures themselves would seem to stand on somewhat of a different footing,\textsuperscript{1005} and the question arises whether purely local territorial law, enacted by the local territorial legislature, is federal law for purposes of Article III. Although some courts have held that cases involving purely territorial law do not "arise under" federal law within the meaning of section 1331,\textsuperscript{1006} those cases are merely interpreting section 1331, not Article III.\textsuperscript{1007} Using the federal ingredient theory of Osborn,
one could certainly argue that local territorial law “arises under” federal law for Article III purposes. Just like the Bank of the United States, the territorial governments are created by and given all of their powers by Congress. Thus, in every case involving territorial law, the question arises as to whether the territorial government has the authority to enact such a law. This is an original federal ingredient sufficient to say that such a case “arises under” federal law for purposes of Article III.1009

5. Erie and the Territories. The Rules of Decision Act, also known as section 34 of the Judiciary Act of 1789, provides that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”1010 This statute was originally construed by the Supreme Court as requiring federal courts sitting in diversity (or exercising supplemental jurisdiction over state law claims) to apply only state statutory law, state court decisions interpreting state statutes, and state court decisions on questions of so-called “local” law, such as rights and title to real estate and other matters immovable and intraterritorial in character or nature. Federal courts were not otherwise required to follow state court decisions—even those of the state’s highest court—on matters of general law not codified by state statute, such as tort and contract matters.1011

In Erie Railroad Co. v. Tompkins,1012 the Supreme Court reversed course, holding that federal courts sitting in diversity or exercising

interpretation of statutory grant of federal question jurisdiction to federal courts, and not meaning of “arising under” as contained in Article III).

1008 See supra notes 829-41 and accompanying text.


Like the Bank of the United States, territorial governments are “entirely the creation of Congress.” All their powers flow from the relevant organic statutes; they cannot so much as enter into contracts without congressional authorization. It would seem that all their laws—indeed all their acts and decisions—arise under the laws of the United States.

Id.


1012 304 U.S. 64 (1938).
supplemental jurisdiction over state law claims must follow state court decisions on all matters of state substantive law.\textsuperscript{1013} The \textit{Erie} Court expressed concern that under existing practice, the rule of decision—and consequently the outcome of the case—could turn on whether the suit could be brought in or removed to federal court based on diversity or supplemental jurisdiction. Thus, the outcome could be different for the same set of facts depending on the citizenship of the parties and the amount in controversy.\textsuperscript{1014}

By its terms, the Rules of Decision Act does \textit{not} apply to a federal court applying territorial law, for it refers only to the laws of the "States."\textsuperscript{1015} However, the Supreme Court has held that the policy arguments marshaled in the \textit{Erie} decision weigh in favor of deferring to the territorial courts on matters of territorial law.\textsuperscript{1016} Accordingly, the Court has held that a federal court sitting in diversity applying territorial law should follow the decisions of the territorial courts except for those instances in which it believes that the territorial courts have made a "manifest" or "clear" error.\textsuperscript{1017}

\begin{itemize}
\item \textsuperscript{1013} \textit{Id.} at 78.
\item \textsuperscript{1014} See \textit{id.} at 74-75 (noting "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court").
\item \textsuperscript{1015} 28 U.S.C. § 1652.
\item \textsuperscript{1016} De Castro v. Bd. of Comm'rs, 322 U.S. 451, 452-59 (1944); Waialua Agric. Co. v. Christian, 305 U.S. 91, 108-10 (1938).
\item \textsuperscript{1017} See \textit{De Castro}, 322 U.S. at 452-59.
\end{itemize}

Nor does it follow that the deference due, on appeals from the local tribunals, to their understanding of matters of local concern will lead to the establishment of a local law differing from that developed in decisions in appeals from the federal district courts sitting in our insular possessions. It is not any the less the duty of the federal courts in cases pending in the federal district court or on appeal from it to defer to that understanding, when it has found expression in the judicial pronouncements of the insular courts . . . . Once understood what deference is to be paid, the problem is comparable to that presented when, upon appeals from federal district courts sitting in the states, the federal appellate courts are required to follow state law under the rule of \textit{[Erie]}.

\textit{Id.} While the lower federal courts have routinely followed this rule, \textit{e.g.}, Abuan v. Gen. Elec. Co., 1992 WL 535958, at *1 (D. Guam Feb. 25, 1992) ("As a federal court sitting in diversity, the Court must apply Guam substantive law."). there appears to be an exception in the District Court of the Virgin Islands. That District Court has reasoned that it is not bound to predict local law when sitting in diversity, because it has been vested by the Virgin Islands code with authority to decide novel questions of Virgin Islands law as a local trial court. See Spink v. Gen. Acc. Ins. Co. of Puerto Rico, Ltd., 36 F. Supp. 2d 689, 691 & n.6 (D.V.I. 1999) ("The judicial power of the Territory is vested in . . . the 'District Court of the Virgin Islands,' and in a court of local jurisdiction to be designated the 'Territorial Court of the Virgin Islands' . . . ." etc.)
IV. PROPOSALS FOR RESOLVING THE PROBLEM

Part II of this Article catalogued the "no forum" and "biased forum" problems that exist in Indian Law cases, and Part III of this Article examined ways in which Congress has resolved similar "no forum" and "biased forum" problems in analogous circumstances. Accordingly, this Part applies the lessons derived from Part III to the problem identified in Part II.

A. CREATE SPECIALIZED, NON-ARTICLE III COURTS FOR INDIAN RESERVATIONS

One option for resolving the "no forum" and "biased forum" problems in Indian Law is for Congress to create specialized, non-Article III federal courts to adjudicate disputes arising in Indian Country. Since such specialized courts would not be created pursuant to Article III, Congress would be able to vest such courts with jurisdiction over any matter. Thus, for example, creating a specialized federal court could provide for jurisdiction over disputes between two members of an Indian tribe arising in Indian Country where the tribe has not yet created its own tribal court. Moreover, such a court could exercise jurisdiction over civil disputes between an Indian and a non-Indian arising in Indian Country and could provide for removal of such suits from tribal and state courts to such a specialized federal court to avoid concerns of local court bias.

1. Source of Authority. Congress's plenary authority to regulate Indians and Indian affairs is derived from three sources: the Indian Commerce Clause, the Treaty Clause, and the Territory Islands.

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1018 See supra notes 71-603 and accompanying text.
1019 See supra notes 604-1017 and accompanying text.
1020 See U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] [t]o regulate Commerce ... with the Indian Tribes."); Morton v. Mancari, 417 U.S. 535, 551-52 (1974) ("Article I, § 8, cl. 3, provides Congress with the power to 'regulate commerce ... with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation."); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959) ("The Federal Government's power over Indians is derived from Art. I, § 8, cl. 3 of the United States Constitution.").
1021 See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ... ."); Morton, 417 U.S. at 551-52 (stating power to regulate Indian tribes
Parallels to courts in foreign countries can be drawn. Just as the combination of the Foreign Commerce Clause and the Treaty Clause justify the creation of specialized federal courts abroad, such as the U.S. Court for China, so the combination of the Indian Commerce Clause and the Treaty Clause justify the creation of such specialized federal courts for Indian Country. Moreover, the Supreme Court has recognized that Indian reservations set aside for the Indians by the federal government are territory within the exclusive jurisdiction of the federal government. Thus, just as Congress has the authority to create Article IV territorial courts in the formal territories, so it should have like authority to create such courts for Indian reservations. Indeed, the U.S. Court in Indian Territory, which exercised jurisdiction over civil disputes arising in Indian Country, was identified and implicitly approved of as a non-Article III court by the Supreme Court.

Creating specialized, non-Article III courts to adjudicate disputes in Indian Country would comport with the Supreme Court's holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that Congress has the authority to create non-Article III courts for geographic enclaves over which Congress exercises plenary control, such as the District of Columbia and the Territories. Indeed, the *Northern Pipeline* Court cited with approval its prior decision recognizing the U.S. Court in Indian Territory as a non-Article III court.

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1022 See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."); United States v. Kagama, 118 U.S. 375, 379-80 (1886) (stating Indians are under federal regulation because they "are within the geographical limits of the United States"); United States v. Rogers, 45 U.S. (4 How.) 567, 571-72 (1846) (holding Cherokees controlled and occupied territory "with the assent of the United States, and under their authority").

1023 See supra notes 716-19 and accompanying text.

1024 See supra note 1022 and accompanying text.

1025 See supra note 795 and accompanying text.


1027 Id. at 64-65, 75-76.

1028 Id. at 65 n.16.
Could Congress go a step further and vest such specialized courts with jurisdiction over any dispute involving an Indian or an Indian tribe, regardless of whether such disputes arose within or outside of Indian Country? Here, Congress's authority is not nearly as clear. The *Northern Pipeline* plurality recognized that Congress's authority to create non-Article III courts for geographic enclaves was an *exception* to the "constitutional command that the judicial power of the United States must be vested in Art. III courts."\(^{1029}\) The plurality identified two other situations in which Congress is able to create non-Article III courts: military courts and courts to adjudicate public rights disputes.\(^{1030}\) To the extent such specialized courts are adjudicating matters arising in Indian Country itself, they would seem to fall within the first exception identified in *Northern Pipeline*, but to the extent they extend to private disputes arising elsewhere throughout the United States, they would not. The *Northern Pipeline* court rejected the argument that Congress could, pursuant to its Article I powers, create non-Article III courts whenever it found that to be necessary.\(^{1031}\)

However, the *Northern Pipeline* plurality spoke generally of the three identified exceptions as "each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."\(^{1032}\) To be sure, the authority of Congress and the Executive over Indians and Indian affairs has historically been viewed as "extraordinarily broad."\(^{1033}\) Thus the ability of Congress to create non-Article III courts might seem to fall within this broadly defined exception to the general rule requiring that private law disputes be adjudicated in Article III courts. Moreover, in subsequent cases, the Supreme Court has moved away from the *Northern Pipeline* plurality's general rule that private rights disputes should be adjudicated in Article III courts, endorsing

\(^{1029}\) Id. at 63-64.

\(^{1030}\) Id. at 66-67.

\(^{1031}\) Id. at 73.

\(^{1032}\) Id. at 64.

instead a balancing test that weighs the reasons Congress had for creating such a non-Article III court against the values underlying Article III's Tenure and Compensation Clauses.\footnote{See generally CFTC v. Schor, 478 U.S. 833, 847-48 (1986) (stating constitutionality of non-Article III court is determined by reference to purposes underlying requirements of Article III); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III").}

In addition, it is not clear that Congress's Article I authority over the District of Columbia, or its Article IV authority over the territories, limits its authority to provide a non-Article III forum to cases arising \textit{within} the District of Columbia or the territories. In \textit{Tidewater},\footnote{337 U.S. 582 (1949).} the Court recognized—and the parties seemed to agree—that Congress had the authority to create a non-Article III federal forum to adjudicate disputes involving citizens of the District of Columbia regardless of whether they arose in the District itself or elsewhere in the United States.\footnote{Id. at 590, 600-03.} Thus, it would seem that Congress could, using similar logic, create a federal forum to adjudicate disputes involving Indian tribes, tribal entities, or tribal members regardless of where they arose in the United States. In any event, as will be demonstrated below, even if Congress lacks the authority to create non-Article III courts to adjudicate Indian law disputes arising outside of Indian Country, there are numerous other ways of ensuring that such disputes are adjudicated in a federal forum.

\textbf{2. Structure of Courts.} As demonstrated above, when Congress has found it necessary to create federal courts to adjudicate disputes arising in the territories, it has employed a variety of different models.\footnote{See supra notes 605-56 and accompanying text.} Some territories—particularly the western territories—required courts of general jurisdiction to adjudicate all disputes, as they had no existing local court systems in place. Other territories, such as Hawaii, already had well-developed judicial systems in place and required nothing more than a federal court with the ability to adjudicate federal question, diversity and similar cases.
What is true for the territories is likewise true for the various Indian reservations across the United States. Tribal judicial systems can range from very sophisticated to very unsophisticated, and indeed, as was demonstrated above in the “no-forum” cases, may not exist at all. On the sophisticated end, the Navajo Nation’s court system consists of seven district courts, a children’s court, a peacemaker court, and an appellate court, and adjudicates tens of thousands of cases per year; the Nation also has a published tribal code and its own caselaw reporter. Thus in attempting to solve the “no forum” and “biased forum” problems, care must be taken to encourage and respect tribal sovereignty, to preserve the existing tribal court systems, and to encourage the future development of tribal court systems.

Accordingly, it makes the most sense in creating specialized, non-Article III courts for Indian Country to model them after the “transitional” federal courts created for the Virgin Islands, the Northern Mariana Islands, and Guam. Such courts can be vested with permanent original as well as removal jurisdiction over the typical cases adjudicated in Article III federal district courts, such as federal question and diversity cases. In addition, such courts can be vested with such general jurisdiction as is not then vested in the local tribal courts. This sort of a scheme would ensure that there are no gaps in jurisdiction while a tribe is in the process of developing its own judicial system, eliminating the “no forum” problem while at the same time preserving tribal sovereignty and giving tribes an incentive to create their own judicial systems.

Even in the case of tribes with fully developed judicial systems, such as the Navajo Nation, such non-Article III courts will still exercise jurisdiction, including removal jurisdiction, over federal question and diversity cases, with the latter being defined to include disputes between an Indian and a non-Indian (which is permissible, as a non-Article III court is not subject to the formal limitations on subject matter jurisdiction imposed by Article III). Even if defen-

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1038 See supra notes 182-86 and accompanying text.
1040 See supra notes 641-56 and accompanying text.
dants opt not to remove such cases to the specialized federal court, the mere ability to remove such cases would alleviate some of the concerns expressed by the Supreme Court in *Nevada v. Hicks*, and would thus blunt efforts by the Court to continue narrowly construing the adjudicative jurisdiction of the tribal courts.

Another question that arises is whether it really makes sense to create a different specialized federal court for each reservation given the number of reservations in the United States and the cost of creating new courts. The Navajo Nation—extending as it does over four states and having a substantial population and caseload—might justify the creation of a separate federal court. However, there are many smaller tribes scattered throughout the United States with populations of only a few hundred people that likely generate a very small number of cases each year. For such reservations, the United States Tax Court provides a useful model. Congress created the United States Tax Court as an Article I legislative court to adjudicate disputes between taxpayers and the U.S. government. The judges of the Tax Court, appointed by the President with the advice and consent of the Senate, serve for a term of 15 years. While the Tax Court is based in the District of Columbia, it may sit anywhere throughout the United States, and, by statute, it is supposed to schedule its sessions so as to enable taxpayers to appear before it with as little expense as possible. Accordingly, the Tax Court rides circuit throughout the United States, hearing cases in different federal courthouses throughout the country. In like fashion, Congress could create a non-Article III United States Court for Indian Country, which could ride circuit throughout the country, sitting in various federal courts throughout the nation according to a schedule and adjudicating cases arising in Indian Country.

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1041 See supra notes 498-603 and accompanying text.
1042 See generally GETCHES ET AL., supra note 17, at 8-9.
1044 Id. § 7443(b).
1045 Id. § 7443(e).
1046 Id. § 7445.
1047 Id. § 7446.
B. USE OF EXISTING, ARTICLE III COURTS

While it is certainly possible to create specialized, non-Article III courts to adjudicate Indian law cases, such a scheme presents several difficulties. First, it is expensive, even if Congress were to choose to follow the Tax Court model. Moreover, as indicated above, although it seems certain that Congress has the constitutional authority to create such courts to adjudicate disputes arising in Indian Country, it is less certain whether it has like authority to create such courts to adjudicate such disputes arising outside of Indian Country. Accordingly, this section proposes a number of changes that Congress could enact that make use of the existing Article III federal courts already in place throughout the country.

1. Modify the Well-Pleaded Complaint Rule. As shown above, under current law, when an Indian tribe is sued in state court and it raises the federal defense of tribal sovereign immunity, the well-pleaded complaint rule bars removal of the case from state to federal court, forcing the Indian tribe to litigate the issue of sovereign immunity all the way through the state court system, with the possibility of federal court review only by way of a petition for a writ of certiorari to the Supreme Court. This is so even when a tribe is sued by the state itself or by an arm of the state, thus raising concerns that the forum adjudicating the dispute is not a neutral one. Accordingly, if sued in a state court, an Indian tribe should be able to remove the suit to federal court by raising the federal defense of tribal sovereign immunity.

As demonstrated above, the well-pleaded complaint rule is not constitutionally required, but is merely a gloss on the "arising under" jurisdiction of section 1331. Thus, Congress can modify it as it pertains to Indian tribes. The simplest way to achieve this result is to modify section 1362 so that it applies to suits in which an Indian tribe is a plaintiff or a defendant and where the federal issue arises by way of either a well-pleaded complaint or as a

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1049 See supra notes 492-95 and accompanying text.
defense. Accordingly, when suit is brought against an Indian tribe in state court, the tribe can remove the case to federal court and have the suit adjudicated in a federal forum in the first instance.\footnote{Indeed, such a modification of the well-pleaded complaint rule need not be limited to suits involving Indian tribes: it could apply to any dispute between a tribal member or tribal entity on the one hand and a non-Indian on the other.}

In the special case of a suit being brought against the tribe by a state, a question arises whether providing for removal of such cases from state to federal court is barred by the Eleventh Amendment. Yet it seems fairly clear that when a state brings a suit against someone in state court that raises a federal question in a well-pleaded complaint, the Eleventh Amendment does not bar the defendant's removing the case to federal court.\footnote{See Illinois v. City of Milwaukee, 406 U.S. 91, 101 (1972) (citing Ames v. Kansas, 111 U.S. 449 (1884)) ("[W]here a state is suing parties who are not other states . . . those suits may be brought in or removed to [federal court]."); Regents of Univ. of Minn. v. Glaxo Wellcome, Inc., 58 F. Supp. 2d 1036, 1039 (D. Minn. 1999) (holding Eleventh Amendment did not bar removal of action to federal court).} A like result should apply where the federal issue comes in as a defense, since the well-pleaded complaint rule is not constitutionally required. Although a few courts have suggested that the Eleventh Amendment bars removal of suits brought by the state against someone in state court, this language is arguably dicta as none of those cases involved a federal question, and all were decided on the alternative ground that a state is not a citizen of a state for purposes of diversity jurisdiction.\footnote{See Moore ex rel. Mississippi v. Abbott Labs., Inc., 900 F. Supp. 26, 30-31 (S.D. Miss. 1995); California v. Steelcase, Inc., 792 F. Supp. 84, 87 (C.D. Cal. 1992). While it is clear that a state is not a citizen of a state for purposes of the diversity statute, the cases so holding are grounded on the diversity statute and not Article III itself, so it is not entirely clear that Congress lacks authority to define a state as a citizen of a state if it so chooses. Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).}

2. Define Indian Tribes as Citizens of the State in Whose Borders They Are Located. As indicated above, the federal courts have for the most part declined to exercise diversity jurisdiction over suits involving Indian tribes on the ground that Indian tribes are not citizens of any state for purposes of the diversity statute. Yet the Court has previously deemed other sovereign entities located within states—such as counties and school boards—to be citizens of the states in which they are located for purposes of diversity jurisprudence.
Additionally, Congress has defined corporations as citizens of both the states in which they are located and the state in which they have their principal place of business, and the Court has upheld Congress's ability to so define corporate citizenship. Moreover, at least one lower court has recognized Congress's authority to define a tribe as a citizen of the state within whose borders the tribe is located.

Such a scheme, however, would only partially solve the "biased forum" problem. Undoubtedly, most disputes between a tribe on the one hand and non-Indians on the other will involve either non-Indians who are residents of the same state in which the reservation is located or a governmental entity located in that state. There will thus not be diversity jurisdiction except in those instances in which suit is brought by or against a citizen of a different state.

3. Define Indian Tribes as "States" for Diversity Purposes. As demonstrated above, where a dispute is between a citizen of a state on the one hand and a member of an Indian tribe located within the same state, there is no diversity jurisdiction under the diversity statute as it is currently defined. Thus, even if Congress (or the Supreme Court) makes clear that federal district courts can exercise diversity jurisdiction notwithstanding the tribal abstention rule announced in LaPlante where no forum otherwise exists, that would only partially solve the problem; in non-diversity cases, the parties would still be left without a forum.

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1058 See Akins v. Penobscot Nation, 130 F.3d 482, 485 (1st Cir. 1997) ("Although Indian tribes are not usually subject to the diversity jurisdiction of the federal courts, . . . the Settlement Act subjects the Maine tribes to diversity jurisdiction."). See also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 32 F. Supp. 2d 497, 502 (D.R.I. 1999) ("Perhaps the Narragansett Tribe could be considered a citizen of Rhode Island for diversity jurisdiction under the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1708."). Of course, Congress might have to be more specific in the case of certain tribes. The Navajo reservation, for example, is located within four states—Utah, Colorado, Arizona, and New Mexico.
1059 See, e.g., Poitra v. Demarrias, 502 F.2d 23, 29 (8th Cir. 1974).
One way to solve this problem, at least in the case of disputes between tribal members and non-members, as well as to rectify the biased forum problem, would be to define each of the Indian tribes throughout the United States as "States" for purposes of diversity jurisdiction. As indicated above, Congress has defined the term "States" in the diversity statute as including the territories, the District of Columbia, and Puerto Rico. The Supreme Court and the lower federal courts have upheld Congress's authority to do so on the grounds that they are in fact "States" within the meaning of the Diversity Clause and that the greater power to create non-Article III courts includes the lesser power to vest the existing Article III courts with jurisdiction.

be no access to state court [in non-Public Law 280 states]. Therefore, in these circumstances, non-resident plaintiffs have access to federal court but resident plaintiffs are denied access to federal and state court. A more discriminatory result is hard to imagine.

Id.; Jean Pendleton, supra note 52, at 544. While these courts have found that exercising diversity jurisdiction when possible is essential in a "no forum" situation to avoid discrimination against plaintiffs with bona-fide substantive claims, a diversity forum only solves half the problem. A plaintiff residing in the state in which the reservation-based claim arose, lacking diversity of citizenship, would still remain without a forum. The solution to this "no forum" situation would appear to be legislative. Congress, in that event, would have to create a federal forum for plaintiffs residing outside of the reservation but in the same state. This is the least satisfactory solution given the speed at which Congress acts, when and if it acts at all.

Id.; Pommersheim, supra note 56, at 350. Any application of the diversity doctrine in the tribal court jurisdiction situation has potentially discriminatory effects. Diversity jurisdiction is premised on the notion that instate plaintiffs have ready, if not favorable, access to state forums, and diversity jurisdiction allows a non-resident plaintiff access to a more neutral federal forum. But this scheme breaks down in the context of diversity in the tribal court situation because no plaintiff has access to a state forum. The result is that one class of plaintiffs (non-residents of the state in which the reservation is located) will have access to federal court while another class of plaintiffs (residents of the state in which the reservation is located) will have access to neither federal nor state court. It is highly unlikely that federal courts can ratify the use of diversity jurisdiction given that it leads to such unfair and discriminatory results.

Id. 28 U.S.C. § 1332(d).

See supra notes 842-68 and accompanying text.
Yet whatever ambivalence the Constitution may have to treating the District of Columbia and the Territories as "States" for purposes of the Diversity Clause, the Constitution seems outright hostile to the prospect of treating Indian Tribes, located within the boundaries of existing states, as "States" for any purpose. The Admissions Clause of the Constitution provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." The purpose of this clause was both to appease larger states with significant western land holdings, such as Georgia, North Carolina, and Virginia, that feared they would be divided into multiple states without their consent and to appease smaller states against the risk of a junction of smaller states (and thus a diminution of their power) without their consent. Indeed, when the Cherokee Nation adopted a constitution modeled after the U.S. Constitution on July 4, 1827, proponents of removing the Indians westward decried this as an effort by the Cherokee Nation to erect a state within a state, in contravention of the Admissions Clause.

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1063 U.S. CONST. art. IV, § 3, cl. 1.
1065 See J.P. KINNEY, A CONTINENT LOST—A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA 54-55 (1975) ("It was represented that [the preparation and adoption of a constitution] by the Cherokee was an effort to set up an independent nation within the sovereign State of Georgia. These critics of the Cherokee quoted in support of their position Section 3 of Article IV of the Federal Constitution."). See also FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 237-238 (1982).

The Constitution forbade the erection of a new state within the territory of an existing state without that state's permission.... On these grounds, [President Jackson] told Congress, he had informed the Indians that their attempt to establish an independent government [within the boundaries of Georgia and Alabama] would not be counteracted by the Executive of the United States.
It would seem as though the meaning of "States" as used in Article IV is the same as the meaning of the word "States" as used in describing the "judicial power" in Article III.\textsuperscript{1066} It would thus seem that Congress could not simply create diversity jurisdiction over disputes between a citizen of a state and a member of an Indian tribe located within the boundaries of that state merely by defining the reservation as a "State" for purposes of the diversity statute, as it has done for the territories and the District of Columbia.\textsuperscript{1067} The distinction between Indian tribes on the one hand and the territories and the District of Columbia on the other is pronounced: while the former are located within the boundaries of existing states, the latter are not, and thus the former could not be deemed to be "States" in the sense in which that term is used in the Constitution without the consent of the states within which those Indian tribes are located.

Thus, one would seem to be able to rely only on the alternative rationale employed by the \textit{Tidewater} court: that, in essence, the greater the power to create a specialized non-Article III court to adjudicate such disputes justifies the lesser power of vesting the existing Article III courts with jurisdiction to adjudicate such disputes.\textsuperscript{1068} As demonstrated above, Congress would seem to have the authority to create specialized non-Article III courts to adjudicate disputes between Indians and non-Indians, at least when those disputes arise in Indian Country.\textsuperscript{1069} Accordingly, it would seem as though this would fit within the \textit{Tidewater} rationale, to the extent that rationale is a valid one. However, as shown above, that rationale garnered only three votes,\textsuperscript{1070} and the decision was only sustained because two justices believed the District of Columbia to


\textsuperscript{1067} \textit{See} 28 U.S.C. § 1332(d) (1994) ("The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."). Note, however, that the definition of "State" is more limited for purposes of the removal statute. 28 U.S.C. § 1451 (1994) ("For purposes of this chapter—(1) The term 'State court' includes the Superior Court of the District of Columbia. (2) The term "State" includes the District of Columbia.").

\textsuperscript{1068} \textit{Tidewater}, 337 U.S. at 600 (opinion of Jackson, J.).

\textsuperscript{1069} \textit{See supra} notes 882-920 and accompanying text.

\textsuperscript{1070} \textit{Tidewater}, 337 U.S. at 583 (opinion of Jackson, J.).
be a "State" within the meaning of the Constitution. Given the
difficulties of using the latter rationale for Indian tribes, it would be
hard to justify federal court jurisdiction under the Tidewater theory.

4. Provide for Federal Court Removal and Federal Appellate
Review. A number of commentators have suggested that Congress
should eliminate the ability under National Farmers collaterally to
attack the jurisdiction of tribal courts in federal district courts and
should instead give the Supreme Court the authority to review the
decisions of tribal courts by writ of certiorari. Of course, one
argument in support of such a proposal is that Congress and the
Supreme Court are unlikely to allow tribal court jurisdiction to
expand absent some federal check on their exercise of authority.
Indeed, as demonstrated above, much of the Supreme Court's recent
jurisprudence shrinking the jurisdiction of the tribal courts seems
to be motivated by the lack of a means of removing cases from tribal
to federal courts and the lack of federal court review of the decisions
of tribal courts.

Congress can easily amend the removal statute to allow for the
removal from tribal to federal courts of cases falling within the
original jurisdiction of the federal courts in a manner akin to the
current provision allowing for removal from state to federal court.
Under such a scheme, federal question cases such as Nevada v. Hicks
could be removed to federal court. As demonstrated above,

1071 Id. at 625-26 (Rutledge, J., concurring).
1072 See Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Comm'n on
Civil Rights, 100th Cong., 2d Sess. 81-82 (1988) (remarks of Professor Robert N. Clinton);
Reynolds, supra note 27, at 601 ("A proposal for reviewing tribal court decisions by writ of
certiorari is more respectful of the sovereignty and independence of the tribal court system,
yet still cognizant of the need for some ultimate check on the exercise of tribal sovereign
powers."); Laurie Reynolds, Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty
While Expanding Federal Jurisdiction, 73 N.C.L. REV. 1089, 1154 (1995) (endorsing Supreme
Court review of tribal court decisions because it would end "insulation" of some tribal courts
while maintaining careful balance "between respect for tribal sovereignty and the overarching
principle of judicial review than the current exhaustion doctrine").
1073 See Reynolds, supra note 1072, at 1154 ("Moreover, complete insulation of tribal court
decisions from all federal judicial review will preclude meaningful expansion and enhance-
ment of tribal court powers. Congress and the federal courts . . . are unlikely to allow tribal
courts to exercise significant coercive power over nonmembers without the check of ultimate
federal review.").
1074 See supra notes 498-603 and accompanying text.
Congress has historically and currently provides for removal from local territorial to federal territorial courts in cases falling within the original jurisdiction of Article III district courts, and there is no reason why Congress cannot do the same in the case of tribal courts.\textsuperscript{1077} 

As to providing for appellate review of tribal court decisions, one commentator doubts that Congress would enact such a proposal, reasoning that Congress is unlikely to take measures that would add to the Supreme Court's already heavy workload.\textsuperscript{1078} However, as has been demonstrated above, Congress could create a non-Article III federal court to hear such appeals, or alternatively, it could vest the existing federal courts of appeals with such jurisdiction. Since Indian tribes are scattered throughout the nation, Congress could vest each of the federal courts of appeals with jurisdiction to review the decisions of tribal courts located within the circuit, thus preventing an overload on any one court of appeals and providing an appellate forum that is geographically proximate to the respective reservations. Moreover, to prevent overloading, the courts of appeals could be given the ability to review such decisions by discretionary writ of certiorari, as in the case of the Ninth Circuit's review of Guam, instead of through mandatory appeal.\textsuperscript{1079} Alternatively, they could be vested with mandatory appellate jurisdiction over only certain matters.\textsuperscript{1080} 

There is no question that a non-Article III appellate court created by Congress could hear appeals of all cases from tribal courts and that the Supreme Court and the federal courts of appeals could hear appeals on matters falling within the Article III categories of jurisdiction. However, it is less clear whether the Supreme Court and the federal courts of appeal could hear appeals involving disputes between non-diverse citizens (including an Indian versus a non-Indian) arising under tribal law. While territorial law can be

\textsuperscript{1077} See supra notes 921-1009 and accompanying text.

\textsuperscript{1078} See Robert Laurence, Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act, 10 CAMPBELL L. REV. 411, 431 n.88 (1988) ("I judge the chance that Congress would ever add to the Supreme Court's workload by allowing certiorari to be sought from several hundred tribal courts to be approximately zero.").


deemed to "arise under" federal law for Article III purposes, in interpreting the Double Jeopardy Clause, the Court has drawn a distinction between the territories and Indian tribes that might suggest that laws enacted by territorial governments "arise under" federal law, while those enacted by Indian tribes do not.

In *United States v. Wheeler*, the Court held that the Double Jeopardy Clause did not bar prosecution of an Indian in federal court under a federal criminal statute when he had been previously convicted in a tribal court of a lesser included offense arising out of the same incident. Previously, the Court had held that a prosecution in a territorial court barred a subsequent prosecution in a federal court and vice-versa. The *Wheeler* Court distinguished the relationship between the territorial and federal governments from that between the tribal and federal governments, reasoning that although territorial governments are creations of Congress that act as mere arms of the federal government, tribes exercise their power to punish tribal offenders as part of their retained sovereignty. However, this distinction would seem only to require the identification of a different original federal ingredient, and not to say that no original ingredient exists. In every case involving

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1031 U.S. CONST. amend. V.
1033 Id. at 313-14.
1034 See Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) ("Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty . . . . Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court.") (citing Grafton v. United States, 206 U.S. 333, 352 (1907)).

The "dual sovereignty" concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities . . . . successive prosecutions by federal and territorial courts are impermissible because such courts are "creations emanating from the same sovereignty." . . . [A] territorial government is entirely the creation of Congress, "and its judicial tribunals exert all their powers by authority of the United States." . . . When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as "an agency of the federal government." . . . Thus, in a federal territory and the Nation, as in a city and a State, "[t]here is but one system of government, or of laws operating within [its] limits."

1036 Id. at 328.
territorial law, the original federal ingredient that exists in every case is “Did Congress vest the territorial government with authority to enact such a law?” In the case of Indian tribes, the question is the reverse: since tribes retain their inherent sovereignty unless diminished or extinguished by Congress, an original ingredient in every case involving tribal law would be “Has Congress diminished or extinguished the tribe’s authority to enact such a law?,” or “Does the tribe have, as a matter of federal law, legislative jurisdiction to enact such a law?” Thus, because an original ingredient could be found in every case, it would appear as though the existing Article III courts could exercise appellate jurisdiction over all cases adjudicated in the tribal courts, thus providing a measure of protection against local court bias.

Indeed, such an original federal ingredient would seem to justify original Article III jurisdiction over all disputes arising in Indian Country. In every such case, the question would arise whether tribal law or state law would govern the dispute. Since the question of whether a state or a tribe has legislative jurisdiction over a particular cause of action arising in Indian Country is itself a federal question, all such disputes would fall within the Article III “arising under” jurisdiction of the federal district courts located in the states.

5. Protective Jurisdiction, Federal Incorporation of Tribal Law, and Federal Common Law. As discussed above, the theory of protective jurisdiction provides that Congress’s (arguably) greater power under Article I to enact substantive law to govern a particular dispute includes the (arguably) lesser power to allow local law to govern but instead to provide a federal forum in which to adjudicate such a dispute. Although there are questions about Congress’s ability to legislate the rules of decision for every dispute involving a resident of the District of Columbia or the territories, it is

1087 See supra notes 989-1009 and accompanying text.
1088 See supra notes 842-68 and accompanying text.
1089 Goldberg-Ambrose, supra note 27, at 580 n.217.
relatively clear that Congress’s plenary power under the Indian Commerce Clause is far broader than its powers under the Territory and District Clauses. Congress’s power under these clauses is not limited by geography, giving Congress the authority to enact substantive law governing, for example, every contract entered into by an Indian and any tort involving an Indian, regardless of where geographically such disputes arose. Accordingly, Congress has the authority to enact the governing law to adjudicate such disputes. Thus under Wechsler’s theory of protective jurisdiction, it could take the lesser step of vesting the existing Article III courts with jurisdiction over all such disputes. Even under the Mishkin version of the theory of protective jurisdiction, Congress’s extensive involvement in the field of Indian affairs would seem to make this the sort of federal program that it could protect. The theory of protective jurisdiction has never been approved by the Supreme Court; however, to the extent it is a viable theory, the case of suits involving Indians appears to be a perfect fit.

As demonstrated above, there are more doctrinally sound ways in which Congress can effectively achieve the same result. Rather than specifically legislating the rules of decision for all tort, contract, and other like disputes arising in Indian Country and for

There has been considerable speculation over whether Congress possesses the power to legislate rules of decision for suits involving citizens of the District of Columbia. Congress’ power to legislate for the District readily sustains any federal substantive rules designed to govern transactions between District citizens and state citizens within the District. Only when transactions outside the District between District citizens and state citizens are at issue does the existence of federal law-making competence become problematic. These problems become especially thorny when the federal rule is applied to a case involving a District citizen who moved to the District after the transaction which is the subject of the litigation took place.

Id. U.S. CONST. art. I, § 8, cl. 3.
1091 Id. cl. 17.
1092 See Dick v. United States, 208 U.S. 340, 357 (1908) (“Congress has the power to say with whom, and on what terms [Indians] shall deal and what articles shall be contraband.”); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197-98 (1876) (holding Congress may not only ban unlicensed sale and production of liquor in “Indian Country,” but also extend ban to neighboring jurisdictions).
1093 See supra notes 842-46 and accompanying text.
1094 See supra notes 847-51 and accompanying text.
all disputes involving Indian tribes, tribal entities, and tribal members arising elsewhere, Congress could simply incorporate state and tribal law as a matter of federal law. For example, Congress could provide that when a dispute arises on a reservation, tribal law will be incorporated as the federal rule of decision, and when it arises off a reservation, state law will be incorporated as the federal rule of decision. The result would be the same as if Congress simply vested the federal courts with jurisdiction over such disputes except that, as a result of the fiction that Congress has carefully considered the various state and tribal laws prior to adopting them, there is no Article III problem and no need to invoke the untried theory of protective jurisdiction.

Alternatively, Congress could authorize the federal courts to create federal common law to govern disputes arising in Indian Country or involving tribal entities or tribal members. The federal courts could either adopt local tort and contract law as a matter of federal common law or create their own body of rules to apply uniformly across the country. In any event, this alternative likewise reaches the same result without raising any Article III concerns.

6. Create an Indian Sovereign Immunities Act. This Article has identified two problems with respect to tribal sovereign immunity. First, when a tribe is sued in state court, it is forced to litigate its federal defense of sovereign immunity in that forum because of the well-pleaded complaint rule. This creates a potential "biased forum" problem, especially when a state citizen or a state entity is bringing suit against the tribe. Second, tribal sovereign immunity can create a "no forum" scenario because the only exceptions to tribal sovereign immunity are waiver by the tribe or abrogation by the federal government. Since the defense applies in state, federal, and tribal courts, those injured by tribes may have no form of judicial relief.

Since tribal sovereign immunity is analogous to foreign sovereign immunity, Congress could enact something akin to the Foreign Sovereign Immunities Act ("FSIA"), and allow for removal to federal court whenever suit is brought against an Indian tribe. Like the

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1055 See supra notes 213-22 and accompanying text.

FSIA, such an act could specify those instances in which an exception to sovereign immunity would arise.\textsuperscript{1097} If the goal is merely to provide a neutral forum in which the tribe can adjudicate its defense of sovereign immunity, an exception to sovereign immunity need only be made in the act where there is waiver by the tribe or express abrogation by Congress. This would allow suits to be brought in federal court whenever a tribe is sued, thus effectively addressing the biased forum problem.\textsuperscript{1098} If the goal is to go further—to ensure that tribes are subject to suit in connection with their non-sovereign activities—exceptions could likewise be made for cases involving commercial activity by the sovereign entity\textsuperscript{1099} and noncommercial torts committed by the sovereign entity, as in the FSIA.\textsuperscript{1100} Moreover, when the tribe itself brings the suit, it could be subjected to counterclaims arising out of the same transaction or occurrence or to other counterclaims to the extent that they do not seek relief in excess of the amount claimed by the tribe in its suit.\textsuperscript{1101} Just as under the FSIA, such suits would be deemed to “arise under” federal law for Article III purposes since, at the outset of every case, the federal court would be required to determine whether the federal right of tribal sovereign immunity bars suit being brought against the Indian tribe.\textsuperscript{1102}

V. CONCLUSION

This Article has identified two significant problems in Indian Law involving judicial jurisdiction. First is the “no forum” problem


\textsuperscript{1098} Cf. id. § 1605(a)(1) (setting forth exception to foreign sovereign immunity in case of waiver).

\textsuperscript{1099} Cf. id. § 1605(a)(2).

\textsuperscript{1100} Cf. id. § 1605(a)(5) (setting forth exemption to foreign sovereign immunity in case of noncommercial tortious acts or omissions of foreign sovereign).

\textsuperscript{1101} Id. § 1607(b)-(c).

\textsuperscript{1102} Alternatively, Congress could abrogate tribal sovereign immunity under specific circumstances, but only in tribal as opposed to state or federal court. Although the Supreme Court has held that Congress lacks the ability to abrogate a state’s sovereign immunity in the state’s own courts (except in narrowly defined circumstances), Alden v. Maine, 527 U.S. 706, 754 (1999), that holding is based on the 11th Amendment, and is thus not applicable to tribal sovereign immunity. Of course, such a proposal would solve the “no forum” problem but would expand the “biased forum” problem.
in which no court has jurisdiction over disputes involving Indian tribes, tribal entities, or tribal members. Second is the "biased forum" problem in which a state or a tribal court has jurisdiction over a dispute, but the possibility of local bias poses a substantial risk that litigants will not be treated fairly. By examining the ways in which Congress has addressed the "no forum" and "biased forum" problem in other circumstances, this Article has proposed ways in which Congress can, consistent with the strictures of Article III, address the "no forum" and "biased forum" problems in Indian Law.

To be sure, while this Article has tried to suggest ways in which the problems can be solved in a manner that safeguards tribal sovereignty, all of the proposed solutions will, to some extent, involve a diminishment in tribal sovereignty. On the other hand, a failure to find a solution to these problems will only mean a continued attack on tribal courts by the Supreme Court and the lower federal and state courts that will permanently and seriously erode tribal sovereignty. If tribes are unwilling to allow Congress to make measured reductions in tribal sovereignty, they risk a steady erosion of their sovereignty at the hands of the federal and state courts.