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Abstract

Twenty years ago, the Supreme Court misread its precedents and took a shortcut to do what was "simpler" instead of what was right. It determined, without examining the origins of tribal judicial power, that tribal courts are not courts of general jurisdiction. Writing for the majority in *Nevada v. Hicks*, Justice Antonin Scalia concluded that in order to find that tribal courts were able to interpret federal law, the Court would have to "attribute to tribal courts jurisdiction that is not apparent." But power often exists even if it is not apparent at first glance. Unwilling to do even a cursory examination to determine whether tribal courts might nonetheless possess general jurisdiction, the Court decided that it would be "surely . . . simpler . . . to conclude that tribal courts cannot entertain" claims arising under federal law. This Article objects to the legal principle that tribes cannot exercise their inherent sovereign powers simply because it is "simpler" for the Supreme Court.

In *Hicks*, the Court abdicated its responsibility by not engaging in an analysis of the origins of the judicial power exercised by tribal courts. Under the principles of inherent sovereignty, it is the tribal sovereign, and not the Supreme Court, that controls the jurisdiction of tribal courts. If a tribal government vests in its judicial department the authority to interpret federal law, then the tribal court maintains that power until withdrawn by the tribal sovereign. This Article further argues that the Court in *Hicks* exceeded its Article III exercise of judicial power to attempt to limit—against the will of the tribal sovereign—the general jurisdiction of tribal courts. It concludes by encouraging tribal governments to decide for themselves whether they want their courts to interpret federal

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law. If the tribal sovereign assigns that power to its courts, then tribal courts should begin affirmatively exercising general jurisdiction despite *Hicks*.

INTRODUCTION

In the 1970s, nearly all uranium development in the United States occurred on tribal land, including extensive uranium mining on the Navajo Nation.[1] By the late 1970s, miners were dying of health issues linked to uranium exposure.[2] Between the 1970s and 1990s, the cancer rates of the Navajo Nation doubled, even though the rates fell nationwide.[3]

In 1995, Laura and Arlinda Neztsosie, enrolled members of the Navajo Nation, filed a lawsuit in Navajo Tribal Court alleging several claims related to uranium contamination

1. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1482; *see also* Winona LaDuke, *Uranium Mines on Native Land*, HARV. CRIMSON (May 2, 1979), https://www.thecrimson.com/article/1979/5/2/uranium-mines-on-native-land-pthe/ [https://perma.cc/5R5M-GYZ3] ("[B]y 1975 the Federal Trade Commission could report 380 uranium leases on Indian lands as opposed to four on public and acquired lands."). Although uranium mining is now prohibited by many tribal governments, its effects remain. On the Navajo Nation alone, two abandoned uranium mills left approximately 200,000 tons of radioactive waste, resulting in "a barren landscape and pervasive, lethal contamination." Wood, *supra*.

2. Mary F. Calvert, *Toxic Legacy of Uranium Mines on Navajo Nation Confronts Interior Nominee Deb Haaland*, PULITZER CTR. (Feb. 23, 2021), https://pulitzercenter.org/stories/toxic-legacy-uranium-mines-navajo-nation-confronts-interior-nominee-deb-haaland [https://perma.cc/WBL3-ZJTD].

3. *Id.*

under Navajo common law.[4] Because these claims dealt with radioactivity, they also fell under the federal Price–Anderson Act (dealing with exposure to radioactive material).[5] The claims alleged that El Paso Natural Gas operated open-pit uranium mines that contaminated water that the Neztsosies used for several purposes, including drinking.[6] As a result of using and consuming the contaminated water, the plaintiffs claimed that they were exposed to radioactive and other hazardous materials that had an adverse impact on their health.[7]

El Paso collaterally attacked the jurisdiction of the Navajo Tribal Court by asking the U.S. District Court for the District of Arizona for an injunction.[8] The federal district court enjoined the Navajo Tribal Court from hearing any claim arising under the federal Price–Anderson Act, but it permitted the Tribal Court to proceed to hear any claim recognized by Navajo tort law, reasoning that the tribal-court exhaustion doctrine required federal courts to generally permit tribal courts to determine their own jurisdiction before reviewing claims based on tribal law.[9]

On appeal, the Ninth Circuit not only affirmed the district court's refusal to enjoin the Navajo Tribal Court from hearing claims based on Navajo tort law but also held that the Navajo Tribal Court could hear claims under the Price–Anderson Act.[10] It reasoned that tribal courts, like state courts, had concurrent jurisdiction over federal claims and were, therefore, as capable of interpreting federal law as any state court judge.[11] El Paso appealed the Ninth Circuit's decision to the U.S. Supreme Court.[12]

In a unanimous opinion written by Justice David H. Souter, the Court held that the Price–Anderson Act "transforms into a

4. Frank Pommersheim, *Tribal Courts and Federal Courts: A Very Preliminary Set of Notes for Federal Courts Teachers*, 36 ARIZ. ST. L.J. 63, 71–74 (2004) (discussing the *Neztsosie* case and contextualizing its meaning for the relationship between tribal and federal courts).

5. 42 U.S.C. § 2210(n)(2) (providing that claims involving nuclear materials may be heard in federal courts regardless of whether the claims are framed as violations of state law).

6. El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 477 (1999).

7. *Id.*

8. *Id.* at 478.

9. *Id.*

10. El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610, 617 (9th Cir. 1998) ("Price–Anderson provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents."), *rev'd*, 526 U.S. 473 (1999).

11. *Id.*

12. *Neztsosie*, 526 U.S. at 478.

federal action 'any public liability action arising out of or resulting from a nuclear incident'" and allows for the removal of those claims from state to federal court.[13] While Justice Souter recognized that Congress was silent as to whether claims made in tribal court under tribal law should be treated like those in state court and thereby removed to a federal court, he concluded without evidence that Congress intended to deny tort claims based on tribal law arising from nuclear accidents[14] and remanded the case to determine whether the Neztsosie's claims constituted a public liability action arising from a nuclear accident.[15]

The *El Paso Natural Gas Co. v. Neztsosie*[16] opinion is troubling for the many ways it ignores foundational principles of tribal sovereignty[17] and federal Indian[18] law to announce new judicially created limitations on the power of tribal courts divorced from any congressional intent. First, it intentionally ignores the century-old canon of construction that statutory ambiguity should be construed in favor of tribal sovereignty, with "doubtful expressions . . . resolved in favor"[19] of Indian

13. *Id.* at 484.

14. *Id.* at 487 ("Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like these. Now and then silence is not pregnant.").

15. *Id.* at 488.

16. 526 U.S. 473 (1999).

17. For a robust discussion of tribal sovereignty, see *infra* Section IV.A. For an academic discussion of inherent tribal sovereignty, see generally Angela Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (describing how tribes use their sovereignty to promote internal values which may, at times, conflict with Western conceptions of law and justice); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006) (describing how tribes use their inherent sovereign powers and tribal courts to keep reservation communities safe); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) (discussing the role of tribal sovereignty in federal courts, including tribal sovereign immunity).

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

19. McClanahan v. Ariz. St. Tax Comm'n, 411 U.S. 164, 174 (1973) (citing Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

tribes by reading congressional intent into statutory silence. Second, it denies "the right of reservation Indians to make their own laws and be ruled by them"[20] by preventing Indian tribes from creating civil causes of action under tribal tort law related to the radioactive contamination of Indigenous lands. But perhaps most troublingly, *Neztsosie* is the precursor to the Supreme Court's determination in *Nevada v. Hicks*[21] that tribal courts are not courts of general jurisdiction.[22] This holding dismantled the long-established right of tribal governments to exercise their inherent power to determinate their own jurisdiction.[23]

For defenders of tribal sovereignty, *Hicks* represents the nadir of respect by the Court for tribal power, but today there is renewed hope. A new Supreme Court brings with it a better understanding of inherent tribal powers.[24] More than twenty years after *Neztosie* and *Hicks* were decided, recent Supreme Court jurisprudence has provided an opening to restore the original understanding that Indian tribal courts may interpret federal laws if their concomitant tribal sovereign assigns them that power.

In 2023's *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*,[25] the Court explained that tribal

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

21. 533 U.S. 353 (2001).

22. *Id.* at 367. General jurisdiction, in this sense, is the authority of a tribal court to hear claims based upon federal law, interpret federal law, and enforce federal law. For a more thorough discussion of general jurisdiction, see *infra* Section II.A.

23. *See* Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 393 (1974) (stating that "while many federal statutes have since qualified [the Indian tribes'] authority over their territory, none has explicitly usurped tribal jurisdiction over non-Indian offenses"); F. Browning Pipestem, *The Journey from* Ex Parte Crow Dog *to* Littlechief*: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 AM. INDIAN L. REV. 1, 8 (1978) ("Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished*.").

24. For example, the Court recognized the inherent rights of tribal law enforcement for the first time in 2021, holding that a tribal officer was exercising inherent tribal power when he stopped and searched a non-Indian in Indian country. United States v. Cooley, 593 U.S. 345, 347–48 (2021). For an excellent academic observation on how the Court is embracing tribal sovereignty and inherent tribal power, see generally Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963 (2022).

25. 599 U.S. 382 (2023).

governments are "other foreign or domestic government[s]" of the United States.[26] In doing so, the Court ultimately not only held that the Bankruptcy Code abrogated tribal sovereign immunity[27] but also located tribal sovereignty as distinct from a federal enclave or state instrumentality, recognizing that Indian tribes exercise a sovereign's inherent power.[28] The opinion reaffirms the sovereign status of tribes in our federal system[29] and opens up the possibility to further build upon inherent tribal power.[30]

This Article argues that because Indian tribes are sovereign governments[31] (like other federal or domestic governments) that possess an even greater sovereignty than states,[32] tribal courts may hear claims arising under federal law and interpret the meaning of the federal law in the same manner as state courts. Part I focuses on the origins of general jurisdiction. An examination of early judicial opinions, constitutional structure, and even the theory behind sub-federal judicial systems all suggest that tribal courts are courts of general jurisdiction. Part II continues this discussion by exploring the Supreme Court's

26. Lac du Flambeau Band of Lake Sup. Chippewa Indians v. Coughlin, 599 U.S. 382, 395, 399 (2023).

27. *Id.* at 393.

28. *Id.* at 399.

29. *See id.*

30. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 42 (1999) ("[I]nherent tribal power—which is beyond the reach of the Bill of Rights but subject to plenary congressional power—exercised within its customary territorial domain."). For a discussion of inherent tribal power, see generally Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014).

31. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789 (2014) (describing tribal sovereignty as "settled law"). *See generally* Resnick, *supra* note 17 (analyzing the extent to which Indian tribes have actual sovereignty); Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002) (arguing that the Supremacy Clause does not apply to sovereign Indian tribes); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (analyzing the relationship between sovereignty and property laws and how those shape and reinforce social and racial paradigms between the United States and Native tribes).

32. Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) ("Indian tribes are not states. They have a status higher than that of states."). Justice Elena Kagan has offered one of the most trenchant commentaries on the omission of Indian tribes from the founding documents: "While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity." *Id.* (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991)).

opinion in *Nevada v. Hicks*, which is the most explicit judicial rejection of the principle that tribal courts are courts of general jurisdiction. Part III critiques *Hicks*'s rejection, arguing that a consistent interpretation of tribal sovereignty requires that tribal courts be restored to their status as courts of general jurisdiction. It explains that the jurisdiction of tribal courts is not properly controlled by the Supreme Court, a power assumed without justification by Justice Scalia in *Hicks*, but is instead a question for tribal governments to decide. Part IV contextualizes this conclusion, showing that when tribes exercise general jurisdiction, they do so using the same "dual sovereignty" principles as state courts. It demonstrates that permitting tribal courts to interpret federal law is consistent with commonly understood precepts of federalism and does not disrupt the primary position that federal courts retain in interpreting the meaning of federal law. Finally, this Article ends with a few concluding remarks.

I. DUAL SOVEREIGNTY AS THE BASIS FOR GENERAL JURISDICTION

When Congress creates a cause of action, a claim made pursuant to that cause of action may be heard by a federal court.[33] This is the very basis of federal question jurisdiction,[34] where federal courts have the power to hear claims arising under federal law because it is the federal court system (culminating in the United States Supreme Court) that is empowered to provide the ultimate interpretation of federal law.[35]

While claims arising under federal law may be brought in the federal courts for resolution, state courts presumptively

33. Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 269 (2007) ("[T]he Marshall Court did not deem any case that might involve a federal question one 'arising under' federal law. Rather, the Supreme Court explicated the Arising Under Clause in the first few decades following ratification to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was determinative of a right or title asserted in the proceeding before it.").

34. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("This provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law.").

35. *See* Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1136 (2022) ("In some ways, the Supreme Court is the ultimate arbiter of federal law. But in other ways, the complexity of U.S. society and the sheer number of legal disputes the system must resolve make it functionally impossible for the Supreme Court to reign supreme over all aspects of all suits. Accordingly, the Supreme Court has evolved over time into a body that uses the discretionary certiorari process to shape the broad contours of federal law.").

share concurrent jurisdiction over those claims.[36] Until Congress designates a cause of action as exclusively federal, state courts may not refuse to enforce a claim arising under federal law.[37] The Supreme Court grounds this power in the principle of dual sovereignty: "Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."[38]

This Article argues that Indian tribes share in the "dual sovereignty" of the United States. Well-established precedent provides that the dual sovereignty doctrine provides authority for an Indian tribe and the federal government to separately prosecute an individual for the same underlying act without violating the defendant's rights under the Double Jeopardy Clause[39] because the prosecutions are conducted by separate sovereigns.[40] To understand why tribal courts are courts of general jurisdiction, in marked contrast to precedent,[41] this Part explores the origins of, and justifications for, general jurisdiction.

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36. Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2039 (2016) ("When Congress creates a federal cause of action, it needs to do nothing in order for state courts of general jurisdiction to maintain concurrent jurisdiction. Likewise, state legislatures need not act in order for their state courts of general jurisdiction to maintain concurrent jurisdiction.").

37. Testa v. Katt, 330 U.S. 386, 393 (1947) ("[T]he policy of the federal Act is the prevailing policy in every state. Thus, . . . this Court stated that a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" (quoting Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916))).

38. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

39. United States v. Lara, 541 U.S. 193, 197–99 (2004) (explaining that "the Double Jeopardy Clause does not bar successive prosecutions brought by *separate sovereigns*" and that when a tribe brings criminal charges against a nonmember Indian, it is exercising its "'*inherent*' *tribal* power (not delegated federal power)").

40. United States v. Wheeler, 435 U.S. 313, 328 (1978) ("[T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.").

41. *See* Nevada v. Hicks, 533 U.S. 353, 367 (2001) (concluding in a sharply divided case that tribal courts are not courts of general jurisdiction).

A. *General Jurisdiction: Subject Matter, Not Personal Jurisdiction*

The concept of "general jurisdiction" as a legal term of art presents potential confusion that is best addressed at the outset. The confusion[42] arises because general jurisdiction has both a personal jurisdiction and a subject matter jurisdiction connotation.[43]

In the context of personal jurisdiction, general jurisdiction refers broadly to a court's authority to assert personal jurisdiction over all parties whose connections to the forum state are so continuous and systematic that they make the party essentially at home there.[44] General *personal* jurisdiction requires something more than merely "doing business" in a state[45] and, with few exceptions,[46] is narrowly focused on the defendant's domicile.[47]

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42. *Cf.* Fort Bend Cnty. v. Davis, 587 U.S. 541, 547 (2019) ("Jurisdiction . . . is a word of many, too many, meanings." (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004))).

43. *Id.* (stating that "jurisdictional" is generally reserved for "delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction) (quoting *Kontrick*, 540 U.S. at 455)).

44. Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) ("As we have since explained, '[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State.'" (alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))). *See generally* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) (critiquing the term "general jurisdiction" in the context of a personal jurisdiction analysis).

45. *Daimler AG*, 571 U.S. at 139–40 n.20 ("General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests . . . ."). For a critique of the "doing business" test, which laid the groundwork for the Court's decision in *Daimler*, see Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 681–95 (2012).

46. The Supreme Court recently held that corporations may be subject to personal jurisdiction where, as a consequence of registering to do business in a state in which they are not domiciled, they agree to be sued. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 125–26 (2023).

47. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."). Admittedly, the Court has noted that in exceptional circumstances a party might qualify for general personal jurisdiction

However, it is in the context of subject matter jurisdiction that this Article tackles the scope of general jurisdiction. Instead of referring to a court's power over the defendant, a state court exercises general jurisdiction when it applies and interprets federal law in addition to state law[48]: "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."[49] State courts have long been held to exercise general jurisdiction[50] except when explicitly withdrawn by Congress.[51] Despite Supreme Court precedent to the contrary,[52] tribal courts may exercise the same authority for largely the same reasons.

B. *The Framers Intended Non-Federal Courts to Interpret Federal Law*

It has always been assumed that federal courts are not the exclusive forum to adjudicate federal claims or to interpret federal law.[53] The Constitution itself is ambiguous as to which courts may take up the mantle of interpreting federal law, while the Federalist Papers explicitly allude to state courts filling this role. Because the interpretation of federal law has never been

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beyond the limits of her domicile. *See Daimler AG*, 571 U.S. at 139 n.19 ("We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."); *see also Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 928 (discussing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). For an academic discussion of these exceptionally few narrowly tailored exceptions, see generally Judy M. Cornett, *The Rulification of General Personal Jurisdiction and the Search for the Exceptional Case*, 89 TENN. L. REV. 571 (2022).

48. Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1834 (2020) ("State courts possess general jurisdiction (granted either by state legislatures or state constitutions) that embraces claims made under federal law, including under the Federal Constitution.").

49. Claflin v. Houseman, 93 U.S. 130, 136 (1876).

50. *Id.*

51. Congress can act to make a cause of action exclusively federal. *See* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1406 n.6 (1983) ("[M]uch federal jurisdiction is concurrent with state courts. Unless Congress explicitly makes jurisdiction over a federal claim exclusively federal, state courts are ordinarily empowered (if not obligated) to hear federal claims.").

52. *See* Nevada v. Hicks, 533 U.S. 353, 367–68 (2001).

53. *See ArtIII.S1.6.3 Doctrine on Federal and State Courts*, CONSTIT. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-6-3/ALDE_00013231/ [https://perma.cc/27Z6-2VXM].

exclusively reserved to federal courts, and because the same justification for extending general jurisdiction to state courts applies to tribal courts, tribal courts ought to be treated as courts of general jurisdiction.

1. The Constitutional Argument

Article III of the Constitution provides for the creation of federal courts and assigns to them their concomitant exercise of judicial power.[54] In Section One, the Constitution creates only a single federal court—the Supreme Court: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[55]

It is entirely possible that Congress would have refused to create inferior federal courts or that once federal courts were created, they would only be permitted to exercise jurisdiction over a limited set of cases, leaving the enforcement of at least some federal law to state or other courts.[56] As Professor Daniel J. Meltzer trenchantly observed in his excellent history of Article III, "at the Convention, in the ratification debates, and in the first Congress, there surely was a widespread expectation that the Supreme Court would exercise appellate jurisdiction, often coupled with the observation that only such review could ensure uniformity."[57] Whose opinions did Article III envision the Supreme Court reviewing? Without the guarantee of lower federal courts, it was assumed that other courts would interpret federal law and the Constitution, with the Supreme Court ensuring a uniform interpretation.[58] Such a system endures today, with the Supreme Court hearing appeals based on the alleged misinterpretation of federal law by state and territorial

54. *See generally* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (discussing the origins of Article III, the ability of Congress to create the lower courts, and the scope of the judicial power).

55. U.S. CONST. art. III, § 1.

56. *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1617 (1990) ("Article III, after all, itself prescribes a single Supreme Court not subject to further review, while leaving creation of the lower federal courts to congressional choice."); *see also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 197 (2007) ("The Madisonian Compromise resulted in the adoption of language in Article III that empowers, but does not require, Congress to create lower federal courts.").

57. Meltzer, *supra* note 56, at 1618.

58. *See id.*

courts.[59] Congress has even explicitly provided for Supreme Court review of non-federal court interpretations of federal law.[60]

The very structure of Article III, therefore, clearly implies that federal courts are not the only judicial bodies charged with interpreting federal law. Whatever the inferior bodies are, wherever they be found, Article III suggests that the United States Supreme Court should have appellate power over the interpretation of federal law for the purposes of uniformity.[61] The founding document leaves open, however, which lower judicial bodies may interpret federal law subject to Supreme Court review.[62]

There is an entire chapter of the U.S. Code, Chapter 25, that deals with Indians.[63] Indian tribes have signed hundreds of treaties with the United States,[64] and treaty obligations are

59. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 160–61 (2021) (discussing how cases are appealed from state courts of final review to the U.S. Supreme Court).

60. 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . .").

61. *See* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 591 n.149 (1994) ("Even those who opposed the creation of lower federal courts and argued for the original resolution of judicial business in the state courts appeared to admit the necessity of authorizing the Supreme Court to exercise appellate review.").

62. *See* A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1, 58–62 (2011) (discussing various uncertainties regarding concurrent jurisdiction in cases arising under federal law).

63. *See* Morton v. Mancari, 417 U.S. 535, 552 (1974) ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the [Bureau of Indian Affairs], single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

64. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 74 (2012) ("Congress might not have the incredible—well-nigh absolute in some instances—authority that its plenary power confers over Indian affairs without the authority voluntarily relinquished to it in hundreds of Indian treaties." (footnote omitted)). The specific number of Indian treaties is debated. *See* Beth DiFelice, *Indian Treaties: A Bibliography*, 107 L. LIBR. J. 241, 244 (2015) ("Treaties between

federal questions subject to judicial interpretation.[65] It follows that tribal courts, with specialized expertise in Indian law, are the kinds of judicial bodies that ought to be able to interpret federal law, particularly those federal laws dealing with Indian people and tribal lands. It was surely understood by drafters of the Constitution that tribal judicial systems would enforce federal treaties, even if they could not have imagined enforcement of federal laws generally.[66] The structure of Article III leaves open the opportunity for tribal courts to assert general jurisdiction, and no act of Congress has ever foreclosed that power.

2. The Framers' Intent

Additional support for the proposition that non-federal courts may interpret the federal law comes directly from the Framers themselves. In urging the adoption of the Constitution, Alexander Hamilton recognized in Federalist No. 82 that Article III's language[67] might be construed in one of two ways: either Section One could mean that the Supreme Court and whatever lower courts Congress might establish "should alone" have the power to decide and interpret federal law or the language might merely create a federal judiciary but refrain

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the U.S. and Indian nations number between 367 and 375; scholars and compilers have not settled on a definitive number. 'The actual number of treaties signed between the United States and the tribes will probably never be prepared on a final list to which everyone can agree.'" (quoting INST. FOR THE DEV. OF INDIAN L., A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES 2 (1973))).

65. *See* Lattimer's Lessee v. Poteet, 39 U.S. 4, 13–14 (1840).

66. *See* TREATY WITH THE CREEKS, 1790, *reprinted in* 2 INDIAN AFFAIRS, LAWS AND TREATIES 25, 27 (Charles J. Kappler ed., 1904) (providing that the "Creeks may punish [a citizen of the United States or other persons who are not Indians, who attempt to settle on any of the Creeks lands] or not, as they please"); *cf.* Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1101 (2013) ("Because judges applying the Indian canon interpret treaty language based on the tribe's perspective, rather than that of 'a reasonable speaker of English . . . at the time the . . . provision was adopted,' this fundamental principle of Indian law may have simply seemed incompatible with originalist methodology. . . . [F]ar from being incompatible with the Indian canon, originalist theory actually justifies it: a treaty should be read as the tribe would have understood it because this method reflects the most faithful application of the original meaning of the treaty text." (alteration in original) (emphasis omitted)).

67. U.S. CONST. art. III, § 1, cl 1 ("The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

from giving the federal courts exclusive authority over federal causes of action.[68]

Hamilton recognized that of the two interpretations, "[t]he first excludes, the last admits, the concurrent jurisdiction of the State tribunals," and because the first "would amount to an alienation of State power by implication, the last appears . . . the most natural and the most defensible construction."[69] And so, under Article III, the Framers imagined a system whereby state courts could decide questions of the federal law, subject only to an ultimate appeal to the federal courts.

Presaging the ultimate development of general jurisdiction, Hamilton continued by noting that "[t]he judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."[70] Importantly, his references were not just to state courts that "will be divested of no part of their primitive jurisdiction" but also to those "of Japan, not less than New York."[71] Whatever the ultimate system of sovereigns would be, courts of sovereigns other than the federal judiciary would be able to hear claims and give decisions based on federal law. If Japanese courts were capable of interpreting the federal law, surely tribal courts that share the geographic incorporation of the United States and are intimately familiar with the application of its laws are capable of exercising such power.

Professors Anthony J. Bellia Jr. and Bradford R. Clark have recently written thoughtfully about the Founders and the natural understanding that state courts were courts of general jurisdiction.[72] They suggest that Hamilton's voice in the Federalist Papers was building upon a well-established set of rules for instruments that transfer sovereign rights.[73] For example, in Federalist No. 32, Hamilton "explained that because the Constitution involved a 'division of the sovereign power,' it was subject to 'the rule that all authorities of which the States are not *explicitly* divested in favour of the Union

68. THE FEDERALIST NO. 82 (Alexander Hamilton).

69. *Id.*

70. *Id.*

71. *Id.*

72. Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 522 (2022).

73. *Id.* at 550–51.

remain with them in full vigour.'"[74] Bellia and Clark suggest that Madison reinforced this interpretation in Federalist No. 46 by repeatedly arguing that "the dangers occasioned by federal usurpation of state authority would deter such misconduct."[75] They conclude by articulating the basic understanding of the Framers that "[a]lthough the people of the several States transferred a portion of the States' sovereign rights and powers to the federal government by ratifying the Constitution, the States continued to retain and exercise all remaining sovereign authority."[76] Among this residual sovereignty was the power to interpret federal law.[77]

Because tribal governments never ratified the Constitution,[78] it is even more certain that they could not have given up their inherent authority to interpret federal law. If the Founders of the Constitution could countenance that the judicial power of "every government looks beyond its own local or municipal laws,"[79] then tribal governments, with whom the United States signed treaties as coequal sovereigns, could certainly interpret at least those federal laws to which they were consenting parties. While the Framers may have been focused on the power of states to interpret the federal law when making their argument for the Constitution in the Federalist Papers, the legal principles they articulate are not limited to concurrent state jurisdiction. The fact that Indian tribes neither ratified the Constitution nor surrendered any of their inherent judicial power makes Indian tribes more, not less, capable of assuming the power to interpret federal law.

C. *State Courts Assert General Jurisdiction*

Building off of the structure of Article III and the assurances given by the Founders that the newly created federal courts did not have exclusive jurisdiction over federal law, the Supreme Court developed the modern doctrine of general jurisdiction. Excepting only those areas of law that were presumptively

74. *Id.* at 550 (quoting THE FEDERALIST NO. 32 (Alexander Hamilton)).

75. *Id.* at 551 (quoting THE FEDERALIST NO. 46 (James Madison)).

76. *Id.*

77. *Id.*

78. Jeffrey B. Mallory, *Congress' Authority to Abrogate a State's Eleventh Amendment Immunity from Suit: Will* Seminole Tribe v. Florida *be Seminal?*, 7 ST. THOMAS L. REV. 791, 807 (1995) ("The fact that the Indian tribes never ratified the Constitution refers back to the 'plan of convention' waiver of sovereign immunity through implied consent . . . .").

79. THE FEDERALIST NO. 82 (Alexander Hamilton).

exclusively federal—such as bankruptcy[80] or patent[81] law—a state could permit its courts to exercise concurrent authority to interpret and decide matters of federal law subject to ultimate appellate review by the Supreme Court itself.[82] Every state has done so.[83]

The Supreme Court's first articulations of general jurisdiction date back to the Marshall Court and are premised on the principles of dual sovereignty. In the 1820 opinion *Houston v. Moore*,[84] Justice William Johnson wrote for the majority, explaining that "[e]very citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States."[85] The Court explained that there were a variety of offenses that offended both the law of the state and the federal sovereign, and that one sovereign's refusal to prosecute did not prevent the other from asserting its sovereign power and levying charges against the defendant.[86]

The following year, Chief Justice John Marshall, writing for an unanimous court in *Cohens v. Virginia*,[87] recognized the right of state courts to interpret federal law subject to appellate review in the federal courts.[88] Congress had passed a law

80. *See* Michelle Wright, *From Stem to* Stern*: Navigating Bankruptcy Practice After* Stern v. Marshall, 77 MO. L. REV. 1159, 1163–64 (2012) (discussing the history of bankruptcy jurisdiction, resulting in the Bankruptcy Act of 1841, and the subsequent judicial interpretation that bankruptcy proceedings are exclusively federal in nature).

81. *See* Shawn P. Miller, *Where's the Innovation: An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents*, 18 VA. J.L. & TECH. 1, 8 (2013) ("Patent litigation in the United States is exclusively federal and all lawsuits must be filed in a federal district court.").

82. *See* Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 CONN. L. REV. 407, 433 (2001) ("In one sense, states do have to 'do something' to otherwise permit suits in state court under federal statutes—they must have created a state court of general jurisdiction empowered to hear general civil claims. Either by state constitutional provisions or by state statutes, every state has taken that step and provided civil courts of such general jurisdiction.").

83. *Id.*

84. 18 U.S. 1 (1820).

85. *Id.* at 33.

86. *Id.* at 34 (providing counterfeiting the current coin of the United States and robbing the mail on the highway as examples of such offenses).

87. 19 U.S. 264 (1821).

88. *Id.* at 378 ("Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under

authorizing a national lottery to raise money for the District of Columbia, and Virginia had passed a law prohibiting the sale of out-of-state lottery tickets.[89] Virginia proceeded to prosecute persons selling national lottery tickets for violating Virginia law because federal law did not modify the Virginia prohibition.[90] Upon conviction in state court, the defendant appealed to the U.S. Supreme Court, arguing that Virginia had misinterpreted the federal law.[91] While recognizing that state courts could proceed to make their own determination of whether a federal law sufficiently abrogated state law, any state interpretation of the federal law was ultimately subject to federal court review and reversal.[92]

The dual sovereignty basis for general jurisdiction continued to evolve throughout the nineteenth century and was applied with equal consideration to the application of civil and criminal laws. In 1876, the Court explained that:

> Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, — concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction.[93]

This mutuality—that rights provided by either sovereign could be enforced in the courts of the other—forms the basis of general jurisdiction.

The acceptance of general jurisdiction today is so uncontroversial that it often goes unremarked. Our twentieth-century jurisprudence makes merely passing mention of the

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this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party.").

89. *Id.* at 375.

90. *Id.*

91. *Id.* at 376.

92. *Id.* at 386, 388 ("Different States may entertain different opinions on the true construction of the constitutional powers of Congress. . . . There is certainly nothing in the circumstances under which our constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.").

93. Claflin v. Houseman, 93 U.S. 130, 136 (1876).

general principle that state courts may interpret federal law absent clear congressional intent. When necessary, the Supreme Court has intervened to remind lower federal courts that state courts share concurrent authority to interpret federal law. State courts can interpret the meaning of the Federal Labor Management Relations Act of 1947: "Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."[94] State courts may hear personal injury claims under the federal Outer Continental Shelf Lands Act: "The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication."[95] State courts have concurrent authority to hear cases based on the RICO statute: "States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."[96] General jurisdiction remains an important part of American jurisprudence, established clearly on the strength of the dual sovereignty principle that either state or federal courts may interpret the laws of the other.

Members of federally recognized Indian tribes are likewise dual citizens in exactly the same manner as non-Indians are citizens of both the state in which they reside and the United States.[97] At a minimum, Native persons are citizens of both their tribe and the United States.[98] If state courts may assume general jurisdiction over federal causes of action unless Congress explicitly limits the authority to the federal courts, then tribal courts should hold the same position. Needing only

94. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962).

95. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981).

96. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

97. Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 54 (2011) ("As dual citizens, Native Americans are subject to successive prosecution in tribal court and federal court for the same conduct.").

98. *Id.*; *see also* Hope Babcock, *A Possible Solution to the Problem of Diminishing Tribal Sovereignty*, 90 N.D. L. REV. 13, 42 (2014) ("Because Indians are dual citizens, they 'claim and exercise citizenship simultaneously in Native nations and in the United States.'" (quoting Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AM. ETHNOLOGIST 239, 240 (2005))).

the permission of the tribal sovereign to exercise general jurisdiction, tribal courts may exercise their status as dual sovereigns to interpret federal law unless and until Congress says otherwise.

II. GENERAL JURISDICTION AND INDIAN TRIBES

Cohen's Handbook of Federal Indian Law, regarded by many as the foundational treatise in the field,[99] explains that "[t]ribal courts' jurisdiction to adjudicate matters arising in Indian country is broad, encompassing all civil and criminal matters absent limitations imposed by lawful federal authority."[100] Hidden within this broad conception of tribal power is that the limitations imposed by the federal authority must be lawful. Whether Court-imposed limitations on tribal power are lawful forms the basis of this Article's conclusion that tribal courts are courts of general jurisdiction and that the Supreme Court is without a legal basis for restricting that general jurisdiction.

As Professor Nell Jessup Newton has observed, "The judiciary's frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs."[101] In the summer of 2023, the Supreme Court seemed to agree: "the Constitution vests in the federal government a set of potent (but limited and enumerated) powers."[102] The lawfulness of federal courts intruding on the inherent powers of tribal courts is ripe for reexamination.

This Part briefly explores the history of the tribal exercise of general jurisdictional powers. It focuses on both theory and precedent to provide the reader with the necessary background

99. Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 649–50 (2006) (discussing the seminal importance of Felix Cohen and his *Handbook of Federal Indian Law*); *see also* Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 MICH. J. RACE & L. 65, 100 n.156 (2020) ("Felix Cohen is widely considered the father of modern Indian law.").

100. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01(2)(e) (Nell Jessup Newton & Kevin K. Washburn eds., 2024 ed.); *see also id.* § 5.04 (analyzing the scope of tribal jurisdiction).

101. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984); *see also* Clinton, *supra* note 31, at 214 ("Relying on the claimed supremacy of federal law created by the Indian plenary power doctrine, the federal judiciary has unilaterally exercised judicial plenary power over Indian affairs, assisted by opponents of Indian sovereignty, and sometimes by the tribes themselves, who continue to present and argue such cases to the federal courts.").

102. Haaland v. Brackeen, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring).

to understand the argument made in the following Parts regarding tribal courts as courts of general jurisdiction.

A. *Before* Nevada v. Hicks

Because tribal courts exercise all sovereign powers not explicitly taken away, rather than only those powers affirmatively granted,[103] they are more similar to state courts of general jurisdiction than federal courts of limited jurisdiction.[104] It is not surprising, then, that tribal courts have historically been called upon to determine questions of federal law. The *Neztsosie* case, which opened this Article, is but one example where Navajo citizens brought both tribal tort claims and claims under the federal Price–Anderson Act in tribal court.[105] The Ninth Circuit held that tribal courts had concurrent jurisdiction to decide the federal claims before the Supreme Court ultimately reversed.[106]

The Indian Civil Rights Act (ICRA)[107] provides another common example. Indian tribes are not bound by the Constitution, and the Bill of Rights does not apply in tribal court.[108] However, Congress, through its legislative power, enacted the ICRA to require tribal courts to comply with some, but not all, of the individual rights protected by the

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103. Riley, *supra* note 17, at 821 ("As presently constituted under federal law, tribal sovereignty ensures that Indian tribes enjoy the same inherent rights of self-government over their members and retained territories as any other nation, except as limited by the doctrine of discovery, treaty-based cessions of authority, or explicit congressional abrogation under the plenary power doctrine."); *see also* United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

104. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 100, § 4.1(2)(d) (2005 ed.) ("In that sense, tribal courts are more like state courts of general jurisdiction than like federal courts.").

105. El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 477–78 (1999).

106. El Paso Nat. Gas Co. v. Neztsosie, 136 F.3d 610, 617 (9th Cir. 1998) ("Price–Anderson provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents."), *rev'd*, 526 U.S. 473 (1999).

107. Indian Civil Rights Act, Pub. L. No. 90-284, §§ 201–501, 82 Stat. 77, 77–80 (1968) (codified at 25 U.S.C. §§ 1301–05).

108. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) (writing for the majority, Chief Justice John G. Roberts Jr. stated: "Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' . . . The Bill of Rights does not apply to Indian tribes" (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring))); *see also* Grant Christensen, *Getting* Cooley *Right: The Inherent Criminal Powers of Tribal Law Enforcement*, 56 U.C. DAVIS L. REV. 467, 513 (2022) (discussing the difference between the ICRA and the Bill of Rights).

Constitution.[109] Individuals who felt that their rights under the ICRA were violated filed claims alleging the federal violation directly in tribal forums.[110] In fact, the Supreme Court has required the exhaustion of tribal court remedies before seeking review in a federal court, even when the underlying basis of the federal court's jurisdiction was predicated upon a federal question.[111]

Tribal courts hear so many claims under the ICRA that a complete list of even just published cases would be impossible to include here, but a short summary is provided for brevity. The Mashantucket Pequot Tribal Court held that a defendant's due process rights under the ICRA were violated when he was denied the opportunity to cross-examine witnesses and review written evidence.[112] The Northern Plains Intertribal Court of Appeals allowed a plaintiff to pursue an ICRA claim against the Three Affiliated Tribes of the Fort Berthold Reservation in tribal court.[113] Citing Ninth Circuit precedent,[114] the Hopi Appellate Court determined that tribal courts could interpret the right to equal protection guaranteed by the ICRA unconstrained by Fourteenth Amendment jurisprudence but consistent with "due regard for the historical, governmental, and Cultural values of the Indian tribe."[115]

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109. *See* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 n.60 (2003) (noting that important exceptions include "the guarantee of a republican form of government, the prohibition against an established religion, the requirement of free counsel for an indigent accused, the right to a jury trial in civil cases, the provisions broadening the right to vote, and the prohibitions against denial of the privileges and immunities of citizens").

110. *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1109 (2007) ("[T]ribal forums are the sole locus in which non-habeas ICRA claims may be brought.").

111. Pommersheim, *supra* note 4, at 68 ("[P]ursuant to federal question jurisdiction, there must be an exhaustion of tribal court remedies before there is federal court review of whether there was tribal court jurisdiction in the first instance. The Supreme Court has couched its exhaustion rationale as necessary to support the development of tribal courts, to obtain the benefit of their expertise, and to advance the orderly administration of justice." (citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985))).

112. Morris v. Mashantucket Pequot Gaming Enter., No. MPTC-EA-95-120, 1998 Mashantucket Trib. LEXIS 30, at *13–14 (Mashantucket Pequot Tribal Ct. 1998).

113. Francis v. Wilkinson, No. cv 03-03-92, 1992 NPICA 7, at *1–2 (Northern Plains Intertribal App. Ct. 1992).

114. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976), *abrogated by* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

115. Nevayaktewa v. Hopi Tribe, No. 97AC000004, 1998 Hopi App. LEXIS 1, at *13–14 (Hopi App. Ct. Mar. 20, 1998).

Historically, tribal courts assumed general jurisdiction, hearing claims based on federal law and tribal law interchangeably. While it is true that tribal courts did not historically interpret the U.S. Constitution, that was a consequence of the Constitution not being binding on the tribal sovereign instead of some implied limitation on the power.[116] Despite this precedent, a divided United States Supreme Court announced in 2001 that tribal courts may not interpret federal laws.[117]

B. *The Mess Created by* Nevada v. Hicks

The question of whether tribal courts are courts of general jurisdiction, which was implicitly considered by the Court in *Neztsosie*, was finally directly decided in *Nevada v. Hicks*.[118] *Hicks* is an example of bad facts making bad law.[119]

Floyd Hicks is a member of the Fallon Paiute-Shoshone Tribe, residing on the Fallon Paiute-Shoshone Reservation.[120] Hicks was twice accused of having killed a California bighorn sheep in Nevada, outside of the reservation.[121] The Nevada state game warden conducted an investigation of Hicks's off-reservation activities by securing a search warrant for Hicks's on-reservation property first from a Nevada state court and then authorized by the tribal court.[122] Both investigations concluded that Hicks had not broken the law.[123] He had killed only Rocky Mountain bighorn sheep and not California bighorn sheep.[124] However, in the course of the investigation, Hicks's sheep heads had been damaged.[125]

Hicks filed a claim in the Fallon Paiute-Shoshone Tribal Court against tribal officials, the state game warden, and the

116. *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 379, 384 (1896) (explaining that the Cherokee Tribe did not violate a defendant's Fifth Amendment rights by using a five-member grand jury to indict him for killing a Cherokee man on Cherokee lands, and that, consequently, there was no need for the Cherokee tribal court to interpret the U.S. Constitution).

117. Nevada v. Hicks, 533 U.S. 353, 367–68 (2001).

118. *Id.* at 367.

119. *See* Catherine T. Struve, *How Bad Law Made a Hard Case Easy:* Nevada v. Hicks *and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 299, 301 (2003).

120. *Hicks*, 533 U.S. at 355–56.

121. *Id.* at 356.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

State of Nevada, alleging both violations of tribal law (trespass to land and abuse of process) and a violation of his civil rights under federal law in a 42 U.S.C. § 1983 action.[126] Although only his claims against the defendants in their individual capacities survived sovereign immunity challenges, the authority of the tribal court to assert jurisdiction over the defendants was affirmed by the tribal trial court, tribal appellate court, the U.S. District Court for the District of Nevada, and the Ninth Circuit.[127] The Supreme Court granted certiorari and reversed.[128]

Hicks is best remembered for its discussion of the subject matter jurisdiction of tribal courts. It is the only time the Supreme Court has ever suggested that a tribal court lacks jurisdiction over a tribal cause of action occurring on tribal lands.[129] Justice Sandra Day O'Connor, in a concurrence joined by two other Justices,[130] castigated the majority for ignoring the importance of the status of the land—and would have distinguished the case because the state officers were acting in their official capacity and with permission of the tribal court when they entered Hicks's property.[131] Lower courts have

126. *Id.* at 356–57 (outlining the alleged violations, including "denial of equal protection, denial of due process, and unreasonable search and seizure"). For a discussion of Section 1983 claims, see generally Eric H. Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985).

127. *Hicks*, 533 U.S. at 357.

128. *Id.* at 375. For an academic discussion of the effect of the *Hicks* case, see Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001).

129. Neptune Leasing, Inc. v. Mountain States Petroleum Corp., No. sc-cv-24-10, 2013 WL 2393054, at *9–10 (Navajo Sup. Ct., May 13, 2013) ("Only one time, in *Nevada v. Hicks*, has the U.S. Supreme Court established an exception to the general rule that *Montana* does not apply to jurisdictional questions arising from the tribe's authority to exclude, where a state had a competing interest to execute a warrant and the tribe's power of exclusion was not enough on its own to assert regulatory jurisdiction over state officers in that situation."); *see also* Judith V. Royster, *Revisiting Montana: Indian Treaty Rights and Tribal Authority Over Nonmembers on Trust Land*, 57 ARIZ. L. REV. 889, 891 (2015) ("The reach of that decision, *Nevada v. Hicks*, is a matter of considerable debate, but it is not debatable that, for the first time, the Court found that a tribe did not possess the inherent civil authority to govern nonmembers on Indian lands." (citation omitted)).

130. *Hicks*, 533 U.S. at 387 (O'Connor, J., concurring, joined by Stevens and Breyer, JJ.).

131. *Id.* at 387, 392 ("The Court holds that a tribe has no power to regulate the activities of state officials enforcing state law on land owned and controlled by the tribe. The majority's sweeping opinion, without cause, undermines the authority of

largely limited *Hicks* to its facts on the question of subject matter jurisdiction.[132] As the Ninth Circuit explained, when an injury occurs entirely on tribal trust lands, "there are no obvious state interests at play" and no need to conduct a further inquiry under *Hicks*.[133]

Hidden within the *Hicks* opinion was a much more dangerous conclusion. In a 7–2 decision, with Justices John Paul Stevens and Stephen Breyer concurring only in the judgment,[134] the Court held conclusively for the first time that tribal courts are not courts of general jurisdiction and, therefore, that the Fallon Paiute-Shoshone Tribal Court lacked jurisdiction to hear Hicks's § 1983 claim—even if it had had jurisdiction over the subject matter.[135] Writing for the majority, Justice Scalia reasoned that tribal courts "cannot be courts of general jurisdiction [in the same sense as state courts], for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction."[136] While some federal laws provide for tribal court enforcement, there is no federal grant of power to tribal courts to determine § 1983 claims.[137]

The Justice Scalia majority continued to justify its conclusion that tribal courts are not courts of general jurisdiction by pointing to the federal removal statute.[138] It noted that the removal statute speaks only to the removal of cases from "*state* court," and it drew the conclusion that were tribal courts permitted to exercise general jurisdiction,

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tribes to 'make their own laws and be ruled by them.' I write separately because Part II of the Court's decision is unmoored from our precedents." (citation omitted) (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997))).

132. McDonald v. Means, 309 F.3d 530, 540 (9th Cir. 2002) (explaining that *Hicks* "is limited to the question of tribal-court jurisdiction over state officers enforcing state law"); Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 805, 814 (9th Cir. 2011) (holding that the tribal court had jurisdiction because of the status of the land, without consideration of *Hicks* and the *Montana* factors for civil jurisdiction over nonmembers); Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 902 (9th Cir. 2017) ("*Hicks* is limited to situations in which 'the specific concerns at issue in that case exist.'" (quoting *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 813)).

133. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc., 715 F.3d 1196, 1205 (9th Cir. 2013).

134. *Hicks*, 533 U.S. at 401–04 (Stevens, J., concurring in judgment).

135. *Id.* at 367 (majority opinion) ("Respondents' contention that tribal courts are courts of 'general jurisdiction' is also quite wrong.").

136. *Id.*

137. *Id.* at 367–68.

138. *Id.* at 368.

defendants facing federal claims in tribal court "would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum."[139] The Court recognized that although it would be possible to afford tribal court defendants some federal court access through the use of injunctions, it declined to do so, concluding that "the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits."[140]

Notably, the Court never explained why the lack of a federal statutory right of review in federal courts necessarily required that tribal courts be unable to interpret federal claims. To the contrary, the opinion recognized that Congress had, at times, expressly permitted tribal courts to hear federal claims,[141] presumably without any right of removal to the federal courts. The opinion further provided no justification as to why the authority of tribal courts should be limited only to those instances where Congress had expressly suggested that a claim could be made in tribal court. Absent from the Court's discussion was any attempt to consider the inherent authority of tribal governments or the ability of tribal governments to define for themselves the jurisdiction of their courts. The majority was only too willing to recognize that state sovereigns define the scope of state court jurisdiction without federal interference, but it decided that it was "simpler" not to inquire whether tribal governments shared the same inherent power.[142]

Justice Stevens, joined by Justice Breyer, called out the majority for its fundamental misunderstanding of the inherent powers of tribal courts: "the Court's initial assumption is deeply flawed. Absent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is

139. *Id.* The conclusion that the federal removal statute does not provide a mechanism to remove a federal cause of action from tribal to federal court is further supported by Tenth Circuit precedent. *See* Becenti v. Vigil, 902 F.2d 777, 780–81 (10th Cir. 1990).

140. *Hicks*, 533 U.S. at 369.

141. *Id.* at 367–68 ("It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law . . . [, such as] 25 U.S.C. § 1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978) [and] 12 U.S.C. § 1715z–13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of Housing and Urban Development against reservation homeowners).").

142. *Hicks*, 533 U.S. at 369.

fundamentally one of *tribal* law."[143] Justice Stevens explained that, just like state courts, the power of tribal courts begins with the tribal sovereign.[144] If tribal governments wish to permit their tribal courts to hear claims based on federal law, then the tribal sovereign may extend to its tribal courts the judicial power to interpret federal law subject only to an express limitation by Congress itself.[145]

Despite the objections raised by Justice Stevens's concurrence, *Hicks* has created a judicially imposed barrier to tribal sovereignty and the inherent power of tribal courts. The lack of a principled reason for the limitation has attracted substantial critique from the legal academy but has nonetheless judicially limited tribal power without a statutory or constitutional basis.[146] The effect has been profound.

C. *The Aftermath of* Nevada v. Hicks

In the years following *Hicks*, federal courts repeatedly intervened to limit the jurisdiction of tribal courts consistent with the Supreme Court's conclusion that tribal courts are incapable of hearing claims based upon, or interpreting, federal law absent some affirmative grant from Congress. As the discussion in this Section shows, *Hicks* has been subject to grueling academic critique and has left tribal courts less able to protect their own citizens, finances, and resources.[147]

1. Increased Federal Intervention in Tribal Courts

Hicks's conclusion that tribal courts are not courts of general jurisdiction has profoundly reduced the role of tribal courts in regulating conduct related to Indian country[148] and has

143. *Id.* at 402 (Stevens, J., concurring in the judgment).

144. *Id.* at 404 ("Section 1983 creates no new substantive rights; it merely provides a federal cause of action for the violation of federal rights that are independently established either in the Federal Constitution or in federal statutory law. Despite the absence of any mention of state courts in § 1983, we have never questioned the jurisdiction of such courts to provide the relief it authorizes." (citation omitted)).

145. *Id.* at 403 ("Given a tribal assertion of general subject-matter jurisdiction, we should recognize a tribe's authority to adjudicate claims arising under § 1983 unless federal law dictates otherwise.").

146. S*ee* discussion *infra* Section II.C.2.

147. *See* discussion *infra* Section II.C.1.

148. 18 U.S.C. § 1151 (providing a statutory definition of Indian country, which is used for both criminal and civil jurisdiction and which includes all reservations, dependent Indian communities, and allotments). For an academic discussion of

correspondingly infringed upon tribal sovereignty. The following examples adequately illustrate the damage to the inherent power of tribal courts inflicted by *Hicks*'s limitation on tribal judicial power.

a. Limitations on Forum Selection

Federal courts have limited the enforceability of forum selection clauses between tribal entities and nonmembers when the nonmember wants to make a claim under federal law because tribal courts are not courts of general jurisdiction.[149] For example, in *Smith v. Western Sky Financial*,[150] the nonmember plaintiff brought claims against a tribal payday lender, alleging violations of the Fair Debt Collection Practices Act, Fair Credit Extension Uniformity Act, and the Unfair Trade Practices and Consumer Protection Law.[151] The tribal entity asked the federal court to dismiss based upon forum non conveniens to allow the plaintiff to file her claim in the tribal court of the Cheyenne River Sioux Tribe pursuant to the forum selection clause in the loan agreement.[152] The federal district court refused to enforce the forum selection clause because the plaintiff's federal claims could not be heard in tribal court.[153] Citing *Hicks*, the court explained that "[u]nlike the general jurisdiction enjoyed by state courts, the subject matter jurisdiction of tribal courts over persons who are not members of the tribe is limited, and 'a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.'"[154]

Indian country, see Katherine Florey, *Indian Country's Borders: Territoriality, Immunity, and The Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595 (2010); Kristen Carpenter, *Interpreting Indian Country In* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73 (1999).

149. Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 782–83 (E.D. Penn. 2016).

150. 168 F. Supp. 3d 778 (E.D. Penn. 2016).

151. *Id.* at 781.

152. *Id.* at 782 ("The Loan Agreement in question provides that it 'is subject to the exclusive laws and jurisdiction' of the [Cheyenne River Sioux Tribe (CRST)], and the borrower consents to the subject matter and personal jurisdiction of the CRST by signing the agreement. Defendants therefore argue that Plaintiff has thus waived her right to bring suit in this Court for any dispute relating to the loan agreement, and the Court must dismiss the action under the doctrine of *forum non conveniens* so that Plaintiff may bring her claims in a CRST Court.").

153. *Id.*

154. *Id.*

Other courts have reached the same conclusion.[155] In *Jackson v. Payday Financial LLC*,[156] the Seventh Circuit refused to uphold the forum selection clause in a loan agreement with the tribal entity.[157] Citing *Hicks*, it explained that "a tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction. Therefore, a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court."[158]

Regardless of the merits of the plaintiffs' claims, or the liability of the tribal payday lender under federal consumer protection laws, tribal courts cannot give relief under federal law because federal courts view tribal courts as incapable of interpreting and enforcing these federal statutes. The consequence of this federally imposed tribal disability is to invalidate the forum selection clause bargained for between private parties.

b. ERISA Claims and Tribal Court

Before *Hicks*, at least one federal court had suggested that whether tribal courts possessed jurisdiction over Employee Retirement Income Security Act (ERISA) claims was a question of tribal law.[159] As the U.S. District Court for the District of North Dakota explained, "the question of whether the tribal court has jurisdiction to hear the ERISA claim is not before this court. Even if it were, this court would allow the tribal court an opportunity to determine the scope of its jurisdictional powers as a matter of comity."[160] Another federal court held that tribal courts are appropriate forums to determine whether a plan is covered by the federal ERISA statute: "The tribal court presumptively has jurisdiction to determine whether LSI's plans are valid ERISA plans. The Court will accordingly require the Defendants to contest the validity of the plans in that forum."[161] Although amendments to ERISA in 2006 excluded

155. *See, e.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 783 (7th Cir. 2014); Hengle v. Asner, 433 F. Supp. 3d 825, 862 (E.D. Va. 2020).

156. 764 F.3d 765 (7th Cir. 2014).

157. *Id.* at 768.

158. *Id.* at 783.

159. White Tail v. Prudential Ins. Co. of Am., 915 F. Supp. 153, 154 (D.N.D. 1995).

160. *Id.* at 155.

161. Prescott v. Little Six, Inc., 897 F. Supp. 1217, 1224 (D. Minn. 1995).

some tribal benefit plans from the scope of the law,[162] tribal courts have still subsequently been called upon to interpret the statute.[163]

After *Hicks*, the power of tribal courts to hear and enforce benefits claims under ERISA has been significantly narrowed. For example, the U.S. District Court for the Western District of Michigan relied upon *Hicks* to determine that tribal courts could only hear claims for underpayment or denial of benefits if the claim arose under tribal law in a plan not covered by ERISA.[164] If the claim is an ERISA claim, then the claim presents a federal question, which is beyond the scope or interpretation of the tribal court.[165]

Because *Hicks* concluded that tribal courts are no longer courts of general jurisdiction, tribal courts have lost the ability to hear claims brought by their members to recover underpaid or unpaid benefits pursuant to an ERISA plan. Because of *Hicks*, the federal courts have held that once the tribal court determines that a plan is covered by ERISA, the tribal court loses subject matter jurisdiction to interpret the statute, or award recovery under it.

c. Protection of Tribal Natural Resources

There are extensive federal protections for natural resources that exist on tribal lands.[166] *Neztsosie* is just one example of tribal courts hearing claims brought by tribal members to assert damages caused by the mining of resources located in

162. Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(a)(2), 120 Stat. 780, 1051 (including plans established and maintained by a tribal government, a sub-division of a tribal government, or an agency or instrumentality of either, in the definition of governmental plan); *see also* 29 U.S.C. § 1003(b)(1) (excepting governmental plans from coverage).

163. Geroux v. Assurant, Inc., No. 08-cv-00184, 2010 WL 1032648, at *2 (W.D. Mich. Mar. 17, 2010).

164. *Id.* at *16.

165. An ERISA plan is such an innately federal question that a claim to enforce benefits under the plan may be filed in federal court, and a provision in the plan permitting its enforcement necessarily unambiguously waives the tribe's sovereign immunity defense. *See* Coppe v. Sac & Fox Casino Healthcare Plan, No 14-cv-02598, 2015 WL 6806540, at *2 (D. Kan. Nov. 5, 2015).

166. For greater discussion on these federal protections, see generally Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T. L. 437 (2010); Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENV'T. L. 42 (2014); James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191 (2006).

Indian country.[167] State courts regularly hear claims based on federal law seeking the protection of natural resources or claiming damages for their destruction or mismanagement.[168]

Since *Hicks* was decided, federal courts have limited the authority of tribal courts to protect their own reservation resources or to provide relief to their own members when the negligent exploitation of these resources results in physical harm. For example, in *Kodiak Oil & Gas v. Burr*,[169] the Eighth Circuit relied upon *Hicks* to deny tribal courts the authority to hear claims that oil companies were violating their Bureau of Indian Affairs–approved leases by excessively flaring natural gas that could otherwise have been captured and sold[170]: "Given the Supreme Court's reasoning in *Hicks*, we conclude the better reading is that tribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization."[171] The Court reasoned that the interpretation and construction of oil and gas leases on Indian lands, even those contracts made with tribes or their members, raised federal questions because of the extensive set of federal regulations governing these resources.[172] Because tribal courts could not interpret the federal law, they lacked the authority to police the behavior of oil companies or give aggrieved tribal members relief.[173]

d. Inability to Enforce Other Federal Rights

The *Hicks* decision attempted to abrogate the right of tribal courts to enforce federal laws in various areas, resulting in a broad and pernicious impact on tribal sovereignty. A full

167. For an excellent discussion of using tribal courts to resolve environmental claims, see Helia Bidad, *The Power of Tribal Courts in Ongoing Environmental-Tort Litigation*, 132 YALE L.J.F. 904, 926–27 (2023) ("[I]n a world in which federal courts are inhospitable to environmental-tort suits and plaintiffs struggle to keep these suits in friendlier state courts, tribal courts pose a potentially promising alternative. . . . [S]ince tribal courts are not mired in the same case law as state and federal courts, they provide a forum that can provide greater success for creative litigation strategies to address environmental harms.").

168. *See* Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1003 (2001) (discussing the use of state courts to resolve questions of federal environmental law).

169. 932 F.3d 1125 (8th Cir. 2019).

170. *Id.* at 1134.

171. *Id.* at 1135.

172. *See id.* at 1135–36.

173. *Id.* at 1136–37 ("Because the tribal courts' adjudicative authority is limited to cases arising under tribal law and the case at issue here arises under federal law, we conclude the tribal court lacked jurisdiction.").

recitation of this broad and pernicious impact is beyond the scope of this Article, but the following brief summary is illustrative of the myriad, disparate effects of *Hicks*. In addition to the areas above, federal courts have denied tribal courts the right to hear trademark and copyright claims,[174] suits involving other tribes that raise federal questions,[175] suits for a violation of an individual's civil rights,[176] the enforceability of tribal commitments pursuant to a compact entered into under the federal Indian Gaming Regulatory Act (IGRA),[177] and claims under the federal Controlled Substances Act.[178] Undeniably, *Hicks*'s refusal to consider whether a tribal government may give its courts the authority to hear federal questions has limited the role of tribal courts in fully upholding the law within their territory. This is a disability that has never been imposed upon their state court sisters.

2. A Critique of the Court's Reasoning

Alongside the practical limitations *Hicks* imposed upon tribal courts described above, the opinion garnered widespread

174. Philip Morris U.S. v. King Mt. Tobacco Co., 569 F.3d 932, 935 (9th Cir. 2009) ("[T]he Tribal Court does not have colorable jurisdiction over nonmember Philip Morris's federal and state claims for trademark infringement on the Internet and beyond the reservation.").

175. Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226, 1229 (10th Cir. 2014).

176. *Hicks* itself denied tribal courts from hearing civil rights claims under § 1983. Nevada v. Hicks, 533 U.S. 353, 368 (2001); *see also* Burrell v. Armijo, 456 F.3d 1159, 1175 (10th Cir. 2006) (McConnell, J., concurring) ("This case is essentially a civil rights action under 42 U.S.C. §§ 1981 and 1985. In *Nevada v. Hicks*, the Supreme Court established that a tribal court cannot entertain claims under 42 U.S.C. § 1983, and I see no reason to distinguish the § 1983 claim in *Hicks* from the Burrells' § 1981 and § 1985 claims." (citation omitted)).

177. Wells Fargo Bank v. Maynahonah, No. C11-cv-00648, 2011 WL 3876519, at *2 (W.D. Okla. Sept. 2, 2011) ("[T]he enforceability of the Tribe's contractual commitments to arbitrate disputes is an issue of federal law and is not a matter within the scope of the [Apache Gaming Commission's] regulatory authority."); Muhammad v. Comanche Nation Casino, No. 09-cv-00968, 2010 WL 4365568, at *1 (W.D. Okla. Oct. 27, 2010) ("The Court need not, however, stay this case to permit tribal courts to determine their jurisdiction under the IGRA and the [Tribal Gaming Compact Between the Comanche Nation and the State of Oklahoma] because these questions are matters of federal law over which tribal courts lack jurisdiction.").

178. McKesson Corp. v. Hembree, No. 17-cv-00323, 2018 WL 340042, at *5 (N.D. Okla. Jan. 9, 2018) ("Defendants have cited no provision of the [Controlled Substances Act (CSA)] that would provide a tribal court with jurisdiction of a claim asserting rights created by the CSA, even if such a claim were permissible.").

academic condemnation;[179] although, considerably more attention was paid to the 9–0 decision that a tribal court could not hear claims under tribal law against a state game warden exercising his duties in Indian country than to the 7–2 decision that tribal courts are not courts of general jurisdiction and, therefore, also could not hear Hicks's § 1983 civil rights claims. A brief review of what has already been written about the *Hicks* decision and the inherent power of tribal courts is helpful to provide a framework for the critique and arguments that this Article offers in the following Parts.

Perhaps the most powerful contemporaneous critique of the *Hicks* Court's limitation on the inherent power of tribal courts comes from Professor Catherine Struve in her discussion of the case in *How Bad Law Made a Hard Case Easy:* Nevada v. Hicks *and the Subject Matter Jurisdiction of Tribal Courts*.[180] Professor Struve begins her discussion by making the best of a bad case and suggesting that *Hicks*'s interpretation of the inherent power of tribal courts did not foreclose the ability of tribal courts to hear federal claims against persons otherwise subject to tribal authority.[181]

Professor Struve's article goes on to support her central thesis that the bad precedent developed along the lines of *Montana v. United States*[182] and *Strate v. A-1 Contractors*[183] "made *Hicks* an easy case" because the Court used the precedent to avoid an examination of tribal sovereignty.[184] A proper examination of the powers of a tribal court, Professor

179. For just a sampling of the academic discussion responding to the *Hicks* opinion, see Richard E. James, *Sanctuaries No More: The United States Supreme Court Deals Another Blow to Indian Tribal Court Jurisdiction*, 41 WASHBURN L.J. 347, 348 (2002); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267–68 (2001); Skibine, *supra* note 128, at 348–49; Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal - Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 37, 61 (2004); Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 989, 1010 (2010).

180. Struve, *supra* note 119, at 288–89.

181. *Id.* at 296. ("[F]or it might be the case that under *Hicks*, tribal courts can still hear federal claims against defendants who are subject to tribal regulatory authority.").

182. 450 U.S. 544, 564 (1981) (holding that outside of tribal lands, a tribe's inherent power is no greater than "what is necessary to protect tribal self-government or to control internal relations").

183. 520 U.S. 438, 453 (1997) ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding.").

184. Struve, *supra* note 119, at 297.

Struve suggests, would have asked the Court to determine "whether the ability to authorize tribal courts to hear federal claims arises from tribes' pre-existing sovereign powers."[185] To conduct the analysis, the Court should have inquired "whether any statute or treaty had removed that inherent power, and whether a tribe's exercise of that power would be inconsistent with the tribe's status as a domestic dependent nation."[186]

Although Professor Struve concludes that the proper analysis—placing tribal sovereignty and inherent tribal power at the center of inquiry—"would not have constrained the court to reach a different result"[187]; it would have forced the court to account for the structural differences between court systems and for the interconnectedness (or lack thereof) of federal and tribal courts.[188] While the article ultimately suggests that there are challenges to a tribal court interpreting federal law, it argues that those challenges could be overcome by providing some form of removal or appeal to a federal body when a tribal court interprets a federal question.[189]

Writing ten years later, with the benefit of hindsight and an important 2004 Supreme Court decision recognizing and reaffirming the inherent powers of Indian tribes,[190] Professor Katherine Florey added substantially new insights to the *Hicks* opinion and its discussion of the general jurisdiction of tribal courts. In her article, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, Professor Florey characterized the Court's conclusion that tribal courts are not courts of general

185. *Id.*

186. *Id.* at 298.

187. *Id.*

188. *Id.* ("The analysis, I argue, would have to account for potential procedural and structural differences between tribal and non-tribal courts; for the lack of structural interconnections between the tribal and federal court systems; and for special problems relating to the adjudication of claims against state officers for actions taken under color of state law.").

189. *Id.* at 316 ("Congress could ensure the availability of tribal-court jurisdiction, by providing the appropriate statutory measures to connect tribal courts hearing federal claims with the federal court system.").

190. United States v. Lara, 541 U.S. 193, 196 (2004) (stating that tribal courts have the inherent criminal power to prosecute nonmember Indians). For an academic discussion of the importance of *Lara* to inherent tribal sovereignty, see, for example, Alex Tallchief Skibine, United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47 (2004); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

jurisdiction as "unsatisfyingly circular"[191] because the Court started with an assumption that a tribal court's adjudicative powers do not exceed their regulatory ones, but then asked "whether tribal courts might enjoy expanded adjudicative powers in federal, as opposed to state law, claims."[192]

Professor Florey continued her critique of *Hicks* by highlighting that nowhere in Supreme Court jurisprudence is there ever an explanation for why a tribe's adjudicatory powers may not exceed its regulatory powers:

> What is the justification for treating adjudication as necessarily an act of regulation by the tribe, particularly when there is no indication that the tribal court plans to apply a distinctively tribal decisional rule? Further, even if one is to concede some overlap between tribal adjudication and tribal regulation, why are they so alike that they must be governed by *precisely the same rule*, particularly when they are treated so distinctly in the state and international contexts?[193]

Her exploration of the unmoored origins of the Court's conclusion in *Hicks* adds substantially to the critique that tribal courts are not courts of general jurisdiction. Professor Florey ultimately suggests recasting the jurisdictional quagmire that the Supreme Court has created regarding a tribe's adjudicatory powers as a question of personal instead of subject matter jurisdiction.[194] She argues that the Court is really less concerned with a tribal court's interpretation of the law (noting that many tribal court cases involve application of the common law)[195] than with protecting the rights of unsuspecting defendants. She concludes that the Court would have been better served recasting the jurisdictional challenge as one of personal jurisdiction rather than subject matter jurisdiction because focusing on protecting the rights of defendants in tribal

191. Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1534 (2013).

192. *Id.*

193. *Id.* at 1535.

194. *Id.* at 1543 ("[W]hatever the substantive limits on tribal courts' powers are, those limits are best characterized as ones of personal jurisdiction.").

195. *Id.* at 1545 ("Moreover, even where tribal courts have the opportunity to apply substantive tribal standards, they do not necessarily seize it. Instead, tribal courts frequently apply state law, or something like it, to the claims before them, explicitly borrowing from state law as a way to fill in gaps in still-evolving tribal codes.").

courts is more consistent with Supreme Court precedent, including *Hicks*.[196]

3. Now is the Time to Rethink the General Jurisdiction of Tribal Courts

The argument that I advance below builds upon the work of Professors Struve and Florey but benefits from a shift in the Court's recognition of tribal sovereignty that was likely unpredictable, if not unimaginable, when their arguments were developed.[197] It also departs from the conclusions reached by both scholars. Unlike Professor Struve's conclusion that an examination of the origins of tribal power may foreclose tribal general jurisdiction without an avenue for federal review of those opinions, I argue that whether a tribal court exercises an inherent judicial power to review federal law is purely a question of tribal law and cannot be limited by countervailing federal considerations without an explicit act of Congress. Unlike Professor Florey, I argue that whether a tribal court exercises general jurisdiction is not a question of fairness to the defendant but solely a question of whether the tribal sovereign intended to extend the authority to hear claims based on federal law to its tribal judiciary. The conclusions reached here are aided considerably by the Supreme Court's renewed emphasis on inherent sovereignty as the basis for extending tribal power.

In 2020, the Court recognized the inherent power of the Muscogee (Creek) Nation to exert its criminal jurisdiction over its entire reservation territory.[198] In 2021, the Court expanded

196. *Id.* at 1547–48 ("[T]he Court's underlying concern in *Strate* and *Hicks* logically cannot be with tribal regulation of nonmembers (despite the Court's suggestions to the contrary), because to the extent that adjudication equals regulation, tribal courts already 'regulate' nonmembers. . . . Furthermore, much of the Court's reasoning in both *Strate* and *Hicks* suggests that its primary concern is not so much the burden of subjecting a nonmember to tribal law but the burden of having to appear in tribal *court*.").

197. *Id.* at 1543 (recognizing, expressly, in 2013, the limited appetite the Supreme Court had in that era to expand the inherent powers of Indian tribes: "To be sure, the Court has shown little inclination in recent years to move toward a more expansive view of tribal sovereignty; indeed, all indications have been to the contrary").

198. McGirt v. Oklahoma, 591 U.S. 894, 897–98 (2020). For an excellent discussion on the importance of the *McGirt* decision from the tribe's ambassador, see Jonodev Chaudhuri, *Reflection on* McGirt v. Oklahoma, 134 HARV. L. REV. F. 82, 85 (2020). For a discussion on its relevance to inherent tribal power, see Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/2020/ 08/

the powers of tribal police, recognizing for the first time their inherent authority to stop and detain non-Indians suspected of committing crimes in Indian country.[199] In 2022, the Court reaffirmed that the power to create criminal laws governing the conduct of Indians on an Indian reservation was an inherent power exercised by tribal government and not a power delegated to Indian tribes by the United States, even when the prosecution is conducted in a court created and authorized under federal law.[200]

This trend in favor of recasting cases in terms of inherent tribal power culminated with the Court's 2023 decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*. *Lac du Flambeau* doesn't initially seem to have implications for the jurisdiction of tribal courts. It is an 8–1 decision resolving a circuit split and holding that the Bankruptcy Code waived the sovereign immunity of an Indian tribe in a cease and desist action related to a debt that was part of a bankruptcy proceeding.[201] However, the definition of "government unit" at issue in the case does not explicitly mention Indian tribes.[202] Instead, it refers to "other foreign or domestic government[s]."[203]

Justice Ketanji Brown Jackson, writing for the majority, explains that Indian tribes must be included among the foreign

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13/mcgirt-reese/ [https://perma.cc/NSZ4-6VHT] and Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367, 392 (2020).

199. United States v. Cooley, 593 U.S. 345, 350–51 (2021). For a discussion of the importance of the *Cooley* opinion to the expansion of inherent tribal power, see Christensen, *supra* note 108, at 476.

200. Denezpi v. United States, 596 U.S. 591, 598–600 (2022)*; see also* Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1902–03 (2022) (analyzing how the dual sovereignty doctrine and the Double Jeopardy Clause impact tribal sovereignty and jurisdictional boundaries).

201. Lac du Flambeau Band of Lake Superior Chippowa Indians v. Coughlin, 599 U.S. 382, 386 (2023) (explaining that the circuit split arose in conflicting interpretations of the Bankruptcy Code from the Sixth and Ninth Circuits).

202. *Id.* at 393 ("[N]either § 101(27) nor § 106(a) mentions Indian tribes by name."); *Id.* at 402 (Gorsuch, J., dissenting) ("Until today, there was 'not one example in all of history where [this] Court ha[d] found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute.'" (quoting *In re* Greektown Holdings, LLC, 917 F. 3d 451, 460 (6th Cir. 2019))).

203. *Id.* at 389 (majority opinion).

and domestic governments contemplated by the Code.[204] Joined by everyone but Justices Clarence Thomas and Neil Gorsuch,[205] the majority reasoned that "[f]ederally recognized tribes exercise uniquely governmental functions: 'They have power to make their own substantive law in internal matters, and to enforce that law in their own forums.'"[206] Citing the Court's post-*Hicks* jurisprudence on sovereign immunity, the Court recognized "Indian sovereignty and self-governance"[207] and talked of tribes' "governmental powers and attributes."[208]

Today, we have a new Court. Only Justice Thomas remains from the *Hicks* majority. This is a Court that just upheld the constitutionality of the Indian Child Welfare Act against all challenges,[209] reasoning that, at least in the area of Indian children domiciled outside of Indian country, state and tribal courts exercise concurrent jurisdiction[210] and that there must exist "preconstitutional powers necessarily inherent in any Federal Government" to protect Indian children without enumerating the scope of those powers.[211] Four years ago, the Court wrote that Indian tribes "have inherent sovereignty independent of th[e] authority arising from their power to exclude."[212] Michigan Law professor and Indian law expert Matthew Fletcher has recently commented on the Court's interpretation shift in Indian law cases, noting the rise of new

204. *Id.* at 390 ("Accordingly, we find that, by coupling foreign and domestic together, and placing the pair at the end of an extensive list, Congress unmistakably intended to cover all governments in § 101(27)'s definition, whatever their location, nature, or type.").

205. *Id.* at 399 (Thomas, J., concurring in the judgment); *id.* at 402 (Gorsuch, J., dissenting). Justice Gorsuch's dissent was even more supportive of tribal sovereignty, finding that no waiver of immunity should have been assumed without the explicit mention of Indian tribal governments in the Bankruptcy Code. *Id.* at 403 ("It is, after all, 'inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.' . . . And it applies to Tribes no less than foreign nations, a tradition that traces back over 170 years." (citations omitted)).

206. *Id.* at 392 (majority opinion) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978)).

207. *Id.* at 392–93 (citing Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788–89 (2014).

208. *Id.*

209. Haaland v. Brackeen, 599 U.S. 255, 277–78 (2023).

210. *Id.* at 265–66 ("For other Indian children, state and tribal courts exercise concurrent jurisdiction, although the state court is sometimes required to transfer the case to tribal court.").

211. *Id.* at 274.

212. United States v. Cooley, 593 U.S. 345, 346 (2021) (quoting Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 425 (1989) (plurality opinion)).

textualists who assume that the "inherent tribal powers remain extant absent a clear statement (or expression) of intent by Congress to abrogate or modify them."[213] An era of inherent sovereignty has arrived at the Court and, with it, an opportunity to rethink *Hicks* and its misunderstanding of the inherent power of tribal courts.

Today, the best understanding of inherent tribal sovereignty is the one that permits the sovereign to establish the boundaries of jurisdiction for its own courts. If a tribal government creates a tribal court of general jurisdiction, then that court may interpret federal law and give relief on federal claims brought before it, subject only to an express withdrawal of such power from Congress. In short, tribal courts are courts of general jurisdiction.

III. TRIBAL COURTS ARE COURTS OF GENERAL JURISDICTION

What does it mean to say that state courts are courts of general jurisdiction? In contrast to federal courts, which are courts of limited jurisdiction and therefore must have some Article III authority to exercise judicial power,[214] state courts are limited only by the powers conferred by their state legislatures[215] and any limits imposed by the Supremacy Clause.[216] If the state sovereign confers upon its courts the power to interpret federal statutes, treaties, or the Constitution, then, absent some congressional limitation, state courts may hear, interpret, decide, and enforce claims based upon federal law.[217]

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213. Fletcher, *supra* note 24, at 978.

214. Bellia, *supra* note 33, at 323 ("By deeming themselves courts of 'limited' jurisdiction, federal courts subjected themselves to principles that in application limited the extent to which they would exercise jurisdiction otherwise belonging to state courts.").

215. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1082 (2010) ("Ordinarily, a state legislature can limit state court jurisdiction in any way that it chooses, as long as it does not discriminate against federal claims.").

216. Blackman, *supra* note 36, at 2119 ("It is clear that state judges are bound by the supreme law of the land, regardless of how they are appointed, or elected, or what court they sit in. But, as in any court, they can only act when vested with jurisdiction by the state legislature or constitution. For '[w]ithout jurisdiction the court cannot proceed at all in any cause.'" (alteration in original)).

217. *Id.* at 2120 ("State judges are dependent on state legislatures to vest them with the appropriate jurisdiction. In this sense, the state legislatures place an additional limitation on federal power and promote their police power. State judge sovereignty places limits on the ability of Congress to regulate the state courts.").

What the *Hicks* Court misunderstood, because it started from a baseless assumption of limited tribal authority,[218] is that tribal courts are also courts of general jurisdiction. Like state courts, tribes exercise an inherent sovereignty, and, pursuant to that sovereignty, tribal governments may exercise any inherent power that has not been taken away: "any aspects of sovereignty consistent with the tribes' dependent status, and which have not been taken away by Congress, remain with the tribes."[219] As the Supreme Court reaffirmed in 2016, "beginning with Chief Justice Marshall and continuing for nearly two centuries, this Court has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty."[220]

Because Indian tribes are sovereign governments, determining whether tribal courts may exercise jurisdiction becomes a two-part analysis. First, have tribal governments imbued their courts with the power to interpret federal law? Second, if tribal governments have intended their courts to exercise jurisdiction over federal laws, then tribal courts may assert that authority unless Congress, pursuant to its broad but limited power in the area of Indian affairs,[221] has suggested otherwise. Because Congress has never acted to restrict the general jurisdiction of tribal courts, tribal courts so imbued by their respective tribal sovereigns are courts of general jurisdiction.

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218. For a direct critique of the *Hicks* majority and its misunderstanding of inherent tribal power, see Getches, *supra* note 179, at 329–30 ("The Rehnquist Court's 2001 decision in *Nevada v. Hicks* is a stunning example of how it pursues the Justices' larger agendas in Indian cases while ignoring and misapplying Indian law principles. The Court catapulted fragments of dicta from a few cases into sweeping rules that limit tribes' sovereignty over their reservations.").

219. Winnemucca Indian Colony v. U.S. *ex rel.* Dep't of the Interior, 837 F. Supp. 2d 1184, 1190 (D. Nev. 2011).

220. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 72 n.5 (2016) (first citing Worcester v. Georgia, 31 U.S. 515, 559–61 (1832); then citing Talton v. Mayes, 163 U.S. 376, 384 (1896); and then citing Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014)).

221. Haaland v. Brackeen, 599 U.S. 255, 272–73 (2023) ("In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as 'plenary and exclusive.' . . . To be clear, however, 'plenary' does not mean 'free-floating.' A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere.").

A. *Tribal Governments Define the Jurisdiction of Tribal Courts*

The authority of a judicial system arises from the inherent powers of the sovereign it serves. Federal judicial power is given by each of the consenting states to the federal sovereign in Article III of the Constitution,[222] and, therefore, federal courts are courts of limited jurisdictional authority—unable to exceed the limits of Article III.[223]

Tribal courts operate under the same principle, except Indian tribes did not give away any of their inherent judicial powers. Academic discussion of inherent sovereignty affirms that the judicial authority of tribal courts is predicated upon the exercise of a tribe's inherent power. Professor Robert Clinton, who has written extensively about the origins of tribal power, asserts that "[l]ike all sovereign bodies, [tribes] . . . had the inherent power to prescribe laws for their members and to punish infractions of those laws."[224] He goes on to explain that "inherent sovereignty derived from [tribes'] preexisting national existence" has been limited by the Courts on the basis that tribes are included "within the boundaries of the United States."[225] But that reasoning provides only a greater justification for the exercise of general jurisdiction. If Indian tribes are a domestic sovereign, the third sovereign in the American system,[226] then it seems natural that a tribal government might extend the power of its courts to interpret federal law in exactly the same way that states do.

The Supreme Court long ago announced the right of Indians "to make their own laws and be ruled by them."[227] The power to make their own laws includes the authority to establish, or

222. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 10 (2002) ("[T]he Constitution subjects the federal government, as well as the state governments, to the power of the federal courts under Article III through consent of the United States given by the states collectively in their ratification of the Constitution.").

223. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 774 (2001) ("Article III granted federal courts only the 'judicial power' to decide cases and limited inherent authority to taking actions essential to protect that core adjudicatory function . . . ." (footnote omitted)).

224. Clinton, *supra* note 31, at 197.

225. *Id.* at 197.

226. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 6 (1997).

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

decide not to establish, tribal courts.[228] If the tribal sovereign creates a tribal judicial structure, it also has the power to define the metes and bounds of its authority.[229] If a tribe exercises its inherent power to permit its courts to hear claims based on federal law, then the exercise of general jurisdiction by the tribal court is an example of the tribe making its own laws and being ruled by them.[230] "[A]bsent governing Acts of Congress," the courts of the United States have no authority to limit the tribal sovereign's exercise of its inherent power.[231]

1. The Decision to Confer General Jurisdiction on Tribal Courts is One Determined by Inherent Tribal Sovereignty

That tribes are sovereign is "settled law,"[232] reaffirmed by the Supreme Court in June 2023.[233] As Justice Gorsuch has powerfully opined: "Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns."[234] Similarly, as the Tenth Circuit has observed: "Indian tribes are not states. They have a status higher than that of states."[235] While states surrendered some of their sovereignty to the federal government through the ratification of the U.S. Constitution, "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties."[236]

Therefore, when an Indian tribe acts, it is acting pursuant to its inherent authority.[237] These actions include not only policymaking in the legislative or regulatory sense but also empowering their courts or justice structures to hear cases and

228. *See id.*

229. *See id.* at 221–22.

230. *See id.* at 222.

231. *Id.* at 220.

232. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789 (2014).

233. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 387 (2023) ("Our cases have thus repeatedly emphasized that tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the 'baseline position.'").

234. Oklahoma v. Castro-Huerta, 597 U.S. 629, 667–68 (2022) (Gorsuch, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.).

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

236. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991).

237. *See* Riley, *supra* note 17, at 810–13 (discussing the Supreme Court's recognition that tribes may act pursuant to their inherent powers, even in ways that may be discriminatory, to enact and enforce policies that would be unlawful if attempted by state or federal governments).

resolve conflicts that arise in Indian country.[238] Tribes, therefore, do not need to trace the exercise of their inherent power to a treaty or to an act of Congress because treaties and statutes do not delegate power to the tribal sovereign; they are limitations upon the tribal sovereign's inherent authority.[239] As Felix Cohen observed as far back as 1942: "The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty."[240] Unless a tribe has surrendered its power through a treaty, or has had the exercise of its inherent power affirmatively limited by Congress, it retains full and plenary authority.[241]

If one accepts that tribes exercise an inherent sovereignty, that there are inherent powers that preexisted the United States and that can be traced to time immemorial, then it is up to each tribe to determine the extent of the jurisdiction of its courts. This is consistent with Justice Stevens's discussion in *Hicks*: "Absent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law."[242] This is consistent with the assumption of general jurisdiction by state courts. The Supreme Court has previously explained that whether state courts can decide questions of federal law is "governed in the first instance by state laws."[243] In exactly the same way,

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

239. Creel, *supra* note 97, at 82 ("Despite the historical impacts, proscriptions, and impositions on tribal justice systems, tribal courts still represent an exercise of inherent tribal sovereignty, sovereignty that predates the formation of the United States and its Constitution. Operation and application of inherent sovereignty requires recognition of tribal justice systems as separate and distinct.").

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

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

242. Nevada v. Hicks, 533 U.S. 353, 402 (2001) (Stevens, J., concurring in the judgment).

243. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981).

whether tribal courts can hear claims based on federal law is governed by tribal law.

2. Tribes Have Exercised Their Sovereignty to Give Tribal Courts General Jurisdiction

Even some Indian law scholars will be surprised by just how broadly tribal governments have defined the power of their tribal courts to exercise general jurisdiction. While not every tribe may define the powers of its tribal courts so broadly, the published opinions from tribal courts defining the scope of their own powers make clear that the presumption from most tribal governments is that they intend their tribal courts to exercise general jurisdiction.

To demonstrate that tribal governments intend their tribal courts to exercise general jurisdiction, consider the discussion from tribal courts themselves interpreting the extent of the judicial power assigned to them by their respective tribal sovereigns. The Puyallup Tribal Code provides that "[t]he Tribal Court is a court of general jurisdiction over all matters, except as limited by Tribal Law, in all areas and to the full extent permitted by Article I of the Constitution of the Puyallup Tribe."[244] The Puyallup Appellate Court interpreted this language to permit it "to fashion remedies necessary to reach a just decision" even if no express tribal statute permits the remedy imposed.[245] In an earlier case, the Puyallup Trial Court had explained that the "tribal court derives its authority from the inherent sovereign power of the tribe" and that, as an integral institution of the tribe, it properly exercised the tribe's inherent judicial powers over all matters except where limited expressly by tribal council.[246]

The Salish and Kootenai courts have come to the same conclusion. In *Moran v. Salish & Kootenai Tribes*,[247] the Tribal Court of Appeals determined that it was not federal law but tribal law that determined whether the court could exercise

244. Taraya v. Taraya, No. puy-cv-diss-2014-0008, 2016 Puyallup App. LEXIS 2, at *3–4 (Puyallup Tribal Ct. App. July 19, 2016) (quoting PUYALLUP TRIBAL CODE § 4.16.130 (2024)).

245. *Id.* at *1, *4.

246. Satiacum v. Sterud, No. 82-cv-01157, 1982 Puyallup Trib. LEXIS 1, at *9–10 (Puyallup Tribal Ct. Apr. 23, 1982).

247. Moran v. Salish & Kootenai Tribes, No. 95-cv-00282, 1995 Mont. Salish & Kootenai Tribe LEXIS 2 (Conf. Salish & Kootenai Ct. App. Oct. 23, 1995).

limited or general jurisdictional powers.[248] It concluded that "the grant of civil jurisdiction to the Tribal Court over 'all suits' with authority to exercise personal and subject matter jurisdiction to the 'fullest extent possible' constitutes a generalized grant of subject matter jurisdiction over all civil cases and controversies" and, therefore, the tribal courts were courts of general jurisdiction.[249] It continued by observing that "[s]ignificantly, there is no federal or tribal law which limits the Tribal Court's authority so as to defeat tribal court jurisdiction in this case"; thus, the tribal court may not only exercise jurisdiction over the subject matter of the dispute but also issue a temporary restraining order and any other relief deemed necessary to effectuate the law.[250]

The Grand Traverse Band Tribal Court has determined that it "is one of general jurisdiction," subject only to limitation or modification by the Tribal Council or the tribal constitution.[251] The Little River Band of Ottawa Indians has made the same determination, concluding that its constitution "creates the judicial system and delegates it broad judicial powers. Section 8 of Article VI provides that the judicial powers 'shall extend to all cases and matters in law and equity . . . .' Furthermore, the Tribal Court is a court of general jurisdiction."[252]

There is even a handful of precedent post-*Hicks* where non-tribal courts have seemed to ignore the Supreme Court's suggestion that tribal courts are not courts of general jurisdiction. For example, the Court of Civil Appeals of Alabama acknowledged in 2006 that the Coushatta Tribal Court is "a court of general jurisdiction located on Indian lands in Louisiana."[253] Similarly, the U.S. District Court for the District of North Dakota recognized that "[t]he Turtle Mountain Tribal Court in Belcourt, North Dakota, is a court of general jurisdiction" and required a habeas petition filed under federal

248. *Id.* at *30 ("We must therefore at the outset turn to [Confederated Salish and Kootenai Tribes] tribal law to determine whether the Tribal Court is one of limited or general jurisdiction.").

249. *Id.* at *32.

250. *Id.*

251. McClellan v. Grand Traverse Band Election Bd., No. 18-cv-02904, 2018 Grand Traverse Band App. LEXIS 1, *4 (Grand Traverse Band of Ottawa and Chippewa Indians Ct. App. Mar. 28, 2018) (quoting Raphael v. Grand Traverse Band Election Bd., No. 13-cv-02189, slip op. at 3 (Grand Traverse Band of Ottawa and Chippewa Ct. App. May 21, 2014) (en banc)).

252. *In re* Hardenburgh, No. 99-200-02/02-A2, 1999 MI Ottawa Trib. LEXIS 6, at *4 (Little River Band of Ottawa Ct. App. June 28, 1999).

253. *Ex Parte* Rich, 953 So. 2d 409, 410 (Ala. Civ. App. 2006).

law (25 U.S.C. § 1303) to be heard by the tribal appellate court as part of the exhaustion process before the claim could be filed in federal court.[254] Finally, the U.S. District Court for the District of Nebraska has described the Ponca Tribe as having "established a tribal court system that has courts of general jurisdiction" capable of granting a divorce petition even to a nonmember who resides on the reservation.[255]

Admittedly, not all tribal governments have intended to imbue their tribal courts with general powers. The Mashantucket Pequot Tribal Council expressly changed the jurisdiction of the tribal court from one of general to one of limited jurisdiction: "The law . . . convert[ed] the Tribal Court from one of general jurisdiction, 'ha[ving] jurisdiction over all subject matters not expressly withheld by . . . legislation;' [sic] to one of limited jurisdiction with 'jurisdiction only over subject matters expressly set forth in the legislation.'"[256]

The jurisdiction of the Mashantucket Pequot Tribal Court is a perfect illustration of the role tribal sovereignty plays in defining the jurisdiction of tribal courts. While federal courts could not limit the jurisdiction of the Mashantucket Pequot Tribal Court without some authority from Congress,[257] the Mashantucket Pequot Tribal Council could limit the court's jurisdiction unilaterally by exercising its inherent power. It did so expressly.[258] Should the Council decide in the future to give the tribal court jurisdiction over federal causes of action, it need only pass a new statute amending the jurisdictional provision to restore authority to its tribal courts.

B. *The Supreme Court Cannot Create a Common Law Rule Limiting the Inherent Power of Tribes*

The Supreme Court's announcement in *Hicks* that tribal courts are not courts of general jurisdiction finds no basis in treaty or statute. The Court does not point to any source of affirmative law to base its limitation. Instead, Justice Scalia

254. LaVallie v. Turtle Mt. Tribal Ct., No. 06-cv-00009, 2006 WL 1069704, at *3 (D.N.D. Apr. 18, 2006).

255. Miodowski v. Miodowski, No. 06-cv-00443, 2006 WL 3454797, at *3 (D. Neb. Nov. 29, 2006).

256. Milios v. Mashantucket Pequot Gaming Comm'n, No. 2000-cv-132, 2000 Mashantucket Trib. LEXIS 28, at *7 (Mashantucket Pequot Trib. Ct. June 30, 2000) (second and third alteration in original) (citing Healy v. Mashantucket Pequot Gaming Enter., 1 MPR 63 (Mashantucket Pequot Ct. App. 1999)).

257. *See infra* Section IV.B.

258. *See Milios*, 2000 Mashantucket Trib. LEXIS 28, at *7.

merely remarks that the federal removal statute does not allow removal from tribal to federal court,[259] and without federal review, there can be no general jurisdictional authority: "Not only are there missing here any distinctive federal-court procedures, but in order even to *confront* the question whether an unspecified removal power exists, we must first attribute to tribal courts jurisdiction that is not apparent."[260] Rather than engage in that analysis, or inquire further if tribal jurisdiction may exist even if not readily "apparent," the Court decided that "[s]urely the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits."[261]

This reasoning is untethered from the supposedly careful and decided deliberation that the Court engages in when creating legal rules.[262] Although it might be much "simpler" for the Supreme Court if tribal courts lacked the authority to interpret federal law; actual legal rules require a more nuanced examination of the exercise of judicial power by both tribal courts and courts of the United States. The path through such an examination leads to only one conclusion: it is the tribal sovereign—and not the Supreme Court—that has the authority to determine whether tribal courts may hear and interpret federal claims.

Justice Scalia's rationale also ignores the historical context of removal and a decided Congressional preference, or at least ambivalence, for non-federal interpretations of federal law. From the founding until 1875 the Supreme Court heard cases where a state court "refused to recognize a federal right or privilege" but not all cases "arising under" federal law.[263] As

259. Nevada v. Hicks, 533 U.S. 353, 368 (2001) ("Furthermore, tribal-court jurisdiction would create serious anomalies, as the Government recognizes, because the general federal-question removal statute refers only to removal from *state* court." (citation omitted)).

260. *Id.* at 369.

261. *Id.*

262. Arizona v. Mayorkas, 143 S. Ct. 1312, 1316 (2023) (statement of Gorsuch, J.) ("Decisions produced by those who indulge no criticism are rarely as good as those produced after robust and uncensored debate. Decisions announced on the fly are rarely as wise as those that come after careful deliberation. Decisions made by a few often yield unintended consequences that may be avoided when more are consulted." (footnote omitted)).

263. Jacob Sandler, Note, *Uncompelling Uniformity*, 76 FLA. L. REV. 1961, 1977 (2024) ("The Supreme Court was to serve as a check on a state court's potential hostility to federal law, not as a buffer on a state court's reception of federal law. In other words, the Supreme Court was empowered to police the floor, but not lower the ceiling, of federal rights throughout the United States." (footnote omitted)).

Professor Thomas Bennett has aptly observed: "with limited exceptions, there was no general federal question jurisdiction before 1875. Even then, it was subject to a substantial amount-in-controversy requirement, which was jurisdictional and not eliminated until 1980."[264] If state interpretations of federal law were largely not subject to Supreme Court correction until 1875, and subject to an amount in controversy requirement until 1980, federal court review of other court interpretations of federal law can hardly be an inimical part of the federal judiciary.

1. The Supreme Court's Common Law Jurisprudence Must be Tied to an Act of Congress

When a party wants to challenge a tribe's exercise of its inherent powers, does that challenge arise under a source of federal law as required by Article III?[265] A single Supreme Court precedent holds that such a question arises under the common law, which is among the laws of the United States and therefore qualifies for federal question jurisdiction.[266] Such an articulation of the common law is beyond the original understanding of the limited power of federal courts, which requires any common law to be developed as an extension of a federal delegated power.[267]

Since at least 1972, federal courts have been able to exercise judicial power over cases that allege questions of the federal common law.[268] Writing for the Court in *Illinois v. City of*

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264. Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211, 1259 (2021).

265. For a much more detailed discussion of this question, see Grant Christensen, *Article III and Indian Tribes*, 108 MINN. L. REV. 1789, 1807 (2024).

266. *Id.*; *see* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985). For a scholarly discussion criticizing the Supreme Court's extension of the federal common law to questions of tribal jurisdiction, see Fletcher, *supra* note 179, at 1004–05.

267. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46–50 (1985).

268. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972), *superseded by statute*, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* Am. Elec. Power Co. Inc. v. Connecticut, 564 U.S. 410 (2011). *See generally* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006) (proposing a framework for understanding the limitations of federal common law in arguing that it should be guided by a set of principles that align with federal interests while respecting state autonomy); Skibine, *supra* note 30 (arguing for greater tribal autonomy in regard to the relationship between federal common law and the inherent sovereignty of Indian

Milwaukee,[269] Justice William O. Douglas recognized that "the remedies which Congress provides are not necessarily the only federal remedies available."[270] He cited previous precedent, explaining that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned."[271] The problem is that whether a tribal court may interpret federal law is not a question over which federal courts may exercise judicial power. It is only properly a question of whether the tribal sovereign vested in its judicial system the power to interpret federal law.

Thinking about states in an analogous situation helps to articulate the tribal, instead of federal, nature of the inquiry. When a state court hears a claim based on federal law, there is no federal court inquiry about its power to do so.[272] The question is one of state law: did the state sovereign authorize its state courts to decide questions of the federal law?[273] If the state did permit its courts to extend the judicial power to questions of federal law, then there is no federal common law rule that may intervene to interfere with the assumption of state jurisdiction absent an express act of Congress.[274] Congress understands this limitation and accordingly enacted 28 U.S.C. § 1441—the

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tribes); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996) (advocating for greater protection of state sovereignty by reinterpreting federal common law and emphasizing the structural constraints imposed by the Constitution).

269. 406 U.S. 91 (1972), *superseded by statute*, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* Am. Elec. Power Co. Inc. v. Connecticut, 564 U.S. 410 (2011).

270. *Id.* at 103.

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

272. *See* Reich v. Lopez, 858 F.3d 55, 62 (2d Cir. 2017) ("For a court to exercise general jurisdiction over a defendant, 1) state law must authorize general jurisdiction; and 2) jurisdiction 'must comport with constitutional due process principles.'"); *see also* Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1040 (2020) ("General-jurisdiction courts are created and defined by state law.").

273. Reich v. Lopez, 858 F.3d at 62.

274. Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 WIS. L. REV. 1465, 1471 ("The requirement that state courts of otherwise general jurisdiction adjudicate federal claims brought against state defendants forces a state to ensure that its conduct complies with federal law, but, unlike the statutes at issue in *New York* and *Printz*, does not require the state to regulate third party conduct.").

federal removal statute.[275] Nothing in the removal statute permits the removal of federal questions from tribal courts.[276]

Rather than constituting evidence that tribal courts are not courts of general jurisdiction, the absence of tribal courts from the removal statute is in fact evidence that Congress did not affirmatively intend for federal courts to interfere in tribal courts' interpretation. That is not to say that federal review is never available when a tribal court interprets federal law. The *Neztsosie* opinion is just one example of a tribal court defendant seeking federal review of a tribal court's interpretation of the Price–Anderson Act by using the injunctive powers of the federal courts.[277] But no act of Congress suggests that there must be an avenue for federal court review when a tribal court hears a federal claim. The Court must "defer to Congress" because, just like waivers of sovereign immunity, "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" to determine whether the removal statute extends to federal questions filed in tribal courts.[278]

Professor Martha Field explains that "the primary limit on power to make federal common law is that there must be a source of authority for any given federal common law rule."[279] That source of authority may be a constitutional provision, a treaty, or a federal statute, but it must be something more than

275. 28 U.S.C. § 1441; *see also* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 909 at n.55 (2009) ("Likewise, in several cases, the Court relied on constitutional cases to interpret the 'arising under' language in the removal statute.").

276. Nevada v. Hicks, 533 U.S. 353, 368 (2001) ("[T]he general federal-question removal statute refers only to removal from *state* court." (citation omitted)); *see also* M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction Over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, 1845 n.123 (2014) ("§ 1441 does not permit removal from tribal court to federal courts. ('The plain language of [§ 1441] makes no reference to tribal courts and would appear to foreclose removal of a federal claim asserted in tribal court to federal court.'). This means that nonmember defendants who are properly before a tribal court cannot remove their case to federal court." (alteration in original) (citation omitted)); *cf.* Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 765 (1997) (discussing how removal/remand might have worked should the statute permit tribal court removal) (The author now writes as Melissa L. Tatum).

277. *Hicks*, 533 U.S. at 368–69 (discussing the use of injunctive powers to obtain federal review in *Neztsosie*).

278. Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 759–60 (1998).

279. Martha A. Field, *The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 928 (1986).

a statute conferring jurisdiction on the federal courts.[280] When the federal common law is recognized to require some enabling authority, the propriety of the federal courts to assert judicial power over an Indian tribe on a common law basis is lost. That is precisely what the *Hicks* majority attempted to do. Without any substantive basis, without even relying upon the removal statute, the Court announced a limitation on another sovereign's exercise of its rights because it was "simpler."[281] That is beyond the scope of the Supreme Court's exercise of judicial power in Article III because such a common law rule has no basis in any source of positive law.

2. No Act of Congress Authorizes the Court to Limit Tribal Court Jurisdiction

Defendants in tribal courts have repeatedly sought to restrict the inherent adjudicatory powers of tribal courts. They have, unfortunately, sometimes been successful.[282] But consistent with the analysis above, the Court may announce a common law rule limiting the inherent power of a tribal court only if Congress has authorized the creation of the limitation.[283]

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

281. *Hicks*, 533 U.S. at 369.

282. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) (holding that a tribal court lacked adjudicatory jurisdiction over a traffic accident occurring on a state-maintained highway running through the reservation and involving a widow and mother of tribal members who had long resided on the reservation); *Hicks*, 533 U.S. at 374 (holding that a tribal court lacked adjudicatory jurisdiction over tribal law claims for trespass and conversion of property committed by a state officer executing a state warrant that was subsequently approved by the tribal court); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 320 (2008) (holding that a tribal court lacked adjudicatory jurisdiction over a breach of contract and discrimination claim brought by tribal members related to the sale of property from a nonmember bank to a nonmember purchaser).

283. Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 931 (2004) ("[A]ny valid exercise of lawmaking power by the federal judiciary must have a foundation in some other, independent source of authority."); Matthew Slovin, *Stipulating to Overturn* Klaxon, 97 N.Y.U. L. REV. ONLINE 127, 136 n.75 (2022) ("Federal law, for its part, must be promulgated under the 'finely wrought and exhaustively considered' process set forth in the Constitution." (citing INS v. Chadha, 462 U.S. 919, 951 (1983))).

After all, there is no basis for plenary judicial power[284] that permits the Court to arbitrarily announce limits to the jurisdiction of other sovereigns who have long held a government-to-government relationship with the United States[285] and who enjoy the right to "make their own laws and be ruled by them."[286] When a tribal government decides to permit its courts to exercise its judicial power to interpret federal law and give judgments based on federal claims, the Supreme Court may only interfere if the grant of that power has violated some statute or treaty.[287] It may not make a decision based on its own view that the assertion of power is not obvious at first, that the assertion of power is inconvenient, or that it would simplify the judicial task if the Supreme Court didn't have to consider whether or how to hear appeals from decisions of tribal courts interpreting federal law.[288] Creating common law rules that artificially limit the inherent power of tribal courts infringes upon that inherent power in precisely the way rejected by the Supreme Court in 1959.[289]

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284. Clinton, *supra* note 31, at 228 ("Since the *Montana* tests originally were developed as limited exceptions (applicable only to nonmember owned lands) to the then prevailing assumption of tribal governing authority over the whole of the reservation, this suggestion constituted a remarkable enlargement of the federal judicial curtailment of tribal authority under the guise of plenary judicial power. Notwithstanding the total lack of authority for this suggestion in the history of the tribal [] federal relationship or the prior precedents of the Court, it nevertheless prevailed in the next case decided by the Court, *Nevada v. Hicks*.").

285. Tribes are sovereign, and their relationship to the United States is a government-to-government relationship. Yellen v. Confederated Tribes of the Chehalis Rsrv., 594 U.S. 338, 345 (2021) ("A federally recognized tribe is one that has entered into 'a government-to-government relationship [with] the United States.'" (alteration in original) (quoting HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3]) (Nell Jessup Newton ed., 2012 ed.).

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

287. Clark, *supra* note 268, at 1259 ("'[F]ederal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.'").

288. *Cf.* Nat'l Farmers Union Ins. Cos. v, Crow Tribe of Indians, 471 U.S. 845, 855–56 (1985) ("[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy . . . and administrative or judicial decisions." (footnote omitted)).

289. This principle was first announced by the Court in *Williams*, 358 U.S. at 220. For an academic discussion, see Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 557–60 (1997).

Congress has, at times, created federal causes of action that it expressly intended to be heard in tribal forums. The *Hicks* opinion points to two of them.[290] In the Indian Child Welfare Act,[291] Congress intended tribal courts to hear claims involving the termination of parental rights, foster care, and pre-adoptive and adoptive placements of Indian children.[292] In a separate statute,[293] Congress intended tribal courts to have jurisdiction over foreclosure actions brought by the Department of Housing and Urban Development against reservation homeowners.[294] Neither of these statutes has any right of appeal to the federal courts or to the U.S. Supreme Court, and yet that lack of federal review did not result in any dicta from the *Hicks* majority questioning the power of tribal courts to hear those claims. If anything, the existence of federally created causes of action—intended to be heard in tribal court without any federal court review—demonstrates that Congress does not see the lack of review as a reason tribal courts should be prohibited from interpreting federal laws.

Congress has at times gone even further. Amendments to the National Housing Act contained a provision permitting tribal sovereigns to designate the court in which the Secretary can seek to garnish the wages of a delinquent tribal member entitled to tribal income or income derived from a trust fund.[295] The Act permits the tribal sovereign to select from "tribal court, [a] court of competent jurisdiction designated by the tribe, or Federal district court."[296] By permitting the tribal government to designate the court, Congress has not only recognized that tribal courts are appropriate forums to resolve debts owed to the United States, but actually delegated the power to select the forum to the sovereign itself. Notably the Act does not "give" tribal courts the jurisdiction to hear these claims. It could not.

290. Nevada v. Hicks, 533 U.S. 353, 367–68 (2001).

291. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.

292. *Id.* § 101, 92 Stat. at 3071; *see also Hicks*, 533 U.S. at 367 ("25 U.S.C. § 1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978)").

293. Supplemental Appropriations Act of 1984, Pub. L. No. 98-181, 97 Stat. 1153.

294. *Id.* at sec. 422, § 248(f)(5), 97 Stat. at 1215–16; *see also Hicks*, 533 U.S. at 367–68 ("12 U.S.C. § 1715z–13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of Housing and Urban Development against reservation homeowners)").

295. Supplemental Appropriations Act of 1984, sec. 422, § 248(f)(4), 97 Stat. at 1215.

296. *Id.*

Congress cannot confer subject matter jurisdiction upon a tribal court, only the tribal sovereign can do so.[297]

In fact, no tribal court could hear claims predicated upon these federal statutes merely because Congress would permit the claims to be heard by a tribal court. Congress cannot require tribal courts to hear any claim, including those under the Indian Child Welfare Act or those involving the foreclosure of property on a reservation.[298] It can, however, prohibit federal claims from being heard in tribal courts by including the prohibition in a statute and tying its authority to enact that statute to its broad but not unlimited power to legislate in the area of Indian affairs.[299] Otherwise, the tribal sovereign must affirmatively give its courts the power to hear even those claims Congress intended tribal courts to decide.[300]

The examples, pointed to by Justice Scalia in the *Hicks* opinion, show that Congress understood that tribal courts would be interpreting and enforcing federal law even when those statutes provided no mechanism for federal courts to correct any errors made by the tribal courts. Far from finding these congressional authorizations unconstitutional or unlawful because they fail to provide for federal review, the *Hicks* majority admits that "some statutes proclaim tribal-court jurisdiction over certain questions of federal law."[301] It makes no attempt to distinguish these laws from other federal statutes that might appear in tribal court; it merely declares that "tribal-court jurisdiction would create serious anomalies."[302]

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297. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.").

298. *See* Haaland v. Brackeen, 599 U.S. 255, 373–76 (2023) (Alito, J., dissenting) (discussing limitations on congressional authority regarding tribal sovereignty).

299. *Id.* at 276 (majority opinion) ("Article I gives Congress a series of enumerated powers, not a series of blank checks. Thus, we reiterate that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.").

300. For an example of a federal court of the United States recognizing that tribal court jurisdiction is controlled by the tribal sovereign, see Stock W., Inc. v. Confederated Tribes of Colville Rsrv., 873 F.2d 1221, 1228 (9th Cir. 1989) ("The dispute arises out of the reservation and concerns tribal resources, and there are apparently no treaties or statutes that would limit tribal court jurisdiction in this case. In addition, Colville tribal law explicitly provides for jurisdiction in cases like this." (footnote omitted)).

301. *Hicks*, 533 U.S. at 367.

302. *Id.* at 368.

While it is uncertain what anomalies would develop, giving the Court the benefit of the doubt that tribal court interpretation of federal statutes would be anomalous while state interpretation of federal statutes is consistent with our federalist system, there is still no legal basis permitting federal courts to correct the anomaly. Not every right has a remedy.[303] As Justice Kagan explained in a case—admittedly about sovereign immunity instead of inherent sovereign power—in Indian law in particular, "Congress exercises primary authority" and, so, "[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress."[304] Without a congressional indication that tribal courts asserting general jurisdiction are disfavored, federal courts lack the authority to impose such a common law restriction.[305]

Moreover, it is the denial of general jurisdiction that creates the anomaly. Because Congress has expressly permitted tribal courts to hear some federal claims, even the *Hicks* decision cannot remove that authority.[306] After *Hicks*, the federal–tribal relationship is left with a common law rule from the Supreme Court rejecting all tribal court interpretations of federal law, while Congress expressly permits the review of specific causes of action. Certainly, that is a more anomalous conclusion than just permitting tribal courts to assert general jurisdiction when authorized by their tribal sovereign. This second proposition—at the core of this Article—removes the anomalies and restores a pre-*Hicks* understanding that tribal courts can interpret federal law unless expressly prohibited by an act of Congress.

IV. TRIBAL COURTS BENEFIT FROM THE SAME DUAL SOVEREIGNTY AS STATES

In *Hicks*, the Court explained that state courts had long been permitted to interpret the federal law because of the principle of "dual sovereignty," which recognized that state courts have an "inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."[307] The majority in *Hicks* made no attempt to determine whether Indian tribes could also exert that dual sovereignty. It

303. Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1438 n.142 (2002).

304. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799–800 (2014).

305. *Id.*

306. *Hicks*, 533 U.S. at 367–68.

307. *Id.* at 366 (citing Tafflin v. Levitt, 493 U.S. 455, 458 (1990)).

did not address any of the Court's precedent on a tribe's inherent authority. It merely repeated an unsupported assertion from *Strate v. A-1 Contractors* that "adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction."[308] A reexamination of all of the Court's precedent mandates a different conclusion.

Any proper analysis must begin with the recognition that tribal governments are sovereign. That conclusion is mandated by a textual reading of the Constitution itself.[309] In the Commerce Clause, Indian tribes are contradistinguished from states and foreign nations.[310] The Supreme Court has called this a "distinct appellation" that confirms tribal governments' status as sovereigns.[311] Justice O'Connor famously called tribal governments the "third sovereign,"[312] while Justice Amy Coney Barrett recently described Indian tribes as "self-governing sovereign political communities with the inherent power to prescribe laws for their members and to punish infractions of those laws."[313]

Well-established precedent holds that tribal governments are entitled to the same dual sovereignty as states.[314] The Supreme Court has made clear that "[t]he powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"[315] "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute."[316] When asked whether subjecting an individual to

308. *Id.* at 367 (relying on *Strate v. A-1 Contractors* assertion that "As to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction . . . ." 520 U.S. 438, 453 (1997)).

309. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1170 (1995) ("The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct.").

310. U.S. CONST. art. I, § 8, cl. 3 ("[Congress has the power] [t]o regulate commerce with foreign Nations, and among the several states, and with the Indian tribes.").

311. Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831).

312. O'Connor, *supra* note 226.

313. Denezpi v. United States, 596 U.S. 591, 598 (2022) (quoting United States v. Wheeler, 435 U.S. 313, 322–23 (1978)).

314. *See* Santa Claro Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

315. United States v. Wheeler, 435 U.S. 313, 322 (1978), *superseded by statute*, Department of Defense Appropriations Act, 1996, Pub. L. No. 101-511, tit. VIII, § 8077(b)–(c), 104 Stat. 1856, 1892–93, *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

316. *Id.* at 323.

both the tribal law and federal law in separate judicial proceedings violated the Fifth Amendment's Double Jeopardy protection, the Court reasoned that because tribes exercise a "dual sovereignty" separate from that of states or the United States, no violation of the Fifth Amendment had occurred.[317]

In 2022, the Court expanded the applications of dual sovereignty between the United States and Indian tribes, confirming that a specialty court created by federal law[318] could criminally prosecute an individual for a violation of both tribal law and federal law.[319] The Court reasoned that the Fifth Amendment "does not bar successive prosecutions by the same sovereign"[320] as long as the offenses charged were "defined by separate sovereigns."[321] Although *Denezpi v. United States*[322] involved prosecution in a specialty court created for Indian country, and the Supreme Court did not determine whether such a court was organized pursuant to tribal authority,[323] the same principles of dual sovereignty emerge. If a Court of Indian Offenses (CFR Court) can hear charges filed under both tribal and federal law, interpret those laws, and give a verdict based upon them, then a tribal court should certainly be able to entertain both a tribal claim and a federal claim in a single civil case.

A. *The Exercise of General Jurisdiction is Consistent with Congressional Support for Tribal Sovereignty*

A recurrent theme throughout this Article, and throughout the Court's Indian law jurisprudence, is that it is Congress, and not the courts, that is in the position to modify the exercise of inherent tribal authority. The Court itself recognizes that its

317. *Id.* at 332 ("[T]here are persuasive reasons to reject the respondent's argument that we should arbitrarily ignore the settled 'dual sovereignty' concept as it applies to successive tribal and federal prosecutions."); *see also* Riley & Thompson, *supra* note 200 (analyzing how the dual sovereignty doctrine and the Double Jeopardy Clause impact tribal sovereignty and jurisdictional boundaries).

318. In this case, it was a CFR Court operated in conjunction between Indian tribes and the United States. For a longer discussion of CFR Courts in Indian country, see Gregory D. Smith & Bailee L. Plemmons, *The Court of Indian Appeals: America's Forgotten Federal Appellate Court*, 44 AM. INDIAN L. REV. 211, 212–13 (2020).

319. Denezpi v. United States, 596 U.S. 591, 594–95 (2022).

320. *Id.* at 594.

321. *Id.* at 599.

322. 596 U.S. 591 (2022).

323. *Id.* at 600 ("We need not sort out whether prosecutors in CFR courts exercise tribal or federal authority.").

conclusions regarding the inherent power of tribal governments are based upon its understanding "*at the time*" the decisions are made and that its opinions may change based on the "relevant legal circumstances" that "modify or adjust the tribes' status."[324] When the Court has invited Congress to restrict inherent tribal sovereignty,[325] Congress has refused.[326]

In the last fifteen years, Congress has repeatedly acted to recognize and expand the inherent power of tribal courts. In 2010, it enacted the Tribal Law and Order Act[327] (TLOA), which dramatically expanded the criminal penalties tribal courts could impose and recognized their felony jurisdiction for the first time.[328] Three years later, Congress recognized the inherent power of tribal courts to prosecute non-Indians in an expansion of the Violence Against Women Act,[329] permitting tribal prosecutors to convict non-Indian defendants in tribal court for acts of domestic violence, dating violence, and violations of a protection order.[330] In 2022, it further expanded its recognition of the inherent criminal jurisdiction of tribal

324. United States v. Lara, 541 U.S. 193, 205–06 (2004) (emphasis added).

325. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998) ("Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.").

326. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 801 (2014) ("All that we said in *Kiowa* applies today, with yet one more thing: Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity.").

327. Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (codified in scattered sections of 18 U.S.C. and 25 U.S.C.).

328. *Id.* § 234, 124 Stat. at 2279–82 (codified at 25 U.S.C. § 1302). For an academic discussion of the TLOA, see generally David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 GONZ. L. REV. 767 (2011) (examining the impact of the TLOA on strengthening tribal sovereignty and improving the criminal justice system in Native American communities); Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317 (2013) (arguing that providing the right to counsel is essential for upholding tribal sovereignty within the Native American criminal justice system); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016) (examining the challenges of maintaining tribal sovereignty while addressing public safety needs in Indian country).

329. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

330. *Id.* §§ 904–05, 127 Stat. at 120–25. For an excellent discussion of the requirements and limitations of the 2013 reauthorization, see Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 291–95 (2016).

courts, including a recognition of authority over some non-Indian–on–non-Indian crimes,[331] which had been previously prohibited by Supreme Court precedent.[332]

Consistent with *United States v. Lara*'s suggestion that the Supreme Court's common law limitations on tribal courts are subject to subsequent modification based upon new information, it is time to reconsider *Hicks*.

B. *The United States Supreme Court Retains its Position as the Ultimate Arbiter of the Meaning of Federal Law*

Finally, nothing about the recognition of tribal courts as courts of general jurisdiction interferes with the longstanding legal principle that the final arbiters of federal law are the federal courts.[333] The *Hicks* majority suggests that among the problems with tribal courts exercising general jurisdiction is that there is no automatic right of review of a tribal court's interpretation.[334] A right of review in federal court has never been a required feature of the exercise of general jurisdiction.[335] "Federal Courts are not Tribal Appellate Courts,"[336] and the federal removal statute does not permit the removal of federal questions from tribal court to federal court.[337]

Professor Fletcher has perhaps the most trenchant reply to critiques that tribal courts might misinterpret federal law. In his scholarship, he comprehensively shows that the Supreme Court regularly refuses to correct errors involving Indian law

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331. *See* Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, § 804, 136 Stat. 840, 898–901.

332. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribal courts cannot criminally prosecute non-Indian persons without treaty authorization or approval by Congress).

333. Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 117 (2009); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 84 ("Where the desire for uniformity is especially strong, federal jurisdiction may be made exclusive.").

334. Nevada v. Hicks, 533 U.S. 353, 368–69 (2001).

335. *See* SUP. CT. R. 10 (stating that U.S. Supreme Court review of cases, including those appealed from state courts of last resort, is "not a matter of right, but of judicial discretion").

336. Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805, 930 (2018); *see also* Eagleman v. Rocky Boy Chippewa-Cree Tribal Bus. Comm. or Council, 699 Fed. Appx. 599, 600 (9th Cir. 2017) ("Tribal courts are not vertically aligned under the federal judicial hierarchy. They are institutions within coordinate sovereign entities vested with the power to regulate internal tribal affairs.").

337. Miller*, supra* note 276, at 1846.

without doing apparent injury to the balance of sovereigns in the American system. In *Factbound and Splitless*, he analyzes more than 150 cert pool memos from the papers of Justice Harry Blackmun involving Indian law cases.[338] The article documents in excruciating detail the repeated and consistent errors made by state and federal courts when interpreting Indian law and how the Supreme Court often refuses to correct such errors because they are "factbound," "splitless," or both, which is to say that they involve an interpretation of law unlikely to reoccur and unable to create a circuit split because it applies to a single tribe or to tribes in a single state.[339]

The number and diversity of examples are sufficient to make even casual observers of Indian law uncomfortable: the Court used the factbound and/or splitless justification to deny review when the Vermont Supreme Court deviated from established precedent to create its own standard denying the Abenaki people their aboriginal rights to hunt and fish,[340] when the Eleventh Circuit relied upon outdated authority to deny individual Indians immunity from taxation,[341] when the Seventh Circuit misinterpreted a treaty provision that denied an Indian tribe a portion of its land that was of "immense importance to the tribal community",[342] and when the Alaska Supreme Court refused to permit Alaska Native Villages to decide internal child custody matters.[343] In the Alaska case, Professor Fletcher noted that the cert memo reluctantly recommended a grant because, "[a]lthough the issues are not

338. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 934 (2009).

339. *Id.* at 937–38 ("Critically, memowriters recognize that tribal claims are usually based on a single treaty or statute grounded deep in American history. The treaty's terms and history are bound to a particular territory, so a law clerk would be hard-pressed to argue that the case has national implications. Because Indian law cases have limited territorial reach, splits in lower court authority are unlikely. Jurisdictional splits are the most important objective factor favoring a grant of certiorari. Moreover, these cases are complex and involve 'factbound' applications of settled law. The petitioner is therefore praying the Court to correct a lower court error applying rules of law previously determined by the Supreme Court. This, according to the Court's own rules, it will rarely do." (footnotes omitted)).

340. *Id.* at 937; State v. Elliot, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993).

341. Fletcher, *supra* note 338, at 959; Oscecola v. Fla. Dep't of Revenue, 893 F.2d 1231 (11th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).

342. Fletcher, *supra* note 338, at 963; Sokaogon Chippewa Cmty. v. Exxon Corp., 2 F.3d 219 (7th Cir. 1993), *cert. denied*, 510 U.S. 1196 (1993).

343. Fletcher, *supra* note 338, at 962–63; *In re* F.P., 843 P.2d 1214 (Alaska 1992), *cert. denied*, 508 U.S. 950 (1993).

very interesting and seem to have little national significance, they are quite important to Native-State relations in Alaska, and only this Court can resolve the conflict."[344] The Court denied cert anyway.[345] When the federal courts refuse to correct errors of law impacting Indian tribes through the discretionary review of the certiorari process, it can hardly be constitutionally problematic, let alone mandated, that tribal courts be denied the right to interpret federal law merely because there is not a formalized channel of federal court review of their decisions.

The U.S. Supreme Court has long accepted that in a country with competing sovereigns, it is possible, perhaps inevitable, that, occasionally, a court asked to interpret the law of another sovereign will get the law wrong.[346] Perhaps the most classic case is *Fauntleroy v. Lum*.[347] In *Fauntleroy*, the Missouri state court enforced a contract for cotton futures that was made in Mississippi but was unlawful under Mississippi law.[348] Rather than appeal the Missouri court's wrongful interpretation through the Missouri appellate system, the defendant waited until the prevailing plaintiff attempted to enforce the judgment in Mississippi.[349] The defendant then objected to the enforcement of the judgment because Missouri had completely misapplied Mississippi law.[350]

The Supreme Court enforced the Missouri judgment even though the Court agreed that the judgment was based on an inaccurate reading of Mississippi law.[351] As Justice Oliver Wendell Holmes Jr. explained:

> We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect.

344. Fletcher, *supra* note 338, at 962.

345. *Id.* at 963; *see* Circle Native Cmty. v. Alaska Dep't of Health & Soc. Serv., 508 U.S. 950 (1993) (No. 92-1536) (mem.) (denying certiorari of *In re* F.P., 843 P.2d 1214).

346. *See generally* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) (discussing extensively the consequences and responses to courts making inaccurate interpretations of law, including depublishing opinions, the use of vacatur, summary reversal, and others).

347. 210 U.S. 230 (1908).

348. *Id.* at 233–34.

349. *Id.* at 234.

350. *Id.*

351. *Id.* at 237–38.

> Mistakes will be rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken it made a natural mistake.[352]

The American legal system and the U.S. Constitution can survive if an interpretation of law is mistakenly inaccurate. There is no reason to believe that tribal courts are unable or unqualified to interpret federal law. Doubtless, a mistake may, from time to time, occur. If Congress is concerned with tribal courts making mistakes when interpreting federal law, it can amend the removal statute to provide for the removal of federal questions from tribal to federal courts. But the Constitution certainly does not require denying tribal courts the assertion of general jurisdiction merely because it is possible that they misinterpret federal law. After all, "[m]istakes will be rare," but if they occur, they will be "natural mistake[s]."[353]

CONCLUSION

For the last twenty years, a single Supreme Court precedent has forcibly interfered with the ability of tribal governments and tribal courts to protect their citizens and resources by permitting claims premised on federal law from being filed in tribal court.[354] Instead, tribal members must file their federal causes of action in federal courts, which may be hundreds of miles from the reservation.[355] "Serious practical problems arise by virtue of the vast distances between some Indian reservations and the federal courts that serve them."[356]

For more than sixty years, the maxim of tribal sovereignty has been that Indians have the right to make their own laws and be ruled by them.[357] The Supreme Court may neither create

352. *Id.*

353. *Id.*

354. *See* discussion *supra* Section IV.B.

355. Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711 (2006) ("Consider, for example, the challenge facing a victim or witness from the Red Lake Band of Ojibwe Reservation near the Canadian border in northern Minnesota who may be required by federal summons to travel 250 miles or more of back roads and highways to reach federal court in St. Paul or Minneapolis, Minnesota. While such distances would be daunting to anyone, residents of Indian reservations (and certainly victims and witnesses to violent crime) tend to have incomes well below the poverty level." (footnotes omitted)).

356. *Id.*

357. The Supreme Court precedent here is clear, for three Supreme Court cases repeat this language. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332

its own common law rules denying tribes the authority to determine for themselves which claims their courts may hear nor announce common law restrictions preventing the tribal sovereign from exercising an inherent power.[358] The Court may interpret the assertion of jurisdiction as being inconsistent with an act of Congress or contrary to an express treaty provision, but no such legislative limitation has ever prevented tribal governments from creating tribal courts of general jurisdiction.[359]

It is particularly egregious that the Court in *Hicks* concluded that tribal assertion of general jurisdiction is "not apparent," so it would be "simpler" to deny tribal courts that power.[360] New rules fashioned out of the common law, particularly rules denying rights to American citizens, should never be announced just because they are "simpler." A proper analysis of tribal sovereignty would show that tribal governments have never lost the right to interpret the law of other sovereigns. If a tribal government vests in its tribal court the authority to interpret federal law, then its tribal courts are courts of general jurisdiction until *Congress* says otherwise. The Supreme Court must be faithful to its own precedent: "absent governing Acts of Congress," courts may not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them."[361]

Of the original nine members of the Court that decided *Hicks*, only Justice Thomas remains. In the interval, Congress has repeatedly expanded its understanding of inherent tribal sovereignty, and since 2020, the Court seems to decide annually a new case recognizing the inherent power of tribal authorities.[362] *Hicks* has earned its retirement. Tribal

(1983); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 465–67 (1989) (Blackmun, J., concurring) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987)); *see also* John Arai Mitchell, *A World Without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country*, 61 U. CHI. L. REV. 707, 717 (1994) (discussing the importance of the language from *Williams v. Lee*, 358 U.S. 217, 220 (1959) on inherent tribal sovereignty).

358. Mitchell, *supra* note 357, at 709–10.

359. *Id.* at 710–11.

360. Nevada v. Hicks, 533 U.S. 353, 368–69 (2001).

361. Williams v. Lee, 358 U.S. 217, 220 (1959) (holding that Arizona state courts could not hear a collection action brought by a non-Indian against Navajo debtors for debts incurred on the reservation and that the non-Indian lender would have to avail himself of the tribal court to collect on the debt because using state courts would infringe on the rights of the Navajo Nation to make its own laws and be governed by them).

362. *See supra* notes 198–208 and accompanying text.

governments that decide that they want their courts to hear claims based on federal law should challenge the assumptions in *Hicks* by enacting new tribal statutes that authorize their courts to hear federal questions. For Indian tribes that have already granted their courts general jurisdiction, tribal courts should dutifully decide claims arising under federal law whenever filed by parties in tribal court.

Consistent assertion of general jurisdiction will create new norms, and when the Supreme Court is again confronted with the question of tribal court authority to hear questions of federal law, it will be forced to engage in the inherent sovereignty analysis presented here before it arbitrarily limits the use of tribal judicial power. Future plaintiffs in the same position as Laura and Arlinda Neztsosie should be able to have their claims heard in their tribal community and decided by local courts, pursuant to tribal *and* federal law, and without the interference of Supreme Court precedent.