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Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction

Kevin J Worthen*

For the past thirty years, legal scholars and legislators have vigorously debated the constitutionality of legislative proposals limiting federal court jurisdiction over claims arising under federal law. This dispute has been waged in numerous congressional hearings¹ and dozens of law review articles.² Despite the

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1. See, e.g., *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter *Constitutional Restraints*]; *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); *The Supreme Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968); *The Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958).

2. See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Blackmar, *The Legislative Challenge to the Judiciary*, 14 ST. LOUIS U.L.J. 24 (1969); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973); Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984) [hereinafter *Original Understanding*]; Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986); Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238 (1970); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Hart, *The Power of*

vigorousness of the discussion and the mountain of paper it has engendered, no consensus has been reached, largely because none of the legislative proposals³ has ever been enacted.⁴

When an important debate rages on for such a long time with no definitive resolution, it sometimes is helpful to view the issues from a new perspective that allows reexamination of the basic premises underlying the various arguments. Examination from a new perspective is particularly helpful when it

Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) [hereinafter *Appellate Jurisdiction*]; Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982) [hereinafter *Majoritarian Constraints*]; Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982) [hereinafter *Constitutional Limitations*]; Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982) [hereinafter *Congressional Power*]; Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973).

The amount of scholarly writing on the subject has been so immense that one of the participants in the debate concluded that it was "choking on redundancy." Gunther, *supra*, at 897 n.9 (quoting letter from William Van Alstyne to Gerald Gunther (Feb. 28, 1983)). As Professor Gunther observed, however, "the risk of adding to the redundancy is clearly offset . . . by the pervasiveness and significance of the issues." Gunther, *supra*, at 898.

3. Proposals have been made to eliminate Supreme Court review of a variety of federal questions, including internal security laws, S. 2646, 85th Cong., 1st Sess. (1957), reprinted in *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 1-2 (1957); anti-obscenity laws, S. 4058, 90th Cong., 2d Sess. (1968); racial desegregation orders involving busing, H.R. 13916, 92d Cong., 2d Sess. (1972), reprinted in *School Busing: Hearings on Proposed Amendments to the Constitution and Legislation Relating to Transportation and Assignment of Public School Pupils Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 1928-30 (1972); religious school exercises, H.R. 6501, 92d Cong., 1st Sess. (1971); and abortion, S. 158, 97th Cong., 1st Sess. (1981), reprinted in *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1117-20 (1981). A recent unsuccessful proposal would have eliminated all federal court jurisdiction over cases involving challenges to state flag destruction laws. 136 CONG. REC. S8700-04 (daily ed. June 26, 1990).

4. See, e.g., *Constitutional Restraints*, *supra* note 1, at 9 (statement of Leonard Ratner) ("From 1953 to 1968, over 60 bills were introduced to eliminate Federal Court . . . jurisdiction over particular subjects. . . . These bills have not been enacted.").

shifts consideration of the issues from an abstract to a concrete setting. Federal Indian law provides such a perspective for critical reexamination of the constitutional necessity for federal jurisdiction over claims arising under federal law.⁵ The conventional wisdom is that Congress has never completely eliminated federal court jurisdiction over any class of cases arising under federal law.⁶ A noted Indian law case, *Santa Clara Pueblo v. Martinez*,⁷ however, holds that Congress has done exactly that. Since *Santa Clara Pueblo*, plaintiffs who wish to bring a civil action alleging tribal violations of title I of the federal Indian Civil Rights Act (ICRA)⁸ cannot file such an action

5. Professor Judith Resnik recently noted the absence of Indian law cases and concepts from federal court scholarship and some of the implications of that absence. Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989). Professor Resnik correctly observed that one should not assume that principles that apply in the federal-state relationship automatically apply in the federal-tribal relationship because the former relationship is premised on the constitutionally-based theory of consent, while the latter is not. *Id.* at 690-97. Nevertheless, she pointed out that the differences may not be as great as many perceive and that much can be learned about the former by studying the latter. *Id.* at 697-701. For the purposes of this Article, the key similarity between state and tribal courts — the similarity that permits useful consideration of the issue of congressional authority over federal court jurisdiction in an Indian law context — is that neither set of courts is an article III federal court. See *infra* text accompanying notes 90-92. Thus, when Congress delegates to tribal courts the exclusive authority to adjudicate cases arising under federal law, Congress raises the very issue about which scholars and legislators have debated — the limitations on Congress's authority to prohibit article III federal courts from exercising jurisdiction over such cases.

6. Cf. *Constitutional Restraints*, *supra* note 1, at 10 (statement of Leonard Ratner) ("Congress . . . has itself recognized and respected the essential constitutional functions of the Court. None of [the proposed bills] has been passed"). As Professor Van Alstyne observed, "Congress has virtually never sought to remove some aspect of Supreme Court appellate jurisdiction from pique with its particular decisions (the one clear effort to do so fell short solely because Congress had overlooked an obscure, alternative procedure left unaffected by its restriction at the time [see the *McCardle* case . . .])." *Id.* at 119 (statement of William Van Alstyne).

7. 436 U.S. 49 (1978).

8. 25 U.S.C. §§ 1301-1303 (1988). For the purposes of this Article, the term "civil ICRA action" is used as a shorthand reference to non-habeas corpus Indian Civil Rights Act (ICRA) actions challenging tribal civil laws. As noted below, see *infra* text at note 98, violations of the ICRA can be remedied in federal court via habeas corpus. Habeas corpus is technically a civil proceeding. That remedy, however, is available in the ICRA context only "to test the legality of [a person's] detention by order of an Indian tribe." 25 U.S.C. § 1303 (1988). This will usually occur when a person is charged by the tribe with a criminal offense. See, e.g., *Greywater v. Joshua*, 846 F.2d 486, 487 (8th Cir. 1988) (habeas corpus jurisdiction exists to challenge jurisdiction of tribal court in criminal proceeding); *Duro v. Reina*, 851 F.2d 1136, 1138-39 (9th Cir.

in federal court. They must file the action in tribal court.⁹ Moreover, these plaintiffs cannot obtain any federal court review of an adverse tribal court decision concerning the interpretation of this federal statute.¹⁰ According to the *Santa Clara Pueblo* Court, Congress intended that tribal courts have exclusive jurisdiction over civil ICRA claims even though those claims are based on a federal statute.¹¹

The *Santa Clara Pueblo* ruling and civil ICRA cases since that time thus provide a concrete setting for examining the constitutional necessity of a federal judicial forum for the adjudication of legal issues arising under federal law. As is often the case when legal theories are examined in the federal Indian law context, such examination not only illuminates the propriety of the current state of affairs in the federal Indian law area, it also sheds much needed light on the frequently unexamined premises on which the theories themselves rest.

Accordingly, the main focus of this Article is not on the extent to which the current limits on federal jurisdiction over civil ICRA claims are consistent with constitutional theories developed to date, although that issue will be discussed,¹² but rather on what the ICRA experience demonstrates about the validity of those theories.¹³ The ICRA experience reveals the practical problems created by the more established constitutional theories, and provides policy support for a less established view that, until now, has been based primarily on historical arguments.¹⁴ The ICRA experience also highlights the sometimes overlooked fact that the differences in the constitutional theories result as much from contrasting views about the meaning of the supremacy clause of article VI, as from differences about the scope of the judicial clauses of article III.¹⁵

1988), *rev'd on other grounds*, 110 S. Ct. 2053 (1990) (same); *Weatherwax ex rel. Carlson v. Fairbanks*, 619 F. Supp. 294, 295-96 (D. Mont. 1985) (habeas corpus jurisdiction does not exist to test validity of tribal court child custody decree). Indeed, the only cases in which habeas corpus jurisdiction has been successfully asserted in federal court have all involved challenges to the exercise of a tribe's criminal, rather than civil, authority. *See infra* note 145.

9. *Santa Clara Pueblo*, 436 U.S. at 65.

10. *Id.* at 72.

11. *Id.* at 67.

12. *See infra* Part IV.

13. *See infra* Part III.

14. *See infra* Part III.

15. *See infra* Part III.

I. THE CONSTITUTIONAL NECESSITY OF FEDERAL COURT JURISDICTION OVER FEDERAL LAW ISSUES: AN UNRESOLVED DEBATE

The debate concerning congressional authority to limit federal court jurisdiction has, until now, focused almost exclusively on article III of the Constitution.¹⁶ The first sentence of article III provides that “[t]he 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.”¹⁷ The initial sentence of the second section provides that “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”¹⁸

Were nothing else in article III, it would seem quite clear that the Supreme Court, and perhaps the “inferior courts,” had a constitutional mandate to exercise jurisdiction over any case “arising under” the “Constitution [or] Laws of the United States” and that Congress could not restrict that authority without violating article III. These two provisions state in clear mandatory terms¹⁹ that the federal judicial power “shall” be vested in the courts referred to in article III and that this power “shall” extend to all cases arising under federal law.

Article III, however, contains more than these two provisions. After describing the type of cases over which the

16. Some commentators discussing the limits of congressional authority over federal court jurisdiction have relied on the supremacy clause to some extent. See *infra* notes 44-46, 69 and accompanying text. Recent historical research has demonstrated that such reliance is justified; see Amar, *supra* note 2, at 248-49; Sager, *supra* note 2, at 48-49; *Original Understanding*, *supra* note 2, at 812-14. However, most participants in the debate have paid little attention to the role of the supremacy clause. See *infra* note 59 and accompanying text.

17. U.S. CONST. art. III, § 1.

18. U.S. CONST. art. III, § 2. The judicial power also extends to:

[A]ll Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

19. Robert Clinton has shown that “the drafters fully understood the difference between the mandatory ‘shall’ and the discretionary ‘may,’ and almost invariably used ‘shall’ where a mandatory obligation was intended.” *Original Understanding*, *supra* note 2, at 782 & n.147.

Supreme Court has original jurisdiction,²⁰ section 2 states: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*"²¹ The extent to which this phrase empowers Congress to limit or restrict Supreme Court jurisdiction over federal law claims has been the main focus of the debate concerning congressional authority to limit federal question jurisdiction.²² In the course of the debate, three main positions²³ have evolved:

20. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2.

21. *Id.* (emphasis added).

22. *See infra* notes 23-26.

23. Some have advanced a fourth position — that the exceptions clause authorizes Congress to limit the Supreme Court's jurisdiction only with respect to its review of factual findings. *See, e.g.,* R. BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); Brant, *supra* note 2, at 5; Merry, *supra* note 2, at 53. The proponents of this position focus, with considerable logic, on the phrase immediately preceding the critical "exceptions and regulations" term. Noting that the entire sentence provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make," U.S. CONST. art. III, § 2 (emphasis added), and drawing support from the sometimes vigorous debate among the framers of the Constitution concerning the extent to which the Supreme Court should be authorized to overturn jury factual findings; *see, e.g.,* Brant, *supra* note 2, at 6-11; Merry, *supra* note 2, at 57-68, those who adopt this position conclude that "the 'exceptions and regulations' which Congress was empowered to make were intended to extend only to review of facts, not to the entire grant of jurisdiction." Brant, *supra* note 2, at 5. *Accord* Merry, *supra* note 2, at 69.

Critics of this position, however, point out that a careful reading of the sentence reveals that the "exceptions" phrase modifies the words, "appellate Jurisdiction," rather than the word "Fact." *Congressional Power, supra* note 2, at 914. Critics also note that the limits imposed on the Supreme Court's appellate jurisdiction by the Judiciary Act of 1789 "went far beyond matters of factual review," contemporaneous evidence that the framers were not concerned exclusively with such matters. *Id.* Professor Redish also argues that "Supreme Court precedent, such as *McCordle*, . . . clearly disposes of the review-as-to-fact theory, since the limitation on the Court's appellate jurisdiction upheld there was in no way confined to review of factual determinations." *Id.* at 914-15.

Thus, despite the initial appeal of this argument, it has not been widely adopted, nor recently defended. *See* Amar, *supra* note 2, at 217 n.50. *But cf.* Caron, *Federal Judicial Power: The Constitutionality of Legislative Encroachment*, 34 DEPAUL L. REV. 663, 675-78 (1985) (fact/law theory is "persuasive"). Indeed, one of its original proponents has now abandoned the position; *see* R. BERGER, DEATH PENALTIES 161 & n.31 (1982); Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801, 806-09. *Accord* McAfee, *Berger v. The Supreme Court - The Implications of His Exceptions-Clause Odyssey*, 9 U. DAYTON L. REV. 219 (1984). Accordingly, this theory is not evaluated in as much detail as the three set forth above.

first, the "essential functions" theory, which asserts that article III prohibits Congress from divesting the Supreme Court of all jurisdiction to review any class of cases arising under federal law;²⁴ second, the "plenary power" theory, which postulates that article III places no meaningful limit on Congress's authority to eliminate all federal question jurisdiction;²⁵ and third, the "distributive authority" theory, which maintains that, although Congress has the authority to *distribute* federal jurisdiction between the Supreme Court and the lower federal courts, article III requires that *some* federal court have authority to decide all cases or controversies arising under federal law.²⁶ Each of these theories is summarized below.

A. ESSENTIAL FUNCTIONS THEORY: ABSOLUTE LIMITATION ON CONGRESSIONAL AUTHORITY TO RESTRICT SUPREME COURT JURISDICTION

In his famous 1953 article, *Exercise in Dialectic*, Henry Hart asserted that Congress's "exceptions" power could not be used constitutionally in a manner that would "destroy the essential role of the Supreme Court in the constitutional plan."²⁷ Hart did not elaborate, however, on what he believed constituted the "essential role" of the Court, nor on the precise limits this restriction placed on Congress's authority to restrict federal court jurisdiction.²⁸ Some scholars have argued that Hart ultimately concluded that there were no limits on congressional authority to restrict the Supreme Court's jurisdiction.²⁹

In spite of this argument, Professor Leonard Ratner employed Hart's concept to fully develop an essential functions theory in his seminal article on congressional power over

24. See *infra* Part I.A.

25. See *infra* Part I.B.

26. See *infra* Part I.C. With the exception of the "essential functions" theory, this author has created the labels attached to these three theories. Moreover, as noted in the text below, there are some differences among theories categorized under the same label. The scholars in each group do, however, generally agree on the major points embraced by that theory. The categorization is intended to imply nothing more.

27. Hart, *supra* note 2, at 1365.

28. The article is in the form of a dialogue between "Q" and "A". In response to "Q"'s contention that the "essential role" limitation was "pretty indeterminate," Hart's "A" explained only that "whatever the difficulties of the test, they are less, are they not, than the difficulties of reading the Constitution as authorizing its own destruction?" *Id.*

29. *Constitutional Restraints*, *supra* note 1, at 121-22 (statement of William Van Alstyne).

Supreme Court jurisdiction.³⁰ Ratner identified two essential functions that the Supreme Court is constitutionally required to perform. First, the Court must provide a forum for the resolution of "inconsistent or conflicting interpretations of federal law."³¹ Second, it must provide a forum to "maintain the supremacy of federal law."³² According to Ratner, a law that prohibits Supreme Court review of all cases regarding a particular matter is an unconstitutional usurpation of the Court's essential functions because it prevents the Court from carrying out its constitutional mandate to maintain the uniformity and supremacy of federal law.³³

In reaching this conclusion, Ratner first reviewed the history behind the "exceptions" and "supremacy" clauses of the Constitution, concluding that this history demonstrated the constitutional convention's intention to make the Supreme Court the principal instrument for implementing the supremacy clause.³⁴ He also noted language in early Supreme Court cases that recognized the need for the Supreme Court to resolve conflicting interpretations of federal law as well as the Court's role in maintaining the supremacy of that law.³⁵ Examining the meaning given to the terms "exceptions" and "regulations" at the time of the Constitution's adoption, Ratner demonstrated that the founders did not intend to grant Congress unlimited authority over Supreme Court jurisdiction.³⁶

Ratner then addressed the contention that the Supreme Court, in *Ex parte McCordle*,³⁷ upheld Congress's authority to completely remove the Court's jurisdiction over a class of cases

30. *Appellate Jurisdiction*, *supra* note 2.

31. *Id.* at 161.

32. *Id.*

33. *Id.* at 201.

34. *Id.* at 161-65.

35. *Id.* at 166-68 (discussing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858)).

36. *Id.* at 168-71. Ratner noted that according to common usage, an "exception" necessarily has a narrower application than the rule or description. For example, Ratner observed that courts and commentators had agreed for hundreds of years prior to the passage of the Constitution "an exception in a deed or lease could not include all of the property otherwise conveyed. Nor could such an exception extend to an essential part of the property conveyed." *Id.* at 169.

37. 74 U.S. (7 Wall.) 506 (1869). As Professor Van Alstyne has observed, the one thing which "virtually everything written about this clause has shared in common [is] a reference to *Ex parte McCordle*." Van Alstyne, *supra* note 2, at 232.

raising federal law issues.³⁸ Ratner noted that, although the Court upheld legislation eliminating the particular provision on which jurisdiction rested in that case, it made clear that another avenue of Supreme Court review was open to McCordle.³⁹ According to Ratner, this availability of habeas corpus review enabled the Court to carry out its essential functions.⁴⁰

Finally, Ratner attempted to reconcile his theory with the history of congressional limitations on Supreme Court jurisdiction since the initial Judiciary Act of 1789.⁴¹ Ratner admitted that Congress had not always provided for Supreme Court review of all cases involving all federal issues,⁴² but concluded that the Court could always perform its essential functions because some avenue for Supreme Court review was always available when lower courts rendered conflicting interpretations of federal law.⁴³

The language of the supremacy clause,⁴⁴ as well as the intent behind it, are critical to Ratner's theory. Indeed, the two essential functions that form the core of Ratner's theory both derive from the perceived need for some governmental entity to ensure that federal law remain supreme. Under Ratner's view, Congress cannot completely eliminate the Supreme Court's jurisdiction over article III matters because the Court's essential role is to enforce the supremacy clause.⁴⁵ Thus, the essential functions theory is not based solely on the language and intent of article III, but on the language and intent of article VI as well.⁴⁶

38. *Appellate Jurisdiction*, *supra* note 2, at 178-80.

39. The Court stated:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The [repealing act] of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

74 U.S. (7 Wall.) at 515.

40. *Appellate Jurisdiction*, *supra* note 2, at 178-80.

41. *Id.* at 183-201.

42. *See, e.g., id.* at 195 (discussing lack of Supreme Court jurisdiction over federal criminal cases in the 18th and 19th centuries).

43. *Id.* at 186-88, 192-93, 195-201.

44. U.S. CONST. art. VI (stating "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made under, the Authority of the United States, shall be the supreme Law of the Land").

45. *Appellate Jurisdiction*, *supra* note 2, at 160-61, 163-65.

46. Several of Ratner's critics have overlooked this important fact. They have criticized the essential functions theory because no language in article III

Some scholars have attacked almost every aspect of Ratner's analysis.⁴⁷ On the other hand, Ratner's reasoning has persuaded other scholars to varying degrees.⁴⁸ In any event, almost all academics who have addressed the subject since Ratner's article have used his theory as a starting point, either as a foil for reaching the opposite conclusion, or as a building block for composing a variation on the essential functions theme.

B. PLENARY CONGRESSIONAL POWER OVER SUPREME COURT JURISDICTION: A BROAD INTERPRETATION OF THE EXCEPTIONS CLAUSE

A number of scholars have emphatically rejected Ratner's essential functions theory.⁴⁹ They conclude that nothing in article III prevents Congress from restricting or even eliminating federal jurisdiction over article III cases.⁵⁰

These commentators' initial attack on Ratner's theory fo-

defines the Court's essential functions. See, e.g., *Congressional Power*, *supra* note 2, at 906-07. They have also attacked some of Ratner's historical evidence because it does not refer specifically to the exceptions clause. See, e.g., *id.* at 908-13. Such attacks overlook Ratner's reliance on "concurrent development of the supremacy clause" and article III. *Appellate Jurisdiction*, *supra* note 2, at 165. The scope of the Court's essential functions is found as much, if not more, in article VI as in article III. Ratner's main point is that *taken together* the two provisions evidence the framers' intent to make the Supreme Court "the principal instrumentality" for ensuring that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* (citing U.S. CONST. art. VI).

47. See *infra* Part I.B.

48. Auerbach, *The Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts*, 47 MO. L. REV. 47 (1982); Blackmar, *supra* note 2, at 25-26, 45-46; Brant, *supra* note 2, at 4-5, 27-28; Caron, *supra* note 23, at 673-78; Forkosch, *supra* note 2, at 245-57. See generally, *Majoritarian Constraints*, *supra* note 2, at 941 n.48 (listing commentators and their work supporting the "essential functions" theory).

49. See, e.g., *Congressional Power*, *supra* note 2, at 911 ("the 'essential functions' thesis is little more than constitutional wishful thinking"); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) ("I see no basis for this [Ratner's] view"); *Constitutional Restraints*, *supra* note 1, at 55 (statement of Paul Bator) ("[t]he arguments which would place serious limits on the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court are not . . . persuasive").

50. See, e.g., Bator, *supra* note 2, at 908-09; Gunther, *supra* note 2, at 908-09; *Congressional Power*, *supra* note 2, at 906-15; Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 975, 981 (1982); Van Alstyne, *supra* note 2, at 269. The "plenary power" theory is currently the most widely accepted theory. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 10g, at 35 (4th ed. 1983) (plenary power theory is "[t]he orthodox view").

cuses on the language of article III. They note that the language of the exceptions clause does not recognize any essential functions limitation.⁵¹ They also generally assert that the historical evidence cited by Ratner is at least problematic, if not worthless.⁵² Moreover, they emphasize that the essential role of the judiciary in the constitutional scheme would be preserved even if Congress eliminated all Supreme Court review because state courts, which are obligated to uphold the supremacy clause, would still be available to review article III cases.⁵³

51. See, e.g., Gunther, *supra* note 2, at 903 ("there is simply no 'essential functions' limit on the face of the exceptions clause"). Professor Van Alstyne asserted: "[t]he emphasis is appropriately on the adjective 'such.' That is to say, such exceptions as Congress shall make . . . Like the commerce power, [the 'exceptions' power] may be put to promiscuous and undesirable uses, but the power is there to make those damaging uses." *Constitutional Restraints*, *supra* note 1, at 99 (statement of William Van Alstyne).

52. *Congressional Power*, *supra* note 2, at 908. However, several more recent articles have added considerable support to some of Ratner's historical analysis; see Amar, *supra* note 2, at 248-50; *Original Understanding*, *supra* note 2, *passim*; Sager, *supra* note 2, at 45-51.

53. *Congressional Power*, *supra* note 2, at 912; see also Rice, *supra* note 50, at 982 (withdrawal of Supreme Court jurisdiction in abortion cases would leave state court remedies intact).

This assertion is not without its own problems. As Professor Sager has pointed out: "The state courts are bound by the supremacy clause to apply the Constitution to both state and federal conduct; there is, however, some question about what sources of constitutional law a state court should use to decide cases" when Congress has indicated its dissatisfaction with a particular Supreme Court ruling by stripping the Court of jurisdiction over that issue. Sager, *supra* note 2, at 40. Moreover,

various states have devised idiosyncratic mechanisms that inhibit the ability of their courts to declare state conduct unconstitutional [such as] supermajority requirements, see *Nebraska ex rel. Belker v. Board of Educ. Lands*, 185 Neb. 270, 283-85, 175 N.W.2d 63, 69-70 (1970) (Spencer, J., dissenting); *Board of Educ. v. Columbus*, 118 Ohio St. 295, 160 N.E. 902 (1928); and popular recall of judicial decisions, see *People v. Western Tel.*, 198 P. 146 (Colo. 1921).

Sager, *supra* note 2, at 56 n.112. The states' ability to adopt such innovative measures would itself be subject to constitutional attack if the state courts alone were empowered to enforce the supremacy clause. See Amar, *supra* note 2, at 255 n.165. Finally, political pressure on the state court judges would be extreme.

State judges, many of whom suffer insecure tenure, cannot be expected to enforce constitutional rights rigorously against their own state's conduct - in the face of popular hostility to the rights in question, an absence of support from the federal courts, and the obvious desire of Congress that the disfavored claims be repudiated. . . . In the face of intense political pressure, some state courts will resist, but some will reluctantly succumb, and some will welcome the opportunity to undo offending federal doctrine.

A few proponents of this position have even asserted that the issue is no longer open because the Supreme Court has expressly recognized that the exceptions clause grants broad authority to Congress to limit the Court's jurisdiction.⁵⁴ Others who have rejected Ratner's conclusion, however, have admitted that no case has directly addressed the exact issue of whether Congress may completely eliminate federal judicial review of cases arising under federal law.⁵⁵

Many scholars who have endorsed the "plenary power" theory consider it unwise for Congress to eliminate all federal court jurisdiction over article III cases.⁵⁶ They also note that such limitations might be unconstitutional for other reasons.⁵⁷ However, they all conclude that nothing in article III prohibits Congress from eliminating all federal jurisdiction over cases raising federal law issues.⁵⁸ Moreover, none of these scholars has asserted that the supremacy clause itself might serve as an external (non-article III) limit on Congress's authority to limit

Sager, *supra* note 2, at 68-69. The ICRA experience sheds considerable light on the validity of these arguments. See *infra* text accompanying notes 157-75.

54. Rice, *supra* note 50, at 975-76.

55. See, e.g., *Congressional Power*, *supra* note 2, at 905-06 ("precedent will prove to be of relatively limited value in deciphering the meaning of the exceptions clause"); *Constitutional Restraints*, *supra* note 1, at 51 (statement of Paul Bator) ("the answer is by no means clear"); *id.* at 122 (statement of William Van Alstyne).

56. See, e.g., Gunther, *supra* note 2, at 898; *Constitutional Restraints*, *supra* note 1, at 133-35 (statement of William Van Alstyne); *id.* at 55-56 (statement of Paul Bator).

57. For example, Professor Van Alstyne has asserted that legislation that prohibited litigants from bringing claims in federal court on the basis of their race would violate the equal protection component of the due process clause. Van Alstyne, *supra* note 2, at 263; *Constitutional Restraints*, *supra* note 1, at 132 (statement of William Van Alstyne). Van Alstyne also asserted that elimination of the claims of a readily identifiable group might be held to offend the ban on bills of attainder. Van Alstyne, *supra* note 2, at 263. Of most relevance to this Article is Professor Redish's suggestion that

[p]erhaps we should conclude that . . . judges who sit subject to significant control by the political branches of the state or local government - i.e., lack constitutional protection of their salary and tenure - should be deemed insufficiently independent, as a matter of due process, in cases involving the assertion of a constitutional violation by that government.

Congressional Limitations, *supra* note 2, at 161. See *infra* text accompanying notes 192-96.

58. See, e.g., Bator, *supra* note 2, at 1039; Gunther, *supra* note 2, at 908-09; *Congressional Power*, *supra* note 2, at 906-15; Rice, *supra* note 50, at 975, 981; Van Alstyne, *supra* note 2, at 269.

federal court jurisdiction.⁵⁹

C. MANDATORY JURISDICTION IN SOME FEDERAL COURT: THE EXCEPTIONS CLAUSE AS DISTRIBUTIVE AUTHORITY

Over the last decade, a few scholars have attempted to stake out a middle ground between the two extremes. These scholars assert that *some* federal court, either the Supreme Court or one of the inferior courts, is constitutionally required to have jurisdiction in some form, either original or appellate, over all cases or controversies arising under federal law.⁶⁰ The proponents of this position generally view the exceptions clause as congressional authority to distribute the constitutionally-mandated federal judicial power between the Supreme Court and the lower federal courts.⁶¹ Like Ratner, they emphasize the connection between article III and the supremacy clause.⁶² They depart from Ratner's viewpoint, however, by asserting that, although the constitutional framers were extremely concerned that federal law be supreme, uniformity in the interpretation of federal law was not one of their overriding concerns.⁶³ The framers' primary concern was that the final word concern-

59. See Gunther, *supra* note 2, at 900, 916-21 (discussing the various "external restraint" theories with no mention of the supremacy clause).

60. Amar, *supra* note 2, at 272 ("[a]ll cases arising under *federal* law . . . must be capable of final resolution by a *federal* judge") (emphasis in original); *Original Understanding*, *supra* note 2, at 749-50 ("The conclusion of this inquiry is that the framers . . . intended to mandate that Congress allocate to the federal judiciary as a *whole* each and every type of case or controversy defined as part of the judicial power of the United States by section 2, clause 1 of article III . . .") (emphasis added); Sager, *supra* note 2, at 66 ("Congress can relegate the adjudication of article III business to the state courts, but it must provide persons who advance claims of federal constitutional right an opportunity to secure review - in *some* article III court - of the state court's disposition.") (emphasis added).

As noted below, Professor Sager did not extend his theory to all cases arising under federal law. See *infra* text accompanying note 75. However, he did adopt a distributive authority view concerning constitutional claims.

61. See Amar, *supra* note 2, at 257 ("the 'exceptions' clause gives Congress the power to structure the internal hierarchy of the federal judiciary by shifting the final power to decide various mandatory cases from the Supreme Court to other *Article III* judges — not to state judges, as the Hart school would have it") (emphasis in original); *Original Understanding*, *supra* note 2, at 844 ("[a]t most, then, the reference to exceptions in the so-called exceptions and regulations clause was designed to facilitate implementation of the Madisonian compromise authorizing Congress to create inferior federal courts").

62. Amar, *supra* note 2, at 249; *Original Understanding*, *supra* note 2, at 844; Sager, *supra* note 2, at 48-49.

63. Amar, *supra* note 2, at 263; *Original Understanding*, *supra* note 2, at 844.

ing the interpretation of federal law be vested in federal judges possessing the independence guaranteed by the salary and tenure provisions of article III,⁶⁴ rather than in state court judges who might not have the same institutional protections.⁶⁵ Thus, these commentators expand the constitutional parameters of the debate to include not only the supremacy clause, but also the salary and tenure provisions of article III.⁶⁶

Proponents of the distributive authority theory have, to date, focused mainly on the legislative history of article III, rather than on contemporary problems.⁶⁷ They point out that those who participated in the constitutional convention and the subsequent ratification debates expressed great reluctance to rely on state courts as the ultimate enforcers of federal law, especially when federal law conflicted with law enacted by state legislatures, who controlled the state judiciaries.⁶⁸ They also

64. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

65. Amar, *supra* note 2, at 248-50; *Original Understanding*, *supra* note 2, at 844.

66. Amar, *supra* note 2, at 235-38; Sager, *supra* note 2, at 61-68.

67. Professor Clinton's article focused "exclusively on the original intention of the drafters and ratifiers of article III, eschewing for the present the modern doctrinal implications of that inquiry." *Original Understanding*, *supra* note 2, at 748. The ICRA experience demonstrates that the concerns expressed by the framers are still valid concerns today.

68. See, e.g., Amar, *supra* note 2, at 226-27, 235, 247-49; *Original Understanding*, *supra* note 2, at 768, 811-16.

The historical work of both Professors Clinton and Amar (particularly the former) is so exhaustive that it cannot, and need not, be summarized in this article. However, a few samples demonstrate the tenor of the framers' feelings with respect to allowing state courts to have the final say in cases involving conflicts between federal and state law. For example, when discussing the rejected proposal for congressional enforcement of the concept of federal law supremacy, James Madison made clear that state courts could not be relied upon to carry out this role. "Confidence can [not] be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 27-28 (M. Farrand ed. 1911). Edmund Randolph expressed similar views the next day when discussing the need for inferior federal courts. *Id.* at 46 ("the Courts of the States can not be trusted with the administration of the National laws"). The Federalist Papers are replete with similar observations. See, e.g., THE FEDERALIST NO. 81, at 547 (A. Hamilton) (J. Cooke ed. 1961) ("[s]tate judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws"); THE FEDERALIST NO. 39, at 256 (J. Madison) (J. Cooke ed. 1961) ("in controversies relating to the boundary between the [state and national power], the tribunal which is ultimately to decide, is to be established under the general Government"). Similar concerns

cite evidence linking the development of article III with the development of the supremacy clause, and demonstrating the framers' intent that the federal judiciary be the body charged with enforcing that clause.⁶⁹ Finally, they trace the history of the exceptions clause to prove that it was connected in the framers' mind to the existence and use of inferior federal courts.⁷⁰

Commentators adopting this general view have all stopped short of asserting that some article III federal judge must have jurisdiction over *every* case falling within the categories outlined in section two of article III. They disagree, however, about where the exact line should be drawn. For example, Professor Amar distinguishes between the first three categories of

were expressed during the ratification debates. See, e.g., 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 179-80 (J. Elliot 2d ed. 1836) ("[i]t is impossible for any judges, receiving pay from a single state, to be impartial in cases where the local laws or interests of that state clash with the laws of the Union, or the general interests of America").

69. See, e.g., Amar, *supra* note 2, at 248-50; *Original Understanding*, *supra* note 2, at 811-16. For example, those at the convention "specifically modified the 'arising under' language of [article] III to render it 'conformabl[e] to a preceding amendment' changing the language of the supremacy clause." Amar, *supra* note 2, at 249 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 431 (M. Farrand ed. 1911)). Furthermore, the rejection of the congressional negative of state laws indicated the framers' intent to have the judiciary enforce the supremacy clause. See, e.g., THE FEDERALIST NO. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961) ("[Federal] power must either be a direct negative on the state laws, or an authority in the federal courts to over-rule such as might be in manifest contravention of the articles of union. . . . The latter appears to have been thought by the convention preferable to the former.").

70. See, e.g., Amar, *supra* note 2, at 241 n.120; *Original Understanding*, *supra* note 2, at 776-82. As Professor Clinton observed, "It is especially important that the exceptions and regulations clause made its initial appearance in a section of a draft constitution dealing with the distribution of federal judicial power, rather than in a clause delineating the scope of jurisdiction that would be exercised by the federal courts." *Id.* at 776.

A connection between the jurisdiction of lower federal courts and the exceptions clause was made by several of those involved in the framing of the constitution. See, e.g., THE FEDERALIST NO. 82 (A. Hamilton) (J. Cooke ed. 1961). Hamilton states:

I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court.

Id. at 557; see also *id.* at 556-57 (the power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance).

cases in section two of article III⁷¹ and the last six,⁷² asserting that article III requires federal court review of only the former (which includes federal question cases), but not the latter.⁷³ Professor Clinton, on the other hand, concludes that the rule requiring that some federal court have the authority to review all the cases listed in article III does not apply to cases that Congress considers too trivial to be heard in federal court.⁷⁴ Professor Sager limits his rule to cases involving constitutional claims.⁷⁵ All of them agree, however, that Congress is authorized to distribute whatever constitutionally-mandated jurisdiction there is between the Supreme Court and the lower federal

71. The three categories are those 1) arising under federal law, 2) affecting ambassadors and other public ministers, and 3) involving admiralty and maritime jurisdiction. U.S. CONST. art. III, § 2.

72. The last six categories involve the various forms of diversity jurisdiction. *Id.*

73. Amar, *supra* note 2, at 229-30. Amar justifies this distinction by noting that (1) the framers used the word "all" when referring to the first three types of cases, but not the latter six, (2) the first major committee draft made this distinction even more clear, and (3) the first three grants of jurisdiction were of more concern to the framers than the last six, as evidenced by their comments at the time. Amar, *supra* note 2, at 240-54.

74. *Original Understanding*, *supra* note 2, at 750. Clinton postulated that some cases are "so trivial that they would pose an unnecessary burden on both the federal judiciary and on the parties forced to litigate in federal court." *Id.* Based on comments during the ratification debates and subsequent congressional legislation (especially that imposing jurisdictional amount in controversy requirements on some federal actions), Clinton concluded that, during the ratification process, those who supported a completely independent judiciary conceded:

the power to set jurisdictional amount limitations to avoid burdensome and vexatious cases or appeals involving small sums that would force litigants to distant federal courts, and the power to limit the Supreme Court's appellate powers to review facts in order to preserve the common law institution of the jury trial.

Id. at 845.

75. Sager, *supra* note 2, at 21. Sager provided little explanation for this distinction. Although there may be some policy reasons for making such a distinction, the historical and textual support for it appears limited. As Redish pointed out:

given the claims [Sager] makes for his historical evidence, there is no logical way to limit the need for an article III court to police the states to cases involving assertions of constitutional rights. . . . [T]he supremacy clause . . . is not limited in its dictate to matters of constitutional law, much less of constitutional right.

Constitutional Limitations, *supra* note 2, at 148.

Indeed, the first major committee draft of article III did not mention constitutional claims in the federal question grant of jurisdiction, providing that "[t]he jurisdiction of the supreme tribunal shall extend 1. to all cases, arising under laws passed by the general [Legislature]." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 68, at 146.

courts, as long as some article III judge has the ultimate power to decide cases covered by that jurisdiction.⁷⁶

Thus, great diversity of opinion remains concerning Congress's ability to prohibit federal courts from reviewing cases arising under federal law. The lack of consensus is in part the result of the abstract nature of the debate to this point. Congress has never passed the legislation that has been the focus of this debate. According to the *Santa Clara Pueblo* Court,⁷⁷ however, Congress has passed legislation prohibiting federal court review of a class of cases arising under federal law,⁷⁸ and for more than ten years, civil cases involving that federal law have been conclusively adjudicated in non-federal forums.⁷⁹ Thus, the preceding, largely abstract debate may now profitably be reexamined in a modern concrete setting.

II. FEDERAL JURISDICTION OVER CASES ARISING UNDER THE INDIAN CIVIL RIGHTS ACT: THE LEGACY OF *SANTA CLARA PUEBLO*

A. LAYING THE BACKDROP

In order to fully understand the relevance of the *Santa Clara Pueblo* ruling to the ongoing debate about congressional

76. See Amar, *supra* note 2, at 250-54; *Original Understanding*, *supra* note 2, at 749-54; *Constitutional Limitations*, *supra* note 2, at 163-65; Sager, *supra* note 2, at 30.

77. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978). The *Santa Clara* Court concluded that congressional silence relative to article III jurisdiction over civil Indian Civil Rights Act claims indicated that Congress did not intend to intrude on tribal sovereignty. *Id.* at 72.

78. The Court concluded that in enacting the ICRA Congress intended to protect tribal sovereignty by allowing tribal courts, and not article III courts, to adjudicate disputes among Indians. *Id.*

79. *Begay v. Navajo Nation*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6032 (Nav. Sup. Ct. 1988); *Kinslow v. Business Comm. of the Citizen Band Potawatomi Indian Tribe of Okla.*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6007 (C.B. Pot. Sup. Ct. 1988); *Johnson v. Navajo Nation*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6037 (Nav. Sup. Ct. 1987); *Chavez v. Tome*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6029 (Nav. Sup. Ct. 1987); *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6106 (Chy. R. Sx. Ct. App. 1988); *One Feather v. Oglala Sioux Tribal Public Safety Comm'n*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6042 (Oglala Tr. Ct. App. 1986); *Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation*, 13 Indian L. Rep. (Am. Indian Law. Training Program) 6023 (Ute T.C. 1986); *Holt v. Kallappa*, 14 Indian L. Rep. 6007 (Met. Tr. Ct. 1986); *Conroy v. Bear Runner*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6037 (Oglala Tr. Ct. App. 1984); *In re L.L.H.*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6043 (Inter. Ct. App. 1982).

authority over federal question jurisdiction, one must understand a few basic principles concerning the nature of the federal-tribal relationship and the nature of tribal courts.

1. The nature of the federal-tribal relationship

Unlike the federal-state relationship, the relationship between the federal and tribal governments is not detailed in the Constitution. Indeed, the term "Indian tribe" appears in the Constitution only once, in the provision authorizing Congress to "regulate Commerce . . . with the Indian Tribes."⁸⁰ This paucity of express constitutional guidance has had two effects. First, courts have historically not applied constitutional provisions limiting federal and state authority to tribes.⁸¹ Second, statutes, treaties, and federal common law, rather than the Constitution, provide the basic principles governing the federal-tribal relationship.⁸² Thus, even though the Constitution does not generally constrain tribal authority, that authority can be limited without tribal consent in two main ways:⁸³ 1) "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess,"⁸⁴ and 2) federal common law prohibits Indian tribes from

80. U.S. CONST. art. I, § 8, cl. 3. The term "Indian" appears in two other places. In article I, section 2, the Constitution specifies that representatives will be apportioned among the several states by adding the number of free persons "excluding Indians not taxed" and three-fifths of all other persons. Although the fourteenth amendment eliminated the 60% valuation for "other Persons," it retained the exclusion for "Indians, not taxed." U.S. CONST. amend. XIV, § 1.

81. *Santa Clara Pueblo*, 435 U.S. at 56. For example, courts have held that neither the fifth, fourteenth nor first amendments apply to Indian tribes. *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (fifth amendment provision requiring indictment by grand jury); *Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1405 (9th Cir. 1987) (takings clause); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (freedom of religion under the first and fourteenth amendments); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 557 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959) (fourteenth amendment).

82. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (federal common-law prohibits Indian tribes from exercising criminal jurisdiction over non-Indians); *United States v. Mazurie*, 419 U.S. 544 (1975) (upholding federal statutory delegation to Indian tribes of authority to prohibit introduction of liquor into Indian country); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (tribal hunting and fishing rights granted by treaty not abrogated by federal statute).

83. Limitations imposed by treaty are, at least in theory, imposed with the consent of the tribe. The extent to which that consent is voluntary is questionable in many instances.

84. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). *See also* *Escon-*

exercising governmental authority which is "inconsistent with the dependent status of the tribes."⁸⁵

In short, unrestrained by constitutional limitations, Indian tribes possess all aspects of sovereignty not otherwise withdrawn by treaty, statute, or federal common law.⁸⁶ Whether tribal action exceeds either statutory or common law limits is a question arising under the laws of the United States, at least in the broad constitutional sense, the former involving the interpretation of a federal statute; the latter interpretation of federal common law.⁸⁷ Civil ICRA claims — the focus of the federal Indian law aspect of this article—fall into the first category, cases involving the interpretation of a federal statute. As noted below, exclusive jurisdiction over these claims has been vested in tribal courts.

2. The nature of tribal courts

Tribal courts currently function on over one hundred reservations in the United States.⁸⁸ The exact nature of these courts varies from tribe to tribe.⁸⁹ However, all tribal courts share two key features central to the focus of this article. First, although some tribal courts derive their structure and proce-

dido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 787 n.30 (1984) ("all aspects of Indian sovereignty are subject to defeasance by Congress").

85. *Montana v. United States*, 450 U.S. 544, 564 (1981); *see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978) (Indian tribes have no criminal jurisdiction over non-Indians because exercise of such authority is inconsistent with their status as domestic dependent nations). The Supreme Court has explained the basis of this limitation: "[The tribes] incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised . . ." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

86. *Wheeler*, 435 U.S. at 323.

87. *See, e.g., National Farmers' Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853 (1985) (federal common-law limitation on tribal authority presents question arising under federal law within the meaning of 28 U.S.C. § 1331); *Tennaco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 575-76 (10th Cir. 1984) (*per curiam*) (interpretation of federal statute governing tribal authority over oil leases is federal question within the meaning of 28 U.S.C. § 1331).

88. AMERICAN INDIAN LAWYER TRAINING PROGRAM INC., INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS 1 (1982) [hereinafter INDIAN SELF-DETERMINATION].

89. Others have described these courts in detail which need not be repeated here. *See, e.g., id.* at 36-42; Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 553-63 (1976) [hereinafter *Jurisdictional Maze*]; Pommersheim, *The Contextual Legit-*

ture from federal law, no tribal court is truly a federal court.⁹⁰ Tribal courts are courts of a sovereign other than the federal government.⁹¹ The Supreme Court made this clear when it

imacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay, 18 N.M. L. REV. 49, 50-56 (1988).

In general, tribal courts can be grouped into three categories: 1) traditional tribal (or custom) courts — which developed independent of any federal intervention, 2) tribal courts — often organized pursuant to tribal constitutions, and 3) C.F.R. courts — which have adopted structural and procedural rules promulgated by the Bureau of Indian Affairs. INDIAN SELF-DETERMINATION, *supra* note 88, at 36-42. The first two kinds of courts are clearly established pursuant to the tribes' inherent sovereign authority. *Id.* at 36, 38. C.F.R. courts are established pursuant to federal regulations codified in the Code of Federal Regulations and are often funded by federal financing. *Id.* at 39. See 25 C.F.R. § 11.3-11.21 (1967). C.F.R. courts originated when the Secretary of the Interior, acting without express statutory authority, established Courts of Indian Offenses, staffed by Indian judges. *Jurisdictional Maze*, *supra*, at 553.

90. Even the C.F.R. courts do not appear to be "federal courts" because they are not authorized by federal statute, a requirement for both article I and article III courts. See *Jurisdictional Maze*, *supra* note 89, at 556 n.275. As Professor Resnik observed, "tribal courts are not simply federal products." Resnik, *supra* note 5, at 737. One C.F.R. court explained:

The Courts of Indian Offenses, although established pursuant to regulations in 25 C.F.R. partially administered by the Bureau of Indian Affairs, and funded from federal sources, are essentially tribal entities. The court is not a federal court established pursuant to either article I or article III of the U.S. Constitution The Courts of Indian Offenses act as tribal courts since they are exercising the sovereign authority of the tribe for which the court sits. . . . It is from the inherent power of the Indian nations to make laws, and be ruled by them that is the source of the court's power. The Code of Federal Regulations simply provides the procedure for the day-to-day function of the court

Ponca Tribal Election Bd. v. Snake, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6085, 6087-88 (Ct. Ind. App. 1988).

91. *Wheeler v. United States*, 435 U.S. 313, 326-28 (1978). Because they are not created by any congressional legislation, tribal courts are not article I legislative courts. Congress did not create these tribunals to help implement federal legislative statutes or policy. Therefore, cases involving the extent of congressional authority to vest legislative courts with authority to resolve cases covered by the terms of article III are not directly applicable to the issues raised in this article. See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). Those cases are further inapplicable to the current debate because they do not address the extent to which review by an article III court is necessary. See *Northern Pipe Line*, 458 U.S. at 70 n.23 ("when Congress assigns these matters to . . . legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review"). Moreover, disputes in article I courts do not normally involve conflicts between federal and non-federal law. Therefore, enforcement of the supremacy clause — a critical focus of this article — is not implicated by the use of article I tribunals.

ruled that the double jeopardy clause does not prevent the federal government from bringing criminal charges in federal court against a defendant who has already been subjected to criminal proceedings in tribal court.⁹² Second, there is no general statutory authority for federal court review of tribal court decisions, not even by the Supreme Court.⁹³ Thus, when Congress vests exclusive jurisdiction over claims arising under federal law in tribal courts, it implicitly precludes article III federal court judicial review of such claims — the very act around which the abstract debate has thus far revolved. According to the Supreme Court's ruling in *Santa Clara Pueblo*, Congress took that unprecedented step when it enacted the Indian Civil Rights Act.⁹⁴

B. THE SANTA CLARA PUEBLO RULING

In 1968, Congress passed the Indian Civil Rights Act,⁹⁵ which statutorily imposes on Indian tribes many of the limitations that the Bill of Rights and fourteenth amendment impose on the federal and state governments.⁹⁶ The express purpose of

92. *Wheeler v. United States*, 435 U.S. 313, 326-28 (1978). The *Wheeler* Court expressly stated that the Navajo tribal court "derives its powers from the inherent sovereignty of the tribe." *Id.* at 327 n.26. The Court did leave open the question whether a C.F.R. court was merely "an arm of the Federal government." *Id.* However, there are persuasive reasons for concluding that they are not. See *supra* note 90; *Jurisdictional Maze*, *supra* note 89, at 555-56.

93. Resnik, *supra* note 5, at 733.

Following *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 851 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), there may be some "review" of a tribal court's determination of whether its exercise of jurisdiction violates federal common law. However, it is unclear what role the district court is playing in such cases. It is apparently not to act as a typical appellate court because jurisdiction is based on 28 U.S.C. § 1331, which grants original jurisdiction over cases arising under federal law. See *National Farmers Union*, 471 U.S. at 853. Moreover, the "review" is apparently limited to the jurisdictional issue. *Iowa Mutual*, 480 U.S. at 19. The exact scope of such "review" is irrelevant for purposes of this article because the *Santa Clara Pueblo* Court rejected the argument that such "review" is available in civil ICRA cases. *Santa Clara Pueblo*, 436 U.S. at 69-70.

94. In *Talton v. Mayes*, 163 U.S. 376 (1896), the Court recognized Congress' plenary authority to regulate Indian matters. *Santa Clara Pueblo*, 436 U.S. at 56. Congress utilized this recognized authority enacting the ICRA. *Id.* at 57.

95. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1303 (1988)).

96. The key provision of the ICRA, 25 U.S.C. § 1302 (1988), provides:
No Indian tribe in exercising powers of self-government shall -

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right

this legislation is to "protect individual Indians from arbitrary and unjust actions of tribal governments" by placing "limitations on an Indian tribe in the exercise of its powers of self-government."⁹⁷ The sole statutory federal judicial remedy is habeas corpus,⁹⁸ a remedy that cannot be invoked in many situations in which a tribe might violate the ICRA.⁹⁹

of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Id.

Although many of these provisions mirror their constitutional counterparts, there are some exceptions. For example, there is no prohibition against the establishment of a religion, nor any right to vote in tribal elections, and the right to counsel in a criminal trial is limited by the defendant's ability to pay for the assistance himself. Moreover, "[t]he provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely." *Santa Clara Pueblo*, 436 U.S. at 63 n.14.

97. S. REP. NO. 841, 90th Cong., 1st Sess. 6 (1967).

98. 25 U.S.C. § 1303 (1988) ("the privilege of the writ of habeas corpus [is] available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe").

99. As Justice White pointed out in his dissent in *Santa Clara Pueblo*, "several of the specified rights are most frequently invoked in non-custodial situations." *Santa Clara Pueblo*, 436 U.S. at 74 (White, J., dissenting). "For example, habeas corpus relief is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property." *Id.* at 74 n.3. Moreover, because Indian tribes have no criminal jurisdiction over non-Indians, habeas corpus will

For ten years, federal courts assumed jurisdiction over civil actions alleging violations of the ICRA.¹⁰⁰ In 1978, however, the Supreme Court decided *Santa Clara Pueblo v. Martinez*,¹⁰¹ a case that altered the jurisdictional course of all subsequent civil ICRA claims.

Julia Martinez was a member of the Santa Clara Pueblo, a federally recognized Indian tribe. Her husband was a member of the Navajo tribe. The ten Martinez children were not eligible for tribal membership because a tribal ordinance denied membership to the offspring of tribal women whose husbands were not members of the tribe, even though children of male members who married nonmembers were eligible for membership.¹⁰² Thus, even though the Martinez children were reared on the reservation, spoke the Tewa language of the Pueblo, and were accepted into the Pueblo's ancient religion,¹⁰³ their mother's repeated efforts to enroll them in the tribe were unsuccessful, and they were denied the right to vote in tribal elections, hold secular office in the tribe, or inherit their mother's possessory interest in tribal lands.¹⁰⁴

almost never be available to non-Indians who are victims of ICRA violations. See *Oliphant v. Suquamish Tribe of Indians*, 435 U.S. 191, 195, 211-12 (1978).

100. See, e.g., *Wounded Head v. Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir. 1975) (equal protection challenge to age limitation in tribal voting laws); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933 (10th Cir. 1975) (equal protection and due process challenge to tribal interference with use of private land); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1234 (4th Cir. 1974) (due process challenge to manner to resolving property dispute); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (9th Cir. 1973) (due process and equal protection challenge); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (8th Cir. 1972) (equal protection and due process challenge to tribal election law).

101. 436 U.S. 49 (1978).

102. The ordinance provided:

1. All children born of marriage between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriage between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Santa Clara Pueblo, 436 U.S. at 52 n.2.

103. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1041 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

104. The Pueblo held all the land within its boundary in fee simple title in common pursuant to an 1858 Act of Congress. *Id.* at 1041 n.3. Tribal law granted possessory interests in the land to tribal members. *Id.* Tribal mem-

After exhausting available tribal remedies,¹⁰⁵ Julia Martinez and one of her daughters filed a class action suit, alleging that the tribal ordinance violated the equal protection provision of the ICRA because it discriminated on the basis of gender and ancestry.¹⁰⁶ The district court denied the tribe's motion to dismiss for lack of jurisdiction, concluding that the action fell within the confines of 28 U.S.C. § 1343(a)(4),¹⁰⁷ but ruled in the tribe's favor on the merits.¹⁰⁸ The Tenth Circuit affirmed the jurisdictional ruling, but reversed the district court's ruling on the merits.¹⁰⁹

The Supreme Court addressed only the jurisdictional issue,¹¹⁰ concluding that federal courts have no jurisdiction over civil ICRA claims.¹¹¹ The Court ruled that Congress intended to limit federal judicial review to habeas corpus actions because other actions would unduly interfere with tribal sovereignty.¹¹²

The exact nature of the *Santa Clara Pueblo* Court's ruling is somewhat obscured because the Court relied heavily on principles used to determine whether an implied private cause of action exists under the ICRA.¹¹³ Indeed, some may contend

bers could pass this possessory interest on to their descendants who were tribal members but not to descendants who were non-members. *Id.*

105. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 11 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

106. *Id.* at 6.

107. *Id.* at 9. Section 1343(a)(4) authorizes federal district courts to resolve "any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343(a)(4) (1988).

108. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18-19 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

109. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042, 1048 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

110. The Court first concluded that although the tribe enjoyed sovereign immunity from ICRA actions, individual tribal officers did not, relying on the rule set forth in *Ex parte Young*, 209 U.S. 123 (1908). *Santa Clara Pueblo*, 436 U.S. at 58-59.

111. *Santa Clara Pueblo*, 436 U.S. at 72.

112. "Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303 [habeas corpus relief]." *Id.* at 70.

113. *See, e.g., id.* at 60 ("we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one").

Professor Resnik's description of the case reflects the somewhat ambiguous nature of the Court's holding. She indicated that the issue in *Santa Clara Pueblo* was "whether the federal court should imply a right of action *and federal court jurisdiction*" and that the Court's response was that "no implied

that *Santa Clara Pueblo* is no different from numerous other Supreme Court cases in which the Court ruled that Congress had not impliedly created a private right of action to enforce a federal statute.¹¹⁴ However, a close examination of the entire decision, the ensuing results, and subsequent lower federal court and tribal court decisions reveals that the Court's ruling was essentially a jurisdictional one that focused on the forum in which the claim may be brought rather than on the type of litigant bringing the action.

The *Santa Clara Pueblo* decision itself indicates that, unlike the typical implied cause of action ruling that precludes a private plaintiff from bringing an action enforcing the federal statute in any forum,¹¹⁵ the *Santa Clara Pueblo* decision precludes relief only in a federal forum.¹¹⁶ At the outset, the Court framed the issue as "whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members."¹¹⁷ Thus, the issue was not whether a private citizen could bring an action asserting that such an ordinance violated the federal statute. Instead, the issue was whether a federal court was empowered to entertain such an action.

In response to the argument that the absence of a federal civil remedy would render the ICRA meaningless, the Court emphasized that private citizens could assert civil ICRA claims in tribal courts.¹¹⁸ Furthermore, the Court concluded that the committee report on the final version of the bill indicated that the ICRA was to be enforceable both "on habeas corpus *and in*

cause of action existed, *and the federal courts could not hear the discrimination charge*" because the Court concluded that "implication of a right of action *and federal court review* for [such] claims" would undermine congressional intent to preserve tribal sovereignty. Resnik, *supra* note 5, at 672-73 (emphasis added).

114. See, e.g., *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (no private cause of action to enforce section 409(a) of ERISA); *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 148-50 (1980) (no private cause of action to enforce the Federal Records Act); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-79 (1979) (no private cause of action to enforce section 17(a) of the Securities and Exchange Act).

115. See, e.g., *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1063-66 (Del. 1986) (summary judgment granted in state court because no implied private right of action to enforce section 17(a) of the Federal Securities Act).

116. *Martinez v. Santa Clara Pueblo*, 436 U.S. 49, 65 (1978).

117. *Id.* at 51.

118. The Court observed: "Tribal forums are available to vindicate rights created by the ICRA. . . . Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* at 65.

tribal forums."¹¹⁹ These statements indicate that the Court held only that such claims could not be brought in federal court, not that they could not be brought at all.

The ensuing result of the *Santa Clara Pueblo* ruling also demonstrates that it involved something more than the simple holding that private citizens were not authorized to bring suit to enforce the ICRA. In the typical situation in which no private cause of action is recognized, the result is that a federal agency or officer is the only one authorized to judicially enforce the statute.¹²⁰ In such situations, federal court review of the statute is still available if any judicial action is taken, and the exercise of the standard modes of federal judicial power assures the supremacy of federal law. In the ICRA context, however, no such review is available. Although some tribes have tribal constitutions that require federal approval of all tribal laws, many tribes, including the most populous tribe, do not.¹²¹ In the latter situation, there is no federal review of the tribal action, and thus no federal authority to bring an action to enforce the provisions of the federal statute. Indeed, the *Santa Clara Pueblo* Court emphasized that Congress rejected proposals authorizing the Justice Department to bring ICRA enforcement actions.¹²² The Court was fully aware, therefore, that no federal agency would have the authority to enforce the ICRA and that enforcement was dependent on private civil actions in tribal court.¹²³

Subsequent federal and tribal court decisions have confirmed that the *Santa Clara Pueblo* Court ruled that tribal courts, not federal courts, have exclusive authority to adjudicate civil ICRA claims. Numerous federal courts have refused to adjudicate civil ICRA claims on jurisdictional grounds, while acknowledging the authority of tribal courts to resolve such claims.¹²⁴ More importantly, numerous tribal courts have adju-

119. *Id.* at 70 n.28 (emphasis added).

120. See, e.g., *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 148 (1980) (Attorney General only person authorized to enforce the Federal Records Act).

121. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 18 (1979) ("[t]he Navajo Tribe operates without a tribal constitution").

122. *Santa Clara Pueblo*, 436 U.S. at 67-68.

123. *Id.*

124. See, e.g., *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10th Cir. 1987) ("Actions for any other [non-habeas corpus] relief must be brought through tribal forums. The federal courts *must decline jurisdiction* where such forums are available.") (emphasis added); *United States ex rel. Kishell v. Turtle Mountain*

icated civil ICRA claims since *Santa Clara Pueblo*.¹²⁵ These cases highlight the difference between the *Santa Clara Pueblo* case and cases involving an implied private cause of action — in other contexts in which the Supreme Court has refused to find an implied private cause of action, litigants could not afterwards assert the identical claim in a different forum.¹²⁶

Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (“a federal court has *no jurisdiction* to enjoin violations of the Act or to award damages”) (emphasis added); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457, 1458 (D. Nev. 1986) (“although a Tribe is bound by the ICRA, a federal court has *no jurisdiction* to enjoin violations or to award damages for violations of that Act”) (emphasis added); *Learned v. Cheyenne-Arapaho Tribe*, 596 F. Supp. 537, 540 (W.D. Okla. 1984) (“this Court concludes, as did the *Martinez* Court, that federal *jurisdiction is lacking* over the § 1302 claims”) (emphasis added); *Sahmaunt v. Horse*, 593 F. Supp. 162, 164 (W.D. Okla. 1984) (“the [*Santa Clara Pueblo*] Court held that federal courts *had no jurisdiction* to entertain actions to redress violations of the ICRA other than by habeas corpus petition”) (emphasis added).

In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), the Tenth Circuit held that a federal court *could* exercise jurisdiction over a civil ICRA action if it was brought by a non-Indian, did not involve an intra-tribal dispute, and no tribal forum was available. *Id.* at 685. However, the decision has been subject to scholarly criticism, *see, e.g.*, Gover & Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 *HAMLIN L. REV.* 497, 499-515 (1985), and has been narrowly construed by the Tenth Circuit; *see White v. Pueblo of San Juan*, 728 F.2d 1307, 1312-13 (10th Cir. 1984); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982). The lower courts in the Ninth Circuit have rejected *Dry Creek*. *See R. J. Williams Co. v. Fort Belknap Hous. Auth.*, 509 F. Supp. 933, 941 (D. Mont. 1981).

125. *See, e.g.*, *Begay v. Navajo Nation*, 15 *Indian L. Rep. (Am. Indian Law. Training Program)* 6032, 6034 (Nav. Sup. Ct. 1988); *Kinslow v. Business Comm. of Citizen Band Potawatomi Indian Tribe of Okla.*, 15 *Indian L. Rep. (Am. Indian Law. Training Program)* 6007, 6007 (C.B. Pot. Sup. Ct. 1988); *Chavez v. Tome*, 14 *Indian L. Rep. (Am. Indian Law. Training Program)* 6029, 6029 (Nav. Sup. Ct. 1987); *One Feather v. Oglala Sioux Tribal Pub. Safety Comm'n*, 16 *Indian L. Rep. (Am. Indian Law. Training Program)* 6042, 6043 (Oglala Tr. Ct. App. 1986); *Chapoose v. Ute Indian Tribe of Uintah-Ouray Reservation*, 13 *Indian L. Rep. (Am. Indian Law. Training Program)* 6023, 6023 (Ute Tr. Ct. 1986); *Conroy v. Bear Runner*, 16 *Indian L. Rep. (Am. Indian Law. Training Program)* 6037, 6038 (Oglala Tr. Ct. App. 1984); *In re L.L.H.*, 10 *Indian L. Rep. (Am. Indian Law. Training Program)* 6043, 6043 (Inter. Tr. Ct. App. 1982).

Referring to language from *Santa Clara Pueblo*, one tribal court observed: “It is hard to conceive that this language means anything else but that tribal courts must entertain causes of action based on the ICRA of 1968.” *Dupree v. Cheyenne River Hous. Auth.*, 16 *Indian L. Rep. (Am. Indian Law. Training Program)* 6106, 6108 (Chy. R. Sx. Ct. App. 1988).

126. *See, e.g.*, *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1063-66 (Del. 1986) (state court grants summary judgment because no implied private right of action to enforce section 17(a) of Federal Securities Act).

Scholars have also concluded that *Santa Clara Pueblo* does not eliminate

Santa Clara Pueblo thus holds that although Congress created a federal right for tribal members to be free of certain types of tribal government activity, it decided to prohibit federal courts from exercising jurisdiction over civil cases alleging violations of that right, choosing instead to rely exclusively on tribal courts for enforcement. Although Justice White vigorously challenged the Court's reading of congressional intent,¹²⁷ neither he nor the seven justice majority¹²⁸ even considered the larger question whether Congress could, without violating article III, prohibit federal courts from exercising jurisdiction in such cases.¹²⁹

civil ICRA claims, but rather directs that they be brought in tribal court. See, e.g., *Gover & Laurence*, *supra* note 124, at 498 ("[c]ivil actions under the ICRA would henceforth be brought in tribal court to be finally determined as there could be no appeal to the federal system"); *Ziontz*, *supra* note 121, at 20-21.

127. *Santa Clara Pueblo*, 436 U.S. at 73-83 (White, J., dissenting).

128. Justice Blackmun did not participate in the case.

129. Some may contend that civil ICRA claims asserted in tribal courts arise under tribal law rather than federal law, relying on *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). In *Merrell Dow*, the Court held that when there is no implied private right of action to enforce a federal statute, a state-created negligence action incorporating one component of that statute as an element of the negligence claim does not "arise under" federal law within the meaning of 28 U.S.C. § 1331 (1988). 436 U.S. at 817. Arguably, civil ICRA claims are merely tribally-created claims incorporating the provisions of the ICRA as an element of the cause of action. If so, they may not arise under federal law within the meaning of section 1331. However, unlike the claim asserted in *Merrell Dow*, which sought to enforce a state-created right of freedom from negligently inflicted personal injuries, a civil ICRA claim seeks to enforce *federally*-created rights. See *Santa Clara Pueblo*, 436 U.S. at 65 (ICRA claims in tribal forums "vindicate rights created by the ICRA") (emphasis added).

More importantly, even if civil ICRA claims do not arise under federal law within the meaning of section 1331, there can be no doubt that they arise under federal law within the meaning of article III, § 2, which is the critical definition for purposes of the issues raised by this Article. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) (article III extends to cases in which the interpretation of federal law "forms an ingredient of the original cause"). Even the cause of action in *Merrell Dow* fell within the *constitutional* grant of authority, as recognized by the Supreme Court when it acknowledged its authority to review the state-law claim asserted in that case.

The most critical difference between the *Merrell Dow* ruling and the *Santa Clara Pueblo* ruling for purposes of this Article is that Congress authorized the Supreme Court (an article III court) to review the claim asserted in *Merrell Dow* under 28 U.S.C. § 1257, see *Merrell Dow*, 478 U.S. at 816, whereas neither that statute nor any other authorizes Supreme Court review of tribal court decisions. Thus, the *Merrell Dow* ruling does not raise the issue addressed by this Article — whether Congress can eliminate *all* federal court review of cases arising under federal law within the meaning of article III, § 2.

Another less critical difference between the *Merrell Dow* situation and the ICRA is that the *state* decided to adopt the federal standard utilized in *Merrell*

Accordingly, it would appear that the debate over Congress's authority to eliminate federal court jurisdiction over federal claims, which has for so long raged in an abstract setting, may now be examined in a concrete context. Such an examination reveals serious practical problems with both the essential functions theory and the more widely accepted plenary power theory. The inquiry provides support for the distributive authority theory by demonstrating that the concerns expressed by the framers two hundred years ago with respect to eliminating federal court jurisdiction over federal law claims are still valid today.¹³⁰ It further illuminates the sometimes overlooked fact that the main dispute among the scholars really reflects as much their disparate views of the meaning of the supremacy clause as their contrasting opinions of the meaning of article III. Finally, the examination raises serious doubts about the constitutionality of the current enforcement scheme for civil ICRA claims.

III. NEW LIGHT ON CONGRESSIONAL AUTHORITY TO LIMIT FEDERAL QUESTION JURISDICTION: LESSONS FROM THE ICRA EXPERIENCE

Each of the three major theories — essential functions, plenary power, and distributive authority — sheds a slightly different light on the correctness of the *Santa Clara Pueblo* ruling. More importantly, however, examining each of those theories in light of the ICRA experience sheds new light on the validity of the theories themselves.

A. ESSENTIAL FUNCTIONS AND THE ICRA: HOW MUCH REVIEW IS ESSENTIAL?

At first glance, the *Santa Clara Pueblo* ruling would appear

Dow, 478 U.S. at 824, while Congress decided to impose the federal standards in the ICRA on the tribes. *Santa Clara Pueblo*, 402 F. Supp. 5, 16-17 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978). The concern for federal supremacy is clearly greater in the latter situation.

130. As noted above, this Article will not attempt to restate or reevaluate the historical research done by proponents of the distributive authority theory. See *supra* note 68. The main conclusion of this Article is that the reasons which the framers thought necessitated limitations on congressional authority over federal court jurisdiction in 1791 are still relevant today. In short, this Article provides concrete examples of the policy arguments that support the historical arguments made by the proponents of the distributive authority theory.

to violate the essential functions theory because the end result is that tribal courts, rather than the Supreme Court, are the final expositors of the federal statute. By substituting "tribe" for "state" in the historical materials that Ratner uses to support the essential functions theory, it seems at least superficially apparent that the *Santa Clara Pueblo* ruling is incorrect. Justice Taney's statement in *Ableman v. Booth*¹³¹ sets forth the objections that could be raised to the *Santa Clara Pueblo* ruling under the essential functions theory:

[T]he supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several [tribes], conflicting decisions would unavoidably take place . . . and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different [tribes], and the Government of the United States would soon become one thing in one [reservation] and another thing in another. It was essential, therefore, to its very existence as a Government, that . . . a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a [tribal] court or a court of the United States, should be finally and conclusively decided And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every [location].¹³²

Applying the essential functions argument to the ICRA is not that simple, however. Although it seems clear that the United States Supreme Court will not have jurisdiction to review any *civil* ICRA claims,¹³³ the availability of federal habeas relief may provide the Supreme Court with sufficient opportunities to carry out its essential functions. As noted above, the essential functions theory does not require a Supreme Court decision in every case that involves a federal law.¹³⁴ According to Professor Ratner, as long as there is "a significant avenue" of Supreme Court review available to resolve conflicts between

131. 62 U.S. (21 How.) 506 (1858).

132. *Id.* at 517-18.

133. There is no original federal court jurisdiction over such claims and no jurisdictional statute authorizing federal court review of tribal court decisions. See Gover & Laurence, *supra* note 124, at 498 ("[c]ivil actions under the ICRA will henceforth be brought in tribal court to be finally determined as there can be no appeal to the federal system").

134. *Constitutional Restraints*, *supra* note 1, at 15 (statement of Leonard Ratner); accord *Majoritarian Constraints*, *supra* note 2, at 936.

the Constitution and state law or in the interpretation of federal law, the Court can perform its essential functions.¹³⁵ Just how significant the avenue of review must be to prevent a restriction from exceeding that limit is unclear.

In an effort to define the parameters of the "significant avenue of review" aspect of the essential functions theory, Professor Ratner has asserted that although the Court's essential functions would not be disrupted by "a *procedural* limitation" restricting Court review in "*some but not all cases*" involving a particular subject, legislation that denied the Court jurisdiction to review *all* cases involving that subject would obstruct the Court's functions.¹³⁶ Application of that statement to the ICRA context demonstrates that it merely particularizes the question, rather than resolves it. If habeas corpus review is available, is elimination of federal court jurisdiction over civil ICRA actions merely a procedural limitation restricting the availability of Supreme Court review in some but not all ICRA cases? The answer to this question is not readily apparent on the surface of the ICRA. In theory, habeas review might be sufficient to satisfy the essential functions theory. In practice, however, the theoretical availability of Supreme Court review of ICRA habeas cases ensures neither a uniform application of that Act, nor supremacy of federal law.

Practical experience over the past ten years indicates that particular provisions of the ICRA can rarely, if ever, be raised in a habeas proceeding. During that time, federal courts have declined jurisdiction over civil cases involving the meaning of the just compensation,¹³⁷ free speech, and freedom of assembly provisions of the ICRA.¹³⁸ They have also refused to hear cases involving the kind of notice and opportunity for hearing the ICRA requires before a person's property can be attached,¹³⁹ the kind of access to tribal court required to satisfy the ICRA's due process clause,¹⁴⁰ and the limits the ICRA's equal protec-

135. *Constitutional Restraints*, *supra* note 1, at 10 (statement of Leonard Ratner); accord *Majoritarian Constraints*, *supra* note 2, at 936.

136. *Constitutional Restraints*, *supra* note 1, at 16 (statement of Leonard Ratner); accord *Majoritarian Constraints*, *supra* note 2, at 936.

137. *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275-76 (8th Cir. 1987); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1309 (10th Cir. 1984).

138. *Barnes v. White*, 494 F. Supp. 194, 196-97 (N.D.N.Y. 1980).

139. *R. J. Williams Co. v. Fort Belknap Hous. Auth.*, 509 F. Supp. 933, 939 (D. Mont. 1981).

140. *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318-19 (10th Cir. 1982).

tion clause imposes on tribal taxation of employers of non-Indians.¹⁴¹

At the same time, tribal courts have adjudicated cases involving issues such as the due process protections afforded tribal employees or officials who are removed from office,¹⁴² the equal protection limitations on discriminatory tribal taxes,¹⁴³ and the due process requirements for civil forfeiture proceedings.¹⁴⁴ None of these issues has been raised in a federal habeas proceeding during the past twelve years.¹⁴⁵ Moreover, it seems highly unlikely that such issues would ever be raised in a habeas context.¹⁴⁶ Thus, although federal courts now occasion-

141. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984).

142. *Kinslow v. Business Comm. of the Citizen Band Potawatomi Indian Tribe of Okla.*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6007, 6009-10 (C.B. Pot. Sup. Ct. 1988); *One Feather v. Oglala Sioux Tribal Pub. Safety Comm'n*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6042, 6043 (Oglala Tr. Ct. App. 1986).

143. *Conroy v. Bear Runner*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6037, 6039 (Oglala Tr. Ct. App. 1984).

144. *Begay v. Navajo Nation*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6032, 6034 (Nav. Sup. Ct. 1988).

145. There have been only five reported decisions in which federal courts have exercised jurisdiction over ICRA habeas corpus claims since *Santa Clara Pueblo*. *Duro v. Reina*, 851 F.2d 1136, 1146 (9th Cir. 1988), *rev'd*, 110 S. Ct. 2053 (1990); *Greywater v. Joshua*, 846 F.2d 486, 488 (8th Cir. 1988); *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988); *Smith v. Confederated Tribes of Warm Springs Reservation of Or.*, 783 F.2d 1409, 1412 (9th Cir.), *cert. denied*, 479 U.S. 964 (1986); *Ramos v. Pyramid Tribal Court*, 621 F. Supp. 967, 969 (D. Nev. 1985). There have been a few unsuccessful efforts to invoke federal habeas jurisdiction. *See, e.g.*, *Navajo Nation v. Confederated Tribes of Warm Springs Reservation of Or.*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 3058 (D. Or. 1988) (holding that principles of sovereign immunity made defendant immune to suit); *Weatherwax ex rel. Carlson v. Fairbanks*, 619 F. Supp. 294, 297 (D. Mont. 1985) (holding that child custody issues were within the province of tribal courts).

One of the five cases, *Ramos*, involved alleged violations of the double jeopardy, due process, and cruel and unusual punishment clauses of the ICRA because the defendant was convicted in tribal court after conviction in state court for similar violations arising out of the same incident. 621 F. Supp. at 969. The defendant also challenged the legal authority of the tribal judge who presided at the trial. *Id.* at 970. Two of the others, *Duro* and *Greywater*, challenged the authority of a tribal court to assert criminal jurisdiction over an Indian who was not a member of the tribe. *Duro*, 851 F.2d at 1139; *Greywater*, 846 F.2d at 488. The fourth case, *Randall*, considered whether dismissal of an appeal because of the tribal court judge's failure to timely rule on an *in forma pauperis* motion violated the due process clause of the ICRA. The exact nature of the alleged ICRA violation in the final case, *Smith*, is not clear from the opinion. It is clear, however, that the case involved a challenge to the tribe's exercise of its criminal law authority. 783 F.2d at 1411.

146. As Justice White noted in his dissenting opinion in *Santa Clara*

ally interpret the ICRA provisions that restrict the criminal authority of tribal governments, tribal courts are the exclusive interpreters of other provisions of the Act. Because there is no Supreme Court review of non-habeas tribal court decisions, this situation ultimately ensures neither complete uniformity, nor supremacy of federal law with respect to many provisions of the ICRA.¹⁴⁷ To the extent that the essential functions theory is truly premised on achieving both uniformity and supremacy, the ICRA, as construed in *Santa Clara Pueblo*, would seem to be unconstitutional.

The ICRA experience clearly indicates that the *theoretical* possibility that there is *some* avenue available to resolve conflicting interpretations at some point in the future¹⁴⁸ does not, as a *practical* matter, ensure either the uniformity or the supremacy of federal law. This realization seriously undermines the essential functions theory because it demonstrates the weakness of Professor Ratner's response to one of the strongest arguments advanced against the theory.

Critics have attacked the essential functions theory by pointing out that there have been periods, starting with the first Judiciary Act, during which the Supreme Court has not had complete statutory authority to review all decisions in which there were conflicting interpretations of federal law.¹⁴⁹

Pueblo, "habeas corpus relief is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property." 436 U.S. at 74 n.3 (White, J., dissenting).

147. See *infra* text accompanying notes 158-73, 209-11; see also *infra* note 211.

148. Although it is possible that at some point a tribe may choose to enforce all its laws through criminal statutes, thereby rendering federal habeas and, ultimately, Supreme Court review of all ICRA provisions possible, the tribes themselves can choose to retain complete control over the interpretation of many of the ICRA's provisions by enforcing their laws through non-custodial means.

149. The most telling attack on the historical accuracy of Ratner's argument points out that the Supreme Court lacked jurisdiction over federal criminal cases until 1891. See An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 84 (1789); An Act to Establish Circuit Courts of Appeals, ch. 517, 26 Stat. 826 (1891) (giving the Supreme Court jurisdiction over "capital or other infamous crimes"). Referring to this 100 year gap in Supreme Court jurisdiction over such cases — which obviously raised issues of statutory interpretation of federal laws — Ratner maintains that sufficient review was available because 1) when the two judges on the circuit panel disagreed about an issue, they were required to certify the disputed question to the Supreme Court, 2) habeas corpus was available to test the constitutionality of the conviction and probable cause for pre-trial commitment, and 3) habeas jurisdiction *might* have been available if confinement resulted from an interpretation of federal law that conflicted with other decisions under "the exceptional circum-

This historical gap in Supreme Court jurisdiction, critics contend, demonstrates that the Supreme Court has never been the ultimate interpreter of all federal law, as Professor Ratner contends it must be. At a general level, Professor Ratner has responded to this argument by asserting that review of federal law decisions need not be immediate and that limited inconsistency is tolerable as long as some avenue of review is ultimately available.¹⁵⁰ Thus far, Professor Ratner has been able to respond at this general level because the debate has remained at an abstract level. In the concrete ICRA context, Professor Ratner can no longer hedge his bet. Either articles III and VI require federal court review of *all* ICRA claims (including civil actions) or there will be no uniformity and supremacy. Ultimately, it seems, the essential functions theory must require that review be available. Otherwise, the essential functions theory is, in the ICRA context, a meaningless facade.

Advancing to this more extreme position would render the essential functions theory vulnerable to attack on historical grounds, however, because such universal review has not been available in all categories of cases throughout federal judicial history.¹⁵¹ Ratner could avoid this pitfall and still rebut the historical attack if he were willing to concede that the Constitution does not require uniformity of federal law. He would have to concede this point because the one area in which Supreme Court review was not available for one hundred years involved *federal* criminal cases, in which the question was the meaning, not the supremacy of federal law.¹⁵² Ratner's arguments thus becomes weakest from a historical standpoint when he seeks to constitutionalize both the supremacy *and* *uniformity* functions of the Supreme Court. At that point, his arguments also lose

stances" doctrine that developed later. *Appellate Jurisdiction*, *supra* note 2, at 195-201; *Majoritarian Constraints*, *supra* note 2, at 953. The first two means of review clearly would not ensure consistent interpretations of federal criminal statutes. The first would not because review was premised on the inability of the two judge panel to reach a decision, not on the existence of a conflict between two panels or courts. The second would not because erroneous interpretations of a statute would not necessarily be a basis for habeas review. *Appellate Jurisdiction*, *supra* note 2, at 200. The last assertion seems to be nothing more than wishful thinking, as Ratner is unable to identify any case in which habeas review was granted on the basis of an erroneous interpretation of the statute. *See generally id.* at 198-200 (discussing the possibility of habeas review based on statutory interpretation).

150. *Constitutional Restraints*, *supra* note 1, at 11 (statement of Leonard Ratner).

151. *See supra* note 149.

152. *Id.*

textual support. The supremacy clause does not by its terms require uniformity of interpretation. It is, after all, the supremacy clause, not the uniformity clause. While there may be sound reasons for having a tribunal that can provide a uniform interpretation of federal laws, the supremacy clause was not designed to achieve that goal. The supremacy clause was inserted in the constitution to delineate the relationship between federal law and non-federal laws.¹⁵³ A desire for uniformity may well have been one of the reasons why the framers chose to resolve conflicts between those laws in favor of federal law, but supremacy does not necessarily require uniformity.

Professor Ratner's critics have been half right. There is no textual support for one of his two essential functions. However, they have also been half wrong. Professor Ratner's error is not in linking the federal question jurisdictional grant of article III with the supremacy clause,¹⁵⁴ but in interpreting the supremacy clause to require uniformity. The essential functions theory does not require additional support for the proposition that the Supreme Court has constitutionally protected essential functions, but rather for the proposition that one of those functions is to provide a uniform interpretation of all federal laws. The ICRA experience thus confirms what others have previously discovered — that there is a fundamental ambiguity and weakness in the essential functions theory. However, examination of that weakness indicates that the critical fault lies in Professor Ratner's interpretation of the supremacy clause, not, as many of his critics have contended, in his construction of article III.

B. PLENARY POWER THEORY: WHO WILL GUARD THE GUARDIANS?

At first glance, those commentators who have argued that Congress has plenary power to eliminate all federal review of cases arising under federal law would seem to have no problem

153. The framers' main concern was that the states would ignore or contravene federal laws with which they disagreed, leading some in the convention to argue that Congress should have the authority to negate conflicting state laws. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (M. Farrand ed. 1966); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 68, at 27-28.

154. Professors Amar and Clinton have shown Professor Ratner to be at least historically correct on this point. See *supra* note 69 and accompanying text.

with the *Santa Clara Pueblo* ruling. If the Supreme Court correctly determined that Congress intended to prohibit the exercise of federal jurisdiction in ICRA cases, the ruling would seem to be correct under the plenary power theory. Once again, however, when the practical results of the *Santa Clara Pueblo* decision are evaluated, disturbing questions are raised, questions concerning the meaning of the Supremacy Clause and the constitutional mechanism for enforcing it.

Because tribal governments have not historically been organized in conformity with separation of powers concepts, tribal judiciaries often are not independent of the tribal legislative body.¹⁵⁵ In some instances, the two bodies are one and the same.¹⁵⁶ Thus, the practical result of the *Santa Clara Pueblo* ruling has been that the tribal officials who enact laws that conflict with federal law often end up being the ultimate arbiters of the resulting conflict. Obviously, serious theoretical concerns exist about the extent to which the supremacy clause will be properly enforced when those making that decision have such a vested interest in concluding that no conflict exists. Concrete examples from the ICRA context indicate that these concerns are not solely theoretical.¹⁵⁷

155. Ziontz, *supra* note 121, at 10-14. "In at least 27 tribes the council hears appeals from tribal court judgments, and in 21 of the 27 the council also appoints the trial judges." INDIAN SELF-DETERMINATION, *supra* note 88, at 59. "Tribal courts are considered subordinate to the tribal council on about one-half the reservations." Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Court After Santa Clara Pueblo v. Martinez*, 62 DENVER L. REV. 761, 769 (1985). *But see* Pommersheim, *supra* note 89, at 66 (noting move toward "de facto if not de jure separation of powers").

156. For example, in *Santa Clara Pueblo*, the judicial authority is vested in the tribal council, which is also the legislative body. *Santa Clara Pueblo*, 436 U.S. at 66 n.22. *See* INDIAN SELF-DETERMINATION, *supra* note 88, at 59 (stating "[i]n at least 27 tribes the council hears appeals from tribal judgments . . .").

157. The following examples are not intended to question the legitimacy of tribal courts. *See* Resnik, *supra* note 5, at 741 ("[w]hat is most remarkable about the twenty year history of the enforcement of the Indian Civil Rights Act is . . . how close [tribal governments] have come in a very short twenty year[s] . . . to reaching a level of development in enforcement of civil liberties that took almost a century and half of development in federal and state courts") (quoting Clinton, Speech on Tribal Courts and Civil Rights: Prepared for Delivery at AALS Convention 9-10 (AALS Native American Rights Section, January 8, 1989)).

Indeed, one of the main points of this section is that many state courts might well respond in the same manner *were* no federal court review of their decisions available. Numerous examples from state courts that *were* subject to federal court review justify this conclusion. *See, e.g., State v. Phillips*, 540 P.2d 936, 938-39 (Utah 1975) (refusing to apply first amendment limitations to state

The first example is *Santa Clara Pueblo* itself. As the Supreme Court noted, the Santa Clara Pueblo tribal council possesses ultimate legislative and judicial authority.¹⁵⁸ Thus, Julia Martinez's sole remedy after the Court's ruling was to convince the tribal council which had enacted the law, that the enactment violated federal law, a course she had already unsuccessfully pursued.¹⁵⁹ One need not wonder whether the framers of the Constitution, who in many ways evidenced a distrust of human nature,¹⁶⁰ intended that the conflict between federal and subordinate laws be resolved by those who had such an interest in upholding the subordinate laws.

The ICRA experience also demonstrates that the legislative body enacting the non-federal law can maintain control over the final decision concerning the potential conflict between federal and non-federal law in less direct ways. *Shortbull v. Looking Elk*¹⁶¹ indicated one manner in which such control could be maintained. In *Shortbull*, a non-enrolled member¹⁶² of the Oglala Sioux Tribe sought to run for the office of President of the tribe. The tribal council initially voted to permit Shortbull to run, but subsequently enacted a resolution casting doubt on that decision.¹⁶³ A tribal court judge ruled that the subsequent resolution did not rescind the initial vote and ordered the tribal election board to place Shortbull's name on the ballot.¹⁶⁴ One week later, the tribal court judge held

pornography laws). See also *infra* notes 176-86 and accompanying text. See generally, J. PELTASON, *FIFTY-EIGHT LONELY MEN*, 146-47 (1961) (describing state court resistance to federal desegregation rulings); Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. L. REV. 260 (1972).

158. 436 U.S. at 66 n.22. ("[j]udicial authority in the Santa Clara Pueblo is vested in its tribal council").

159. The Court noted that Ms. Martinez had made "unsuccessful efforts to persuade the tribe to change the membership rule." *Id.* at 53.

160. See, e.g., THE FEDERALIST NO. 80, at 516 (A. Hamilton) (Modern Library ed. 1937) (it is naive to believe "that . . . prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct infractions of them"); 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 520 (J. Elliot 2d ed. 1836), quoted in Caron, *supra* note 23, at 666 ("[n]o government can be stable which hangs on human inclination alone, unbiased by coercion").

161. 677 F.2d 645 (8th Cir. 1981).

162. Shortbull was a non-enrolled member "because although his father is a member of the Tribe, Shortbull was born off the reservation . . . where his father was employed." *Id.* at 646.

163. *Id.* at 646-47.

164. *Id.* at 647.

certain tribal officials in contempt for failing to place Shortbull's name on the ballot.¹⁶⁵ The tribal executive committee then suspended the tribal judge and replaced him with a judge who promptly quashed his predecessor's order.¹⁶⁶ Presented with this fact situation, the Eighth Circuit expressed concern that Shortbull's ICRA rights would not be upheld because the tribal council effectively controlled the court determining the existence and extent of any conflict between the ICRA and the challenged tribal action.¹⁶⁷ Yet, under *Santa Clara Pueblo's* interpretation of the ICRA, neither the Eighth Circuit, nor any other federal court — including the Supreme Court — could take any action to ensure that federal law remained supreme.¹⁶⁸

Similarly, in *R.J. Williams Co. v. Fort Belknap Hous. Auth.*,¹⁶⁹ plaintiff filed suit in federal district court alleging that the tribal court issued an order attaching plaintiff's property without providing plaintiff notice or an opportunity to be

165. *Id.*

166. It was unclear whether the suspension was valid under tribal law. *Id.* at 647 n.2. Indeed, the original tribal judge ruled that he was still the tribal court judge in charge of the matter after he was suspended. *Id.* at 647. He had arrest warrants issued for those persons he had held in contempt in his pre-suspension order. *Id.* These orders were similarly quashed by his successor, and the election was held without Shortbull's name on the ballot. *Id.*

167. *Id.* at 650.

168. A similar lack of judicial independence was manifested in a case in which the ICRA was only peripherally involved. *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985). In *Runs After*, a group of tribal members living on the Cheyenne River Sioux Reservation presented the tribal council with a resolution to reapportion the reservation into thirteen election districts. *Id.* at 348. When the tribal council refused to adopt the resolution, the members circulated a petition to effectuate the reapportionment. *Id.* A majority of the voters then approved the reapportionment referendum in a tribal election. *Id.* When the Tribal Council refused to acknowledge the referendum vote, an action was filed in tribal court to enforce the results of the election. *Id.* The tribal court upheld the reapportionment and ordered all future tribal elections to be held in thirteen election districts. *Id.* The next day, the Tribal Council terminated the tribal judge, rescinded the tribal court order, and appointed a new tribal court judge, who then ruled that the referendum resolution was invalid. *Id.* at 348.

A federal court action was ultimately filed against the tribal council and the United States (the latter for failing to intervene as allegedly required by federal law). The Eighth Circuit ruled that the claim against the federal defendants was properly dismissed for failure to exhaust administrative remedies and that the district court did not have jurisdiction to resolve tribal law issues, not even when the resolution of those issues raised concerns under the ICRA. *Id.* at 352-53.

169. 509 F. Supp. 933 (D. Mont. 1981).

heard.¹⁷⁰ Plaintiff claimed that the action violated the due process clause of the ICRA.¹⁷¹ The district court concluded that, in light of *Santa Clara Pueblo*, it did not have jurisdiction over the ICRA claim.¹⁷² It then noted that no court had jurisdiction over the dispute because the tribal ordinance expressly provided that the tribal court had no jurisdiction over the matter.¹⁷³ If the tribal judiciary has no authority to review ICRA claims, a factor often controlled by the tribal legislative body which enacts the tribal jurisdictional statutes, tribal officials who engage in the conduct allegedly in conflict with federal law become the sole judges of whether the conflict exists and the manner in which the conflict will be resolved.¹⁷⁴

Thus, experience under the ICRA has shown that when the ultimate interpretation of federal law is left with a non-federal forum, there is a strong possibility that federal law will not be supreme, because those resolving the conflict between federal and non-federal law will often have an interest, either direct or indirect, in finding that the non-federal law prevails. Clearly, the framers of the Constitution did not envision this situation, given their skepticism of the independence of state courts.¹⁷⁵

Some critics may contend that the problems manifested in the ICRA context would not arise in any other context because states are different from Indian tribes. However, the two governments are not that different from one another in critical respects. Local legislative sentiment can also influence state courts deciding cases involving conflicts between state and fed-

170. *Id.* at 938.

171. *Id.* at 939.

172. *Id.*

173. *Id.* at 940.

174. The problems created by this lack of judicial independence prompted one tribal court to hold that the ICRA itself required some degree of judicial independence. In *Chapoose v. Ute Indian Tribe*, 13 Indian L. Rep. (Am. Indian Law Training Program) 6023 (Ute T. C., 1986), the tribal court held that the tribal legislative body's efforts to vest itself with exclusive power to judicially review a case in which it was a defendant constituted a violation of the due process clause of the ICRA, noting that "the Business Committee cannot establish itself as final arbitrator of Indian Civil Rights Act violations claimed against themselves; a fair hearing before a neutral party is a minimum requirement of fundamental fairness." *Id.* at 6027. However, because no independent body could enforce the decree, it is questionable how enforceable the tribal court directive would be. Moreover, the correctness of the ruling is far from clear. The Ninth Circuit has held that the ICRA does not preclude the tribal council from being the ultimate arbiter of the tribal constitution. *Howlett v. Salish*, 529 F.2d 233, 240 (9th Cir. 1976).

175. *See supra* note 68.

eral law. Indeed, several federal civil rights laws are premised on the belief that state courts will be unable to resist local legislative pressure when resolving conflicts between state and federal laws. For example, 42 U.S.C. § 1983 was enacted in large part because of charges that state courts were "under the control" of conspirators.¹⁷⁶ As one member of Congress noted, section 1983 actions were necessary to counter "the decisions of the county judges who are made little kings, with almost despotic powers to carry out the partisan demands of the Legislature which elected them."¹⁷⁷

Experience from the not-so-distant past confirms that state courts will, at times, bow to popular political pressure when resolving conflicts between state and federal laws. Only thirty years ago, federal courts were engaged in a running battle with some southern state courts that refused, despite clear direction and the certain prospect of reversal, to enforce federal law when to do so ran counter to the wishes of then current local political powers.¹⁷⁸ One state appellate court at the time admit-

176. CONG. GLOBE, 42d Cong., 1st Sess. 394 (1871) (remarks of Rep. Rainey).

177. *Id.* app. at 186 (remarks of Rep. Platt). One of the principal purposes of section 1983 was to reach state court resistance to the enforcement of federal law. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). See Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 971-83 (1987). As Professor Nichol observed, "if state judiciaries could have been counted on to enforce the provisions of the federal constitution, the entire legislative scheme would have been unnecessary." *Id.* at 974.

Similarly, 28 U.S.C. § 1443 (1988), which permits removal to federal court when a state court defendant "cannot enforce in the courts of such State" various federal civil rights laws, assumes that some state courts faced with a conflict between state and federal law will enforce the state law and ignore the federal law despite the command of the supremacy clause. Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1187 (1963).

178. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964), *rev'g* 153 So. 2d 1 (Fla. 1963); *Hamilton v. Alabama*, 376 U.S. 650 (1964), *rev'g* 275 Ala. 574, 156 So. 2d 926 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963), *rev'g* 241 La. 958, 132 So. 2d 860 (1961).

In one instance, it took one federal district court and three U.S. Supreme Court rulings to convince the Florida Supreme Court that state law prohibiting integration of the state's law schools would have to yield to the commands of the fourteenth amendment. *Florida ex rel. Hawkins v. Board of Control*, 60 So. 2d 162 (Fla. 1952), *vacated*, 347 U.S. 971 (1954), *on remand*, 83 So. 2d 20 (Fla. 1955), *cert. denied, clarifying prior order of vacation*, 350 U.S. 413 (1956), *on remand*, 93 So. 2d 354 (Fla. 1957), *cert. denied without prejudice to seeking relief in federal district court*, 355 U.S. 839 (1957); *Hawkins v. Board of Control*, 162 F. Supp. 851 (N.D. Fla. 1958). See J. PELTASON, *supra* note 157, at 146-49.

Four United States Supreme Court decisions (three of which reversed

ted that it was "a mere way station on the route to the United States Supreme Court where defendants hope that in light of supposed social and political advances, they may find legal endorsement of their ambitions."¹⁷⁹

Other state courts were not so demure. When a federal district court in Louisiana enjoined the Orleans Parish school board from requiring and permitting segregation in the New Orleans schools, the state legislature resisted compliance by attempting to withdraw authority from the local school board.¹⁸⁰ When the district court rebuffed the legislature's efforts,¹⁸¹ the legislature enlisted the aid of the state court, which enjoined the school board from complying with the federal court order on the basis that under state law only the legislature had the authority to integrate the school.¹⁸² After the federal court enjoined enforcement of that order and struck down the state law on which it was based,¹⁸³ the legislators hurriedly passed another law and arranged to have a sympathetic plaintiff "challenge" it in state court in hopes that a ruling upholding the law would be final and unreviewable because neither side would appeal.¹⁸⁴ Not surprisingly, the Louisiana Supreme Court upheld the law.¹⁸⁵ But, the maneuverings were of no avail, as the federal district court subsequently struck down the law, noting that state court decrees subverting federal court rulings on federal constitutional rights are themselves unconstitutional and invalid.¹⁸⁶

state supreme court decisions) were required before the Alabama Supreme Court was willing to enforce federal constitutional provisions in conflict with a state statute. *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1961); *NAACP v. Gallion*, 368 U.S. 16 (1961); *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958). See Meltsner, *Southern Appellate Courts: A Dead End*, in *SOUTHERN JUSTICE* 142-45 (L. Friedman, ed. 1965) (describing the NAACP litigation).

179. *McLaughlin v. Florida*, 153 So. 2d 1, 2-3 (Fla. 1963), *rev'd*, 379 U.S. 184 (1964). As the U.S. portion of the citation suggests, the description was accurate in that particular case.

180. A description of *some* of the legislature's evasive actions is chronicled in *Bush v. Orleans Parish School Bd.*, 190 F. Supp. 861, 863 n.1 (E.D. La. 1960).

181. *Id.*

182. *Id.* at 865 n.7.

183. *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42, 45 (E.D. La. 1960) (*per curiam*).

184. The plaintiff was a member of a group favoring segregation and an associate of "the state's leading segregationist." J. PELTASON, *supra* note 157, at 233.

185. *Singlemann v. Davis*, 240 La. 929, 125 So. 2d 414 (La. 1960).

186. *Bush v. Orleans Parish School Bd.*, 190 F. Supp. 861, 864 (E.D. La. 1960).

Thus, there have been times in American history when, because of local political pressure, federal law has received no warmer reception in state courts than it did in the tribal court incidents outlined above, despite the existence of ultimate review by an article III court with power to reverse the state court decision and enforce the command of the supremacy clause. Therefore, state courts are not as different from tribal courts in this important respect as might first appear.

More importantly, although states have been more inclined than Indian tribes to structure their governments to conform with separation of powers concepts,¹⁸⁷ it is critical to an understanding of the federal judiciary's role under the Constitution to realize that nothing in the Constitution requires state courts to be independent from state legislatures or other local political pressures. Although the wording of the guarantee clause of the Constitution assumes that the states will have both a legislative and an executive branch,¹⁸⁸ it does not require states to have a tripartite system of government.¹⁸⁹ The Supreme Court has re-

187. See Ziontz, *supra* note 121, at 10-17 (discussing historical and cultural reasons why some Indian tribes have not adopted the separation of powers concepts).

188. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4 (emphasis added).

189. United Beverage Co. v. Indiana Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985). The exact meaning of the guarantee clause is far from clear, in part because the Supreme Court has held that, at least in most contexts, "the enforcement of that guarantee . . . is for Congress, not the courts." Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937). See also Reynolds v. Sims, 377 U.S. 533, 582 (1964) (federal judiciary lacks power, under the guarantee clause, to affirmatively reapportion a legislature); Baker v. Carr, 369 U.S. 186, 226-29 (1962) (federal judiciary lacks power, under the guarantee clause, to declare apportionment schemes unconstitutional); Luther v. Borden, 48 U.S. 1, 42 (1849) (federal judiciary lacks power to evaluate legitimacy of state governments). However, state courts have been more willing to venture into the arena. See, e.g., City of Thornton v. Horan, 192 Colo. 144, 145-52, 556 P.2d 1217, 1218-22 (1976) (en banc), cert. denied, Wittenbrink v. Colorado, 431 U.S. 966 (1977); *In re Interrogatories Propounded by the Senate*, 189 Colo. 1, 3-15, 536 P.2d 308, 311-20 (1975) (en banc); Vansickle v. Shanahan, 212 Kan. 426, 428-52, 511 P.2d 223, 225-44 (1973); *In re Opinion to the Governor*, 185 A.2d 111, 112-19 (R.I. 1962). With one exception, these courts have concluded that "the Guaranty Clause does not require a particular distribution of power within a state." *In re Interrogatories*, 181 Colo. at 11, 536 P.2d at 316. Even the Kansas Supreme Court, which found that some separation of powers was required by the guarantee clause (a proposition for which it had very little support), concluded that the principle was violated "only where 'the whole power of one department is exercised by the same hands which possesses the whole power

peatedly confirmed that the Constitution's separation of powers concept is not mandatory on the states,¹⁹⁰ and that states are free to determine for themselves how they will distribute power among their governmental branches.¹⁹¹

Accordingly, even though all states now have a system which provides a tripartite form of government, the Constitution does not require an independent judiciary at the state level, any more than it does at the tribal level. It seems unlikely that the framers believed that separation of powers at the state level would contribute to enforcement of the supremacy clause when nothing in the federal constitution mandated judicial independence at the state level.¹⁹² The framers expressed just the opposite viewpoint, asserting that the federal government could not rely on state courts to uphold federal interests because they were dependent on state legislatures.¹⁹³ Thus, the framers could not possibly have intended that state courts be the final enforcers of the supremacy clause. Without judicial independence, the framers felt, state courts could not be trusted in that role.¹⁹⁴

of another department," or when "their powers or authority [are] materially curtailed," *Vansickle*, 212 Kan. at 451, 511 P.2d at 243 (quoting FEDERALIST PAPER NOS. 43, 47), a test that would not seem to preclude executive or legislative control over the appointment and removal of judges.

190. *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980). *Accord* *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974).

191. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). Moreover, recent statements in Supreme Court cases not directly addressing the issue continue to affirm that "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980); *accord* *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974).

192. Indeed, "at the time the Constitution was adopted many of the states had virtually a one-branch government — the one branch being the legislature." *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 158 (7th Cir. 1989).

193. James Madison argued that "[c]onfidence can [not] be put in the State Tribunals as guardians of the National authority and interests. In all States these are more or less dependent on the Legislatures." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 68, at 27-28. Madison noted specific examples: "In R[hode] Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the legislature who would be willing instruments of the wicked and arbitrary plans of their masters." *Id.* at 28.

The experience of some ICRA plaintiffs prove that constitutional protection against such practices is still necessary. *See Shortbull v. Looking Elk*, 677 F.2d 645, 645-50 (8th Cir.), *cert. denied*, 459 U.S. 907 (1982) discussed in text accompanying notes 161-68, *supra*.

194. As Professor Amar has noted "[e]ven those who favored limiting the federal judiciary sought state court jurisdiction only in the *first instance*" be-

Advocates of the plenary power theory have therefore underestimated the importance of the supremacy clause in their analysis.¹⁹⁵ They seem to have assumed, without stating, that the supremacy clause is self-effectuating, that nothing needs to be done to ensure compliance with that provision. The historical evidence suggests that the framers thought otherwise.¹⁹⁶ The ICRA experience demonstrates the wisdom of the framers' thinking. The ICRA experience illustrates that when judicial independence is lost, confidence that the supremacy clause is being properly enforced diminishes, because the final decision concerning the conflict between federal and non-federal laws is often made by those who enacted the non-federal law or by judges subject to their control.¹⁹⁷ This dilemma is exactly what the framers feared would happen, and why, some argue, they prohibited Congress from eliminating federal court jurisdiction

cause, as John Rutledge explained "the right to appeal to the supreme national tribunal [is] sufficient to secure the national rights [and] uniformity of [Judgements]." Amar, *supra* note 2, at 249 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 124 (M. Farrand ed. 1911)) (emphasis added).

195. Proponents of the plenary power theory may object to the increased emphasis placed on the supremacy clause in this article in light of the fact that the ICRA is a congressional statute, rather than a constitutional provision. To paraphrase Professor Redish: when,

the policy-making branches of the federal government . . . [have] conclude[d] that in a particular instance . . . there is no need to worry about [tribal] court interference, there is, by definition, no possibility of interference with federal supremacy; the federal government has chosen to deem acceptable whatever constructions of federal law the [tribal] courts develop.

Constitutional Limitations, *supra* note 2, at 146-47.

However, this begs the very question to be resolved — who is to enforce the supremacy clause, Congress or the federal courts. As Professor Amar has pointed out, Professor Redish's argument erroneously equates federal legislative power with all federal power. Amar, *supra* note 2, at 224. Although it is within Congress's discretion to refrain from exercising its article I power to enact legislation, it may not waive the judiciary's article III power to review that legislation once it is enacted any more than it may waive the President's article II power to veto that legislation. *Id.* at 251 n.150.

Moreover, when the tribal court is under the influence of the tribal council, allowing tribal courts the final authority to resolve conflicts under the ICRA renders the statute meaningless because the statute would act as a limit on the tribal council only if the tribal council voluntarily adopted the limitation — a choice it could make in the absence of the ICRA. That result may be worse than no statute at all because it creates the appearance that there is federal protection against tribal interferences with civil rights, when in fact there is none. The illusion of federal protection may undermine movement to provide genuine protection.

196. See *supra* text accompanying note 69.

197. See *supra* text accompanying notes 157-75.

over such conflicts.¹⁹⁸ Once one realizes that a critical assumption of the plenary power theory is that state courts (with no guarantee of judicial independence) are to be the ultimate enforcers of the supremacy clause, the weakness of that assumption becomes apparent.¹⁹⁹

Proponents of the plenary power theory may object that the separation of powers concerns raised by the ICRA examples demonstrate only that there must be *some* limitation on entrusting ultimate resolution of conflicts between federal and non-federal law to a body controlled by those who enacted the non-federal law, but not that *article III* provides that limit. Indeed, Professor Redish, one of the leading plenary power theory advocates, has already postulated that the *due process clause* might prevent Congress from eliminating all federal court jurisdiction unless there were some guarantee that the state court judges who would then have the final say on conflicts between the federal and non-federal law were independent of the political branches whose actions are being challenged.²⁰⁰

Professor Redish, however, fails to provide any convincing reason for his theory that the requirement should be found in the due process clause rather than article III. His argument requires a court to determine how much independence is required in order to satisfy the due process clause, a vague²⁰¹ and intru-

198. See *supra* text accompanying note 68.

199. The argument that state judges will follow the command of the supremacy clause merely because that clause requires them to do so is inconsistent with other premises on which the plenary power theory is based. While assuming that state court judges can be trusted to effectuate the supremacy clause without any oversight because that clause compels them to be "bound by Oath or Affirmation" to support the clause, the plenary power theory proponents fail to explain why that same trust cannot be placed in state legislators who are under the same constitutional obligation. Article VI provides, in pertinent part, that "the *Members of the several State legislatures*, and all executive and *judicial Officers*, both of the United States and of the *several States*, shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, § 3 (emphasis added). If an oath to uphold the Constitution (including the supremacy clause) is a sufficient guarantee that the supremacy clause will be enforced, that guarantee would also prevent legislative usurpation of federal power, and no judicial review at all would be necessary. Yet, not even the plenary power theory advocates have adopted that position. If something more is required, oversight in the form of federal judicial review seems to be the most likely enforcement tool both because of its simplicity and because of the historical connection between articles VI and III. See *supra* text accompanying note 69.

200. *Constitutional Limitations*, *supra* note 2, at 161-66.

201. Professor Gunther concluded that:

sive²⁰² inquiry that would be entirely unnecessary if article III were to require federal court review of such cases. If federal court jurisdiction over such claims were available at some point in the process, there would no longer be any concern about the independence of the ultimate arbiter because the federal Constitution itself, with its tenure and salary provisions, already ensures the essential independence.²⁰³

Moreover, additional guarantees of independence, although perhaps not constitutionally necessary, would exist because a federal, rather than non-federal, tribunal is resolving the conflict. This fact may create an inherent bias in *favor* of the federal law, but if such bias exists, it would tend to effectuate, rather than undermine, the constitutional directive that federal law be supreme.²⁰⁴

Thus, the undesirable results caused by the lack of federal review of ICRA cases highlights a critical weakness in the plenary power theory — its reliance on non-federal judges, with no guarantee of independence, as the enforcers of the supremacy clause. Others have identified the weakness from a

Redish's due process alternative to Sager's thesis [that article III required that some federal judge adjudicate such claims] fails because of the same flaw Redish finds in Sager: "Unless we are able to find objective criteria, grounded in the Constitution, by which to declare state courts technically inadequate forums for the adjudication of constitutional rights, we cannot - as a constitutional matter, at least - reject the long-accepted history recognizing the competence of state courts to perform this function."

Gunther, *supra* note 2, at 915-16 (quoting *Constitutional Limitations, supra* note 2, at 166).

202. Requiring a tribe to restructure its entire judicial system in order to satisfy traditional notions of due process would, to some extent, undermine the "well-established federal 'policy of furthering Indian self government.'" *Santa Clara Pueblo*, 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Whether such action would be more intrusive than allowing federal court review of tribal decisions may be questionable. However, federal courts have shown some willingness to interpret the statutory provisions of the ICRA more flexibly than the constitutional due process provision, especially in light of the legislative history of the ICRA. See *infra* notes 216-17.

203. Professor Redish also fails to provide any evidence that the framers linked the proper implementation of the supremacy clause to enforcement of the due process clause, a showing that would be difficult to make since the latter was not part of the original Constitution. See Amar, *supra* note 2, at 227-28 n.81.

204. Whether the limitation is found in the due process clause or articles III and VI makes no difference for purposes of determining the constitutionality of the current ICRA enforcement scheme. Thus, the statute may be unconstitutional even under the plenary power theory. See *infra* text accompanying note 224.

historical perspective.²⁰⁵ The ICRA experience confirms the foresight of the framers' concerns and the continuing relevance of those concerns in today's society.

C. DISTRIBUTIVE AUTHORITY THEORY: VINDICATION FOR A RISING THEORY

The current ICRA enforcement scheme seems to violate the distributive authority theory because non-federal judges who lack the tenure and salary protections constitutionally provided federal judges by article III make the final interpretation of many provisions of the ICRA.²⁰⁶ However, two questions remain concerning the validity of the theory; the ICRA experience provides some tentative answers to both inquiries.

First, does it make any difference whether the final interpretation of the ICRA is left to non-federal judges? In other words, would the availability of some federal court review alter the result? A definitive answer to that question cannot be extrapolated from the ICRA experience; it is impossible to determine how individual cases would change if they were brought in a different forum or if further review were available. Nonetheless, evidence from both the post and pre-*Santa Clara Pueblo* eras suggests that federal review would make a difference in a significant number of cases.

The post-*Santa Clara Pueblo* experience indicates that the absence of any federal court review sometimes enables those who enacted the challenged legislation to manipulate the outcome.²⁰⁷ This result causes concern about the extent to which the supremacy clause has been enforced in a number of cases in which no federal court review was available.²⁰⁸

Cases from the pre-*Santa Clara Pueblo* era likewise indicate that the availability of federal court review increases the likelihood that federal rights will be vindicated and federal law will be supreme. In a number of cases decided prior to *Santa Clara Pueblo*, federal courts upheld challenges to tribal action when such relief had been denied by the tribal forum.²⁰⁹ In-

205. See *supra* text accompanying notes 68-69.

206. As noted below, the current enforcement scheme would appear to violate all three variations of the distributive authority theory. See *infra* text accompanying notes 219-23.

207. See *supra* text accompanying notes 157-74.

208. See *supra* text accompanying notes 157-75.

209. See, e.g., *Rosebud Sioux Tribe v. Driving Hawk*, 534 F.2d 98, 99-101 (8th Cir. 1976) (due process violation in invalidating results of tribal election); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1232-37 (4th

deed, *Santa Clara Pueblo* itself presented a situation in which, prior to the Supreme Court's jurisdictional ruling, a federal court had granted relief to a civil ICRA litigant whose claims had been denied by the tribal forum of last resort.²¹⁰ Moreover, even in cases in which federal court review did not change the substantive result, the presence of federal jurisdiction alleviated concerns about the impartiality of the non-federal forum and hence the enforceability of the supremacy clause.²¹¹ Therefore, although far from conclusive, experience under the ICRA, both before and after *Santa Clara Pueblo*, indicates that the availability of some federal court review enhances the enforcement of the supremacy clause.

The second inquiry is whether the lack of uniformity which could result from having lower federal court judges act as the final arbiters of the ICRA, a result that is constitutionally permissible under the distributive authority theory, causes any critical enforcement problems. The answer to this question is less clear. Because *Santa Clara Pueblo* was the first Supreme Court decision on the ICRA, and because the Court did not reach the merits of the controversy in that case, the Supreme

Cir. 1974) (division of land without notice or opportunity to be heard violated due process clause of ICRA); *Dodge v. Nakai*, 298 F. Supp. 26, 28-34 (D. Ariz. 1969) (exclusion of individual from reservation because of allegedly contemptuous laughter at advisory committee meeting violated due process, freedom of speech and bill of attainder provisions of the ICRA).

210. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042-48 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978). The Tenth Circuit decision in *Santa Clara Pueblo* may not provide the best example of federal review making a difference because the federal district court agreed with the tribal council that the ordinance did not violate the ICRA. 402 F. Supp. 5, 11-19 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978). Review by the district court, with no further federal appeal, would satisfy the requirements of the distributive authority theory.

211. *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1195-1201 (D.S.D. 1975), raised concerns similar to those presented in *Shortbull v. Looking Elk*, 677 F.2d 645, 645-50 (8th Cir. 1982) (discussed *supra* in text accompanying notes 161-68) about the impartiality of the non-federal forum. In *Williams*, an unsuccessful candidate for tribal office challenged the propriety of the election in tribal court. When the tribal judge issued a restraining order to prevent the counting of the ballots, the tribal council voted to overrule the restraining order. When the tribal judge issued arrest warrants for the council members who voted to overrule his order, the council voted these warrants invalid. The tribal judge eventually resigned rather than be suspended. 387 F. Supp. at 1195-96. After noting these events, the federal district court concluded that because "the tribal judicial system is subservient to the tribal council, a defendant in this action," further exhaustion of tribal remedies was not required. *Id.* at 1198. However, the district court ultimately held that the alleged deficiencies in the election process did not violate the ICRA. *Id.* at 1199-1201.

Court has not definitively resolved many of the issues raised by civil ICRA cases, and lower federal courts have differed among themselves concerning these issues to some extent.²¹² Some scholars have criticized the pre-*Santa Clara Pueblo* courts for reaching inconsistent results.²¹³ Much of the inconsistency, however, stemmed from the federal courts' efforts to vindicate ICRA rights while minimizing interference with legitimate tribal customs and procedures, a balancing act mandated by the terms and legislative history of the ICRA.²¹⁴ Thus, the inconsistency is not as dramatic as some have contended.²¹⁵ A careful reading of the cases raising the consistency concerns indicates that the different results reflect not so much conflicting interpretations of the ICRA, as differences in the facts involved in each situation.²¹⁶ Such inconsistency is inevitable

212. Note, *Enforcement of Indian Civil Rights*, 37 RUT. L. REV. 1019, 1021 (1985).

213. *Id.* at 1021.

214. As the Supreme Court noted in *Santa Clara Pueblo*, "[t]wo distinct and competing purposes are manifest in the provisions of the ICRA: . . . strengthening the position of individual tribal members vis-a-vis the tribe, . . . [and] promot[ing] the well-established federal 'policy of furthering Indian self government.'" 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (emphasis added).

215. For example, one commentator asserted that federal courts were "divided . . . on the question of what standard of constitutional protection is provided by the constitutional-type rights of the Act. Some courts . . . held the tribes and their courts to the constitutional standards of the federal courts themselves. Another held that the Act did not necessarily incorporate the rights guaranteed by the Constitution." Schultz, *supra* note 155, at 775. However, those cases applying the "federal standard" involved tribes which had adopted laws that paralleled federal laws. See *Means v. Wilson*, 522 F.2d 833, 839 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Brown v. United States*, 486 F.2d 658, 661 (8th Cir. 1973); *Daly v. United States*, 483 F.2d 700, 704-05 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973). Thus, as one commentator explained, "[a]ll the tests developed by courts to date share the assumption that fourteenth amendment standards should be applied unless there is particular justification for not doing so." Note, *Martinez v. Santa Clara Pueblo: The Scope of Indian Equal Protection*, 1976 UTAH L. REV. 547, 555.

216. For example, in one case in which the federal court applied the federally developed equal protection standards to tribal election procedures, the court observed that it did so because "the tribes have established procedures 'paralleling those commonly found in our culture' " and that in "this . . . type of case . . . the Anglo-Saxon notion of equal protection is embraced by section 1302(8) of the Indian Civil Rights Act." *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238-39 (9th Cir. 1976) (emphasis added). Moreover, even though it applied the federal test, the court was influenced by considerations unique to the particular tribal government involved, ultimately upholding a durational residency requirement for tribal council candidates because
the cultural identity of the . . . Tribes is primarily a product of contin-

when federal legislation is designed to vindicate individual rights without interfering excessively with governmental units that are markedly different from one another.²¹⁷ More importantly, there is no indication that the resulting disparities from tribe to tribe had any adverse impact on the enforcement of the command of the supremacy clause. Although the evidence is again inconclusive, the ICRA experience suggests that concerns over uniformity need not affect the scope of the constitutional limitations on Congress's authority over federal courts.

Thus, the ICRA experience vindicates the distributive authority theory to some extent. The history of the ICRA since *Santa Clara Pueblo* raises serious questions about the premises on which the other two competing theories rest. Moreover, experience under the ICRA indicates that federal review does make enforcement of the supremacy clause more likely and that the lack of uniformity that could result from vesting lower federal courts with the final word on a federal statute does not undermine the commands of that clause. Furthermore, that experience demonstrates that the framers' concerns about leaving enforcement of federal law to non-independent, non-federal judges, concerns revealed by the distributive authority proponents' historical research, continue to be valid in modern times.

IV. THE CONSTITUTIONALITY OF THE INDIAN CIVIL RIGHTS ACT: A POSTSCRIPT

This Article primarily seeks to point out what the ICRA experience teaches about the ongoing debate over Congress's authority to prohibit federal courts from exercising the article III judicial power to adjudicate cases arising under federal law. However, examination of the role of federal courts in enforcing ICRA rights in the light of the theories generated by the debate raises serious questions about the constitutionality of the ICRA itself. Although this issue is not the main focus of this Article, the matter deserves some attention.

ued physical presence on the reservation, and the elected leaders of the Tribe must be current and long-term actual residents . . . in order to insure that they are sufficiently familiar with and part of that culture in order to be entrusted to carry it forward.

Id. at 243.

217. As one court observed: "The Indian Civil Rights Act is properly considered in the context of federal concern for Indian self-government and cultural autonomy: Its guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy." *McCurdy v. Steele*, 353 F. Supp. 629, 633 (D. Utah 1973).

Serious questions concerning the constitutionality of the ICRA arise under any of the three prevailing theories developed to date. The absence of any Supreme Court review over tribal court decisions, coupled with the prohibition on original federal jurisdiction over civil ICRA claims, arguably interfere with what some scholars contend are the Supreme Court's essential functions of ensuring the uniformity and supremacy of federal law. As previously demonstrated,²¹⁸ the availability of Supreme Court review in the narrow classes of cases that may arise in the habeas corpus context does not preserve these functions in any meaningful way. Tribal courts are, as a practical matter, the final arbiters of the meaning of many ICRA provisions, a clear violation of the essential functions theory.

Similarly, the absence of any federal court jurisdiction over civil ICRA claims violates at least one variant of the distributive authority theory. The current scheme clearly runs afoul of Professor Amar's view that article III requires that jurisdiction over *all* federal question claims be vested in some federal court²¹⁹ because civil ICRA claims are currently adjudicated exclusively in tribal courts without federal review.

The current ICRA scheme also seems to violate Professor Clinton's theory.²²⁰ His exception for cases that are "so trivial" that they would pose "an unnecessary burden on both the federal judiciary and the parties" does not seem to apply. The individual rights asserted in ICRA cases are hardly trivial. Moreover, the number of cases in which those rights are asserted is not so large that the exercise of federal jurisdiction would place an undue burden on the federal judiciary or the parties. Only 36 civil ICRA decisions have been reported since *Santa Clara Pueblo*,²²¹ and in 24 of those cases, at least one

218. See *supra* text accompanying notes 136-47.

219. See *supra* text accompanying notes 71-73.

220. See *supra* text accompanying note 74.

221. Since *Santa Clara Pueblo*, there have been 23 reported and one unpublished federal cases in which a civil ICRA claim was raised. *Medina v. San Juan Pueblo*, 17 Indian L. Rep. (Am. Indian Law Training Program), 2020 (10th Cir. 1989); *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10th Cir. 1987); *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275 (8th Cir. 1987); *Runs After v. United States*, 766 F.2d 347, 351 (8th Cir. 1985); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1309 (10th Cir. 1984); *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983); *Snow v. Quinalt Indian Nation*, 709 F.2d 1319 (9th Cir. 1983); *Confederated Salish & Kootenai Tribes of the Flathead Reservation of Montana v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, *Polson v. Confederated Salish*, 459 U.S. 977 (1982); *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982); *Shortbull v. Looking Elk*, 677 F.2d 645, 650 (8th Cir. 1981),

party wanted to be in federal court.²²² An increase of less than

cert. denied, 459 U.S. 907 (1982); *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 278 (9th Cir. 1981); *Trans-Canada Enter. Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980); *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981); *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (D. Mont. 1988); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457, 1458 (D. Nev. 1986); *Learned v. Cheyenne-Arapaho Tribe*, 596 F. Supp. 537, 538 (W.D. Okla. 1984); *Sahmaunt v. Horse*, 593 F. Supp. 162, 163 (W.D. Okla. 1984); *Stroud v. Seminole Tribe of Florida*, 574 F. Supp. 1043, 1045 (S.D. Fla. 1983); *Dubray v. Rosebud Hous. Auth.*, 565 F. Supp. 462, 468 (D.S.D. 1983); *Babbit Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418, 423 (D. Ariz. 1981), *rev'd*, 710 F.2d 587, 600 (9th Cir. 1982); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 509 F. Supp. 933, 937 (D. Mont. 1981); *Barnes v. White*, 494 F. Supp. 194 (N.D.N.Y. 1980); *Shubert Constr. Co., Inc. v. Seminole Tribal Hous. Auth.*, 490 F. Supp. 1008, 1009 (S.D. Fla. 1980); *Johnson v. Fredrick*, 467 F. Supp. 956, 958 (D.N.D. 1979).

There have been 12 reported tribal civil cases raising ICRA issues during that time period: *Begay v. Navajo Nation*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6032, 6034 (Nav. Sup. Ct. 1988); *Kinslow v. Business Comm. of the Citizen Band Potawatomi Indian Tribe of Okla.*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6007, 6007 (C.B. Pot. Sup. Ct. 1988); *Chavez v. Tome*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6029, 6029 (Nav. Sup. Ct. 1987); *Johnson v. Navajo Nation*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6037, 6037 (Nav. Sup. Ct. 1987); *Ponca Tribal Election Bd. v. Snake*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6085, 6092 (Ct. Ind. App. 1988); *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6106, 6106 (Chy. R. Sx. Ct. App. 1988); *One Feather v. Oglala Sioux Tribal Public Safety Comm'n*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6042, 6043 (Oglala Tr. Ct. App. 1986); *Conroy v. Bear Runner*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6037, 6039 (Oglala Tr. Ct. App. 1984); *In re L.L.H.*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6043, 6043 (Inter. Ct. App. 1982); *Lawrence v. Southern Puget Sound, Inter-Tribal Hous. Auth.*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6011, 6011 (Sug. Tr. Ct. 1987); *Holt v. Kallappa*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6007, 6009 (Met. Tr. Ct. 1986); *Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation*, 13 Indian L. Rep. (Am. Indian Law. Training Program) 6023, 6024 (Ute T.C. 1986).

There have also been several tribal decisions in which a defendant raised ICRA claims in a criminal proceeding. *See, e.g., LaFloe v. Smith*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6007, 6007 (Ft. Peck Ct. App. 1984); *Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6008, 6012 (Intertr. Ct. App. 1984); *United States v. McGahuey*, 10 Indian L. Rep. 6051 (Hoopa Ct. Ind. Off. 1983) (*per curiam*); *Squaxin Island Tribe v. Johns*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6010, 6010 (Sq. I. Tr. Ct. 1987). However, these defendants had access to federal court via the habeas corpus route if they were unsuccessful at the tribal level. *See, e.g., Greywater v. Joshua*, 846 F.2d 486, 487 (8th Cir. 1988) (habeas corpus available to challenge tribal court criminal jurisdiction over non-member Indians).

222. *See supra* note 221 (federal court cases).

three cases a year would not seem to be overly burdensome for the federal court system.

Professor Sager's view that federal jurisdiction is mandatory only for cases raising constitutional violations might even implicate the current ICRA scheme.²²³ A civil ICRA claimant could allege that, to the extent that the challenged tribal law conflicts with the ICRA, the tribal law violates the supremacy clause.

Finally, even those who argue that no article III limitation on congressional authority exists might find that the current scheme, under which civil ICRA claims are often adjudicated by either those who enacted the challenged law or those subject to their control, violates some other provision of the Constitution, most notably the due process clause. Relegating a litigant to a forum in which such potential bias exists could violate the due process clause.²²⁴

Supporters of the current ICRA scheme might argue that the foregoing discussion assumes a critical fact that, particularly in light of the views put forth in this Article, must be determined before any of the theories can properly be applied to the ICRA — that the supremacy clause applies to Indian tribes. If, as this Article suggests, limits on congressional authority over federal courts depend to a large degree on the proper mechanism for enforcing the supremacy clause, the current ICRA scheme will contravene those theories only if the supremacy clause applies to Indian tribes. Because constitutional provisions generally do not apply to Indian tribes,²²⁵ the question is not as easily answered as one might assume.

223. See *supra* text at note 75.

224. The point is illustrated by adapting Professor Redish's argument to the tribal context:

No one can doubt . . . that an actual showing of undue influence by [the tribe] over a judge in a particular case constitutes a deprivation of due process. For example, if unimpeachable evidence exists that a [tribal] court judge was told by local governmental authorities that if he decides a particular case against the [tribe] his salary will be reduced or he will not be slated for reelection next year, then there can be little question that the judge's decision in favor of the [tribe] would be subject to a successful due process challenge.

Constitutional Limitations, *supra* note 2, at 162.

To some ICRA plaintiffs, this hypothetical seems all too real. See *Runs After v. United States*, 766 F.2d 347, 348 (8th Cir. 1985); *Shortbull v. Looking Elk*, 677 F.2d 645, 647 (8th Cir. 1982); *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1196 (D.S.D. 1975), discussed *supra* notes 161-68, 211 and accompanying text.

225. See *supra* text accompanying note 81.

Although it is beyond the scope of this Article to fully address the matter, it is proper to at least outline some initial arguments supporting the conclusion that the supremacy clause does indeed apply to tribes as well as to the states.

First, the language of the supremacy clause suggests that the clause fully applies to Indian tribes even though it does not mention them and even though no specific evidence exists to show that the framers contemplated that the clause would apply to tribal governments. The language of the supremacy clause does not limit itself to the supremacy of federal law over state law. Grammatically, the supremacy clause is two clauses. The first provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."²²⁶ The second clause then contains a specific directive as to the application of the first: "[A]nd the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."²²⁷ That the second clause is limited to state *judges* is evidence that it is not merely a repetition of the first. Surely, the first clause binds state legislators to the same degree as it does judges. Thus, although the second clause clearly indicates a primary concern for limiting state judiciaries, the first clause provides a more sweeping rule that is not limited to any particular governmental body. The laws of the United States are to be the "supreme law of the land" regardless of the source of the conflict.

Further evidence that this broad provision applies to entities other than state judiciaries, and specifically to separate sovereigns like Indian tribes, is the inclusion of "treaties" in the list of paramount federal actions. Clearly, the framers intended that treaties restricting tribal action would supersede any tribal law or custom to the contrary because many of the treaties of the time limited tribal authority to act.²²⁸

226. U.S. CONST. art. VI, cl. 1.

227. *Id.* at U.S. CONST. art. VI, cl. 2.

228. For example, a 1785 treaty between the United States and the Wiamanock, Delaware, Chippawa and Ottawa Nations required the various tribes to turn over to the United States any Indian who robbed or murdered a U.S. citizen rather than prosecuting the Indian themselves. II C. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 10 (1904).

The Choctaw nation in 1786 agreed to a similar treaty provision, as well as to one prohibiting it from punishing the innocent under the idea of retaliation. *Id.* at 13. Nearly identical provisions were contained in the 1786 treaty between the United States and the Chickasaw nation. *Id.* at 15.

In addition, the entire history of the federal government's post-constitutional relationship with Indian tribes has proceeded on the assumption that federal authority is paramount to tribal authority, even with respect to intratribal matters. Although the supremacy clause has seldom been invoked as the basis for this federal supremacy,²²⁹ the legal authority of the federal government to enact legislation affecting Indian tribes has never seriously been questioned.²³⁰ The Supreme Court has stated that Indian tribes no longer possess full sovereignty.²³¹ According to the Court, the tribes' inclusion in the United States, and their assent to its protection, necessarily divests tribes of some sovereign powers.²³² In addition, tribes have given up some sovereign powers by treaty, and Congress has removed others.²³³

Finally, both the Supreme Court and tribal courts have indicated that the command of the supremacy clause extends to Indian tribes. In *Santa Clara Pueblo*, the Supreme Court expressly assumed that tribes were bound to follow federal law.²³⁴ Several tribal court decisions expressly recognized the same

229. At times, federal supremacy over Indian tribes has been linked to various constitutional grants of authority to Congress. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making") (citations omitted); Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199 (1984) ("[t]he Plenary Power Doctrine . . . can be traced not only to [the constitutional] commerce power but also to the treaty, war, and other foreign affairs powers, as well as the property power"). At other times, it has been tied to notions of conquest and consent. See *Duro v. Reina*, 110 S. Ct. 2053, 2066 (1990) (Brennan, J., dissenting) ("[w]hen the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government, they necessarily lost some of the sovereign powers they had previously exercised"); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (as a result of European discovery of America, tribal "rights to complete sovereignty, as independent nations, are necessarily diminished"). At one time, the Court utilized a trust theory to justify federal regulation. *United States v. Kagima*, 118 U.S. 375, 381 (1886). That idea has largely been abandoned. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1002 (1981).

230. The moral legitimacy of the justification in support of that legal authority, however, has been vigorously disputed. See, e.g., R. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 325-28 (1990).

231. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

232. *Id.*

233. *Id.*

234. The Court observed: "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law, *which these forums are obliged to apply.*" 436 U.S. at 65 (emphasis added).

principle, with varying degrees of reluctance.²³⁵

Thus, the language and history of the supremacy clause, as well as practical experience, substantiate that the command of the supremacy clause applies to Indian tribes. If that assertion is true, the current version of the ICRA, which provides for no federal review of tribal court ICRA decisions, is of questionable constitutionality under any of the accepted theories, all of which recognize the need for some constitutionally protected mechanism for enforcing the supremacy clause.

CONCLUSION

Examining the ongoing debate concerning congressional power to eliminate federal court jurisdiction over cases arising under federal law from the federal Indian law viewpoint allows consideration of the issues in a concrete setting. Experience under the Indian Civil Rights Act during the last twenty years indicates that some federal review of actions arising under federal law is needed if the command of the supremacy clause is to be fully effectuated. At the same time, it indicates that a uniform interpretation of that federal law is not essential to the enforcement of the clause. This examination thus provides support for the distributive authority theory, which postulates that Congress is required to vest some federal court with the authority to review all cases arising under federal law.

Application of the various theories to the ICRA also reveals serious constitutional concerns about the current enforcement scheme for civil ICRA claims. Although the *Santa Clara Pueblo* Court may have correctly interpreted Congress's intent in concluding that the ICRA prohibits federal court review, the problems such a scheme raises arguably transcend congressional power, reaching the level of a constitutional violation. Perhaps in the next round of legislative debate concern-

235. See, e.g., *Johnson v. Navajo Nation*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6037, 6040 (Nav. Sup. Ct. 1987) ("Indian tribes may have to amend their laws, or enact laws, which will conform to the rights created by the ICRA, because the ICRA 'has the substantial and intended effect of changing the law which [tribes] are obliged to apply'") (quoting *Santa Clara Pueblo*, 436 U.S. at 65); *Miller v. Crow Creek of Sioux Tribe*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6008, 6011 (Intertr. Ct. App. 1984) ("Of course, there is much federal legislation which Indian tribes are bound by such as the Indian Civil Rights Act. Such federal legislation naturally takes precedence over tribal law"). This is not to say, however, that tribal courts are pleased with the concept. The *Miller* court expressed some frustration: "[w]e must accept the limitations imposed on Indian tribes by federal legislation because we have no other choice." 12 Indian L. Rep. at 6012.

ing congressional authority to limit or eliminate federal jurisdiction over cases arising under federal law, Congress will focus on this concrete example of federal Indian law and the lessons that can be learned from the ICRA experience.²³⁶

236. Senator Orrin Hatch has introduced legislation providing for federal court review of tribal court decisions involving civil ICRA claims. S. 2747 100th Cong. 2nd Sess., 134 Cong. Rec. S. 11656 (1988). It is ironic that one who has been so active in promoting legislation eliminating federal jurisdiction over cases involving the vindication of federally protected rights in other contexts, *see, e.g.*, S. 37, 99th Cong. 1st Sess., 131 Cong. Rec. S. 69 (1985) (busing cases); S. 583, 97th Cong. 1st Sess., 127 Cong. Rec. 3190 (1981) (abortion cases), would see the need for providing such review in the Indian law context.

