FEDERAL COURTS, STATE POWER, AND INDIAN TRIBES: CONFRONTING THE WELL-PLEADED COMPLAINT RULE

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I. INTRODUCTION

In *Inyo County v. Paiute-Shoshone Indians*,[1] the Supreme Court held that an Indian tribe could not bring an action under 42 U.S.C. § 1983[2] for damages against county officials for the wrongful execution of a state search warrant on tribal property and for injunctive relief to prevent the officials from executing additional threatened search warrants.[3] The Court reasoned that, because the Tribe claimed that its status as a sovereign government rendered it immune from the state court warrants, the Tribe could not be considered a "person" under section 1983.[4] The Court extended to the Tribe the general rule that sovereigns are not "persons" who can sue or be sued under section 1983.[5]

This much of the decision, in terms of its impact upon federal Indian law, is relatively innocuous.[6] Of much more significance is the Court's suggestion that, on remand, the federal court might lack subject matter jurisdiction over the remainder of the case:

> In addition to § 1983, the Tribe asserted as law under which its claims arise the "federal common law of Indian affairs." But the Tribe has not explained, and neither the District Court nor the Court of Appeals appears to have carefully considered, what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes. In short, absent § 1983 as a foundation for the Tribe's action, it is unclear what federal law, if any, the Tribe's case "aris[es]

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1. 538 U.S. 701 (2003).

2. Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000).

3. *Inyo County*, 538 U.S. at 705–06, 708–12.

4. *Id.* at 711–12.

5. *See id.*

6. Indeed, Indian tribes are sovereign entities. The Court describes them as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)). As Justice Ginsburg, writing for the majority in *Inyo County*, noted, in response to Justice Stevens' concurrence, "It hardly 'demean[s]...Native American Tribes,' in our view, to bracket them with States of the Union" in holding that they are sovereigns, not "persons," under section 1983. *Inyo County*, 538 U.S. at 712 n.6 (alterations in original) (citation omitted) (quoting *id.* at 713 (Stevens, J., concurring)).

> under." We therefore remand for focused consideration and resolution of that jurisdictional question.[7]

This short directive exhibits a concern about whether the well-pleaded complaint rule presents a barrier to federal question jurisdiction over the Tribe's case.[8] If it does, not only the Paiute-Shoshone Indians in *Inyo County*, but other tribes, in many similar situations, could be locked out of federal court and relegated to state court for the resolution of fundamental conflicts about the scope of state power over tribal affairs and property.[9] This could be true notwithstanding the fact that federal law governs the result.[10] Indian tribes are not "citizens" for the purpose of diversity jurisdiction under 28 U.S.C. § 1332.[11] Thus, they must rely upon federal question jurisdiction to access the federal courts.[12]

The well-pleaded complaint rule, described by one scholar as a "fundamental cornerstone[] of federal subject matter jurisdiction,"[13] provides that, for the purposes of 28 U.S.C. § 1331,[14] a case "arises under" federal law only if the plaintiff's asserted cause of action requires, as one of its essential elements, the resolution of an issue of federal law.[15] Justice Holmes first stated the rule by means of a simple formula: "A suit arises under the law that creates the cause of action."[16] Federal questions that arise only as defenses to state claims do not appear, of necessity, on the face of a "well-pleaded" complaint and cannot, therefore, give rise to federal question jurisdiction.[17] The Tribe's assertion in *Inyo County*, that it is free from state process under principles of federal Indian common law, arguably looks like a defense to a state claim rather than a federal cause of action—hence its apparent vulnerability under the well-pleaded complaint rule.

If the Tribe's federal court action in *Inyo County* were barred by that rule, it would be a dramatic revelation of sorts because, until now, myriad cases have "arisen" and proceeded to judgment on the merits in the federal courts in ways similar to *Inyo County* without ever generating concerns under the well-pleaded complaint rule.[18] Indeed, some of those "slipping through" have been decided by the Supreme Court and have established the very principles that govern state authority over tribal affairs.[19] If tribes are forced to adjudicate these controversies in the state

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7. *Inyo County*, 538 U.S. at 712 (alteration in original) (citations omitted) (quoting 28 U.S.C. § 1331 (2000)).

8. *See infra* text accompanying notes 13–17.

9. *See infra* Part IV.

10. *See infra* Part III.

11. *See* Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974) (citing cases).

12. *See also infra* Part VI (discussing 28 U.S.C. § 1362 (2000)).

13. Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1794 (1998).

14. Section 1331 of title 28 of the U.S. Code provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000).

15. *E.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9–11 (1983); Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112 (1936).

16. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916), *overruled in part on other grounds by Franchise Tax Bd.*, 463 U.S. 1.

17. *Franchise Tax Bd.*, 463 U.S. at 10; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673–74 (1950); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

18. *See infra* notes 189–192, 207–224, accompanying text.

19. *See infra* notes 189–192, 207–224, accompanying text.

courts, with petitions for certiorari to the Supreme Court providing the only means for federal court review, they will be left in a predicament reminiscent of the legendary fox minding the chicken coop, for the contours of state power over tribes will be left largely to state judiciaries. The Supreme Court itself has noted that state courts are often hostile to federal rights of Indian tribes.[20]

The Supreme Court justifies the well-pleaded complaint rule on two principal grounds: first, it promotes federalism by minimizing federal court interference with state court adjudications;[21] second, it promotes the conservation of resources in the federal courts.[22] The neat, formulaic nature of the rule appears to work well to achieve these goals. The Court has been hard-pressed, however, to retain the simplicity of the rule in the face of practical realities requiring departures from it.[23] When raw conflicts of state and federal power are at issue, the Court has justified departures from the rule by allowing equitable actions to proceed in federal court to uphold paramount federal law[24] and, in certain limited situations, by recharacterizing a state claim as "federal."[25]

The Court has yet to confront the application of the well-pleaded complaint rule in a case like *Inyo County*, which turns on federal law and involves a contest about the scope of state power over an Indian tribe or its reservation affairs. The paramount federal interests underlying such a dispute put the rule to the test. Article I, Section 8 of the Constitution "vests the Federal Government with exclusive authority over relations with Indian tribes,"[26] and, as a result, the scope of tribal sovereignty[27] is "dependent on, and subordinate to, only the Federal Government, not the

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20. *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566–67 (1983) (stating that there is "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974) ("[S]tate authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."); *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 313 n.11 (1997) ("[T]he readiness of the state courts to vindicate the federal right[s of Indian tribes] has been less than perfect.") (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 339 (1983) (stating that state and local decision making may be "based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation"); United States v. Kagama, 118 U.S. 375, 384 (1886) (recognizing that "[b]ecause of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies").

21. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379–80 (1959) (stating that the rule serves the "deeply felt and traditional reluctance" of the Supreme Court to expand federal court jurisdiction in a manner that could interfere with state courts).

22. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1950) (stating that the rule is necessary to conserve the resources of the federal courts). *See generally* Miller, *supra* note 13, at 1782.

23. *See infra* text accompanying notes 69–92.

24. *See infra* text accompanying notes 56–64; *see also infra* notes 148–151 and accompanying text.

25. *See infra* text accompanying notes 69–83.

26. Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985) (construing U.S. CONST. art. I, § 8, cl. 3 and citing Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)). As Indian law scholar Judge William C. Canby writes, "One of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 138 (4th ed. 2004); *see also infra* note 233.

27. Tribal sovereignty is "the power of self-determination." Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1064 (10th Cir. 1995) (discussing sovereign immunity and quoting Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992)).

States."[28] "The policy of leaving Indians free from state jurisdiction and control," the Supreme Court has said, "is deeply rooted in the Nation's history."[29]

This article shows why the well-pleaded complaint rule should not stand in the way of a tribe, like the Paiute-Shoshone Indians in *Inyo County*, that seeks equitable relief from a federal court to prevent a state law coercive action alleged to violate federal law protective of tribal sovereignty.[30] Rather than presenting a paradigmatic problem under the well-pleaded complaint rule, such claims should be considered federal causes of action "arising under" federal common law.[31] Cases involving these claims, moreover, mirror cases in which the Court has seen fit to recharacterize state claims as "federal" in order to achieve paramount federal goals, that is, cases in which federal interests make adjudication in federal, rather than state, court necessary.[32]

Part II sets a foundation for the discussion by describing the origins of the well-pleaded complaint rule, its operation in the context of actions brought pursuant to *Ex parte Young*[33] to enjoin federal law violations by state actors, and exceptions the Court has made for the rule to ensure federal court jurisdiction over cases presenting uniquely important federal concerns but failing to present a federal cause of action on the face of the complaint. Part III examines the doctrine of Indian sovereignty and the federal interests at stake in unique controversies concerning the scope of state power over tribes and their affairs. There is a significant tension between the dictates of the well-pleaded complaint rule and the historic federal protection of tribal sovereignty, a protection sought by the Paiute-Shoshone Indians in *Inyo County*. Part IV steps back from these foundational discussions to identify the doctrinal bases for federal courts to take jurisdiction over claims like those presented in *Inyo County* without running afoul of the well-pleaded complaint rule and its established exceptions. Part V then surveys Supreme Court decisions involving Indian affairs in which the Court has either grappled with federal question jurisdiction under section 1331 or tacitly accepted it. These decisions, together with examples from the lower federal courts, reveal that the federal courts often proceed as courts in equity to protect the federal rights of tribes from the imposition of state authority in situations like *Inyo County* without raising any concerns about the well-pleaded complaint rule. This case law supports the view that tribes have an implied cause of action as a matter of federal common law to protect such rights. Finally, Part VI examines how 28 U.S.C. § 1362, which gives federal district courts jurisdiction over civil actions brought by Indian tribes "wherein the matter in controversy arises under" federal law, affects the debate. The Supreme Court has yet to

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28. Washington v. Confederated Tribes, 447 U.S. 134, 152–54 (1980); *see also* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 891 (1986) ("[I]n the absence of federal authorization,...all aspects of tribal sovereignty [are] privileged from diminution by the States."); *supra* note 20.

29. Rice v. Olson, 324 U.S. 786, 789 (1945).

30. While generally referring to actions by Indian tribes, this article encompasses actions involving disputes about state power over reservation and tribal affairs generally. Indian tribes are not the only parties who may seek relief from a federal court to assert the federal protections against assertions of state power over reservation affairs. *See infra* notes 133–134; *infra* text accompanying note 195. Parties other than Indian tribes who may have standing to raise these protections will be referred to herein as "tribe-affiliated parties."

31. *See infra* text accompanying notes 222–227, 258–264.

32. *See infra* text accompanying notes 88–102, 166–172.

33. 209 U.S. 123 (1908).

address whether the well-pleaded complaint rule constrains jurisdiction under section 1362, and there is little treatment of the subject by lower federal courts.[34] The legislative history and application of section 1362 to date, however, further support the view that federal court actions by Indian tribes to prevent the imposition of state authority in violation of federal common law, statutory, or treaty rights should be deemed to arise under federal law and, therefore, present no problems under the well-pleaded complaint rule. This should be true whether such actions fit the model of an *Ex parte Young* claim in equity, directed at state officers, or proceed against other parties who threaten to impose state authority in violation of tribes' federally protected rights. The Article concludes that the well-pleaded complaint rule does not constrain federal court jurisdiction over such actions by tribes under section 1362 or by tribes or tribe-affiliated parties with standing to bring such actions under section 1331.

II. THE WELL-PLEADED COMPLAINT RULE: ORIGINS, PARADOXES, AND EXCEPTIONS

There is a wealth of scholarship addressing the well-pleaded complaint rule, its complex contours, and whether it legitimately serves the goals that its defenders claim.[35] The present concern is not to reexamine those debates but to consider attributes of the rule within the specific context of disputes about the propriety, under federal law, of assertions of state authority over tribes or their reservation affairs.

A. Origins of the Well-Pleaded Complaint Rule

The well-pleaded complaint rule evolved from the formalities of pleading prior to the merger of law and equity.[36] The rule is grounded in the notion that the federal district courts, as courts of limited jurisdiction, cannot assert authority over a case as "arising under" federal law when the federal issue is merely anticipated, but not certain to arise.[37] In principle, a federal court is powerless to compel an answer in a case seeking to invoke federal question jurisdiction unless the federal question has already "arisen" as an essential ingredient of the plaintiff's complaint.[38] In a "well-

34. *See infra* note 232 and accompanying text.

35. *See, e.g.*, 13B CHARLES A. WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 3566 (2d ed. 1984); Miller, *supra* note 13; Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Alan D. Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563, 605 (1981); Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 COLUM. L. REV. 983 (1979); AMERICAN LAW INSTITUTE STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1312 (1969) [hereinafter ALI STUDY]; RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 190 (1995); Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between the State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769 (1992).

36. *See* Mishkin, *supra* note 35, at 176–77; WRIGHT & MILLER ET AL., *supra* note 35, § 3566, at 87–89.

37. *See Gully*, 299 U.S. at 117; *Mottley*, 211 U.S. at 152. *See generally* WRIGHT & MILLER ET AL., *supra* note 35, § 3566, at 84; Mishkin, *supra* note 35, at 163.

38. *See generally* Hornstein, *supra* note 35, at 605; Note, *supra* note 35, at 986 & n.22; ALI STUDY, *supra* note 35, § 1312, at 189–90.

pleaded" complaint, a plaintiff must state the essential ingredients of the cause of action alleged, and the federal court can assess its subject matter jurisdiction by disregarding any extraneous federal issue that is not essential to the plaintiff's claim.[39] Thus, the rule has been variously stated in a manner reflecting the strict formalities of pleading:

- "[a] suit arises under the law that creates the cause of action."[40]
- "whether a case is one arising under [federal law]...must be determined from what necessarily appears in the plaintiff's statement of his own claim... unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."[41]

Under this "quick rule of thumb,"[42] if only state law defines the elements of the plaintiff's action, the court will lack federal question subject matter jurisdiction.[43] This serves the "deeply felt and traditional reluctance" of the Supreme Court to expand federal court jurisdiction in a manner that could interfere with state courts.[44]

The apparent bright-line test for federal question jurisdiction provided by this formal rule has yielded to exceptions and qualifications when urgent or unique federal issues have dominated the resolution of a controversy, whether or not those issues are part of the plaintiff's "well-pleaded" complaint.[45] The contortions of logic that have ensued to sustain the rule in the face of practical realities requiring departures from it have left the problem of federal question jurisdiction in a state of doctrinal disrepair.[46] To meet the Court's concern in *Inyo County*, tribes, tribal officials, or tribe-affiliated parties seeking federal court relief from the imposition of state authority in violation of federal law protections of tribal sovereignty must fit within the logic of the rule or its anomalous exceptions.[47] The Supreme Court has

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39. *See generally* Hornstein, *supra* note 35, at 605; Note, *supra* note 35, at 986 & n.22; ALI STUDY, *supra* note 35, § 1312, at 189–90.

40. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916), *overruled in part by Franchise Tax Bd.*, 463 U.S. 1.

41. Okla. Tax Comm'n v. Graham, 489 U.S. 838, 840–41 (1989) (per curiam) (quoting Taylor v. Anderson, 234 U.S. 74, 75–76 (1914)).

42. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 832 (2002) (quoting *Franchise Tax Bd.*, 463 U.S. at 11).

43. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); *Franchise Tax Bd.*, 463 U.S. at 10; *Gully*, 299 U.S. at 116.

44. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379–80 (1959); *see Franchise Tax Bd.*, 463 U.S. at 9–10.

45. *See infra* text accompanying notes 69–102.

46. *See Franchise Tax Bd.*, 463 U.S. at 4 (applying the rule "for reasons involving perhaps more history than logic"). "There is no 'single, precise definition' of th[e] concept [of federal question jurisdiction]; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.'" Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax Bd.*, 463 U.S. at 8). Little guidance can be found in Justice Cardozo's eloquent prose on the subject: "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation.... [What is needed is] a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully*, 299 U.S. at 117–18 (citations omitted).

47. A number of recent cases address the tangle of problems presented by the rule. *See, e.g.*, Aroostook Band of Micmacs v. Executive Dir. Me. Human Rights Comm'n, 307 F. Supp. 2d 95 (D. Me. 2004); Cayuga Indian Nation v. Vill. of Union Springs, 293 F. Supp. 2d 183 (N.D.N.Y. 2003); Penobscot Nation v. Georgia-Pacific Corp., 106 F. Supp. 2d 81 (D. Me. 2000), *aff'd on other grounds*, 254 F.3d 317 (1st Cir. 2001).

tailored the operation of the well-pleaded complaint rule in federal court cases brought pursuant to *Ex parte Young*[48] to enjoin assertions of state authority that threaten to violate federal law. Significant lessons derive from that context.

B. The Well-Pleaded Complaint Rule and Ex parte Young *Actions*

Whether a case is removed to federal court on the basis of federal question jurisdiction or is initially brought there on that basis, the application of the well-pleaded complaint rule is the same.[49] A case commenced in state court under state law cannot be removed to federal court on the ground that a federal immunity or law bars the suit.[50] In *Gully v. First National Bank in Meridian*,[51] Justice Cardozo declared, "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby."[52] Since the well-pleaded complaint rule applies equally to cases originating in federal court and those removed from state courts, a would-be state court defendant cannot commence suit in federal court on the basis of a federal defense to a state court action to prevent the occurrence of such an action.[53] The federal law issue, arising as a defense to a state court action, must be fought out in the state courts. Justice Frankfurter, in language as emphatic as Justice Cardozo's declaration in *Gully*, wrote for the Court in *Skelly Oil Co. v. Phillips Petroleum Co.*[54] that "[t]o sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because...artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress [and] disregard the effective functioning of the federal judicial system."[55]

The federal courts and commentators, however, recognize and accept what appears, at first glance, to be an anomaly. At least in the context of actions commenced in federal court pursuant to *Ex parte Young*,[56] the same federal controversy at issue in a non-removable state court action may serve as the basis for a federal court action commenced by the state court defendant (turned federal court plaintiff) over which federal question jurisdiction exists.[57] Under *Ex parte Young*, state officials "who threaten and are about to commence proceedings either of a civil or criminal nature" in violation of the Federal Constitution "may be enjoined by a

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48. 209 U.S. 123 (1908).

49. *Franchise Tax Bd.*, 463 U.S. at 10 n.9.

50. One commentator appropriately points out that the term "federal *question*" jurisdiction is a misnomer; it should more accurately be described as "federal *claim*" jurisdiction. Mishkin, *supra* note 35, at 170–71.

51. 299 U.S. 109 (1936).

52. *Id.* at 116.

53. *See id.*; *see also* Okla. Tax Comm'n v. Graham, 489 U.S. 838, 840 (1989) (per curiam); *infra* Part V.C.

54. 339 U.S. 667 (1950).

55. *Id.* at 673–74.

56. 209 U.S. 123 (1908).

57. For example, in *Phillip Morris Inc. v. Harshbarger*, 946 F. Supp. 1067 (D. Mass. 1996), Phillip Morris was both a defendant in a case brought by the Commonwealth of Massachusetts in the state court and a plaintiff against the Massachusetts attorney general in the federal court. The federal court rejected Phillip Morris's attempt to remove the state court action but retained jurisdiction over the separate federal court action, in which Phillip Morris sought to enjoin the attorney general from invoking the state law claim that gave rise to the parallel state court case. *See id.* at 1070, 1073.

Federal court of equity from such action."[58] The federal district courts have federal question jurisdiction over such actions[59] even though the claims raised could serve as defenses to the assertion of state law by the same state officials (or their agents) against the federal court plaintiff in the posture of a defendant in state court.[60] In *Shaw v. Delta Air Lines, Inc.*,[61] the Court explained, "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."[62] Doctrines of repose or comity, such as abstention,[63] might warrant a federal court staying its hand, but subject matter jurisdiction—the power of the court to hear the case—is established in such cases.[64]

Shaw leaves unresolved the issue of whether *Ex parte Young* claims against state actors are the only kinds of equitable claims for relief against imposed state authority that avoid the well-pleaded complaint rule. If *Shaw* were limited in that way, then a tribe could not bring an action in federal court to enjoin a private party from proceeding against it with a state common law or statutory cause of action in violation of federal law protections. Nor could a tribe, like the Paiute-Shoshone Indians in *Inyo County*, seek to enjoin county or municipal officials, since the *Ex parte Young* construct, grounded in the Eleventh Amendment, involves only injunctions against state officials.[65]

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58. 209 U.S. at 156; *accord* Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645 (2002) (stating that a "complaint [that] alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" states a proper claim under *Ex parte Young* (quoting Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment))).

59. *See Ex parte Young*, 209 U.S. at 143–45.

60. *See, e.g.*, Illinois v. Gen. Elec. Co., 683 F.2d 206, 209 (7th Cir. 1982); *Harshbarger*, 946 F. Supp. at 1073 (citing cases and commentary). A proper claim under *Ex parte Young* satisfies both the well-pleaded complaint rule and the Eleventh Amendment. *See id.* at 1071–72. *Ex parte Young* is known less for its utility in establishing federal question jurisdiction, however, and more for founding a legal fiction to circumvent the Eleventh Amendment's prohibition of federal court jurisdiction over suits against states. Under that fiction, a state officer embarking on a course in violation of federal law cannot be deemed to act on behalf of the State *qua* State because such an officer would be acting in an illegitimate manner. *See Ex parte Young*, 209 U.S. at 159–60; Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring in part and concurring in judgment). Thus, suits to enjoin such officers are not considered suits against states that would be barred by the Eleventh Amendment. Of course, as a practical matter, but for the *Ex parte Young* fiction, federal courts would be impotent to prevent continuing violations of federal law by state actors. *See id.* at 269; Green v. Mansour, 474 U.S. 64, 68 (1985).

61. 463 U.S. 85 (1983).

62. *Id.* at 96 n.14 (citing *Ex parte Young*, 209 U.S. at 160–62).

63. *See Harshbarger*, 946 F. Supp. at 1076–79 (discussing and applying abstention doctrines requiring federal courts to abstain to allow state courts to resolve related disputes between the same parties); *see also* Winnebago Tribe v. Stovall, 341 F.3d 1202, 1204–05 (10th Cir. 2003) (refusing to abstain in favor of pending state court proceeding involving same parties when state jurisdiction turns on federal Indian law and citing cases).

64. *See Harshbarger*, 946 F. Supp. at 1070–79.

65. *See* Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 906–10 (9th Cir. 2002), *vacated on other grounds*, 538 U.S. 701 (2003); *see also* Lincoln County v. Luning, 133 U.S. 529, 530–31 (1890) (holding that the term "state," as used in the Eleventh Amendment, does not include municipalities or counties); Ceballos v. Garcetti, 361 F.3d 1168, 1182–83 (9th Cir. 2004) (discussing distinctions between state and county officials).

Courts and commentators have struggled to establish coherent grounds for limiting federal court jurisdiction over actions to enjoin assertions of state power solely to *Ex parte Young* actions in the face of the well-pleaded complaint rule. One treatise states that "on principle" the *Shaw* rule should be "confined to actions to which state officials are parties." WRIGHT & MILLER ET AL., *supra* note 35, § 3566, at 102. It provides no reasoning to support that view other than that *Ex parte Young* recognized an "implied right of action for injunctive relief against state officers who are threatening to violate" federal law. *Id.* The First Circuit questions the meaningfulness of distinguishing between a claim to enjoin a private party and a claim to enjoin a state actor, but nevertheless observes it in construing the *Shaw* exception to the well-pleaded complaint rule. Playboy Enters. v. Pub. Serv. Comm'n, 906

Such a limitation makes little sense in the context of conflicts about state power over Indian tribes, tribal property, or reservation affairs. If a tribe has an established right under a federal treaty, a federal statute, or as a matter of federal common law to be free from state authority over its affairs and property, a federal court in equity should have power to issue an injunction in favor of the tribe to protect that right whether it is threatened by a state actor, by local authorities, or by corporations or individuals. Just because such a claim may prevent a state court action from proceeding or allow what could be a federal defense to a state cause of action to operate affirmatively as the ground for a claim in federal court does not mean that the claim, like an action under *Ex parte Young*, does not "arise under" federal law.

Federal courts often entertain actions by local officials, corporations, and individuals against tribes or tribal officials to prevent the imposition of tribal authority in violation of federal law.[66] The unique importance of federal court adjudication over these controversies mandates recognition that they arise under federal law to ensure their resolution by federal courts. The same imperative warrants ensuring that actions by Indian tribes or tribe-affiliated parties to prevent the imposition of state authority in violation of federal law proceed in federal court, whether brought against state officials, under *Ex parte Young*, or against other parties.[67] Indeed, the federal courts regularly entertain claims for injunctive relief by Indian tribes or the United States to prevent defendants who are not state officials from proceeding with coercive state law claims against tribes in violation of federal law, tacitly accepting such claims as cognizable federal causes of action.[68]

The Supreme Court's cautious departures from the strict confines of the well-pleaded complaint rule when unique and important issues of federal law dominate a dispute informs this discussion, for similarly important federal law concerns dominate claims in cases like *Inyo County*, where federal limitations upon the imposition of state authority over tribal matters are at issue. The following section reviews the Court's limited flexibility with respect to the rule and examines the rule's consequences for the subject at hand.

C. "Artful Pleading" of Federal Claims to Invoke Federal Question Jurisdiction

The so-called "artful pleading" doctrine for avoiding the well-pleaded complaint rule involves the recharacterization of a state cause of action as federal so that it can be deemed to "arise under" federal law for the purposes of section 1331. Artful

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F.2d 25, 30 (1st Cir. 1990); *accord* Penobscot Nation v. Georgia-Pacific Corp., 106 F. Supp. 2d 81, 83 n.4 (D. Me. 2000), *aff'd on other grounds*, 254 F.3d 317 (1st Cir. 2001); Me. Cent. R.R. v. Ry. Labor Executives Ass'n, 835 F. Supp. 16, 18 (D. Me. 1988). The Second Circuit has avoided the issue but noted it in passing. *See* Concerned Citizens v. Envtl. Conservation, 127 F.3d 201, 207 (2d Cir. 1997) (concluding "that at a minimum, there must be adversity between the plaintiff and the state enforcing authorities," but declining to decide whether a state official must be a defendant). The Fifth Circuit appears to take seriously the possibility that a party could invoke federal question jurisdiction in an action to enjoin a private party from imposing state law in violation of federal law but has not squarely addressed the issue. *See* Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1180 n.7 (5th Cir. 1984) (noting, in declining federal question jurisdiction, that a private party had not threatened to sue under the state law alleged to be barred as a matter of federal law).

66. *See infra* notes 189–192 and accompanying text.

67. *See infra* notes 193, 228–230 and accompanying text.

68. *See infra* notes 203, 223–224, 248, and 265.

pleading takes two principal forms.[69] The first involves recharacterizing a state cause of action as "federal" because a federal issue can be found embedded in the claim.[70] In this instance, although the complaint indisputably asserts only a state law cause of action, if the plaintiff's asserted right to relief "requires resolution of a *substantial* question of federal law," federal question jurisdiction can be invoked.[71] The source of this exception to the ironclad requirement of a federal cause of action is *Smith v. Kansas City Title & Trust Co.*[72]

In *Smith*, a corporate shareholder commenced an action in federal court to enjoin his corporation from investing in bonds issued under the Federal Farm Loan Act.[73] The plaintiff claimed that such investments would constitute a breach of fiduciary duty under state law because the Act was unconstitutional, and that the defendant corporation could not, therefore, purchase the bonds.[74] While the cause of action was wholly state-created, the Court announced "the general rule" that if the complaint reveals that a plaintiff's "right to relief depends upon the construction or application of" a significant issue of federal law, the district court has federal question jurisdiction.[75] The Court, therefore, departed from the hard-and-fast notion that, to avoid the well-pleaded complaint rule, a federal cause of action must appear on the face of the complaint. It allowed the plaintiff to proceed in federal court not because the complaint stated a federal cause of action, but because the plaintiff's ultimate right to relief turned on an important question of federal law.[76] Fearful that such a

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69. *See generally* Miller, *supra* note 13, at 1784–98.

70. *See id.* at 1786–89.

71. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (emphasis added) (quoting *Franchise Tax Bd.*, 463 U.S. 1, 13); *see also Merrell Dow Pharm., Inc.*, 478 U.S. at 819 (Brennan, J., dissenting) ("[I]t is firmly settled that there may be federal-question jurisdiction even though both the right asserted and the remedy sought by the plaintiff are state created.").

72. 255 U.S. 180 (1921).

73. *Id.* at 195.

74. *See id.* at 198.

75. *Id.* at 199.

76. While commentators have speculated whether federal question jurisdiction under *Smith* will survive as a viable exception to the "cause of action" test for the well-pleaded complaint rule, there is general agreement that the Court continues to reconfirm *Smith*. *See generally* Note, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV. L. REV. 2272 (2002); Miller, *supra* note 13, at 1792; Redish, *supra* note 35, at 1793. *See also infra* note 77. The *Smith* rule has been applied by the lower federal courts in a fumbling manner (and often over vigorous dissents) in a variety of contexts. *See, e.g.*, Templeton Bd. of Sewer Comm'rs v. Am. Tissue Mills of Mass., Inc., 352 F.3d 33 (1st Cir. 2003) (declining to find federal question jurisdiction for declaratory judgment seeking construction of Clean Water Act requirements affecting contract obligation); Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997) (finding federal question jurisdiction over suit brought by tribes for breach of gaming compact negotiated pursuant to the federal Indian Gaming Regulatory Act (IGRA) even though IGRA provided no federal cause of action); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997) (finding federal question jurisdiction to exist in case involving state tort claim that could affect foreign mining industry, because the case implicated significant foreign policy considerations); W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188 (2d Cir. 1984) (finding federal question jurisdiction over claim for declaratory judgment that defendant breached a lease in violation of the Federal Condominium and Cooperative Abuse Relief Act even though that Act provided no federal cause of action); Garvin v. Alumax of S.C., Inc., 787 F.2d 910 (4th Cir. 1986) (finding federal question jurisdiction over state tort claim against manufacturer and owner of a ship loader because plaintiff's ability to proceed in the face of a state law immunity defense turned on plaintiff's asserted claim that the immunity defense was preempted by the Federal Longshoremen's and Harbor Workers' Compensation Act).

standard could open the floodgates for litigation in the federal courts, the Supreme Court has since declared that this proposition "must be read with caution."[77]

The second form of "artful pleading" is known as "complete preemption."[78] In a complete preemption case, a plaintiff may assert a state cause of action and face removal to federal court because the defendant claims that the plaintiff's state law cause of action is "completely" preempted by federal law.[79] The underlying rationale for this accommodation of the well-pleaded complaint rule is that, if a state court defendant can assert a federal preemption defense in a manner that "recharacterize[s] [the] plaintiff's claim as federal in nature, the federal issue is not a defense, but rather actually provides the basis for the plaintiff's cause of action."[80] Stated another way,

> In complete preemption cases, federal law so occupies the field that any complaint alleging facts that come within the [federal] statute's scope necessarily "arise under" federal law, even if the plaintiff pleads a state law claim only. It is not just that a preemption defense is present, but that it is so persuasive that the claim must be deemed completely federal from its inception.[81]

Thus far, the "complete preemption" exception to the well-pleaded complaint rule has been recognized only in two contexts: labor contract actions commenced under state law, which are deemed completely preempted by the Labor Management Relations Act (LMRA),[82] and state law actions involving employee benefit matters, which are similarly considered completely preempted by the Employment Retirement Income Security Act (ERISA).[83]

The artful pleading doctrine, in both forms—the "substantial" federal question standard under *Smith* and the "complete preemption" standard applied to claims preempted by the LMRA or ERISA—turns the well-pleaded complaint rule on its head.[84] "[T]he propriety of removal...depends on whether the case originally could have been filed in federal court,"[85] and under the established formulation of the well-

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77. *Merrell Dow Pharm. Inc.*, 478 U.S. at 809. One court skeptically declares, "The Supreme Court has periodically affirmed this basis for jurisdiction in the abstract..., occasionally cast doubt upon it, rarely applied it in practice, and left the very scope of the concept unclear." Almond v. Capital Props., Inc., 212 F.3d 20, 24 (1st Cir. 2000) (Boudin, J.). In *Merrell Dow Pharmaceuticals, Inc.*, the Court made clear that "the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." 478 U.S. at 808.

78. *See generally* Miller, *supra* note 13, at 1793–1800.

79. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557 (1968).

80. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 103.45[2] (3d ed. 2003).

81. *Id.* (footnote omitted); *see also* Schmeling v. NORDAM, 97 F.3d 1336, 1342–43 (10th Cir. 1996) (explaining the Supreme Court's application of the complete preemption doctrine).

82. Labor-Management Relations Act, 29 U.S.C. §§ 141–187 (2000); *see Avco Corp.*, 390 U.S. 557.

83. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2000); *see Metro. Life Ins. Co.*, 481 U.S. 58.

84. In a recent dissenting opinion, Justice Scalia described the "complete preemption" exception to the well-pleaded complaint rule as "jurisdictional alchemy," pointing out that none of the Court's precedents explains how the nonviability of a state cause of action due to the preemptive force of federal law "magically transform[s] that claim into one 'arising under' federal law." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 14–15 (2003) (Scalia, J., dissenting); *see also* Miller, *supra* note 13, at 1797 (pointing out that the "complete preemption" rule is inconsistent with the well-pleaded complaint rule).

85. *City of Chicago*, 522 U.S. at 163 (citing *Caterpillar Inc.*, 482 U.S. at 392; *Franchise Tax Bd.*, 463 U.S. at 8).

pleaded complaint rule, neither a state cause of action with an embedded federal issue (no matter how "substantial") nor a state cause of action facing a federal defense of "complete preemption" could be removed.[86] No federal law gives rise to the cause of action.[87]

The "substantial federal question" variant of the artful pleading doctrine, under *Smith*, allows federal courts "to go beyond the text of the complaint to inquire into the true nature of the plaintiff's claim and to provide a federal forum when, and only when, the federal interest merits its availability."[88] The "complete preemption" variant likewise allows courts to look past the four corners of the complaint and consider whether substantive federal law so governs the claim that the alleged state law is devoid of force.[89] Two questions linger in this "remarkably tangled corner of the law."[90] First, when is a federal question that is embedded within a state cause of action sufficiently "substantial" to trigger federal question jurisdiction?[91] Second, how strong must the federal interest be to trigger federal question jurisdiction under the "complete preemption" rule?[92] The Supreme Court has offered little guidance on these questions.

At base, these exceptions to the well-pleaded complaint rule reflect the necessity of ensuring that some cases presenting important questions of federal law are routed directly to federal court rather than moved through the state court system with the off-chance of later review in the Supreme Court.[93] State court adjudication presents a risk of harm to federal interests in these cases. The substantial-federal-question branch of the artful pleading doctrine ensures "that certain federal principles are interpreted consistently."[94] The purpose of the "complete preemption" branch is to vindicate Congress's apparent desire to abrogate state causes of action in particular substantive areas.[95] Courts have been timid in applying both branches, however, lest

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86. *Id.*

87. In *Avco Corp.*, establishing the complete preemption doctrine in the context of the LMRA, the complaint asserted a state law contract claim. 376 F.2d 337, 339 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968). In *Metropolitan Life Insurance Co.*, where the Court applied the doctrine in the ERISA context, the plaintiff brought state law tort and contract claims. 481 U.S. at 61.

88. Miller, *supra* note 13, at 1785; *see Merrell Dow Pharm. Inc.*, 478 U.S. at 814 n.12.

89. *See* Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 830 (1986). In the complete preemption context, the very assertion of state authority is anathema to federal interests. A well-known treatise writer suggests that a better term for "complete preemption" would be "jurisdictional preemption" because the decision about federal court jurisdiction subsumes a determination on the merits: that a state cause of action is preempted as a matter of federal law. MOORE, *supra* note 80, ¶ 103.45[2].

90. *See Almond*, 212 F.3d at 22.

91. *See* Miller, *supra* note 13, at 1788 (exploring this issue).

92. *See* Fleet Bank, Nat'l Ass'n v. Burke, 160 F.3d 883, 890 (2d Cir. 1998) (assessing significance of federal issue necessary to trigger "complete preemption" basis for section 1331 jurisdiction).

93. *See generally* Miller, *supra* note 13, at 1820–21; Twitchell, *supra* note 89, at 827.

94. Miller, *supra* note 13, at 1821.

95. *See id.* at 1821–22. The Supreme Court explains the rationale for the "complete preemption" doctrine as follows:

> A few areas, involving "uniquely federal interests" are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by..."federal common law."

Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988); *accord* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001).

they trample on the prerogatives of state judiciaries or open the federal courts to a new and large array of cases.[96]

The well-pleaded complaint rule, it should be remembered, while heeded with the sanctity accorded constitutional doctrines, is not such a doctrine. Rather, it is a judge-made rule of construction applied to Congress's grant of original jurisdiction to the federal district courts over "all civil actions arising under the Constitution, laws, or treaties of the United States" pursuant to 28 U.S.C. § 1331. If any constitutional principle governs the construction of section 1331 it is that the federal courts have a duty *to accept* the jurisdiction that Congress has conferred upon them.[97] The *declination* of jurisdiction under the well-pleaded complaint rule, therefore, should not be undertaken lightly,[98] especially when uniquely significant federal rights are at stake.[99]

When Indian tribes seek to prevent assertions of state authority that violate their federally protected rights to be free of such authority, a federal court's constitutional obligation to take jurisdiction should be the foremost consideration, for the outcomes of such controversies can shape tribes' identities as sovereigns with significant, long-term consequences for relations between tribes, states, and the federal government.[100] Indeed, the same federal interests underlying the artful pleading doctrine are uniquely at stake when tribes face the imposition of state authority in apparent violation of their rights secured by federal statutes, treaties, or as a matter of federal common law. The imposition of that authority, in the very form of a state court proceeding against the tribe under state law, would constitute harm to the tribe's federal right to be free from such state action or process.

In this setting, the two principal goals of the well-pleaded complaint rule, federalism and conservation of federal court resources, fall by the wayside. The notion that, under principles of federalism, a state judiciary should have the first crack at deciding the scope of state power over an Indian tribe or its reservation property or affairs is contrary to both the federal government's historic protection

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96. *See generally* Almond v. Capital Props., Inc., 212 F.3d 20, 24 & n.2 (1st Cir. 2000) (discussing rare application of the substantial federal question variant of the artful pleading doctrine and citing cases); Miller, *supra* note 13, at 1786, 1797 ("The *Smith* principle has been given limited application in the years since its establishment....Because of the obvious federalism implications of the complete-preemption doctrine...its application thus far has been extremely limited by the lower federal courts.").

97. Federal district courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), *quoted in* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358 (1989).

98. As Justice Brennan wrote for the Court in *England v. Louisiana State Board of Medical Examiners*:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal...claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts....

375 U.S. 411, 415 (1964).

99. *Id.*

100. *See* Rice v. Rehner, 463 U.S. 713, 719 (1983) (stating that the "historical traditions of tribal independence" from state authority "reflect the accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other") (quotations and citations omitted).

of Indian tribes from state intrusions and the doctrine of Indian sovereignty.[101] Like the cases that fall within the artful pleading doctrine, federal interests necessitate federal court resolution of the controversy in the first instance. Such controversies, often turning on principles of federal Indian common law, are too important to entrust to the state courts.[102] Moreover, cases presenting unique questions about the scope of state power over Indian affairs are hardly likely to flood the federal docket. Part III describes the basic federal principles at issue in *Inyo County* and cases like it.

III. THE INDIAN SOVEREIGNTY DOCTRINE

The "Indian sovereignty doctrine"[103] derives from the federal government's protection of the authority of Indian tribes over their territory and members from competing state authority.[104] It is grounded in the constitutional plenary authority of the federal government over Indian affairs.[105] Three aspects of the doctrine shield tribes and their affairs from state authority: tribal sovereign immunity,[106] a special federal preemption standard for cases involving the interests of Indian tribes,[107] and the rule that state authority is prohibited if it infringes upon tribal self-government confirmed by federal law.[108]

In *Inyo County*, the Tribe asserted all three aspects of the doctrine in its complaint for declaratory and injunctive relief to prevent the county, its district attorney, and

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101. *See infra* note 103 (describing the doctrine); *see also infra* notes 113–129 and accompanying text (describing federal Indian common law principles).

102. "In areas governed by federal common law..., federal jurisdiction is needed to generate a body of precedent with the unique federal perspective that gives this law its distinctive tone and content." Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 86–87. The contours of state and tribal authority over reservation and tribal affairs, largely established by federal common law, are "anomalous" and "complex." *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42 (1980). Since Congress established section 1331 federal question jurisdiction to promote uniformity in areas of complex federal law, *see* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 826–28 & n.6 (1986) (Brennan, J., dissenting), cases involving tribal-state conflicts are particularly in line with Congress's concern.

103. The "Indian sovereignty doctrine" is used herein as an umbrella term to refer to federal law protections of tribal authority vis-à-vis state power. *See infra* notes 113–129 and accompanying text. The Supreme Court describes the "Indian sovereignty doctrine, which historically gave states 'no role to play' within a tribe's territorial boundaries," as the "backdrop" against which applicable statutes or treaties affecting Indian tribes must be read. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123–24 (1993) (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168, 172 (1973)); *see* Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973). In discussing the doctrine, the Court refers to the "'deeply rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.'" *Okla. Tax Comm'n*, 508 U.S. at 123 (quoting *McClanahan*, 411 U.S. at 168 (quoting Rice v. Olson, 324 U.S. 786, 789 (1945))). The Court notes that Congress has "acted consistently upon the assumption that States have no power to regulate the affairs of Indians on a reservation." Williams v. Lee, 358 U.S. 217, 220; *see also* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1253–55 (10th Cir. 2001) (discussing "the doctrine of Indian sovereignty").

104. *See, e.g.*, *McClanahan*, 411 U.S. at 168; *Bryan*, 426 U.S. at 376 n.2; *see also Williams*, 358 U.S. at 218–20.

105. *Williams*, 358 U.S. at 219. Tribal sovereignty carries with it "a historic immunity from state and local control." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973)); *see also supra* note 26.

106. *See infra* text accompanying notes 113–129.

107. *See infra* text accompanying notes 120–123.

108. *See infra* text accompanying notes 124–125.

its sheriff from executing search warrants on the Tribe within the reservation.[109] By bringing a claim under 42 U.S.C. § 1983, the Tribe asserted a cognizable federal cause of action; although, as noted above, the Tribe was held not to be able to assert that claim.[110] In the absence of that claim, the Supreme Court questioned whether federal question jurisdiction could be sustained by the remainder of the complaint, which invoked common law rules of tribal sovereignty as a basis for declaratory and injunctive relief.[111] Indeed, it asked for "focused consideration and resolution of that jurisdictional question" on remand.[112] The Court should not have paused. The uniquely (and necessarily) federal nature of the law governing the competing authority of tribes and states shows that it is imperative for federal courts, not state courts, to resolve disputes in this area.

Sovereign Immunity. Sovereign immunity protects the dignitary interest of a sovereign to be free from judicial authority without its consent.[113] Indian tribes retain sovereign immunity as part of their "inherent sovereign authority," predating the Republic.[114] Like other attributes of "Indian sovereignty and self-government,"[115] a tribe's sovereign immunity from suit "is privileged from diminution by the States."[116] "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[117] The immunity is a jurisdictional constraint.[118] Thus, where it is present, state courts lack power, as a matter of federal law, to proceed.[119]

Federal Preemption. The special rule of federal preemption in the Indian context derives from the federal government's duty to "protect the Indians and their property against interference...by a state."[120] In the field of Indian affairs, the Court has

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109. *See* Complaint of the Bishop Paiute Tribe, Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701 (2003).

110. *See supra* note 3 and accompanying text.

111. *Inyo County*, 538 U.S. at 712.

112. *Id.*

113. For several descriptions of the value of a state's sovereign immunity, see *Alden v. Maine*, 527 U.S. 706, 714 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996); *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 268 (1997); and *Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (citing *Seminole Tribe*, 517 U.S. 44).

114. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 51, 56 (1978)); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1065 (1st Cir. 1979).

115. Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890 (1986).

116. *Id.* at 891; *accord* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998); *see also* Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.").

117. *Kiowa Tribe*, 523 U.S. at 754.

118. *See* Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165, 172–73 (1977); Florida v. Seminole Tribe, 181 F.3d 1237, 1240 n.4 (11th Cir. 1999); *Bottomly*, 599 F.2d 1061.

119. *See generally infra* notes 134, 203–204 (citing cases). Sovereign immunity is not synonymous with tribal sovereignty; rather, it is one attribute of the status of Indian tribes as governments. *See In re* Greene, 980 F.2d 590, 595 (9th Cir. 1992) (explaining the distinction).

120. *Bryan*, 426 U.S. at 376 n.2. The Supreme Court has observed that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *Id.* (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 170–71 (1973) (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958))). *But see* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214–15 (1987) (stating that there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent"). The Court has rejected the view that state authority can be presumed to apply to tribes, stating that that is "simply not the law." *Id.* at 216 n.18

"rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required."[121] Rather, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable."[122] If a state seeks to regulate non-Indian activity on a reservation, the Indian preemption standard calls "for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[123]

The Infringement Test. Finally, the Court has announced that absent governing acts of Congress, state authority that affects a tribe's control over its territory or members, including state judicial authority invoked by private litigants, cannot be imposed upon a tribe or its members if it "infringes on the right of reservation Indians to make their own laws and be ruled by them."[124] This barrier to state authority is grounded in the Court's historic protection of "inherent tribal sovereignty" under principles of federal common law and in accordance with congressional policy.[125]

Cases generating the application of the foregoing rules usually involve some consideration of federal treaties or statutes.[126] Observing that today, "in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction," the Supreme Court relies less upon "platonic notions of Indian sovereignty" and looks more to relevant treaties and statutes in order to discern the limits of state power over Indian affairs.[127] Nevertheless, areas of tribal sovereignty that traditionally have remained immune from state control as a matter of federal common law will remain so "except where Congress has expressly provided that State laws shall apply."[128] "Repeal by implication of an established tradition of [tribal] immunity or self-governance is disfavored."[129]

(quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980)).

121. *White Mountain Apache Tribe*, 448 U.S. at 144 (citations omitted). "Complete preemption" is not necessary to oust state power over Indian affairs. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) ("The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively preempted by federal statute."); *see also* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 792 (1991) (Blackmun, J., dissenting) ("[S]pheres of activity otherwise susceptible to state regulation are 'according to the settled principles of our Constitution,...committed exclusively to the government of the Union,' *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561, where Native American affairs are concerned....") (alteration in original).

122. *White Mountain Apache Tribe*, 448 U.S. at 144.

123. *Id.* at 145.

124. *Williams*, 358 U.S. at 220; *accord Mescalero Apache Tribe*, 462 U.S. at 334 n.16; *White Mountain Apache Tribe*, 448 U.S. at 142.

125. *See Mescalero Apache Tribe*, 462 U.S. at 334 n.16; *Cabazon*, 480 U.S. at 222; *Williams*, 358 U.S. at 220–23.

126. Congress ended all treaty making with tribes in 1871 and substituted unilateral Congressional enactments as the primary method of addressing the property and other rights of Indian tribes. 25 U.S.C. § 71 (2000). One writer observes, "By this time, the United States had dropped all pretense of dealing with Indian tribes...as anything more than the nation's wards incapable of speaking for themselves." EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE 80 (1991); *see also* CANBY, *supra* note 26, at 108–09 (describing the federal government's transition from treaty making to statutory enactment in dealing with tribes).

127. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 & n.8 (1973).

128. Rice v. Rehner, 463 U.S. 713, 719–20 (1983) (quoting *McClanahan*, 411 U.S. at 170–71 (quoting U.S. DEP'T OF THE INTERIOR, *supra* note 120, at 845)).

129. *Id.* at 720.

IV. DISTILLING THE PROBLEM

Tribes and tribe-affiliated parties seeking federal court protection from the imposition of state authority in violation of the Indian sovereignty doctrine or a specific federal treaty or statute governing a particular tribe must craft a federal complaint that properly "arises under" federal law under the terms of the well-pleaded complaint rule. Such claims must either be "deemed" to arise under federal law in like manner to those under the artful pleading doctrine[130] or be considered federal "causes of action," like claims fitting the *Ex parte Young* model.[131] This part sets forth the context for this challenge. As explained below, notwithstanding apparent constraints in establishing cognizable federal "causes of action," equity provides tribes and tribe-affiliated parties with flexibility to present claims "arising under" federal law when a ripe controversy is presented over the proper boundary between state and tribal authority.

Controversies about the scope of state power over tribes and reservation affairs arise in a variety of settings particular to federal Indian law.[132] The prototypical case is one in which a tribe seeks injunctive relief from a federal court to prevent a private party or a state or local official from imposing state authority (by means of a state common law or statutory claim) upon the tribe or a matter of significant concern to the tribe.[133] The tribe's claim for injunctive relief may be based upon tribal sovereign immunity,[134] federal preemption under the rule applicable in Indian

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130. *See supra* text accompanying notes 69–96.

131. *See supra* Part II.B.

132. Controversies about the competing authority of tribes and states are prevalent in so-called "P.L. 280" states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin), where Congress approved state jurisdiction over certain criminal cases and civil controversies arising within Indian reservations pursuant to sections 2 and 4 of Public Law 280, 67 Stat. 588, enacted in 1953 (codified at 18 U.S.C. § 1162(a) (2000); 28 U.S.C. § 1360(a) (2000)). *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976); Quechan Indian Tribe v. McMullen, 984 F.2d 304 (9th Cir. 1993); Confederated Tribes v. Washington, 938 F.2d 146 (9th Cir. 1991); Jones v. State, 936 P.2d 1263 (Alaska Ct. App. 1997). Such controversies are also plentiful in the context of the eastern Indian land claims settlement acts, enacted by Congress in the 1980s to resolve massive land claims of tribes in Maine, Rhode Island, Connecticut, and Massachusetts. *See, e.g.*, Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994); Narragansett Indian Tribe v. Rhode Island, 296 F. Supp. 2d 153 (D.R.I. 2003); Wiener v. Wampanoag Aquinnah Shellfish Hatchery Corp., 223 F. Supp. 2d 346 (D. Mass. 2002); State v. Spears, 647 A.2d 1054 (Conn. 1994); Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983).

133. *See supra* note 47; *infra* notes 136, 203–204, 212, 222–224, 228, 262. While the focus here is upon actions that Indian tribes may commence to protect against the imposition of state authority, tribal members and entities affiliated with tribes in economic ventures may, in some instances, invoke principles of tribal sovereignty in seeking to prevent imminent assertions of state authority. *See, e.g.*, Dep't of Taxation & Fin. v. Milhem Attea & Bros., 512 U.S. 61 (1994); *Rehner*, 463 U.S. 713; Fisher v. Dist. Court, 424 U.S. 382 (1976); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003); John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988). Tribes may intervene or bring actions on their own to protect their sovereignty interests in such cases. *See* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1242 (10th Cir. 2001); Shivwits Band of Pauite Indians v. Utah, 185 F. Supp. 2d 1245 (D. Utah 2002). Further, given the involvement of Indian tribal governments in economic enterprises, it is not always clear whether an entity threatened by state authority is considered the sovereign tribe or an entity distinct from the tribe. *See also infra* note 134.

134. *See infra* note 204. The extent to which tribal officers or employees enjoy the sovereign immunity of a tribe is an ever-increasing subject of litigation. *See, e.g.*, Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes, 261 F.3d 567, 570 (5th Cir. 2001); Tamiami Partners v. Miccosukee Tribe of Indians, 177 F.3d 1212, 1225–26 (11th Cir. 1999); Ariz. Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1133–34 (9th Cir. 1995); Turner v. Martire, 82 Cal. App. 4th 1042 (2000). So too is the extent to which tribal sovereign immunity extends to tribal business entities or economic enterprises. *See, e.g.*, Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 86 (2d Cir. 2001);

affairs, or on the ground that the threatened imposition of state authority infringes upon the right of tribal self-government.[135] Under any of these common law principles, the advancement of a state common law or statutory enforcement action could harm a tribe's federal right, secured by treaty, statute, or as a matter of federal common law, to be free from state authority or to govern its own affairs.[136]

If, in such a case, a state coercive action is commenced in state court before the tribe can file for relief in the federal court, the well-pleaded complaint rule would bar removal of the case to federal court unless, under the "artful pleading" doctrine, the tribe can convince a federal court that resolution of the state action necessarily requires resolution of a substantial federal issue or that the state action is subject to "complete preemption."[137] If, on the other hand, the tribe files for relief in federal court, the well-pleaded complaint rule could bar federal court jurisdiction if the district court perceives the tribe's invocation of the Indian sovereignty doctrine as asserting a mere defense to a state cause of action, rather than setting forth a cognizable federal claim such as an action under *Ex parte Young*.[138] The tribe would appear to be engaged in a "preemptive strike"[139] against a state proceeding or an attempt to "seize litigation from state courts."[140]

Under the strict formulation of the well-pleaded complaint rule, the quest for federal question jurisdiction collapses into a quest for identifying a federal cause of action.[141] Notwithstanding the Court's occasional willingness, under the artful pleading doctrine, to consider the prominence of a federal issue (as opposed to a federal "cause of action") in deciding whether federal question jurisdiction exists,[142] the lower federal courts inevitably apply the well-pleaded complaint rule in accordance with the original Holmes test by seeking to identify a federal cause of action.[143]

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 30 (1st Cir. 2000); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040 (8th Cir. 2000); Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1268–69 (10th Cir. 1998); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 809–10 (7th Cir. 1993); Md. Cas. Co. v. Citizens Nat'l Bank of W. Hollywood, 361 F.2d 517, 521 (5th Cir. 1966); Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131 (N.D. Okla. 2001); Parker Drilling Co. v. Metlakatla Indian Cmty., 451 F. Supp. 1127 (D. Alaska 1978); Atkinson v. Haldane, 529 P.2d 151 (Alaska 1977); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty., 674 P.2d 1376, 1378 (Ariz. Ct. App. 1983); Trudgeon v. Fantasy Springs Casino, 71 Cal. App. 4th 632, 638–39 (1999); Gavle v. Little Six, Inc., 555 N.W.2d 284, 294–96 (Minn. 1996).

135. *See infra* text accompanying notes 211–224.

136. *See, e.g.*, Kiowa Indian Tribe v. Hoover, 150 F.3d 1163, 1172 (10th Cir. 1998); Sac & Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995); Seneca-Cayuga Tribe v. Oklahoma *ex rel.* Thompson, 874 F.2d 709, 712–16 (10th Cir. 1989); Winnebago Tribe v. Stovall, 216 F. Supp. 2d 1226, 1234–39 (D. Kan. 2002), *aff'd*, 341 F.3d 1202 (10th Cir. 2003); Bowen v. Doyle, 880 F. Supp. 99, 136–37 (W.D.N.Y. 1995), *aff'd*, 230 F.3d 2000 (2d Cir. 2000); Tohono O'Odham Nation v. Schwartz, 837 F. Supp. 1024, 1030, 1034 (D. Ariz. 1993); *see also* Fort Belknap Indian Cmty. v. Mazurek, 43 F.3d 428 (9th Cir. 1994) (addressing merits of claim for injunctive relief from state enforcement of liquor laws).

137. *See supra* text accompanying notes 69–83.

138. *See supra* notes 17, 54–60 and accompanying text.

139. Fleet Bank, Nat'l Ass'n. v. Burke, 160 F.3d 883, 892 (2d Cir. 1998); *see* Colonial Penn Group, Inc. v. Colonial Deposit Co., 834 F.2d 229, 233 (1st Cir. 1987).

140. Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952).

141. *See supra* text accompanying notes 16–17, 39–43.

142. *See supra* text accompanying notes 69–83.

143. *See, e.g.*, Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 808 (1986); Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 116 (1936); Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1915), *overruled in part on other grounds by* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983); Templeton Bd. of Sewer Comm'rs v. Am. Tissue Mills of Mass., Inc., 352 F.3d 33, 39–40 (1st Cir. 2003); Wiener

If federal jurisdiction is not expressly provided by statute, "[t]he settled framework for evaluating whether a federal cause of action lies"—a framework first set forth in *Cort v. Ash*[144]—requires consideration of whether:

> (1) the plaintiff[] [is]...part of the class for whose special benefit the statute was passed; (2)...indicia of legislative intent reveal...[a] congressional purpose to provide a private cause of action; (3) a federal cause of action would...further the underlying purposes of the legislative scheme; and (4) the...cause of action is a subject traditionally relegated to state law.[145]

This framework, if conflated with the rule for discerning whether there is federal question jurisdiction, fails to account for claims for injunctive relief that the Supreme Court has adjudicated, particularly in the field of Indian affairs, without the slightest concern that federal question jurisdiction could be lacking.[146] These cases show that, whether explicitly acknowledged or not, there is some flexibility in the search for a cognizable "cause of action" that will justify "arising under" jurisdiction, at least in the context of federal Indian law.[147]

Indeed, the federal courts often assert their authority, in equity, to enjoin invasions of rights established by federal law.[148] Such federal common law actions are deemed to arise under federal law for the purposes of federal question jurisdiction even though they do not fit the *Cort v. Ash* standards for a federal "cause of

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v. Wampanoag Aquinnah Shellfish Hatchery Corp., 223 F. Supp. 2d 346, 351 n.8 (D. Mass 2002). *See generally* Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U. L. REV. 978, 996–97 (1979); Mishkin, *supra* note 35, at 190–91 (stating that it would be more accurate to describe federal question jurisdiction as "federal claim jurisdiction").

144. 422 U.S. 66 (1975).

145. *Merrell Dow Pharms. Inc.*, 478 U.S. at 810–11 (citing Cort v. Ash, 422 U.S. 66, 78 (1975), and other cases).

146. *See infra* notes 148–149, 203, 207–224, 248, 265 and accompanying text; *see also infra* notes 151, 188–192 and accompanying text.

147. It should be noted that the Supreme Court has not been consistent about how forcefully it demands identification of a federal cause of action to ground federal question jurisdiction. Indeed, the Court recently has said:

> [T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case. [T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another....

Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 642–43 (2002) (citations and quotations omitted). The Court, however, readily exhibits concern for the necessity of identifying a federal cause of action when the federalism concerns of the well-pleaded complaint rule are piqued, that is, where federal relief could interfere with state court proceedings. *See, e.g.*, *Wycoff Co.*, 344 U.S. at 248; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673–74 (1950); *see also Gully*, 299 U.S. at 117–18 (describing the subtleties of identifying a "cause of action" on which to rest federal question jurisdiction). Since the "vast majority of cases" test federal question jurisdiction on the basis of whether "federal law creates the cause of action," *Merrell Dow Pharms. Inc.*, 478 U.S. at 808, the well-pleaded complaint rule inevitably collapses into a problem of "cause of action" identification.

148. *See, e.g.*, Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404–06 (1971) (Harlan, J., concurring); Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *see also* Comm'r of Patents v. Whiteley, 71 U.S. (4 Wall.) 522, 526 (1866) ("[T]here should be a remedy to enforce every right."); Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 389 (1829) ("For every right it is a maxim that there is a legal remedy for its violation."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress."). *See generally* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 818–19 (1953).

action."[149] A ready example is an *Ex parte Young* claim for injunctive relief. Such a claim is an "implied right of action" as a matter of federal common law even though it would not meet the *Cort v. Ash* factors.[150] Clearly, there must be some give and take for federal courts to invoke their inherent equitable authority to protect federal rights whether or not a complaint states a "cause of action" on the basis of a particular congressional enactment in the *Cort v. Ash* sense, and whether or not it fits into the *Ex parte Young* model.[151]

That should be true for *Inyo County* and cases like it involving ripe claims for equitable relief arising under the Indian sovereignty doctrine. Such disputes involve the competition for power between two sovereigns (state and tribe), a contest which is uniquely governed, under the Constitution, by federal law.[152] In that sense, it has the same markings as disputes falling within the "artful pleading doctrine" which, because of the necessity of federal adjudication, are characterized as "arising under" federal law.

Part IV surveys the Supreme Court's treatment of the well-pleaded complaint rule in Indian affairs cases to date with an eye towards discerning whether the type of federal common law claim at issue in *Inyo County* may be deemed to "arise under" federal law like cases falling within the artful pleading doctrine. These cases show that the Court recognizes the practical necessity of ensuring federal court adjudication of such disputes to establish the proper boundaries of state and tribal authority under controlling, and often anomalous, federal law. Indeed, the Supreme Court and lower federal courts have readily adjudicated equitable claims by tribes to uphold their federal protections from state authority in contexts outside the *Ex parte Young* model without pausing to consider whether they properly "arise under" federal law in accord with the well-pleaded complaint rule. Thus, such claims have already taken their place as cognizable federal claims "arising under" federal common law; they just need to be expressly recognized as such.

V. THE WELL-PLEADED COMPLAINT RULE AND INDIAN AFFAIRS

The Supreme Court has, on three occasions, addressed whether controversies in the field of Indian affairs properly "arise under" federal law: first, in 1974, in *Oneida Indian Nation v. County of Oneida*,[153] which involved several tribes' claims

149. *See Nat'l Farmers Union*, 471 U.S. at 850; Illinois v. City of Milwaukee, 406 U.S. 91, 98–100 (1972); Trans-Bay Eng'rs & Builders, Inc. v. Hills, 551 F.2d 370, 377–78 (D.C. Cir. 1976); *see also* Univ. of Haw. Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1101 (9th Cir. 1999) (identifying "a federal cause of action...under the contract clause" without any discussion of *Cort v. Ash* factors (quoting E & E Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 678 (7th Cir. 1980))).

150. *See* WRIGHT & MILLER ET AL., *supra* note 35, § 3566, at 102; *see also supra* text accompanying notes 58–62.

151. *See, e.g.*, *Nat'l Farmers Union*, 471 U.S. at 850–52; *Bivens*, 403 U.S. at 400 (Harlan, J., concurring). As one commentator notes, "The different jurisdictional treatment given suits at law and equity is not always the result of 'artful' pleadings, but sometimes reflects more flexible remedial purposes of equitable relief." Note, *supra* note 35, at 985. "[A] federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978) (citing *Ex parte* Peterson, 253 U.S. 300, 312–14 (1920)).

152. *See supra* notes 26–29, 103–105, and accompanying text.

153. 414 U.S. 661 (1974).

to establish aboriginal title to land; second, in 1985, in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,[154] in which a non-Indian defendant in a tribal court action sought to enjoin an Indian plaintiff from proceeding against it in the tribal court; and third, in 1989, in *Oklahoma Tax Commission v. Graham*,[155] where a tribe sought to remove to federal court a state court tax enforcement action, which the tribe claimed was barred by sovereign immunity. In other cases, the Supreme Court has proceeded to the merits notwithstanding apparent obstacles under the well-pleaded complaint rule.[156]

A. Oneida Indian Nation v. County of Oneida

In *Oneida*, the Oneida tribes of New York and Wisconsin filed a complaint in the district court claiming that cessations of land by the Tribes to the State of New York were ineffective to terminate the Tribes' rights of possession.[157] They asserted subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1362.[158] "The District Court ruled that the cause of action, regardless of the label given it, was created under state law and required only allegations of the plaintiffs' possessory rights and the defendants' interference therewith."[159] Thus, it dismissed the case "for want of subject matter jurisdiction," viewing the Tribes' reliance upon federal law and treaties as an attempt "to resolve a potential defense," which could not be considered to arise under federal law.[160]

The district court's reasoning is consistent with the historical rules of pleading concerning land disputes. For plaintiffs out of possession, the availability of a state law remedy of ejectment precludes federal question jurisdiction even if the plaintiff asserts title to the land as a matter of federal law.[161] This is because, as a matter of pleading, in actions for ejectment, allegations as to title are unnecessary, and a federal claim for possession by a plaintiff positioned to bring the state action for ejectment is, therefore, not well-pleaded.[162] Tracking this law, the Second Circuit, in an opinion written by Judge Friendly, declared that the Tribes' jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule for determining federal question jurisdiction."[163]

The Supreme Court reversed and finessed the problem of the well-pleaded complaint rule in a manner that departed from the standard formulation requiring identification of a federal cause of action. Assuming that the claim was an action for possession, the Court said,

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154. 471 U.S. 845 (1985).
155. 489 U.S. 838 (1989) (per curiam).
156. *See infra* text accompanying notes 207–224; *see also infra* notes 203, 257, 265.
157. 414 U.S. at 665.
158. *Id.*
159. *Id.* at 665.
160. *Id.*
161. *See* White v. Sparkill Realty Corp., 280 U.S. 500 (1930).
162. *See id. See generally* WRIGHT & MILLER ET AL., *supra* note 35, § 3566, at 88.
163. Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 918 (2d Cir. 1972), *rev'd*, 414 U.S. 661 (1974). Judge Lumbard dissented. He viewed Congress's enactment of 28 U.S.C. § 1362 as providing tribes with a federal forum for controversies arising under federal law without the constraints of the well-pleaded complaint rule. *Id.* at 924–25 (Lumbard, J., dissenting).

> [W]e are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession— was plainly enough alleged to be based in federal law. The federal law issue, therefore, did not arise solely on anticipation of a defense....[T]he basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.[164]

In the context of the Court's general adherence to the strict requirement of the well-pleaded complaint rule—that the complaint state a federal cause of action—this result appears anomalous.[165]

In a later case,[166] the Court described its finding of subject matter jurisdiction in *Oneida* as of "similar effect" to the "complete preemption" reasoning in *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists.*[167] In *Avco Corp.*, the Court held that an action brought in state court to enforce a labor union agreement would be deemed to "arise under" a federal law, section 301 of the LMRA,[168] because "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'"[169] Yet neither the Court nor the Tribes in *Oneida* pointed to any federal statute, like section 301, establishing a federal cause of action of such sweeping preemptive force as to displace a similar state cause of action.[170] What is it, then, about *Oneida* that makes it of "similar effect" to the complete preemption cases?

The reasoning of the Court in *Oneida* points to the imperative of federal court adjudication of tribal-state conflicts. First, the Court in *Oneida* observed, in accordance with its earliest decisions in Indian law, that "[u]nquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United

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164. *Oneida*, 414 U.S. at 666–67. Finding jurisdiction proper, the Court declined to address whether section 1362 established subject matter jurisdiction in the district courts without the constraints of the well-pleaded complaint rule. *Id.* at 682 n.16.

165. *See* WRIGHT & MILLER ET AL., *supra* note 35, § 3566, at 88–89 & n.15 (comparing decision to ejectment actions barred by the well-pleaded complaint rule). In his concurring opinion, Justice Rehnquist carefully warned would-be "artful pleaders" that the decision "should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse," because "the standards for evaluating compliance with the well-pleaded complaint rule...will retain their traditional vigor tomorrow as today." 414 U.S. at 684 (Rehnquist, J., concurring).

166. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23 n.25 (1983); *see also* Fleet Bank, Nat'l Ass'n v. Burke, 160 F.3d 883, 886 (2d Cir. 1998) (suggesting that *Oneida* is a "complete preemption" case).

167. 390 U.S. 557 (1968).

168. Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 376 F.2d 337, 340 (1967) (citing 29 U.S.C. § 185 (2000)), *aff'd*, 390 U.S. 557 (1968).

169. *Franchise Tax Bd.*, 463 U.S. at 23 (quoting *Avco Corp.*, 376 F.2d 337.)

170. In fact, in a follow-up case to *Oneida*, the Court made clear that the Nonintercourse Act of 1793 provided no remedial basis for vindicating Indian property rights. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237 (1985).

States."[171] More broadly, however, the Court explained, in line with the same authority, that "within their boundar[ies]" tribes historically have "possessed rights with which no state could interfere...and that the whole power of regulating the intercourse with them...[is] vested in the United States."[172] Thus, not only tribal-state conflicts over land claims, but those concerning the boundaries of their respective sovereignty, should be deemed to arise under federal law to invoke the jurisdiction of the federal courts. As in the "complete preemption" context, the uniquely federal character of the dispute mandates federal court adjudication.

B. National Farmers Union Insurance Co. v. Crow Tribe of Indians

In *National Farmers Union*,[173] the Court similarly confronted the problem of identifying a basis for federal question jurisdiction over a controversy clearly calling for resolution in federal court. In that case, a member of the Crow Tribe of Indians was injured in a parking lot owned by a school on the reservation.[174] He sued the school in tribal court for negligence and won a default judgment.[175] The school and its insurance company, National Farmers Union, then sued the tribal court plaintiff, the tribal court judges, and the members of the Crow tribal council in the federal district court.[176] Asserting subject matter jurisdiction pursuant to section 1331, they sought an injunction to prevent the named defendants from executing the tribal court judgment on the ground that the Crow Tribal Court lacked subject matter jurisdiction.[177] The district court granted the injunction,[178] but a divided panel of the Ninth Circuit reversed.[179] It held that the district court lacked subject matter jurisdiction over the claims because they did not arise under federal law.[180] The Supreme Court reversed.[181]

First pointing out that "th[e] statutory grant of 'jurisdiction [provided by section 1331] will support claims founded upon federal common law as well as those of a statutory origin,'" the Court reasoned that the petitioners' claimed "right to be protected against an unlawful exercise of Tribal Court judicial power...has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians."[182] Since the Petitioners asserted a federal right to

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171. 414 U.S. at 668 (quoting United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941) (quoting Cramer v. United States, 261 U.S. 219, 227 (1923)); (citing, inter alia, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832))).

172. *Id.* at 671 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832)); *see also id.* at 674 ("[A]s the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent. There being no federal statute making the statutory or decisional law of the State...applicable to the reservations, the controlling law remained federal law.") (citation omitted).

173. 471 U.S. 845 (1985).

174. *See id.* at 847.

175. *See id.* at 847–48.

176. *Id.*

177. *See id.* at 848.

178. *See id.* at 848–49.

179. *Id.* at 849.

180. *See id.* at 849.

181. *Id.* at 857.

182. *Id.* at 850–51 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)).

be free from the tribal court's judgment, the Court concluded that they had "filed an action 'arising under' federal law within the meaning of § 1331."[183]

Like *Oneida*, *National Farmers Union* cannot be sustained under the strict confines of the well-pleaded complaint rule. Indeed, the claims asserted by the school and the insurance company constituted federal defenses to a claim arising under tribal law. If, for the purposes of section 1331, "[a] suit arises under the law that creates the cause of action,"[184] these claims would not satisfy the rule.

National Farmers Union sets the well-pleaded complaint rule on a new course in the field of Indian affairs without even mentioning it.[185] While the petitioners asserted no readily cognizable federal "cause of action" against which to test whether the case "arose under" federal law in satisfaction of the well-pleaded complaint rule, in the spirit of *Smith* and the inherent equitable authority of the federal courts, the *National Farmers Union* Court rested federal question jurisdiction upon the perceived imperative of reserving a federal forum to resolve an important question of federal common law governing Indian affairs: the power of a tribal court over non-Indians.[186] Like *Oneida*, *National Farmers Union* involved a claim "arising under" federal Indian common law.[187] As in *Oneida*, the substantiality of the federal controversy, as a matter of federal common law, supported federal question subject matter jurisdiction over the claim.[188]

National Farmers Union has spawned a plethora of cases in the federal courts in which plaintiffs seek to enjoin tribal court plaintiffs and judges by asserting, as matter of federal common law, that jurisdiction is lacking in the tribal court.[189] Other cases have been brought under section 1331 federal question jurisdiction to enjoin tribes' assertions of regulatory authority.[190] Some have been commenced by

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183. *Id.* at 852–53. The Court nevertheless fashioned an exhaustion rule, requiring the district courts to either stay or dismiss without prejudice actions challenging the jurisdiction of tribal courts "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.* at 857.

184. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916), *overruled in part on other grounds by* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983).

185. The Court's failure to mention the rule by name is a curious omission since the problem presented was whether the petitioners' claim "arose under" federal law for the purposes of section 1331. The Court's directive that "when [petitioners] invoke § 1331, they *must contend* that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum," *Nat'l Farmers Union*, 471 U.S. at 852 (emphasis added), reveals the presence of the rule in the case. *See also id.* at 853 (stating that since petitioners rely on federal law as the basis for "the asserted right of freedom from Tribal Court interference, [t]hey...filed an action 'arising under' federal law within the meaning of § 1331").

186. *See Nat'l Farmers Union*, 471 U.S. at 852–53.

187. *See id.*; *see also* Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 538 (9th Cir. 1994) (stating that a tribe's action to enjoin state prosecutions of tribal officials under state gaming laws "arises under...the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes, and the states") (citing *Nat'l Farmers Union*, 471 U.S. at 850–53).

188. Without questioning what federal "cause of action" gives rise to claims for injunctions against tribal court plaintiffs and judges, the Court consistently has addressed the merits of such claims. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

189. *See, e.g.*, Burlington N. R.R. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994); Stock W. Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991), *rev'd in part on rehearing*, 964 F.2d 912 (9th Cir. 1992) (en banc); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990).

190. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1981) (suit to enjoin enforcement of tribal tax); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc) (action to enjoin tribal logging regulation); Ariz. Pub. Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995) (action to enjoin tribal employment

states.[191] The few that have considered the propriety of federal question jurisdiction have not questioned whether such claims meet the "arising under" standard of the well-pleaded complaint rule.[192]

National Farmers Union involved a lawsuit by a non-Indian insurance company to prevent the imposition of tribal power by a tribal court plaintiff and tribal representatives in violation of federal law. The case establishes that such an action, like an action under *Ex parte Young*, "arises under federal law" to trigger section 1331 federal question jurisdiction in the district courts. There is no principled reason to limit recognition of such an action to the party alignment in *National Farmers Union*. Under mutuality principles, tribes and non-Indians should stand on the same jurisdictional footing.[193] Either instance presents a compelling federal problem: just as non-Indians should be able to invoke federal court jurisdiction to challenge the imposition of tribal authority by private parties and tribal officials, so too should tribes be able to invoke federal question jurisdiction to prevent private parties or local officials from employing state power against tribal interests in violation of federal law.

C. *Oklahoma Tax Commission v. Graham*

In *Oklahoma Tax Commission v. Graham*,[194] the Chickasaw Nation and the manager of its wholly owned motor inn sought to remove an action brought against them in the state court by the Oklahoma Tax Commission to collect unpaid excise taxes.[195] The Tribe claimed that the action was barred by tribal sovereign immunity.[196] Both the district court and the Tenth Circuit upheld removal over the State's objection that "the complaint alleged on its face only state statutory violations and state tax liabilities."[197] The Tenth Circuit, over a dissent by Judge Tacha, held that although "nothing within the *literal* language of the pleading even

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regulation); Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987) (action to enjoin tribal rent control); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (action to enjoin enforcement of tribe's repossession law); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) (action to enjoin tribal tax); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (action to enjoin tribe's building regulations); Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980) (suit to enjoin tribe's business licensing ordinance).

191. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); South Dakota v. Bourland, 508 U.S. 679 (1993); State Dep't of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994); Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983); New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

192. *See Ariz. Pub. Serv. Co.*, 77 F.3d at 1132 ("[A] non-Indian challenging an exercise of tribal adjudicatory or legislative power states a claim that arises under federal law."); *Baker*, 698 F.2d 1323 (7th Cir. 1983) (stating that state court claim for declaratory judgment that state has authority to regulate hunting and fishing within certain water bodies to exclusion of tribal regulatory authority asserted under a federal treaty may be removed and comparing controversy to "complete preemption" context).

193. The Supreme Court and lower federal courts have relied on the principle of mutuality to establish jurisdictional parity for tribal and state interests. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991) (citing Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991)); *see also* Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 257 (1995) (applying "mutuality" principle); Mille Lacs Band of Indians v. Minnesota, 853 F. Supp. 1118, 1129 (D. Minn. 1994) (applying "mutuality" principle), *aff'd on other grounds*, 124 F.3d 904 (8th Cir. 1997), *aff'd* 526 U.S. 172 (1999).

194. 489 U.S. 838 (1989) (per curiam).

195. *Id.* at 839.

196. *Id.*

197. *Id.*

suggests implication of a federal question," the implicit issue of tribal sovereign immunity was "inherent within the complaint because of the parties subject to the action."[198]

The Supreme Court, in a *per curiam* decision, reversed, restating the well-pleaded complaint rule:

> [W]hether a case is one arising under [federal law] in the sense of the jurisdictional statute...must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.[199]

The Court went on to point out that "it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law."[200]

Graham cannot be read to preclude tribes from asserting sovereign immunity as an affirmative right on which to rest federal question jurisdiction, at least in the context of injunctive actions against state officials. In *Shaw v. Delta Airlines*, the Court made clear that actions for equitable relief under *Ex parte Young* to prevent state officials from violating federal law properly arise under federal law.[201]

Sovereign immunity, although based on federal common law rather than a congressional enactment, is established federal law, and, pursuant to *Ex parte Young*, tribes may invoke their sovereign immunity from suit as an affirmative right to prevent state officials from violating it.[202] Indeed, the Supreme Court and numerous lower federal courts have entertained actions brought by tribes to enjoin state taxes on the basis of sovereign immunity and other common law rules derived from the Indian sovereignty doctrine.[203] Outside of the tax area, federal courts of appeals have entertained lawsuits by tribes against state court plaintiffs or judges to enjoin them from proceeding with a state court action on the ground of tribal sovereign immunity.[204]

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198. 489 U.S. at 840 (quoting Oklahoma *ex rel.* Okla. Tax Comm'n v. Graham, 846 F.2d 1258, 1260 (10th Cir. 1988)).

199. *Id.* at 840–41 (quoting Taylor v. Anderson, 234 U.S. 74, 75–76 (1914)) (alterations in original). The Court noted, in passing, that "the sole alleged basis of original federal jurisdiction is 28 U.S.C. § 1331." *Id.* at 840. The Tribe did not invoke 28 U.S.C. § 1362. *Id.*

200. *Id.* at 841.

201. *See supra* notes 61–64 and accompanying text.

202. *See* Sac & Fox Nation v. LaFaver, 979 F. Supp. 1374, 1352–54 (D. Kan. 1997), *aff'd on other grounds*, Sac & Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000). Without discussing *Ex parte Young*, a number of courts have proceeded to the merits of actions for injunctive relief brought by tribes or tribe-affiliated parties to prevent the imposition of state authority on the basis of sovereign immunity. *See, e.g.*, Sac & Fox Nation v. Hanson, 150 F.3d 1163 (10th Cir. 1998); Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995), *aff'd*, 230 F.3d 2000 (2d Cir. 2000).

203. *E.g.*, Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); County of Yakima v. Confederated Tribes of the Yakima Indian Nation, 502 U.S. 251 (1992); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). In *National Farmers Union*, the Court pointed out, as examples of the appropriate exercise of section 1331 jurisdiction, that it had addressed "questions concerning the extent to which a tribe's power to engage in commerce has included an immunity from state taxation." 471 U.S. at 852.

204. *E.g.*, Kiowa Indian Tribe v. Hoover, 150 F.3d 1163, 1172 (10th Cir. 1998); Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1062 (10th Cir. 1995); Seneca-Cayuga Tribe v. Oklahoma *ex rel.* Thompson, 874 F.2d 709, 716 (10th

In short, *Graham* simply exemplifies the paradox for the well-pleaded complaint rule presented by *Ex parte Young* actions.[205] Had the Tribe proceeded in federal court to seek injunctive relief against the state officers imposing the disputed tax, the Tribe would have invoked federal question jurisdiction, for its affirmative claim for relief would have been a cognizable federal cause of action under *Ex parte Young*, thereby "arising under" federal law.[206] But because the Tribe instead tried to remove the state court action, it was barred by the well-pleaded complaint rule.

D. Other Cases

In two other cases, *California v. Cabazon Band of Mission Indians*[207] and *New Mexico v. Mescalero Apache Tribe*,[208] the Supreme Court proceeded to the merits of affirmative claims by tribes that they were protected from state regulatory authority notwithstanding two "red flags" under the well-pleaded complaint rule: (1) the lack of any apparent federal cause of action under which the Tribes' claims "arose"[209] and (2) the apparent attempt by the Tribes to assert what would naturally be federal defenses to anticipated state coercive actions to enforce state laws.[210]

In *Cabazon*, a case that ushered in the modern era of Indian gaming, a controversy arose between the Tribe and county officials about the regulation of the Tribe's card and bingo games on the reservation.[211] The Tribe sued the county in federal district court "seeking a declaratory judgment that the county had no authority to apply its ordinances inside the reservations and an injunction against their enforcement," and the State intervened as defendant.[212] The Court found that the Tribe's claim that county officials could not regulate its bingo games turned on the Indian preemption standard.[213] Weighing "traditional notions of Indian sovereignty and the congressional goal of Indian self-government" against the defendants' claim that state and local regulation was necessary to prevent the Tribe's gaming operations from criminal infiltration (a claim the Court found unpersuasive), the Court concluded that the state laws were preempted.[214] The Court did not pause to consider

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Cir. 1989); White Mountain Apache Tribe v. Smith Plumbing Co., 856 F.2d 1301, 1304 (9th Cir. 1988); Bowen v. Doyle, 880 F. Supp. 99, 127–29 (W.D.N.Y. 1995), *aff'd*, 230 F.3d. 525 (2d Cir. 2000).

205. *See supra* notes 53–62 and accompanying text.

206. *See supra* notes 58–62 and accompanying text. There are a number of recent examples of federal court cases involving *Ex parte Young* actions by tribes to enjoin state taxes. *See, e.g.*, Coeur d'Alene Tribe v. Hammond, 384 F.3d 674 (9th Cir. 2004); Prairie Band Potawatomi Indians v. Richards, 379 F.3d 979 (10th Cir. 2004); Winnebago Tribe v. Stovall, 341 F.3d 1202 (10th Cir. 2003); Sac & Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000).

207. 480 U.S. 202 (1987).

208. 462 U.S. 324 (1983).

209. *See supra* notes 16–17, 36–44, 49–55, 141–143 and accompanying text.

210. *See supra* notes 16–17, 36–44, 49–55, 141–143 and accompanying text.

211. *See Cabazon*, 480 U.S. at 205–06.

212. *Id.* at 206. In the early 1980s, when tribes experimented with gaming enterprises to generate government revenues, cases like *Cabazon*, in which tribes initiated federal actions to enjoin asserted state regulatory authority on the basis of rights secured by federal Indian common law, were commonplace. *See, e.g.*, Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

213. *Cabazon*, 480 U.S. at 216 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–34 (1983)). The Indian preemption standard is discussed *supra* text accompanying notes 120–123.

214. *Cabazon*, 480 U.S. at 216, 220–22. The Court also referred to the tribal and federal regulatory regime

whether the Tribe's action, directed at county officials and relying upon federal Indian common law, properly arose under federal law, notwithstanding the fact that such claims would not necessarily establish a federal right of action under *Ex parte Young*.[215]

In *New Mexico v. Mescalero Apache Tribe*,[216] the Tribe claimed exclusive authority to regulate hunting and fishing activities within its reservation and brought an action to enjoin the enforcement of New Mexico's hunting and fishing laws.[217] As in *Cabazon*, the Tribe invoked no specific federal cause of action, under *Ex parte Young* or otherwise, on which to rest an assertion that its claim "arose under" federal law. The Court concluded that the Tribe's claim was governed by the preemption and infringement standards.[218] Examining the Tribe's interest in regulating reservation hunting and fishing by both Indians and non-Indians to promote reservation economic development, the Court held that those interests trumped the regulatory and financial interests of the State.[219] In addition, the Court concluded that the application of New Mexico's laws would supplant tribal control by imposing an "inconsistent dual system" of rules.[220]

The Tribe's claims in *Mescalero Apache Tribe*, like those in *Cabazon*, did not look like prototypical *Ex parte Young* claims. Nevertheless, as in *Cabazon*, the Court did not pause to consider, in the words of Justice Ginsburg in *Inyo County*, "what federal law, if any, the Tribe's case 'aris[es] under.'"[221]

Since *Cabazon*, the lower federal courts consistently have adjudicated claims brought by tribes to prevent the imposition of other forms of state or local regulation over their reservation gaming activities, most without any consideration of subject matter jurisdiction.[222] Likewise, tribes have, on many occasions, proceeded in the federal district courts with *Mescalero Apache Tribe*-type claims for injunctive relief against other forms of state regulation within their reservations.[223] Rarely have the

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in place with respect to the games, *see id.* at 205 n.2, 219 n.23, and concluded that the state and county laws would "impermissibly infringe on tribal government." *Id.* at 222.

215. *See supra* note 65; *supra* text accompanying notes 66–67.

216. 462 U.S. 324 (1983).

217. *Id.* at 329–30. New Mexico conceded that the Tribe exercised exclusive authority over the activities of its members and could also regulate non-members, but it claimed a right to exercise concurrent jurisdiction over non-members. *See id.* at 330.

218. *Id.* at 332–34 & n.16.

219. *See id.* at 338–41. In addition to regulatory interests, the Court noted the State's interest in generating revenue from licensing fees, which it viewed as the equivalent of a state tax on reservation activities. *See id.* at 343.

220. *Id.* at 339–41.

221. *See Inyo County*, 538 U.S. at 712 (quoting 28 U.S.C. § 1331 (2000)).

222. *E.g.*, Forest County Potawatomi Cmty. v. Norquist, 45 F.3d 1079, 1082 (7th Cir. 1995); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 538 (9th Cir. 1994); United Keetoowah Band of Cherokee Indians v. Oklahoma *ex rel.* Moss, 927 F.2d 1170, 1171, 1173 (10th Cir. 1991); Seneca-Cayuga Tribe v. Oklahoma *ex rel.* Thompson, 874 F.2d 709, 716 (10th Cir. 1989); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 645–46, 649 (W.D. Wis. 1990) (citing 28 U.S.C. § 1362 (2000) and Supremacy Clause, U.S. CONST. art. VI, cl. 2, as bases for jurisdiction).

223. *E.g.*, Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003) (suit for declaratory judgment that county lacks jurisdiction to impose land use regulation on reservation); Fort Belknap Indian Cmty. v. Mazurek, 43 F.3d 428 (9th Cir. 1994) (action to enjoin enforcement of state liquor laws); Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991) (suit to enjoin state court from refusing to recognize tribal court adoption decree); Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980) (suit to enjoin state jurisdiction over on-reservation hunting and fishing); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1976) (suit to enjoin enforcement of county zoning ordinances on reservation); Quinault

courts in such cases questioned whether a tribe's claim properly "arises under" federal law notwithstanding the fact that the asserted claim could be viewed as a federal defense to a potential state court enforcement action and would not neatly fit within the *Ex parte Young* model as an affirmative federal right of action.[224]

The Supreme Court's decisions in *Oneida* and *National Farmers Union*, its unquestioned acceptance of jurisdiction in *Cabazon* and *Mescalero Apache Tribe*, and—notwithstanding its rejection of jurisdiction in the removal context in *Graham*—its readiness to adjudicate affirmative claims by tribes to prevent state taxation in violation of federal law[225] all suggest that ripe disputes about the competing authority of tribes and states properly "arise under" federal common law without running afoul of the well-pleaded complaint rule.[226] Actions for injunctive relief to prevent the assertion of state authority in violation of the Indian sovereignty doctrine invoke federal question jurisdiction just as forcefully as the injunctive

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Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966) (suit to enjoin enforcement of state laws on reservation); *see also* Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1973) (action to enjoin enforcement of state taxes); Langley v. Ryder, 602 F. Supp. 335 (W.D. La. 1985) (action to enjoin state criminal prosecutions for, inter alia, violations of state gaming, business licensing, and tax laws); Cayuga Indian Nation v. Fox, 544 F. Supp. 542 (N.D.N.Y. 1982) (suit to enjoin enforcement of state court order for filing of lis pendis concerning land subject to tribal land claims litigation). In some instances, tribes have successfully commenced actions in federal court to enforce tribal regulations. *See* Brendale v. Confederated Tribes, 492 U.S. 408 (1989) (action by tribe to establish inherent power to regulate non-Indian land use within reservation); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074 (9th Cir. 1990); Chilkat Indian Vill. v. Johnson, 870 F.2d 1469 (9th Cir. 1989); Knight v. Shoshone & Arapahoe Indian Tribe, 670 F.2d 900 (10th Cir. 1982); Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976).

224. The Seventh and Tenth Circuits have concluded that a tribe's request to vindicate a federal common law or statutory right to engage in reservation gaming activities free from state or local interference properly triggers the jurisdiction of the federal district court. *See Forest County Potawatomi Cmty.*, 45 F.3d at 1082 (stating that a tribe's right to be immune from state regulation is a "federal right whether its source is the [Indian Gaming Regulatory Act]...the Indian Commerce Clause, or federal recognition of the inherent sovereign powers of an Indian tribe"); *United Keetoowah Band of Cherokee Indians*, 927 F.2d at 1173 (stating that an action by tribe "asserting its immunity from the enforcement of state laws is a controversy" arising under federal law within the meaning of 28 U.S.C. § 1362); *see also Roache*, 54 F.3d at 538 (stating that such a case "clearly arises under federal law, be it [the Indian Gaming Regulatory Act] or the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes, and the states"). The U.S. District Court for the Northern District of New York recently held that a tribe's claim for equitable relief to prevent local governments from applying their land use and zoning laws against the tribe in violation of federal treaty, statutory, and federal common law protections did not violate the well-pleaded complaint rule. *See* Cayuga Indian Nation v. Vill. of Union Springs, 293 F. Supp. 2d 183 (N.D.N.Y. 2003). The Ninth and Tenth Circuits have held that actions by tribes to enforce their laws against non-Indians generate controversies governed by principles of federal common law and thereby arise under federal law. *Knight*, 670 F.2d at 902–03; *Chilkat Indian Vill.*, 870 F.2d at 1473–74; *accord Morongo Band of Mission Indians*, 893 F.2d at 1077. In *Morongo Band of Mission Indians*, the Ninth Circuit rejected a non-Indian's assertion that the court's acceptance of jurisdiction over the Tribe's action to enforce its ordinance would "do violence to the 'well-pleaded complaint rule,'" *id.* at 1078, reasoning that the federal question as to the tribe's "power to regulate 'the affairs of non-Indians'" inhered in the complaint, *id.* (quoting *Nat'l Farmers Union*, 471 U.S. at 851–52); "[i]t arises from the nature of the complaint itself," *id.* (citing *Chilkat Indian Vill.*, 870 F.2d at 1474 & n.9). In *Native Village of Venetie I.R.A. Council v. Alaska*, a tribe sought to enjoin a state court from refusing to recognize a tribal court adoption decree. 944 F.2d at 551. The Tribe relied upon a full faith and credit provision of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(d). *Id.* The State argued that the Tribe failed to state a federal cause of action. *Id.* at 552. The Ninth Circuit disagreed. Notwithstanding Congress's failure to provide a cause of action under ICWA, the court held that the Tribe had a "cause of action based on the right of self-governance" to require the state to enforce its adoption decree, consistent with ICWA. *See id.* at 553–54.

225. *See supra* note 203; *see also supra* note 206 (citing recent lower court cases).

226. *See supra* text accompanying notes 166–172, 189–192, 222–224.

action brought by the claimants in *National Farmers Union* to prevent the assertion of tribal authority as a matter of federal common law.[227]

These claims are colorable actions in equity as a matter of federal common law, not only when brought against state officers under the *Ex parte Young* model, but when brought against local officials or private parties. Tribes' federal law protections from state authority may be just as threatened by the actions of local officers or private parties as they are by state officers.[228] The Court has tacitly recognized this by adjudicating tribes' suits against local officials in *Cabazon* and in a number of tax cases.[229] This recognition is well justified under the Court's own doctrine of mutuality; since the Court provides private parties and local officials with a federal forum to enjoin assertions of tribal authority,[230] it should readily give mutual treatment to tribes by providing a federal forum in equity to prevent local officials or private parties from imposing state power in violation of the Indian sovereignty doctrine or a specific treaty or statute governing a particular tribe.

Beyond all that can be gleaned in this regard from the precedents of the Supreme Court and lower federal courts, Congress itself has strongly suggested, through its enactment of 28 U.S.C. § 1362, that, when such actions are brought by Indian tribes, they properly "arise under" federal law, whether directed at state officers, local authorities, or private parties. Part VI examines section 1362 and the congressional policy underlying it.

VI. THE WELL-PLEADED COMPLAINT RULE AND 25 U.S.C. § 1362

Pursuant to 28 U.S.C. § 1362, Congress established original jurisdiction in the federal district courts for actions by Indian tribes "wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."[231] The Supreme Court has not yet decided whether to apply the well-pleaded complaint rule to the construction of section 1362.[232] If the rule did apply to section 1362, there is no

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227. *See supra* text accompanying notes 166–172, 189–192, 222–224.

228. *See, e.g.*, Oneida Indian Nation v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003), *rev'd,* City of Sherrill v. Oneida Indian Nation, No. 03-855, 2005 U.S. LEXIS 2927 (U.S. Mar. 29, 2005); Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003); Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999); John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975); Seneca-Cayuga Tribe v. Town of Aurelius, 2004 U.S. Dist. LEXIS 17481 (N.D.N.Y. 2004); Cayuga Indian Nation v. Vill. of Union Springs, 293 F. Supp. 2d 183 (N.D.N.Y. 2003).

229. *See* City of Sherrill v. Oneida Indian Nation, No. 03-855, 2005 U.S. LEXIS 2927 (U.S. Mar. 29, 2005); *see also supra* note 203; *supra* text accompanying notes 212, 215.

230. *See supra* notes 188, 190–191 (citing cases).

231. 28 U.S.C. § 1362 (2000). Section 1362 provides, in full, as follows:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Id.

232. The Second Circuit split on the issue in *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974), in which the tribe claimed subject matter jurisdiction under both statutes. Judge Friendly, writing for the majority, simply wrote that "the jurisdictional issue in this case is the same under either section." *Id.* at 919 n.4. Reviewing the legislative history, he stated that "the sole purpose of § 1362 was to remove any requirement of the jurisdictional amount." *Id.* Judge Lumbard disagreed. Under his view of the legislative history, Congress enacted section 1362 to give tribes a federal forum to enforce federal treaty rights in situations where the United States, for whatever reason, chose not to act. *Id.* at 924 (Lumbard, J., dissenting). He argued "that the 'arising under' language" of section 1362 should be construed as broadly as the power granted to the

reason it should constrain federal courts from taking subject matter jurisdiction when tribes seek equitable relief to prevent the imposition of state law in violation of the Indian sovereignty doctrine.[233] The legislative history and case law surrounding section 1362 support the view that such claims "arise under" federal law.[234]

Congress enacted section 1362 in 1966 to reverse a 1964 decision of the Ninth Circuit, *Yoder v. Assiniboine and Sioux Tribes*,[235] and to give Indian tribes access to federal court to protect their rights in the same manner that the United States can in its capacity as trustee for tribes.[236] While the federal government has a duty to protect the rights and property of Indian tribes from impairment by state authority,[237] it cannot, of course, bring every case necessary to protect such tribal interests. Thus, the passage of section 1362 "reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court."[238] According to the Supreme Court, "the substantive interest which Congress...sought to protect is tribal self-government."[239]

In *Assiniboine*, the Tribe sought to enjoin a private company and state oil and gas regulators from enforcing a state order affecting tribal leases to the company.[240] The Tribe claimed jurisdiction pursuant to section 1331.[241] The district court, looking at the leases in question, concluded that the Tribe's claim was worth $10,000 or more pursuant to the requirement of section 1331 then in effect and issued an injunction

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federal courts under Article III, Section 2 of the Constitution. *Id.* at 924–25. The Supreme Court, finding that the Tribes' claims in *Oneida* satisfied the well-pleaded complaint rule, had "no occasion to address" the issue. 414 U.S. at 682 n. 16. Only one other federal court has considered the issue in any detail. *See* Penobscot Nation v. Georgia-Pacific Corp., 106 F. Supp. 2d 81 (D. Me. 2000), *aff'd on other grounds*, 254 F.3d 317 (1st Cir. 2001).

233. One reason the well-pleaded complaint rule might not apply to section 1362 is that unlike the grant of jurisdiction provided by section 1331, which the Court has decided must be strictly construed, *see* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379–80 (1959), the construction of section 1362 "must be dictated by a principle deeply rooted in Court's jurisprudence: [s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." County of Yakima v. Confederated Tribes of the Yakima Indian Nation, 502 U.S. 251, 269 (1992). This canon of construction is grounded in the trust doctrine, which includes the federal government's duty to protect tribal self-government from diminution by states. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980).

234. *See infra* text accompanying notes 235–239, 266–268.

235. 339 F.2d 360 (9th Cir. 1964).

236. H.R. REP. NO. 89-2040 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3145; *see* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 473–74 (1976).

237. *E.g.*, Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 891 (1986); *White Mountain Apache Tribe*, 448 U.S. at 142–43 (citing U.S. CONST. art. I, § 8, cl. 3); Morton v. Mancari, 417 U.S. 535, 551–52 (1974); Rice v. Olson, 324 U.S. 786, 789 (1945); United States v. Kagama, 118 U.S. 375, 384 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 234–35 (1982) (stating that the trust "relationship not only preserved tribal government, but insulated it from state interference").

238. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 559 n.10.

239. *Moe*, 425 U.S. at 468 n.7. The House Committee report on the provision states that it would allow tribes to bring actions in federal court "for the protection of powers of tribal self-government," House Report 2040, noting that "[t]he issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts." *Id.* at 3147–48 (emphasis added).

240. *See* Assiniboine & Sioux Tribes v. Calvert Exploration Co., 223 F. Supp. 909, 910 (D. Mont. 1963), *rev'd*, Yoder v. Assiniboine & Sioux Tribes, 339 F.2d 360 (9th Cir. 1964). The company wanted to "pool" its oil and gas leases to meet a state "spacing requirement"; the tribes refused to include their leases in the pool, but the company obtained an order from state regulators allowing it to do so. *See id.*

241. *Id.* at 910.

in favor of the Tribe.[242] The Ninth Circuit reversed. Because it viewed the "the matter in controversy" to be "the right [of the Tribe] to be free from" state regulation, the value of the leases was immaterial to the controversy.[243] Thus, given the nature of the action, the value requirement of section 1331 could not be met, and the court concluded that the district court lacked subject matter jurisdiction.[244] The final House Committee Report on section 1362 characterized *Assiniboine* as an action by a tribe "to enjoin the enforcement of a State order," and explained that this was "the type of litigation which would be governed by the new Section 1362."[245]

The "type of litigation" at issue in *Assiniboine*, however, could well be viewed as a preemptive strike against a state cause of action, the enforcement of the state regulatory order at issue. The Tribe entered federal court in advance of a state enforcement action to establish a federal defense: its freedom, pursuant to the Indian sovereignty doctrine, from assertions of state control by a private party and a state commission.[246] Absent recognition of a "cause of action" by a tribe to enjoin such asserted state authority as a matter of federal common law, this would be a textbook problem for subject matter jurisdiction under the well-pleaded complaint rule.[247] Congress, however, clearly intended the district courts to exercise jurisdiction over these equitable claims for relief by tribes to check assertions of state authority.

Congress's second objective in enacting section 1362, to allow tribes to bring the kinds of cases in the federal courts that the United States could bring, as trustee, to protect tribal interests, similarly suggests that Congress expected the district courts to exercise subject matter jurisdiction over particular claims in equity to protect tribal sovereignty. Indeed, the power of the United States to bring actions in equity to prevent harm to tribal interests, including the harmful imposition of state authority, is virtually boundless.[248]

A critical question, therefore, is to what extent tribes attained, through section 1362, access to federal courts on a par with the national government.[249] One limit is the Eleventh Amendment. In *Blatchford v. Native Village of Noatak*,[250] the Court held that section 1362 does not empower tribes to sue states in federal court in a manner that would conflict with the Eleventh Amendment, something the United

242. *See id.*

243. *Yoder*, 339 F.2d at 363.

244. *See id.* at 364.

245. H.R. REP. NO. 89-2040.

246. *See Assiniboine*, 223 F. Supp. 909.

247. *See supra* notes 16–17, 36–44, 49–55, 141.

248. Pursuant to 25 U.S.C. § 175 (2000), the U.S. Attorney General, as trustee, may bring actions at law and in equity to protect tribes. And the United States has, on numerous occasions and in a variety of contexts, sued to protect tribes from state authority in violation of federal treaties or common law. *See, e.g.*, United States v. Rickert, 188 U.S. 432 (1903) (action to enjoin county taxes directed at improvements on and tools used to cultivate Sioux Indian lands); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (action to enjoin county from enforcing zoning and building codes against tribe); United States v. Michigan, 508 F. Supp. 480 (W.D. Mich. 1980), *aff'd*, 712 F.2d 242 (6th Cir. 1983) (action to prevent a state court from holding tribal member in contempt for violating state fishing regulations); United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978), *appeal dismissed*, 573 F.2d 1117 (9th Cir. 1978) (action to stop state interference with tribal fishing rights), *aff'd*, 645 F.2d 749 (9th Cir. 1981).

249. The Supreme Court has said that section 1362 does not equate "tribal access [to federal court] with the United States' access *generally*, but only 'at least in some respects.'" Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) (quoting Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 473 (1976)).

250. 501 U.S. 775 (1991).

States is empowered to do.[251] In *Moe v. Confederated Salish & Kootenai Tribes*,[252] however, the Court held that tribes can invoke section 1362 to enjoin state taxes without being subject to the constraints of the Tax Injunction Act[253] in like manner to the United States.[254] In distinguishing its reasoning in *Moe* from that in *Blatchford*, the Court suggested that section 1362 trumps congressional enactments protective of states as a matter of comity, but not similar protections afforded by the Constitution.[255] Lower federal courts likewise have suggested that section 1362 trumps judge-made rules of repose designed to protect state authority in the interests of comity[256] as well as congressional enactments with the same objective, such as the Anti-Injunction Act.[257]

The well-pleaded complaint rule, of course, is not constitutionally based; it is largely a rule of comity and repose in deference to the authority of state courts.[258] One of its principal utilities, limiting the invocation of federal question jurisdiction under section 1331 when the claim asserted constitutes a federal defense to an anticipated state cause of action, is incompatible with Congress's purpose in enacting section 1362: to give tribes access to federal court to protect the "substantive" right of "tribal self-government,"[259] a right that may well depend upon the vindication of tribes' freedom from state control as a matter of federal law. The same reasoning that supports the Court's conclusion in *Moe* that tribes may invoke section 1362 to stop the enforcement of state taxes[260] and the conclusions of other federal courts that tribes may invoke section 1362 to stop other state court proceedings[261] also supports a conclusion that tribes should be able to invoke federal court jurisdiction pursuant to section 1362 without running afoul of the well-pleaded complaint rule. While such cases appear to posit federal law defenses to state

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251. *Id.*

252. 425 U.S. 463 (1976).

253. 28 U.S.C. § 1341 (2000). The statute provides, in pertinent part, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

254. *Moe*, 425 U.S. at 474–75.

255. In *Blatchford*, the Court explained that the Tax Injunction Act, "which *Moe* held § 1362 to eliminate in its application to tribal suits, was merely a limitation that Congress itself had created—commiting [sic] state tax-injunction suits to state courts as a matter of comity." *Blatchford*, 501 U.S. at 784–85. The obstacle to suit in *Blatchford*, the Eleventh Amendment, the Court said, "by contrast, is a creation not of Congress but of the Constitution." 501 U.S. at 785.

256. Tohono O'Odham Nation v. Schwartz, 837 F. Supp. 1024, 1028–29 (D. Ariz. 1993) (abstention); Bowen v. Doyle, 880 F. Supp. 99, 129–34 (W.D.N.Y. 1995) (abstention and *Rooker-Feldman* doctrines), *aff'd on other grounds*, 200 F.3d 525 (2d Cir. 2000). *See generally* Winnebago Tribe v. Stovall, 341 F.3d 1202, 1204–05, 1207 (10th Cir. 2003) (summarizing, in context of action brought under section 1362 to enjoin state taxes, cases declining to apply abstention when tribal rights to be free of state authority are at issue).

257. 28 U.S.C. § 2283 (2000); *see* Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1063 n.1 (10th Cir. 1995) (dictum); *Tohono O'Odham Nation*, 837 F. Supp. at 1028; *Bowen*, 880 F. Supp. at 130–31 & n.39 (citing cases); Cayuga Indian Nation v. Fox, 544 F. Supp. 542, 550–51 (N.D.N.Y. 1982). The Anti-Injunction Act provides that the federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (2000).

258. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9–10 (1983) (stating that the well-pleaded complaint rule avoids "more or less automatically a number of potentially serious federal-state conflicts"); *see also supra* notes 21, 22 and accompanying text.

259. *See Moe*, 425 U.S. at 468 n.7.

260. *See id.* at 473–75.

261. *See supra* notes 256–257; *infra* note 262.

coercive actions as affirmative claims for relief in federal court,[262] like *Ex parte Young* claims,[263] they are compatible with the well-pleaded complaint rule.[264]

Congress clearly intended tribes to mimic the United States in protecting tribal rights of self-government under federal law in the face of asserted state authority. Thus, at least in those cases where the Eleventh Amendment presents no bar, section 1362 allows tribes to draw upon a rich federal common law history, which exhibits myriad actions by the United States to enjoin assertions of state power over tribes and their affairs.[265] These include injunctions against local officials and counties.[266] Thus, in the context of section 1362, tribes' equitable actions to prevent assertions of state power need not fit within the mold of an *Ex parte Young* case, involving alleged violations of federal law by only state officers, to clear the well-pleaded complaint rule. So long as they mirror claims brought by the United States, they properly "arise under" federal law. Moreover, since Congress intended tribes to proceed in federal court with equity actions like *Assiniboine*, which involved a request to prevent a private party from enforcing a state law (the converse of *National Farmers Union*),[267] it is plain that Congress understood equitable actions

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262. *See, e.g.*, United Keetoowah Band of Cherokee Indians v. Oklahoma *ex rel.* Moss, 927 F.2d 1170, 1173 (10th Cir. 1991) ("An action such as this by a tribe asserting its immunity from the enforcement of state laws is a controversy within § 1362 jurisdiction as a matter arising under the Constitution, treaties or laws of the United States."); Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665, 666 (10th Cir. 1980) (action under section 1362 by tribe to enjoin state regulation of tribal hunting and fishing); Wampanoag Tribe v. Mass. Comm'n Against Discrimination, 63 F. Supp. 2d 119, 120 (D. Mass. 1999) (action for declaratory and injunctive relief under section 1362 against civil rights complainant and state civil rights commission to stop state civil rights proceeding against tribe); *Tohono O'Odham Nation*, 837 F. Supp. at 1027–28 (action under section 1362 to enjoin state court, plaintiffs, and judge to "preserve the integrity of Indian sovereignty"); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986) (stating that 28 U.S.C. § 1362 (2000) provides subject matter jurisdiction for declaratory and injunctive relief against threatened enforcement of state regulatory laws over tribal bingo games); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 714 n.3 (W.D. Wis. 1981) (stating that 28 U.S.C. § 1362 provides subject matter jurisdiction for declaratory and injunctive relief against threatened enforcement of state regulatory laws over tribal bingo games); Seminole Tribe v. Butterworth, 658 F.2d 310, 311 (5th Cir. 1981) (stating that 28 U.S.C. § 1362 provides subject matter jurisdiction for declaratory and injunctive relief against threatened enforcement of state regulatory laws over tribal bingo games); Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 656 (9th Cir. 1966) (action under section 1362 to prevent state regulatory jurisdiction on reservation); *see also* Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 551–52 (9th Cir. 1991) (stating that court has subject matter jurisdiction under section 1362 over action by Alaska native community "to enjoin the state of Alaska and certain of its officials from refusing to recognize" tribal court adoption orders, so long as the community is a tribe or band within the meaning of section 1362); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 657–58 & n.1 (9th Cir. 1975) (stating that federal question of state authority to impose zoning ordinance on reservation is "justiciable case or controversy").

263. *See supra* notes 56–62 and accompanying text.

264. *See supra* notes 56–62 and accompanying text; *see also* text accompanying notes 221–230.

265. *See* United States v. Bd. of Comm'rs, 251 U.S. 128, 133 (1919) ("[T]he existence of power in the United States to sue [pursuant to its trust obligation to Indians]...disposes of the proposition that because of remedies afforded [the Indians] under the state law the authority of a court of equity could not be invoked by the United States."); McCarty v. Hollis, 120 F.2d 540, 542 (10th Cir. 1941) ("The United States, in its own...capacity as guardian of Indian tribes or individual Indians, may institute and maintain in the federal courts appropriate suits for the enforcement of the rights or the protection of the property of its Indian wards.") (citing cases); United States v. Charles, 23 F. Supp. 346, 348 (W.D.N.Y. 1938) (stating that the United States "can maintain an action in its own courts" to "preserve[e] intact the Indian reservation with the management of internal affairs within the hands of the Indians"); *see also supra* note 248.

266. *See supra* notes 248, 265.

267. *See supra* note 240 and accompanying text.

of that sort to arise under federal law and invoke subject matter jurisdiction under section 1362.[268]

VII. CONCLUSION

The Court's departures from the "quick rule of thumb" provided by the well-pleaded complaint rule, which focuses on identifying a federal cause of action on the face of a complaint, reflect one essential reality: some controversies, because of the very nature of the federal rights at stake, must be committed to the jurisdiction of the federal courts. The federal district courts must, of necessity, have original jurisdiction over actions to enjoin state officers from violating federal law under the *Ex parte Young* doctrine in order to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"[269] Under the artful pleading doctrine, district courts must likewise take original jurisdiction over cases that nominally are grounded in state causes of action but involve the adjudication of substantial and novel questions of federal law or an area of law that Congress has completely preempted lest state courts intrude upon areas of utmost federal concern. In a similar vein, the district courts must have original jurisdiction over actions to enjoin assertions of tribal adjudicatory authority in accordance with *National Farmers Union* lest tribal courts fail to follow federal common law limitations upon tribal power.

Consistent with these qualifications of the strict confines of the well-pleaded complaint rule, Indian tribes beset with assertions of state authority in contravention of federal law must be able to invoke the original jurisdiction of the federal courts to enjoin those asserting such authority. Vindication of the federal protection of tribal sovereignty from intrusive state power is too central a concern of the federal government to leave in the hands of state courts. Such cases are of the utmost importance to tribal independence and self-government and involve unique conflicts about the distribution of power between separate governments. The federal interest in ensuring that one of those competing governments, state government, not control the outcome is obvious and compelling.[270]

Justice Cardozo wrote that "plain necessity" must dictate whether a claim "arises under" federal law to vest jurisdiction in the federal district courts.[271] To identify a federal "cause of action" for a well-pleaded complaint requires, in his words, "a selective process which picks the substantial causes out of the web and lays the other

268. *See supra* note 245 and accompanying text.

269. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160).

270. State courts cannot be viewed, in this context, as neutral institutions, separate from the interests of other branches of state government. When state governmental interests are, by history or circumstance, potentially antagonistic to federal interests, the Supreme Court has not hesitated to affirm injunctions against them or those seeking to harness state authority through their processes. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992); Shelley v. Kraemer, 334 U.S. 1 (1948); *see also* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("[T]his Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.").

271. Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112–17 (1936).

ones aside," distinguishing "between controversies that are basic and those that are collateral."[272]

In the field of federal Indian law, the Supreme Court and the lower federal courts have already discerned this plain necessity by implicitly recognizing that controversies concerning the scope of state authority over tribes and their reservation affairs under the Indian sovereignty doctrine are "basic," not "collateral," federal law controversies and, when ripe, give rise to federal causes of actions for equitable relief.[273] Like the Tribes' claim to possession exclusive of the state in *Oneida* and the insurance company's claim of freedom from tribal authority in *National Farmers Union*, such actions involve controversies that uniquely arise under federal law by history and by necessity. The United States has brought myriad such equitable actions to protect tribes and their resources from state and local encroachments.[274] Congress itself has recognized the imperative of providing a federal forum for such actions.[275] Thus, there should be no doubt that when tribes, or tribe-affiliated parties with standing, seek equitable relief from a federal court to prevent the imposition of state power against a tribe or its reservation resources or affairs in derogation of federal law, such claims "arise under" federal law within the meaning of the well-pleaded complaint rule.

Further, whether such equitable actions are directed against state officials in line with *Ex parte Young* or against local officials or private parties, they "arise under" federal law by "plain necessity." That necessity is as urgent for tribes facing state law coercive actions by private parties or local officials as it is for private parties or local officials facing tribal law coercive actions in cases like *National Farmers Union*.[276]

In *Inyo County*, the Paiute-Shoshone Indians properly invoked the subject matter jurisdiction of the federal district court in seeking to protect the Tribe's rights, under the Indian sovereignty doctrine, to be free from the criminal search warrants at issue. The well-pleaded complaint rule should not obstruct that Tribe's access to federal court. Nor should it stand in the way of similarly situated tribes (or tribe-affiliated entities) seeking equitable relief to prevent state officials, local authorities, or private parties from harnessing state power to control reservation resources or affairs in a manner that violates the protections of federal law.

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272. *Id.* at 118.

273. *See supra* notes 203–204, 206 (citing cases); *supra* notes 211–224 and accompanying text; *supra* notes 256–257, 262 (citing cases).

274. *See supra* notes 248, 265.

275. *See supra* text accompanying notes 235–257, 265–268.

276. *See supra* notes 20, 100, 132–136 and accompanying text; *see also supra* notes 248, 265 (citing actions by the United States).