

Washington University

Law Review Online

VOLUME 101

2024

STANDARDIZING APPEALS FROM DOMESTIC DEPENDENT SOVEREIGN COURTS

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ABSTRACT

*The U.S. Supreme Court’s historic decision in *McGirt v. Oklahoma* held that much of northeastern Oklahoma is Native American land. As a result, the State of Oklahoma had to transfer criminal jurisdiction over Native Americans in northeast Oklahoma to the federal government and tribes. This aspect of *McGirt* is a call to reassess how the federal government collaborates with its various domestic dependent sovereigns, comprising: (1) the overseas territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands; (2) federally recognized Indian tribes; and (3) the fifty states and D.C.*

All of these domestic dependent sovereigns possess an inherent judicial power and use it to decide issues of federal law. But these rulings are not always appealable. Parties can directly appeal¹ federal questions from most territorial courts—and court systems of the fifty states and D.C.—to Article III courts. Conversely, there is no way to directly appeal a federal question

* University of Virginia School of Law J.D. 2018; Rutgers University B.A. 2015. The *Washington University Law Review* editorial staff, especially Daniel Heintz, Alissa Gilmer, Skyler Dykes, Reagan Edwards, Clare Ennis, Abbey Fitzsimmons, Sarah Schuermann, Taylor Scribner, and Samantha Shults, provided valuable substantive insights and technical assistance during the publication process. I am grateful for their contributions, and they deserve much credit for this scholarly work.

1. Direct appeals are part of the original case, and “‘collateral review’ of a judgment or claim means a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process.” *Wall v. Kholi*, 562 U.S. 545, 553 (2011).

from the High Court of American Samoa, tribal courts, or Code of Federal Regulations courts ("C.F.R. courts") used by tribes that do not operate their own courts, to an Article III court. This status quo violates the foundational doctrine of judicial federalism that federal courts define federal law for other court systems. It is also problematic because the people of American Samoa and Indian reservations deserve the exact same interpretation of federal law as everyone else living in the country.

Congress ought to remedy this unequal treatment of American Samoans and Native Americans. It should use its plenary authority over the territories and tribes to pass a new statute allowing parties to directly appeal dispositive federal questions from the High Court of American Samoa, tribal courts, and C.F.R. courts to federal circuit courts. This update to the law would facilitate consistency of federal law in American Samoa and Indian reservations vis-à-vis the rest of the country. But legal principles of comity and respect for the inherent sovereign authority of American Samoa and Native American tribes dictate that any new jurisdictional statute should strictly limit directly appealable issues to federal questions.

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INTRODUCTION

McGirt v. Oklahoma is a landmark U.S. Supreme Court case where Jimcy McGirt—a Native American who is an enrolled member of the Seminole Nation of Oklahoma—asserted in post-conviction proceedings that the State of Oklahoma lacked jurisdiction to prosecute him for three serious crimes committed within the historical boundaries of the Muscogee (Creek) Indian Reservation.²

The central issue in *McGirt* was whether northeastern Oklahoma and the City of Tulsa remain Native American land classified as Indian Country for purposes of federal criminal law.³ McGirt and the Creek Nation, which joined as *amicus curiae*, urged an affirmative answer to this question because “[s]tate courts generally have no jurisdiction to try Indians for conduct committed in Indian Country.”⁴ Justice Neil Gorsuch noted that, “[i]f Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would

2. 140 S. Ct. 2452, 2459 (2020).

3. *Id.* at 2459–60, 2471, 2479.

4. *Id.* at 2459–60 (internal quotation marks omitted).

fall instead to the federal government and [the Creek] Tribe.”⁵ Oklahoma would however retain its sovereign “authority to try non-Indians for crimes against non-Indians on the lands in question.”⁶

The U.S. Supreme Court settled this jurisdictional “contest” between the federal government, the Creek Tribe, and Oklahoma by holding that *McGirt* committed his crimes in Indian Country, where offenses by Native Americans are not subject to state criminal jurisdiction.⁷

Justice Gorsuch’s framing of *McGirt* as a “jurisdictional contest” aptly illustrates the federal government’s complex interactions with its domestic dependent sovereigns,⁸ encompassing: (1) the five overseas territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands;⁹ (2) federally recognized Native American tribes;¹⁰ and (3) the fifty states and D.C.¹¹

Moreover, *McGirt*’s impact on federal, tribal, and state authority to prosecute crimes in Indian Country is an invitation to reassess the federal government’s relations with its domestic dependent sovereigns and find potential areas for improvement. For example, domestic dependent sovereigns exercise their judicial power through courts that decide issues of federal and local law.¹² But it is not always possible to directly appeal an

5. *Id.* at 2460.

6. *Id.*

7. See *id. passim* (citing, *inter alia*, 18 U.S.C. §§ 1151(a), 1153(a)). Whether federal and tribal courts have concurrent jurisdiction over these offenses is unsettled. See *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990).

8. I borrow the phrase of “domestic dependent sovereigns” from Chief Justice John Marshall’s portrayal of Native American tribes as “domestic dependent nations.” *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). Chief Justice Marshall coined this phrase because “the qualified nature of Indian sovereignty . . . plac[es] a tribe’s . . . governmental powers and attributes” in the hands of Congress. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014). The sovereign powers of the U.S. overseas territories, fifty states, and D.C. are similarly limited, so it seems appropriate to designate territories, tribes, states, and D.C. as “domestic dependent sovereigns.”

9. *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021); *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984).

10. See *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (noting that the “federally recognized tribes obtain [sovereign] immunities and privileges ‘by virtue of their government-to-government relationship with the United States,’” but unrecognized tribes lack similar sovereign powers (citing 25 C.F.R. §§ 83.1–2 (2013))).

11. See *Brackeen v. Haaland*, 994 F.3d 249, 311 (5th Cir. 2021) (“[S]tates retain sovereign authority under the Tenth Amendment ‘only to the extent that the Constitution has not divested them of their original powers’”).

12. See *Ortiz v. United States*, 138 S. Ct. 2165, 2177 (2018) (clarifying that territorial courts established by Congress under Article IV of the Federal Constitution do not exercise the judicial power of the United States); see also *S & S Servs., Inc. v. Rogers*, 35 F. Supp. 2d 459, 462 (D.V.I. 1999) (explaining that the District Court of the Virgin Islands and the local Virgin Islands courts are “vested with the ‘judicial power of the Territory’ of the Virgin Islands.” (quoting V.I. CODE ANN. tit. 4, § 2 (1976))); *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005) (“Indian tribes are not bound by the United States Constitution in the exercise of their powers, including their judicial powers”);

interpretation of federal law from a domestic dependent sovereign court to an Article III court. Parties who litigate federal questions before any court in the territories of Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands—or in the court systems of the fifty states and D.C.—can directly appeal to an Article III court. But that is not true for the High Court of American Samoa, tribal courts, or C.F.R. courts used by Native American tribes that do not operate their own judicial systems.

This difference in the availability of direct appeals that concern issues of federal law is difficult to reconcile with the doctrine of judicial federalism that federal courts define federal law. It also undermines the consistency of federal law throughout the United States. Congress should take corrective action to help American Samoans and Native Americans derive the same benefit from federal laws as other residents of the United States.

Part I of this Essay sets out the varying availability of direct appeals from domestic dependent sovereign courts. Part II builds on this analysis by discussing potential legislative solutions that Congress can implement using its plenary and exclusive authority over territories and Native American tribes. Part III ends this Essay by exploring critical policy considerations that should inform any forthcoming legislation to standardize the availability of direct appeals from questions of federal law across domestic dependent sovereigns.

I. INCONSISTENT AVAILABILITY OF DIRECT APPEALS FROM DOMESTIC DEPENDENT SOVEREIGN COURTS

Article III of the Constitution states:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished ¹³

Federal appellate courts—inclusive of the federal circuit courts and the U.S. Supreme Court—are Article III courts that define federal law through direct appeals¹⁴ from federal administrative agencies and various lower

Armadillo Bail Bonds v. State, 772 S.W.2d 193, 195–96 (Tex. App.—Dallas 1989, pet. granted), *aff’d*, 802 S.W.2d 237 (Tex. Crim. App. 1990) (“[T]he State of Texas has placed judicial power . . . in the judicial branch.”).

13. U.S. CONST. art. III, § 1. Article III judges hold lifetime tenure. *See id.*

14. *See supra* note 1 (explaining the difference between direct and collateral appeals).

courts.¹⁵ But these federal appellate courts cannot review all federal issues that are resolved by domestic dependent sovereign courts. Although questions of federal law are directly appealable from a majority of domestic dependent sovereign courts to Article III courts, it is impossible to directly appeal rulings of federal law from the High Court of American Samoa, tribal court, or C.F.R. court, to Article III courts. This disparity in the availability of direct appeals is investigated below.

A. Territorial Courts

The United States has five permanently populated overseas territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. These far-flung outposts in the Caribbean Sea and Pacific Ocean are home to almost four million people.¹⁶ The territories are similarly situated as they each use the dollar, their inhabitants do not pay federal income tax on money earned within the territories, and they each elect one non-voting delegate to Congress even though their residents are otherwise barred from participating in national elections.¹⁷

This voting restriction hints at a key distinction between territories. Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands are all “‘organized territories,’ meaning Congress passed an Organic Act allowing them to establish a government and elect a governor and a legislature.”¹⁸ Their inhabitants receive birthright U.S. citizenship.¹⁹

In contrast, there is no Organic Act for American Samoa, so it is an “unorganized territory” and its residents are U.S. nationals, not citizens.²⁰ For this reason, American Samoans are “denied the right to vote, the right to run for elective federal or state office outside [of] American Samoa, and the right to serve on federal and state juries” but retain the right to “work and travel freely in the United States” and have a streamlined naturalization process.²¹ American Samoa further differs from the other overseas territories because the federal questions resolved in its court system cannot be directly appealed to any Article III court.

15. See *Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996) (“[T]ribal judges, like state judges, are expected to comply with binding pronouncements of the federal courts.”).

16. *The Territories: They Are Us*, NAT’L CONF. OF STATE LEGISLATURES, Jan. 2018, at 27.

17. See *id.*; see also Aaron Steckelberg & Chiqui Esteban, *More than 4 Million Americans Don’t Have Anyone to Vote for Them in Congress*, WASH. POST (Sept. 28, 2017), <https://www.washingtonpost.com/graphics/2017/national/fair-representation/> [https://perma.cc/VET7-6XQG].

18. *The Territories: They Are Us*, *supra* note 16.

19. See *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021).

20. See *The Territories: They Are Us*, *supra* note 16; accord *Fitisemanu*, 1 F.4th at 865.

21. *Fitisemanu*, 1 F.4th at 865.

1. Courts in the Four Organized Territories

Article IV of the Constitution gives Congress plenary authority over the territories.²² Congress has used this power to establish Article IV courts in Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.²³

As of 2022, the District Courts for Guam, the Northern Mariana Islands, and the Virgin Islands are still Article IV courts that exercise the judicial power of their territories, not the judicial power of the United States.²⁴ They are staffed by Article IV judges appointed to ten-year terms and removable for cause by the President of the United States and have the same subject-matter jurisdiction as Article III district courts.²⁵ Direct appeals are taken from the District Courts for Guam and the Northern Mariana Islands to the U.S. Court of Appeals for the Ninth Circuit.²⁶ Litigants can directly appeal decisions of the District Court for the Virgin Islands to the U.S. Court of Appeals for the Third Circuit.²⁷

Puerto Rico is different because President Lyndon B. Johnson converted its Article IV territorial court to an Article III district court vested with the judicial power of the United States by signing Public Law 89-571 in 1966.²⁸ The U.S. Court of Appeals for the First Circuit handles direct appeals from the U.S. District Court for the District of Puerto Rico.²⁹

The foregoing federal courts coexist with local courts that exercise the judicial power of their territories, as permitted by Congress under Article IV.³⁰ The local courts of Guam,³¹ the Northern Mariana Islands,³²

22. See *Virgin Islands v. Clark*, 53 V.I. 183, 192 (2010).

23. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel* (*Hodel I*), 637 F. Supp. 1398, 1415 (D.D.C. 1986); *United States v. Santiago*, 23 F. Supp. 3d 68, 68 (D.P.R. 2014).

24. These courts are designated as “District Courts,” as opposed to “United States District Courts,” because they are not Article III courts and thus do not exercise the judicial power of the United States. See *Nguyen v. United States*, 539 U.S. 69, 72 n.3 (2003) (citing *Guam v. Olsen*, 431 U.S. 195, 196–97 n.1 (1977)).

25. *Hodel I*, 637 F. Supp. at 1415; see also *Armstrong v. Northern Mariana Islands*, 576 F.3d 950, 952 (9th Cir. 2009); *Birdman v. Off. of the Governor*, 677 F.3d 167, 175 (3d Cir. 2012).

26. See 28 U.S.C. § 1291; see also 48 U.S.C. §§ 1424-3(c), 1821, 1823(c).

27. See *United States v. Morton*, 993 F.3d 198, 202–03 (3d Cir. 2021) (citing 18 U.S.C. §§ 3231, 3742, 28 U.S.C. § 1291, and 48 U.S.C. § 1612).

28. See *United States v. Santiago*, 23 F. Supp. 3d 68, 68 (D.P.R. 2014).

29. See *Víctor J. Salgado & Assocs. Inc. v. Cestero-Lopategui*, 34 F.4th 49, 51, 52 n.5 (1st Cir. 2022).

30. See 48 U.S.C. § 1424(a)(1) (Guam); N. MAR. I. CONST. art. IV, §§ 1–3 (Northern Mariana Islands); *Díaz Cintrón v. Porto Rico*, 24 F.2d 957, 958–59 (1st Cir. 1928) (Puerto Rico); 48 U.S.C. § 1611(a) (Virgin Islands).

31. See, e.g., *Guam v. Perry*, 2009 Guam 4 ¶¶ 10–22 (assessing whether a Guam law violated the Federal Constitution).

32. See, e.g., *Commonwealth v. Bashar*, 2018 MP 11 ¶¶ 5–8 (examining whether federal immigration law as to marriage fraud preempted a related local statute).

Puerto Rico,³³ and the Virgin Islands³⁴ decide issues of federal law that parties can directly appeal by petitioning the U.S. Supreme Court for a writ of certiorari.³⁵

2. American Samoa

Although federal questions litigated before federal and local courts in Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands are appealable to Article III courts, that is not true in American Samoa given the unusual nature of its judicial system.

For context, American Samoa consists of the easternmost Samoan islands in the Pacific Ocean—which sit approximately 2,500 miles due south of Hawaii.³⁶ It is the only overseas territory in the Southern Hemisphere and was “ceded to the United States by the *matai* (chiefs) of the islands” in the early 1900s.³⁷ The population of American Samoa is just under 50,000 and another 200,000 persons of Samoan descent live elsewhere in the United States.³⁸ Its local constitution recognizes freedom of speech and religion, due process of law, and other basic civil rights.³⁹

Communities in American Samoa still follow traditional customs collectively known as the *fa’a Samoa*.⁴⁰ This traditional way of life revolves around extended families named *aiga* led by *matai*, who are the only individuals allowed to sit in the upper house of the territorial legislature.⁴¹ The *fa’a Samoa* also embraces communal land ownership that encompasses well over ninety percent of the land within the islands and is strictly limited to individuals with at least fifty percent American Samoan heritage.⁴²

There is no Article IV court in American Samoa.⁴³ As an unorganized territory, American Samoa instead exercises its judicial power through a local court system over which the Secretary of the Interior has plenary

33. P.R. LAWS ANN. tit. 4, § 24s(b), (e)–(f) (2017).

34. See, e.g., *St. Luce v. Transp. Servs. of St. John Inc.*, CIV. NO. 182/2005, 2005 WL 8180208, at *1 (V.I. Super. Ct. Oct. 5, 2005) (rejecting arguments that a local court lacked jurisdiction over federal claims).

35. See 28 U.S.C. §§ 1257, 1258, 1260 and 48 U.S.C. § 864 for the U.S. Supreme Court’s appellate jurisdiction over the Supreme Court of Puerto Rico; 48 U.S.C. § 1424-2 for the U.S. Supreme Court’s appellate jurisdiction over the local courts of Guam; 48 U.S.C. § 1613 for the relationship between the U.S. Supreme Court and the courts of the Virgin Islands; and 48 U.S.C. § 1824 for the relationship between the U.S. Supreme Court and the courts of the Northern Mariana Islands.

36. *Fitisemanu v. United States*, 1 F.4th 862, 866 (10th Cir. 2021).

37. See *Virgin Islands v. Clarke*, 53 V.I. 183, 192 (2010); see also 48 U.S.C. § 1661(a).

38. See *Fitisemanu*, 1 F.4th at 866.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *United States v. Santiago*, 23 F. Supp. 3d 68, 69 n.2 (D.P.R. 2014).

authority.⁴⁴ This local court system comprises village courts, one district court, and the High Court of American Samoa.⁴⁵ The latter court is split into four divisions: the family and substance abuse division, the land and titles division, the trial division, and the appellate division.⁴⁶

American Samoan law gives the High Court broad subject-matter jurisdiction over admiralty, civil, and criminal cases in the territory.⁴⁷ And Congress supplemented this local jurisdiction by vesting in the High Court of American Samoa the power to decide limited matters of federal law involving, *inter alia*, animal welfare, environmental pesticide regulations, food safety, maritime law, motor vehicle safety, and Occupational Health and Safety Administration violations.⁴⁸

The appellate division of the High Court of American Samoa is the court of last resort for the territory,⁴⁹ and its rulings on federal and local law are directly appealable to only the Secretary of the Interior.⁵⁰ But parties may seek collateral review of High Court decisions by suing the Secretary of the Interior in federal court in D.C. under the theory that their administration of the American Samoan court system violated federal law.⁵¹

While American Samoa benefits from the ability to adjudicate certain federal cases, this authority is problematic in some ways. The High Court of American Samoa does not collect data on its federal workload, but its Chief Judge has stated that these federal matters consume much High Court time.⁵² And the High Court's inability to enjoin proceedings in, or transfer cases to, federal court complicates its work by inviting parallel suits in federal district court.⁵³

In addition, American Samoa is not in any federal judicial district, which is a key fact given the High Court's limited federal jurisdiction. When a federal civil matter is outside the High Court's jurisdiction, all parties live in American Samoa, and the relevant events occurred there, no proper

44. See generally WILLIAM O. JENKINS, JR., U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 11 (2008). See also *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel (Hodel II)*, 830 F.2d 374, 376 (D.C. Cir. 1987).

45. AM. SAMOA CODE ANN. § 3.0101 (1992).

46. JENKINS, *supra* note 44, at 6.

47. AM. SAMOA CODE ANN. §§ 3.0103, 3.0208 (1992).

48. See, e.g., 7 U.S.C. §§ 136(i) (environmental pesticide control), 2146(c) (animal welfare); 29 U.S.C. § 653 (occupational safety); 46 U.S.C. § 31301(2)(E) (admiralty disputes); 49 U.S.C. § 30102(a)(13) (motor vehicles); JENKINS, *supra* note 44, at 14.

49. AM. SAMOA CODE ANN. § 3.0202 (1992).

50. *Hodel II*, 830 F.2d 374, 383–87, 383 n.58 (D.C. Cir. 1987) (citing *King v. Morton*, 520 F.2d 1140, 1144 (D.C. Cir. 1975)).

51. See *id.*; accord *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977) (ordering the Secretary not to enforce an American Samoan conviction obtained without a jury).

52. JENKINS, *supra* note 44, at 14.

53. *Id.*

federal venue exists—so no court can hear the case.⁵⁴ Finally, federal criminal cases that arise in American Samoa are prosecuted thousands of miles away in federal district court in D.C. and Hawaii.⁵⁵

Leaving all appeals from the High Court of American Samoa up to the Secretary of the Interior also merits scrutiny. The Secretary's position is that "a decision to intervene in the judicial system of American Samoa 'cannot be taken lightly,' as any intervention might jeopardize the United States policy of 'fostering greater self-government and self-sufficiency without disturbing the traditional Samoan cultural values.'"⁵⁶ And the Secretary will generally intervene in the affairs of the High Court only when the record presents "a clear case of abuse of judicial discretion."⁵⁷ As of 1986, "the Secretary ha[d] never of [their] own accord overruled a decision of the Samoan judiciary."⁵⁸ This state of affairs persisted across the next two decades. In 2008, a former High Court law clerk remarked that, "[i]n theory, the secretary of the interior could overrule high court decisions, but that has never happened during the more than one-hundred-year history of the court."⁵⁹

At present, High Court of American Samoa rulings are functionally unappealable aside from the rare collateral challenge to the Secretary of the Interior's management of the American Samoan court system.⁶⁰ And at least one federal district court has indicated that collateral review of High Court decisions implicating federal law is available only when a party exhausts their available local remedies by appealing to the Secretary of the Interior.⁶¹

54. *Id.* at 13 (citing 28 U.S.C. § 1391), 21 n.54.

55. *Id.* at 15–17 (citing, *inter alia*, United States v. Lee, 159 F. Supp. 2d 1241 (D. Haw. 2001), *aff'd*, 472 F.3d 638 (9th Cir. 2006)).

56. *Hodel II*, 830 F.2d at 378.

57. *Hodel I*, 637 F. Supp. 1398, 1404 (D.D.C. 1986).

58. *Id.* at 1413.

59. Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 351 (2008).

60. *Id.*

61. See *Barlow v. Sunia*, CIV. NO. 18-00423-JAO-KJM, 2019 WL 5929736, at *4 (D. Haw. Nov. 12, 2019) ("[T]he exhaustion requirement [is] not rooted in § 2254 whose exhaustion requirement is 'limited to "courts of the State," ' but instead, 'principles of comity and efficiency support[] the exhaustion requirement' Thus, while there may be dispute regarding the source of an exhaustion requirement, there can be no doubt it applies with equal force to territorial remedies. And while American Samoa differs from Guam in important respects, e.g., it is an unincorporated territory with neither an Organic Act nor a district court located within its territory, the Court can discern no reason why these distinctions would justify a different outcome when assessing the need to exhaust territorial remedies based on more fundamental principles of comity." (quoting *Pador v. Matanane*, 653 F.2d 1277, 1279 n.1 (9th Cir. 1981))). However, the *Barlow* court noted that other federal courts have said the exhaustion requirement is satisfied when a party appeals to the highest judicial authority in American Samoa—with no need to appeal to the Secretary of the Interior. See *id.* at *5 n.9 (citing, *inter alia*, *King v. Morton*, 520 F.2d 1140, 1144 (D.C. Cir. 1975) ("Exhaustion is not at issue here, since King has already appealed his conviction to the highest court in American Samoa.")). It is therefore an open question whether exhaustion of remedies in American Samoa requires an appeal to the Secretary of the Interior. See *id.*

B. Tribal Courts

Native Americans have shaped what is now the United States since time immemorial. Chief Justice John Marshall acknowledged as much in *Johnson v. M'Intosh* when he applied the Anglo-American “doctrine of discovery” in concluding that Great Britain impaired tribal land ownership when it founded its American colonies.⁶² He then held that the United States, as the successor to Great Britain, possesses superior title to Native American lands within its territory.⁶³

This understanding of the federal-tribal relationship still controls today. Congress recognizes 573 tribes⁶⁴ as “domestic dependent nations that exercise inherent sovereign authority” over their internal affairs.⁶⁵ But these tribes are subordinate to the federal government⁶⁶ and Congress has plenary and exclusive power over them under the Indian Commerce Clause and the Treaty Clause of the Constitution.⁶⁷

The U.S. Supreme Court has regardless stated that Indian tribes still possess inherent sovereign authority—absent congressional abrogation—because they predate the Federal Constitution.⁶⁸ And Congress has decided that tribes can invoke their sovereign power of self-government to set up formal judicial branches.⁶⁹ Tribes may alternatively use C.F.R. courts established under Article I of the Federal Constitution as subdivisions of the Department of the Interior.⁷⁰ Although independent tribal courts and C.F.R. courts both resolve dispositive federal questions, neither option allows for direct appeals to Article III courts—as set out below.

1. Independent Tribal Courts

Over 330 tribes have courts that exercise the inherent judicial power of their tribes.⁷¹ Tribal law—as limited by federal law—defines the jurisdiction of tribal courts.⁷²

62. 21 U.S. 543, 572–74, 584 (1823).

63. *Id.*

64. Angelique EagleWoman, *Jurisprudence and Recommendations for Tribal Court Authority Due to Imposition of U.S. Limitations*, 47 MITCHELL HAMLINE L. REV. 342, 342–43, 343 n.1 (2020).

65. *Michigan V. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (internal quotation marks omitted)).

66. See *Worcester v. Georgia*, 31 U.S. 515, 519 (1832); *cf.* *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493–94 (2022) (explaining the limitations of *Worcester*).

67. See *United States v. Lara*, 541 U.S. 193, 200 (2004).

68. *Bay Mills Indian Cmty.*, 572 U.S. at 788.

69. *Lara*, 541 U.S. at 210 (citing 25 U.S.C. § 1301(2)).

70. As their name suggests, C.F.R. courts are administrative tribunals established under Article I of the Federal Constitution.

71. EagleWoman, *supra* note 64, at 342–43.

72. EagleWoman, *supra* note 64, at 354.

In general, tribal and non-tribal plaintiffs can bring civil suits against tribal defendants in tribal court.⁷³ And Congress has authorized tribal courts to dispose of certain civil claims arising from federal law.⁷⁴ For criminal cases, tribes have “criminal jurisdiction over *all* Indians, including nonmembers.”⁷⁵ Tribal courts thus can adjudicate the federal crimes that any Native American commits within Indian Country.⁷⁶ But tribal courts lack jurisdiction over non-Indian criminal defendants except when non-Indians commit domestic violence against Indians, as set out in the Violence Against Women Reauthorization Act of 2013.⁷⁷ In this context, tribal courts adjudicate important issues of federal law. But there is no way to directly appeal these decisions to an Article III court.⁷⁸

Civil litigants are confined to collateral attacks on tribal court jurisdiction in federal court after exhausting all available tribal remedies.⁷⁹ Commentators have identified three problems with the application of this collateral review mechanism, which can be called *Iowa Mutual* abstention, to final tribal court judgments.⁸⁰

First, the correct analytical pathway is murky in cases where the tribal court appropriately exercised jurisdiction.⁸¹ The U.S. Supreme Court has said that, “[u]nless a federal court determines that the Tribal Court lacked jurisdiction . . . , proper deference to the tribal court system precludes

73. See *Williams v. Lee*, 358 U.S. 217, 223 (1959). The United States Supreme Court has left open the extent of tribal court civil jurisdiction over non-member defendants. See *Nevada v. Hicks*, 533 U.S. 353, 358 n.2, 374 (2001).

74. *Hicks*, 533 U.S. at 366–69. The scope of federal civil lawsuits that may be filed in tribal court remains somewhat nebulous. See *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 944–45 (9th Cir. 2009).

75. *United States v. Lara*, 541 U.S. 193, 198 (2004) (quoting 25 U.S.C. § 1301(2) (emphasis in original) (internal quotation marks and citation omitted)).

76. *United States v. Bruce*, 394 F.3d 1215, 1221 (9th Cir. 2005). Some federal courts posit that federal and tribal courts share concurrent jurisdiction over federal crimes tribe members commit in Indian Country. See *id.* But this is an unresolved question of law for offenses listed in the federal Major Crimes Act. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022) (assuming *arguendo* that the Major Crimes Act divests Native American tribes of criminal jurisdiction); *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990). It is conversely undisputed that tribes can prosecute Native Americans for tribal crimes in tribal court. See *Spurr v. Pope*, 936 F.3d 478, 485 (6th Cir. 2019).

77. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 900 n.6 (9th Cir. 2017).

78. See Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 605 & n.322 (1997).

79. *Id.* at 561 & n.147 (analyzing *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9 (1987)).

80. See *id.* at 567 (“Did the Supreme Court intend to hold that, in cases where both federal and tribal court jurisdiction exist, the federal court must decline to exercise its concurrent jurisdiction until the tribal court has decided the case, and that a federal court may only exercise its jurisdiction over the merits if and when it determines that the tribal court lacked jurisdiction?”); see also *id.* at 537 (“[I]t is entirely possible that an overzealous discernment of National Farmers Union and Iowa Mutual may . . . pressure federal courts to take an aggressive stance on tribal court jurisdiction and . . . diminish rather than enhance tribal court sovereignty by fostering the assumption that tribal courts are somehow inferior or weaker and require greater protection.” (internal quotation marks omitted)).

81. See *id.* at 567.

relitigation of issues raised . . . and resolved in the Tribal Courts.”⁸² Taken at face value, this language suggests that federal courts cannot bypass valid tribal court jurisdiction to get to other legal issues presented by the parties. But several federal courts have reached the merits of claims properly subject to tribal court jurisdiction.⁸³

Second, the scope of federal court authority is unclear if the tribal court was without jurisdiction.⁸⁴ Must a federal court limit itself to jurisdictional questions, or may it decide the underlying civil claims on the merits?⁸⁵

Third, the tendency of federal courts to use *Iowa Mutual* abstention to facilitate independent de novo review of tribal court verdicts motivates federal courts to narrowly construe tribal court jurisdiction.⁸⁶ This diminishes tribal sovereignty by reducing the scope of their judicial power.⁸⁷ Setting aside this important topic, *Iowa Mutual* abstention wastes judicial resources by inviting parties to file duplicative lawsuits in federal and tribal court.⁸⁸

Criminal defendants in tribal court are similarly situated to civil litigants. Their access to federal court is restricted to a petition for a writ of habeas corpus that collaterally attacks convictions under the theory that their “detention by order of an Indian tribe” violates federal law as incorporated against the relevant tribe by Congress.⁸⁹

2. C.F.R. Courts

The tribal court system also encompasses C.F.R. courts for Indian tribes without court systems.⁹⁰ Five regional C.F.R. courts serve sixteen tribes in Colorado, New Mexico, Nevada, Oklahoma, and Utah.⁹¹

82. *Iowa Mut.*, 480 U.S. at 19.

83. Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. 241, 246 & n.27, 251–60, 266, 271–72, 275–78 (1998).

84. See Watson, *supra* note 78, at 567.

85. See *id.*

86. See *id.* at 537; see also Royster, *supra* note 83, at 242–43, 251–60, 271–72, 275–78.

87. See Royster, *supra* note 83, at 242–43, 251–60, 271–72, 275–78.

88. See Watson, *supra* note 78, at 575–78.

89. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57–58 (1978) (citing, *inter alia*, 25 U.S.C. § 1303). Tribes are not automatically subject to the Constitution. *Id.* at 56. But Congress limited this rule by partially subjecting tribes to the Constitution via the Indian Civil Rights Act. *Id.* at 57.

90. See generally *Tribal Court Systems*, U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFS., <https://www.bia.gov/CFRCourts/tribal-justice-support-directorate> [<https://perma.cc/9WTY-SKMM>]; see also Denezpi v. United States, 142 S. Ct. 1838, 1843 (2022) (explaining that the purpose of C.F.R. courts “is ‘to provide adequate machinery for the administration of justice for Indian tribes’ in certain parts of Indian country ‘where tribal courts have not been established’” (citing 25 C.F.R. § 11.104 (2021))).

91. See generally *Court of Indian Offenses*, U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFS., <https://www.bia.gov/CFRCourts> [<https://perma.cc/BW97-CLCB>]; see also Denezpi, 142 S. Ct. at 1843.

C.F.R. courts are hybrid tribunals that “‘retain some characteristics of an agency of the federal government’ but ‘also function as tribal courts.’”⁹² The Department of the Interior’s “Assistant Secretary for Indian Affairs appoints C.F.R. court judges, called magistrates, subject to a confirmation vote by the governing body of the tribe that the court serves. The Assistant Secretary may remove magistrates for cause of his own accord or upon the recommendation of the tribal governing body.”⁹³ The Department of the Interior also appoints the prosecutor for each C.F.R. court unless a Department contract with a tribe says otherwise.⁹⁴

The subject-matter jurisdiction of C.F.R. courts is broad. They hear criminal cases with Native American defendants, and civil cases involving at least one Native American party.⁹⁵ Such expansive subject-matter jurisdiction requires C.F.R. courts to analyze federal law.⁹⁶

C.F.R. court decisions are appealable to only the Courts of Indian Appeals—the appellate divisions of C.F.R. courts.⁹⁷ Courts of Indian Appeals judges are appointed by the Department of the Interior’s Assistant Secretary for Indian Affairs—with tribal approval.⁹⁸ These judges serve four-year terms and are removable for cause by the Assistant Secretary.⁹⁹ Courts of Indian Appeals decide cases using three-judge panels and a record from the C.F.R. court.¹⁰⁰

No direct appeals may be taken from Court of Indian Appeals judgments.¹⁰¹ Unhappy civil litigants can only collaterally attack a Court of Indian Appeals ruling in federal district court under the theory that the C.F.R. court lacked jurisdiction.¹⁰² Criminal defendants are no better off

92. *Caddo Nation of Okla. v. Ct. of Indian Offenses for Andarko Agency*, No. CIV-14-281-D, 2014 WL 1328378, at *2 (W.D. Okla. Apr. 1, 2014) (citing *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991)).

93. *Denezpi*, 142 S. Ct. at 1843 (citing 25 C.F.R. §§ 11.201(a), 11.202 (2022)).

94. *Id.* (citing 25 C.F.R. § 11.204 (2022)).

95. 25 C.F.R. §§ 11.114, 11.116, 11.118 (2022); Gregory D. Smith & Bailee L. Plemmons, *The Court of Indian Appeals: America’s Forgotten Federal Appellate Court*, 44 AM. INDIAN L. REV. 211, 221–22 (2020); see also *Denezpi*, 142 S. Ct. at 1843 (2022) (summarizing the criminal jurisdiction of C.F.R. courts).

96. See, e.g., *Denezpi*, 142 S. Ct. at 1844 (“An officer with the federal Bureau of Indian Affairs filed a criminal complaint in C.F.R. court. That complaint charged *Denezpi* with three crimes: assault and battery, in violation of 6 Ute Mountain Ute Code § 2 (1988); terroristic threats, in violation of 25 C.F.R. § 11.402; and false imprisonment, in violation of 25 C.F.R. § 11.404.”); Smith & Plemmons, *supra* note 95, at 225–29, 234 (summarizing C.F.R. court subject-matter jurisdiction).

97. See Smith & Plemmons, *supra* note 95, at 223.

98. 25 C.F.R. § 11.201(a) (1994).

99. 25 C.F.R. § 11.201(b) (1994).

100. Smith & Plemmons, *supra* note 95, at 224.

101. 25 C.F.R. § 11.200(d) (1994) (“Decisions of the appellate division [of C.F.R. courts] are final and are not subject to administrative appeals within the Department of the Interior.”).

102. See *Tillett v. Lujan*, 931 F.2d 636, 641 (10th Cir. 1991) (“Requiring *Tillett* to exhaust her tribal remedies does not preclude her from thereafter bringing a suit in federal court challenging the

because they may challenge a Court of Indian Appeals decision only by petitioning a federal district court for a writ of habeas corpus—the classical collateral appeal of criminal convictions.¹⁰³

C. State Courts and D.C.

Like the overseas territories and Native American tribes, the fifty states are domestic dependent sovereigns because they “retain sovereign authority under the Tenth Amendment ‘only to the extent that the Constitution has not divested them of their original powers.’”¹⁰⁴ They possess their own inherent judicial power and can create state court systems for the exercise thereof.¹⁰⁵ State courts can adjudicate issues of federal law litigated before them.¹⁰⁶ And parties may directly appeal a state court system’s final decision on the merits of a federal question to an Article III court by petitioning the U.S. Supreme Court for a writ of certiorari.¹⁰⁷

In contrast, Congress holds plenary and exclusive authority over D.C. under Article I of the Constitution.¹⁰⁸ Congress has established federal courts called the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. These are constitutional courts that exercise the judicial power of the United States through Article III judges holding lifetime tenure,¹⁰⁹ and they are also vested with the judicial power of D.C.¹¹⁰ Congress also set up a local court system made up of the D.C. Superior Court and the D.C. Court of Appeals.¹¹¹ These local D.C. courts have judges who serve fixed terms,¹¹² so they only exercise the judicial power of D.C.¹¹³ The local D.C. courts deal with federal

tribal courts’ [i.e., the C.F.R. court’s] exercise of jurisdiction. Once the tribal courts have acted, their determination of jurisdiction is subject to review in federal court.” (internal citations and quotation marks omitted)).

103. See *Dry v. CFR Ct. of Indian Offenses for Choctaw Nation*, 168 F.3d 1207, 1209 (10th Cir. 1999) (citing *Wetsit v. Stafne*, 44 F.3d 823, 826 (9th Cir. 1995)).

104. *Brackeen v. Haaland*, 994 F.3d 249, 311 (5th Cir. 2021).

105. See *Armadillo Bail Bonds v. State*, 772 S.W.2d 193, 195 (Tex. App.—Dallas 1989, pet. granted), *aff’d*, 802 S.W.2d 237 (Tex. Crim. App. 1990) (“[T]he State of Texas has placed judicial power . . . in the judicial branch. We reach this conclusion because the State of Texas, as sovereign, created district courts.”).

106. *Hodel I*, 637 F. Supp. 1398, 1415 (D.D.C. 1986).

107. 28 U.S.C. § 1257(a).

108. *United States v. Lopez*, 514 U.S. 549, 589 n.3 (1995) (Thomas, J., concurring) (citing U.S. CONST. art. I, § 8, cl. 17).

109. *Palmore v. United States*, 411 U.S. 389, 406–07 (1973).

110. D.C. CODE § 11-101 (2001). The D.C. Code also allows the United States Supreme Court to exercise the judicial power of D.C.

111. *Palmore*, 411 U.S. at 407–10.

112. *Id.* at 409–10.

113. *Ortiz v. United States*, 138 S. Ct. 2165, 2196 (2018) (Alito, J., dissenting); *Sibley v. U.S. Sup. Ct.*, 786 F. Supp. 2d 338, 344 (D.D.C. 2011).

and D.C. law.¹¹⁴ And federal questions decided by both court systems in D.C. are directly appealable by filing a petition for a writ of certiorari with the U.S. Supreme Court.¹¹⁵

II. WHY IT MATTERS AND WHAT WE CAN DO ABOUT IT

As set out above, decisive issues of federal law are not always directly appealable from domestic dependent sovereign courts to Article III courts. Unlike parties in other overseas territories, the fifty states, and D.C., litigants in American Samoa, tribal courts, and C.F.R. courts cannot directly appeal federal questions to the federal judiciary. I discuss the nature of this problem and several potential solutions below.

A. *Why Does It Matter?*

The inability of parties to directly appeal issues of federal law from the High Court of American Samoa, tribal courts, or C.F.R. courts, to Article III court is troublesome for at least four reasons.

First, the fact parties cannot directly appeal federal questions from the High Court of American Samoa, tribal courts, or C.F.R. courts, to any Article III court means these domestic dependent sovereign courts can disagree with federal court constructions of federal law—even those of the U.S. Supreme Court.¹¹⁶ The lack of direct review by Article III courts may even incent the High Court, tribal courts, and C.F.R. courts to interpret federal law differently than Article III courts.¹¹⁷ This state of affairs is in tension with the doctrine of judicial federalism that federal courts define federal law.¹¹⁸ It is also problematic for nationwide uniformity of federal law, a crucial goal the U.S. Supreme Court pursues by granting certiorari to resolve conflicts between federal circuit courts.¹¹⁹ And different definitions of federal law in the High Court, tribal courts, and C.F.R. courts may preclude the people of American Samoa and Indian reservations from asserting their legal rights. This dissonance in the law would encourage the vertical forum-shopping that Justice Louis Brandeis flatly disapproved of in

114. *Palmore*, 411 U.S. at 407–10; *see also* MPAC, LLC, v. District of Columbia, 181 F. Supp. 3d 81, 84–85 (D.D.C. 2014), *aff'd*, No. 14-7090, 2014 WL 4628997 (D.C. Cir. Aug. 11, 2014) (remanding a federal question to the D.C. Court of Appeals).

115. 28 U.S.C. §§ 1254, 1257(a)–(b).

116. *See* Smith & Plemmons, *supra* note 95, at 234–36.

117. *See* Watson, *supra* note 78, at 604–05 & nn.319–20 (citing, *inter alia*, *Satiacum v. Reagan*, 10 Indian L. Rptr. 6009, 6011 (Puyallup Tribal Ct. Sept. 17, 1982) (declaring that the Puyallup tribal court is not bound by United States Supreme Court decisions limiting tribal sovereignty)).

118. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 n.9 (2022).

119. *Loughrin v. United States*, 573 U.S. 351, 355 & n.2 (2014); *see* Smith & Plemmons, *supra* note 95, at 234–36 (discussing inconsistency of law as interpreted by tribal and C.F.R. courts).

Erie Railroad Co. v. Tompkins.¹²⁰ Indeed, Justice Brandeis noted “[i]n at least some states, . . . the state courts applied different rules of decision than the federal courts on some questions of general law” in setting out his justifications for creating the modern *Erie* doctrine.¹²¹

Second, collateral review mechanisms available from the High Court of American Samoa, tribal courts, and C.F.R. courts are narrow, so it is difficult to secure merits review of federal questions. As of 2008, there were only two instances of a party making a successful collateral attack on a High Court decision by suing the Secretary of the Interior for violating federal law in their management of American Samoan courts.¹²² This is not a real avenue to appellate review. In addition, the U.S. Supreme Court says that, “[u]nless a federal court determines that the Tribal Court lacked jurisdiction . . . , proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.”¹²³ As such, Article III courts can review the merits of tribal court—and C.F.R. court—judgments only if the tribal court or C.F.R. court lacked subject-matter jurisdiction over the case or controversy at the outset.

Third, the Department of the Interior is the final arbiter of direct appeals from the High Court of American Samoa and C.F.R. courts. This authority is irreconcilable with the separation-of-powers doctrine that adjudication in the political branches cannot involve the judicial power required to “dispose conclusively of an individual’s legal claim to private rights that fit the template of life, physical liberty, or traditional forms of property.”¹²⁴ As noted earlier, the High Court of American Samoa and C.F.R. courts resolve criminal cases and land disputes implicating private rights recognized since the nineteenth century.¹²⁵ Because final High Court and C.F.R. court rulings are appealable only to the Secretary of the Interior or their appointees, these individuals have the final say in all criminal and land matters adjudicated in Samoan and C.F.R. courts. But the Secretary of the Interior is an Executive Branch official appointed by the President of the United States. As a result, the Secretary of the Interior and their underlings lack “structural protections against the political process” needed to safeguard private rights subject to

120. Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 964–67 (2013) (analyzing *Erie R.R. v. Tompkins*, 304 U.S. 64, 74–75 & n.7 (1938)).

121. *Id.*

122. Weaver, *supra* note 59, at 351.

123. *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 19 (1987).

124. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 559 (2007) [hereinafter Nelson, *Adjudication in the Political Branches*]; see also Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1429 (2021) (“[T]he political branches d[o] not have . . . sway over vested private ‘rights.’ Only true courts c[an] conclusively determine . . . that a private person had forfeited such rights.”).

125. See, e.g., Smith & Plemmons, *supra* note 95, at 219 (summarizing subject matter jurisdiction of C.F.R. courts, which includes land disputes).

only judicial power.¹²⁶ Nor can private rights be impaired by the limited adjudicative authority the Executive Branch uses to administer public rights and government privileges like patents.¹²⁷ And this vesting of judicial power in the Department of the Interior casts doubt on whether the administration of American Samoa—and the C.F.R. courts' use of trial and appellate judges who can be fired by Executive Branch officials—adheres to constitutional separation-of-powers principles.¹²⁸

Fourth, the non-appealability of federal questions raised in American Samoa produces strange results vis-à-vis the availability of further review. Congress has authorized the High Court of American Samoa to adjudicate certain civil claims arising from federal law.¹²⁹ The High Court also handles local criminal cases implicating federal laws like the Sixth Amendment right to a jury.¹³⁰ And High Court dispositions of these matters are insulated from direct review by an Article III federal court.¹³¹ Conversely, the Department of Justice prosecutes federal crimes committed in American Samoa in Article III district courts in D.C. and Hawaii.¹³² Defendants can appeal rulings by these courts to the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court. Under these circumstances, civil parties cannot appeal issues of federal law from the High Court to Article III courts. But criminal defendants may file such appeals, depending on whether they are prosecuted in the High Court or in federal district court in D.C. or Hawaii. It makes little sense to condition the appealability of federal questions with a nexus to American Samoa on the type of case at issue—civil or criminal—and whether a criminal defendant is tried in the High Court or a federal forum far removed from American Samoa.

B. What Can We Do About It?

Congress has several choices for improvement of American Samoan, tribal, and C.F.R. court systems.

Lawmakers on Capitol Hill could broaden the availability of federal and local courts within American Samoa and Native American reservations or authorize the U.S. Supreme Court to grant petitions for writs of certiorari from the High Court, tribal courts, or C.F.R. courts. But neither of these commentator-favored proposals can meaningfully address the inability of

126. Nelson, *Adjudication in the Political Branches*, *supra* note 124, at 559.

127. *Id.* at 559, 571.

128. *Id.* at 559, 565, 566–73.

129. *See supra* note 48 and accompanying text.

130. *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977).

131. *Hodel II*, 830 F.2d 374, 383 n.58, 384–87 (D.C. Cir. 1987).

132. *See JENKINS*, *supra* note 44, at 13–15.

parties to directly appeal federal questions from the High Court, tribal courts, or C.F.R. courts, to an Article III court.

Alternatives include giving nearby Article III district courts jurisdiction over federal appeals from the High Court, tribal courts, and C.F.R. courts, or permitting litigants to directly appeal issues of federal law to the federal court of appeals for the relevant geographic region. The better option is to bypass the district courts and send federal appeals from the High Court, tribal courts, and C.F.R. courts, directly to federal circuit courts. This solution would avoid burdening busy district judges and use procedural mechanisms unique to federal appellate courts to reduce any burden on the federal judiciary from its added responsibilities for the High Court, tribal courts, and C.F.R. courts.

The following paragraphs assess each solution for the unavailability of direct federal question appeals from the High Court, tribal courts, and C.F.R. courts, and explain why federal circuit courts are the best solution to the problems caused by the inconsistent availability of direct appeals from domestic dependent sovereign courts.

1. Court Expansion Is Disfavored and Impractical

American Samoan stakeholders have discussed creating an Article III district court that would be part of the District of Hawaii, or establishing a new Article IV territorial court.¹³³ Either idea would facilitate direct appeals of federal questions from American Samoa. But both options are unpopular among locals, who see an increased federal judicial presence as a threat to the *fa'a Samoa*.¹³⁴ Congress could also be hesitant to set up a new federal court in American Samoa because this project would involve administrative and fiscal challenges consisting of: (1) allocating the jurisdiction of the new court to provide access to justice without encroaching on the *fa'a Samoa*;¹³⁵ (2) building out localized U.S. Attorney, Marshal, and Pretrial and Probation offices and simultaneously providing needed public defender services;¹³⁶ (3) constructing the workspaces needed to support a federal court and financing its accompanying support staff; and (4) gathering a sufficient pool of United States citizens for federal jury service while avoiding conflicts of interest and undue social pressures.¹³⁷ Because American Samoa lacks suitable facilities, the federal government would

133. *Id.* at 3, 26–31.

134. *Id.* at 15–16, 23–26; Weaver, *supra* note 59, at 357–58, 362–64.

135. JENKINS, *supra* note 44, at 26–31.

136. *Id.*

137. *Id.* at 25 (explaining that not all American Samoans are United States citizens and only United States citizens can sit on federal juries).

need to spend at least \$2.5 million on a new courthouse.¹³⁸ This new district court would also cost the United States a minimum of \$8.6 million annually.¹³⁹ Scholars have separately proposed expanding the federal jurisdiction of the High Court of American Samoa.¹⁴⁰ This solution would not permit litigants to directly appeal issues of federal law to an Article III court. At any rate, the American Samoan government and High Court might not have the operational capacity necessary to absorb additional federal jurisdiction.¹⁴¹

Federal Indian law commentators similarly favor wholesale changes to tribal courts. A popular idea is to expand tribal court jurisdiction by statute or treaty.¹⁴² But this alone does nothing to facilitate direct appeals of federal questions from tribal court to federal court. Other proposals urge Congress to identify tribes lacking courts and fill this gap with a two-tiered judiciary made up of trial and appellate courts, then create a new federal circuit court superior to all tribal court systems.¹⁴³ This solution is unworkable because Congress cannot unilaterally impose courts on tribes without violating their inherent sovereign authority, which extends to the establishment of judicial branches. It also presents major financial and logistical challenges because over 200 of the 573 federally recognized Indian tribes operate without courts and a single federal appeals court may find it difficult to adequately master the laws enacted by hundreds of tribes.¹⁴⁴

2. *Grants of Certiorari Are Too Rare*

Setting aside court expansion, Congress could allow parties who litigate in the High Court, tribal courts, or C.F.R. courts to petition the U.S. Supreme Court for a writ of certiorari.¹⁴⁵ Such congressional action would put these domestic dependent sovereign courts on the same footing as the

138. *Id.* at 34–36 n.75. The General Services Administration estimates that it would spend eighty to ninety dollars per square foot on a 32,000-square-foot courthouse. Multiplying the low price per square footage by the required square footage produces an estimated total cost of \$2.56 million.

139. *Id.* at 36–40. The General Services Administration mapped out several scenarios for expenses associated with a new district court in American Samoa. For simplicity, I aggregated the lowest estimated cost per component, which was \$4.3 million for the court, \$1.3 million for U.S. Attorneys, \$2 million for U.S. Marshals, and \$1 million for U.S. Pretrial and Probation. The sum of these figures is \$8.6 million.

140. *Id.* at 31–33; Weaver, *supra* note 59, at 364.

141. JENKINS, *supra* note 44, at 31–33.

142. R. Stephen McNeill, Note, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status as "Domestic Dependent Nations,"* 65 WASH. & LEE L. REV. 283, 320–29 (2008); EagleWoman, *supra* note 64, at 371–74.

143. McNeill, *supra* note 142, at 329–32; see also Royster, *supra* note 83, at 254 n.84.

144. See EagleWoman, *supra* note 64, at 342–43; Smith & Plemmons, *supra* note 95, at 233–36.

145. See Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 893 (1990).

courts of the fifty states and D.C. But this is not the best way to facilitate direct appeals of federal questions from the High Court, tribal courts, and C.F.R. courts to Article III courts. The U.S. Supreme Court seldom grants certiorari. It receives between 5,000 and 6,000 petitions each term and hears oral argument in 60 to 70 cases,¹⁴⁶ which translates to a success rate of barely one percent. And there is no indication that the U.S. Supreme Court will be more interested in High Court, tribal court, or C.F.R. court decisions. As such, certiorari petitions are not a viable pathway to merits review of federal questions resolved by the High Court, tribal courts, or C.F.R. courts, so Congress should find a better solution.

3. *Federal District Courts Are an Imperfect Option*

If Congress rejects court expansion and petitions for writs of certiorari, it could incorporate the High Court of American Samoa, tribal courts, and C.F.R. courts, into nearby Article III district courts. Analogous plans have periodically materialized with regard to American Samoa for at least ninety years. Congress considered passing an Organic Act for American Samoa in the 1930s and its deliberations included enacting “an avenue of appeal from the High Court of American Samoa to the U.S. District Court of Hawaii,” but this proposal went nowhere.¹⁴⁷ Six decades later, a draft bill suggested giving the District of Hawaii “limited jurisdiction over federal cases arising in American Samoa” and was structured such that magistrate judges would sit full-time in American Samoa but Article III judges would preside over trials in Hawaii.¹⁴⁸ This legislation fizzled because federal judicial officials opposed it due to transportation difficulties.¹⁴⁹ Nor did these officials want to unfairly burden the District of Hawaii.¹⁵⁰

Although integration of the High Court, tribal courts, and C.F.R. courts, into existing Article III district courts for trial or appellate purposes might seem attractive at first glance, Congress should consider two major caveats. First, federal district courts are not always receptive to increased workloads, as Congress learned in 1995 when it explored having the District of Hawaii adjudicate American Samoa’s federal cases in the first instance.¹⁵¹ Second, giving district judges the initial crack at direct appeals of federal questions from the High Court, tribal courts, and C.F.R. courts, could prompt further

146. See generally SUP. CT. OF THE U.S., A REPORTER’S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 14 (2022) (providing data on the Supreme Court’s workload).

147. JENKINS, *supra* note 44, at 7.

148. *Id.* at 16–17.

149. *Id.*

150. *Id.*

151. *Id.*

review by the federal circuit court superior to the district court and the filing of a petition for a writ of certiorari with the U.S. Supreme Court. Parties might then endure a five-stage judicial process involving American Samoan and Indian courts of first instance and last resort, plus all three levels of the federal judiciary.¹⁵² And such extended litigation could increase the time horizon for a final decision beyond that practicable for the parties and raise jurisdictional mootness concerns.

4. *Why Federal Appellate Courts Are the Best Solution*

Congress should bypass the foregoing ideas in lieu of direct appeals to federal circuit courts. This plan can be implemented in two steps. American Samoa is not in a judicial district, so the first step would be to incorporate it into the geographic jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. This West Coast court is a logical choice because it is the closest federal circuit court to American Samoa and already handles direct appeals from District Courts in Guam and the Northern Mariana Islands. The second step would be congressional enactment of a new jurisdictional statute that allows parties to directly appeal dispositive federal questions from the High Court of American Samoa and tribal court to the regional federal circuit court. And this solution is supported by the historical—though abandoned—practice of giving federal circuit courts jurisdiction over direct appeals from the local courts of last resort in Guam,¹⁵³ the Northern Mariana Islands,¹⁵⁴ Puerto Rico,¹⁵⁵ and the Virgin Islands.¹⁵⁶

Adoption of existing circuit precedent by the American Samoan, tribal, and C.F.R. courts would be simple. As a practical matter, circuit precedent would prospectively bind these domestic dependent sovereign courts at the time Congress passes a new jurisdictional statute allowing direct appeals of federal questions to the regional federal circuit courts. This automatic and immediate application of circuit precedent would give individual litigants and the courts a body of law to reference during the adjudicative process. Such ready-made law will simplify decisions of American Samoan, tribal, and C.F.R. courts and allow them to focus on open questions of local law. In addition, the concept of finality of judgments would absolve American

152. I base this five-stage hypothetical on the two-level court systems currently used by American Samoa, the Navajo Nation, and C.F.R. courts. See AM. SAMOA CODE ANN. § 3.0101 (1992); Weaver, *supra* note 59, at 348 (defining the structure of the American Samoan court system). See generally *Judicial Branch of the Navajo Nation: Public Guide to the Courts*, NAVAJO NATION (Feb. 23, 2021), <https://courts.navajo-nsn.gov/> [<https://perma.cc/G2M3-PL9N>] (giving an overview of Navajo courts).

153. *Limtiaco v. Camacho*, 549 U.S. 483, 486–88 (2007).

154. 48 U.S.C. § 1824(a); *Taisacan v. Northern Mariana Islands*, 546 U.S. 977 (2005).

155. *United States v. Lebrón-Caceres*, 157 F. Supp. 3d 80, 93 n.20 (D.P.R. 2016), *amended by* No. 15-279, 2016 WL 204447 (D.P.R. Jan. 15, 2016).

156. *Vooyo v. Bentley*, 901 F.3d 172, 183–84 (3d Cir. 2018).

Samoan, tribal, and C.F.R. courts of any obligation to change or otherwise revisit past opinions in light of newly binding circuit precedent.¹⁵⁷ This application of finality doctrine will protect these domestic dependent sovereign courts from filings by parties seeking to overturn past unfavorable decisions. For example, when a federal circuit court overrules previous circuit precedent in an en banc decision, the en banc judgment does not reopen the overruled proceedings.¹⁵⁸ The en banc ruling merely sets out a new rule for prospective application.

The federal circuit courts are well-equipped to adjudicate direct appeals of federal questions from American Samoan, tribal, and C.F.R. courts for at least three reasons, which are set out below.

First, the federal circuit courts are already familiar with the nuances of appellate practice and the applicable standards of review. Cases decided by the High Court of American Samoa and Indian courts of last resort may first pass through local administrative agencies and different levels of the local court system before they reach the federal judiciary.¹⁵⁹ The federal circuit courts already handle direct appeals from the final decisions of some federal administrative agencies that use multi-step adjudicative processes—like the Executive Office of Immigration Review¹⁶⁰ and the Commissioner of Social Security.¹⁶¹ This experience with federal agencies gives the federal circuit courts extensive working knowledge of appellate principles that facilitate proper resolution of matters previously litigated in several tribunals, such as exhaustion, forfeiture, and waiver.¹⁶²

Second, federal circuit courts can use existing doctrines to ameliorate encroachment on the inherent sovereignty of American Samoa and tribes. Recall that *Iowa Mutual* abstention invites federal courts to reach the merits of claims that arise from tribal law.¹⁶³ Federal circuit courts could minimize such intrusions on the inherent sovereignty of American Samoa and tribes through the adequate and independent state law grounds doctrine. Under this doctrine, the U.S. Supreme Court “will not review judgments of state courts that rest on adequate and independent state grounds”¹⁶⁴ That

157. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 478 (1982) (“Depriving state judgments of finality . . . would violate basic tenets of comity and federalism.”).

158. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022) (en banc) (overruling part of *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012), without reopening that case for review).

159. *See, e.g., AM. SAMOA CODE ANN.* § 3.0208 (1992) (defining the High Court’s jurisdiction).

160. *See Garland v. Ming Dai*, 141 S. Ct. 1669, 1675–78 (2021).

161. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1773 (2019).

162. Exhaustion dictates that claims not litigated in the tribunal of first instance cannot be raised later. *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004). Forfeiture is the failure to make an argument, whereas waiver is the surrender of a legal right. *Claiborne v. Blauser*, 934 F.3d 885, 893 (9th Cir. 2019).

163. *See Royster, supra* note 83, at 251–54.

164. *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983).

avoidance of state law stems from jurisdictional limitations imposed by Article III. “The jurisdictional concern is that [an Article III court cannot] ‘render an advisory opinion, and if the same judgment would be rendered by the state court after [an Article III court] corrected its views of federal laws, [federal] review could amount to nothing more than an advisory opinion.’”¹⁶⁵ This doctrine can be extended to judgments of the High Court and Indian courts through a rule that such cases are unreviewable if the final disposition would stand on local law alone. And this proposed rule is arguably already required by the jurisdictional limitations that Article III imposes on federal courts in prohibiting advisory opinions.

Third, federal circuit courts can apply an “adequate and independent Samoan or tribal law grounds” rule via familiar procedural tools like issue-specific notices of appeal,¹⁶⁶ certificates of appealability, and screening panels.¹⁶⁷ Under this system, any party that wants to directly appeal a federal question from the High Court or an Indian court would file an issue-specific notice of appeal and request a certificate of appealability from the federal circuit court. A certificate of appealability would be granted only if the appeal concerns issues of federal law identical to those litigated in the High Court, tribal court, or C.F.R. court. Failure to satisfy this condition would push the appeal to a screening panel for disposition through an unpublished non-precedential order.¹⁶⁸ These procedural safeguards would help a federal circuit court’s three-judge merits panels avoid ruling on matters of local law beyond their purview.¹⁶⁹ And the availability of procedural dispositions will moderate any federal judicial inclination to analyze particularly compelling issues of American Samoan or tribal law.

Additional reforms will increase the benefit of this possible change in the law. Congress can meaningfully improve access to justice in American Samoa by granting the High Court jurisdiction over all civil actions based on federal law and amending 28 U.S.C. § 1391 so these claims can be filed in the High Court if no other venue is proper.¹⁷⁰ Congress can further the same objective by instructing the Department of Justice to try crimes with a nexus to American Samoa in the High Court where practicable.¹⁷¹ Congress should also tackle duplicative litigation by allowing American Samoan,

165. *Id.* at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)).

166. *See, e.g.*, FED. R. BANKR. P. 8009(a)(1)(A) (“The appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.”).

167. U.S. CT. OF APPEALS FOR THE NINTH CIR., GENERAL ORDERS 51–73 (2023) (describing certificates of appealability and screening panels).

168. *Id.* at 66–69.

169. *See Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) (recognizing that interpretations of tribal law by the Northern Cheyenne Appellate Court are binding on federal courts).

170. JENKINS, *supra* note 44, at 15.

171. *See Weaver*, *supra* note 59, at 326, 355–57, 366.

tribal, and C.F.R. courts to enjoin parallel litigation in federal district court. And such legislation should facilitate case transfers between American Samoan, tribal, and C.F.R. courts and the federal district courts.¹⁷² These new judicial procedures will simplify the administration of justice by American Samoa, Indian tribes, and federal district courts.

III. PUBLIC POLICY

Several policy considerations should inform any future congressional efforts to vest federal circuit courts with jurisdiction over direct appeals from the High Court of American Samoa and Indian court systems. These policy factors will help Congress appropriately balance the inherent sovereignty of American Samoa and Indian tribes with the fundamental national interest in consistent interpretation of federal law.

Congress could initially protect the inherent sovereignty of American Samoa and Native American tribes by codifying the judge-endorsed position that the American Samoan and “tribal courts are best qualified to interpret and apply [local] law.”¹⁷³ By extension, their rulings on local law should be binding¹⁷⁴ and entitled to deference.¹⁷⁵ But lawmakers on Capitol Hill must follow the doctrine of judicial federalism that federal courts define federal law,¹⁷⁶ as recognized by Indian courts including the Navajo Nation Supreme Court.¹⁷⁷ Congress should moderate federal deference to American Samoan and Indian courts by voiding their interpretations of local law if preempted by federal law.¹⁷⁸ And these domestic dependent sovereign courts would be bound by decisions of regional federal circuit courts on issues of federal law. This precise allocation of precedent-making authority between American Samoan, Indian, and federal courts would protect the use of traditional customs and values in American Samoan and tribal legal reasoning¹⁷⁹ while also maximizing consistency in interpretation of federal law across the country. As the famous eighteenth-century Mohawk leader Thayendanegea (Joseph Brant) put it:

Among us we have no prisons, we have no pompous parade of courts,
we have no written laws, and yet judges are as highly revered among

172. JENKINS, *supra* note 44, at 16; *see also* 28 U.S.C. §§ 1404, 1406.

173. *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 16 (1987).

174. *Sanders*, 864 F.2d at 633.

175. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993).

176. *See Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996).

177. *Conoco, Inc. v. Ponca Tax Comm’n*, 21 Indian L. Rptr. 6119, 6121 (Ponca Tribal T.C. Sept. 28, 1994); *Biakeddy v. Biakeddy*, 18 Indian L. Rptr. 6111, 6112 (Navajo May 7, 1991).

178. *See Nat’l Farmers Union Ins. v. Crow Tribe*, 468 U.S. 1315, 1318 (1984) (Rehnquist, J.) (“I cannot believe that Indian tribal courts are . . . free to exercise their jurisdiction in a manner prohibited by . . . this Court . . .”).

179. *EagleWoman*, *supra* note 64, at 360–61; *Royster*, *supra* note 83, at 247.

us as they are among you, and their decisions are as highly regarded.¹⁸⁰

Application of traditional values in American Samoan and Indian courts segues to a broader principle. The so-called *Insular Cases* are a “string of Supreme Court decisions issued at the turn of the twentieth century . . . that addressed a basic question: when the American flag is raised over an overseas territory, does the Constitution follow?”¹⁸¹ And the answer was a “flexible and pragmatic approach” based on the principle that constitutional provisions extend to the territories “only if the circumstances of the territory warrant their application.”¹⁸²

The *Insular Cases* are controversial and very rightly “criticized as amounting to a license for further imperial expansion and having been based at least in part on racist ideology” that is repugnant.¹⁸³ But the U.S. Supreme Court has recently repurposed the *Insular Cases* and their flexible framework now gives the “federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution. This same flexibility permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.”¹⁸⁴ Congress has similarly pursued a tribal self-determination policy since the 1960s.¹⁸⁵

These policies of self-determination support the above plan to authorize direct appeals of federal questions from the High Court of American Samoa and Indian courts to federal circuit courts because it would largely preserve local judicial autonomy while facilitating consistent interpretations of federal law throughout the country.

Congress should finally view direct appeals of federal issues from the High Court of American Samoa, tribal courts, and C.F.R. courts as a golden opportunity to fix *Iowa Mutual* abstention. Giving preclusive effect to local interpretations of local law and making federal questions directly appealable to federal circuit courts will limit the importance of *Iowa Mutual* abstention by encouraging lawsuits in the High Court and Indian court while reducing any federal judicial skepticism of those forums.¹⁸⁶ On appeal, parties could selectively challenge jurisdiction or the merits. This would address concerns that *Iowa Mutual* abstention invites federal courts to narrowly construe the jurisdiction of a domestic dependent sovereign court as a way to unlock the

180. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 201 (1989).

181. *Fitisemanu v. United States*, 1 F.4th 862, 869 (10th Cir. 2021).

182. *Id.*

183. *Id.* at 869–70.

184. *Id.* at 870–71.

185. *EagleWoman*, *supra* note 64, at 362.

186. *Watson*, *supra* note 78, at 537, 577–78.

merits for de novo review. And Congress should tell federal circuit courts that *Iowa Mutual* abstention allows them to rule on claims in the first instance if the lower court lacked jurisdiction. These incremental reforms will simplify *Iowa Mutual* abstention by changing it from a source of disagreement among federal courts and commentators to a simplified doctrine that pauses parallel federal litigation out of respect to the High Court and tribal court systems.¹⁸⁷ This change to the law is favorable as a policy matter because it will improve the efficiency of federal courts through streamlined decision-making.

CONCLUSION

An unusual aspect of our federal court system is that federal questions are not directly appealable from all domestic dependent sovereign courts. Parties can directly appeal issues of federal law from courts in Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands—and courts of the fifty states and D.C.—to Article III courts. But that is not true of the American Samoan, tribal, or C.F.R. courts. This difference broaches the possibility that these courts will interpret federal law differently than their Article III peers without recourse, which is irreconcilable with the doctrine of judicial federalism that federal courts define federal law for other courts. In addition, such inconsistency in federal law may treat American Samoans and Native Americans less favorably than other Americans vis-à-vis the laws applicable to them.

Congress should correct this inequality by passing a new jurisdictional statute that permits direct appeals of federal questions from the High Court and Indian courts to the federal circuit court for the geographic region. But any legislation to that end must incorporate principles of comity and respect for the inherent sovereign power of American Samoa and Native American tribes. For this reason, Congress should preserve as much local autonomy over local law as possible while promoting uniformity of federal law across the country. This balance can be achieved by making American Samoan and tribal interpretations of local law binding on the federal courts unless somehow preempted by federal law. And such an upgrade to the law will advance equality by helping American Samoans and Native Americans assert their rights under federal law. As Hinmatóowyalahtq̓it (Chief Joseph) of the Nez-Pearce tribe once explained:

Treat all men alike. Give them the same laws. Give them all an even chance to live and grow. All men were made by the same Great

187. See *id.* at 534 n.7, 601–07.

Spirit Chief. They are all brothers. The earth is the mother of all people, and all people should have equal rights upon it.¹⁸⁸

188. CHESTER ANDERS FEE, CHIEF JOSEPH: THE BIOGRAPHY OF A GREAT INDIAN 281–83 (1936).