The Utmost Rights and Interests of the Indians: Tribal Law Interpretations of the Indian Civil Rights Act

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"Our Indian courts are necessary if tribal governments are to exercise the sovereign prerogatives of tribes as recognized by Congress and the federal courts. It is the job of Indian tribunals to interpret tribal laws and to apply them evenly to everyone under tribal jurisdiction. Congress has mandated in the Indian Civil Rights Act that this be done according to 'due process' and without impairment of many individual liberties found in the federal Constitution."[1]

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[1] NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT v (1978).

INTRODUCTION

It has been more than fifty years since Congress enacted the Indian Civil Rights Act (ICRA) and more than forty years since the United States Supreme Court articulated in *Martinez* that Tribal courts are the proper forum for adjudicating ICRA claims.[2] In the decades since, Tribal courts have developed a rich body of intertribal common law pertaining to the implementation of ICRA.[3] This comes after over a century of assimilative policies in which the federal government attempted to eradicate native culture and traditions and subjected Indians to the deprivation of individual rights by federal and state judicial systems.[4] I begin with the Anishinaabe story of *Dibaakonigewinini miinawaa Anishinaabe* (The Judge and the Indian) in an attempt to highlight the confusion that often occurs when Anglo-American legal principles are applied to Indians.[5] As the story is told:

> Aaningodinong-sh gii-tebibinaawag miigaadiwaad gaa-izhi-gibaakwa'indwaa. Mii I'iw miigaazong miinawa go awiiya babakite'waawaad. Miish a'aw bezhig inini gaa-izhi-maajiinind Wiigaziibiigiing. Mii iko iwidi gaa-izhiwinindwaa gii-kibaakwa'indwaa. Namanj iwidi gaa-

[2] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968); *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (concluding that ICRA claims should be adjudicated in tribal courts).

[3] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 17 ("It is 'Indianness' which makes tribal courts different from Anglo courts. The use of customs which are important to the tribe in the courtroom should be encouraged in tribal member disputes . . . . Respect, understanding and greater effectiveness of Indian courts can follow application of traditional law . . . .").

[4] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 86 (1942) ("During the century from 1833 to 1933 hundreds of laws affecting Indian tribes were enacted and a great part of these laws, perhaps a majority of them, in some way deprived the Indian tribes of rights or possessions they had once enjoyed").

[5] JIM CLARK, LIVING OUR LANGUAGE: OJIBWE TALES & ORAL HISTORIES 48 (Anton Treuer ed., 2001).

> izhiwinind, mii a'aw inini. Gaawiin go apaji ogii-nisidotanziin. Baamaa go gaye zhaaganaashiimo. Miish iwidi azhigwa gii-izhiwinind imaa wii-tibaakwanind. Niibawid imaa agindaamagad dibaakonigewininiwan. "*You're charged with assault and battery*," inaa giiwenh.
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> [And once in a while they got caught fighting one another and were thus imprisoned. And that's how fighting was when they boxed someone. Then that one man was taken away. He was a really good fighter, the one taken away to Grantsburg. They were usually brought there when they were locked up. He must have been brought there, that man. He did not understand very well. Later he would speak English. Now he was brought there when he would be indicted. As he stood there it was read by the judge. He was told at length what the reason for his imprisonment was. He was informed by the judge, "You're charged with assault and battery," he said, so the story goes.]
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> Ani-ganawaabamaad iniw dibaakonigewininiwind, "Oonh wenh, gaawiin sa niin wiikaa zhiiwitaagan gemaa gaye waasamoo-makakoons igaye ingimoodisiin," odinaan giiwenh. Miii'iw gaa-initang. Mii gaa-izhi-noondamaan iwidi gaa-o-bizindaagwak ayi'ii, mii dibaakwa'ind.
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> [As he looked at that judge, "oh baloney, I never stole any salt or battery," he told him, so the story goes. That's how he understood [the charge]. That's how I heard it over there, listening about how he was indicted.][6]

As evidenced in this Anishinaabe story, Tribal courts are the proper forums to adjudicate individual rights disputes that arise within their jurisdictions to avoid the confusion associated with the application of Anglo-American legal systems and legal principles to Indians.[7] In this regard, the ruling in *Martinez* was significant as it "allows the tribes to implement the ICRA in a manner which preserves their ability to decide difficult questions in accordance with tribal values, and more importantly, in a manner consistent with tribal sovereignty."[8] The *Martinez* Court came

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[6] *Id*. at 48–49.

[7] FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LAW 57 (1995) ("Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and sovereignty . . . [and] provid[e] reliable and equitable adjudication in the . . . diverse matters that come before them. In addition, they constitute a key tribal entity for advancing and protecting the rights of self-government.").

[8] Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 35 (1979).

to this conclusion because "Congress intended that under the Indian Bill of Rights, tribal governments would be permitted the freedom to retain traditional customs and procedures so long as they do not violate specific protections contained in the act and so long as those procedures render substantial fairness and justice."[9] So how are Tribes doing in the implementation of ICRA? Specifically, how are Tribal courts balancing the promotion of Tribal sovereignty with the protection of individual rights?[10] Does ICRA establish a mandate to Tribal governments to assume and require judicial review of any allegedly illegal action by a Tribal government? Can a Tribe accused of violating these primary rights also be the judge of its own actions and at same the time comply with federal law?[11] This Article examines these questions in detail.

This Article is not the first piece that attempts to square ICRA's provisions with the importance of preserving Tribal custom. Other scholars have analyzed the impact of ICRA's provisions on federal court interpretations,[12] in the habeas context,[13] or the broad impact of ICRA over the last several decades.[14] These contributions bring vital context on how ICRA shapes the Tribal legal landscape, but do not often dedicate space to discussing the Tribal court decisions that describe on the ground level how Tribal governance and individual rights interact to animate ICRA's impact on Tribes. This Article prioritizes examining some foundational cases that typify the various approaches Tribes may take to interpret ICRA in harmony with their unique Tribal customs.

In doing so, Part I provides a brief introduction. Part II details the implementation of individual rights protections prior to the enactment of ICRA. Part III provides an overview of the passage of ICRA. Part IV examines federal court encroachment into Tribal court determinations of individual rights protections. Part V provides an overview of the ruling in *Martinez*. Part VI details Tribal court interpretations of ICRA associated with Tribal sovereign immunity, Tribal council actions, equal protection,

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[9] U.S. COMM'N ON CIV. RTS., AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 21 (1972).

[10] *See Tribal Courts Act of 1991*: *Hearing on S. 1752 Before the Select Comm. on Indian Affs., United States Senate*, 102nd Cong. 68 (1991) ("Take for example the 1968 Indian Civil Rights Act. It does two things. On the one hand, it promotes tribal self-government. At the same time, it protects individual rights").

[11] Halona v. MacDonald, 1978 Navajo App. LEXIS 7, 1 Navajo Rptr. 189, at *17–18 (Navajo Ct. App. Jan. 24, 1978).

[12] *E.g.*, Judy Lynch, *Indian Sovereignty & Judicial Interpretations of the Indian Civil Rights Act*, 4 IMMIGR. & NAT'Y L. REV. 207, 222–28 (1981).

[13] *See generally ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709 (2016).

[14] *See generally* KRISTEN CARPENTER ET AL., THE INDIAN CIVIL RIGHTS ACT AT FORTY (2012).

due process, and criminal protections. Part VII concludes by offering recommendations for Tribal courts in their ongoing review of ICRA.

I. INDIVIDUAL RIGHTS PROTECTIONS PRIOR TO THE ENACTMENT OF ICRA

In examining the status of the individual rights protections that Indians possessed prior to the enactment of ICRA, this Article begins with an international law perspective. In this regard, international law "evolved with concomitant recognition of Indians as human beings having certain rights. The roots of this policy are said to be found in the Bull *Sublimis Deu* of Pope Paul III, issued June 4, 1537."[15] This Papal Bull declared:

> Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.[16]

This and other European colonial era doctrines have been utilized "as the originating source of Indian rights under U.S. law."[17] Emanating from these doctrines is the doctrine of plenary power, which has been historically utilized as the justification for the implementation of assimilative policies and the infringement of inherent Tribal sovereignty.[18]

The primary purpose of the assimilative policies as implemented was the eradication of Native culture and traditions.[19] In the process of achieving this purpose, "federal policy makers attempted to eradicate Native culture and religions in order to separate the people from the

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[15] U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 515 (1966) (quoting F.A. MACNUTT, BARTHOLOMEW DE LAS CASAS: HIS LIFE, HIS APOSTOLATE AND HIS WRITINGS 429–31 (1909)).

[16] *Id.*

[17] ROBERT WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 51 (2005).

[18] For a critique of how Federal Indian law has been developed to support the diminishment of tribal sovereignty through the perpetuation of historical assimilation policies using the doctrines of discovery and implicit divesture, see Kekek Jason Stark, *Nakomidizo: An Anishinaabe Law Response to Two Hundred Years of Johnson v M'Intosh and the Doctrines of Discovery and Implicit Divesture*, 23 TRIBAL L. J. 12 (2024).

[19] Kekek Jason Stark, *Indian Policing: Agents of Assimilation*. 73 CASE W. RSRV. L. REV. 683, 710 (2023).

intimate relationship that was associated with ancestral lands."[20] In this regard, "the Native way of life was condemned as universally worthless and deserving of extinction."[21]

In 1873, the Commissioner of Indian Affairs wrote about the purpose of the assimilation policy era in his annual report: "[t]he first condition of civilization is protection of life and property through the administration of law. As the Indians are taken out of their wild life, they leave behind them the force attaching to the distinctive tribal condition."[22] In 1874, the Commissioner of Indian Affairs expounded upon this assertion.[23] He explained "that the Indians were lawless and needed law."[24] This sentiment was reinforced in the 1881 report of the Commissioner of Indian Affairs, which stated: "[T]he Indians need to be taught the supremacy of law, and the necessity for strict obedience thereto."[25] Moreover, according to the Executive Secretary of the American Indian Defense Association, "the whim of the superintendent [was] the law."[26] As such, "[a]t times the Indian Bureau, represented by the superintendent, are said to have combined, for these Indians, the functions of an employer, landlord, policeman, judge, physician, banker, teacher, relief administrator, and employment agency."[27] The 1915 Bureau of Municipal Research report confirms this: "the Indian superintendent was a czar within the territorial jurisdiction prescribed for him. He was ex-officio

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[20] *Id*. at 712 (citing DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION 185 (2020)); *id.* at 712 n.124 (quoting ADAMS, *supra* note 20, at 7) ("The policy issue could be reduced to this fact: Indians possessed the land, and whites wanted the land . . . . For the founders of a settler nation a major priority was the creation of a mechanism and rationale for divesting Indians of their lands.").

[21] *Id.* at 712–13 n.125 (quoting ADAMS, *supra* note 20, at 8) ("In a word, Indians were savages because they lacked the very thing whites possessed—civilization. And because the law of historical progress and the doctrine of social evolution meant that civilized ways were destined to triumph over savagism, Indians would ultimately confront a fateful choice: civilization or extinction.").

[22] 1873 ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR 372–735.

[23] 1874 ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR 323–24, 326–27.

[24] Stark, *supra* note 19 at 713 (quoting 1874 ANN. REP. OF THE COMM'R OF INDIAN AFFS., *supra* note 23, at 11-12, 14–15); U.S. DEP'T INTERIOR, REP. OF THE SEC'Y OF THE INTERIOR; BEING PART OF THE MESSAGE AND DOCUMENTS COMMUNICATED TO THE TWO HOUSES OF CONGRESS AT THE BEGINNING OF THE SECOND SESSION OF THE FORTY-THIRD CONGRESS xiv (1874).

[25] 1881 ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR xvii–xviii.

[26] *Reserve Courts of Indian Offenses: Hearings on H.R. 7826 Before the H. Comm. on Indian Affs.*, 69th Cong. 19 (1926) (Statement of John Collier, Executive Secretary, Am. Indian Def. Ass'n).

[27] U.S. DEP'T OF INTERIOR, *supra* note 15, at 569.

both guardian and trustee. In both of these capacities he acted while deciding what was needed for the Indian and while disbursing funds."[28]

Felix S. Cohen explains that "[d]uring the century from 1833 to 1933 hundreds of laws affecting Indian tribes were enacted and a great part of these laws, perhaps a majority of them, in some way deprived the Indian tribes of rights or possessions they had once enjoyed."[29] The Bureau of Indian Affairs (BIA) enacted the laws most suppressive of Indian individual rights protections during the Assimilation policy era, which were known as the "Regulations of the Indian Department."[30] In his 1883 Report of the Secretary of the Interior, Secretary Henry Teller stated that the implementation of these regulations "was designed to 'civilize the Indians' by forcing them to 'desist from the savage and barbarous practices . . . calculated to continue them in savagery.'"[31] Punishment under these regulations included fines, hard labor, withholding vital food and clothing rations, and imprisonment.[32] Eventually, BIA became concerned with the "blatant disregard for fair procedures and individual rights" in the implementation of these regulations.[33]

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[28] *Id.* (quoting ADMIN. OF THE INDIAN OFF., BUREAU OF MUN. RSCH. PUBL'N NO. 65, 21 (1915)).

[29] COHEN, *supra* note 4, at 86.

[30] *See* U.S. DEP'T OF THE INTERIOR, ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR 24 (1892).

> [T]he agent is authorized in the "Regulations of the Indian Department" to prevent Indians from leaving their reservation without a permit for that purpose, and instructed not to allow the practice of bands of Indians of one reservation making or returning visits to other reservations for the purpose of receiving or giving presents, and he has the power to use his Indian police to prevent the infraction of these rules. The final judgments of the courts of Indian offenses are subject to modification and revocation by the Indian agent, who is given appellate jurisdiction. The Indian agent, as shown by the foregoing, now has almost absolute power in the Indian country, and so far as the people over whom he rules are concerned, he has none to contest his power.

Id.; *See* DEP'T OF THE INTERIOR, OFF. INDIAN AFFS., RULES GOVERNING THE COURT OF INDIAN OFFENSES 2–3 (1883).

[31] Denezpi v. United States, 596 U.S. 591, 606 (2022) (Gorsuch, J., dissenting) (quoting U.S. DEP'T OF THE INTERIOR, REPORT OF THE SECRETARY OF THE INTERIOR, VOLUME I: BEING PART OF THE MESSAGE AND DOCUMENTS COMMUNICATED TO THE TWO HOUSES OF CONGRESS AT THE BEGINNING OF THE FIRST SESSION OF THE FORTY-EIGHTH CONGRESS x (1883)).

[32] WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 120–21 (1966).

[33] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 10 ("By the 1930's it was obvious that the assimilationist policies of the past had failed. Allotment had caused the loss of 90 million acres by Indians, and tribal governments were largely under the thumb of the Indian agents. Life on Indian reservations was miserable.").

In response, the Indian Reorganization (Wheeler-Howard) Act was enacted on June 18, 1934.[34] The Act was proclaimed to be "one of the most significant single pieces of legislation directly affecting Indians ever enacted by the Congress of the United States."[35] The Act, as originally proposed, purported "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise."[36] In doing so, "the Secretary of the Interior revoked regulations of the office, in force since 1884, which are said to have empowered the superintendent of an Indian reservation to act as judge, jury, prosecuting attorney, police officer, and jailer."[37] As part of this revocation, pursuant to the Revised Law and Order regulations enacted as part of the Indian Reorganization Act, "[a] judicial system was established giving the defendants the right to formal charges, jury trial, power to summon witnesses, and the privilege of bail."[38] As such, "[t]he Commissioner of Indian Affairs described the revised Law and Order Regulations in these terms:"

> Indian Service Officials are prohibited from controlling, obstructing, or interfering with the functions of the Indian courts. The appointment and removal of Indian judges on those reservations where courts of Indian offenses are now maintained is made subject to confirmation by the Indians of the reservation. Indian defendants will hereafter have the benefit of formal charges, the power to summon witnesses, the privilege of bail, and the right to trial by jury. The offenses for which punishment may be imposed are specifically enumerated, the maximum of 6 months labor or $360 fine being imposed for such offenses as assault and battery, abduction, embezzlement, fraud, forgery, misbranding and bribery.[39]

As a result of enacting the Indian Reorganization Act, Congress recognized the existence of their federal responsibility to Indians, requiring the United States to further Tribal sovereignty and support Tribal

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[34] Indian Reorganization Act of 1934, Pub. L. 73–383, 48 Stat. 984 (1934) (as amended at 25 U.S.C. §§ 5101–5129).

[35] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955 (1972).

[36] *Id.* at 961 (quoting H.R. 7902, 73d Cong., 2d Sess. (1934); S. 2755, 73d Cong., 2d Sess. (1934)); *see also* THEODORE H. HAAS, U.S. DEP'T OF THE INTERIOR, U.S. INDIAN SERV., TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A. 1 (1947) ("The Indian Reorganization Act was presaged by the enactment by Congress of the Pueblo Relief Act on May 31, 1933 . . . .").

[37] U.S. DEP'T OF INTERIOR, *supra* note 15, at 570.

[38] *Id.*

[39] *Id.* (quoting ANN. REP. OF THE SEC'Y OF THE INTERIOR 166 (1936)).

self-government.[40] As proposed, the Act included a provision ensuring "the civil liberties of minorities and individuals within the community, including the liberty of conscience, worship, speech, press, assembly, and association."[41] However, "[t]his provision was dropped from the final version."[42] As a result, "[a] forcible application of these guarantees on the tribes did not occur again in federal legislation until 1968."[43] Therefore, in the time period between 1933 and 1968 "no law [was] enacted which took from any Indian tribe, against its will, any of its liberties or any of its possessions."[44]

An integral component of the Indian Reorganization Act was the establishment of modern-day Tribal courts in place of the Court of Indian Offenses.[45] As a result, "Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and sovereignty, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them."[46] Moreover, "they constitute a key tribal entity for advancing and protecting the rights of self-government."[47]

This is a significant development because in *Talton v. Mayes* the United States Supreme Court determined that the individual rights

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[40] *See, e.g.*, Memorandum from Barack H. Obama on Tribal Consultation (Nov. 5, 2009), 74 Fed. Reg. 57881 (Nov. 9, 2009) (providing federal departments and agencies "are responsible for strengthening the government-to-government relationship between the United States and Indian tribes"); American Indian and Alaska Native Education, Exec. Order No. 13,336, 69 Fed. Reg. 25295 (May 5, 2004) ("The United States has a unique legal relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes."); Memorandum from William Jefferson Clinton on Government-to-Government Relations with Native American Tribal Governments (Apr. 29, 1994), 59 Fed. Reg. 22951 (May 4, 1994) (directing the head of each executive department and agency to implement the government-to-government relationship as well as to consult with federally recognized tribal governments and attempt to work cooperatively with them in matters that affect them); Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms."); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972) (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)) ("The United States, acting through the Secretary of the Interior, 'has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.'").

[41] *Tribal Self-Government and the Indian Reorganization Act of 1934*, *supra* note 35, at 962 n.49 (quoting S. 2755, 73d Cong., 2d Sess., tit. I, § 3 (1934)).

[42] *Id.*

[43] *Id.*

[44] COHEN, *supra* note 4, at 86.

[45] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 10. The authority for substitution of "tribal courts" for "court of Indian Offenses" is found at 25 C.F.R. § 11.104 (2020).

[46] POMMERSHEIM, *supra* note 7, at 57.

[47] *Id.*

protections that limited federal (and later state) governments did not apply to Tribal governments.[48] In furtherance of this holding, federal courts determined, "the guaranty of religious liberty in the first amendment of the United States Constitution does not protect . . . the Indian against religious oppression on the part of tribal authorities."[49] Therefore, individual rights protections of Indians are a matter of Tribal law.[50] As a result, "if an Indian desires protection in this respect, the members of an Indian tribe must write the guaranties they desire into tribal constitutions. Such guaranties have been written into many tribal constitutions that are now in force."[51] As an example, an examination of Tribal constitutions adopted before June 1, 1940, shows twenty-two Tribal constitutions that contained individual rights protections.[52] If we extend the examination of Tribal constitutions further, we find that "prior to the passage of the Indian Civil Rights Act, 117 tribes had provisions protecting civil rights in their constitutions, while 130 tribes had no such provision."[53]

II. INDIAN CIVIL RIGHTS ACT

In *Native American Church v. Navajo Tribal Council*, the United States Court of Appeals for the Tenth Circuit upheld the principle that "with respect to freedom of religion, the [U.S.] Constitution did not apply to the Navaho tribe."[54] In doing so, the court recognized that "[t]he first and fourteenth amendments were interpreted as restrictions on the state and federal but not on tribal governments."[55] In the aftermath of the *Native American Church* decision, the Subcommittee on Constitutional Rights

[48] Talton v. Mayes, 163 U.S. 376, 384 (1896) ("It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which . . . had for its sole object to control the powers conferred by the Constitution on the National Government.").

[49] COHEN, *supra* note 4, at 124 (quoting Memorandum from the Solic. of the Interior Dep't (Aug. 8, 1938) (Lower Brule Sioux)) ("The first amendment guaranteeing religious liberty is said to not limit the action of a tribal council"); *see also* U.S. Dep't of the Interior, Opinion Letter on Authority of Navajo Tribe to Ban Use of Peyote Within Reservation (Dec. 3, 1940) (holding that a Navajo peyote control resolution was valid and did not infringe religious liberty).

[50] Kekek Jason Stark, *Responsible Governance and Tribal Customary Rights*, 59 HARV. C.R.–C.L. L. REV. 27, 38–39 (2024).

[51] COHEN, *supra* note 4, at 124.

[52] *Id.* (collecting examples).

[53] Ziontz, *supra* note 8, at 1 n. 4; *see generally* Elmer R. Rusco, *Civil Liberties Guarantees under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269 (1990) (including detailed analysis of Tribal constitutions in force as of 1981 that included individual rights protections).

[54] Donald J. Burnett Jr., *An Historical Analysis of the 1968 Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 573 (1971) (citing Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959)).

[55] *Id.* at 573.

initiated a preliminary inquiry "to determine whether such immunity from constitutional restraint had resulted in actual deprivations of constitutional rights by the Indian tribes."[56] In the process of the inquiry, "Indians came to be known as 'the minority group most in need of having their rights protected by the national government.'"[57] In this regard, Senator Erwin, Chairman of the Subcommittee on Constitutional Rights stated: "[e]ven though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities."[58] In response, the Subcommittee held a number of hearings on Indian rights.[59] In the course of these hearings, "tribal reaction ranged from lukewarm acceptance to outright opposition."[60] It was noted that "[w]hile some tribal spokepersons protested that the Act was unnecessary or would impose rigid Anglo-American legal constraints on informal tribal court systems, the traditional Pueblos of the Southwest vigorously protested invasions into their tribal sovereignty that could fundamentally alter the theocratic nature of Pueblo life."[61]

At the conclusion of these hearings "nearly 1100 pages of testimony had been recorded and nearly 2500 questionaries distributed in the field had been returned."[62] The responses centered on the "violation of constitutional rights by tribal courts and councils, the inadequate support of tribal legal systems by the BIA, and violation of constitutional rights by non-Indian authorities off the reservation or the failure of those authorities to provide law enforcement services on the reservation when empowered to do so."[63] The culmination of the hearings evidenced that the actions of non-Indian authorities were "the greatest threat to the civil liberties of Indians."[64] For example, "the Cheyenne River Sioux claimed that Indians were frequently arrested for crimes for which whites would not have been

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[56] *Id*. at 575.

[57] *Id*.

[58] *Id*. (quoting 114 CONG. REC. 393 (1968)).

[59] *See, e.g.*, *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1 (1961); *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 2 (1961); *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 87th Cong., 2nd Sess., pt. 3 (1962); *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4 (1963); *Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

[60] MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 302 (2d ed. 1983).

[61] *Id*.

[62] Burnett Jr., *supra* note 54, at 587.

[63] *Id*. at 588.

[64] *Id*. at 584.

prosecuted."[65] Similarly, the South Dakota Indian Commission explained "that Indian prisoners were compelled to perform manual labor not demanded of non-Indian prisoners."[66] The testimony of the Chairman of the Crow Creek Sioux Tribe "quoted a police commissioner in a small South Dakota town: 'Well, I think the boys are going to have to get some more Indians in jail, because we need a lot of snow moved over there on the north side of town.'"[67] The testimony of the Crow Tribe "alleged that police in Billings and Hardin, Montana, customarily released intoxicated Indians at the city limits, dropping them even in sub-zero weather."[68] Likewise, the testimony of the Shoshone-Bannock Tribe "charged that Indian defendants confronted a presumption of guilt in courts off the reservation."[69]

In response to the testimony and questionnaire responses received as part of these hearings, Senator Sam Erwin of North Carolina introduced a number of bills that "affirmed his conviction that tribal systems of justice should not be allowed to operate outside the Constitution."[70] The main purpose of the bills as introduced "were addressed primarily to bringing the Constitution to reservations, integrating tribal systems into the overall legal system of the country, and protecting the principle of the consent of the governed."[71] Of greater significance is what the bills failed to address: "how to control the sometime arbitrary and unresponsive BIA, how to adequately fund tribal systems of justice, [and] how to halt violations of Indian rights by state and local officials."[72] The solution to these weaknesses was ICRA.

On November 21, 1968, President Lyndon B. Johnson signed H.R. 2516 into law as part of the Civil Rights Act of 1968.[73] The portions of the Act dealing with Indian Rights, Titles II through VII, are entitled the Indian Civil Rights Act.[74] The provisions of ICRA that substantially mirror the Bill of Rights in the U.S. Constitution are popularly called the Indian

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[65] *Id.* (citing *Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 331 (1965)).

[66] *Id*. (citing *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 87th Cong., 2nd Sess., pt. 3, 588 (1962).

[67] *Id.* at 584 n. 172 (quoting *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, 898 (1963)).

[68] *Id.* at 585 (citing *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, 882–83 (1963)).

[69] *Id*. (citing *Hearings on Const. Rts. of Am. Indians Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, 828 (1963)).

[70] *Id*.

[71] *Id*. at 588.

[72] *Id*. at 588–89.

[73] *Id*. at 613–14.

[74] Indian Civil Rights Act, 25 U.S.C. § 1301 et. seq.

Bill of Rights.[75] The response to the Act as enacted was mixed,[76] as were the provisions themselves. "Some were clearly supportive of such self-determining concepts as the requirement that any future state assumptions of jurisdiction over Indians be only with Indian consent" while others inhibited "the latitude of self-government which tribes had enjoyed previously."[77] However, in regard to the provisions that limited tribal self-government, "[m]any tribes questioned the extension of Bill of Rights protections to individual Indians vis-a-vis tribes because of the inherent clash with Indian custom and traditional values."[78]

As enacted, ICRA "extends most of the constitutional protections of the American Constitution to individuals under the jurisdiction of Indian tribal governments."[79] In this regard "[t]he statute repeats the language of the [U.S.] Constitution . . . and covers most of the rights and liberties found there, with some notable exceptions."[80] These exceptions include the absence of a right to bear arms, "an establishment clause[,] and a right to counsel at the government's expense."[81] In an attempt to preserve Tribal sovereignty and self-government, "[t]hese exceptions were intended to avoid infringing upon the right of tribes to preserve their identity and cultural autonomy."[82] The individual rights protections include the following:

> [T]he rights to free exercise of religion; free speech, press, assembly, and the protection for a redress of grievances [25 U.S.C. § 1302(a)(1)]; the right to be free of unreasonable search and seizures without a search warrant to be issued only upon a showing of probable cause [25 U.S.C. § 1302(a)(2)]; the right to be free from being placed in double jeopardy [25 U.S.C. § 1302(a)(3)]and from self-incrimination [25 U.S.C. § 1302(a)(4)]; the right to due process and equal protection [25 U.S.C. § 1302(a)(8)]; the right to be free from taking of property without just compensation [25 U.S.C. § 1302(a)(5)]; the right to a speedy trial, to confront witnesses, and to the assistance of counsel [25 U.S.C. § 1302(a)(6)]; the freedom from excessive bail and cruel and unusual punishment [25

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[75] Note, *Indian Bill of Rights and Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1345 (1969).

[76] Burnett Jr., *supra* note 54, at 601.

[77] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 12.

[78] *Id.*

[79] MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 329 (2024).

[80] Ziontz, *supra* note 8, at 1–2.

[81] FLETCHER, *supra* note 79; *see* Indian Civil Rights Act, 25 U.S.C. § 1302(a).

[82] Ziontz, *supra* note 8, at 2.

> U.S.C. § 1302(a)(7)]; the freedom from bills of attainder and ex post facto laws [25 U.S.C. §1302(a)(9)]; and the right to a jury of at least six persons in all criminal cases carrying the possibility of imprisonment [25 U.S.C. § 1302(a)(10)].[83]

ICRA also prohibited Tribes from sentencing criminals to more than six months in prison and imposing more than $500 in fines.[84] This was subsequently amended in 1986 to prohibit Tribes from sentencing criminals to more than one year and imposing more than $5,000 in fines.[85] Notably, the Tribal Law and Order Act of 2010 further amended the prohibition on sentencing criminals to no more than three years and $15,000 in fines for those Tribes implementing enhanced constitutional protections.[86] In implementing ICRA, Tribes are allowed to stack sentences for up to a total of nine years.[87] Furthermore, the United States Commission on Civil Rights recognized that "in enforcing the act, the courts will have the serious responsibility of drawing a balance between respect for individual rights and respect for Indian custom and tradition."[88]

With the passage of ICRA, the Indian Civil Rights Task Force was once again tasked with establishing a Model Code for Tribes to consider in the administration of justice.[89] The development of a Model Code is significant because, similarly to the creation of the initial Model Code under the Indian Reorganization Act, it was discovered that "tribal courts usually follow procedural codes derived from, if not identical to, those governing Courts of Indian Offenses because the latter are readily available without developmental costs and are assured of the requisite approval of the Secretary of the Interior."[90] As drafted, the Model Code continues to perpetuate assimilative policy; it does not further Tribal law legal traditions and Tribal customary law. Instead, it codifies western legal procedure.[91] "An examination of the Model proves that it is nothing more than a redraft of the old Bureau regulations, harmonized with the Indian Bill of Rights largely through borrowings from the American Law

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[83] FLETCHER, *supra* note 79.

[84] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 201, 82 Stat. 77 (1968).

[85] Indian Civil Rights Act, 25 U.S.C. § 1302(a)(7)(B).

[86] *Id.* at § 1302(b)–(c).

[87] *Id.* at § 1302(a)(7)(D).

[88] U.S. COMM'N ON CIV. RTS., *supra* note 9, at 11.

[89] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 201, 82 Stat. 77 (1968).

[90] Russel Lawerence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROBS. 25, 25 (1976).

[91] *Id.* at 26 ("The real significance of the Model Code is that in seeking to cure alleged constitutional errors in the administration of justice it perpetuates errors of a more fundamental nature—historical errors of policy").

Institute's Model Code for Pre-Arraignment Procedure."[92] Despite the promise of ICRA to preserve Tribal rights, customs, and traditions, initial efforts such as the Model Code demonstrate that the federal approach was still primarily concerned with Anglo legal principles.

III. FEDERAL ENCROACHMENT INTO TRIBAL COURT DETERMINATIONS

Once ICRA was enacted, "the federal courts rapidly began to invoke general federal question jurisdiction under 28 U.S.C. § 1331, or occasionally 28 U.S.C. § 1334 (civil rights) or 1361 (mandamus), to review the decisions of tribal councils and courts under the provisions of the Act."[93] In exercising federal review, federal courts generally required the exhaustion of Tribal remedies.[94] For example, in *O'Neal v. Cheyenne River Sioux Tribe*, the United States Court of Appeals for the Eighth Circuit explained, "we can find no persuasive reasons for not requiring exhaustion in this case. A general exhaustion requirement in cases such as this will do much to strengthen tribal governments, including tribal courts, and, thereby aid the reservation Indian in maintaining a distinct cultural identity."[95] In doing so, the court recognized that in enacting ICRA, "Congress wished to protect and preserve individual rights of the Indian peoples, with the realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments."[96] In this regard, the court noted that "Congress did not intend to detract from the continued vitality of the tribal courts by passage of this legislation."[97]

Therefore, "a number of cases have defined responsibilities of the tribal judiciary pursuant to the ICRA."[98] As such, "[t]he power and authority of the tribal court has been generally upheld."[99] For example, in *Lohnes v. Cloud* the United States District Court for the District of North Dakota explained, "[w]hile [ICRA] has indeed encroached upon, and redefined, tribal sovereignty . . . it is clear that the Act is not meant to substitute a federal forum for the tribal court."[100]

However, the policy of maintaining unique Indian cultures "has not always been followed" because "[f]ederal courts often ignore Indian

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[92] *Id.*
[93] PRICE & CLINTON, *supra* note 60, at 302.
[94] *Id.*
[95] O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1148 (8th Cir. 1973).
[96] *Id.*
[97] *Id.* at 1144 n.1.
[98] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 18–19 & n.34 (collecting cases).
[99] *Id.* at 19.
[100] *Id.* at 17.

culture and tradition, and instead interpret the ICRA as they do similar requirements in the United States Constitution."[101] This misguided "inclination of courts to interpret the ICRA using Anglo concepts of constitutional rights is often based on the fact that tribal court and government structures are structured after Anglo institutions."[102] For example, in *Howlett v. Salish and Kootenai Tribes of the Flathead Reservation* the Ninth Circuit interpreted ICRA to embrace that, "[w]here . . . the Tribes' election and voting procedures are parallel to those commonly employed in Anglo-Saxon society, we then 'have no problem of forcing an alien culture, with strange procedures, on (these tribes).'"[103] Similarly, in *Daly v. United States*, the Eighth Circuit "declared that where the Indian Tribe's election procedures were analogous to those found in Anglo culture, the equal protection clause of ICRA would be interpreted as the equal protection clause of the Constitution is interpreted."[104] In *Wounded Knee v. Andera*, the South Dakota District Court reasoned that when the "judicial system [of the tribe] is Anglo-American and assuredly not Indian; adding the safeguards guaranteed in Anglo-American law certainly is no more of an encroachment upon the Indian way of life than the tribal court itself."[105]

As evidenced by these early cases, during the ten-year span following the enactment of ICRA, federal courts continuously used the Act to intrude upon the decision making of Tribal councils and courts.[106] Thus, while "billed as a measure in furtherance of Indian self-determination," in reality "ICRA has caused many changes in the workings and operations of tribal courts."[107] Most of these changes centered around Tribal court reactions to federal court intrusion demanding the application of Anglo law principles, rather than organically

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[101] *Id*.

[102] *Id*. at 26.

[103] Howlett v. Salish and Kootenai Tribes of the Flathead Reservation, 529 F. 2d 233, 238 (9th Cir. 1976) (quoting White Eagle v. One Feather, 478 F.3d 1311, 1314 (8th Cir. 1973)).

[104] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 26 (citing Daly v. United States, 483 F. 2d 700 (8th Cir. 1973)).

[105] *Id*. (quoting 416 F. Supp. 1236, 1241 (alterations in original)). Similar reasoning was also articulated in *White Eagle v. One Feather*, 478 F. 2d 1311, 1314 (8th Cir. 1973) and *Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975).

[106] For example:

> Among the areas reviewed were tribal apportionment, Brown v. United States, 486 F.2d 658 (8th Cir. 1973); election procedures, Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); due process complaints in tribal land assignments, Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); and tribal membership criteria, Slattery v. Arapaho Tribal Council, 453 F.2d 278 (10th Cir. 1971).

PRICE & CLINTON, *supra* note 60, at 302.

[107] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 16 (internal citations omitted).

allowing Tribal courts to develop their own bodies of law based upon Tribal cultural values entrenched in the Indian way of life.[108] Due to the lack of funding and federal support, "[u]nfortunately, the federal obligation to help provide the means to carry out Congress' mandate ha[d] not been met fully."[109]

A decade after Congress enacted ICRA, the Supreme Court agreed to address the scope of federal review of Tribal court decisions in *Santa Clara Pueblo v. Martinez*.[110] Ultimately, this case would determine the constraints that ICRA would have upon Tribal sovereignty.[111]

IV. *SANTA CLARA PUEBLO V. MARTINEZ*

The decision in *Santa Clara Pueblo v. Martinez* cemented the importance of Tribal courts in vindicating civil rights.[112] The case involved "whether a tribal ordinance which admitted into membership the offspring of male members who married outside the Pueblo, while denying membership to offspring of female members who married outside the Pueblo could stand under ICRA."[113] As explained by Alvin J. Ziontz, "[t]he question was intriguing because the validity of tribal classifications which discriminate between the sexes on the basis of traditional values and beliefs was at issue."[114] In addressing this issue, the Court examined whether Congress waived Tribal sovereign immunity from suit in enacting ICRA.[115] The Court explained that a waiver of sovereign immunity cannot be implied, rather it must be "unequivocally expressed."[116] In doing so, the Court examined the legislative history and "found two separate but competing purposes for ICRA: to impose protections for individual

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[108] *Id.* at 12 (internal citations omitted):

> At a time when policy favored maximum self-government, it would seem inconsistent for tribes to have external limits placed on their functions. The Act not only limited Indian courts in their disposition of cases, but it imposed requirements of due process upon them. And the provision in [ICRA] for federal court habeas corpus review of tribal orders created a specter of reviews of Indian court procedures by the exacting standards of the well-developed Anglo legal system.

[109] *Id.* at 16 (internal citations omitted).

[110] 436 U.S. 49 (1978).

[111] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 16.

[112] 436 U.S. 49 (1978).

[113] Ziontz, *supra* note 8, at 5.

[114] *Id.*

[115] *Martinez*, 436 U.S. at 58–59.

[116] *Id.* ("Nothing [in] ICRA purports to subject tribes to the jurisdiction of the federal courts . . . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity . . . .").

members of the tribes and to further Indian tribal self-government."[117] The Court held that in enacting ICRA, Congress did not confer upon federal courts jurisdiction to resolve civil rights complaints against Tribal governments.[118] As a result, complaints against Tribal government actions must pursue a Tribal forum.[119] The Court explained:

> Tribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law applying bodies. Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.[120]

Ultimately, the Court held that "a federal judicial remedy was not essential to the effectiveness of the ICRA."[121] As such, "the effectiveness of the ICRA would be realized within the framework of tribal government."[122] This is because "ICRA would not only guide the tribal government's actions and decisions, but would also challenge tribal governments to provide forums within which individual members could vindicate grievances under the Act."[123] As a result, "[t]he case is, therefore, a major restatement of the vitality of tribal sovereignty."[124]

V. TRIBAL COURT INTERPRETATIONS

[117] Ziontz, *supra* note 8, at 7 & n.40 (quoting *Martinez*, 436 U.S. at 62) ("In addition to its objectives of strengthening the position of individual members vis-à-vis the tribe, Congress also intended to promote the well-established federal policy of furthering Indian self-government").

[118] *Martinez*, 436 U.S. at 59.

[119] *Id.* at 65–66.

[120] *Id.* (internal citations omitted).

[121] Ziontz, *supra* note 8, at 8.

[122] *Id.*

[123] *Id.* In the absence of a tribal forum, see *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1209 (11th Cir. 2012) (citing Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir.1980)) ("[ICRA] creates an implied cause of action, at least where the following narrow circumstances are met: (1) the involvement of a non-Indian in the suit; (2) an attempt by the plaintiff to seek a remedy in a tribal forum; and (3) the unavailability of an adequate tribal remedy.").

[124] *Id.* at 5.

The ruling in *Martinez* was significant because it "allows the tribes to implement the ICRA in a manner which preserves their ability to decide difficult questions in accordance with tribal values, and more importantly, in a manner consistent with tribal sovereignty"[125] because "Congress intended that under the Indian Bill of Rights, tribal governments would be permitted the freedom to retain traditional customs and procedures so long as they do not violate specific protections contained in the act and so long as those procedures render substantial fairness and justice."[126] So how are Tribes doing in the implementation of ICRA? Specifically, how are Tribal courts balancing the promotion of Tribal sovereignty with the protection of individual rights?[127] Does the Act establish a mandate commanding Tribal governments to assume and requiring judicial review of any allegedly illegal action by a Tribal government? Can a Tribe accused of violating these primary rights be the judge of its own actions and also comply with federal law?[128] This Part examines these questions in detail.

A. Tribal Sovereign Immunity

In implementing ICRA in Tribal forums, we begin by applying the doctrine of Tribal sovereign immunity. This doctrine derives from the sovereign authority of the Tribe and its inherent right to self-government.[129] The doctrine originates in Anglo-American common law pursuant to the sovereign principle that the "King can do no wrong."[130] The doctrine has been acknowledged as a core element of Tribal sovereign status.[131] The basic premise of Tribal sovereign immunity is that a Tribe is

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[125] *Id.* at 35.

[126] U.S. COMM'N ON CIV. RTS., *supra* note 9, at 21.

[127] *Tribal Courts Act of 1991: Hearing before the Select Comm. on Indian Affs., U.S. Senate, One Hundred Second Congress, Second Session, on Proposed Substitute Bill to S. 1752, the Indian Tribal Courts Act of 1991*, 102d Cong. 68 (1992) ("Take for example the 1968 Indian Civil Rights Act. It does two things. On the one hand, it promotes tribal self-government. At the same time, it protects individual rights").

[128] *See, e.g.*, Halona v. MacDonald, 1978 Navajo App. LEXIS 7, 1 Navajo Rptr. 189, at *17–18 (Navajo Ct. App. Jan. 24, 1978) (rejecting that *legislatures* could judge their own actions and comply with federal law).

[129] Teasley v. Kootenai Tribe of Idaho, 25 Indian L. Rep. 6148, 6150 (Kootenai Tribal Ct. 1998) ("The general doctrine of tribal sovereignty and the right to self-government has several adjuncts, one of the most important of which is tribal sovereign immunity."); Works v. Fallon Paiute-Shoshone Tribe, 24 Indian L. Rep. 6033, 6033 (Intertribal Ct. App. Nev. 1997) ("A sovereign exercises the rights and performs the obligations of governance. Immunity from suit arises as an inherent right and is a result of a tribe's status as a sovereign power").

[130] Harold J. Kent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992).

[131] Hudson v. Hoh Indian Tribe, 21 Indian L. Rep. 6045, 6046 (Hoh Tribal Ct. App. 1992) ("Immunity from suit arises as a result of the tribe's status a sovereign power. Traditionally, all sovereigns were immune from suit at common law.").

immune from suit unless immunity is waived.[132] This is an integral aspect of Tribal self-government because "immunity is necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy."[133] The principle encompassing the doctrine of sovereign immunity "therefore constitutes a well-established principle of law affecting Indian tribes."[134] In addressing the doctrine of sovereign immunity with regard to ICRA disputes, Tribal courts have varied in its application.

1. Case Summaries

In *Johnson v. Navajo Nation*, the Navajo Supreme Court determined that "suits against the tribe under ICRA are barred by its sovereign immunity from suit."[135] The Court reasoned: "If we hold that the ICRA has waived the sovereign immunity of the Navajo Nation in Navajo Courts, we will be sanctioning an attack on the tribal treasury."[136] In explaining this rationale the Court explained that "ICRA suits which result in money damages against the Navajo Nation will only divert funds allocated for essential governmental services."[137] As a result, "[e]nforcement has generally been through suits against tribal officials for acting outside the scope of their authorities."[138] This allows ICRA to be implemented in a manner that promotes Tribal government accountability.

In *Sliger v. Stalmack*, the Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court addressed sovereign immunity in an employment dispute alleging wrongful discharge.[139] The court urged fairness and adherence to accountability in its ruling, stating that in "[s]ituations like the instant one" that "seem to the Court, at first blush, to involved injustice and unfairness" that the Tribe "should treat others fairly," just as it would ask to be treated.[140] It also recognized that "the law, both federal and tribal, which recognizes the importance of tribal

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[132] Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1108 (2007) ("The primary purpose [of sovereign immunity] is to ensure that the sovereign is not subject to lawsuits for its actions unless it waives its immunity.").

[133] Clement v. LeCompte, 22 Indian L. Rep. 6111, 6112 (Cheyenne River Sioux Ct. App. 1994).

[134] Rave v. Reynolds, 23 Indian L. Rep. 6150, 6161 (Winnebago Sup. Ct. 1996).

[135] Johnson v. Navajo Nation, 14 Indian L. Rep. 6037, 6040 (Navajo Sup. Ct. 1987) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978)).

[136] *Id*.

[137] *Id*.

[138] *Id*.

[139] Sliger v. Stalmack, No. 99-10-490-CV, 2000 WL 35750181, at *1 (Grand Traverse Tribal Ct. Feb. 14, 2000).

[140] *Id.* at *2.

sovereign immunity may be seen as allowing tribes to take unfair advantage of the unwary."[141] Despite these principles, the court held that "ICRA does not waive tribal sovereign immunity" and that "even in situations of unjustness and unfairness, it is without authority to provide relief."[142]

In *LeCompte v. Jewett*, the Cheyenne River Sioux Court of Appeals addressed the doctrine in the context of an election dispute.[143] The court, in a review of the Tribal code that acknowledged the imposition of federal law upon the Tribe, held that "both the 1968 Indian Civil Rights Act and the Constitution of the Cheyenne River Sioux Tribe waived such sovereign immunity in tribal court."[144] It reasoned that, pursuant to the Act of 1877, "the United States agreed to secure to the Indian people of the Cheyenne River Indian Reservation 'an orderly government' and promised that 'each individual shall be protected in his rights of property, person, and life.'"[145] Moreover, "[a]n orderly government would include the right to petition the tribal government for a redress of legal grievances and the right to be protected in one's person would include the liberty to run for elected office."[146] The court also acknowledged that the Congress's intent in enacting ICRA was to provide "aggrieved parties" with "access to a tribal forum."[147] Addressing the waiver included in the Tribal constitution, the court explained that "as a matter of tribal law . . . the Indian people of the Cheyenne River Indian Reservation intended that the people should have a right to a tribal judicial forum to judicially review action of the tribal council."[148] It applied the reasoning of *Marbury v. Madison* that "any act of the legislature repugnant to the Constitution is void" similarly "applies to the tribal court and mandates a duty to review actions of the tribal council which are repugnant to the tribal constitution."[149] The court emphasized that "the Indian people of the reservation recognized this when they adopted article v, section 1(c) of the tribal bylaws; they intended the term 'between Indians' to mean 'between Indian parties' which meant the tribe, tribal entities and tribal officials acting in their official capacities."[150]

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[141] *Id.*
[142] *Id.* at *1–2.
[143] 12 Indian L. Rep. 6025 (Cheyenne River Sioux Ct. App. 1985).
[144] *Id.* at 6026.
[145] *Id.* (quoting Act of February 27, 1877, 19 Stat. 254 (1877)).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 6027 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
[150] *Id.*

In *Francis v. Wilkinson*, the Northern Plains Intertribal Court of Appeals addressed a suit alleging that the Tribal Business Council of the Three Affiliated Tribes violated an individual's rights under ICRA.[151] The court reasoned that "there is no federal statutory authority giving the tribal court's *(sic)* in general or this court in particular authority to hear cases against a tribal governing authority even when such cases alleged violation of [ICRA]" but that in this context, the authority comes directly from the Tribal constitution.[152] As the court explained, the Three Affiliated Tribes Constitution provides that "the People of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act."[153] Applying Article VI, Section 3 of the Tribal constitution, it concluded "the tribal court has authority to hear this case on its merits, but the only relief that the court can impose against the council is injunctive relief."[154] As part of the limitation imposed by only authorizing injunctive relief, the court had the option of voiding the action that resulted in ICRA violation, here the termination of the employment agreement.[155] This may not necessarily be the desired outcome in an employment relationship that has soured, but it is a form of a remedy.

That same year, the Northern Plains Intertribal Court of Appeals confirmed *Francis* in *Bordeaux v. Wilkinson*.[156] It reaffirmed that the Constitution of the Three Affiliated Tribes "confirm[s] that injunctive relief against the tribal business council for violations of the Indian Civil Rights Act is authorized by the constitution" and that Article VI, Section 3(b) of the Constitution "expressly and unequivocally waive[s] council immunity from ICRA suits."[157] It also went further than *Francis* to recognize "the constitutional waiver of sovereign immunity of the tribal business council in actions involving violations of the Indian Civil Rights Act . . . does not bar a suit for monetary damages against Tribal Officials found to be acting outside the scope of their lawful authority."[158] This

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[151] Francis v. Wilkinson, 20 Indian L. Rep. 6015, 6015 (Northern Plains Intertribal Ct. App. 1993).

[152] *Id*.

[153] *Id*. at 6015-16 (quoting the Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation Article VI, Secs. 3 & 3(b)).

[154] *Id*. at 6016.

[155] *Id*.

[156] 21 Indian L. Rep. 6131 (Fort Berthold Tribal Ct. 1993).

[157] *Id*. (quoting *Francis*, 20 Indian L. Rep. at 6015).

[158] *Id*. (quoting Felcia R. Felix-Fox v. Bus.Council of the Three Affiliated Tribes, Forth Berthold Civil No. 04-93-A04-96 (1993)).

reasoning allows ICRA to be implemented in a manner that promotes Tribal government accountability.

In *Hudson v. Hoh Indian Tribe*, the Hoh Tribal Court of Appeals addressed an action for wrongful termination of employment.[159] In response to the filing of the action, the Tribe filed a motion to dismiss based upon the doctrine of sovereign immunity.[160] In addressing the doctrine, the Court held that because "[t]he Hoh tribe ha[d] not explicitly waived its sovereign immunity from suit under the terms of the Personnel Policies and Procedures . . . [t]he only basis upon which a waiver of sovereign immunity can be argued is article IX of the Hoh Constitution. Article IX is entitled 'Bill of Rights.'"[161] Under the explicit text of that Article, "the right to petition for the redress of grievances is to be accorded the same protections as those enjoyed under the United States Constitution" and that therefore "this court is compelled to interpret the redress of grievance clause of the Hoh Tribal Constitution in the same manner as that right is interpreted by the Supreme Court under the first amendment to the Constitution of the United States . . . ."[162]

In applying Anglo-American legal standards, the court recognized that "the right of access to the courts is one aspect of the right to petition."[163] As a result, the court determined that "the right to petition for redress of grievances guaranteed to Hoh tribal members in the Constitution of the Hoh tribe must be read as a limitation upon any sovereign immunity that the Hoh Tribe may possess."[164] Therefore, "plaintiff in this case ha[d] a clear right to file her petition for redress of grievance in the Hoh Tribal Court."[165] As such, the court recognized that petitioner possessed an administrative remedy under the personnel policies and procedures "which can be appealed to the tribal court pursuant to Article IX of the Hoh tribal constitution."[166]

The court also recognized that ICRA was another limiting factor regarding the Tribe's sovereign immunity claim.[167] In doing so, the court acknowledged that "[o]ne of the rights guaranteed to individual Indians by the Indian Civil Rights Act is the right to due process."[168] Furthermore, the

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[159] 21 Indian L. Rep. 6045, 6045 (Hoh Tribal Ct. App. 1992).

[160] *Id*. at 6046.

[161] *Id*.

[162] *Id*.

[163] *Id*. (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)).

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] *Id.*

[168] *Id*.

right to due process was "also guaranteed by article IX of the Constitution of the Hoh Indian Tribe."[169] As a "[n]o claim of sovereign immunity by the Hoh Tribe can circumvent the plaintiff's constitutional right."[170] The Hoh Tribe thus endorses a belt-and-suspenders approach to assessing due process and sovereign immunity for the Tribe.

In *Davis v. Keplin*, the Turtle Mountain Tribal Court addressed a claim involving subject matter jurisdiction regarding an employment dispute.[171] In this matter, the court examined whether the claim involved a cause of action under ICRA for violation of due process of law, as well as whether the claim was barred by the doctrine of sovereign immunity.[172] The court acknowledged that Tribal court precedent established that "[ICRA] was a legislative intent to limit tribal sovereign immunity involving claims of civil rights violations."[173] The court's precedent provided that, ICRA "is a legislative expression of congressional plenary power over the tribes and enforcement of the provisions of this federal statute is vested with the tribal court. Therefore, the court is not divested of jurisdiction to entertain cases which allege a civil rights violation based on ICRA."[174]

The Tribe had claimed that the Turtle Mountain Tribal Code of 1976, pursuant to Title 2, Chapter 2.0102(4), divested the Court of jurisdiction.[175] The Code states "[t]he Court shall not have jurisdiction over any suit brought against the Tribe without the consent of the Tribe. Nothing in this code shall be construed as consent by the Tribe to be sued."[176] The Court emphasized that "tribal governments are subject to congressional plenary authority . . . 'Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess . . . . ICRA represents an exercise of that authority.'"[177] As a result, the court explained that "[t]he doctrine of sovereign immunity is no longer absolute and has been effectively abrogated by this express, unequivocal expression of congressional intent to provide jurisdiction to the tribal court based upon alleged violations of

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[169] *Id*.

[170] *Id*. at 6047.

[171] 18 Indian L. Rep. 6148 (Turtle Mountain Tribal Ct. Sept. 6, 1991).

[172] *Id*.

[173] *Id*. at 6149.

[174] *Id*. (quoting Denial of Motion to Dismiss, Davis v. Keplin, 18 Indian L. Rep. 6148 (Turtle Mountain Tribal Ct. Sept. 6, 1991).

[175] *Id*. at 6148.

[176] *Id*. (quoting Turtle Mountain Tribal Code of 1976, tit. 2, ch.2.0102(4) (1976)).

[177] *Id*. (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 49 (1978)) (internal citations omitted).

an individual's civil rights protected by ICRA."[178] In doing so the court emphasized that "[i]t is also the opinion of this court that this Act abrogates tribal sovereign immunity in the limited area of civil rights only."[179]

In *Works v Fallon Paiute-Shoshone Tribe*, the Intertribal Court of Appeals of Nevada addressed an allegation of a violation of civil rights guaranteed under ICRA "by actions of the Fallon Paiute Shoshone Tribe and others."[180] The Court determined that "the Indian Civil Rights Act itself is a waiver of the immunity of the tribe for the narrow purpose of vindicating rights guaranteed by the Act and ordering an appropriate remedy."[181]

In *Rave v. Reynolds*, the Winnebago Supreme Court reasoned that the Winnebago Tribal Code specifically incorporates a provision authorizing Tribal court review of Tribal council actions.[182] The Court emphasized that Section 1-916 of the Tribal code reads: "The tribal courts shall have authority to review any act by the tribal council, or any tribal officer, agent, or employee to determine whether that action, is constitutional under the tribal constitution, authorized by tribal law, and not prohibited by [ICRA]."[183] This provision, however, conflicts with Section 1-919 of the Tribal Code which reserved the Tribe's sovereign immunity by establishing that except as otherwise waived, the "tribe shall be immune from any civil actions, and its officers and employees shall be immune from suit for any liability arising from the performance of their official duties."[184] In reconciling these two provisions, the Court held that "Section 1-919 must be read in light of the obvious authorization contained in Section 1-916 permitting the tribal courts to exercise broad powers of judicial and administrative review over the actions of tribal officials, tribal agencies, and the tribal council."[185] As a result of this interpretation, the Court determined that the Tribal Code operated as a waiver of Tribal sovereign immunity in the context of ICRA and constitutional violations.

2. Analyzing Tribal Conceptions of Sovereign Immunity

In analyzing the implementation of ICRA in Tribal forums pertaining to the doctrine of Tribal sovereign immunity, these cases

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[178] *Id*. at 6149.

[179] *Id*. at 6151.

[180] Works v. Fallon Paiute-Shoshone Tribe, 24 Indian L. Rep. 6033, 6033 (Intertribal Ct. App. Nev. 1997).

[181] *Id*.

[182] Rave v. Reynolds, 23 Indian L. Rep. 6150, 6163 (Winnebago Sup. Ct. 1996).

[183] *Id*.

[184] *Id*.

[185] *Id*.

highlight the ability of Tribes to use their own laws in conjunction with ICRA to decide for themselves whether sovereign immunity bars suit. In both *Johnson* and *Sliger*, the respective courts determined that there was no waiver of Tribal sovereign immunity.[186] On the other hand, in *Rave*, the Court explained that a waiver of sovereign immunity was provided in the Tribal Code.[187] In *LeCompte*, the Court explained that a waiver was provided both pursuant to the Act of 1877 as well as pursuant to the Tribal constitution.[188] Likewise, the courts in *Francis* and *Bordeaux* articulated that a waiver of sovereign immunity was provided in each Tribal constitution.[189] In *Hudson*, the Court explained that a waiver of sovereign immunity was provided by both the Tribal constitution and ICRA.[190] The courts in *Davis* and *Works* determined, contrary to the previously mentioned cases, that pursuant to the enactment of ICRA Congress issued a waiver of sovereign immunity.[191] The justification for this determination is the dual purpose of ICRA requiring a balancing between individual protections and the protection of Tribal government authority.[192]

In the course of engaging in the requisite balancing, some Tribal courts have weighed in favor of individual protections depicting the issuance of a waiver of sovereign immunity, while others have weighed more heavily in favor of the protection of Tribal government authority. In both situations, these decisions highlight the importance of Tribal government accountability. A commitment to accountability is most evident when a waiver is issued, requiring the protection of individual rights by the Tribal government. An ethos of Tribal accountability is also evident when a government official that has acted outside the scope of their authority can be sued in their official capacity for money damages,[193] as well as by allowing a suit for injunctive relief against the Tribal

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[186] Johnson v. Navajo Nation, 14 Indian L. Rep. 6037, 6040 (Navajo Sup. Ct. 1987); Sliger v. Stalmack, No. 99-10-490-CV, 2000 WL 35750181, at *1 (Grand Traverse Tribal Ct. Feb. 14, 2000).

[187] *Rave*, 23 Indian L. Rep. at 6163.

[188] LeCompte v. Jewett, 12 Indian L. Rep. 6025, 6026 (Cheyenne River Sioux Ct. App. 1985).

[189] Francis v. Wilkinson, 20 Indian L. Rep. 6015, 6015 (Northern Plains Intertribal Ct. App. 1993); Bordeaux v. Wilkinson, 21 Indian L. Rep. 6131, 6132 (Fort Berthold Tribal Ct. 1993).

[190] Hudson v. Hoh Indian Tribe, 21 Indian L. Rep. 6045, 6046 (Hoh Tribal Ct. App. 1992).

[191] Davis v. Keplin, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. Sept. 6, 1991); Works v. Fallon Paiute-Shoshone Tribe, 24 Indian L. Rep. 6033, 6033 (Intertribal Ct. App. Nev. 1997).

[192] *See* Squaxin Island Tribe v. Johns, 15 Indian Law Rep. 6010, 6011 (Squaxin Island Tribal Ct. App. 1987) ("[ICRA] is intended to serve a dual purpose—affording protections to individuals while, at the same time, protecting government authority. Where government interests of a tribe are implicated, the ICRA permits a more flexible interpretation.").

[193] *Bordeaux*, 21 Indian L. Rep. at 6132.

government,[194] barring a suit for money damages to shield the Tribal treasury,[195] or in the context of civil rights suits.[196] All in all, these decisions generally evidence that Tribes accused of violating individual rights are adequately allowing for the judgment of its own actions by authorizing judicial review in Tribal forums. As a recommendation for Tribes implementing ICRA protections, intertribal common law suggests that Tribes should expressly issue the requisite limited waiver of sovereign immunity allowing for disputes to be addressed in Tribal forums while utilizing appropriate cultural values and traditions.[197]

B. Tribal Council Action

Another key feature of ICRA implementation is how the law impacts Tribal leaders. To that end, this Subpart will examine whether the actions of the Tribal council action are confined or limited by ICRA. As with ICRA's impact on sovereign immunity, Tribal interpretations of limitations on Tribal councils are dependent not just on ICRA itself, but also Tribal sources of authority.

1. Case Summaries

A basic proposition to this effect, that Tribal interpretations of limitations on Tribal councils is dependent on both ICRA and Tribal sources of authority, was outlined in *Oglala Sioux Tribal Personnel Board v. Red Shirt*, where the Oglala Sioux Tribal Court of Appeals addressed a claim against the Oglala Sioux Personnel Board.[198] The Court recognized that the "rights of an individual tribal member in relation to violations by tribal government indicates that the rights of freedom of speech and due process of law guaranteed by the Indian Civil Rights Act of 1968 can be asserted against a tribal government."[199] As a result, the court held "the tribal court is the recognized and appropriate body to ensure that individual tribal members are protected under the rights created by [ICRA]."[200]

In *Office of the Navajo Nation President and Vice-President v. Navajo Nation Council*, the Navajo Supreme Court examined the contours

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[194] *Francis*, 20 Indian L. Rep. at 6016.

[195] Johnson v. Navajo Nation, 14 Indian L. Rep. 6037, 6040 (Navajo Sup. Ct. 1987).

[196] *Davis*, 18 Indian L. Rep. at 6149.

[197] Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701, 720, 726–28 (2006).

[198] Oglala Sioux Tribal Pers. Bd. v. Red Shirt, 16 Indian L. Rep. 6052, 6052–53 (Oglala Sioux Tribal Ct. App. 1983).

[199] *Id.* at 6053.

[200] *Id.*

of a Tribal council enactment.[201] In reviewing the Tribal council action, the Court reasoned that it is inappropriate for the Tribal council to "re-define the Fundamental Law [traditional customary law] of the Navajo Nation to include man-made law."[202] The Court reasoned that "[t]he Legislative Branch may acknowledge, not independently 'enact' Fundamental Laws [traditional customary law]. Similarly, the Judicial Branch may consider and apply *Dine bi beenahaz'áanii* [fundamental law of the Diné] in court decisions."[203] As a result, the Court determined that "the Council may not insulate nor exclude any statute, policy or regulation from judicial review."[204] This is because "[j]udicial review by tribal courts of Council resolutions is mandated by [ICRA], and is delegated to the Navajo Nation Courts by the People through Council."[205]

In *Wescogame v. Alvirez*, the Hualapai Court of Appeals addressed a case that involved an action for injunctive relief against Hualapai officials for the wrongful divesture of a Tribal member's title as First Attendant to Little Miss Hualapai as embedded in the Hualapai Bill of Rights.[206] The court held that "sovereign immunity is not a bar to suit in Tribal Court when the action is brought to enforce provisions of Article IX of Hualapai Constitution (the Hualapai Constitution Bill of Rights), and the remedy sought is limited to injunctive relief against tribal officials."[207] In reviewing the matter, the court acknowledged that there was tension in the Hualapai Constitution between Article IX, which established the Hualapai Bill of Rights, and Article XVI, which provided for Tribal sovereign immunity.[208] As a result, the court recognized that if it ruled in favor of a strict reading of Article XVI, absent an express waiver "[t]his language appears to close off litigation as a mechanism for holding the Tribe accountable for violations of the Bill of Rights."[209] The court acknowledged that, "the people of the Hualapai Tribe ensured that sovereign immunity would be enshrined in the language of their constitution, thereby giving it special force and durability."[210] The court determined that:

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[201] Off. of the Navajo Nation President & Vice-President v. Navajo Nation Council, 9 Am. Tribal L. 46, 59 (Navajo Sup. Ct. 2010).

[202] *Id.*

[203] *Id.* at 60.

[204] *Id*. at 57.

[205] *Id*. at 58.

[206] Wescogame v. Alvirez, No. 2017-AP-001, at *1 (Hualapai Nation Ct. App. 2017).

[207] *Id*. at *3.

[208] *Id*.

[209] *Id*.

[210] *Id*. at *8 (quoting WD at the Canyon, LLC v. Hwal'Bay Ba: J Enter., No. 2015-AP-004, at *5 (Hualapai Ct. App. 2016)) ("Further, to the extent sovereign immunity promotes

> [T]his Court should apply a strong presumption against actions against the Tribe or its officials beyond those exceptions . . . . Whenever the claim brought against the Tribe or its officials seeks a monetary remedy; or fails to invoke rights protected by the Bill of Rights; or could have been brought had plaintiff negotiated a contractual waiver, this Court has struck the balance between individual rights and sovereign immunity in favor of the later. Under these circumstances, the competing rights are not as compelling as constitutional individual rights; and opportunities to vindicate rights, either by seeking alternative remedies or negotiating a waiver in advance may be available.[211]

However, the court ultimately ruled in favor of the rights of individuals, explaining that "where the government takes harmful action against an individual in violation of rights protected under the Hualapai Bill of Rights . . . an injunction may be the only means of vindicating those rights. If injunctive relief is denied in the name of sovereign immunity, those rights may become meaningless."[212] Therefore, the *Wescogame* court held "Tribal officials will be deemed to have lost their official capacity when they are alleged to have acted to deny rights protected under the Hualapai Bill of Rights, and they are sued solely for injunctive relief."[213]

In *Halona v. MacDonald*, the Navajo Court of Appeals addressed a dispute regarding an injunction to expend funds appropriated by the Tribal council for legal expenses, due to the allegations that the appropriation was illegal for failing to comply with certain Tribal procedures and for being violative of the substantive rights of the plaintiffs.[214] The court concluded that its role is to "[a]nalyz[e] legislation so as to guarantee that the . . . laws which we must interpret and enforce [are] consistent and fair to all" because "it is absolutely essential to the preservation of sovereignty and to the avoidance of actions which might otherwise be in violation of federal law."[215] The Navajo Supreme Court agreed, determining that it is an essential attribute of Tribal governance for the branches to invoke "a

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governmental dignity interests and respect for sovereign status, tribes need it to combat the many threats to that status, historic and contemporary, from federal and state courts and legislatures.").

[211] *Id*. at *8–9.

[212] *Id*. at *9.

[213] *Id.* at *10.

[214] Halona v. MacDonald, 1978 Navajo App. LEXIS 7, at *17–18 (Navajo Ct. App. January 24, 1978).

[215] *Id*. at *23.

traditional abiding respect for the impartial adjudicatory process."[216] Importantly, the Court grounded its analysis in the truth that:

> This has been the Navajo way since before the time of the present judicial system. The Navajo people did not learn this principle from the white man. They have carried it . . . through history . . . . Those appointed by the people to resolve disputes were and are unquestionable in their power to do so. Whereas once the clan was the primary forum (and still is a powerful and respected instrument of justice), now the People through their Council have delegated the ultimate responsibility for this to their courts.[217]

In addressing the questions of fundamental Tribal customary rights, the Court explained that "[t]he answer does not lie in a non-Indian analysis."[218] The Court reasoned that the issue "raises a question peculiar to Navajo tradition and law."[219] The Court further explained, "[w]e cannot imagine how any legislative body accused of violating [equal protection and due process of law] could be the judge of its own actions and at the same time comply with [ICRA]. Of course, this is not possible. Judicial review must, therefore, necessarily follow."[220]

In *Mille Lacs Band of Ojibwe Indians v. Williams*, the Non-Removable Mille Lacs Band of Ojibwe Indians Court of Appeals addressed the constitutionality of the Band's Exclusion and Removal Ordinance as it applied to a Band member under the Band and Minnesota Chippewa Tribe Constitutions, as well as whether the ordinance was valid under ICRA.[221] The court, utilizing the rationale associated with the importance of maintaining relationships, held that a heightened standard of removal for Band members applied "because they possess unique interests in remaining on the Mille Lacs reservation that non-members may not posses[s]."[222] The court remanded the matter to the lower court to stay the removal petition until a revised Exclusion and Removal Ordinance could be enacted that addressed the issues raised in this matter.[223] In doing so, the court emphasized:

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[216] *Id.* at *18.

[217] *Id*. at *18–19.

[218] *Id*. at *11.

[219] *Id*.

[220] *Id*. at *17–18.

[221] Mille Lacs Band of Ojibwe Indians v. Williams, No. 11-APP 06, *4–5 (Non-Removable Mille Lacs Band of Ojibwe Indians Ct. of Apps. 2012).

[222] *Id*. at *15–16.

[223] *Id*. at *17.

> It could certainly impair a Band member's right to exercise his "religion" if he is desirous of learning the traditional ways of the Anishinaabe and his access to the patrimony necessary for practicing these ways was defeated by his inability to come on to the reservation. The court also believes that a right of a person to live with his child and raise his child is that type of intimate relationship that many Courts have recognized as being within that core group of persons whom a person has a First Amendment right to live with and associate with.[224]

As utilized in this case, when the Band member is able to learn the principles of harmony through the engagement of his responsibilities and obligations associated with societal, kinship, and clan relations, the court was able to address the negative behavior of the individual while specifically concentrating on the expected behavior of the community in the furtherance of sovereignty and self-government.[225] In doing so, the court restrained the Band's executives from unilaterally exiling members from the Band.

2. Analyzing Tribal Council Action

All of these decisions highlight that the rights of an individual can be asserted to restrain Tribal officials from violating or continuing to violate them. These decisions generally evince that a Tribe accused of violating an individual right must adequately allow judgment of its own actions by authorizing judicial review in Tribal forums. Just as in those cases dealing narrowly with the issue of sovereign immunity, these decisions also evidence a proper balance between individual protections and the protection of Tribal government authority. This is evident by holding a Tribe accountable for individual protection violations in a fair and consistent manner in furtherance of sovereignty and self-government. Accordingly, Tribes implementing ICRA protections should follow intertribal common law's suggestion that Tribes should allow for judicial review of Tribal government actions in Tribal forums, balancing individual protections against that of Tribal government authority.

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[224] *Id*. at *5.

[225] *Id*.; *see also* Stark, *supra* note 19, at 698 ("[F]or many Indigenous peoples, tribal law did not focus exclusively on the negative behavior of an individual; rather, it concentrated on the expected behavior of the community based upon social, kinship, and clan obligations and responsibilities").

C. Equal Protection

This section will examine ICRA's application to the right of equal protection of the law. As explained by the Navajo Supreme Court:

> The term civil rights is elusive because it implies a selective reference to interests which are deemed to be of superior quality in our scheme of legal values. The classes of rights that can fall under that category are open-ended in character, but they are most often concerned with personal liberty and, more recently, with the right of equal treatment.[226]

1. Case Analyses

In *Skokomish Indian Tribe v. Saylor*, the Skokomish Fisheries Court addressed a citation pertaining to a Tribal member "allowing her non-Indian husband to assist her in the tribal fishery."[227] The defendant argued that the citation should be dismissed pursuant to *United States v. Washington*[228] and the equal protection clause of ICRA.[229] In regard to the *United States v. Washington* claim, the defendant argued that the federal precedent restricts the power of the Tribe to "qualify the activity of spouse fishing and the defendant has a right, created by that decision, to be assisted by her spouse."[230] The court rejected this argument, concluding that the "treaty fishing right by its very nature is a communally owned property right reserved by the tribe and enjoyed communally."[231] As such, "[t]he defendant has no individual title to this right, but may participate in

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[226] Arizona Public Service Co. v. Office of Navajo Labor Relations, 17 Indian L. Rep. 6105, 6112 (Navajo Sup. Ct. 1990) (internal citations omitted).

[227] Skokomish Indian Tribe v. Saylor, 5 Indian L. Rptr. L-4, L-4 (Point No Point Skokomish Fisheries Ct. 1978).

[228] 384 F. Supp. 312 (W.D. Wash. 1974) (allocating fishing rights between Tribes in Washington and the state government).

[229] *Id.*

[230] *Id.*

> The defendant bases her argument upon the court's response in U.S. v Washington to a ruling on the "States Department of Fisheries Questions per Reconsideration Motion." The court stated the following to the question of whether a non-member may exercise or assist in the exercise of a treaty fishing right: A treaty right fisherman may secure the assistance of other tribal fisherman with off-reservation treaty fishing rights in the same usual and accustomed places, whether or not such fisherman are members of the same tribe or another treaty tribe; and a treaty right fisherman may also be assisted by his or her spouse (whether or not possessing individual treaty rights), forebears, children, grandchildren and siblings.

[231] *Id.*

the communal right of the tribe" because "[t]he decision in *U.S. v. Washington* did not create in the individual treaty Indian greater rights than the tribe, but indicated a parameter whereby the tribe could reasonably allow the activities of spouse and assistance fishing."[232] The court concluded that "[i]t is clear the tribe could also prohibit these activities."[233]

The Court addressed the defendants' ICRA-based equal protection argument by rejecting a narrow view of the right:

> As the Tribe points out, the purpose of the fishing ordinance is to protect, preserve, and enhance the tribal fishing resource and to allot the harvestable portion of the resource among its members. In doing so, the Tribe has made a distinction between a member who is married to an "Indian" and one married to a "non-Indian." This is not so "small an exception" to be beyond review of this Court, especially in a case involving criminal prosecution. The Tribe is unable to support this distinction by a justification of how the distinction is related to the objective of the ordinance beyond a statement that legislative action enjoys a strong presumption of validity.[234]

The court held "that differential treatment of a tribal member solely on the basis of the race of her spouse, in the absence of a rationale justifying such treatment for purposes of the fishing ordinance, violates [ICRA]."[235] Thus, while the court rejected the precedent-based argument, it dismissed the charge.[236]

In *Winnebago Tribe of Nebraska v. Bigfire*, the Winnebago Supreme Court addressed an equal protection challenge to the gender neutrality of a Tribal criminal statute involving sexual assault.[237] The questions before the Court were "[w]hat law applies to the interpretation of the equal protection clause of the Winnebago Tribal Constitution[,] . . . the standard this Court should use in evaluating alleged violations of the equal protection guarantee of the Winnebago Constitution" and "the result of applying that standard in this case[.]"[238]

In determining the first question, the Court recognized that "Article IV, Section 3(h) of the Winnebago Constitution guarantees some measure

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[232] *Id*. at L-4–L-5.

[233] *Id*. at L-5.

[234] *Id*.

[235] *Id*. at L-4.

[236] *Id.*

[237] Winnebago Tribe of Nebraska v. Hugh Bigfire, 25 Indian L. Rep. 6229, 6230 (Winnebago Sup. Ct. 1998).

[238] *Id*. at 6230.

of equal protection of the law to tribal members, reservation residents, and the other persons with whom the tribal government deals."[239] The Court explained that "[a]lthough the language is virtually identical to the language of the federal Indian Civil Rights Act . . . this Court is not bound to apply federal or state law to this question" because "[i]t is solely a question of the interpretation of tribal law."[240] In this regard, the Court explained that:

> [A] tribal court is free to interpret the tribal constitution independently of the meaning afforded similar language in federal law. This independence is not only a logical result of the sovereignty of the tribe as a separate political community within the United States, but also a necessary option to protect the separate and different cultural heritage of the tribe to adapt the meaning of legal concepts derived from Anglo-American roots to the unique cultural context of communal tribal life. It is only with such sensitive adaptation of such legal concepts to the precise tribal community served by tribal law that such legal concepts will take on true meaning and provide real and meaningful legal protections.[241]

Therefore, it explained that "[i]f tribal statues do not address the matter [of Constitutional interpretation], the Court is specifically directed by [Winnebago Tribal Code, Section 1-109] to apply traditional tribal customs and usages."[242] In this regard, the Court warned against the automatic displacement of customary law.[243] The court emphasized that, "all Tribal written law, including both the Constitution and By-Laws of the Winnebago Tribe of Nebraska and its amendments and the Winnebago Tribal Code, should be interpreted against the backdrop of and in harmony with evolving Tribal custom and tradition."[244]

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[239] *Id*.

[240] *Id*. ("The Winnebago Tribe of Nebraska, however, did not specifically adopt the Indian Civil Rights Act as the basis for the provision of civil rights protections to its constituents and this Court is not bound by that Act in interpreting the Winnebago Constitution.").

[241] *Id*.

[242] *Id*.

[243] *Id*.

> [T]he people of the Winnebago Tribe of Nebraska can directly through constitutional amendment or indirectly by Tribal ordinance alter their Tribal traditions and customs, they should not be found to have done so unless they do so explicitly or unless the new positive law creates such an irreconcilable conflict with Tribal traditions and customary law that two cannot conceivably be harmonized and coexist.

[244] *Id.*

In addressing the second issue, the standard for evaluating equal protection violations, the Court explained that it must fashion a standard that "draws upon the rich cultural, social, and political heritage of the Winnebago Tribe of Nebraska."[245] The Court continued that "[o]nly by the creation of such tribally unique standards will tribal courts realize the full potential of being legal systems within tribal sovereigns."[246] In doing so, it emphasized "this Court takes gender discrimination quite seriously and applies the highest level of scrutiny to such claims—strict scrutiny."[247] As a result, "a compelling governmental interest . . . must be found and the discrimination must be essential to furthering that interest."[248] In addressing the confines of a compelling governmental interest, the "Court must always look to the preservation of tribal culture, traditions, and sovereignty and to the promotion of the health and welfare of tribal members as the most compelling reasons for the formation and operation of tribal government."[249] The Court found "a compelling justification for a gender or other differentiation can be found in the rich culture, history and traditions of the Winnebago Tribe."[250] Therefore, "only invidious and irrational discriminations and disparities in governmental treatment unsupported by tribal law, customs, and usages therefore will be struck down under the equal protection provisions of the Winnebago Constitution."[251]

To apply the Tribal standard to this particular equal protection violation, the Court credited an expert report regarding Tribal custom and tradition which:

> found that under traditional Winnebago customary law, gender differences commonly were drawn for the punishment of offenses related to sexual misconduct because of the natural biological differences in this area between the sexes, the different consequences of misconduct for men and women, and different roles ascribed by the tribal tradition to men and women (without creating any hierarchy or cross-gender disrespect).[252]

Between the expert report and "all sources it consulted," the Court concluded "Ho-Chunk tradition recognizes *and respects* different roles for

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[245] *Id.* at 6231.
[246] *Id*.
[247] *Id*.
[248] *Id*.
[249] *Id*.
[250] *Id.*
[251] *Id*.
[252] *Id*. at 6232.

males and females in the Winnebago Tribe and, particularly, tolerates and encourages different responses to sexual misconduct for men and women."[253] As a result, the Court held that "[i]n Ho-Chunk culture, therefore, gender differences or disparities in treatment do not signal hierarchy, lack of respect or invidious discrimination, but, rather, are a respected and a natural part of life."[254] That is because, "[t]hey are indeed, part of the way that the Winnebago world view brings meaning to life."[255] Therefore, the Court found that:

> [I]n applying the strict scrutiny standard it has announced for gender classifications, it must recognize that traditional differentiations, commonly accepted and practiced by the Tribe without pejorative or discriminatory implications, such a gender distinctions related to sexual conduct, must be sustained as involving the compelling tribal governmental interest of preserving tribal traditions and culture.[256]

Therefore, the Court declared that "[w]hat is tribally appropriate under Ho-Chunk tradition and customary law certainly was not rendered illegal and unconstitutional by the Tribe's own constitution."[257]

In *Garcia v. Tohono O'odham Council*, the Tohono O'odham Court of Appeals addressed a claim against what the council claimed were malapportioned districts based on "traditional district lines."[258] This dispute arose with the conflict between the principle of "one man-one vote" based upon equipopulous districts and the districts as constituted, which represented traditional affiliation.[259] A threshold issue was whether the Tohono O'odham Constitution, by virtue of committing to the council final decision-making power, deprived courts of jurisdiction.[260] The court rejected this argument, holding "the power of the judiciary to scrutinize the laws and ordinances of the tribe and to measure their compliance with the tribal constitution has not been divested."[261] As a result, "any laws purporting to divest the judiciary of its power of constitutional inquiry is

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[253] *Id*. (emphasis in original).

[254] *Id*.

[255] *Id*. ("Gender differences constitute a part of life. Indeed, the Earth, the Grandmother who gives life, is female. Thus, gender role differentiation and gender differences in legal or customary treatment related to those roles are natural and expected.").

[256] *Id*. at 6233.

[257] *Id*.

[258] 16 Indian L. Rep. 6151, 6153, 6156 (Tohono O'odham Ct. App. 1989).

[259] *Id*. at 6156–58.

[260] *Id.* at 6154.

[261] *Id*. at 6154–55.

void."[262] The court explained: "Our ruling is made not with aggressive defense of territory, but with the conviction that separation of powers means that separate branches of government are not self-policing. The judiciary is, beyond peradventure, the arbiter of constitutionality."[263]

With respect to the merits of the malapportionment claim, the Court declined to impose a requirement that all voting districts be equipopulous. It explained that in recognizing traditional districts for representation purposes "the tribe undoubtedly sought 'to preserve, protect and build upon [the] unique and distinctive culture and traditions [of the O'odham].'"[264] This is because historical affiliation with a district "all revolve around a member's historical and cultural connection to a particular district."[265] The Court concluded that "creating a variance with absolute population equality, does not violate the equal protection clauses of the Indian Civil Rights Act and . . . the tribal constitution."[266]

In *Fox v. Hall,* the Three Affiliated Tribes of the Fort Berthold Reservation District Court addressed "whether Chairman Hall voting twice violated the Indian Civil Rights Act and whether the actions of the Council after the walk-out [of councilmembers eliminating a quorum] violated [ICRA] or other constitutional provision."[267] The court recognized it is "restricted from scrutinizing the actions of the Tribal Business Council under the Constitution of the Three Affiliated Tribes," unless they involve a violation of ICRA or "other provisions of organic or customary law which can be reasonably incorporated into the due process and equal protection provisions of [ICRA]."[268] Unlike other Tribes, the court utilized Anglo-American principles and acknowledged that "the Equal Protection Clause [of the U.S. Constitution] mandates a 'one-man, one-vote' rule because of the basic democratic principle that all votes should have an equal sway in the political process."[269] Applying this principle, the court explained that "the one-man, one-vote requirement of the Equal Protection Clause protects primarily the people of the Tribe to assure that all tribal members have an equal voice in tribal government."[270]

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[262] *Id.* at 6155.

[263] *Id.*

[264] *Id.* at 6158.

[265] *Id.*

[266] *Id.*

[267] Fox v. Hall, 26 Indian L. Rep. 6032, 6035 (Three Affiliated Tribes D. Ct. 1998).

[268] *Id.* at 6035 & n.14 ("The Court finds, however, that the grant of authority to this Court by the people of the Tribe to enforce compliance with [ICRA] applies to the Tribal Business Council in the Course of its exercise of its constitutional prerogatives.").

[269] *Id.* at 6035 (quoting Baker v. Carr, 396 U.S. 186 (1962)).

[270] *Id.* at 6036 & n.16 ("It appears that a more appropriate description of the voting system at Fort Berthold is one-man, two votes because the Chairman of the Tribe, who represents all

Therefore, the court reasoned, a scheme which gave "the Chairman of the Tribe . . . the ability to vote twice on all resolutions and measures before the Council, while other councilpersons only had the right to vote once" would violate "the Equal Protection Clause because the double-voting councilperson's constituents would have more say in the political process than the other people of the Tribe."[271]

However, the court cautioned that the Council meeting at question in this dispute "involved an extraordinary situation on the Fort Berthold Reservation."[272] In this regard, "[t]he incoming Chairman was a sitting councilperson representing the Mandaree segment when he was elected."[273] Therefore, "[w]hen the vote was cast regarding filling Chairman Hall's term, the one-man, one vote rule required that all people of the Tribe, including those of the Mandaree segment, have an equal say in determining how that seat would be filled." The court reasoned that "[t]his is especially true for the Mandaree segment because the matter before the Council involved the question of who would represent them the remaining two years of Hall's term."[274] As a result, "[i]t would be unconscionable to suggest that the Mandaree people should not have equal voting strength on that issue."[275]

This unique situation meant that "[h]ad Hall not voted as the Mandaree segment representative and as the Chairman, the rights of the Mandaree segment population to equal protection of the law would have been violated" because "[a]ll members of the Tribe, except the Mandaree segment population, would have voted on the issue of who should represent them the next two years."[276] Therefore, "Hall's actions in voting twice protected the rights of the Mandaree segment to equal protection of the law."[277] The court held that "in the limited circumstance where a sitting tribal councilperson is elected as Tribal Chairman and where the Chairman votes twice, once as segment representative and once as the Chairman, on the single issue of how to fill his vacated seat," ICRA is not violated.[278]

In addressing the legality of the Council's action following the walk-out of councilpersons that eliminated the quorum, the court explained that due to the constitutional mandate to appoint officers within three days of

people of the Tribe, votes on all matters while the councilpersons for the respective districts vote for their constituents.").

[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.*

installing the Chairman, the remaining councilpersons "had no alternative except to appoint officers on a temporary basis subject to later approval by the entire Council once a quorum was gained."[279] This is because if the court accepted the argument that the action of the council in the absence of a quorum was invalid, then the court would have to also declare that the council violated the Constitution "by not installing a tribal government within three days and [thereby] declare tribal government inoperative."[280] The court emphasized that this argument "is absurd and the Court must construe the constitution and by-laws so as to avoid a default in tribal government."[281] The court concluded that in this situation, "a mere majority of the Council can only appoint interim officers at the organizational Business Council meeting, subject to approval by the Council after a quorum is reached" and that "[t]his is the best a Council can do to fulfill its duties under the Constitution when a quorum cannot be reached or is lost because of political disagreements."[282] As a result, the court found "that such action was not so contrary to the [ICRA] and tribal constitution so as to justify court intervention."[283] The walk-out analysis is a prime example of how Tribal courts can use unique Tribal experiences to preserve Tribal self-government; as they occur frequently within Tribal Council politics and the *Fox* court's adherence to a functional rule, drawn from Tribal experience, preserves Tribal government prerogatives.

Lastly, the court addressed the claim for habeas corpus relief in "that the present tribal administration has effectively barred [the Fox plaintiffs] from office and [the Hall defendants are] in the process of misspending tribal resource."[284] The court explained this claim was barred by the political question doctrine.[285] Although "alarm[ed]," the court accepted the assertion of the Hall defendants "that the councilpersons [Fox plaintiffs] were free to return to their offices without recriminations."[286] The court cautioned the parties, asserting that "barring tribal elected officials from attending to their appropriate duties would constitute a violation of [ICRA] cognizable under the habeas corpus provisions of the ICRA."[287]

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[279] *Id.* at 6037.
[280] *Id*.
[281] *Id.*
[282] *Id.*
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id.*
[287] *Id*. (citing Poodry v. Tonawanda Band of Senaca Indians, 85 F.3d 874 (2d Cir. 1996)).

2. Implementing ICRA's Equal Protection Guarantees

As with other areas of law affected by ICRA, the primary takeaway from these cases is that Tribes are able to apply ICRA with due regard to their unique Tribal cultures. Despite their disparate reasoning and sources of law, the decisions highlight an important similarity: Tribal courts' analyses are not bound by federal or state law interpretations of equal protection, but rather apply Tribal law. In this regard, Tribal law interpretations properly draw upon the rich cultural, social, and political heritage of the Tribe. As such, when the differential treatment of an individual occurs a Tribe must, in balancing the protection of the individual's rights with the protection of Tribal government authority, adequately justify the treatment through the furtherance of Tribal traditions, the protection of Tribal sovereignty and self-government, or the promotion of health and welfare. Adopting such a requirement, whether informed by federal standards or drawn entirely from Tribal legal principles, produces Tribal government accountability. Also, a government action that appears to be a violation of equal protection from an Anglo perspective may in fact be an effort to protect an individual's right to the equal protection under Tribal law. Overall, these decisions generally evidence that a Tribe accused of violating equal protection of the law is adequately judging its own actions and vindicating ICRA by allowing judicial review in tribal forums.

D. Due Process

Due process is a companion principle to equal protection, both of which are necessary to secure fundamental rights. ICRA protects due process as well as equal protection, and so fully implementing ICRA requires Tribal forums appropriately provide such process. As Dorma L. Sahneyah, Chief Prosecutor of the Hopi Tribe explained, "[i]ndividuals in our respective courts are afforded all the basic rights guaranteed under [ICRA]. We give great weight to due process of law. Additionally, our courts strive to meet greater and more encompassing rights based on *our own* common values of fundamental fairness."[288] In this regard, "[d]ue process need not mean the same for tribes as for non-Indian America. American courts, in defining due process by incorporating specific substantive rights, have reflected Anglo-American legal values. A more appropriate definition of due process for the tribes would require fairness

[288] *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. 38 (2008) (statement of Dorma L. Sahneyah, Chief Prosecutor, Hopi Tribe) (emphasis added).

as defined in their different culture."[289] Therefore, "[w]hile due process has come to have very different meanings in the context of Anglo-American development of legal protections, application of these substantive standards, as such, to the tribal governments would infringe on what is asserted to be the tribal Indians' right to differentness."[290] And so, just as with equal protection, faithful implementation of ICRA requires Tribal courts to faithfully implement due process as informed by their cultures.

1. Case Analyses

In *In the Matter of Reyn Leno*, the Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court addressed an appeal of a Tribal council decision that the Vice-Chairman had violated the Tribal Ethical Standards Ordinance in that he "used his position on Tribal Council to intimidate, coerce, and threaten the current and former Finance Officers into making decisions favorable to his wife."[291] The Tribal council "determined that a sanction was appropriate, and the Council later imposed a two-month suspension, without pay, from the Council."[292] On appeal, the Tribal court addressed whether Vice-Chairman's due process rights had been violated and whether "the action taken was arbitrary and capricious, in violation of the Tribe's Constitution or [ICRA]."[293]

In addressing the Vice-Chairman's due process claim, the court utilized Anglo-American principles acknowledging that "due process is a flexible concept that varies with particular situation."[294] The court continued in its analysis explaining that "[a]t a bare minimum, due process requires 'some kind of notice . . . and some kind of hearing.'"[295] The Vice-Chairman claimed that he was given inadequate notice, the prohibition against coercion was vague, and allegations of his misconduct were overbroad and vague.[296] The court determined that the Ethics Ordinance was not vague "[b]ecause it is clear from the ordinance that using one's position on the Council to intimidate employee's into giving favorable

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[289] *Indian Bill of Rights and Constitutional Status of Tribal Governments*, *supra* note 75, at 1351.

[290] *Id*. at 1352; *see also* Ponca Tribal Election Board v. Snake, 17 Indian L. Rep. 6085, 6088 (Ind. App., Ponca 1988) (The Court of Indian Appeals—Ponca Tribe determined that Indian Nations have "their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law").

[291] *In re* Reyn Leno, 27 Indian L. Rep. 6213, 6213 (Grand Ronde Tribal Ct. 2000).

[292] *Id.* at 6214.

[293] *Id*.

[294] *Id.* (citing Zinermon v. Burch, 491 U.S. 126 (1990)).

[295] *Id.* **(**quoting Goss v. Lopez, 429 U.S. 565 (1975)).

[296] *Id.* at 6215–16.

treatment to one's spouse is conduct that is prohibited by the ordinance."[297] The court then determined that he had received notice, the allegations were adequate since they were clarified twice, and the Vice-Chairman was provided a witness list before the hearing.[298] The court then explained that the Vice-Chairman was given the opportunity to prepare his defense as the Council "granted him additional time to respond to the allegations against him and provided him with additional information in advance of the hearing."[299] As a result, the court concluded that "[h]e was not deprived of due process."[300]

The court also denied the Vice-Chairman's additional due process claim that alleged the hearing before the Tribal council was biased because he was running for re-election against a sitting member of the council.[301] In doing so, the court highlighted the interest of the Tribe in enacting the Ethical Standards Ordinance.[302] The court explained that "[t]he Tribe's interest in governing the ethical conduct of its own council members is a compelling one, going to the heart of tribal sovereignty and self-government."[303] In recognizing the reasoning utilized in *Navajo Nation v. McDonald*,[304] the court explained that "[t]he Ethical Standards Ordinance of the Grand Ronde Community demands these same high standards of its Council members."[305] In this regard, the court held that "[t]he Tribal Council must have the authority and the freedom to establish standards governing the conduct of its members."[306] The court concluded that, "[t]o hold that a due process violation results simply because two Council members are standing for reelection . . . would interfere unnecessarily with the Tribe's ability to govern itself and to structure the form of its own government."[307] Here, the court used Tribal precedents and Tribal

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[297] *Id.*at 6216.

[298] *Id.* ("[d]ue process only requires notice that gives sufficient detail to allow an opposing party to prepare his defense").

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] 16 Indian L. Rep. 6086 (1989). Notably, *McDonald* is a Tribal case, not an Anglo one.

[305] *In re* Reyn Leno, 27 Indian L. Rep. at 6216 (quoting *MacDonald*, 16 Indian L. Rep. at 6092) ("All . . . government officials are obligated to exercise the powers of their offices honestly, faithfully, legally, ethically, and to the best of their abilities, . . . beyond suspicion of irregularities . . . . [T]hese officials are obligated to perform primarily in the best interests of the . . . people.").

[306] *Id.* (quoting Brandon v. Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon, 18 Indian L. Rep. 6139, 6140 (Grand Ronde Tribal Ct. 1991)).

[307] *Id.* at 6217.

structure to determine the scope of Tribal due process, vindicating ICRA's principles.

In addressing the claim that the "the action taken was arbitrary and capricious, in violation of the Tribe's Constitution or [ICRA]," the court noted, "it simply is not possible to consider whether a sanction is arbitrary and capricious without considering the proceedings that led to and the factual findings that underlie the imposition of the sanction."[308] The court explained that "[s]uch a standard of review is 'narrow and the reviewing Court may not substitute its judgment for that of the agency.'"[309] The court stated that in the Tribal context, "the pertinent aspects of the inquiry appear to be whether the Council offered an explanation for its decision that 'runs counter to the evidence' and whether its decision is 'so implausible that it could not be ascribed to a difference in view.'"[310] The court explained that "under the 'arbitrary and capricious' standard of review a decision maker has erred only if the decision maker has 'offered an explanation that runs counter the evidence before the agency.'"[311] The court noted that the Vice-Chairman did "not contend that the Council's explanation for its decision 'runs counter to the evidence.'"[312] As a result, the court highlighted that, "[a]bsent some arbitrary or capricious action—and none is apparent here—the Council is free to weigh the evidence itself and choose what evidence it finds most probative."[313] As a result, the findings of the Tribal Council were not arbitrary and capricious.[314] This interpretation directly effects the courts' determination of the due process allegations because the requirement that a decision must run counter to the evidence and be implausible confines the court's interpretation of the due process allegations. Limiting the court's ability to do due process balancing between Tribal governments and members in this manner provides deference to the Council.

In *Leech Lake Band of Ojibwe v. Littlewolf*, the Leech Lake Band of Ojibwe Tribal Court addressed a citation for ricing in a closed rice bed.[315] Addressing the merits, the Tribal court recognized that the process for notifying the public of lakes that are available for harvest "consists of issuing Wild Rice Notices that are placed in public places and available at

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[308] *Id*.

[309] *Id*. (quoting O'Keefe's, Inc. v. U.S. Consumer Products Safety Commission, 92 F.3d 940, 942 (9th Cir. 1996)).

[310] *Id.*

[311] *Id.* at 6215 (quoting *O'Keefe's*, 92 F.3d at 942).

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] Leech Lake Band of Ojibwe v. Littlewolf, No. CN-06-11, 2007 WL 7561596, at *1 (Leech Lake Band of Ojibwe Tribal Ct. Apr. 3, 2007).

the Leech Lake Division of Resource Management offices."[316] In doing so, "[i]ndividual lakes that are open for ricing are then posted as 'open' by conservation officers; no postings are made at lakes that are closed."[317] The defendants "argued that they did not know that Swamp Lake was closed."[318] As a result, the defendants claimed that the Tribal regulation was unconstitutionally vague and as a result their due process rights under ICRA were violated.[319] In addressing the claim, the Tribal court recognized that "[f]undamental fairness requires that no person be held criminally responsible for conduct the he/she could not reasonably understand is prohibited."[320] To assess whether notice was provided, the court credited testimony that the defendants "were aware that certain lakes are open for ricing on given dates/times," including Mr. Littlewolf's specific "underst[anding] that some rice beds were open on certain days and closed on others."[321] Moreover, both defendants were aware of the process for posting public notices and that they had received a copy of the Wild Rice Notice.[322] The Tribal court determined that both the Tribal Code and Wild Rice Notice "are sufficiently specific to provide fair warning that seasons for ricing are established by the Leech Lake Band of Ojibwe and that lakes may be either 'open' or 'closed.'"[323] It also recognized that the "[d]efendants' testimony reveals that they were both well aware that ricing outside of the established times/dates is prohibited."[324] As such, the Tribal court concluded that the "[d]efendants could easily have determined with reasonable certainty whether or not they were allowed to rice on Swamp Lake."[325] As a result, the defendants failed to establish that the Tribal Code was unconstitutionally vague and that their due process rights under ICRA had been violated.[326]

In *Begay v. Navajo Nation*, the Navajo Nation Supreme Court addresses the due process challenge of a defendant involving the forfeiture of an automobile used in the illegal delivery of liquor on the reservation.[327]

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[316] *Id.*

[317] *Id.*

[318] *Id.*

[319] *Id.* ("Mr. Littlewolf and Mr. Northbird argued that the ricing notices 'do not give a clear and definite enough notice to the ordinary person as to what conduct will constitute harvesting during closed season or illegal hours.'").

[320] *Id.* at *2.

[321] *Id.* at *4.

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *Id.*

[326] *Id.* at *5.

[327] Begay v. Navajo Nation, No. A-CR-04-87, 1988 Navajo Supp. LEXIS 5, at *1 (Navajo Sup. Ct. July 25, 1988).

The Navajo police stopped the defendant as he was driving on the Navajo reservation and found "six (6) unopened cases of intoxicating liquor (Thunderbird Wine) in the trunk" of the defendant's automobile.[328] The defendant was arrested and charged with delivery of liquor in violation of Navajo law and the police seized the defendant's automobile.[329] A jury convicted the appellant of illegal delivery of liquor and subsequently, the Navajo Nation filed multiple motions for forfeiture of the defendant's vehicle.[330] The district court granted the Nation's motion for forfeiture without a hearing.[331] The Navajo Nation Supreme Court held:

> The totality of the Navajo Criminal Code and the devastation that alcohol causes on the Navajo Nation authorizes the Navajo courts to order a forfeiture of an automobile used for the illegal delivery of liquor. The uniqueness of an automobile and its availability for illegal purposes, combined with the effect of alcohol on the Navajo Nation, requires us to limit this decision to the forfeiture of an automobile used for the illegal delivery of liquor. Illegal delivery of liquor is a serious offense, because liquor has caused far-reaching devastation on the Navajo Nation. As such, the Navajo courts have the power and the duty to 'protect the public interest of the Navajo Nation' from people who engage in such illegal activity.[332]

The Court affirmed that despite the seriousness of liquor on the Navajo Nation, "a civil forfeiture proceeding must provide due process as set forth in the Navajo Nation Bill of Rights, [ICRA], and Navajo common law."[333] Importantly, "due process was not brought to the Navajo Nation by [ICRA] . . . . The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them . . . an opportunity to present and defend their positions."[334] The Navajo Nation's custom of due process is deeply rooted:

> When conflicts arise, involved parties will go to an elder statesman, a medicine man, or a well-respected member of the community for advice on the problem and to ask that person to speak with the one they see as the cause of the conflict. The advisor will warn the accused of the action

[328] *Id*.
[329] *Id*. at *2
[330] *Id*.
[331] *Id*. at *2–3.
[332] *Id*. at *8–9.
[333] *Id.* at *11.
[334] *Id.*

> being contemplated and give notice of the upcoming group gathering. At the gathering, all parties directly or indirectly involved will be allowed to speak, after which a collective decision will be made.[335]

This tradition, which constitutes the "heart of *Navajo* due process" requires "notice and an opportunity to present and defend a position."[336] As a result, the Court found "the Tuba City District Court violated Mr. Begay's due process rights by granting the 'Motion for Forfeiture' without notice to Mr. Begay or without allowing him an opportunity to be heard."[337]

The Navajo Supreme Court further elaborated on its conception of the unique Navajo approach to due process in *Bennett v. Navajo Board of Election Supervisors*, an appeal "from a decision of the Navajo Board of Election Supervisors . . . disqualifying [Bennett] as a candidate for the office of the President."[338] Bennett argued that the "statute limiting elected officials and employees for president and vice-president to previously elected officials and employees of the 'Navajo tribal organization,' [was] invalid because it denies due process and equal protection of the law."[339]

In addressing the due process claim, the Court acknowledged that "[w]hen the Navajo Nation and the United States concluded a treaty in 1868 to establish government-to-government relations, the Navajo people reserved their rights to self-government and to use their customs and traditions as law."[340] The Court affirmed what it noted in *Begay* that "[t]o the extent that those customs and traditions are fundamental and basic to Navajo life and society, they are higher law."[341] The Court also noted that "[t]he Navajo word for 'law' is *beehaz'aanii*," a word which means "something which is absolutely there" and is not unlike "the Anglo conception of natural law."[342] This is confirmed by the Navajo Nation Bill of Right's recognition of "Navajo custom and tradition" that informs "the rights retained by the people [as] the *beehaz'aahii* we described above."[343] This is because "Navajo *beehaz'aahii* speaks to political liberty, and we apply Navajo common law rather than Anglo concepts of political liberty. In Navajo tradition, government and governing was a matter of consensus

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[335] *Id.* at *11–12.

[336] *Id.* at *12 (emphasis added).

[337] *Id.*

[338] Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009, 6009 (Navajo Sup. Ct. 1990).

[339] *Id.*

[340] *Id.* at 6011.

[341] *Id.*

[342] *Id.*

[343] *Id.*

of the people, and Navajos had a participatory democracy."[344] As such, Navajo common law recognized that "all Navajos participated in public decisions. Therefore, there is a strong and fundamental tradition that any Navajo can participate in the process of government, and no person who is not otherwise disqualified by a reasonable law can be prohibited from holding public office."[345] The Court concluded that the matter involves the right to political liberty.[346] This is a right that is embedded in the notion of a "republican participatory democracy" and is grounded in Navajo common law.[347] Therefore, according to the Court, "we are dealing with a fundamental right which the Navajo Nation Council can limit only for good and weighty reasons for the protection of the public interest."[348] That is, the Council must be accountable for any limitation of a right involving political liberty.[349]

2. Due Process in Tribal Courts

Even more so than with other areas of law touched by ICRA, due process analysis relies on an individual Tribe's legal tradition. In most of the cases cited, ICRA is an afterthought. Courts highlight that the Tribal courts are not bound by federal or state law interpretations of due process; rather Tribes reserve their rights to self-government and the right to use their customs and traditions as law. In this regard, Tribal law interpretations of due process should properly draw upon the rich cultural, social, and political heritage of the Tribe, which consistently involves the principles of fairness and respect. As with Anglo due process, fundamental fairness requires that an individual must be reasonably able to understand prohibited conduct. But as this Article has repeatedly made clear, parallels to Anglo law do not overtake ICRA requirements or reduce the need for Tribal courts to use Tribal custom. Furthermore, in balancing individual rights protected by Tribal government authority, due process requires that a Tribe adequately provide an individual with notice and the opportunity to be heard. Here too, this produces Tribal government accountability.

For Tribes implementing ICRA protections, intertribal common law suggests that Tribes should allow for judicial review of due process disputes. In conducting the requisite review, Tribal forums should draw upon the rich cultural, social, and political heritage of the Tribe. Additionally, Anglo conceptions of due process are of even more limited

[344] *Id.*
[345] *Id.*
[346] *Id.* at 6011.
[347] *Id.* at 6012.
[348] *Id.*
[349] See *infra* Part VII.

probative value than in other ICRA-related suits. The Navajo Nation is a prime example: the deeply rooted rights encompassed by *beehaz'aahii* have parallels, but no true duplicates, in Anglo law. Thus, Tribal forums considering Tribal cultures will more likely result in an appropriate balance between the protection of individual rights and the protection of Tribal government authority by ensuring that an individual is adequately provided with notice and the opportunity to be heard.

E. Criminal Protections

This Article's final Subsection surveying implementation of ICRA in Tribal forums will consider how Tribes handle criminal protections. As one Tribal judge, Judge Theresa M. Pouley of the Tulalip Tribal Court explains:

> Tribal courts have now long been operating under the provisions of the Indian Civil Rights Act, which provides the same fundamental protections for the rights of the accused as the Bill of Rights provides under the U.S. Constitution. These substantive and procedural protections are embodied in the tribal criminal codes which incorporate the protection of defendant rights, including: the right to speedy trial, the right to a jury trial, the right to subpoena witnesses and evidence, the right to cross examination, the imposition of probable cause warrant requirements, and prohibitions on excessive bail, double jeopardy and compulsory self-incrimination. The Tulalip Tribes, as do most tribes in the northwest, also provides defendants with the right to seek habeas corpus relief in their Appellate Court.[350]

Judge Pouley continued, "[w]ith regard to the rights of the accused, I can personally attest that all of the tribal courts that I have served as a judge, or practiced in as an advocate, have a strong commitment to protecting the rights of criminal defendant that is equal to that of the state and federal courts."[351]

1. Case Analyses

In *Cheyenne River Sioux Tribe v. Williams*, the Cheyenne River Sioux Tribal Court of Appeals addressed whether a Tribal game warden

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[350] *Tribal Cts. and the Admin. of Justice in Indian Country: Hearing Before the Senate Subcomm. on Indian Affs.*, 110th Cong. 2 (2008) (statement of Hon. Theresa M. Pouley, Judge, Tulalip Tribal Ct., President, Nw. Tribal Ct. Judges Ass'n).

[351] *Id.* at 33.

was allowed to enter a Tribal member's "land or land leased by him for purposes of checking for unlicensed hunting in one instance and conducting a deer survey in the other."[352] In particular, the court acknowledged that the natural resources reserved by the Tribe in its treaties with the United States are a "tribal resource."[353] As a resource belonging to the Tribe, individuals are therefore subject to Tribal regulation.[354] The court addressed the proper balancing of the Tribe's interest in protecting its treaty-reserved resources with the Tribal members' interest in due process and the protection against unreasonable search and seizure as recognized in ICRA.[355] The court proceeded to examine the applicability of the open fields doctrine and acknowledge that pursuant to federal law "land and buildings outside the curtilage are not normally protected against unreasonable search and seizures. An open field is neither a house nor an effect, and therefore the government's entrance upon open fields is not an unreasonable search within the meaning of the Fourth Amendment."[356] In this instance, the court recognized that its analysis is not only confined to a criminal context; rather, its analysis also includes "situations that involve other bona fide governmental (civil) regulatory objectives."[357] In this case, the Tribe's interest included one such objective, heightened "because the tribe has an *ownership* interest in wildlife," not just a regulatory interest.[358] The court determined that the "tribe's legitimate interest in wildlife as a valuable (tribal) resource justifies the application of the 'open fields' doctrine in this case."[359] Therefore, the court concluded that "tribal game warden had probable cause to enter Williams' land based on the observation of hunters who may be hunting without a license."[360] Thus the court reinstated the conviction, but also notably vacated the sentence "in the interests of equity and justice."[361] *Williams* therefore is a strong example of how Tribal courts can balance the interests of Tribes and defendants.

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[352] Cheyenne River Sioux Tribe v. Williams, 19 Indian L. Rep. 6001, 6001 (Cheyenne River Sioux Ct. App. 1991).

[353] *Id*. at 6002 ("There is no doubt that reservation wildlife is a tribal resource . . . .").

[354] *Id*. ("Thus, the tribe has statutorily declared that reservation wildlife is a tribal resource and private individuals may only utilize wildlife in accordance with the code.").

[355] *Id.*

[356] *Id.* (citing Oliver v. United States, 466 U.S. 170 (1984)).

[357] *Id.*

[358] *Id.* (emphasis in original).

[359] *Id.* at 6003 (noting "[i]t *may not* be so . . . where the tribal interest is more attenuated. It is also pertinent . . . that the tribe's activities in this regard must be reasonable under the circumstances . . . and avoid undue interference or intrusion in the bona fide property interests of tribal landholders.").

[360] *Id.* at 6001.

[361] *Id.* at 6003.

In *Palencia v. Pojoaque Gaming, Inc.*, the Pueblo of Pojoaque Tribal Court addressed a similar claim that ICRA's search and seizure protections had been violated.[362] Notably, *Palencia* is a civil case about the tort claims brought against the defendants' staff for detaining who they suspected to be underage gamblers.[363] However, the court recognized the propriety of any detention would be subject to the Tribe's unique interpretation of ICRA's search and seizure guarantees. In doing so the court acknowledged that "[t]he Pueblo of Pojoaque's interpretations of [ICRA] are determined by their customs and traditions but do not ignore legal opinions presented in various tribal, state, and federal courts."[364] In the process, the court emphasized that "[o]ver the years, the Pueblo of Pojoaque enrolled members have been subjected to many violations of their civil rights by both federal and state governments."[365] As a result, "the tribal members understand and covet the right to be free of unreasonable search and seizures and the right to be free of unreasonable restraints upon their liberty."[366] Therefore, the court determined that "[a]ny traditional deprivation of liberty of tribal members is only authorized after a full finding of facts leading to the conclusion that the deprivation of liberty is necessary to protect the Tribe's, or tribal member's, health, safety or welfare."[367] The court concluded that:

> [f]or [Pojoaque Gaming, Inc.] security staff, without law enforcement authority, to forcibly deprive guests of their liberty, not notify them of any possible criminal charges against them, to question them in a harsh, demeaning and demanding manner and to threaten them with possible imprisonment is unreasonable and a violation of Sections 2 [freedom from unreasonable search and seizures] and 8 [freedom against deprivations of liberty without due process of law] of [ICRA].[368]

In *Davisson v. Colville Confederated Tribes*, the Colville Tribal Court of Appeals addressed whether requiring a defendant to prove self-defense by a preponderance of the evidence violated ICRA's right against self-incrimination.[369] The case involved four criminal charges against

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[362] Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149, 6152 (Pojoaque Tribal Ct. 2001).

[363] *Id.* at 6150.

[364] *Id.* at 6152.

[365] *Id.*

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] Davisson v. Colville Confederated Tribes, 2012 Colville App. LEXIS 5, *14 (Colville Confederated Tribes Ct. Apps. 2012).

Davisson: two batteries, a burglary, and possession of a controlled substance.[370] The first three counts were labeled as domestic violence, subjecting Davisson to enhanced penalties.[371] The enhanced sentencing provisions of the Domestic Violence Code require a "defendant to prove self-defense by a preponderance of the evidence," while Davisson argued "that the tribal prosecutor should have the burden to prove lack of self-defense beyond a reasonable doubt."[372]

The court noted that the Colville Confederated Tribes Civil Rights Act (CTCRA) "requires that every defendant in a criminal proceeding is entitled to basic rights including the protections of due process and equal protection of the law."[373] The Court then noted that "Colville tribal law, with respect to due process and equal protection rights of criminal defendants, has always been protective if not more protective, than [ICRA] and thus rulings by this court necessarily meet any federal law and federal constitution requirements."[374] To this end, Davisson claimed that CTCRA prevented "shifting the burdens of proof and persuasion from the prosecution to the defendants for crimes involving domestic violence violates their right to substantive due process."[375] In addressing the claim, the court noted that pursuant to substantive due process requirements, "strict scrutiny" applies "where a party is threatened with deprivation of a fundamental right."[376] The court determined that "the right not to be compelled to testify against oneself is a fundamental right," thus reviewing the due process and equal protection challenges under the strict scrutiny standard.[377] The court explained that "[t]he legislative history sets forth compelling reasons for enhancing sentencing and shifting the burden of proving self-defense from the prosecution to the defense for crimes involving domestic violence."[378] Therefore, the court held that the Tribal Business Council "has not violated tribal or federal statutes guaranteeing the right to due process and equal protection by shifting the burden of proving self-defense from the prosecution to the defendant for crimes involving domestic violence."[379]

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[370] *Id.* at *5.
[371] *Id*.
[372] *Id*. at *2.
[373] *Id.* at *8.
[374] *Id*. at *8–9.
[375] *Id*. at *9–10.
[376] *Id*. at *11.
[377] *Id*.
[378] *Id*. at *18–19.
[379] *Id.* at *21 ("The amendments to the domestic violence act offend no principle of justice that are so rooted in the traditions and conscience of our people as to fundamentally deny due process to a defendant in a case involving domestic violence.").

In *Navajo Nation v. Rodriguez*, the Navajo Nation Supreme Court examined the effect of coercion on the validity of a confession.[380] The Court determined that "any degree of coercion is in violation of Navajo Bill of Rights" and the individual's right to remain silent because "[a] person cannot give information for his or her own punishment unless there is a 'knowing and voluntary decision to do so.'"[381] In this regard, the Court relied upon and reiterated Navajo law principles.[382] The Court emphasized, "[w]e interpreted the English words in our Bill of Rights in light of the Navajo principle rejecting coercion. We said that 'others may 'talk' about a Navajo, but that does not mean coercion can be used to make that person admit guilt.'"[383] This is because "the Navajo value of individual freedom, prohibits coerced confessions."[384] The Court explained:

> In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self-incrimination, is involved.[385]

The Court emphasized that the "fundamental tenet informing us how we must approach each other as individuals" is "*Hazhó'ógo*."[386] The Court concluded that this fundamental Navajo law concept "is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions."[387] As a result, the Court concluded that "[t]he right against coerced self-incrimination attached not when the defendant first appeared before the district court, but when he was placed in police custody . . . . Either the police coerced the defendant, or it did not. Any degree of coercion is in violation of Navajo Bill of Rights."[388]

In *Eriacho v. Ramah Dist. Ct.*, the Navajo Nation Supreme Court addressed a petition for a writ of mandamus seeking to compel a request

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[380] Navajo Nation v. Rodriguez, 5 Am. Tribal Law 473, 475 (2004).

[381] *Id.* at 477 (quoting *Navajo Nation v. McDonald*, 7 Navajo Rep. 1, 13 (Nav. Sup. Ct. 1992)).

[382] *Id*.

[383] *Id.*

[384] *Id*.

[385] *Id.* at 479.

[386] *Id.*

[387] *Id.* at 479-80.

[388] *Id.* at 477.

for a jury trial in a criminal case.[389] It reasoned that a "jury trial is a fundamental right in the Navajo Nation. A jury is a modern manifestation of the Navajo principle of participatory democracy in which the community talks out disputes and makes a collective decision."[390] The Court continued by stating:

> *Hozh"go* requires meaningful notice and explanation of a right before a waiver of that right is effective, it requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction. For notice to be meaningful, and therefore a waiver to be effective, the Navajo government must explain to the defendant that the jury trial right is not absolute, as it may be waived by doing nothing within a certain time. Absent this explanation, the information received by a defendant is incomplete, as it appears the right is automatic and perpetual, like the federal constitutional right. Without this information, the waiver by inaction is not truly knowing and intelligent, and would violate the defendant's right to due process.[391]

Thus, a defendant who was never informed that she would waive by inaction her fundamental right to request a jury did not provide a "knowing and intelligent" waiver of that right.[392] Consistent with the Navajo Nation Supreme Court's approach to due process, here too the Court grounded its analysis in Tribal conceptions of law, not by analogizing to Anglo law.

In *Fort Peck v. Bighorn*, the Fort Peck Court of Appeals addressed whether the self-incriminatory statements of a defendant made at the time of a traffic stop were rightfully admitted into evidence.[393] The court reasoned that:

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[389] Eriacho v. Ramah Dist. Court, 8 Navajo Rptr. 617, 622 (2005).

[390] *Id.* at 623 (citing Duncan v. Shiprock Dist. Ct., 5 Am. Tribal Law 458 (2004)). In *Duncan*, the Navajo Nation Supreme Court determined:

> A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Juries are a part of the fundamental Navajo principle of participatory democracy where people come together to resolve issues by "talking things out." Through this process community members in disharmony are brought back into a state of *hózhó*. The participation of the community in resolving disputes between parties is a deeply-seeded part of our collective identity and central to our ways of government.

Duncan, 8 Navajo Rptr. at 592–93 (internal citations omitted).

[391] *Eriacho*, 8 Navajo Rptr. at 625–26.

[392] *Id.* at 626.

[393] Fort Peck v. Bighorn, 1 Am. Tribal Law 121, 122 (1997).

> Voluntary statements made by an individual to a police officer outside of a custody interrogation, are admissible and do not violate the suspects right to protection from self-incrimination given by the 5th Amendment [of the U.S. Constitution] and [ICRA] . . . . In order to guarantee the 5th Amendment rights and [ICRA] provisions against self-incrimination, tribal police officers must upon arrest, and taking a person into custody, give that person notice of his Tribal Rights, which includes his right to protection against self-incrimination.[394]

The Court of Appeals held that admission of defendant's statements to Tribal police officers prior to his custody and arrest, that he had been drinking and that he was drunk, did not violate his right against self-incrimination.[395]

Finally, in *Clark v. Fort Peck Tribes*, the Fort Peck Court of Appeals held that a Tribal statute criminalizing the refusal to submit a blood draw by the police violated ICRA.[396] The court reasoned that because "less intrusive options exist" such as breathalyzers and urinalysis, "the personal privacy interests outweigh the governmental need for blood tests, thereby making a warrantless blood draw impermissible" under ICRA.[397]

2. Criminal Protections' Place in ICRA Analysis

Perhaps most important in analyzing the relationship between ICRA and the rights of the accused in criminal proceedings is the close nexus such rights have to ICRA's due process command. Criminal protections are an integral part of due process, as the foregoing cases make clear. At the same time, criminal protections are more directly informed by real Tribal conditions, rather than solely Tribal concepts of governance. Tribal ownership of land, Tribal statutes, and historical democratic processes all inform Tribal criminal protections. As with other areas of ICRA implementation, Tribal courts are not bound by federal or state law interpretations of criminal convictions.

As such, when a Tribal member is accused of a crime, a Tribe must balance the individual rights protection with the protection of Tribal government authority. To do so, Tribal authorities must adequately justify the deprivation of liberty as furthering Tribal traditions, protecting Tribal

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[394] *Id*. at 122–23 (citing California v. Beheler, 463 U.S. 1121 (1983)) ("The Supreme Court of the United States set forth the rule of law that Miranda Warnings are not required unless the suspect is placed in custody and under interrogation.").

[395] *Bighorn*, 1 Am. Tribal Law at 123.

[396] Clark v. Fort Peck Tribes, 2018 Mont. Fort Peck Tribe LEXIS 6, *2 (2018).

[397] *Id.* at *6–7 (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2163–64 (2016)).

sovereignty and self-government, or promoting Tribal health and welfare, as defined by the Tribe itself. In doing so, the government must provide an individual with meaningful notice and an explanation of their rights.

CONCLUSION

In passing ICRA, Congress established the assurance of individual right protections for individuals in Indian country. This, in part, fulfilled Congress's duty is to protect the rights and interests of the Indians.[398] It has been argued that ICRA had the "effect of creating new rights *against* tribal governments."[399] However, this Article has clearly established that ICRA did not create new rights; rather, Tribal individual right protections exist pursuant to Tribal law.[400] As such, ICRA affirmed, rather than created, the principle of Tribal governmental accountability.[401] This is because "promoting tribal sovereignty starts with tribal courts applying tribal law to settle tribal member and tribal government disputes."[402] When Tribal councils establish Tribal ordinances and Tribal courts interpret Tribal law, they should draw upon the rich cultural, social, and political heritage of the Tribe.[403] This is because "[t]he goal of protection of individual rights in the court[s] should be achieved by maintaining unique Indian traditions and heritage in harmony with the establishment of such individual rights."[404]

Furthermore, as the foregoing cases studies make clear, courts should seek to use their rich Tribal history to ensure the balance between individual rights protection and Tribal government authority is justified only by the furtherance of Tribal traditions, protection of Tribal

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[398] LEWIS MERIAM, PROBLEM OF INDIAN ADMINISTRATION; REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR, & SUBMITTED TO HIM FEBRUARY 21, 1928, 514 (1928) ("[T]he Indian Service should regard itself as the guardian and attorney for the Indians, leaving no stone unturned to further and protect to the utmost the right of the Indians"); Juliana Repp, *The Indian Civil Rights Act: Tribal Constitutions and Tribal Courts*, MATERIALS PUBLISHED AS PART OF THE 16TH ANN. U. WASH. INDIAN L. SYMP., 13 (2003) ("Tribes should do all they can to clarify and specify civil rights protections within their jurisdictions and provide forums and remedies for aggrieved individuals").

[399] Ziontz, *supra* note 8, at 1 (emphasis added) ("Consequently, the ICRA which makes the constitutional guarantees of liberty and property binding on Indian tribes, and has the effect of creating new rights against tribal governments").

[400] Winnebago Tribe of Nebraska v. Hugh Bigfire, 25 Indian L. Rep. 6229, 6230 (Winnebago Sup. Ct. 1998).

[401] RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 17 (2009) (describing the desire for governmental accountability).

[402] Repp, *supra* note 398, at 13.

[403] Winnebago Tribe of Nebraska v. Hugh Bigfire, 25 Indian L. Rep. 6229, 6231 (Winnebago Sup. Ct. 1998).

[404] NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 1, at 117.

sovereignty and self-government, or the promotion of the health and welfare.[405] This ensures that the people are entitled to an "accountable" government in the protection of their individual rights.[406] This also ensures accountability in the exercise of Tribal government authority.[407] As a result, proper checks and balances promote accountability by preventing abuses of discretion and power.[408] Concerns about abuse of power and the deprivation of individual rights in the operations of government call for judicial review in Tribal forums.[409]

This Article alone cannot possibly survey the full scope of ICRA implementation across every federally recognized Tribe in the United States, much less each culturally and legally distinct Tribe that are not recognized by the federal government. However, in the fifty years since ICRA was enacted, its provisions have been a vital backstop to the development of Tribal law that both protects the fundamental rights of Indigenous people and ensures that Tribal precepts are respected. As Tribal courts enter the next fifty years of ICRA implementation, they should continue to prioritize their unique Tribal cultures, rather than fall prey to the temptation to use convenient Supreme Court precedents or Anglo-American legal concepts to supplant the unique, vibrant history of their Tribe. In doing so, they can vindicate the promise of ICRA and respect the work of their ancestors to establish a legal tradition that has sustained the Tribe for millennia.

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[405] *Bigfire*, 25 Indian L. Rep. at 6230; Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149, 6152 (Pojoaque Tribal Ct. 2001).

[406] Johnson v. Navajo Nation, 14 Indian L. Rep. 6037, 6040 (Navajo Sup. Ct. 1987) ("The Navajo people are entitled to a representative and accountable Navajo tribal government").

[407] *See* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 605 (2021) ("The power imbalance was caused not by an independently powerful executive but instead by his ability to wield power over the other branches such that he was insulated from criticism or accountability").

[408] Off. of the Navajo Nation President & Vice-President v. Navajo Nation Council, 9 Am. Tribal Law 46, 64 (Navajo Sup. Ct. 2010).

[409] *E.g.*, Koon v. Grand Traverse Band of Ottawa and Chippewa Indians, No. 95-067-048-CV, *1–2 (Grand Traverse Band Tribal Ct. 1998) ("the Court is [not] barred from hearing this matter as an administrative review by the separation of powers doctrine. Such assertion . . . completely forgets about the checks and balances that must exist . . . to ensure that the individual branches of government are accountable.").