Putting *Martinez* to the Test: Tribal Court Disposition of Due Process

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I. INTRODUCTION

When many non-Indians think of Native Americans, they envision the stereotypical eighteenth-century brave. Everyone knows the image: bow and arrow, eagle feathers, long black hair. American popular culture has been inundated with these images in media ranging from movies to textbooks.[1] Too often, non-Indians lack the exposure to modern Indian culture necessary to debunk the notion of Indians as largely a historical phenomenon. Native Americans, while having lost vast tracts of land and enduring the policies of a federal government frequently in conflict over the "proper" role for Indians in American society, remain alive as a distinct cultural and politically autonomous group. American Indian tribes, despite their socio-economic hardships, assert an overwhelming desire to exist as self-determining polities.

Many tribes maintain a well-organized system of dispute resolution, often modeled after the Anglo-American court system.[2] The tribal courts play much the same role in Indian societies, at least theoretically, as non-Indian courts play in non-Indian society—dispute resolution and maintenance of social order. The way in which tribal courts attain these results, however, need not mirror Anglo-American society. Tribal courts do have the ability to act independently from their American counterparts and function within Indian societies in culturally sensitive ways.

In 1968, the United States Congress passed the Indian Civil Rights Act ("ICRA")[3] in response to growing complaints about tribal governments abusing the civil rights of their members. With its normative Anglo-American values offended, Congress extended many of the Bill of Rights protections contained within the U.S. Constitution to Indian individuals as protection against their

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1. For a recent example of such a stereotyped image, one need only look at the cover of the popular and respected legal periodical, THE COMPLEAT LAWYER, Fall 1995 (picturing a black and white, presumably old photograph of an Indian elder for an issue touted as containing several articles on the culture of modern American Indians).

2. *See infra* notes 34-37 and accompanying text for a discussion of the establishment of tribal courts. For a detailed discussion of tribal court systems, see SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE (1978).

3. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1994).

tribal governments.[4] The United States Supreme Court, ten years after the passage of the ICRA, decided the case of *Santa Clara Pueblo v. Martinez*,[5] the result of which was to preserve primary control over Indian civil rights claims within Indian tribal courts, better equipped than federal courts to protect cultural traditions and sovereignty. Even with *Martinez*'s delegation of power to tribal courts, the ICRA remains an imposition of Anglo-American values on Indian societies, irrespective of tribal consent. The U.S. Supreme Court envisioned, in *Martinez*, that tribal court disposition of civil rights would allow the tribes to implement the ICRA in a manner which preserves their ability to decide difficult questions in accordance with tribal values. Since the Supreme Court handed down *Martinez* in 1978, much scholarship has been devoted to the debate over whether tribal courts should be entrusted with civil rights protection.[6] Currently, however, no work has been done examining the actual tribal court opinions to see how those courts have addressed civil rights claims.[7] This Note will examine the tribal courts' disposition of the due process clause contained within the ICRA[8] and compare tribal interpretations with federal conceptions of due process.

Part II of this Note provides a broad overview of the field of Indian law, with emphasis placed on the changing nature of tribal sovereignty in federal policy.[9] Part III discusses the legislative history and enactment of the ICRA.[10] In Part IV, the Note outlines the U.S. Supreme Court's decision in *Santa Clara Pueblo v. Martinez*.[11] Part V explains the Project's methodology, discussing the difficulties involved in researching tribal court opinions generally.[12] As a point of reference, Part VI provides a cursory overview of the meaning of due process in the Anglo-American tradition.[13] Part VII, the brunt of the Project, examines the tribal court opinions of the Navajo Nation, the Colville Confederated Tribes, the Hoopa

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4. Because the ICRA creates only statutory rights, Congress may alter these rights at any time. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 465 (1994). On this subject, one commentator noted: "[t]he idea that Congress in 1968 had to bring the Bill of Rights to Indian reservations by statute, and that Congress could pick and choose which constitutional safeguards to extend, is alien to popular concepts of American jurisprudence." Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 338 (1969).

5. 436 U.S. 49 (1978).

6. *See* Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the* Martinez *Decision: A Reconsideration*, 35 S.D. L. REV. 355 (1990); Joseph de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59 (1975); Alvin J. Ziontz, *After* Martinez*: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979); John T. Hardin, Comment, Santa Clara Pueblo v. Martinez*: Tribal Sovereignty and the Indian Civil Rights Act of 1968*, 33 ARK. L. REV. 399 (1979).

7. Professor David Williams, commenting on the lack of scholarship on this point, noted, "I know of no scholarly study surveying the tribal courts' work on this score . . . ." Williams, *supra* note 4, at 497.

8. 25 U.S.C. § 1302(8) (1994).

9. *See infra* part II.

10. *See infra* part III.

11. *See infra* part IV.

12. *See infra* part V.

13. *See infra* part VI.

Valley Tribe of northern California, several Oklahoma tribes, and several tribes from the State of Washington.[14] Finally, the Note attempts to draw conclusions, based on the tribal court opinions, about the meaning of due process in a tribal setting.[15] Ultimately, this Project shows that the *Martinez* vision—tribal courts protecting tribal cultural traditions—has been successfully implemented, though perhaps only at a conceptual level.

II. OVERVIEW OF FEDERAL INDIAN LAW AND THE NATURE OF TRIBAL SOVEREIGNTY

For hundreds of years, Indian tribes have shared a unique relationship with the federal government. While Congress recognizes tribal sovereignty in some respects, tribes remain subject to federal oversight and congressional power. An understanding of any aspect of Indian law must necessarily begin with a discussion of the status of tribes and tribal sovereignty in America.

The two-hundred-year relationship between the federal government and the tribes has been marked most distinctively by its vacillation. At times, the federal government has pursued a policy of self-determination for tribes; at others, the federal government has encouraged assimilation as the proper course for Indian policy. While either course of action may ultimately have proven a healthy one,[16] vacillating federal support between sovereignty and assimilation has damaged Indian cultures immeasurably.[17] Because of the federal government's inconsistent dealing with the tribes, a concise statement of the modern status of tribal sovereignty proves difficult. A brief outline of the sources of tribal sovereignty may serve to preface a broader understanding of the current status and powers possessed by tribes.

A. Tribal Sovereignty v. The Plenary Power of Congress

Early in the history of the United States, the Supreme Court attempted to define the sovereignty possessed by Indian tribes in relation to the federal government. In the case of *Cherokee Nation v. Georgia*,[18] the Court described the powers of the tribes:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a

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14. *See infra* part VII.

15. *See infra* part VIII.

16. This Note deliberately shies away from either value judgment. Purely for the record, however, this author unambiguously and unwaveringly supports tribal sovereignty as the healthiest course for the preservation of Indian cultures.

17. *See generally* VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984) (discussing the remarkably inconsistent federal policy regarding the status of tribes).

18. 30 U.S. (5 Pet.) 1 (1831).

> state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[19]

According to Chief Justice Marshall, the tribes were "domestic" in the sense that they were located within the geographical borders of the United States, while "dependent" in the sense that they had only limited authority.[20] *Cherokee Nation* was the Court's first articulation of the "trust relationship" which still exists between the tribes and the federal government.[21]

The following year, in *Worcester v. Georgia*,[22] the Court recognized tribes' aboriginal sovereignty by holding that Indian tribes have a right of self-government and are not subject to the jurisdiction of the states in which they are located. The premise underlying the Court's recognition of the tribes' power was that prior to European settlement on this continent, tribes possessed total sovereignty.[23] Thus, each tribe began its relationship with the federal government as a sovereign power whose acceptance of the stronger sovereign's protection did not constitute a surrender of the tribe's independence and right of self-government.[24] Between these two seminal cases, the Supreme Court enunciated seemingly incompatible doctrines: tribes as dependent, tribes as sovereign.[25] While tribes retained their aboriginal sovereignty, they remained subject to the power of the federal government by virtue of their dependent status. As a guardian, Congress could exercise plenary power over its ward—the tribes.

For more than a century, Congress recognized tribal sovereignty by negotiating treaties with the tribes.[26] With the passage of time, however, Congress began to favor assimilationist goals, and it ceased the treaty-making practice.[27] Congress enacted legislation stating that "hereinafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[28] Following this policy vision, the Supreme Court soon determined in *United States v. Kagama*[29] that tribes would no longer be recognized as sovereign nations. In the course of its opinion, the Court emphasized the guardian-ward relationship between the federal government and the tribes, stating:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United

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19. *Id.* at 17.

20. Christina D. Ferguson, Martinez v. Santa Clara Pueblo*: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 281 (1993).

21. *Id.*

22. 31 U.S. (6 Pet.) 515 (1832).

23. *Id.* at 555, 560-61.

24. Judy D. Lynch, Note, *Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act*, 1979 WASH. U. L.Q. 897, 899.

25. Ferguson, *supra* note 20, at 282.

26. *Id.* at 283.

27. *Id.*

28. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566, *quoted in* Lynch, *supra* note 24, at 900.

29. 118 U.S. 375 (1886).

> States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[30]

The following year, Congress continued on its assimilationist bent by passing the General Allotment Act, or Dawes Act,[31] authorizing the division of tribally held lands to individual Indians.[32] The apparent purpose of the Act was to assimilate the Indians into contemporary American society by eliminating the tribal land base and centralized tribal structure.[33]

In the late 1920s and early 1930s, the federal policy towards Indian tribes again shifted from assimilation to self-determination culminating in Congress's passage of the Indian Reorganization Act ("IRA") of 1934.[34] The IRA established procedures by which tribes could organize and govern their own internal affairs. The procedures contained in the Act encouraged the tribes to adopt constitutions that became effective once approved by both the tribe and the Secretary of the Interior.[35] Most of the tribal constitutions called for the establishment of a tribal court system in charge of internal dispute resolution.[36] The IRA recognized tribal sovereignty as absolute, though still subject to the limitations of express congressional legislation.[37]

As one commentator noted, "[W]ith the adoption of the IRA, federal policy had come full circle: from *Worcester*'s recognition of tribal sovereignty to the General Allotment Act's policy of assimilation by destroying tribal structure, back to recognition—now by the IRA—of tribal autonomy."[38] To complicate matters further, throughout the federal government's policy vacillations, the status of tribal sovereignty has never been purely sovereign or dependent. While tribes retain vestiges of aboriginal sovereignty, they still must submit to the plenary power of Congress introduced by earlier cases.[39] The confused status of tribes in the American system may currently be the most definitive characteristic of federal Indian policy.

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30. *Id.* at 384-85.

31. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.).

32. Lynch, *supra* note 24, at 900.

33. *Id.*

34. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as 25 U.S.C. §§ 461-479 (1994)).

35. Lynch, *supra* note 24, at 900-01.

36. Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 998 (1991).

37. Lynch, *supra* note 24, at 901.

38. *Id.*

39. The definition of Congress's plenary power over the tribes is most often attributed to the case of *United States v. Kagama*, 118 U.S. 375 (1886). *See supra* note 29 and accompanying text.

III. THE INDIAN CIVIL RIGHTS ACT

A. Enactment

Most of the limitations on federal and state governments aimed at protecting individual civil rights were contained in the first fourteen amendments to the United States Constitution.[40] When U.S. citizenship was extended to the tribes in 1924, they gained the protection against state and federal action owned by all other Americans.[41] The question remained, however, whether the actions of the tribal governments in relation to individual members were subject to the restrictions of the federal Constitution.

This issue arose in 1896 in *Talton v. Mayes*.[42] In *Talton*, the Supreme Court faced the issue of whether or not the grand jury provision of the Fifth Amendment applied to the criminal law of the Cherokee Nation. In a landmark opinion, the Court held that the constitutional requirement was only applicable to the federal government, stating that because the sovereign powers of Cherokee governing bodies pre-dated the non-Indians' arrival on the continent, the Indian courts were not federal agencies subject to the Fifth Amendment.[43] In acknowledging the tribe's aboriginal sovereignty, the Supreme Court clearly reaffirmed its adherence to the principle of tribal self-determination, unless Congress had expressly limited the tribe's power.[44]

Following *Talton*, federal courts used similar reasoning to hold that the other federal constitutional amendments do not restrict tribal action. In *Martinez v. Southern Ute Tribe*,[45] for example, the federal court ruled that the Due Process Clause of the Fifth Amendment did not apply to the acts of an Indian tribe in denying an individual Indian the benefits of tribal membership. Similarly, in *Barta v. Oglala Sioux Tribe*,[46] the court ruled that neither the Due Process Clause of the Fifth Amendment nor the Equal Protection Clause of the Fourteenth Amendment applied to keep an Indian tribe from imposing a tax only on non-members for the use of Indian trust lands.

Without the protection of the Federal Constitution to guard against civil rights violations by Indian tribes, individual Indians lacked any protection against their

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40. M. Allen Core, *Tribal Sovereignty: Federal Court Review of Tribal Court Decisions—Judicial Intrusion into Tribal Sovereignty*, 13 AM. INDIAN L. REV. 175, 181 (1988).

41. *Id.*

42. 163 U.S. 376 (1896).

43. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 563 (1972). Burnett's article contains an in-depth historical exploration of both the common law foundations for the ICRA and its legislative history.

44. *Id.*

45. 249 F.2d 915 (10th Cir. 1957). This case is discussed more fully in Lazarus, *supra* note 4, at 342.

46. 259 F.2d 553 (8th Cir. 1958). The Lazarus article also contains a deeper discussion of this case. *See* Lazarus, *supra* note 4, at 342.

governments, a proposition which alarmed some members of Congress.[47] The situation continued unchanged even through the height of the civil rights movement sweeping the rest of America in the 1960s.[48] The issue of tribal limitations with regard to actions affecting tribal members was not addressed until the passage of the Indian Civil Rights Act of 1968.[49]

In response to alleged violations of civil rights by tribal governments, the Senate Subcommittee on Constitutional Rights began hearings in 1962 which focused on individual rights against tribal governments.[50] "Charges included election fraud, restrictions on religious freedom, harassment and illegal detention of political activists, and arbitrary actions involving membership and property rights."[51] At the close of the hearings, the chief proponent of the reform measures, Senator Hruska, stated:

> As the hearings developed . . . I believe all of us who were students of the law were jarred and shocked by the conditions as far as constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights.[52]

Early proposals to combat these atrocities, framed with an Anglo-American conception of civil rights, included one that would have made tribes subject to the identical constraints imposed upon the federal government by the U.S. Constitution, and one providing for appeal from a tribal forum to a federal district court, where the appeal would take the form of a trial de novo.[53]

After seven years of proposals and counter-proposals, Congress finally settled upon the final version of the ICRA.[54] Title II of the Act extends a uniform "Bill of Rights" to the tribes. Title II provides essentially that no tribe, in exercising its powers of self-government, shall engage in activities which the federal and state governments would be prohibited from undertaking pursuant to the Federal Constitution.[55] For the most part, the Indian Bill of Rights contained in the ICRA mirrors its counterpart in the U.S. Constitution. Congress selectively extended certain rights, however, in the final draft of Title II, declining to extend some individual protections in deference to tribal cultural traditions.[56] The Act differs from the Bill of Rights in its omission of the First Amendment Establishment Clause, in deference to the theocratic nature of some tribal governments, and in

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47. *See* Burnett, *supra* note 43.

48. The American Indian exclusion from the legislative movement towards civil rights is discussed in Core, *supra* note 40, at 182. Core also points out that Indians were excluded from the Civil Rights Act of 1964. *Id.*

49. 25 U.S.C. §§ 1301-1303 (1994).

50. Hardin, *supra* note 6, at 406.

51. *Id.*

52. 113 CONG. REC. 35473 (1967), *quoted in* Hardin, *supra* note 6, at 407.

53. Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 20 (1993). Berry points out the Senate's additional concern that not only tribal governments were violating Indians' civil rights, but so were state and federal agencies. *Id.*

54. The final version of the ICRA was codified at 25 U.S.C. §§ 1301-1303 (1994).

55. Lazarus, *supra* note 4, at 337.

56. *See generally* Burnett, *supra* note 43 (providing a more detailed discussion of the differences between the Indian Bill of Rights and the Federal Bill of Rights).

the limitations placed on a criminal defendant's right to counsel, in deference to the unmanageable administrative and financial burden an absolute right to counsel would place upon tribal court systems.[57]

Despite the similarities in language between the ICRA and the Federal Bill of Rights, the legislative history of the Act indicates that Congress did not intend to subject tribal governments to the same restrictions as the federal and state governments.[58] The legislative history and the text of the Act indicate unambiguously that Congress intended to balance the application of individual civil rights on reservations with continued tribal self-determination over internal affairs.[59]

While some tribes objected to the ICRA as an imposition of Anglo-American values on Indian societies,[60] Congress assumed that tribal courts have a duty to enforce the Act.[61] Regardless of any tribal objections, and without having to obtain tribal consent,[62] Congress used its longstanding and legally recognized plenary power over the tribes to determine the proper balance between individual rights and tribal sovereignty, codify their determinations, and mandate their application.[63]

As one commentator has noted:

> The tortured ambiguity regarding the constitutional and legal status of Indians in the American regime is nowhere more evident than in the very opening words of the Indian Civil Rights Act of 1968. There, in laying out the defining attributes of an Indian tribe, the Act says, on the one hand, that these groups of Indians are "subject to the jurisdiction of the United States," and on the other, that they are "recognized as possessing powers of self-government."[64]

Unfortunately for Congress and the American courts, the passage of the ICRA did not resolve all the ambiguities in terms of the powers and status of Indian tribes, particularly on Indian Country. The ICRA left open the question of which court system would be primarily responsible for hearing claims of civil rights violations.

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57. Lazarus, *supra* note 4, at 346-47.

58. *See* Burnett, *supra* note 43; Lynch, *supra* note 24, at 909-12.

59. Lazarus, *supra* note 4, at 347-48.

60. For a discussion of the tribal criticism of the ICRA, see Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387 (1974); Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1 (1975).

61. Hardin, *supra* note 6, at 407.

62. "Indians also challenged the Act as an infringement of tribal sovereignty because it does not allow for tribal consent to its application." Lynch, *supra* note 24, at 912.

63. *See supra* part II for a discussion of the origins of Congress's plenary power over the tribes.

64. Jeffrey, *supra* note 6, at 358.

B. Federal Application of the ICRA

For ten years following the application of the ICRA, individuals who felt that a tribe had violated their civil rights could appeal tribal court determinations to a federal district court.[65] While the ICRA does not explicitly create a cause of action justiciable in federal court, the courts generally determined that both federal question and civil rights jurisdiction existed under the Act.[66] Given both the legislative history and express language of the Act, Congress intended that the Indian Bill of Rights contained in the ICRA be interpreted within the context of tribal culture and traditions. While Congress had clearly intended to make the ICRA guarantees similar to, but not coextensive with, the Federal Bill of Rights, the federal courts had great difficulty balancing individual rights with traditional tribal practices "where those practices were antithetical to the Anglo-American concepts of personal freedom."[67] Applying the balancing approach called for by the Act, district and circuit courts arrived at inconsistent results.[68]

In *Tom v. Sutton*,[69] the circuit court held that the terms "due process" and "equal protection" in the ICRA should be construed by the court with sensitivity towards the historical, cultural, and governmental values of Indian tribes.[70] Accordingly, the interpretation of terms in the ICRA need not mirror the interpretation of those terms in the federal system. Other cases, however, indicate that situations may arise in which terms under the ICRA should be construed identically to the federal application of those terms.[71] During the decade following the passage of the ICRA, federal courts struggled to effectuate Congress's dual policy objectives—individual rights and tribal sovereignty. The Supreme Court, throughout this period, refused to resolve the issue, or even to address it. Finally, in 1978, the Court decided the case of *Santa Clara Pueblo v. Martinez*,[72] drastically altering the application of Indian civil rights and striking a major blow for tribal sovereignty.[73]

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65. Core, *supra* note 40, at 175.

66. Ferguson, *supra* note 20, at 289. Ferguson further notes that the only requirement that Indian plaintiffs did face in obtaining review under the Act was exhaustion of tribal remedies, botb administrative and judicial. *Id.*

67. Drew Michael Ryce, *Enforcement of Indian Civil Rights*, 37 RUTGERS L. REV. 1019, 1021 (1985).

68. *Id.*

69. 533 F.2d 1101 (9th Cir. 1976).

70. *Id.* at 1104 n.5; *accord* Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); *cf.* Smith v. Confederated Tribes, 783 F.2d 1409 (9th Cir. 1986) (noting that tribal courts may adopt procedures different from federal courts to avoid intrusive interference by federal courts iu tribal administration of the law).

71. *E.g.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

72. 436 U.S. 49 (1978).

73. Professor Robert Laurence has gone so far as to call *Santa Clara Pueblo v. Martinez* "the single most interesting case in all of Anglo-American jurisprudence." Robert Laurence, *A Quincentennial Essay on* Martiuez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307, 307 (1992). While Professor Laurence ultimately disagrees with the Court's holding in *Martinez*, he notes

IV. *SANTA CLARA PUEBLO V. MARTINEZ*

Santa Clara Pueblo v. Martinez involved an ordinance of the Santa Clara Pueblo Indian Tribe[74] which denied tribal membership to children of a member mother and non-member father. The plaintiff, Julia Martinez, was a member of the Santa Clara Pueblo Tribe. After marrying a Navajo (non-Pueblo) Indian, Martinez continued to live on her native reservation.[75] Martinez sought to have her children enrolled as members of the Santa Clara Pueblo.[76] Because of the inter-tribal marriage, tribal law denied membership to her children. If the mother had been a Navajo and the father a member of the Pueblo, then the children could have been enrolled.[77] As a consequence of their exclusion from tribal membership, the Martinez children could not vote in tribal elections nor run for tribal office. Also, in the event of their mother's death, the children retained no right of property inheritance, or even the right to remain on the reservation.[78]

After her attempt to obtain a tribal remedy failed, Martinez brought suit against the tribe in federal district court under the equal protection clause of the ICRA[79] seeking injunctive and declaratory relief for "ancestral" and sex discrimination.[80] The federal court took jurisdiction, applied the ICRA's balancing test, and found for the Pueblo.[81] According to the court, the gender discriminating ordinance was the modern embodiment of a tribal custom. As such, it was entitled to deference.[82]

On appeal, the Tenth Circuit again found that the jurisdiction requirements had been satisfied, though the court reversed the case on the merits.[83] Because the

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that "[n]o case is better designed . . . to rouse an opinion, from lawyers and non-lawyers alike." *Id.* at 308.

74. The 1939 ordinance reads in part:

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

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

75. Jeffrey, *supra* note 6, at 364.

76. The Santa Clara Pueblo has a patrilineal society, meaning that the children are members of their fathers' Pueblo. *Id.*

77. Core, *supra* note 40, at 182. Core also points out that the custom was not changed by the fact that the children were raised on the Pueblo and spoke the Pueblo language. *Id.* at 182-83.

78. Jeffrey, *supra* note 6, at 364.

79. 25 U.S.C. § 1302(8) (1994).

80. Jeffrey, *supra* note 6, at 364.

81. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975).

82. Laurence, *supra* note 73, at 313-14.

83. Martinez v. Santa Clara Pucblo, 540 F.2d 1039 (10th Cir. 1976).

court found that the ordinance was of modern and not traditional origin, deference was not required.[84]

When the case reached the U.S. Supreme Court, the Court reversed both lower courts on jurisdictional grounds, never addressing the substantive merits of the case.[85] In declining jurisdiction, the Court noted that federal court application of the ICRA provisions would substantially interfere with the tribe's ability to maintain itself as a distinct cultural and political entity.[86] The Court stated, "[W]e must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself."[87] The Court further reasoned that while the ICRA certainly did intend to change the substantive law applied to the civil rights of tribal members, tribal forums were available for the vindication of these claims.[88] The Court found that "Congress' failure to provide remedies other than habeas corpus was a deliberate one."[89] In the course of its decision, the Court emphasized the "[t]wo distinct and competing purposes" in the ICRA: "strengthening the position of individual tribal members vis-à-vis the tribe" and the "commitment to the goal of tribal self-determination."[90] Finally, the Court recognized that Congress "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments."[91] Effectively, the decision of the Court removed the federal courts from the field of Indian civil rights.[92]

As a result of the Supreme Court's decision in *Martinez*, tribal courts were elevated from the status of stepping stones en route to federal court to the sole protectors of individual civil rights against the actions of tribal governments.[93] Without the general availability of federal court review of tribal court actions, the Act must be interpreted on a tribe-by-tribe basis. Given the cultural and traditional differences which exist between the tribes, one would expect that the

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84. Laurence, *supra* note 73, at 314.

85. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

86. *Id.* at 59.

87. *Id.* In his article, Professor Jeffrey notes the strange consequences of *Martinez*. Jeffrey states, "It may seem strange to say, but the Court in this decision denied the federal courts the ability to enforce a federal statute . . . ." Jeffrey, *supra* note 6, at 355.

88. *Martinez*, 436 U.S. at 62-65.

89. *Id.* at 61. Habeas corpus relief in federal court is authorized by the ICRA, 25 U.S.C. § 1303 (1994).

90. *Martinez*, 436 U.S. at 62.

91. *Id.* at 62-63.

92. *Martinez*, denying the federal court application of the ICRA, has been sharply criticized by some commentators. *See, e.g.*, Jeffrey, *supra* note 6 (claiming that *Martinez* stripped the ICRA of any practical effect); Laurence, *supra* note 73 (advocating the federal court review of ICRA claims); Ryce, *supra* note 67 (discussing the possibility that tribal courts lack the autonomy from the tribal councils to effectively exercise the power of judicial review).

93. Williams, *supra* note 4, at 497. Professor Williams's thoughtful article presents the ICRA as an example of one possible method of statutory interpretation in the field of Indian law. Williams states, "As the tribes have rights to make laws for themselves, so should they have rights to interpret the laws made for them." *Id.* at 496.

meaning of the ICRA varies substantially across Indian Country.[94] The remaining Parts will explore the tribal court's work in applying the ICRA, specifically the due process guarantee.[95]

V. METHODOLOGY AND SAMPLING

As stated, the brunt of this Project focuses on the actual tribal court opinions and their disposition of the due process clause of the ICRA. The Project was undertaken with certain expectations in mind. Initially, given the enormous variations between Indian tribal cultures, together with the Supreme Court's stance on tribal courts as the sole arbiters of civil rights on Indian Country, one might expect to be able to research this topic using conventional research techniques ingrained in law schools everywhere. One might expect to be able to choose which tribes one wished to examine, go to the law library, pull their court reporters off the shelves, flip through the index, find the heading "Indian Civil Rights Act," find the subheading "Due Process," and then go to the appropriate cases. If one approached the Project with these expectations, one would be wrong.[96]

After these initial failures, finding a cogent alternative methodology proved difficult. At the outset of the Project, four tribes were selected based on geographic and cultural dissimilarity to be used as points of comparison in how the tribes have applied the ICRA. Phone conversations with court representatives from these tribes revealed that either these tribes do not publish or do not disseminate their court opinions.[97] After learning that several of the preliminary choices of tribes did not make their opinions available,[98] the search changed from that which was optimal to that which was available. Thus, purely for reasons of pragmatism, the choice was made to look only at tribes that both published their tribal court opinions and distributed them.[99] In this manner, the tribal court

94. *Id.* at 497.

95. 25 U.S.C. § 1302(8) (1994).

96. Anyone doubting the veracity of this warning is encouraged to try it with another provision of the ICRA. Not only does the work need to be done, no one is doing it. Forewarned, however, is forearmed.

97. The reasons given for this phenomenon ranged from inadequate resources to concern for the integrity of tribal secrets.

98. A few tribes said they would make their opinions available but only within the court office.

99. Admittedly, restricting this analysis only to tribes that publish and distribute their opinions also restricts the Project's generalizability.

opinions examined were taken from the Navajo Reporter,[100] the Oklahoma Tribal Court Reporter,[101] and the Indian Law Reporter.[102]

While substantive conclusions ultimately will be drawn regarding the tribal applications of the ICRA's due process clause,[103] perhaps the most striking and important point learned in doing this research is the relative scarcity of cases that touch upon the ICRA at all. Of the three sources, and almost two thousand cases reviewed, less than one hundred even mentioned the ICRA. For purposes of this analysis, only the cases addressing the due process provision of the ICRA were reviewed further, for several reasons.[104] First, other provisions contained in Title II of the ICRA simply do not arise with enough frequency (or are not reported with enough frequency) to provide adequate grounds for conclusions to be drawn. Due process claims arose in tribal courts, usually concurrently with other claims, with enough frequency to allow lessons to be learned.[105] Second, and conceptually more importantly, the due process clause was chosen by virtue of its paradigmatic status in the Anglo-American liberal-democratic system.[106] One focus was to explore how the tribes, which may or may not be organized in liberal-democratic ways like the American system, apply one of the liberal-democratic maxims: fundamental fairness in the form of due process. The next section will briefly outline the application and meaning of due process in the

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100. In 1968, the Navajo Nation began publishing many of the tribe's important cases from its courts. Currently, the Navajo Reporter consists of five volumes comprising the years 1968-87 inclusive. Volume 6 has yet to be distributed, though certain important Navajo cases for the years after 1987 have been reported elsewhere. *See infra* note 102 for a discussion of the Indian Law Reporter. The Navajo Reporter is arranged essentially the same as a state reporter, and it contains no index. Thus, every case must be reviewed when looking for a particular subject.

101. The Oklahoma Tribal Court Reporter, published by the University of Oklahoma City, consists of three volumes of tribal court opinions from tribes located specifically in the State of Oklahoma. The Oklahoma Tribal Court Reporter, which does contain a subject index, has been previously edited so that it contains only cases deemed by the reporter's editors as sufficiently important or illustrative.

102. The Indian Law Reporter, a publication of the American Indian Lawyer Training Program, began publishing various tribal court opinions in January, 1983. The Indian Law Reporter accepts opinions submitted by tribes all across the United States and publishes opinions which "reflect both a geographic diversity and a sampling of relevant issues." 10 Indian L. Rptr. 6001 (1983). Not every decision received by the Indian Law Reporter is published, so again, some previous editing has taken place.

103. *See infra* part VIII.

104. Cases that merely mentioned the due process clause in passing were also not included in this analysis, as they said nothing of import for the purpose of this Project.

105. In a telephone conversation with Judge Alvin Settler of the Tribal Court (Adult Court) of the Yakima Nation, the question was posed, "Has the Yakima Tribal Court ever addressed any of the provisions in the ICRA's Bill of Rights?" to which Judge Settler responded, "No. It's just that nobody ever raises a stink about it. Sure, we try and follow [the ICRA], but these things just don't come up. I think there are some due process cases which have come up, but I'm not aware of any decisions on the others." Telephone Interview with Judge Alvin Settler, Tribal Court of the Yakima Nation (Nov. 1, 1995).

106. J. Freitag, *Translating* Nisi Per Legem Terrae*: The Semiotics of Due Process* 47 (1995) (unpublished LL.M. Thesis, Northwestern University).

American system so as to provide a frame of reference against which the tribal applications may be compared.

VI. DUE PROCESS IN THE ANGLO-AMERICAN TRADITION

The Fifth and Fourteenth Amendments to the United States Constitution contain a due process guarantee that neither life, liberty, nor property can be denied to any person without due process of law. Due process provides a guarantee against governmental action not covered by law. In other words, no government official may take any action without being authorized by law to do so. Additionally, "due process of law" means that any law which might potentially deprive one of life, liberty, or property must contain certain basic procedures; a person shall be accorded a certain "process" if the government seeks to deprive her of life, liberty, or property.[107] When the power of a government is to be used, or has already been used, against an individual, that individual has a right to a fair procedure to determine the basis for, and legality of, such action.[108]

The concept of due process has also evolved into a substantive constraint on the enactment of legislation. Substantive due process is the concept that government may not enact a particular law because that law is inherently unfair and unjust and, as such, can never meet the requirement of due process. Again, this requirement seems amenable to the moniker, "fundamental fairness." The substance of the law must be just and must not unfairly deprive people of their life, liberty, or property. While originally confined to procedural protections, due process in Anglo-American jurisprudence has evolved into substantive constraints as well.

If an individual's life, liberty, or property is at stake, the individual is ensured that he will be given a fair procedure. The question thus focuses on the nature and quantity of the process that is due.[109] Although due process has never been precisely defined, the thrust is generally away from arbitrariness in governmental actions. The exact process which is due prior to a deprivation of individual rights varies depending on the type of deprivation involved. Essentially, the paramount guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for the governmental actions which have deprived him of his life, liberty, or property interest.[110] Beyond the differences which situations may warrant, a general requirement exists that the procedures be fair and impartial.[111]

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107. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1, at 510 (5th ed. 1995).

108. *Id.*

109. *Id.*

110. *Id.* at 551.

111. Professors Nowak and Rotunda further list some of the elements which judges will consider in determining whether due process has been served:

> The essential elements are: (1) adequate notice of the charges or basis for the government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or

In addition to other requirements, due process requires that the government give notice to of government action that would deprive them of a constitutionally protected life, liberty, or property interest.[112] Again, while the precise requirements vary, the notice provided must be "reasonably designed to insure that the interested parties in fact will learn of the proposed adjudicative action."[113]

Synthesizing the broad range of definitions that comprise due process in different settings, due process in the Americau system requires fundamental fairness. The remainder of this Project will examine different tribal court conceptions of due process, compare those conceptions with Anglo-American conceptions, and attempt to draw conclusions based on these findings.

VII. TRIBAL COURT APPLICATIONS OF DUE PROCESS

As stated, given the enormous variation between tribal cultures, one would expect these variations to be reflected in the tribal courts' disposition of due process. *Martinez* authorizes tribal courts to assume control of civil rights actions, while denying the federal courts the power of review. The questions thus remain: What does the concept of due process mean to tribal courts? How have tribal courts applied the due process clause of the ICRA? Is it possible for tribal courts to apply due process with cultural values in mind when the concept of due process, and even the concept of individual civil rights generally, may not be part of their cultural tradition at all? Since tribes are required to apply the ICRA, how can those tribes that have no conception of due process apply it? In an attempt to shed light on these questions, the Project now turns to the actual tribal court opinions.[114] For purposes of clarity, the cases will be addressed on a tribe-by-

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witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case before the decision-maker; (7) a decision based on the record with a statemcnt of reasons for the decision.

Id. at 548.

112. *Id.* at 552-53.

113. *Id.* at 553.

114. A short note on citation practices seems appropriate before any case analysis begins. The Bluebook contains precious little insight into Indian law case citation, mcntioning only cases published in the Navajo Reporter; other tribes have been neglected. The authorities in this Note therefore come without authoritative guidance on their citation. For the sake of clarity and completeness, and staying true to the spirit of the Bluebook, the following practices have been adopted: (1) Nav. R. has become Navajo Rptr.; (2) ILR has become Indian L. Rptr., using Bluebook abbreviations; (3) Okla. Trib. has become Okla. Tribal Ct. Rptr. using its full name and Bluebook abbreviations. Additionally, wherever possible, the tribal court has been noted with as much specificity as possible, using Bluebook abbreviations. The Navajo Court of Appeals is referrcd to as Navajo Ct. App., although the Blucbook does not require this. A tribe name without a court refers to the Supreme Court of that tribe.

tribe basis. Because its courts have addressed the issue more than any other tribe of record,[115] the Navajos lead off the analysis.

A. The Navajo Nation

The Navajo Nation is distinctive, though not unique, in the fact that it operates without a written constitution. It does, however, have a written Bill of Rights contained within the Navajo Tribal Code—its written set of laws. Beyond the due process guarantees contained within the Navajo Bill of Rights and the ICRA Bill of Rights, Navajo courts repeatedly emphasize that the concept of due process existed in their cultural tradition before either Bill of Rights, and would continue to exist without them. In keeping with United States courts, due process to Navajo courts amounts to fundamental fairness, specifically notice and opportunity to be heard.

Wilson v. Wilson[116] illustrates the Navajo courts' willingness to accept the notion of fundamental fairness as definitive of due process rights. In this divorce action, a default judgment was entered against the husband by the tribal district court for having filed his answer to the complaint one day late. Mr. Wilson then filed a motion with the district court to set aside the default judgment, the main reason being that his answer was filed only one day late. The district court denied his motion. On appeal, the tribal court of appeals stated:

> The argument was made that somehow the failure of the [district] court to grant the motion to set aside the judgment was a denial of "fundamental fairness" and "the right to be heard" under the Indian Civil Rights Act. Those arguments are utterly without merit. "Fundamental fairness" does not preclude society and the courts from fixing reasonable rules to make certain cases are handled smoothly and efficiently. . . . It is fundamentally fair to require that a person who does not follow the rules and asks to be excused from following them be required to give the court good reasons why they were not followed.[117]

Although the court denied that Mr. Wilson's due process rights had been abridged, it did acknowledge that due process requires that fundamental fairness be afforded.

Yazzie v. Jumbo[118] further refines the Navajo conception of due process. To define due process conceptually, the Navajo Supreme Court looks directly to cases decided by the U.S. Supreme Court. The case involved a dispute over water rights between two groups. After losing at trial, one side appealed, claiming that it was deprived of its ICRA-guaranteed due process rights because it was not properly served with the appellee's complaint prior to the board meeting at which the dispute was initially resolved. In addressing this due process claim, the court

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115. The relative frequency may be due to the fact that the Navajo Nation is by far the largest tribe in the United States, accounting for more than half of the total Indian reservation population. The Navajo court system, and tribal courts generally, are discussed in more detail in the study by BRAKEL, *supra* note 2.

116. 3 Navajo Rptr. 145 (Navajo Ct. App. 1982).

117. *Id.* at 147.

118. 5 Navajo Rptr. 75 (Navajo 1986).

first attempted to define the scope of appellants' due process rights. Citing only U.S. Supreme Court cases, the court stated:

> Procedural due process relates to the requisite characteristics of proceedings which seek to effect a deprivation of life, liberty, or property. Procedural due process requires adherence to the fundamental principles of justice and fair play. It encompasses the requirements of notice, and opportunity to be heard, and to defend before a tribunal with jurisdiction to hear the case. It necessarily follows that due process is not required where there is no interference with life, liberty, or a vested property right.[119]

The Navajo Supreme Court in this case conceptualized due process as fundamental fairness in the same way as the federal courts.[120] Because it found no property interest implicated in the case, the court denied relief on the due process claim. The following two cases provide the clearest explication of the meaning of due process for Navajo courts.

In *Begay v. Navajo Nation*,[121] the Navajo Supreme Court addressed an appeal of the lower court's order of forfeiture on appellant's automobile as a result of a conviction on the charge of "Delivery of Liquor."[122] The supreme court held that the district court denied appellant due process by granting the motion for forfeiture without giving him notice that such a motion had ever been filed against him. While the court was careful to limit its holding to the immediate case,[123] it proceeded to explain the role of due process in Navajo society, including the origins of the concept. The court first acknowledged the fact that compliance with due process generally was mandated by both Navajo and federal law: "Navajo court proceedings must comply with the Navajo Bill of Rights and the Indian Civil Rights Act, and as such, we must insure compliance with . . . due process before someone is deprived of their private property."[124] According to the court, due process requires at least notice and opportunity to be heard before property deprivation occurs.[125]

Later in the opinion, the supreme court emphasized that the notion of due process has deeply-embedded roots in the Navajo society; due process is, in fact, a tradition in Navajo tribal culture:

> The concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act or the Navajo Bill of Rights. The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present

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119. *Id.* at 76 (citations omitted).

120. Because so few cases address specifically what due process entails, the focus here is on tribal due process at the conceptual level. In other words, the focus here is on the general contours of the due process guarantee, as opposed to the specific requisite procedures a tribe must afford.

121. 15 Indian L. Rptr. 6032 (Navajo 1988).

122. *Id.* at 6033.

123. "We hold only that the forfeiture of an automobile demands notice and a hearing." *Id.* at 6034.

124. *Id.* (citations omitted).

125. *Id.*

> and defend their positions. This custom is still followed by the Navajo people in the resolution of disputes.[126]

The court then outlined the procedures involved in traditional Navajo due process:

> 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 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. This is Navajo customary due process and it is carried out with fairness and respect. The heart of Navajo due process, thus, is notice and opportunity to present and defend a position.[127]

In its holding, the court stated that the district court did violate the defendant's due process rights "by granting the 'Motion for Forfeiture' without notice [to appellant] or without allowing him an opportunity to be heard."[128]

In a case decided later that same year, the Navajo Supreme Court further elucidated its due process interpretation in *Billie v. Abbott*.[129] The suit arose when Abbott, a Utah official, intercepted the federal tax returns of Navajos living on the Navajo Reservation whose children received federal benefits. The plaintiffs, of whom Billie was one,[130] claimed that their rights were violated when Abbott caused the tax interceptions and when he used state law to decide the plaintiffs' child support obligations. A default judgment was entered against Abbott in tribal court for his failure to comply with discovery orders. Among his claims on appeal, Abbott raised the issue of whether the Navajo District Court could exercise personal jurisdiction over him in this matter.

In the course of finding that the Navajo court did have personal jurisdiction over Abbott, the supreme court commented on the meaning of culture and tradition in determining whether due process has been provided. According to the court:

> Due process under the ICRA and the [Navajo Bill of Rights] must be interpreted in a way that will enhance Navajo culture and tradition. Navajo domestic relations, such as divorce or child support, is an area where Navajo traditions are the strongest. To enhance the Navajo culture the Navajo courts must synthesize the principles of Navajo government and custom law. From this synthesis Navajo due process is formed.
>
> When Navajo sovereignty and cultural autonomy are at stake, the Navajo courts must have broad-based discretion in interpreting the due process clauses of the ICRA and [Navajo Bill of Rights], and the courts may apply

126. Begay v. Navajo Nation, 15 Indian L. Rptr. 6032, 6034 (Navajo 1988) (citations omitted).

127. *Id.*

128. *Id.* at 6033.

129. 16 Indian L. Rptr. 6021 (Navajo 1988).

130. Billie was the named plaintiff in a class action.

> Navajo due process in a way that protects civil liberties while preserving Navajo culture and self-government.[131]

The court found that because Abbott interfered in an area of Navajo culture with strong cultural ties—domestic relations—personal jurisdiction could be exercised over him without offending his due process rights.

Perhaps the most concise statement of Navajo conceptions of due process can be found in an action based on an attempt to quiet title to an inheritance of real property. *In re Estate of Goldtooth Begay #2*[132] involved a dispute over the ownership of a land use permit and a grazing permit, both formerly held by the deceased. The appellant, administrator of Begay's estate, contended that the lower court should have awarded the permits to Begay's heirs. She argued that her due process rights were violated because she was denied an opportunity to participate in the action to quiet title. In the course of holding that her due process rights had not been violated, the court summarized the tribe's stance on due process rights:

> Although due process of law is expressly guaranteed by the Navajo Nation Bill of Rights, this court has noted that "[t]he concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act [nor] the Navajo Bill of Rights." Instead, due process is "fundamental fairness in a Navajo cultural context," and "strict standards of fairness and equity . . . are inherent in the Navajo common law." Due process is found by synthesizing the principles of Navajo custom and government, and it is applied "with fairness and respect."[133]

The court then outlined in more detail what due process requires:

> This court has held that Navajo due process ensures notice and an opportunity to be heard for all parties to a dispute, entitles parties to representation, protects the right to seek political office, prevents the enforcement of ambiguous statutes affecting personal and property rights, must be provided when the government takes private property without the owner's consent, and applies to juvenile proceedings to the same extent as to adult proceedings.[134]

From the court's language, one can see that Navajo culture places strong emphasis on due process as fundamental fairness in a mauner similar to Anglo-American culture. While the tribal courts of the Navajos may finally apply the abstract principle of due process in ways similar to Anglo-American culture, they stress repeatedly that this is not because of the injection of civil rights into tribal culture by the federal government and the ICRA. Notions of fundamental fairness exist as part of Navajo traditional culture, particularly notice and opportunity to be heard. Since, however, the source of the right to fairness is not the ICRA, the tribe recognizes and preserves its right to differ from an Anglo-American conception of due process if their cultural traditions call for it. In this sense, the vision of *Martinez*—tribal application of the ICRA so as to respect

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131. *Id.* at 6024.
132. 19 Indian L. Rptr. 6130 (Navajo 1992).
133. *Id.* at 6131 (citations omitted).
134. *Id.* at 6131-32 (citations omitted).

tribal values—seems to have been successful, at least at the conceptual level, in the Navajo context.

B. The Colville Confederated Tribes[135]

While the Colville Confederated Tribes do not publish their opinions, several cases decided by their tribal courts were included in the Indian Law Reporter. Similar to the Navajo application of the due process clause, the Colville Confederated Tribes recognize the protection of tribal members' civil rights in the form of the Colville Tribal Civil Rights Act ("CTCRA").[136] According to the Colville Confederated Tribes Court of Appeals in *Colville Confederated Tribes v. St. Peter,*[137] tribal courts' attention should first be aimed at compliance with the tribal ordinances.

In *St. Peter*, the appellant alleged that the trial court erred by imposing excessive sentences which were arbitrary and capricious and constituted cruel and unusual punishment, and which violated his due process rights guaranteed by the tribal code by relying on allegedly inaccurate information in sentencing the defendant.[138] According to the court, the Tribal Code mandates compliance with the tribal constitution, tribal statutory and common law, and the ICRA, in that order.[139]

In examining judicial principles on sentencing guidelines, the tribal court looks to federal court applications. While the tribal court is not required to comply with federal standards on the issue of sentencing guidelines, it does believe that federal principles may be used in an advisory capacity. The court states:

> The federal law principles for sentencing review are not "specifically applicable to Indian tribal courts." They are based upon the federal constitutional standards, and not upon the tribal constitution or the Indian Civil Rights Act. Therefore, we consider such principles to be advisory only.[140]

Later in the opinion, the tribal court further reserves the right to use federal interpretations of the concept of due process to guide its own applications. The court, however, stresses the tribe's ability to vary from the federal interpretations at its discretion. The court finds this ability in the Congressional purpose behind the ICRA:

> [T]he legislative history of the ICRA clearly indicates that Congress did not intend to impose full constitutional guarantees under the Bill of Rights on litigants coming before the tribal court or to restrict the tribes beyond what

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135. The Colville Reservation is located in the north-central portion of the State of Washington.

136. Colville Tribal Civil Rights Act, Title 56.01, *cited in* Colville Confederated Tribes v. St. Peter, 20 Indian L. Rptr. 6108 (Colville Ct. App. 1993).

137. 20 Indian L. Rptr. 6108 (Colville Ct. App. 1993).

138. The Tribal Code reads, in pertinent part, "All accused persons shall be guaranteed all civil rights secured under the Tribal Constitution and federal laws specifically applicable to Indian tribal courts." *Id.* at 6109.

139. *Id.*

140. *Id.* (citations omitted).

> was necessary to give the Act the effeet Congress intended. Among the goals intended by Congress in cnacting [sic] ICRA were affording constitutional protections to litigants on one hand, and supporting tribal self-government and cultural autonomy on the other. We therefore apply due process principles under [sic] ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes.[141]

The tribe may use the federal courts as indicators, but considers such practices purely discretionary.

Appellant argued that federal cases supported his contention that criminal defendants have a right to be sentenced on the basis of accurate information.[142] After discussing the federal cases, the tribal court pronounced that the federal interpretations properly reflected notions of fundamental fairness consistent with tribal law.[143] Again, however, the court stressed the autonomy of tribal courts:

> [W]e emphasize that the due process principles reflected in the [federal] eases cited above are federal constitutional standards which cannot be applied without great difficulty to tribal law. Further, the question before us is whether the appellant's due process rights under tribal law were contravened. We believe that such a finding must precede any determination that the appellant's rights were violated under the Indian Civil Rights Act, 25 U.S.C. § 1302(8). Therefore, we adopt a flexible standard of review, utilizing the above [federal] principles, to determine whether the appellant was afforded due process under tribal law.[144]

Finally, and most emphatically, the court comments:

> Even if the court should follow the Federal Rules of Evidence or the business council should adopt speeific court rules which parallel the federal criminal rulcs, this does not mean that the tribal culture, tradition and autonomy has been abandoned. Nor does it mean that the tribal court has taken on such an Anglo-Saxon character that the Bill of Rights should be applied.[145]

The tribal court reserves the right to look to federal courts for guidance in interpreting a given concept, such as due process, and does not view this practice as destructive of tribal autonomy. The tribal court still applies the due process clause with sensitivity towards tribal culture and tradition. Federal law will only be given credence when it does not conflict with the cultural traditions of the tribe. Other opinions by the Colville tribal courts are not so candid about the relationship between tribal court autonomy and federal decisions, but they do reenforce the Colville Confederated Tribes' belief in due process as fundamental fairness, specifically requiring notice and the opportunity to be heard.

In *Swan v. CBC*,[146] the petitioner brought an action against the Colville Business Council ("CBC") asking the court to enjoin the Council from validating the results of one district's election in order to allow the petitioner to show that a new election should take place. Swan alleged that the election committee did not handle his grievance correctly, though he was afforded a hearing on his

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141. *Id.* at 6110 (citations omitted).
142. *Id.* at 6111.
143. *Id.*
144. *Id.* at 6113-14.
145. *Id.* at 6115.
146. 19 Indian L. Rptr. 6113 (Colville Tribal Ct. 1992).

complaints. In ruling on his action, the court acknowledged that an individual's civil rights guarantee him the right to notice and an opportunity to be heard. Again, however, the court addressed the petitioner's civil rights as guaranteed him under the Colville Tribal Code,[147] given by the tribe, and not the ICRA, given by the federal government. The court stated:

> The petitioner was afforded the right to grieve, and the fact that he disagreed with the manner in which the grievance was handled does not detract from the fact that he did receive his grievance hearing. . . .
>
> Due process is "that process which is due": notice and opportunity to be heard. Once again, just because one disagrees with the decision does not mean due process was not provided.[148]

Although the court recognizes the petitioner's right to due process, the source of these rights is tribal law, independent of federal mandates by way of the ICRA. By the language of the court, if the Colville Confederated Tribes wished to differ markedly in their application of due process rights from the federal government, it could and would.

In *Colville Confederated Tribes v. Wiley*,[149] the Colville Tribal Court of Appeals held that a provision of tribal law incorporating Washington state law was a valid exercise of tribal legislative authority, provided that sufficient notice was given to tribal members regarding the adoption of the state's provisions. The appellants argued that the incorporation of state law on driving under the influence of intoxicating alcohol or drugs did not provide adequate notice of prohibited criminal conduct, thus infringing upon their right to due process under the CTCRA and the ICRA. In deciding that adequate notice had not been provided, the tribal court looked to the common federal court standard concerning the incorporation of laws from other jurisdictions. The court stated:

> The appellants [sic] challenge to [the tribal code] as providing inadequate notice of what conduct is prohibited under tribal law has been addressed and rejected by the federal courts. . . . It has consistently been held that a continuing incorporation of law from another jurisdiction provides sufficient notice for due process purposes under federal constitutional standards. Although the appellants are guaranteed statutory due process under the ICRA and CTCRA, no argument has been advanced that they are entitled to greater notice than under federal constitutional standards.[150]

Without explanation, the tribal court assumes the federal standard as the baseline for notice requirements under incorporated statutes. According to the court, because federal courts have held that incorporated statutes do provide sufficient notice, the equivalent standard should be applied by tribal courts. In this case, the court again looks to the federal law for guidance, but unlike other cases, does not mention its ability to part from the federal interpretation. Comparing the words of the Colville Confederated Tribal Courts to Navajo Tribal Courts, one finds a

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147. The Colville Tribal Code grants a right to redress grievances in section 56.02(a). *Swan*, 19 Indian L. Rptr. at 6114.

148. *Swan*, 19 Indian L. Rptr. at 6114 (citation omitted).

149. 22 Indian L. Rptr. 6059 (Colville Ct. App. 1995).

150. *Id.* at 6064.

general similarity. Both tribes seem cognizant of their ability to differ, while both seem willing to look to federal courts for guidance on the "correct" way to apply due process.

C. The Hoopa Valley Tribe[151]

The courts of the Hoopa Valley Tribe have been relatively lucid with regard to their interpretation of due process guarantees. Similar to other tribes examined, the Hoopas recognize the necessity of using the federal courts as guides to tribal interpretation, while they remain protective of their rights to differ. The Hoopa Valley courts, however, seem more inclined to bemoan the impositional character of the ICRA.

In *United States v. McGahuey*,[152] a tribal appellate court case, the appellant McGahuey challenged the tribal court's refusal to grant a jury trial for alleged fishing violations as a denial of his due process rights guaranteed by the ICRA. To answer the question of whether the appellant's rights had been violated, the court looked to the purpose underlying the ICRA, stating:

> [T]he Indian Civil Rights Act of 1968, both in intent as demonstrated by a reading of the legislative history of the Act and by the specific language of the Act, was designed to promote the imposition in part of the existing dominant culture's notions of equal protection and due process as they apply to the "criminal process." Without commenting on either the "acceptability" or the "desirability" of such an approach, those factors, plus a reading of the cases interpreting the Act make Congress' intent and accomplishments clear. The Act insures that those appearing in the Indian courts of the various tribes will be assured certain "fundamental rights." Because this court system and this issue is governed by the Indian Civil Rights Act, which purposely encompasses many concepts defined by years of practice and precedence, *we are forced to look to the dominant system for interpretation of this right to jury concept.*[153]

This court points out that the ICRA, a federal statute, can only be interpreted with federal standards as guides. The court is saying that to enforce Anglo-American concepts, it must look to federal courts for guidance as to what certain terms mean in practice. Applying federal standards and conceptions of fundamental rights in the arena of jury trials when there is a threat of a jail sentence, the appellate court upheld the trial court's denial of appellant's claim to a jury trial.

Beyond mere judicial discretion to look to federal decisions for guidance, the Hoopa Valley Tribe actually codified the practice of looking at other jurisdictions, though it specifically rejected the often hostile state law. In the case of *United States v. Jones*,[154] the Hoopa Valley appellate court addressed the issue of when and for what reasons tribal judges may dismiss matters coming before them. The appellant argued in this case that the trial court's dismissal of his action was procedural error. Appellant argued that the tribal judges should

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151. The Hoopa Valley Reservation is located in Northern California.
152. 10 Indian L. Rptr. 6051 (Hoopa Ct. Ind. Off. 1983).
153. *Id.* (emphasis added) (citations omitted).
154. 11 Indian L. Rptr. 6010 (Hoopa Ct. App. 1984).

be bound by federal procedural law, specifically Rule 48 of the Federal Rules of Civil Procedure which governs dismissals. In the course of its opinion, the appellate court discussed the Hoopa Valley Tribe's practice of looking to the federal system for guidance:

> It cannot be denied that the "federal system" has had vast experience with criminal procedure and this court has previously noted their desire to look to federal rules for guidance. Indeed in the Rules of Court for the Hoopa Valley Indian Reservation Court of Indian Offenses, Rule 5, Proper Judicial Precedent, this court has indicated their interest in looking to the federal system for guidance. Rule 5 reads as follows[:]
>
> (a) The Court shall give greatest weight to relevant prior appellate decisions of the Hoopa Valley Court of Indian Offenses, then to other tribal court decisions (written), then to federal decisions, then to decisions of the trial court. State law does not apply.[155]

The Hoopa Valley Tribe not only recognizes its judges' ability to use federal common law as guidance, but expressly authorizes them to do so. The tribal court does, however, note that tribal courts may depart from federal law in applying due process, as *Martinez* authorizes them to do. The opinion reads:

> This court's primary responsibility is to insure that principles of fairness prevail in the action of the Court of Indian Offenses, and in so doing this court does not concede that federal law is the sole definition of procedural fairness. *Specifically, this court finds that in the Court of Indian Offenses judges may, at their discretion, dismiss matters in the interest of justice.*[156]

According to the court, tribal judges are empowered with more discretion than federal judges. Greater discretionary power is consistent with the characteristic of tribal courts as relatively informal decisionmaking bodies. As one commentator noted, "the trial courtroom is markedly informal and relaxed as compared to that of the Anglo-American system."[157] With their discretionary power, the court in *Jones* found that the trial court judge had abused his discretion and dismissal was not sufficiently justified.

The Hoopa Valley tribal courts have echoed these sentiments—the ability to use the federal courts as guides and their power to remain relatively informal institutions—in later cases. In *Hoopa Valley Indian Housing Authority v. Gerstner*,[158] the Hoopa Valley Court of Appeals upheld the Tribal Employment Rights Ordinance Commission's reinstatement decision in an action for wrongful termination of employment. The appellant claimed that the tribe's employment termination procedures were inadequate, thus depriving her of her due process rights. The primary issue before the court was whether due process rights must accompany termination from tribal employment. After acknowledging that the ICRA guarantees that individuals will not be deprived of property without due

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155. *Id.*

156. *Id.* (emphasis added).

157. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 118-19 (1983).

158. 22 Indian L. Rptr. 6002 (Hoopa Ct. App. 1993).

process of law, the court then looked to the federal court standard in resolving this question. The court stated:

> The United States Supreme Court in construing federal constitutional rights, has held that due process applies to discharge from public employment.
>
> Even though the decisions of federal, state, and other tribal courts are not controlling in this court, such decisions can be used as guidance in helping us address these issues.[159]

The court then, uncharacteristically, listed those rights which are guaranteed by due process in the specific case context, but only after noting that due process rights need not be synonymous with formal adjudicative processes. According to the court:

> Although we decide that due process rights must be granted to employees, including the right to a hearing before an impartial arbiter, that does not necessarily mean that formal trial and court procedures should apply. However, there are certain minimal rights of employees that should be protected in order to have a meaningful opportunity to be heard. Those rights include: (1) adequate notice, (2) a hearing decision by [sic] independent arbiter, (3) an initial burden of proof imposed on the employer, and (4) the right to confront and cross-examine those witnesses used against the employee.[160]

While adopting processes and procedures that provide fundamental fairness in ways similar to federal standards, the Hoopa courts, like other tribal courts examined, acknowledge and preserve their right to differ from Anglo-American values. A final Hoopa case provides an example of the tribal court knowingly departing from federal standards.

Baldy, Sr. v. Hoopa Valley Tribal Council[161] concerned the issue of adequate notice in the context of a tribal enrollment. Lola McCovey applied to the enrollment committee for enrollment based upon the tribal lineage of her father, Clarence Baldy. Tribal enrollment would have affected her rights of inheritance. Paternity questions existed because Baldy had died several years earlier and was not listed on McCovey's birth certificate as her father.[162] On two separate occasions, notice of the enrollment and subsequent hearing was published in the only daily newspaper of general circulation in the tribal community. At the enrollment hearing, the Tribal Council approved McCovey's enrollment application.

Some time later, the appellant filed suit challenging the Tribal Council's decision to enroll McCovey on the basis that they did not have adequate notice of the hearing that determined paternity for enrollment purposes. The appellant argued, unsuccessfully, that the federal notice standard in determining heirs of allottees or heirs of deceased allottees should be adopted and applied by the tribal court. Articulating the federal standard, the court noted:

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159. *Id.* at 6005 (citation omitted).

160. *Id.*

161. 22 Indian L. Rptr. 6015 (Hoopa Ct. App. 1994).

162. The details of the tribe's patrilineal customs are not relevant to the analysis here.

> However, if the court was to rely on federal notice standards, appropriate notice is that which is "reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . but with due regard for the practicalities and peculiarities of the case . . . ."[163]

Rejecting the federal standard in affirming the trial court, the appellate court explained:

> The trial court acknowledged that while the federal standard of notice could possibly be adopted, it had not yet been adopted at Hoopa. The customary notice by publication and posting, when there are unknown interested parties, was the acccpted practice of the trial court at the time of the hearing. The trial court dcclined to adopt the fedcral notice requirement and retroactively apply the standard. The court of appeals agrces.[164]

The tribal courts of the Hoopa Valley Reservation reserve the right to differ from federal application of due process composite rights such as notice, as illustrated by the exercise of power in *Baldy*.

D. Oklahoma Tribes[165]

In the case of *Election Board v. Snake*,[166] decided by the Court of Indian Appeals for the Ponca Tribe, the appellant Election Board, sought review of a tribal court decision stating that the Election Board's refusal to allow appellees to run in the tribal election violated their due process rights. The appellees complained that the Election Board set a deadline for filing candidacies and subsequently extended the deadline, but then failed to honor the extension, thereby preventing the appellees from running for office. The trial court held that the Election Board had indeed violated the appellees' due process rights.

After reviewing the United States Supreme Court's holding in *Talton v. Mayes*[167] and *Santa Clara Pueblo v. Martinez*,[168] the court acknowledged that "neither the Ponca Tribe nor its Election Board are [sic] restricted by the due process provisions of the U.S. Constitution."[169] The court then examined the passage of the ICRA, concluding that the due process provision of the ICRA does perceive a cause of action by parties aggrieved by tribal governments. However, "[t]he only federal remedy under the ICRA is habeas corpus . . . ."[170] Echoing the sentiments of other tribal courts, the court then recognized the

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163. *Baldy, Sr.*, 22 Indian L. Rptr. at 6016 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1949) (omission in original)).

164. *Id.*

165. Each of the following cases was decided by a different tribal court. For reasons of clarity, the remaining cases will be grouped by region where appropriate.

166. 1 Okla. Tribal Ct. Rptr. 209 (Ponca Ct. Indian App. 1988).

167. 163 U.S. 376 (1896); *see supra* notes 42-44 and accompanying text for a discussion of *Talton*.

168. 436 U.S. 49 (1978); *see supra* notes 74-95 and accompanying tcxt for a discussion of *Martinez*.

169. *Snake*, 1 Okla. Tribal Ct. Rptr. at 226.

170. *Id.* at 227.

practice of looking to federal courts for guidance, while emphasizing that federal interpretations are not dispositive in tribal courts. With perhaps the clearest explication of tribal court autonomy of any of the cases examined, the court stated:

> When analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law countries, upon which the United States' notions of due process are founded. In fact, some Indian tribes have gone beyond the provisions of the ICRA, and have enacted more comprehensive rights within the tribal constitutional framework for tribal citizens and other persons subject to a tribe's jurisdiction.[171]

The court then warned of blindly applying foreign concepts of due process:

> When entering the arena of due process in the context of an Indian tribe, courts should not simply rely upon ideas of due process rooted in the anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government. That is not to say that the general concepts of due process analysis with regard to state and federal governments are wholly inapplicable to Indian governments, but these precedents are certainly not dispositive nor controlling in the tribal context. One should tread lightly when analyzing the scope and nature of tribal sovereignty and not make assumptions based upon a history and legal tradition that might be entirely foreign to an Indian nation. . . . Accordingly, we must look to the tribal law of the Poncas, not vague notions of federal and state due process, to determine not only the source of a right to sue but ultimately *what process is due* to the plaintiffs in this matter.[172]

After examining the Election Ordinance, the court determined that "Ponca Tribal law . . . clearly evinces the creation of a due process right."[173] Thus, the court held that the appellants had violated the appellees' due process rights.

The Citizen Band Potawatomi Supreme Court addressed the tribal application of the ICRA in the case of *Kinslow v. Business Committee.*[174] At issue in the case was the removal from office of the tribal Business Committee's Vice-Chairman for misconduct. After a hearing at which the removal was upheld, the former Vice-Chairman appealed, alleging that his removal violated his constitutional rights to due process. Comparing tribal powers of removal of public officers to other cultures' views on removal of officers, the court commented:

> In our context however, these Euro-Middle-Eastern traditions, the English common law, and to a large extent the Anglo-American legal system are foreign to the Citizen Band Potawatomi Indian Tribe of Oklahoma which has existed . . . since time immemorial. The removal of Tribal leaders, who in their actions violate the responsibilities and trust incumbent upon their positions, has traditionally been within the authority of the Potawatomi people exercised according to Tribal law.[175]

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171. *Id.* at 230 (citation omitted).
172. *Id.* at 230-31 (emphasis in original).
173. *Id.* at 232.
174. 1 Okla. Tribal Ct. Rptr. 174 (Citizen Band Potawatomi 1988).
175. *Id.* at 182-83.

Similar to the expression made by other tribes regarding tribal use of federal standards, the court further noted:

> Although the separation of powers expressed in the Constitution is not the same as that in Anglo-American law, the removal provisions [in the tribal constitution] are somewhat akin to the expulsion and impeachment clauses of the United States Constitution. . . . Thus, while the Citizen Band Potawatomi Tribe of Oklahoma and this Court are not bound by or subject to the Constitution of the United States, certain aspects of the precedents of these legal systems will be useful to our inquiry and perhaps persuasive.[176]

This court, like other tribal courts, stressed that the rights at issue stem from the tribal constitution and not the federal government or the ICRA. But, unlike other tribal courts, this court actually questioned the applicability of the ICRA to the tribe at all, stating:

> Further, while it may be arguable whether the Indian Civil Rights Act is applicable to this Tribe under its treaties, the incorporation of fundamentally similar provisions in the Constitution of the Citizen Band Potawatomi Indian Tribe of Oklahoma provides the foundation for our initial inquiry.[177]

Ultimately, the court found that all the tribal constitutional due process requirements had been met in the removal procedures: "The concept of due process entails fair treatment under law, a right to notice and some opportunity to be heard. . . . [The appellant] has been accorded the procedural process which is due under the [tribal] Constitution."[178]

The District Court of the Cheyenne-Arapaho Tribes dealt with the role of tribal custom and tradition in the law in *In re The Sacred Arrows*.[179] Although this case did not concern directly a due process claim, the court's comments on the role of custom in tribal law bear strongly on the reasoning behind the United States Supreme Court's vision in *Santa Clara Pueblo v. Martinez*.[180] According to the Court in *Martinez*, tribal courts should be the primary, and in most cases sole, arbiter of individual Indian civil rights claims because only tribal courts can apply those civil rights with sufficient sensitivity towards tribal custom and tradition.

Sacred Arrows concerned an ownership dispute over sacred artifacts. The court was faced with a question of which law to apply in resolving the dispute—traditional or modern. Applying modern legal precepts, the court would weigh the evidence and determine the rightful owner of the sacred arrows. In this instance, however, traditional dispute resolution called for a different tack. By the traditional procedure, the Headsmen, Chiefs, and Cheyenne tribal members themselves would meet at a neutral site and resolve the matter "in a peaceful and responsible manner."[181]

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176. *Id.* at 183 (citations omitted).

177. *Id.* (citation omitted).

178. *Id.* at 189.

179. 3 Okla. Tribal Ct. Rptr. 332 (Cheyenne-Arapaho Dist. Ct. 1990).

180. 436 U.S. 49 (1978); *see supra* notes 74-95 and accompanying text for a discussion of *Martinez*.

181. *In re The Sacred Arrows*, 3 Okla. Tribal Ct. Rptr. at 337.

Deciding that the dispute should be resolved by traditional procedures and not by judicial fiat, the tribal court noted the important differences between tribal courts' roles in Indian societies and non-Indian decisionmakers' roles in non-Indian societies. The court stated:

> [T]ribal courts cannot merely simulate the state and federal courts in interpreting and applying tribal laws. The Tribal Court has the duty of incorporating centuries of customs and traditions within the framework of the new [tribal] Constitution. As in this case, it is not an easy task. Applying the Tribal Code of Laws to a traditional and religious conflict results in tension and conflict between the Tribal Code of Laws and traditional customs and traditions. Because of these dilemmas, Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to Indian communities. These concepts can be applied only in conjunction with the unique cultural, social, and political attributes of the Indian heritage.[182]

Santa Clara Pueblo v. Martinez speaks exactly and precisely to this scenario. Where cultural heritage is relevant to dispute resolution, tribal courts should meld modern court practices with the tribe's traditional notions of justice. This case, more than any other case examined, reflects a successful application of *Martinez*.

E. Other Tribes in the Pacific Northwest[183]

In 1987, the Squaxin Island Tribal Court addressed the role of due process and the influence of tribal culture in the law in *Squaxin Island Tribe v. Johns*.[184] In that case, Isaac Johns was charged with distributing alcohol to a child under 21 years of age in violation of the Squaxin Island Tribal Code of Laws. After requesting a jury trial at his arraignment, the defendant twice failed to appear for scheduled jury trials. The court ordered the defendant to appear for trial on a third occasion, but ordered a bench trial to be held.[185]

Unlike the right to a jury trial under the Sixth Amendment to the United States Constitution, the ICRA provides for a jury trial only upon request.[186] At issue before the court was whether the order for a bench trial violated the defendant's due process rights guaranteed by the ICRA. In holding that the defendant's due process rights had not been violated, the court stressed the difference between the ICRA and federal civil rights. According to the court:

> Although the defendant requested a jury trial at arraignment, the court finds that the defendant subsequently waived his right to trial by jury by

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182. *Id.* at 337-38.

183. The following group of cases illustrating the tribal application of due process notions all are located in the State of Washington. The grouping does not indicate cultural homogeneity, but for analytical purposes, a regional grouping again facilitates conceptual comprehension.

184. 15 Indian L. Rptr. 6010 (Squaxin Island Tribal Ct. 1987).

185. *Id.*

186. *Id.* The ICRA provides in pertinent part: "No Indian Tribe in exercising the power of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons." 25 U.S.C. § 1302(10) (1994).

> knowingly and voluntarily failing to appear on two occasions without justification after assurances of appearance were made to the court. This does not violate the defendant's right of due process since, unlike due process under the Bill of Rights to the U.S. Constitution, which is intended solely to safeguard individuals, due process under the Indian Civil Rights Act is intended to serve a dual purpose—affording protection to individuals while, at the same time, protecting tribal governmental authority. Where governmental interests of a tribe are implicated, the ICRA permits a more flexible interpretation of due process than its constitutional counterpart.[187]

Applying this balancing test of individual protection versus protection of tribal governmental authority to the immediate case, the court stated:

> The court, on two occasions, notified and afforded the defendant the opportunity for trial by jury. Arranging and preparing for the trial and summoning the jurors was done at considerable expense to the court, its staff, and the tribe. The defendant did not avail himself of that right, but, instead absented himself from the proceedings on both occasions. In light of the balancing of tribal interests under the Indian Civil Rights Act, the court finds that the defendant has waived or forfeited his opportunity for a jury trial.[188]

Santa Clara Pueblo v. Martinez relegated civil rights protection to tribal courts so that those courts could protect Indian societies in ways that federal courts could not, while still protecting individual Indians. In this case, the Squaxin Island court accepted the *Martinez* invitation at the expense of the interests of the individual.

In *Lummi Indian Tribe v. Edwards*,[189] the Lummi Tribal Court of Appeals entertained an argument by a defendant convicted at trial of driving under the influence of intoxicating liquor or narcotic drugs. The defendant appealed her conviction on the grounds that the delay of approximately eighteen months between her arraignment and trial violated her ICRA guaranteed right to a speedy trial[190] and due process. Noting that the right to a speedy and public trial had never been completely defined in Lummi courts, the court stated:

> The court knows of no rule or law of the Lummi Indian Tribe which automatically requires the dismissal of charges because of the lapse of 18 months between arrest and arraignment and trial on the charges. Further, such a lapse cannot justify dismissal of criminal charges without a finding of prejudice to the defendant in proceeding with the trial and a finding that the defendant was not at fault in causing the delay.[191]

As have other tribes, the Lummi Tribal Court of Appeals, in the context of this due process claim, differentiated the ICRA provisions from the Federal Bill of Rights:

> The court of appeals does recognize that the Indian Civil Rights Act does provide for the rights comparable to the United States Bill of Rights and the

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187. *Johns*, 15 Indian L. Rptr. at 6011.

188. *Id.*

189. 16 Indian L. Rptr. 6005 (Lummi Tribal Ct. App. 1988).

190. The ICRA provides in pertinent part: "No Indian Tribe in exercising the powers of self-government shall . . . deny to any person in a criminal proceeding the right to a speedy and public trial." 25 U.S.C. § 1302(6) (1994).

191. *Edwards*, 16 Indian L. Rptr. at 6007.

> fourteenth amendment. Though there is similarity in language of both the ICRA and the Bill of Rights and the fourteenth amendment, *the meaning and application of the ICRA must necessarily be somewhat different than the established Anglo-American legal meaning and application of the Bill of Rights on federal and state governments.*
>
> But even the most liberal interpretation of the Bill of Rights, fourteenth amendment, and Indian Civil Rights Act, does not require the court of appeals to dismiss the charges against the appellant . . . where the appellant failed to demonstrate to the court of appeals that she would be prejudiced by proceeding with the trial.[192]

Like previous tribal cases examined, the Lummi court never explicitly discussed the differences between tribal interpretations of civil rights and federal interpretations. Such an explicit definition is likely impossible, as due process rights in general do not lend themselves readily to precise definition.[193] Most importantly for the purposes of this analysis, the Lummi court acknowledged the necessity of differing from federal court applications in tribal courts.

Stepetin, III v. Nisqually Indian Community[194] further explicates the recognition by tribal judges of the importance of preserving traditional mores in tribal courts. In this case, the court held that a defendant's right to a speedy trial was not violated, but that the tribal law which authorized the tribal court to apply state law where it did not conflict with tribal law was impermissibly vague. Concurring in part and dissenting in part,[195] the tribal court's Chief Justice Irvin discussed at length the hybridization of traditional law and Anglo-American jurisprudence. Chief Justice Irvin stated:

> The Nisqually Tribal Court has come to take on aspects of U.S. jurisprudence because of the tribe's quasi-sovereign status. The law of Anglo-American society is preserved and transmitted in writings, rather than in the oral manner customary to tribal people. Due to the superimposition of Anglo-American written law over tribal oral custom and tradition, the Nisqually Tribe has adopted many of the procedural forms of federal and state tribunals, as well as some substantive provisions.[196]

With more candor than most tribal judges display when commenting upon Indian and non-Indian jurisprudential relations, the Chief Justice then warned of applying non-Indian concepts of justice at all in tribal forums, even when codified by the tribes:

> Tribal statutes which have been adopted in derogation to tribal tradition should be regarded with caution. Just because tribal communities have sometimes given paper recognition to non-Indian practices and Anglo-American law principles in their laws does not necessarily mean that such *apparent* adoption of non-Indian legal concepts and practices should be taken

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192. *Id.* (emphasis added) (citations omitted).

193. NOWAK & ROTUNDA, *supra* note 107, § 13.1, at 510.

194. 20 Indian L. Rptr. 6049 (Nisqually Ct. App. 1993).

195. The specific holding in this case, as in others, is ultimately marginal to the analysis here. The main focus is on the tribal courts' conceptions of due process rights. *See supra* note 120.

196. *Stepetin*, 20 Indian L. Rptr. at 6052 (citation omitted).

> at face value. Tribal practices and traditions have always been oral, and it is very rare that any tribe intends to supplant these with a formal writing.[197]

Pointing out that tribal courts are historically more informal forums, though still protective of the needs of the tribe and providing for order in the society, the Chief Justice commented:

> [T]he court must be fundamentally fair and evenly address the needs of the tribal community in order to maintain legitimacy and respect.
>
> The relational aspect of tribal courts, in which the tribal court serves as a dispute resolution forum for a tribal community which consists of related families, is an important way in which the function of tribal courts differs from that of non-Indian jurisprudence. *Rigid rules, fashioned as precedent for adjudications but ignoring the internal dynamics of the tribal community, may not serve justice at all. In contrast, equitable considerations and procedures allowing flexibility in dispute resolutions may often be more responsive to the relational needs of the tribal community.*[198]

Later in his opinion, Chief Justice Irvin discussed the imposition of the ICRA's civil rights protections on Indian culture, specifically mentioning due process. In so doing, the Chief Justice cautioned against viewing all tribes as identical; each has distinct characteristics making the imposition of Anglo-American values on Indian society even more complex and tenuous. The Chief Justice stated:

> [T]he crossover of a non-Indian legal right into Indian Country is not a simple one. . . .
>
> In the interpretation and determination of due process rights under ICRA, each tribe must be treated with regard to its own individual composition and territory. In many cases, large tribes with large reservations have adopted the Federal Rules of Procedure and/or have incorporated state substantive laws into their codes. Case law from these tribal courts does not necessarily fit smaller reservations with strongly integrated communities, tribes with a different economic base and practices, or tribes with more relaxed procedures or simplified law and order codes.[199]

These statements beg the holding of *Martinez*. Though the ICRA, and even the establishment of tribal courts in the image of Anglo-American courts, inevitably altered and imposed upon tribal cultures, Chief Justice Irvin echoes the United States Supreme Court's sentiments in *Martinez*—tribal courts should be allowed to interpret civil rights with cultural traditions in mind.

Finally, the Port Gamble S'Klallam Court of Appeals addressed the tribal application of due process rights in *In re the Welfare of D.D.*[200] In August, 1988, an order of Indian guardianship was filed appointing the materual grandmother as the guardian of a minor. Five years later, the child's father petitioned the court for guardianship of the child and the court granted him guardianship. Subsequently, the maternal grandmother filed suit claiming a violation of her procedural due process rights. After acknowledging that the maternal

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197. *Id.* (emphasis added) (citation omitted).
198. *Id.* at 6052-53 (emphasis added).
199. *Id.* at 6053.
200. 22 Indian L. Rptr. 6020 (Port Gamble S'Klallam Ct. App. 1994).

grandmother was entitled to procedural guarantees in this case, the court discussed what due process entails in a tribal context:

> While the meaning of due process under the Indian Civil Rights Act is similar to due process as defined under the United States Constitution, it is different. An Indian tribal court's interpretation and application of due process represents the unique tribal sovereign, its distinctive tradition, culture and mores.[201]

Further refining the meaning of due process in a tribal setting however, this court, like other tribal courts examined, looked to other courts' interpretations for guidance, specifically the U.S. Supreme Court:

> While federal, state or other tribal law is not binding authority upon this court, such authority can be used as guidance. "'The fundamental requisite of due process of law is the opportunity to be heard.' The hearing must be 'at a meaningful time and in a meaningful manner.'"
>
> Due process requires notice, the opportunity to be heard in a full and fair hearing, to call witnesses on your behalf, to cross-examine witnesses and to be heard before a [sic] impartial decision maker.[202]

As in previous cases examined, this tribal court expressly reserved the right and realized the need for tribal differentiation from federal interpretations. Because this case involved only the apparently generic requirement of the opportunity to be heard, the tribal court interpretation paralleled the words of the U.S. Supreme Court. As in other cases, the tribal court modeled its interpretations of civil rights provisions after federal interpretations at its discretion, but modeled it nonetheless. The next Part will attempt to draw conclusions about the success of the Supreme Court's vision in *Martinez* and the meaning of due process concepts in Indian culture based upon the previous examination of tribal court opinions.

VIII. CONCLUSIONS

As previously noted, perhaps the most striking point learned in the course of this Project has been the infrequency with which tribal courts are faced with issues concerning the civil rights provisions contained in Title II of the ICRA. While the Project only examined the opinions of tribal courts with the resources or good fortune to have their opinions published in some forum, the tracks left by those courts, though scant, suggest several interesting implications about the status of tribal courts, the role of tribal tradition in the law, and the meaning of due process in a tribal setting.

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201. *Id.* at 6020.

202. *Id.* (quoting Goldberg v. Kelly, 397 U.S. 254, 257 (1969)).

A. What Due Process Means to Tribes

The U.S. Congress, through the ICRA, and the U.S. Supreme Court, through *Santa Clara Pueblo v. Martinez*, have given tribes the power to interpret individual civil rights in two ways. "First, except in habeas corpus cases, the tribe alone interprets the statute's substantive meaning; no federal official has any input. Second, the statute is interpreted on a tribe-by-tribe basis, without any nationwide body insisting on uniformity. As a result . . . one would anticipate that the ICRA's meaning varies substantially across Indian Country."[203] The due process cases examined suggest, contrary to the anticipated substantial differences, that the variances in due process notions across Indian Country occur only at the margins.

All of the tribal courts acknowledge, to varying degrees, that due process essentially means fundamental fairness. The cases examined suggest that, while tribes may apply due process with tradition and culture in mind, due process means fundamental fairness in both a procedural and substantive sense. In a procedural sense, for both criminal and civil cases, due process centers on the right to notice and the opportunity to have one's argument heard by a fair and impartial decisionmaker. Even when the tribal courts, in the cases examined, address substantive due process claims, the determinative factor in whether a due process violation has occurred is ultimately whether the litigant has been afforded the dictates of fairness. In comparison, these tribal courts do not differ greatly from their federal counterparts. When tribal courts do apply due process differently than Anglo-American courts, they generally do so in the context of decreasing formality and increasing discretion for tribal judges to arrive at the broad maxim of "justice." Greater degrees of informality and greater power to apply principles of equity, and thus depart from rigid legal precepts, was acknowledged by several of the courts examined.[204]

Even when they apply principles of due process in ways that mirror Anglo-American courts, the tribal courts remain almost vehemently aware of their ability to differ at their own discretion to protect cultural traditions and tribal sovereignty. The tribal courts examined seem willing to use federal principles where necessary to fill a gap in tribal law, or simply where helpful, but invariably point out that federal principles and precedents do not bind them. Tribal courts preserve the right to vary from Anglo-American interpretations because sometimes, as one commentator stated, "the norms embodied within the Bill of Rights, and partially incorporated into the Indian Civil Rights Act, while reflective of European culture, are alien to the original social structures of Indian tribes."[205]

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203. Williams, *supra* note 4, at 497.

204. *See, e.g.*, *supra* notes 194-98 and accompanying text (discussing Chief Justice Irvin's concurrence in Stepetin, III v. Nisqually Indian Community, 20 Indian L. Rptr. 6049 (Nisqually Ct. App. 1993)).

205. Ferguson, *supra* note 20, at 298.

B. Reason for Tribal-Federal Similarities of Application

One obvious reason that the tribal application of the due process clause might seem to reflect Anglo-American standards may be seen in the Navajo cases. As stated repeatedly in the Navajo court opinions, the notion of due process was not taught to the Navajos by the federal government through the ICRA, nor was it developed with the advent of an Anglo-American court system; Navajo culture has always valued fundamental fairness notions in dispute resolution.[206] Again, according to the Navajo Supreme Court, "[t]he concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act. The Navajo people have an established custom of notifying all the parties in a controversy and allowing them . . . an opportunity to present and defend their positions."[207] Because their culture and traditions value notions of due process similar to Anglo-American notions, Navajo application of due process appears similar to the Anglo-American application.

Other tribes, however, do not traditionally value notions of due process, or civil rights generally, consistent with Anglo-American values. Given the vast number of tribes and widely varying cultures, generalizations about Indians are difficult to make.[208] One theme, however, that runs commonly throughout the literature on Indian culture is the different social structure and methods of dispute resolution traditionally maintained by many tribes.[209] While the concept of individual civil rights pervades Anglo-American thought, Indian societies often value social homogeneity above all else. As two leading scholars in the field of Indian law, Professors Vine Deloria and Clifford Lytle, noted:

> Civil rights is an old and familiar topic to most Americans. Our social contract theory of government limits the exercise of arbitrary and capricious authority over individuals by the civil rights protections of the Bill of Rights. We expect the equal protection of the laws and the protection of due process in any proeeeding that affects our liberty or our property. At least part of our fear of government intrusion is based upon the fact that we are not personally related to or responsible for those who exercise political authority over us. . . .
>
> Indian tribal societies had no concept of civil rights because every member of the soeiety was related, by blood or clan responsibilities, to every other member. There was no pretense that the state existed to prevent injuries to its members by other members.[210]

Perhaps then, mandating that tribes who may lack a cultural backdrop of civil rights or due process enforce civil rights under the ICRA leaves tribes no

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206. *See supra* part VII.A for a discussion of the Navajo treatment of the due process clause.

207. Begay v. Navajo Nation, 15 Indian L. Rptr. 6032, 6034 (Navajo 1988) (citation omitted).

208. On this problem, one commentator noted: "[w]hen dcaling with a wide variety of Indian groups on a continental scale, any generality must submit to numerous qualifications." Brandfon, *supra* note 36, at 995.

209. For articles commenting on the different social structures of many Indian societies, see Brandfon, *supra* note 36; Burnett, *supra* note 43; de Raismes, *supra* note 6.

210. DELORIA & LYTLE, *supra* note 17, at 200.

alternative but to look to Anglo-American courts for interpretive guidance. Thus, even the *Martinez* holding, making tribal courts virtually the sole arbiters of Indian civil rights, does not free the tribes from Anglo-American normative constraints. Basically, if tribes have no cultural concept of individual civil rights as has been suggested, telling those tribes that they may interpret the ICRA with sensitivity for cultural traditions is moot. In that instance, the imposition of the ICRA alone may have effectively required the tribal courts to look to Anglo-American courts.

Tribal courts refuse, however, to allow this inherent imposition to destroy their ability to render decisions in a traditional cultural context. Each tribe expressly recognizes its ability to differ. For example, commenting on the use of Anglo-American or any other precedent, the Hoopa Valley Court of Appeals stated, "[e]ven though the decisions of federal, state, or other tribal courts are not controlling in this court, such decisions can be used as guidance in helping us address these issues."[211] Because of the incompatibility of some civil rights concepts to Indian tribal cultures, tribal courts reserve the right to differ from Anglo-American courts, even in cases where they choose not to differ.

According to Deloria and Lytle, the ICRA is conceptually flawed in that it assumes that tribal courts stand in the same relationship to both tribal citizens and the tribal government as do the federal courts to the American citizenry and the federal government.[212] Whereas "[t]raditional Indian society understood itself as a complex of responsibilities and duties," wrote Deloria and Lytle:

> The ICRA merely transposed this belief into a society based on rights against the government and eliminated any sense of responsibility that the people might have felt for one another . . . . People did not have to confront one another before their community and resolve their problems; they only had to file suit in tribal court.[213]

The ICRA imposed liberal-democratic notions of individual civil rights upon many communitarian societies which previously lacked such concepts.

The U.S. Supreme Court's *Martinez* decision, however, has been lauded as an effort by one branch of the federal government to soften the conceited impact of the ICRA.[214] Seemingly, as evidenced by this examination of tribal disposition of due process claims, the tribal courts value the allowance to differ even if they rarely express that ability.[215] From this perspective, the *Martinez* vision of tribal court control of civil rights so as to protect, as much as possible, tribal sovereignty, appears to have been successful. Thus, the Anglo-American values

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211. Hoopa Valley Hous. Auth. v. Gerstner, 22 Indian L. Rptr. 6002, 6005 (Hoopa Ct. App. 1993).

212. DELORIA & LYTLE, *supra* note 17, at 213.

213. *Id.*

214. *See, e.g.*, Brandfon, *supra* note 36; Ferguson, *supra* note 20; Lynch, *supra* note 24. Other commentators have criticized *Martinez* as negating the positive impact of the ICRA's civil rights protections. *See, e.g.*, Laurence, *supra* note 73; Ryce, *supra* note 67.

215. The term "allowance" is used here to express that Congress clearly has the ability to restrict tribal court authority or even mandate the application of federal standards. See *supra* text accompanying notes 18-39 for a discussion of the origins of Congress's plenary power over the tribes.

of the ICRA have even been "understood by most people as a major step toward the fulfillment of Indian self-government and, if we continue our analysis with consistency, it was certainly a step toward more self-government. But was it what Indians really wanted?"[216]

IX. CLOSING

The federal government, unable to decide the proper course for Indian tribes in America, has vacillated throughout history between assimilation and self-determination, creating an often ambiguous status for tribal cultures. The conflicting policies of the federal government are evident in the opening words of the ICRA. In presenting the characteristics and powers of Indian tribes, the Act says at once they are "subject to the jurisdiction of the United States," and "recognized as possessing powers of self-government."[217] In an attempt to soften the imposition of the ICRA, the United States Supreme Court in *Santa Clara Pueblo v. Martinez* gave control of Indian civil rights to tribal courts. In the period since *Martinez*, much has been written theorizing on the proper forum for Indian civil rights. Almost nothing, however, has been written analyzing the actual tribal court treatment of these issues. According to one commentator, "Indians and non-Indians concerned with civil liberties in a tribal context should pay more attention to this question at the level of tribal government."[218] This Project has attempted to elucidate the tribal courts' struggle to protect tribal autonomy while mired in the wilderness of Anglo-American values. For tribes with values similar to those of Anglo-American culture, application of foreign concepts of civil rights may be accomplished without massive cultural distortion. For tribes that do not share the same notions of civil rights, or even structure their society in the same way, mandated application may inevitably entail a degree of assimilation. Ultimately, only tribal self-determination will preserve tribal culture with sensitivity. The course of tribal self-determination is both moral and important.

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216. DELORIA & LYTLE, *supra* note 17, at 213.

217. 25 U.S.C. § 1301(1) (1994).

218. Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 299 (1990).