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The Story of *Kleppe v. New Mexico*: The Sagebrush Rebellion as Un-Cooperative Federalism

Robert L. Fischman

Jeremiah I. Williamson

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INDIAN COURTS AND FUNDAMENTAL FAIRNESS: INDIAN COURTS AND THE FUTURE REVISITED

MATTHEW L.M. FLETCHER*

For Ann Getches

This article comes out of the University of Colorado Law Review's symposium issue honoring the late Dean David H. Getches. It begins with Dean Getches's framework for analyzing Indian courts. I revisit Indian Courts and the Future, the 1978 report drafted by Dean Getches, and the historic context of the report. I compare the 1978 findings to the current state of Indian courts in America. This article focuses on the reality that the ability of Indian courts to successfully guarantee fundamental fairness in the form of due process and equal protection of the law for individuals under tribal government authority is uniquely tied to the legal infrastructure available to the courts. Congress tried to provide the basic framework in the Indian Civil Rights Act ("ICRA"), and many of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection. I argue that ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness.

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* Professor of Law, Michigan State University College of Law; Director, Indigenous Law and Policy Center. Professor Fletcher is a member of the Grand Traverse Band of Ottawa and Chippewa Indians and an appellate judge for the Hoopa Valley Tribe, Lower Elwha Tribe, Nottawaseppi Band of Potawatomi Indians, Poarch Band of Creek Indians, and Pokagon Band of Potawatomi Indians. This article is an edited version of talks developed for the National American Indian Court Judges Association 2011 Annual Conference and the 2012 Festschrift for Dean David H. Getches, *A Life of Contributions for All Time: Symposium in Honor of David H. Getches*. Miigwetch to Bill Brooks, Craig Dorsay, Kate Fort, Carole Goldberg, Sarah Krakoff, Jill Tompkins, Wenona Singel, Rebecca Tsosie, John Waubunsee, and Jeanne Whiteing.

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INTRODUCTION

There are about three hundred American Indian courts, or tribal courts,¹ in the United States. These courts constitute a powerful exercise of tribal government authority in the modern era, statutorily cabined only by the Indian Civil Rights Act (“ICRA”).² They are usually considered the foundation for

1. I will use “Indian courts” and “tribal courts” synonymously. Dean Getches used “Indian courts,” which is a term that many might think archaic in the twenty-first century. The more recent accepted phrase is “tribal courts.”

2. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–41 (2006)). See generally Donald L. Burnett, Jr., *An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act*, 9 HARV. J. ON LEGIS. 557 (1972); Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969). ICRA purported to extend many, but not all, federal constitutional rights to persons under tribal jurisdiction. Cf. Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1676–77 (2012) (noting that the Second Amendment does not apply to Indian tribes).

individual rights protections in tribal justice systems³ despite being criticized as not good fits for tribal government.⁴ As tribal justice systems develop, they rely less on ICRA and more on indigenous jurisprudence. This article traces that movement.

This article was prepared in honor of the late Dean of the University of Colorado Law School David Getches and traces the modern history of Dean Getches's contribution to the ongoing public discussion about the legitimacy of Indian courts. His work began in the late 1970s with the publication of *Indian Courts and the Future*, a report of an extensive survey of tribal courts commissioned by the National American Indian Court Judges Association.⁵ Getches's work, in many ways the first of its kind, provided the groundwork for establishing a theoretical basis for making tribal law more independent of federal influence and control.

Tribal justice systems, embodied by Indian courts, made enormous strides in the last several decades. Congress is supportive of Indian courts,⁶ and more recently, the

3. See U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT, at II-3 (June 1991) (describing the origins of ICRA and asserting that "[i]t was through the . . . ICRA . . . that Congress statutorily imposed on the tribal governments restrictions similar to those found in the Bill of Rights").

4. See Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1123 (1994) (arguing that individual rights protections are sometimes incompatible with collective tribal rights).

5. NAT'L AM. INDIAN CT. JUDGES ASS'N., INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "REPORT"]. Thanks to the outstanding law librarians at the University of Colorado Law School library, the REPORT and its two appendices are available online. See William A. Wise Law Library, *David H. Getches Collection*, http://www.colorado.edu/law/lawlib/research_resources/digital_collections/getches_collection/ (last visited Oct. 28, 2012).

6. *E.g.*, 25 U.S.C. §§ 3601(4)–(9) (“(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems; (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act; (8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and (9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this Act.”); 25 U.S.C. §§ 3651(5)–(11) (“(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments; (6) Congress and the Federal

Department of Justice has begun to support tribal justice systems by proposing the Stand Against Violence and Empower (“SAVE”) Native Women Act, which would reestablish tribal criminal jurisdiction over non-Indians for some crimes.⁷ The Senate eventually incorporated this provision into the 2012 Senate version of the Violence Against Women Act (“VAWA”) reauthorization.⁸

But the news is not all good. Opponents of tribal sovereignty continually attack tribal justice systems as a means to undercut tribal government authority. In the recent debates over the limited expansion of tribal criminal justice authority in the VAWA reauthorization bill, opponents claimed tribal courts were illegitimate and illiberal, citing to examples opponents claim are representative of tribal justice systems everywhere.⁹ Many tribal governments have illiberal tendencies, and some Indian courts are incapable of combating the worst abuses of tribal governments.¹⁰ Yet, in most instances, modern tribal justice systems are successful at resolving these issues.

This article begins with Dean Getches’s framework for

courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; (7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency; (8) there is both inadequate funding and an inadequate coordinating mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation; (9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems; (10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence; and (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.”)

7. S. 1763, 112th Cong. (2011).

8. See *Senate Passes VAWA, Including Protections for Native Women*, NAT’L CONGRESS OF AM. INDIANS (Apr. 26, 2012), <http://www.ncai.org/news/articles/2012/04/26/senate-passes-vawa-including-protections-for-native-women>.

9. S. REP. NO. 112-153, at 40–41, 51–55 (2012) (reporting minority views of Senators arguing against expansion of tribal court jurisdiction); H.R. REP. NO. 112-480, at 58–59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

10. See generally Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (theorizing illiberalism in tribal governance); Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 50 SAN DIEGO L. REV. (forthcoming 2013) (theorizing lack of tribal accountability for human rights violations).

analyzing Indian courts. Part I first revisits *Indian Courts and the Future*,¹¹ the 1978 report drafted by Dean Getches, and discusses the historic context of the report. It then analyzes the substance of that report and the framing given to the description of Indian courts by Dean Getches. Part I concludes by comparing the 1978 findings to the current state of Indian courts in America.

Next, this article focuses on the ability of Indian courts to successfully guarantee fundamental fairness in the form of due process and the equal protection of the law for individuals under tribal government authority. Part II first details several tribal court opinions that exemplify the uses of ICRA in the last few decades. These modern court opinions demonstrate the ability of Indian courts to guarantee fundamental fairness to tribal court litigants beyond the minimum standards of the Indian Civil Rights Act by incorporating tribal statutory and common law principles. Finally, this article addresses the question of the future relevance of ICRA. Congress tried to provide the basic framework of individual rights protection in ICRA,¹² and many of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection.¹³ ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness.

In short, this article argues that some tribal courts are developing a jurisprudence following principles of “fundamental fairness” that account for tribal customary and traditional law in comporting with American notions of “due process” and “equal protection.” This jurisprudence of fundamental fairness may effectively replace, over time, tribal court borrowing of American law in rights cases.

I. THE GETCHES REPORT AND THE PRESENT

This Part covers several decades of recent history involving American Indian justice systems. I begin by describing and

11. See REPORT, *supra* note 5.

12. See Indian Civil Rights Act, 25 U.S.C. §§ 1301–03 (2006).

13. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art. X, § 1 (1988) (codifying Section 2 of the Indian Civil Rights Act as it existed in 1988 into the tribal constitution).

summarizing what I call the “Getches Report” and follow that with a subsection on the state of Indian courts as of 1978. I conclude this Part with a subsection doing the same for Indian courts in 2012.

A. *The Historical Context of the Getches Report*

In 1979, the National American Indian Court Judges Association (“NAICJA”) published a report entitled *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project*.¹⁴ The project involved surveys of twenty-three tribal courts from around the country about their structure, jurisdiction, day-to-day operations, procedures, and relations with state and federal courts.¹⁵ The results of the surveys are published as Appendix 1 to the report.¹⁶ Appendix 2 collects articles by more than a dozen American Indian law scholars and practitioners who drafted some of the first serious scholarship on tribal courts.¹⁷ In the report, Dean Getches summarized the results of the project and offered dozens of recommendations for developing tribal courts. The report helped tribal advocates begin responding to the series of Congressional hearings that purported to detail (mostly anecdotally) the abuses and incompetence of tribal governance and adjudication in the 1960s.¹⁸ These hearings served as the factual predicate for the enactment of ICRA.¹⁹

14. See REPORT, *supra* note 5.

15. See *id.* at 5.

16. See NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: APPENDIX 1, COMPLICATION OF FINDINGS FROM RESERVATION SURVEYS (David H. Getches & Orville N. Olney eds., 1978) [hereinafter “APPENDIX 1”].

17. See NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: APPENDIX 2, DISCUSSION MATERIALS PREPARED FOR PROJECT ADVISORY COMMITTEE (David H. Getches & Orville N. Olney eds., 1978) [hereinafter “APPENDIX 2”].

18. For an overview of the 1960s hearings, see Elizabeth Ann Kronk, *Tightening the Perceived “Loophole”: Reexamining ICRA’s Limitation on Tribal Court Punishment Authority*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 211, 219–25 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds. 2012).

19. Meanwhile, the American Indian Policy Review Commission recommended the expansion of federal support of tribal justice systems. See AM. INDIAN POL'Y REVIEW COMM'N, 95th Cong., 1st Sess., Final Report 167 (1977). The Commission found that the limitations of tribal justice systems could be tied most directly to resources. See *id.* One commentator in the study argued that Indian tribes that did not have the capacity to “administer criminal and civil jurisdiction in the early 1950s” should not be restricted years later, further noting that “it should have been foreseen that such capabilities would someday be

The study arrived at a critical juncture in the history of American Indian law. The report came immediately after the Supreme Court's holding in *Oliphant v. Suquamish Indian Tribe*²⁰ that tribal courts have no criminal jurisdiction over non-Indians; and in the same year as the American Bar Foundation's report, *American Indian Tribal Courts: The Costs of Separate Justice*²¹ that recommended the abandonment of efforts to develop tribal justice systems.²² It would have been interesting to see whether the Court would have addressed the factual findings of the study in the *Oliphant* decision. Perhaps the Court would have pointed to the report and focused on the areas where tribal justice systems needed to improve as justification for limiting tribal jurisdiction. Or, perhaps the Court would have been more likely to be persuaded that tribal jurisdiction over non-Indians was not terribly disturbing as a civil rights matter. Who knows?

Indian Courts and the Future was the first serious study of tribal justice systems. NAICJA staffers and consultants prepared a detailed survey of tribal courts.²³ The survey results offer data that twenty-first century tribal judges and tribal court practitioners would find familiar in some ways and foreign in other ways.²⁴ The meat of the report is Dean Getches's history of tribal courts and tribal justice systems²⁵

developed" *Id.* (quoting letter from Douglas Nash, Counsel to the Umatilla Reservation to Donald R. Wharton, Task Force No. 4).

20. 435 U.S. 191 (1978), *superseded by statute*, Pub. L. No. 101-511, 104 Stat. 1892 (1990).

21. SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE* (1978); *see also* Samuel J. Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not,"* 62 A.B.A. J. 1002 (1976); Richard B. Collins, Ralph W. Johnson & Kathy Imig Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977) (criticizing and responding to Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not," supra*).

22. *See* BRAKEL, *supra* note 21, at 103 ("[I]t would be more realistic to abandon the [tribal court] system altogether and to deal with Indian civil and criminal problems in the regular county and state court systems.").

23. APPENDIX 1, *supra* note 16, at 1–20.

24. *E.g.*, Juli Anna Grant, *Abby Abinanti, Chief Judge, Yurok Tribal Court, Klamath, California, and California Superior Court Commissioner*, 2 J. CT. INNOVATION 347, 348 (2009) (noting expanded jurisdiction of the tribal court coupled with funding shortages). In contrast to the REPORT, the contemporaneous American Bar Foundation study apparently involved little more than visits by the author to five reservations, conducting informal interviews with various tribal court personnel and parties to tribal court cases, some form of "person on the street" interviews of people in reservation communities, and attendance at a tribal court personnel training. *See* BRAKEL, *supra* note 21, at 3.

25. *See* REPORT, *supra* note 5, at 7–13.

and the recommendations of NAICJA after reviewing the survey and the scholarship.²⁶ The study concluded that Indian courts suffer from a terrific lack of resources that undercut the ability of the courts to guarantee fundamental fairness.²⁷ Perhaps most importantly, the study concluded that Indian courts had few law-trained judges and Indian country²⁸ had limited numbers of law-trained counsel available to litigants.²⁹

Indian Courts and the Future, published in 1978, set the stage for discussions about tribal justice systems for the next several decades and more and this report continues to have relevance to the advancement of tribal courts.

B. *The State of Indian Courts Circa 1978*

At this time, Indian courts suffered from a lack of legal infrastructure—constitutional texts, statutory texts, tribal customary law, and traditional law—upon which to draw and interpret.³⁰ Tribal judges usually applied state and federal precedents in their 1970s and early 1980s opinions.³¹ They did so despite the fact that those opinions were derived from federal and state statutes that did not apply in the tribal context and involved common law from the Anglo-American tradition that also did not apply to tribal communities.³²

26. See *id.* at 103–95.

27. See *id.* at 53–55 (reporting findings that the large majority of tribal court judges were not lawyers and the large majority of tribal court advocates were lay people).

28. “Indian country” is a term of art in federal Indian law, denoting the relevant legal boundaries where federal, state, and tribal boundaries meet. See 18 U.S.C. § 1151 (2006) (defining “Indian country” for federal criminal jurisdiction purposes). I also use “Indian country” less specifically, as here, to generally describe the place where Indians and tribes reside.

29. See REPORT, *supra* note 5, at 53–55, 65 (discussing reliance on non-Indian judges, low salaries for judges and court staff, lack of on-reservation attorneys and law-trained court clerks, and reliance on lay advocates).

30. See *id.* at 37–40, 43–44 (discussing the unavailability of tribal law, the scarcity of model codes, the lack of separation of powers and judicial independence, and the problems with borrowing state law).

31. See *id.* at 43–44 (discussing reliance upon state laws).

32. The prototypical example of a federal common law rule that, at one time, would have been a poor fit for tribal communities is the *Miranda* rule, where criminal suspects have a right to silence and other rights derived, at least in part, from an American tradition of using physical violence to elicit confessions in criminal cases. See *Miranda v. Arizona*, 384 U.S. 436, 446–48 (1966); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 163–64 (2007). In *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604, 615–16 (Navajo 2004), the court noted the disconnect between Anglo-American traditional police

Statutorily, with the exception of a few tribal constitutions,³³ courts had little to draw upon except ICRA.³⁴ Until 1978, when the Supreme Court decided *Santa Clara Pueblo v. Martinez*,³⁵ holding that ICRA did not provide a federal cause of action to adjudicate those claims, litigants could access federal courts to litigate ICRA complaints.³⁶

The Report noted the widely differing responses from the twenty-three tribal courts on their understanding and implementation of ICRA.³⁷ Consultants to the study wrote their responses after visiting the tribal courts.³⁸ The consultants reported that many of the tribal courts had changed into more formal and less traditional entities ten years after ICRA's enactment.³⁹ The consultants noted that many, but not all, of the courts stated that ICRA was helpful as a guide to compel the court to provide proper procedure to litigants and in helping guide substantive civil rights cases.⁴⁰

practices and those of the Navajos.

33. For an extensive survey of tribal constitutions available in the 1960s and 1970s, see generally CHARTERS, CONSTITUTIONS AND BY-LAWS OF THE INDIAN TRIBES OF NORTH AMERICA, PTS 1-12 (George E. Fay, ed. 1967-1971).

34. See Indian Civil Rights Act, 25 U.S.C. § 1302 (2006).

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

36. Cf. REPORT, *supra* note 5, at 76 (predicting more and more federal court ICRA cases). At the time, there was robust scholarly literature debating whether federal courts should have ICRA jurisdiction. Compare Alvin J. Zientz, *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) (arguing against), with Joseph de Raimses, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59 (1975) (arguing in favor).

37. See APPENDIX 1, *supra* note 16, at 261-67.

38. See *id.* at 2.

39. See *id.* at 263-64 ("The court is much more formal and Anglicized. . . . Procedure is becoming more Anglo oriented. . . . The court has become much less traditional and much more formal. . . . Court procedure has become more formal and sophisticated since passage of the ICRA.").

40. See *id.* at 263 ("Indirectly, a great effect—NAICJA [Native American Indian Court Judges Association] training in response to passage of the ICRA has changed judges' techniques; prosecutor to be hired will be a result of ICRA."); *id.* ("Judges feel the ICRA is a good thing, as it gives them a guideline for defining individual rights."); *id.* ("New code, currently being done, includes ICRA protections in law and procedure for the first time."); *But see id.* at 264 ("[C]ourt procedures are inadequate and need to be updated."); *id.* ("Superintendent of the agency BIA ignores the ICRA. He rejects any of the protections and concepts underlying the act."); *id.* ("The court does not follow ICRA procedures, and there are repeated violations. The steps are finally being taken to remedy some of this, but the BIA is still afraid of any challenge being mounted to the court's procedures. The judge either doesn't understand the ICRA, or he takes it too casually."). An additional positive development arising out of the enactment of ICRA was increased availability of training. See *id.* at 263; cf. Letter from Ralph W. Johnson to David H. Getches (June 10, 1977), reprinted in APPENDIX 2, *supra*

As a general matter, it appears the tribal courts welcomed ICRA, especially when it came to procedural improvements. However, one court—according to the consultants—failed to comply with ICRA, saying that “[t]he tribe would lose at any time if someone challenged the tribal court on their ICRA procedures.”⁴¹

It appears that the twenty-three tribal courts surveyed took ICRA more seriously as a procedural guide to provide fundamental fairness to litigants, rather than as an invitation to adopt federal civil rights protections wholeheartedly.⁴² The relative willingness of tribal courts to comply with ICRA was tempered by some courts’ view that ICRA had been imposed on tribes.⁴³

Dean Getches highlighted the similarities between rural justice systems and tribal justice systems, noting several common factors such as “close acquaintance between the judge and parties,” lower caseload, and limited resources.⁴⁴ Because judges often know the parties, the tribal courts surveyed in the study reported that “[p]ersonalized attention to the needs of defendants was . . . common . . .”⁴⁵ That attention resulted in more guilty pleas.⁴⁶ However, the increase in guilty pleas did not necessarily lead to more jail time; in fact, jail sentences were rare.⁴⁷

It appears that ICRA had relatively little impact on reservation justice. Dean Getches reported that “[t]he major change in some courts is that proceedings have become more formal and sophisticated or, in the words of some respondents, Anglicized.”⁴⁸ A corollary to this conclusion is that “tradition has played a smaller role in court proceedings since the Act.”⁴⁹ Dean Getches did not offer a working definition of what

note 17, at 127–35 (recommending greater availability of tribal law-specific training for tribal judges and court staff).

41. APPENDIX 2, *supra* note 17, at 267 (court number 17).

42. See APPENDIX 1, *supra* note 16, at 263.

43. *E.g., id.* at 267 (noting response to question about general concerns about ICRA: “The fact that they have to apply the ICRA at all.”); see also Kirke Kickingbird, “*In Our Image..., After Our Likeness: The Drive for the Assimilation of Indian Court Systems*,” 13 AM. CRIM. L. REV. 675, 694–95 (1976) (expressing concern about ICRA’s imposition of non-Indian values on tribal justice systems).

44. REPORT, *supra* note 5, at 61.

45. *Id.*

46. See *id.*

47. See *id.*

48. *Id.* at 79.

49. *Id.* at 42–43, 74, 79 (discussing how tradition has been shunted aside and how traditional punishments are rare).

“tradition” or “traditional” meant at the time of the survey. However, it is likely that for most reservations surveyed at this time, a “traditional” criminal prosecution involved semiformal court proceedings without a written record, lawyer participation, or a jury.⁵⁰ In addition, most tribal judges believed their courts already complied with the federal requirements in ICRA before its passage.⁵¹ Finally, none of the twenty-three tribes surveyed had waived immunity from suit in tribal court to effectuate ICRA.⁵² Of course, these results pre-dated *Martinez*,⁵³ which held that federal courts have no jurisdiction to entertain civil rights claims against tribes.⁵⁴ It therefore makes sense that the tribes would have no pressing reason to consider a waiver.

Dean Getches’s framing of the report contrasted with most observers’ views of tribal justice systems in one important way—the report was an inside-out view of tribal justice systems rather than an outside-in view.⁵⁵ Typically, commentators assume that a federal solution, perhaps an act of Congress, is necessary to reform tribal justice systems.⁵⁶ While Dean Getches recommended that Congress provide much (if not all) of the funding to improve tribal justice systems, he also proposed tribal legislation to develop the necessary

50. See JOHN R. WUNDER, “RETAINED BY THE PEOPLE”: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 132–33 (1994); *Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 127 (1968) (statement of John S. Boyden, general counsel, Hopi Indian Tribe) (describing objections to American criminal procedure practice from New Mexico Pueblo communities). These kinds of proceedings were even less “traditional” than tribal justice systems in centuries past. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 112–13 (1983).

51. REPORT, *supra* note 5, at 79 (“Some tribal codes and rules of court procedure have been modified to reflect the requirements of the Act, but most judges said they were already complying when it was passed.”).

52. See *id.* at 44.

53. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

54. See Lawrence R. Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 1, 5.

55. By “outside-in,” I mean a study of tribal courts by outsiders usually (if not exclusively) judging tribal justice systems by resort to nontribal factors, such as American constitutional law. An example of an “outside-in” study is the American Bar Foundation study by Brakel referenced in note 21. The 1991 United States Commission on Civil Rights report, THE INDIAN CIVIL RIGHTS ACT, is another.

56. See Robert L. Bennett, *The Tribal Judiciary*, in APPENDIX 2, *supra* note 17, at 13, 25–26 (reporting recommendations by others that Congress should develop a national tribal appellate court and enact tribal laws governing descent and distribution of estates).

infrastructure in Indian country in order to make tribal justice systems viable. Specifically, Dean Getches recommended that tribal legislatures develop their code structures to include the ordinances necessary to govern and to codify a process to apply tribal customary law as a means of preserving the “Indianness” of tribal justice systems.⁵⁷ Dean Getches also offered suggestions on how to separate governmental powers in order to prevent abuses, by and against tribal courts, by adopting necessary tribal statutes to ensure proper separation of powers.⁵⁸ Importantly, Dean Getches argued that weak tribal judiciaries would inadvertently open the door to state and federal interference with internal tribal affairs.⁵⁹

Dean Getches’s recommendations on tribal judicial compliance with ICRA were limited to procedural protections.⁶⁰ Like the Supreme Court implied in *Martinez*,⁶¹ Dean Getches argued that the meaning of “due process” and “equal protection” should be left to tribal courts to interpret: “[t]he goal of protection of individual rights in the court should be achieved by maintaining unique Indian traditions and heritage in harmony with the establishment of such individual rights.”⁶² While American courts recognize claims based on the phrases “due process” and “equal protection,” Dean Getches implicitly acknowledged that tribal courts should be free to diverge from American law in order to preserve the “Indianness” of tribal justice systems and tribal law. Of course, there was no way for anyone at the time to predict how that would come about or whether it would happen.

C. *The State of Indian Courts Circa 2012*

Each year, tribal justice systems grow in numbers, quality,

57. See REPORT, *supra* note 5, at 110–13.

58. See *id.* at 113–15, 124–32 (recommending changes to tribal judicial selection, tenure, and removal rules, and proposing direct separation of the powers statutes).

59. See *id.* at 2.

60. See *id.* at 116–17.

61. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (“By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.”).

62. REPORT, *supra* note 5, at 117.

and sophistication,⁶³ and they grow in a manner many would never have contemplated or expected in 1978. While no one knows with certainty how many tribal courts there are in the United States, my estimate places that number at approximately three hundred.⁶⁴ Despite having their civil and criminal jurisdiction over nonmembers handcuffed by United States Supreme Court decisions before most even began accepting cases,⁶⁵ tribal courts have developed in some of the most creative and progressive ways. Examples include developing cooperative arrangements with state courts,⁶⁶ civil remedies against non-Indian criminal offenders,⁶⁷ peacemakers courts (traditional dispute resolution practices),⁶⁸ and drug courts.⁶⁹

But, just as in 1978, many tribal courts remain undeveloped and often inefficient because of a lack of resources

63. See generally MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011) (surveying tribal court opinions); DAVID E. WILKINS & HEIDI KIIWETINEPINESIHK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 73–78 (3d ed. 2011) (describing the development of tribal justice systems); HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 44–50 (2008) [hereinafter HARVARD PROJECT] (same).

64. A 2005 report on Indian courts noted that the Bureau of Justice Assistance had awarded grants to 294 Indian tribes for planning and enhancing their court systems. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA* 6 (2005) [hereinafter PATHWAYS TO JUSTICE], available at http://law.und.edu/_files/docs/tji/docs/pathways-report.pdf.

65. See *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (limiting tribal jurisdiction over nonmembers); *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 211 (1978) (eliminating tribal criminal jurisdiction over non-Indians); see also Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 815–30 (2006) (describing how Congress undermined tribal criminal jurisdiction in 1885 by enacting the Major Crimes Act, now codified at 18 U.S.C. § 1153).

66. See Corey Wahwassuck, John P. Smith, & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859, 861–67 (2010).

67. See Hallie Bongar White, Kelly Gaines Stoner, & James G. White, *Creative Civil Remedies against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427 (2008).

68. Raymond D. Austin, *Freedom, Responsibility, & Duty: ADR and the Navajo Peacemaker Court*, 32 JUDGES' J. 8 (1993) (describing the development of Navajo peacemaker courts); Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999) (profiling Grand Traverse Band peacemaker court).

69. See Ronald Eagle Johnny, *The Duckwater Shoshone Drug Court, 1997–2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2001–2002) (describing the Duckwater Shoshone drug court).

and a lack of functional judicial independence.⁷⁰ Concerning resources, tribal judges face the reality of limited governmental social services for families and children in need⁷¹ and limited tribal court operations resources.⁷² Furthermore, many tribal judges and their staff members have little or no access to electronic legal research and law clerks,⁷³ although some law schools with Indian law programs are now serving as sources for tribal courts seeking low-cost court clerks.⁷⁴ On the structural side, many tribal judges face overt and covert attacks on their independence (although the extent of interference with the judicial function by tribal policymakers is debated).⁷⁵ For example, many tribal constitutions provide express or implied tribal council control over appointments and retention of tribal judges.⁷⁶ Additionally, some tribal judges

70. See Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 123 (Miriam Jorgensen, ed. 2007).

71. E.g., Patrice H. Kunesch, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 260 (2007) ("For generations, however, tribes have not been able to meet the most basic needs of their tribal families, and Indian people continue to suffer serious consequences of such persistent privation.").

72. For example, currently, tribal courts cannot implement the Tribal Law and Order Act's public defender requirements due to lack of funding. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS (2012), available at <http://www.gao.gov/products/GAO-12-658R>.

73. See Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 455-56 (1999).

74. See MASSEY MAYO CASE & JILL E. TOMPKINS, U. OF COLO. L. SCH., A GUIDE FOR TRIBAL COURT LAW CLERKS AND JUDGES (2007), http://www.colorado.edu/iece/docs/Thompson/Final_version_Guide.pdf.

75. Compare AM. INDIAN L. CENTER, SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES (2000) (cited in Benjamin J. Cordiano, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after Duro v. Reina*, 41 CONN. L. REV. 265, 283-295 (2008)) (finding little interference), and B.J. JONES, THE INDEPENDENCE OF TRIBAL JUSTICE SYSTEMS AND THE SEPARATION OF POWERS 12 (2006), available at http://law.und.edu/tji_files/docs/bjones-jud-indep-memo.pdf (examining the tribal court case law and finding a trend toward increased judicial independence), with Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 180 n.226 (2004) (questioning the validity of the American Indian Law Center survey).

76. E.g., COLORADO RIVER INDIAN TRIBES CONST. AND BY-LAWS art. VI, § 1(k), available at http://www.crit-nsn.gov/crit_contents/ordinances/constitution.pdf (empowering tribal council to establish tribal court).

face threats from tribal legislatures on budgets.⁷⁷ Many tribal courts have virtually no authority to review tribal government actions—even where tribal independence is assured by constitution or statute—because of tribal sovereign immunity.⁷⁸

Despite these concerns and limitations on tribal judicial growth, improvements remain notable. The number of tribal courts has doubled since 1978.⁷⁹ Many tribal courts do enjoy significant independence and adequate budgetary and governmental support resources. More Indian tribes have the resources to offer adequate social services and to develop alternatives to adversarial proceedings, such as Peacemaker courts or circle sentencing.⁸⁰ The respect for tribal courts by tribal governments, tribal members, nonmembers, and foreign governments, while difficult to quantify, improves every year.⁸¹ An increasing number of state courts have adopted rules codifying some form of comity, often reciprocated by tribal courts, in regards to tribal court judgments and orders.⁸²

77. *Cf., e.g.,* Grand Traverse Band of Ottawa & Chippewa Indians v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Ct Adm'r, Stipulation of Dismissal, No. 02-04-967-CV (Grand Traverse Band Tribal Ct., May 22, 2003) (citing 3 Grand Traverse Band Code § 201, the budgetary process for the tribal court).

78. *Cf.* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 73 (1995) (noting that tribal leaders must balance respect for individual rights with the possibility of civil rights suits “grind[ing] tribal activity to a halt”).

79. The Bureau of Indian Affairs counted 134 tribal courts in 1977. *See* REPORT, *supra* note 5, at 148 n.5. No one knows exactly how many tribal courts are in operation now, but my guess is between 250 and 300, based on the Bureau of Justice Assistance report. *See* PATHWAYS TO JUSTICE, *supra* note 64, at 6 (noting 294 tribes had requested federal assistance to develop or enhance tribal justice systems by 2005); *see also* Maylinn Smith, *Tribal Courts: Making the Unfamiliar Familiar*, MINORITY TRIAL LAW., Spring 2008, at 2, available at http://www.jrsla.org/pdfs/publications/2008_spring_minoritytrial.pdf (suggesting there are 275 tribal courts).

80. *See generally* Flies-Away, Garrow & Jorgensen, *supra* note 70, at 123–26 (surveying tribal restorative and reparative justice systems, such as Peacemaker courts and circle sentencing); Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 521–38 (2007).

81. *Cf.* HARVARD PROJECT, *supra* note 63, at 122–23 (discussing institutional requirements needed to improve respect for tribal justice systems).

82. *E.g.,* MICH. CT. RULE 2.615 (reciprocal comity rule on tribal court judgments); *cf.* Craig Smith, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1395 (2010) (arguing that the United States Constitution's Full Faith and Credit Clause and Congressional enactments implementing the Clause mandate that state courts give full faith and credit to tribal court judgments); Stacy L. Leeds,

Slowly, state courts began recognizing routine tribal court judgments and orders as a matter of state common law.⁸³ Tribal court cooperation with local probation offices, social workers and child protection units, and law enforcement have, in some cases, paved the way for improved tribal-state relations and multitudes of intergovernmental agreements.⁸⁴ In recent years, more and more tribal courts have made their codes, ordinances, and court rules—as well as written opinions—available online.⁸⁵ Joining the hard-copy *Indian Law Reporter*, which publishes selected tribal court opinions, are Westlaw, Lexis, and Versus Law.⁸⁶ With tribes making their constitutions and statutes available online and elsewhere, tribal law has never been easier to find.

Meanwhile, tribal courts are developing their own common law. The Navajo Nation's judiciary is the clear leader in this regard.⁸⁷ Other tribal courts have done the same, with mixed results, as we will see in the next section. However, many tribal courts, following the lead of the tribal legislatures, still resort to the borrowing of state and federal law in deciding substantive matters of law.⁸⁸

The next section further develops the sketch of modern tribal courts by providing a small survey of some tribal court opinions that address the question of providing fundamental fairness to litigants in the context of ICRA and tribal

Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N.D. L. Rev. 311, 346–60 (2000) (empirical study of tribal judges' experience with state court recognition of their judgments).

83. *E.g.*, *John v. Baker*, 982 P.2d 738, 761–64 (Alaska 1999) (recognizing tribal court judgment as a matter of comity); *Fredericks v. Eide-Kirshmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164, 167–71 (N.D. 1990) (recognizing tribal court judgment as a matter of comity); *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 612 N.W.2d 709, 718–19 (Wis. 2000) (recognizing principles of comity to require state and tribal courts to allocate jurisdiction amongst themselves).

84. *E.g.*, Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529 (2012) (describing Michigan's experience in developing cooperation between tribal and state agencies in the context of Indian child welfare).

85. *See generally* David Selden, *Basic Indian Law Research Tips: Tribal Law* (Jan. 2012), available at http://narf.org/nill/resources/tribal_law_research_article.pdf.

86. *See id.*

87. *See generally* RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* 39 (2009) (study of Navajo common law and jurisprudence).

88. *See* Hon. Steven Aycock, *Thoughts on Creating a Truly Tribal Jurisprudence* (2006), excerpted in FLETCHER, *AMERICAN INDIAN TRIBAL LAW*, *supra* note 63, at 117–18.

customary and traditional law.

II. FUNDAMENTAL FAIRNESS AND INDIAN COURTS

What guarantees fundamental fairness in Indian courts? Is it ICRA? Is it unwritten tribal customary and traditional law? Is it tribal statutory and constitutional protections? For each tribe, the answer may be different. As we saw in the last section, Dean Getches focused the discussion about these questions by placing the onus on tribal justice systems and away from how state or federal courts and legislatures could guarantee fairness in Indian country. Rather than recommending another federal solution, Dean Getches, on behalf of the National American Indian Court Judges Association, recommended positive tribal law, a return to tribal traditions, and guarantees of procedural due process. In other words, Dean Getches argued that eventually tribal jurisprudence on due process and equal protection should not be based on American jurisprudence but instead on tribal law.

And yet, tribal judges and litigants rely almost exclusively on American jurisprudence concerning due process and equal protection as introduced into tribal law by ICRA.⁸⁹ In our 2008 study of tribal court decisions applying ICRA to civil rights claims, we found that ninety-five percent of tribal courts applied American law.

Of the 120 cases involving an ICRA issue, tribal court judges cited federal and state case law as persuasive (and often controlling law) in 114 cases (95 percent). And, of the six cases in which the tribal court explicitly refused to apply federal or state case law, either the parties included tribal members in a domestic dispute or the tribal court held that its interpretations of the substantive provisions of ICRA were stronger or more protective of individual rights than would otherwise be available in analogous federal or state cases.⁹⁰

Of course, the selection of these cases likely dictated the

89. See generally MATTHEW L.M. FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474; see also Catharine A. MacKinnon, Martinez *Revisited*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 27, 31 (“[T]ribal courts are dispensing justice on sex equality in a very similar way to the US federal courts, with all its disappointing and unnecessary limitations.”).

90. See FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA, *supra* note 89, at 6.

result in that every case involved an allegation relating to, or reasoning based upon, application of ICRA.

In my view, and this is terribly preliminary, tribal courts will soon rely less on ICRA and the related American jurisprudence on due process and equal protection and more on their own customs and traditions for insight.⁹¹ American law was (and still is) a necessary crutch to establishing a tribal common law that effectively guarantees fundamental fairness to litigants in Indian courts as tribes continue to reestablish and adapt their customs and traditions to meet modern needs. Tribal courts have long recognized a need for a legal foundation that would help them guarantee fundamental fairness for all litigants, and American law, as imposed by Congress in ICRA, provides that foundation. Tribal justice systems can proceed in a manner that builds upon that foundation, as many have.⁹² Or tribal courts can dispense with ICRA and federal and state law altogether and choose to rely exclusively on their own common law. As Vine Deloria and Clifford Lytle once wrote, "The greatest challenge faced by the modern tribal court system is in harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence."⁹³

The subsections that follow provide examples of: (1) tribal courts that have embraced American law in order to provide the necessary foundation required to guarantee fundamental fairness; (2) tribal courts that are relying less on American law and, occasionally, rejecting American law altogether; and (3) the potential pitfalls of moving away from American law.

A. *American Law as a Crutch*

Since the Supreme Court's decision in *Martinez*,⁹⁴ tribal

91. Modern scholarship on tribal custom is rapidly developing, and so tribal courts will be able to draw upon that scholarship. *E.g.*, AUSTIN, *supra* note 87 (survey of Navajo common law); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761 (1999–2000) (study of Hopi common law); see generally Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007–2008) (study of tribal common law generally).

92. See, e.g., Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 275 (surveying tribal courts' application of largely federal and state law to ICRA claims); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997–1998) (same).

93. See DELORIA & LYTLE, *supra* note 50, at 120.

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

courts applied American law, as in ICRA, to guarantee due process and equal protection. As Dean Getches noted in 1978, tribal law was generally unavailable to judges, litigants, and the public,⁹⁵ all but forcing tribal judges and litigants to argue American law. What is more interesting, as this subsection shows, is that many tribal courts seemed to apply American law, mostly federal law, as precedential law, rather than as persuasive law. Regardless, in possibly hundreds of cases, tribal courts announced, often as a matter of first impression, the tribal interpretation of “due process” by reference to American cases. Here are but a few examples.

Each of the following excerpts involves a question of fundamental fairness, such as a right to notice and a hearing (*Turtle Mountain* and *St. Regis Mohawk*), or property rights (*Puyallup* and *Chitimacha*) that relies on American constitutional law for formulation and legal support. These statements of hornbook American law appear in many tribal court opinions and look no different than the statements one would see in state and federal court opinions.

Please note that I have disregarded the convention of writing that discourages the use of block quotes in favor of quoting extensively from several tribal court opinions. As a reader, you may be tempted to simply skip the block quotes. Please do not. I am trying to preserve the authorial style and the context of the discussions in these opinions.

1. Turtle Mountain Band of Chippewa Indians Court of Appeals:

A fundamental requirement of [d]ue process is that the parties be given adequate or reasonable notice. “An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action The notice must be of such nature as reasonably to convey the required information” Reasonable notice must be given at each new step in the proceedings.⁹⁶

95. See REPORT, *supra* note 5, at 37–39 (noting the borrowing of state and federal law).

96. *Monette v. Schlenvogt, et al.*, No. TMAC 04-2021, 2005.NATM.0000003, ¶ 25 (Turtle Mtn. Tribal Ct. App., Mar. 31, 2005) (VersusLaw) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 314 (1952)).

2. Puyallup Tribal Court:

The United States Constitution states in pertinent part that no person shall be deprived of property without due process of law. U.S. Constitution, Fifth Amendment. Similarly, the Indian Civil Rights Act prohibits an Indian Tribe exercising powers of self-government from depriving any person of property without due process of law The essence of due process requires notice and an opportunity to be heard The notice should be “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”⁹⁷

3. St. Regis Mohawk Tribal Court:

The Indian Civil Rights Act safeguards those rights restated in entirety in the Constitution of the Saint Regis Mohawk Tribe. Under the Indian Civil Rights Act tribes are prohibited from depriving persons of rights without due process. While Federal, state, and tribal law is not binding authority upon the Saint Regis Mohawk Tribal Court such can act as persuasive authority. The fundamental requirements of due process is the “opportunity to be heard” The hearing must be at a “meaningful time and in a meaningful manner” Due process also requires notice, the right to be heard in a full and fair hearing, to call witnesses and to be heard before an impartial decision maker. The Constitution of the Saint Regis Mohawk Tribe safeguards the same rights as those stated in the Indian Civil Rights Act, that is the political, social, and civil rights of duly enrolled members of the Tribe.⁹⁸

4. Chitimacha Indian Tribal Court of Appeals:

While the Fifth Amendment due process clause does not apply so as to limit the power of tribal self-government, we

97. *Delgado v. Puyallup Tribal Council*, No. 95-3604, 1996.NAPU.0000007, ¶¶ 48–50 (Puyallup Tribal Ct. April 3, 1996) (VersusLaw) (citing *Mullane*, 399 U.S. at 314–315).

98. *In re Constitutional Question re: Voting*, 1998.NASR.0000001, ¶ 40 (St. Regis Mohawk Tribal Ct. Sept. 10, 1998) (VersusLaw) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

believe that the due process analysis developed over the years in federal jurisprudence is instructive and a logical place to begin an analysis of the due process protections found in the Indian Civil Rights Act.

The procedural due process provision of the Fifth Amendment to the United States Constitution that is made applicable to the States through the 14th Amendment can be traced back to ideas that first originated in the Magna Charta of England. The Fifth Amendment to the Constitution of the United States states that no person shall “be deprived of life, liberty or property, without due process of law. . . .” In applying this simple language to real life situations the United States Supreme Court has cautioned against the setting out specific rules [sic] which apply in each and every situation. In case after case the United States Supreme Court has adapted the general concept of procedural due process to deal with the competing interests presented by the case at hand. The Court has specifically held: . . . the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

Moreover, courts have held that procedural due process is . . . “flexible and calls for such procedural protections as the particular situation demands.” Simply put: What is procedural due process under the Fifth Amendment in one case is not in another. Each case is different.

In the recent case of [*Mathews v. Eldridge*], the Court set out a “balancing of interests” test to determine the . . . “specific dictates of due process . . .” which included the following three factors: (1) The private interests at stake; (2) The government’s interests involved; and (3) The risk that the procedure will result in error.⁹⁹

99. *Chitimacha Housing Authority v. Martin*, No. 93-0006, 1994.NACH.0000002, ¶¶ 108–111 (Chitimacha Indian Tribal Ct. App. Sept. 1, 1994) (VersusLaw) (citing and quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Little v. Streat*, 452 U.S. 1, 5–6 (1981); *Wolf v. McDonnell*, 418 U.S. 539, 560 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (other footnotes omitted).

Discussing these tribal courts here is not intended as criticism of these courts. In each of these cases, it is clear that the tribal judiciary is attempting to apply a law that is fair and reasonable to the litigants and in accordance with ICRA. These cases exemplify a rational response to the need to find and apply law that meets the courts' requirement to guarantee fundamental fairness to litigants.

A second category of tribal courts are more hesitant to adopt and apply American law but have little choice given the dearth of available tribal customary law. Consider this statement from the Mashantucket Pequot Tribal Court, which chose to presumptively apply American precedents in the absence of customary law that would trump the American precedents:

"The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative" The ICRA is to be interpreted in a manner "consistent with Tribal practice or custom" Here, there is no distinctively Mashantucket Pequot tribal custom or tradition or cultural norm which is offered in support of the amendment to the Board of Review policy. In the absence of a clearly demonstrated tribal custom or tradition, and because many provisions of the ICRA, including the due process clause, are in language nearly identical to the Bill of Rights and state and federal constitutions, the court will apply general federal and state principles of due process¹⁰⁰

Likely, there simply is no relevant Pequot tribal customary law to apply to civil rights claims. Moreover, it is unlikely that the litigants would be able to research, adapt, and apply tribal customary law in the briefing or during oral argument. These cases demonstrate the standard practice of tribal courts in applying and interpreting ICRA, which is the borrowing of American law as a gap-filler, or crutch. In the last decade or more, several tribal courts are moving away from applying American law and making an effort to adapt and adopt tribal

100. *Miller v. Mashantucket Pequot Gaming Enter.*, 2 Mash. Rep. 418, 421 (1998) (quoting *Johnson v. Mashantucket Pequot Gaming Enter.*, 2 Mash. Rep. 249, 255 (1998); *Dugan v. Mashantucket Pequot Gaming Enter.*, 1 Mash. Rep. 142, 145 (1995)) (other citations omitted).

customs and traditions.¹⁰¹ This is an important development that Dean Getches both presaged and recommended in the report.¹⁰²

B. *The Rise of American Indian Tribal Law*

ICRA, along with the accompanying American law that tribal courts so often used to interpret and apply it, is slowly falling by the wayside as tribal courts, litigants, and tribal legislatures rediscover, adapt, and apply tribal customary and traditional law in tribal court cases.¹⁰³ It is a very slow process and, frankly, should not be done without careful consideration and understanding of a tribe's customs and traditions. As addressed below, several tribal courts are moving in this direction, often without even expressing it. Tribal courts that are moving away from applying ICRA can be grouped into three categories. First, there are courts that apply ICRA's provisions (such as "due process") but partially reject American jurisprudence in favor of tribal custom and tradition unless a gap exists. A second group applied ICRA but eventually rejected it and now relies exclusively on tribal customary and traditional law. A final group (which is largely hypothetical at this time) rejects ICRA altogether, finding the basis for fundamental fairness guarantees exclusively in tribal law (either custom or statute).

One might ask why it is important that Indian courts begin to develop their own jurisprudence and discard American law where possible. American constitutional law derives from a text to which Indian tribes are not, and cannot, be a party.¹⁰⁴ Moreover, tribal constitutions are not copies of the federal or state constitutions, and some tribes have no written constitution.¹⁰⁵ Those are merely structural differences. There

101. See generally FLETCHER, *TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA*, *supra* note 89.

102. See REPORT, *supra* note 5, at 86 (reporting that tribal judges hoped for the development of an "Indian common law"); see also *id.* at 110–12 (recommending development of tribal law).

103. E.g., Sekaquaptewa, *Evolving the Hopi Common Law*, *supra* note 91 (reviewing the development of Hopi common law).

104. See *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (Indian tribes were "not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

105. See Robert J. Miller, *Tribal Constitutions and Native Sovereignty* 14 (April 4, 2011) (unpublished manuscript), (available at <http://ssrn.com/>

are cultural differences, too. Even where tribes have incorporated the phrase “due process” into their organic text, the meaning of due process is dependent on the culture of governance in that tribal community.¹⁰⁶ “Equal protection” may mean more (or, unfortunately, less) civil rights protections for women, people with disabilities, and GLBT persons, than under federal or state constitutional law.¹⁰⁷ Finally, differences of scale matter. The United States Constitution governs more than three hundred million people, and state constitutions govern any number from hundreds of thousands to dozens of millions. Most tribal constitutions, and their accompanying governments, govern far fewer people.

1. Partial Rejection of American Jurisprudence in Applying ICRA

More and more, tribal courts are beginning to move away from reliance upon American law as the primary source for interpreting the provisions of ICRA, including due process and equal protection. It is natural to borrow federal and state case law as a gap-filler in interpreting these legal doctrines, especially where the corpus of tribal common law is sparse. However, these tribal courts are aware of the limitations and side effects of American law in tribal justice systems and apply the law sparingly.

- a. *Cheyenne River Sioux Tribal Court of Appeals*

Consider the Cheyenne River Sioux Tribal Court of Appeals. In *High Elk v. Veit*,¹⁰⁸ the court explained how Lakota notions of due process interacted with ICRA in a case involving a garnishment order. The tribal court opinion draws immediately from the due process requirements of ICRA but quickly moves toward discussion of tribal precedents. The tribal judges were wise to resist blind reliance upon state and federal cases involving garnishments. Those cases take into

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106. See Newton, *supra* note 92, at 344 n.238 (noting that tribal courts “need not follow the U.S. Supreme Court precedents ‘jot-for-jot’”).

107. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 432–40 (6th ed. 2011).

108. 6 Am. Tribal Law 73 (Cheyenne River Sioux Tribal Ct. App. 2006).

consideration that trial courts and their administrators deal with hundreds of thousands of garnishment orders a year and that the practical considerations of that administration affect the due process rights of garnishees in a manner that may or may not be similar in tribal court:

Appellants raise a series of objections to the attachment/garnishment order [under] the federal Indian Civil Rights Act of 1968, 25 U.S.C § 1302(8). While some are phrased as procedural irregularities, most of these . . . implicate the due process requirements of notice and hearing. In *Cheyenne River Sioux Tribe Housing Authority v. Howard*, No. 04-008A (Ch. Riv. Sioux Ct. App., Sept. 23, 2005) this Court recently reaffirmed the traditional Lakota values embodied in the term due process of law. Just as Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests, including their property or, as here, rent payments contractually owed to them, that they be made parties to any case or judgment that would affect those interests, and that they have a full and fair opportunity to participate as a party in any hearing on such issues. In the *Howard* case, this Court recently summarized the requirements of due process in a civil context as follows:

This Court has long recognized that basic Lakota concepts of fairness and respect as well as the federal Indian Civil Rights Act, 25 U.S.C § 1302(8), clearly guarantee all parties who appear before the courts of the Cheyenne River Sioux Tribe due process of law Basic to any concept of due process of law in a civil proceeding, such as this eviction case, is receipt of timely notice and the opportunity to be heard and present evidence at a hearing in support of one's case The basic requirements of notice and hearing, which lie at the core of civil due process of law, do not constitute mere formal requirements or hoops that must be surmounted before judgment. Rather, due process involves functional procedural prerequisites designed to assure that every party has a *realistic*

opportunity to be heard in any case affecting their legal rights. Here, Mr. Howard was fighting to remain in the only home he lawfully occupied, a precious and important right, indeed, particularly for a person in Mr. Howard's fragile medical condition, even if he did own the home in question.

Every court of the Cheyenne River Sioux Tribe is bound both by customary Lakota concepts of respect and by the requirements of due process of law protected by the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8), to assure that the parties before them are all afforded due process of law.¹⁰⁹

Here, Lakota traditions do not necessarily supplant ICRA. Instead, they serve as the replacement for what other tribal courts might have used to define and interpret "due process," that is, American law.

The next logical step, although the court and the attorneys practicing before the court may not realize or even desire it, is for tribal courts to recognize that ICRA is unnecessary altogether and that Lakota law should stand alone to protect fundamental fairness.

b. Colville Confederated Tribes Court of Appeals

Similarly, the Colville Confederated Tribes judiciary has recognized the importance of ICRA while limiting its application by taking care to protect and preserve tribal customs and traditions. Colville will not apply American law in interpreting ICRA unless the American precedents are consistent with tribal custom and tradition:

To place ICRA in perspective for this analysis, we note that the Act was enacted to provide those appearing before tribal courts with certain protections from the Bill of Rights while fostering tribal self-government, and not to impose the full Bill of Rights on tribes. Therefore, when applying common law principles based upon the Bill of Rights to civil rights issues arising from ICRA and tribal law, we do so with

109. *Id.* at 77–80 (citing *Dupree v. Cheyenne River Housing Auth.*, 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1988) and *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950)) (other citations omitted).

considerable care. Federal common law doctrine which interprets duties and protections flowing from the United States Constitution and the Bill of Rights did not include in its development, and is not rooted in tribal law, custom and tradition. Therefore, we will examine how the federal courts have handled similar constitutionally-based issues, but because the origins of tribal law differ, any parallels between federal common law and tribal law must be drawn with caution. Accordingly, we will narrowly adopt such common law interpretations when we are fully satisfied they are consistent with tribal law.¹¹⁰

This matter involved tribal criminal sentencing, an area of law uniquely tied to the legal and political culture of the polity. Tribal custom and tradition would seem to be of paramount importance in such cases. Conversely, reliance upon American law would be particularly suspect.

2. Developing Rejection of ICRA

The Navajo Nation and the Hopi Tribe are two tribes that appear to have adopted and applied ICRA for many years, only to later affirmatively reject most aspects of the Act in its common law tradition. Both Navajo and Hopi have a long tradition of developing a tribal common law independent of much reliance upon American law, especially ICRA.¹¹¹ Both of these courts have applied ICRA and occasionally borrowed American precedents in applying ICRA but have lately moved onto an exclusively tribal common law. Navajo's tribal common law is older¹¹² and, thus, will be discussed first.

a. *Navajo Nation Supreme Court*

The Navajo Nation Judiciary has already successfully

110. *Sam v. Colville Confederated Tribes*, No. 93-15379, 1994.NACC.0000002, at ¶¶ 24–25 (Colville Confederated Tribes Ct. App. 1994) (VersusLaw).

111. See generally AUSTIN, *supra* note 87 (study of Navajo common law and jurisprudence); Sekaquaptewa, *Evolving the Hopi Common Law*, *supra* note 91 (study of Hopi common law and jurisprudence).

112. See Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379, 381–87 (1993); see also JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 39–41 (2008) (noting that the Hopi tribal court ordinance dates to 1972).

adopted and applied tribal customary and traditional law in a large and growing body of tribal common law.¹¹³ The Judiciary separated the rights provided by ICRA from tribal rights at an early stage in modern American tribal court jurisprudence.¹¹⁴ In a recent opinion, the Navajo Nation Supreme Court identified the sources of law that it applies when reviewing civil rights cases involving tribal government action, and barely mentioned ICRA:

The Navajo Nation, while lacking a Constitution, has written organic laws which “set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation.” Doctrines of checks and balances, separation of powers, accountability to the People, and service of the anti-corruption principle formed the premise for “The Title II Amendments of 1989” (Title II Amendments) enacted by Navajo Nation Council Resolution CD-68-89 on December 15, 1989, which established our three-branch government. Principles of due process, equal protection, the right to counsel in criminal cases, rights of assembly and petition, the right to bear arms, freedom of religion and other rights closely tracking the United States Bill of Rights are guaranteed by the Navajo Nation Bill of Rights (1986). Judicial fairness and independence and access to the courts are guaranteed by the Judicial Reform Act of 1985. The above laws, in addition to substantive rights found in the Navajo Treaty and broad principles of fundamental fairness in our tribal Fundamental Laws, “set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation,” and are collectively our “fundamental, organic laws.”¹¹⁵

The Navajo legislature adopted its own Bill of Rights in 1967¹¹⁶ and has developed a rich common law of its own decisions interpreting and applying tribal customary and traditional law. In many ways, ICRA is all but irrelevant. But

113. See generally AUSTIN, *supra* note 87 (study of Navajo common law and jurisprudence).

114. See, e.g., *Nez v. Bradley*, 3 Navajo Rptr. 126, 129–30 (Navajo 1982).

115. *EXC v. Jensen*, No. SC-CV-07-10, 2010 WL 3701050, at *12 (Navajo 2010).

116. See Navajo Nation Code Ann. tit. 1, § 1 (2005) (citing Navajo Nation Council Res. CO-63-67, October 9, 1967); AUSTIN, *supra* note 87, at 72.

the Navajo Nation has not adopted a written constitution,¹¹⁷ so ICRA remains a significant foundation of the legal guarantees of fundamental fairness to litigants, if for no other reason than to demonstrate that Navajo rights protections are more generous than those provided in ICRA.¹¹⁸ Navajo jurisprudence goes beyond ICRA in providing fairness to litigants, but ICRA served as an important steppingstone in the process of developing Navajo common law necessary to guarantee fundamental fairness.¹¹⁹

b. Hopi Tribe Appellate Court

Like the Navajo judiciary, the Hopi Appellate Court struggled with how and whether to apply ICRA at all. In cases like *Harvey v. Hopi Tribe*¹²⁰ and *Maho v. Hopi Tribe*,¹²¹ the court appears to have presumed the Act applied. The court now appears to have affirmatively rejected ICRA. In the language of *In re Batala*, the court wrote in a footnote:

In spite of the language of the Indian Civil Rights Act, 25 U.S.C. § 1302(10), the Court said, “[w]e do not decide today, whether contempt of court is the type of criminal offense contemplated by the ICRA to afford the defendant the right to a trial by jury. However, arguments could be made that a right to a jury trial is guaranteed to defendants in criminal contempt cases.” Appellant cites three cases from Hopi case law to argue why the failure of the trial court to apprise him of his right to a jury trial constituted reversible error. . . . The third case, *In the Matter of Sekayumptewa*, et al., No Appellate Number (Hopi Ct.App.1997), outlined rights guaranteed under the Indian Civil Rights Act as potentially applicable to Hopi contempt cases. These rights included the right to a jury trial, subsection 10 of the Act The court in that case did outline due process rights for

117. See Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231 (1989).

118. See AUSTIN, *supra* note 87, at 73.

119. See, e.g., *Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, No. SC-CV-03-10, 2010 WL 4174625, at *4 (Navajo 2010) (citing *Halona v. MacDonald*, 1 Navajo Rptr. 189 (Navajo 1978)) (“Judicial review by tribal courts of Council resolutions is mandated by the Indian Civil Rights Act, 25 U.S.C. § 1302.”).

120. 1 Am. Tribal Law 270, 272 (Hopi App. Ct. 1997).

121. 1 Am. Tribal Law 278, 280 n. 3 (Hopi App. Ct. 1997).

defendants under the Indian Civil Rights Act, 25 U.S.C. § 1302, in contempt cases, but the Hopi Appellate Court has not bound itself to the black letter meaning of that statute. That Act is more instructive than binding for Hopi purposes and used only at the discretion of the Hopi Appellate Court. Language in *Sekayumptewa* supports this interpretation of Hopi authority, saying only that “the section of the Indian Civil Rights Act that *may* apply to contempt proceeding[s] include” Furthermore, there was no question of fact to be decided by a jury in this case even if Appellant was convicted of criminal contempt.¹²²

The court added: “the Hopi Tribe is not bound by the provisions of the Indian Civil Rights Act.”¹²³ However, the Hopi courts still treat ICRA as persuasive authority, as the same opinion notes.¹²⁴

Again like the Navajo, the Hopi judiciary has seemingly rejected ICRA but has apparently done so in dicta. Regardless, it is my opinion that many more tribal courts will be engaging in the same kind of legal analysis about the general applicability of ICRA to tribal governments. Navajo and Hopi courts are leaders in developing tribal common law. It is natural that their experience and success in announcing tribal common law will inspire other courts to do the same. Eventually, it would not be surprising to see more tribal court opinions rejecting the authority of Congress to enact ICRA, especially considering that the Supreme Court rejected federal enforcement of the statute in *Martinez*.¹²⁵

3. Complete Rejection of ICRA

The tribal court grouping in this section remains largely hypothetical. It remains an open question whether the Nottawseppi Huron Band of Potawatomi Indians Supreme Court and other courts will affirmatively reject ICRA, but I suspect more and more courts may address this possibility in the near future. Following the lead of tribal courts like Navajo

122. *In re Batala*, 4 Am. Tribal Law 462, 468 n.13 (Hopi App. Ct. 2003) (citations omitted).

123. *Id.* at 468.

124. *Id.* (“As the *Sekayumptewa* opinion noted, the provisions of the Indian Civil Rights Act *may* apply to contempt cases in the Hopi Appellate Court.”) (emphasis in original).

125. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

and Hopi, newly constituted tribal courts may skip ICRA altogether and find tribal sources of authority to guarantee fundamental fairness to litigants.

a. Nottawseppi Huron Band of Potawatomi Indians Supreme Court

Here, I discuss one tribal court opinion, the first appellate opinion from a new tribal court in Michigan. It never discussed ICRA as a source of relevant authority, even though (at the time) no parallel tribal rights provisions existed.¹²⁶ In this opinion, I and my two colleagues on the bench (Chief Justice John Waubunsee and Associate Justice Holly Thompson) on the Nottawseppi Huron Band of Potawatomi Indians Supreme Court adopted Anishinaabe customs and traditions as a means of forming the basis for guaranteeing fundamental fairness in reviewing government action. We began our analysis with the most basic formulation of tribal custom and tradition, what some might term natural law. Where other tribal courts might have started with ICRA or American constitutional law as the foundation of tribal law, we looked to the Anishinaabe language and the philosophy of the Anishinaabe people:

Eva Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, recently stated:

There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings

126. The Nottawseppi Constitution now provides for limitations on the exercise of governmental powers. See NOTTAWSEPPI HURON BAND OF POTAWATOMI INDIANS CONST. art. VII (2012), available at http://www.nhbpi.com/pdfs/legal/NHBP_Constitution.pdf.

within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community. . . .

The historical record of the Nottawaseppi Huron Band offers examples: [E]very time somebody was sick [in the 1930's], the women would all gather together and they'd send the word around and they'd go there [to the home of the ill member] and they'd clean that place out. They'd wash blankets, wash dishes, cook and just do everything. Take care of the baby and everything. . . .

[*Mino-bimaadziwin*] informs individual Anishinaabe life choices, but also informs the direction of tribal governance. Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, draws the connection between [*Mino-bimaadziwin*] and Anishinaabe legal principles: The four concentric circles in the sky—*Pagonekiishig*—show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* that is the heart of the supreme law of the Anishinaabe. And simply put, that is the meaning of a constitution. . . .

[*Mino-bimaadziwin*] is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental

law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. We again emphasize our holding that the Constitution and tribal code offers little or no guidance on how Article IX elections should be governed, nor is there an enumerated statement of fundamental constitutional rights principles. Today, [*Mino-bimaadziwin*] guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct in administering Article IX elections.¹²⁷

In the *Spurr* opinion, the Nottawaseppi Huron Band Supreme Court could have reached out and applied ICRA, but instead chose to recognize Anishinaabe custom as a basis for the guarantee of fundamental fairness in holding tribal elections.¹²⁸

These cases show increasing and occasionally dramatic departures from ICRA. However, it should be remembered that in each case it appears that the tribal court sought to provide stronger guarantees of fundamental fairness under tribal law than would have been available in applying American jurisprudence in the areas of due process and equal protection.

C. Hypothetical Pitfalls of Rejecting ICRA

127. *Spurr v. Tribal Council*, No. 12-005APP, at 4–6 (Nottawaseppi Huron Band of Potawatomi Indians Sup. Ct. 2012) (quoting Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 39, 47–48); U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, ANTHROPOLOGICAL TECHNICAL REPORT—HURON POTAWATOMI, INC., reprinted in U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, PROPOSED FINDING—HURON POTAWATOMI, INC. 218, 226 (1995); Vanessa A. Watts, *Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin* 77 (2006) (unpublished master's thesis, University of Victoria) (quoting interview by Vanessa A. Watts with Fred Kelly, member of the Onigaming First Nation (December 14, 2005)), available at <http://dspace.library.uvic.ca:8080/handle/1828/2222>.

128. See *Spurr*, No. 12-005APP, at 7 (citing *Crampton v. Election Bd.*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Ct. May 8, 2009); *Bailey v. Grand Traverse Band Election Bd.*, No. 2008-1031-CV-CV, 2008 WL 6196206, at *9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc); *Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. C-006-0398, 1999 WL 35000425, at *2 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Sept. 30, 1999)).

In the report, Dean Getches listed several ways in which federal courts are significantly deferring to tribal courts, including: requiring litigants to exhaust tribal remedies before challenging tribal jurisdiction;¹²⁹ recognizing continuing tribal court authority in Public Law 280 states;¹³⁰ enforcing off-reservation treaty regulations;¹³¹ and enforcing laws against nonmembers after delegation from Congress.¹³² Dean Getches also suggested that quick access to a fair forum was an important strength of tribal justice systems and that ICRA played an important role in guaranteeing fundamental fairness.¹³³

Critics of tribal courts worry that the courts do not offer acceptable protections to litigants—especially to persons—not members of the tribe. Such criticism has sparked a mini-backlash against tribal jurisdiction in Congress.¹³⁴ Rejection of ICRA may fan the flames of those criticisms.

At least some of the justices on the United States Supreme Court in more recent years appear to share that view.¹³⁵ In 2001, Justice Souter authored an opinion deeply injurious to tribal interests in establishing regular civil jurisdiction over nonmembers. His concurrence in *Nevada v. Hicks*,¹³⁶ which quoted Getches's *Indian Courts and the Future*, raised serious concerns about fundamental fairness in tribal justice systems as they adjudicate the rights of nonmembers:

Although some modern tribal courts “mirror American

129. See REPORT, *supra* note 5, at 88 (citing *O'Neal v. Cheyenne River Sioux Tribe*, 582 F.2d 1140 (8th Cir. 1975)). The Supreme Court later approved of the tribal court exhaustion doctrine in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

130. See REPORT, *supra* note 5, at 88–89 (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976)).

131. See *id.* at 89 (citing *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1975); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974)).

132. See REPORT, *supra* note 5, at 89 (citing *United States v. Mazurie*, 419 U.S. 544 (1975)).

133. See *id.* at 89–90.

134. See S. REP. NO. 112-513, at 40–41, 51–55 (2012) (reporting minority views of senators arguing against expansion of tribal court jurisdiction).

135. See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 115–17 (2002) (arguing that the Court sees a “democratic deficit” in tribal governance); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1221 (2010) (surveying tribal civil jurisdiction cases).

136. 533 U.S. 353 (2001).

courts” and “are guided by written codes, rules, procedures, and guidelines,” tribal law is still frequently unwritten, being based instead “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” and is often “handed down orally or by example from one generation to another.” . . . The resulting law applicable in tribal courts is a complex “mix of tribal codes and federal, state, and traditional law,” NATIONAL AMERICAN INDIAN COURT JUDGES ASSN., INDIAN COURTS AND THE FUTURE 43 (1978), which would be unusually difficult for an outsider to sort out.¹³⁷

Justice Souter’s remarks generated an enormous amount of scholarly debate, almost all of it attacking a perceived bias in the Supreme Court against tribal interests or responding to Justice Souter’s concerns.¹³⁸ Interestingly, and relevant to this Symposium, Dean Getches issued a powerful response to Justice Souter in the *Minnesota Law Review*, arguing that the Court was concerned with what he termed “difference”—that is, any court adopting a tradition that differed from the Anglo-American tradition was suspect—and that it was wrong to do so:

In the tribal court jurisdiction cases, the issue was not the specific denial of any fundamental right, but a general concern with difference—the kind of difference that might be expressed with the laws of any other country or, indeed, among states which, in our federal system, may apply their own mix of laws ranging from the common law of England to unique local ordinances. In these cases, however, the Court has treated the matter as if the most powerful factors were the unfamiliarity of the tribal court to the defendant. The Court acknowledged the impact on the tribe’s interests in maintaining reservation health and safety through the exercise of sovereignty over reservation activities but, unlike a traditional conflict of law analysis, gave no weight to the preference for the local law of the place of injury. If the Court’s role in these cases had been to make a conflict of

137. Hicks, 533 U.S. at 384–85 (Souter, J., concurring) (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130–31 (1995)) (other citations omitted); REPORT, *supra* note 5, at 43.

138. See, e.g., Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 407–08 (2007–2008).

law balancing decision, even without applying Indian law principles, it arguably did not do so with a full appreciation of the tribal interests that were at stake.¹³⁹

According to Dean Getches, the Court is concerned with “difference”—and when it comes to nonmembers haled into tribal courts against their will, “difference” makes all the difference.

One could argue that tribal courts walk a fine line when discarding or limiting the utility of ICRA. One could also argue that it does not matter, especially since the Supreme Court seemed to state in a later case that ICRA, merely a federal statute, does not carry the same weight as the United States Constitution and, therefore, provides insufficient protection for nonmembers in tribal court.¹⁴⁰ I have argued that the Supreme Court’s concerns about tribal jurisdiction over nonmembers are largely irrelevant now and will become even more so with time and experience.¹⁴¹ Because increasing numbers of nonmembers are consenting to tribal jurisdiction,¹⁴² the Supreme Court’s jurisprudence lives on borrowed time.

Moreover, the legitimacy of tribal common law to outsiders is of limited importance. In other words, only nonmembers subject to tribal civil jurisdiction and Indians subject to tribal criminal jurisdiction have the right to seek outside review of tribal court jurisdiction (in civil cases)¹⁴³ or review of a criminal conviction.¹⁴⁴ Tribal justice systems must fight an even greater battle first—demonstrating their legitimacy to the tribal membership.

139. David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 346–47 (2001).

140. See *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008) (“Tribal sovereignty, it should be remembered, is ‘a sovereignty outside the basic structure of the Constitution.’ The Bill of Rights does not apply to Indian tribes. Indian courts ‘differ from traditional American courts in a number of significant respects.’” (citations omitted)).

141. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1014–16 (2010).

142. See Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 116, 120 (2012).

143. See *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985).

144. See 25 U.S.C. § 1303. As the law currently stands, only tribal members and other Indians are subject to tribal criminal jurisdiction. See *United States v. Lara*, 541 U.S. 193, 200 (2004); *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

CONCLUSION

ICRA is a creature of Congress. While Congress may have intended that tribal justice systems be the primary interpreter of “due process” and “equal protection” in accordance with tribal customs and traditions, those concepts remain American concepts, not tribal concepts. ICRA has served, and will continue to serve, an important purpose in assisting tribal courts, litigants, and legislatures in providing the legal infrastructure necessary to guarantee fundamental fairness in Indian country. ICRA is a kind of crutch, a placeholder for tribes and tribal courts to lean upon until proper and legitimate tribal law arises to take its place.

That brings us full circle to the great Dean Getches and the remarkable *Indian Courts and the Future*. Dean Getches’s introduction to the report noted that ICRA was a “challenge” to tribal justice systems—one he hoped tribal governments could meet. He wrote about his concerns that federal courts would be skeptical of tribal jurisdiction if tribal courts did not guarantee fundamental fairness to all litigants:

In measuring Indian courts, federal courts are certain to examine acts of Congress, which deal with the operation of tribal judicial systems. The most sweeping and recent of such acts is the Indian Civil Rights Act. Unquestionably, the Act limits the sovereignty of Indian tribes because it insists upon a form of government not necessarily of their own choosing. They must adhere to concepts of due process and equal protection and assure their members a list of substantive rights borrowed from the United States Constitution, which may be alien to their own traditions of government. The familiarity of non-Indian courts with the federal Bill of Rights provides a ready index for evaluating Indian courts—a gauge for their degree of effectiveness as vehicles of preemption of state governmental activity, and of their exercise of tribal self-government. Yet the response of tribes and, significantly, of the federal establishment as their mentor and trustee has not been adequate to fulfill Congress’ mandate and to meet the challenge of ICRA

fully.¹⁴⁵

Dean Getches also worried about the tribal and federal response to ICRA, and he was right to do so, given the alien character of American law to many Indian communities. But he recognized that the federal Bill of Rights was familiar to most Indian people and certainly to Indian court judges. Federal rights could serve as an important guidepost, even if Indian courts eventually adapted their customs and traditions to meet modern needs. Dean Getches recognized that the goal was to develop tribal jurisprudence and common law with an eye toward tribal customs and traditions, and his work put that goal front and center.

145. REPORT, *supra* note 5, at 2-3 (citation omitted).