Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act

Mark D. Rosen
THE INDIAN CIVIL RIGHTS ACT AT FORTY

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Dedication

We dedicate this book to the memory of David H. Getches who devoted his career to seeking justice for American Indian people. His abiding belief in the foundational principles of federal Indian law and his determination to see those principles realized remain an inspiration to scholars and advocates in the field.
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MARK D. ROSEN

The United States Constitution does not apply to tribal governments.\(^1\) Concerned with potential abuses of power by the tribes, Congress imposed statutory obligations on tribal governments in the Indian Civil Rights Act (ICRA) in 1968 that track almost verbatim the language of the Bill of Rights by guaranteeing (for example) the "free exercise of religion" and "freedom of speech."\(^2\)

Although the ICRA is federal law, tribal courts—not federal courts—have exclusive subject matter jurisdiction over virtually all ICRA claims.\(^3\) Moreover, the United States Supreme Court has ruled that tribal courts need not interpret the ICRA's provisions as the United States Supreme Court has interpreted ICRA's sister terms in the Bill of Rights.\(^4\) Instead, tribal courts may interpret the ICRA in light of tribal needs, values, customs, and traditions. More than this, each tribe is allowed to craft its own interpretation of the ICRA in light of its own tribe's unique needs, values, customs, and traditions.

In short, there are multiple authoritative interpreters of the Indian Civil Rights Act. Due process means one thing in Manhattan, something else on the Navajo Reservation according to Navajo tribal courts, and yet another thing within the Ho-Chunk nation according to the Ho-Chunk tribal courts.

How well—or poorly—does this regime of multiple authoritative interpreters operate? This chapter provides a set of tools and a framework for assessing ICRA's operation. The tools permit an assessment of the nature and extent of tribal court deviations from federal constitutional doctrines. The framework identifies the potential benefits and costs of ICRA's regime of multiple authoritative interpreters. The chapter then applies its tools and framework to a study I have undertaken of every tribal court decision interpreting ICRA that was reported in the Indian Law Reporter over a thirteen-year period.
The principal potential cost of ICRA’s regime is the risk of underdetermining the very protections the ICRA was intended to provide. This chapter’s analysis suggests that this danger has not materialized; rather, tribal courts for the most part have interpreted the ICRA in good faith, often requiring significant changes in tribal governmental practices and announcing extensive individual rights.

The primary benefit of ICRA’s highly decentralized system of authoritative legal interpretation is the promise of allowing the diverse Native American communities the opportunity to maintain their distinctive cultures. Ample evidence indicates that this goal has been realized. Further, even though tribal courts provide independent interpretations of the ICRA, the courts have deeply assimilated many Anglo constitutional values. The tribal assimilation of Anglo values has not resulted in the displacement of Indian values, but rather in a cultural syncretism of Anglo and tribal values.

More generally, allowing diverse communities the opportunity to authoritatively construe a shared text holds out the possibility of creating commonality without compromising homogeneity. It is a method for simultaneously coordinating a diverse citizenry and championing heterogeneity. The reported tribal case law suggests that the ICRA has accomplished these ends to a considerable degree.

The first part of this chapter presents the tools and framework for evaluating the ICRA’s regime of multiple authoritative interpreters. The second part details the study’s methodology. The third part applies the tools and framework to the reported cases. The final part provides a brief conclusion.

**The Tool**

A tribal court can take five possible approaches in its interpretation of ICRA’s terms. Clarifying each approach is important for several reasons. Recognizing the five possible approaches helps to identify patterns that can bring order to the tribal case law. Further, each approach is capable of producing a distinctive range of variations from ordinary federal doctrine. Finally, each approach presents distinctive benefits and potential risks.

**A simple model for describing constitutional doctrine.** The five approaches to past Supreme Court pronouncements can best be appreciated in relation to a simple model I’ve developed that describes constitutional doctrine. Understanding the model, in turn, requires appreciation of the well-known jurisprudential distinction between “rules” and “standards.” Standards are legal edicts that “describe a triggering event in abstract terms that refer to the ultimate policy or goal animating the law,” whereas rules are legal edicts that “describe the triggering event with factual particulars or other language that is determinate within a community.”

For example, “drive safely” is a standard, whereas “maximum speed 55 miles per hour” is a rule.

Now to the model. All ICRA provisions take the form of standards that require active interpretation to identify concretely the actions that are required, permitted, or proscribed in particular circumstances. The interpretive process can be usefully conceptualized as involving three steps.

The first step is identifying the provision with a larger “goal,” that is, a broad-stroke description of what the provision attempts to accomplish. For example, the goal of the Fourth Amendment has been identified as protecting various “personal and societal values,” including a “right to privacy.” It is easy to forget that the goal is almost always a nonaxiomatic translation of the constitutional provision, and instead to view the contemporarily understood goal as inevitable. But this is not so. Indeed, Supreme Court justices frequently disagree as to what a particular constitutional provision aims to accomplish, and doctrinal changes as to what is the goal of a constitutional provision are not at all unusual. Understanding that the goal is part of the process of doctrinal development is vital to appreciating the respects in which a tribal court’s ICRA holding may deviate from ordinary constitutional doctrine.

The second step in the interpretive process is the creation of a “legal test” to determine whether the identified goal is met. This second step occurs because the goal is inevitably too abstract and consequently unworkable for the judiciary’s institutional need to have a shorthand method for decision-making that identifies as legally relevant only a subset of the infinite facts that characterize any given circumstance. The test almost always includes one or more standards. For example, the Supreme Court has translated the aforementioned Fourth Amendment goal into a legal test composed of several standards that ask whether “the individual manifested a subjective expectation of privacy in the object of the challenged search,” and whether society is “willing to recognize that expectation as reasonable.” This legal test helps to particularize the goal but, by deploying standards such as “reasonable” and “expectation of privacy,” still leaves ample uncertainties as to what concretely satisfies the test.

Step three describes what occurs to the legal test’s standard over time. As it is applied over a series of cases, the standard almost always becomes increasingly rule-like. This change occurs because cases, by their very nature, are disputes that involve particular facts, and as the cases are decided they become showcases of what are concrete matters matter the standard means. I dub this process the “rulification of the standard,” and will call step three’s product a “rulified standard.” For example, do people have a “subjective expectation of privacy” in open fields? The Supreme Court has said no. In curtilage surrounded by a high double fence? Not from a naked-eye observation taken from an aircraft, said the Court.
Five possible approaches to case law. The model of doctrinal development permits us to see that tribal courts can take five possible approaches when they construe the ICRA. First, a tribal court can ignore altogether the federal case law and proceed to construe the provision wholly on its own. Call this the "tabula rasa" approach. In Navajo Nation v. Crockett, the tribal court looked to Navajo common law rather than to American case law to define the contours of free speech. The court noted that a Navajo has a "fundamental right to express his or her mind by way of the spoken work and/or actions." But this right is limited insofar as there is "freedom with responsibility." The Navajo concept of responsibility can impose permissible content limitations. For example, "on some occasions, a person is prohibited from making certain statements, and some statements of reciting oral traditions are prohibited during specific times of the year." Responsibility can also impose limits with respect to style of presentation; thus "speech should be delivered with respect and honesty." Finally, Navajo responsibility can impose "another limitation on speech, which is that a disgruntled person must speak directly with the person's relative about his or her concerns before seeking other avenues of redress with strangers." In the employment context, for example, the Crockett court held that an employee dissatisfied with his supervisor "should not seek to correct the person by summoning the coercive powers of a powerful person or entity," but instead first must engage in the process of "talking things out" with his superior. As Crockett shows, and as intuition would suggest, tabula rasa can create doctrines that are virtually unrecognizable to students of American constitutional law.

The remaining four approaches (that is, approaches two through five) involve varying degrees of engagement with, and adoption of, the federal case law.

The second approach is the polar opposite of tabula rasa; the tribal court completely adopts the federal doctrine. Call this "incorporation." Does a tribal court's decision to incorporate federal law mean that the tribal court was superfluous? Sometimes yes, but generally no. As to the sometimes yes: tribal courts sometimes adopt federal case law without explanation or reason—what I'll label "stock incorporation." Stock incorporation is the mode of interpretation under which tribal courts provide the least "value added" insofar as they appear to act just as a federal court would. More frequently, however, tribal courts actively fit the federal doctrine to the tribal context—what I call "fitted incorporation." This mode can take several forms. First, incorporation frequently occurs only after the tribal court has established that the federal approach fits well within the tribal context, a determination that an ordinary federal court might not be capable of making. Second, the tribal court that incorporates a federal doctrine that is not developed far beyond a standard still has to apply the standard to the tribal context, and the tribal court likely is far better suited to undertake this central part of legal interpretation than is a general federal court. Third, tribal courts that incorporate may conceptualize the federal approach as consistent with or derivable from tribal culture and values, and this may have important social meaning to the tribal community, which would be lost if the adjudication had taken place in a federal court. Although the federal legal test is adopted in all three instances of fitted incorporation, the tribal court plays an important role in bringing together tribal and Anglo traditions.

The remaining three approaches (approaches three through five) reject (to varying degrees) federal doctrine as ill-suited to the tribal context. Under the third approach, the tribal court adopts the federal standard but disregards the rufication of the standard. Instead, the tribal court applies the standard in a manner that is closely tailored to the context—hand. Call this "tailoring." This approach is well illustrated by the case of Colville Confederated Tribes v. Bly, which concerned due process protections enjoyed by persons who had been arrested without a warrant. Federal case law had established that constitutional due process requires that defendants arrested without a warrant be brought "promptly" before a judge, which meant forty-eight hours absent exceptional circumstances. The tribal court accepted the Supreme Court's goal and standard, but not its rufication standard. It invoked the standard that there be a "reasonable accommodation of the competing interests," but ruled that the tribal ordinance's seventy-two hour requirement satisfied the "promptly" requirement. The tribe's requirement obviated the need to hold weekend court for Friday night arrests, and "[t]he cost to the Tribes for this procedure would seem to outweigh the extra 24 hours for a defendant."

The fourth interpretive technique is to adopt the federal courts' description of the goal but to reject the federal courts' standard. Call this method "restandardizing." For example, in Hopi Tribe v. Lonewell Scott, the Hopi tribal court accepted that the goal of due process's void for vagueness doctrine is to ensure that persons have fair notice of what conduct is criminally sanctionable. But instead of deploying the ordinary standard—an objective test that looks to the mere "possibility of discriminatory enforcement" and lack of notice—the court applied a subjective test and analyzed how the Native American community in question understood the ordinance and how the tribal authorities had applied it.

The fifth (and last) approach is to replace the goal identified by the Supreme Court. Call this "retooling." An example of retooling can be seen in Downey v.
Bigenus, where the Navajo Supreme Court decided that the goal of the jury right was not only to preserve litigants’ rights but also to advance the tribal community’s interest in “participatory democracy,” that is, to participate in law making and law application. This example provides an instance of retargeting because the United States Supreme Court’s stated goal behind Sixth and Seventh Amendment jury rights concerns the rights of the litigant and the integrity of the legal system, not the rights of jurors to participate in government. Retargeting of the jury right led the tribal court to create a new jury procedure whereby the jury was empowered to direct questions to witnesses.

All that remains is the definition of a few more terms that cut across the five approaches. Under all approaches except for tabula rasa, the tribal court adopts federal case law, and under fitted incorporation, tailoring, restandardizing, and retargeting, the tribal court also adopts the federal law to the tribal context. I will refer to the last set of interpretive approaches collectively as “adapted adoption.” Finally, because tribal courts sometimes cite other tribal court opinions as precedent, distinguishing between “subjective” and “objective” adapted adoption is important. “Subjective adoption” refers to cases where the tribal court itself looks to federal case law and either tailors, restandardizes, retargets, or incorporates. “Objective adoption” refers to a tribal court’s de facto adoption of the federal doctrine without its having cited to federal law (as, for instance, when the tribal court cites to tribal case law as precedent that itself utilized subjective adoption).

To summarize, the five approaches that a multiple authoritative interpreter can take can be mapped onto the model of interpretation as follows:

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<th>Model of Interpretation</th>
<th>Five Approaches to Federal Case Law</th>
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<td>ICRA Provision</td>
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<tr>
<td></td>
<td>(1) Tabula Rasa</td>
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<td>(2) Re-Targeting</td>
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<td>(3) Re-Standardizing</td>
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<td>(4) Tailoring</td>
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<td>(5) Incorporation</td>
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Comparing the five approaches. Of the five approaches, tabula rasa and retargeting afford the potential for most radically departing from constitutional doctrines. After all, incorporation, tailoring, and restandardizing accept the goal identified by the Supreme Court as the principle behind the ICRA provision; what drives tailoring and restandardizing is simply the view that realizing the goal in the context-at-hand requires a deviation from what ordinarily is constitutionally required in federal courts, permitted or proscribed. By contrast, retargeting recasts the goal. Tabula rasa allows for this recasting as well. Incorporation self-evidently leads to the smallest deviation—none—from the ordinary federal case law.

The differences between tabula rasa and retargeting vis-à-vis deviating from constitutional doctrine are subtle. Formally, retargeting provides the same opportunity to alter the goal as does tabula rasa. In practice, however, tabula rasa may allow greater opportunity for deviation than does retargeting. Because retargeting is performed in relation to the federal case law, the goal identified by the Supreme Court, even though it is rejected by the tribal court that retargets, may circumscribe the range of imagined alternatives. To the extent that a tribal court could really approach an ICRA provision without preconceived notions provided by federal case law—an uncertain possibility to be sure, and something increasingly less certain as tribal courts are increasingly populated by people who have received law degrees from American schools—the tabula rasa approach is not so limited. But it still is possible, of course, particularly where tribal judges are religious leaders rather than lawyers.

Though more limited than retargeting and tabula rasa with regard to creating deviations, tailoring and restandardizing still can create significant departures from the ordinary requirements in federal courts. This can be most dramatically illustrated by considering tailoring, the more limited of the two methods (given that it accepts more of the teachings of federal case law as compared to restandardizing). Tailoring can create immense deviations from what is ordinarily permitted or proscribed. The magnitude of the departure depends on the standard and on how community-specific the court is willing to tailor. For example, tailoring has been utilized to uphold prior restraints in select places in the United States.

The Framework

We can now proceed to generating a framework for evaluating tribal courts’ interpretations of the Indian Civil Rights Act.

Potential benefits. There are three core benefits to the ICRA’s regime of multiple authoritative interpreters. First, it increases tribes’ powers of self-governance. Second, it permits variations in governmental structures and accordingly extends the possible range of institutional diversity. Third, the ICRA’s regime of multiple authoritative interpreters may enable communities to flourish that otherwise might not be able to insofar as some tribal communities’ self-definition may turn on their government’s having the power to govern themselves in a manner that would not be compatible with federal constitutional requirements.
Potential costs. The principal potential cost is that permitting tribal courts to construe the ICRA’s provisions independently might subvert the very protections that the ICRA was intended to provide in the first place. Call this the cost of “under-protection.”

It is difficult as an a priori matter to identify, however, what substantive interpretations constitute under-protection. The most obvious candidate—that any variation from what is constitutionally required in general society—is insupportable on both doctrinal and normative grounds. Doctrinally, more than thirty years ago the Supreme Court expressly held that the ICRA’s provisions need not have the same substantive meanings as their sister terms in the Bill of Rights.28 The logic behind this determination is that the ICRA was intended to accomplish two goals that are in tension with one another: protecting the rights of persons who enter Indian country by imposing limits on tribal governments, on the one hand, while preserving “Indian self-government” and the “tribe’s ability to maintain itself as a culturally and politically distinct entity.”29 On the other. Over the past thirty years Congress has considered amending the ICRA many times to respond to the Martinez decision, but at no point has it suggested that this aspect of the case should be statutorily overruled. So, as a doctrinal matter, tribal court deviations from Bill of Rights jurisprudence do not on their own mean that the ICRA provisions have been under-protected.

As a normative matter, rather than undermining the protections that the ICRA’s quasi-constitutional provisions are intended to provide, tribal courts’ doctrinal variations may actually be necessary to fully realize the foundational liberal commitments materialized in the ICRA. Elsewhere I have argued at length that foundational liberal commitments found in liberal constitutions may demand the accommodation of (some) communities that have what may be termed “illiberal” values.40

In the end, identifying what variants from ordinary constitutional doctrines are normatively acceptable requires recourse to such “thick” political theory. Nonetheless, this chapter will not draw directly on this thick theory, but instead will review tribal court deviations on an intuitive, inductive level. Why? First, as is the case with all thick theories, the particular theory I have propounded rests on nonaxiomatic grounds that not everyone would accept.41 Because this chapter's empirical findings are relevant even to those who do not accept my thick political theory, I think it preferable to present my findings in a manner that does not presume the reader’s agreement with it.

Second, the inductive approach alone can, at the very least, defeat a potentially devastating threshold objection that can be leveled at the ICRA’s regime of multipl authoritative interpreters. One may think that ICRA’s protections will be undermined by granting authoritative interpretive power to the very institutions (i.e., tribal governments) that ICRA aims to constrain. But stressing such skepticism is the fact that the tribal governments in the main strongly opposed ICRA’s enactment.42

Yet this chapter’s analysis dispenses of this challenge by showing that tribal courts have engaged in what might be termed “good faith” interpretation of the ICRA. Such good-faith efforts admittedly are necessary, but not sufficient, condition to ensure acceptable under-protection costs. But establishing tribal courts’ good-faith interpretation of ICRA is a sufficiently significant demonstration in the course of a single book chapter. Once again, fully establishing the extent to which ICRA has been under-protected requires recourse to a thick political theory, something beyond the scope of a single chapter.

### METHODOLOGICAL CONSIDERATIONS

This part provides background information that is essential to understanding the third part's empirical review of the ICRA case law. The first section, on tribal courts, explains important information about tribal courts. Subsections on the structure of tribal courts and the role of the tribal judiciary discuss the data relied upon and the study’s methodology.

**Tribal Courts**

Because tribal courts are the institutions that construe and apply the bulk of the ICRA’s provisions, understanding ICRA’s implementation requires an understanding of the tribal courts themselves.

**Structure of tribal courts.** Adjudication in Indian country takes place in either tribal courts or Courts of Indian Offenses. Courts of Indian Offenses, frequently called “CFR Courts,” are established and run by the Bureau of Indian Affairs. Tribal courts are adjudicatory bodies created either by tribal constitutions or by tribal legislative bodies.

Lacking constitutionally mandated structure and forms, tribal court systems are extraordinarily diverse, with approximately 130 entities in the United States.43 The Navajo Nation, for example, has seven district courts, a children’s court, a peacemaker court within each district,44 and an appellate court called the Navajo Nation Supreme Court. Some tribes, such as the Chickasaw Nation, the Choctaw Nation, the Pueblo of Sandia, and the Pueblo of Tohono, do not have appellate courts. In some tribes, the tribal council—the body that enacts tribal legislation—functions as the appellate forum. In many of the pueblos in New Mexico, the tribal leader functions as tribal judge. Finally, many tribes belong to intertribal court and appellate systems. For example, the Intertribal Court of Appeals consists of the Crow Creek Sioux Tribe, the Sisseton-Wahpeton Sioux Tribe, the Rosebud Sioux Tribe, the Three Affiliated Tribes, and the Omaha Tribe.45 Tribal courts also vary according to the sizes of the tribes, their reservations’ general populations, their caseloads, their wealth and resources, their traditions, and the tribunals’ longevity.46
The role of the tribal judiciary. Notwithstanding the differences among tribal courts, an important commonality is that they are institutions that independently review the limits on tribal government imposed by the Indian Civil Rights Act. Indeed, assumption of this function is a mandate of federal law. When it ruled in Martinez that federal courts were generally unavailable to hear ICRA claims, the Supreme Court also stated that tribes must provide forums “to vindicate rights created by the ICRA.” Consistent with this assertion, tribal courts have almost unequivocally found that efforts by tribal council members to exert “undue influence” on them would violate the ICRA’s due process guarantees.

A potential doctrinal obstacle to tribal courts vindicating ICRA rights is the doctrine of tribal sovereign immunity. Martinez specifically found that the ICRA did not waive tribal sovereign immunity. Although this at first might seem to be odd with Martinez’s other holding that tribal courts must provide forums to vindicate ICRA rights, it should be recalled that the most commonly employed claims asserted against federal and state governments to vindicate civil rights claims—Bivens and Section 1983 claims—also assume that governments have not waived sovereign immunity. These federal claims typically yield prospective injunctive relief or damages against individual government officials who have acted beyond the scope of their duties. Even though damage claims against the federal and state governments themselves typically are unavailable on account of sovereign immunity, Bivens and Section 1983 claims are widely viewed as providing effective checks on governmental power.

So, too, with Native American tribes. Many tribal courts have held that the ICRA does not waive tribal sovereign immunity but have allowed prospective injunctive relief or damages where tribal officials act beyond the scope of their duties. The success of Bivens and Section 1983 claims in checking governmental abuses means that the ICRA’s same structure of remedies need not interfere with the deployment of ICRA to protect rights in keeping with Martinez’s charge.

Data

The study’s greatest limitation is the incomplete body of reported case law from which it was able to draw. Most tribes do not publish their tribal court opinions, and the most comprehensive reporter of tribal court decisions, the Indian Law Reporter, typically publishes no more than one hundred decisions per year that come from about twenty-five tribes. Further, the Indian Law Reporter does not publish all cases that are submitted to it by tribes. For these reasons, the reported case law is selective, rendering impossible any effort to generalize about what is happening in Indian country. At the very least, though, the data provides a concrete understanding of what is possible within the ICRA regime. To the extent that favorable patterns emerge from the limited data set available, it is advisable to institute information-gathering changes in the law (like funding and requiring the publication of tribal court decisions) that illuminate what really is occurring across tribal courts rather than to draw negative conclusions on the basis of anecdotal evidence.

Evaluting Tribal Courts' Interpretations of the Indian Civil Rights Act

Methodology

Eschewing reliance on indices, this study examined every published tribal court decision reported in the Indian Law Reporter over the thirteen-year period, from 1986 to 1998 (along with five reported cases from 1999). The study only takes into account cases in which some substantive provision of the Indian Civil Rights Act or analogous provisions in tribal constitutions was construed. Thus, the study does not include the many opinions that dealt exclusively with important non-substantive background legal issues such as sovereign immunity, the nature of the relief (injuries as opposed to damages, for example), and the like; nor does the study consider cases where the ICRA is simply mentioned but not substantially analyzed. In total, there were 193 reported cases, in which 248 claims were pressed.

The study does not distinguish between cases interpreting ICRA provisions or tribal constitutional provisions. This method merits some explanation. Nearly all tribes have tribal constitutions with provisions that verbatim track the ICRA and the Bill of Rights, and these tribal constitutional provisions frequently are relied upon by litigants in tribal courts in conjunction with ICRA and, sometimes, are the only provisions invoked by litigants. Though important technical differences exist between claims based on ICRA and on a tribal constitution, these differences are not relevant for purposes of this article’s study. The legal claims analyzed in this chapter all originate from the Anglo world, regardless of whether their source is ICRA or the federally drafted tribal constitutions. Further, what a claim under either ICRA or a tribal constitution means is determined solely by tribal courts, and neither is reviewable by a federal court. A tribal court’s interpretation of due process under the tribal constitution accordingly sheds much light on how tribal courts interpret Anglo jurisprudential concepts. Consequently, this article does not differentiate between claims based on the ICRA and those based on tribal constitutions.

EMPIRICAL STUDY OF INDIAN CIVIL RIGHTS ACT CASE LAW

At last, the empirical study. The first part examines the ICRA case law from the vantage point of determining whether the ICRA has achieved the potential benefits associated with a regime of multiple authoritative interpreters. The second part analyzes the case law to assess if tribal courts have under-protected the ICRA.

Testing the Framework’s First Criteria: Potential Benefits

The framework’s first set of criteria aims to assess whether ICRA has achieved its potential benefits of extending possibilities for self-governance, expanding the range of legal and institutional options, enabling idiosyncratic but valuable communities
to flourish, and firing the legal imagination. Ample evidence points to the affirmative, on the basis both of the interpretive canons regularly used by tribal courts and the courts' substantive holdings.

**Tribal interpretive canons.** Consistent with the license provided by the Supreme Court in *Martinez*, tribal courts have recognized that the ICRA's provisions need not be interpreted as having their sister terms in the Bill of Rights. As one tribal court has put it, "[w]hen analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian Tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law, upon which the United States' notions of due process are founded."65 The tribal court in *Plummer v. Plummer*66 similarly noted that "due process protections are a product of moral principles, and our own morality and tribal customs frame such principles in the Navajo way." And the court in *Ponca Tribal Election Board v. Snake*67 observed that "[w]hen entering the arena of due process in the context of an Indian tribe, courts should not simply rely on ideas of due process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government."68 At the same time, tribal courts are not unwilling to consult federal case law. For example, the very next sentence in the *Snake* opinion states, "[i]t is not to say that the general concepts of due process analysis with regard to state and federal governments are wholly inapplicable to Indian governments."69

**Identical outcomes.** Achieving the benefits of community-building and self-governance does not mean that tribal courts must interpret the ICRA differently than federal courts have understood the Bill of Rights. Self-governance requires that the tribe has the power to self-govern, but on its own implies nothing about the substance of the governing policies. Likewise, community-building can be advanced by tribal court decisions that deploy tribe-specific values and approaches that, at the end of the day, arrive at the same outcomes that a federal court likely would have come to.

In relation to these ideas, consider the case of *Atsitty v. District Court or the Judicial District of Window Rock*.65 At issue was whether applicants for housing services on the Navajo Reservation had sufficient property interest to assert due process claims that the housing services department's procedures were inadequate. The tribal court engaged in tailoring, adopting the federal standard that a claimant must have a "legitimate claim, rather than a mere unilateral expectation to the benefit." But instead of using the legal test developed by federal courts—which required an examination of the statutes and policy guidelines to determine whether a claimant has the requisite legitimate claim to the benefit—the tribal court defined "legitimate claim" by way of reference to the Navajo concept of *k'e*. The Court explained that *k'e* concerns "one's unique, reciprocal relationships to the community and the universe." *K'e* frames the Navajo perception of moral right, and therefore this court's interpretation of due process rights.66 *K'e* promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony. *K'e* stresses the duties and obligations of individuals relative to their community. The importance of *k'e* to maintaining social order cannot be overstated. In light of *k'e*, due process can be understood as a means to ensure that individuals who are living in a state of disorder or disharmony are brought back into the community so that order for the entire community can be reestablished.

*K'e* therefore required the court to examine the Navajo doctrine of "distributive justice."

Distributive justice is concerned with the well-being of everyone in a community. For instance, if I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives. This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all. Distributive justice requires sharing of Navajo Nation resources among eligible applicants.

Applying these principles to due process, the court then ruled that "[i]f the respondents are eligible for receiving governmental benefits, and although they are mere applicants, they have a sufficient property interest under Navajo common law to assert due process claims."64 Even though a federal court would likely have reached the same conclusion had it applied federal doctrines,65 that the tribal court concluded as it did by reference to its tribe's particular cultural values is significant vis-à-vis both self-governance and community-building. Tribal court independence in interpreting the ICRA affords tribes the opportunity to treat the narratives that reflect their self-understandings (such as *k'e* and Navajo distributive justice) as law, thereby gaining for their communities the socializing and other benefits that law peculiarly affords.66

**Variant outcomes.** Frequently, community-building is viewed as requiring outcomes that vary from what would have been obtained in ordinary federal courts under ordinary federal doctrines. Here are some examples.
(1) Due process and respect for tribal leadership. At issue in *Coharie Confederated Tribes v. Bayeff* was whether due process requires the probable cause determination following a warrant arrest to be made by a judge, or whether it could be made by the prosecutor. Federal law requires that such determinations be made by a judge. A Tribal ordinance provided that “[w]here state law … does not conflict with the Tribal Code, the Tribal Court may resort to and enforce any state statute within tribal jurisdiction.” No provisions of the Tribal code directly governed Stepetin’s actions, but state law criminalized them. The question before the tribal court in *Steptin v. Negiually Indian Community* was whether the ordinance’s incorporation of state law was void for vagueness under ICRA’s due process guarantee. A majority of the tribal court answered in the affirmative. Deploying stock incorporation, the tribal court held that “[t]he principle underlying the vagueness doctrine is that no one is to be held criminally responsible for an act which he or she could not reasonably understand to be prescribed.” Even though “[a]ny reasonable person should know this type of conduct is prohibited in any community … the issue is not whether [defendant] knew this conduct was wrong, but whether he knew it was a crime.” The incorporation provision did not meet this test. The dissent in *Steptin* spotlights the connection between variations from ordinary doctrines and community well-being. The dissent criticized the majority for “ignoring the internal dynamics of the tribal community.” Rather than importing the ordinary federal legal test, the dissent restated the rule. Criticizing the majority’s conclusion that criminal prohibitions had to appear in written statutes, the dissent argued that “traditionally, for a member of what is now the Negiually Indian Community, there was no difference between wrongful conduct and that which was socially sanctioned.” Further, it did not matter whether the source of the tribal member’s knowledge was a written prohibition or an oral tradition. Accordingly, the rule for ICRA due process purposes should follow the traditional Negiually approach, for the ICRA is to be construed “in the context of tribal traditions” and in view of the “cultural expectations and the dynamics of the tribal community.” Applying the restated standard in the context—of a vehicle unsecured by probable cause—the dissent concluded that the defendant had the requisite actual knowledge that his behavior was wrong. Moreover, the dissent forcefully argued that the majority’s approach harmed the community’s well-being. The majority’s rule rewarded a defendant’s factually false claim that he lacked notice, thereby interfering with the “high value on telling the truth and on the admission of fault by a wrongdoer” valued by the tribal community. Moreover, the majority’s rule hindered the “correction of the wrong conduct and/or recompense for its consequences” that is “necessary in order for the wrongdoer to be taken back into the fold of the tribal community. To allow an offender to go unpunished for obvious wrongdoing is destructive to the social health of the tribal community.”

(3) Void for vagueness, honesty, and the integration of wrongdoers back into the community. A man named Stepetin had driven his truck at high speed on a gravel road close to pedestrians, injuring no people, but killing a dog. A Tribal ordinance provided that “[w]here state law … does not conflict with the Tribal Code, the Tribal Court may resort to and enforce any state statute within tribal jurisdiction.” No provisions of the Tribal code directly governed Stepetin’s actions, but state law criminalized them. The question before the tribal court in *Steptin v. Negiually Indian Community* was whether the ordinance’s incorporation of state law was void for vagueness under ICRA’s due process guarantee. A majority of the tribal court answered in the affirmative. Deploying stock incorporation, the tribal court held that “[t]he principle underlying the vagueness doctrine is that no one is to be held criminally responsible for an act which he or she could not reasonably understand to be prescribed.” Even though “[a]ny reasonable person should know this type of conduct is prohibited in any community … the issue is not whether [defendant] knew this conduct was wrong, but whether he knew it was a crime.” The incorporation provision did not meet this test. The dissent in *Steptin* spotlights the connection between variations from ordinary doctrines and community well-being. The dissent criticized the majority for “ignoring the internal dynamics of the tribal community.” Rather than importing the ordinary federal legal test, the dissent restated the rule. Criticizing the majority’s conclusion that criminal prohibitions had to appear in written statutes, the dissent argued that “traditionally, for a member of what is now the Negiually Indian Community, there was no difference between wrongful conduct and that which was socially sanctioned.” Further, it did not matter whether the source of the tribal member’s knowledge was a written prohibition or an oral tradition. Accordingly, the rule for ICRA due process purposes should follow the traditional Negiually approach, for the ICRA is to be construed “in the context of tribal traditions” and in view of the “cultural expectations and the dynamics of the tribal community.” Applying the restated standard in the context—of a vehicle unsecured by probable cause—the dissent concluded that the defendant had the requisite actual knowledge that his behavior was wrong. Moreover, the dissent forcefully argued that the majority’s approach harmed the community’s well-being. The majority’s rule rewarded a defendant’s factually false claim that he lacked notice, thereby interfering with the “high value on telling the truth and on the admission of fault by a wrongdoer” valued by the tribal community. Moreover, the majority’s rule hindered the “correction of the wrong conduct and/or recompense for its consequences” that is “necessary in order for the wrongdoer to be taken back into the fold of the tribal community. To allow an offender to go unpunished for obvious wrongdoing is destructive to the social health of the tribal community.”

(4) Novel doctrines and the value of self-governance. Several tribal courts have designed novel legal doctrines to advance the tribal value of self-governance. Utilizing the jury right, the case of *Downey v. Bigman* developed limitations on the
powers of tribal judges to disregard jury findings. The court grounded its holding in tribal customs concerning not only the defendant's rights but also the community's interest in participating in government. In so doing, the tribal court engaged in retargeting insofar as the goal behind the jury right in American constitutional law is to protect the defendant and the integrity of the judiciary, not to provide a forum for self-government.46

Consulting tribal tradition, the *Bigman* court first noted that juries are a "modern expression of our longstanding legacy of participatory democracy," that is, "the ability of the people as a whole to make law":

Navajo participatory democracy guarantees participants their fundamental right to speak on an issue, and discussion continues until the participants reach consensus. In this sense, decisions are a product of an agreement among the community rather than a select few. Status, wealth, and age are not determinants of whether a person may participate in the decision-making process. Furthermore, no one is pressured to agree to a certain solution, and persuasion, not coercion, is the vehicle for prompting decisions. Juries, said the court, are a continuation of the tradition of "community participation in the resolution of disputes through deliberation and consensus."67 Participation as a juror is a part of community self-governance by interpreting and executing community laws. These tradition-based principles led the *Bigman* court to adopt strict limits on a tribal court's ability to overturn a jury verdict.68 They also led the court to create a wholly novel jury procedure under which jurors may "ask questions of the witnesses during trial," so that the jury would be "more reflective of Navajo participatory democracy."69

The tribal court in *Rough Rock Community School v. Navajo Nation*69 similarly relied on both tailoring and restandardizing to advance the value of self-governance. It struck down due process grounds a tribal ordinance that limited school board candidates to persons who had a "demonstrated interest, experience and ability in Educational Management."71 The tribal court first held that there exists a Navajo "higher law," akin to "the Anglo concept of natural law," that can be found in "Navajo customs and traditions that are fundamental and basic to Navajo life and society." Determining that Navajo higher law guarantees Navajos the "political liberty" to participate in government, the tribal court then tailored when it ruled that participation is a protected liberty under the ICRA's due process clause. The court then restandardized, looking to tribal traditions and concluding that laws affecting liberties derived from "higher law" must have "ascertainable standards."72 The court's novel standard reflected fundamental Navajo values: the absence of "objective" standards "delegate[s] unregulated discretion which could lead to manipulation and abuses of authority. Navajo thought deplores abuses of authority because of the consensual and egalitarian principles of governance."73

(5) Variations across tribes. Finally, tribal courts create non-uniformities vis-à-vis not only federal law but also other tribes. Thus, although tribes sometimes cite to the opinions of the courts of other tribes,74 most frequently they cite only to case law from their own tribe's courts. When citing to other tribes' courts, moreover, they recognize that these opinions are not binding authority75 and that they can take into account the "custom, history and tradition" of their own tribes in construing the ICRA. Another factor justifying different constructions is the unique "composition and territory" of the tribe.76 As one court has noted, "[I]n many cases, large tribes with large reservations have adopted the Federal Rules of Procedure and/or have incorporated state substantive laws into their codes. Case law from these tribal courts does not necessarily fit smaller reservations with strongly integrated communities, tribes with a different economic base and practices, or tribes with more relaxed procedures or simplified law and order codes."77

Testing the Framework's Second Set of Criteria: Potential Costs

The framework's second set of criteria seeks to evaluate whether tribal court interpretations have led to under-protection of the ICRA. My empirical study of the ICRA case law provides strong preliminary evidence that the costs of ICRA's regime of multiple authoritative interpreters have been minimal. Tribal courts have developed substantive ICRA doctrines with real bite and in the process have effectuated significant changes in tribal government practices. Additional evidence of good-faith interpretation by the tribal courts is their attention to federal court precedents, construing ICRA's sister terms in the Bill of Rights. Further, tribes typically depart from federal interpretations only after explaining that there are good reasons to do so. Moreover, as will be explained, the case law reveals that tribal courts have deeply assimilated many Anglo constitutional values even as they have given the provisions varying applications. Additional important evidence is that tribal courts appear to have dealt fairly with non-Indians and nonmembers who have raised ICRA claims. As discussed above, however, a full evaluation of whether ICRA has been under-protected requires a thick political theory.

Protecting rights and reshaping tribal practices. The costs of under-protectio would be prohibitively high if tribal courts did not take their charge of interpreting the ICRA seriously. This response has not happened. As will be seen more fully below, tribal courts have created doctrines that impose significant limitations on tribal governments. To offer just a few examples, tribal courts have used ICRA to close a tribal jail,79 enjoin tribal elections pending the implementation of changes in voter qualifications;80 strike down ordinances that prescribed qualifications for public office;81 reverse the removal of tribal council members;82 reverse tribal banishment decrees;83 impose obligations on tribal governments to provide information to tribal members;84 require that terminated employees be provided
representation at termination hearings; dismiss criminal cases for the failure to prosecute in a timely fashion; exclude from introduction into evidence information obtained pursuant to unlawful searches and seizures; strike down or enjoin enforcement of ordinances for violating equal protection; due process; and the right to free exercise of religion; and reverse countless determinations by tribal administrative bodies for due process violations.

The respect accorded to federal precedent by tribal courts. A necessary (though not sufficient) condition to containing under-protection costs is that the tribal courts engage in good faith efforts of interpretation. A strong indication that tribal courts take seriously their responsibility to construe the ICRA is the respect they give to federal case law construing the Bill of Rights. Although federal case law is not binding, federal case law is cited in nearly every tribal court opinion and, in fact, plays an important role in tribal court construction of the ICRA. Tribal courts only occasionally engage in tabula rasa or retargeting, and almost always deploy some form of adapted adoption: tribal courts most frequently employ tailoring and fitted incorporation, commonly restandardize, and occasionally engage in stock incorporation.

The distribution of interpretive approaches suggests that tribal courts are not averse to consciously adopting Anglo law that they believe to be consistent with their tribe's values. This attention is a strong sign that the tribal courts do not irresponsibly interpret the ICRA, nor does tribal court reliance on federal case law mean that tribal courts lack legal imagination or that tribal court autonomy is a waste of resources. The significant tribal court deviations from ordinary federal doctrines documented in this chapter belie this suggestion. Though tribal courts virtually always look to federal case law for guidance, they neither reflexively reject nor parrot federal approaches.

Assimilation and syncretism. The reported ICRA decisions indicate that tribal courts have deeply assimilated the Anglo jurisprudential concepts that appear in the ICRA's substantive provisions even as they have given them applications that reflect tribal values. In the words of one tribal court, "[a]lthough tribal due process may differ when it comes to its application to customary and traditional laws, many of the principles embodied in the Bill of Rights have become key ingredients in the Indian legal processes." The result is a syncretism of Anglo and tribal values and, in the process, a deep assimilation of many Anglo constitutional values. This integration constitutes further evidence that tribal courts have engaged in good faith efforts to interpret the ICRA seriously, for such syncretism and assimilation likely would not have occurred absent good faith attempts to construe the statute.

Importantly, assimilation is present not only when a holding wholly adopts federal law, but also as tribal courts advance unique constructions of the ICRA provisions. Consider, for example, the role that Anglo jurisprudential concepts play even as tribal courts define ICRA provisions by reference to tribal customs. The tribal custom must be fitted within an Anglo term, which leads tribal courts to assimilate Anglo judicial concepts into their lexicon and way of thinking. This regard may lead tribal courts to adopt the larger gestalt of the system of which the Anglo term is a part, for example, due process is part of a jurisprudential system that emphasizes the rights of individuals rather than, say, the duties of individuals or the rights of the government. Interpreting an Anglo term by reference to tribal customs thus may affect a tribal court's understanding of its own tribe's customs, enacting a particularly deep form of assimilation and cultural syncretism.

These phenomena are well illustrated in Begay v. Navajo Nation. The tribal court held that "[t]he concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act. ... The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them ... an opportunity to present and defend their positions." To support this assertion, the court pointed to the tribe's customary approach to dispute resolution:

When conflicts arise, involved parties will go to an elder statesman, a medicine man, or a well-respected member of the community, and ask him for advice on the problem and to ask that person to speak with the one they see as the cause of the conflict. The advisor will warn the accused of the action being contemplated and give notice of the upcoming group gathering. At the gathering, all parties directly or indirectly involved will be allowed to speak, after which a collective decision will be made.

From this narrative of customary practices, the tribal court derived the content of what the court dubbed "Navajo customary due process.""The heart of Navajo due process, thus, is notice and an opportunity to present and defend a position." The degree of deep assimilation in Begay extends far beyond attaching an Anglo label to customary tribal practices but, it seems, to the court's understanding of the practices themselves. The narrative was intended to identify the content of due process, but rather than yielding what the court found—that due process requires notice and a hearing—the narrative revealed that there were six components of customary dispute resolution: parties [1] voluntarily went to a [2] respected elder who gave [2] notice to the party believed to have done wrong of an [3] upcoming group gathering at which [4] all parties directly or indirectly involved were allowed to [5] speak, after which a [6] collective decision was made. Yet Begay concluded that only two of these components—notice and an opportunity to present and defend a position"—constituted the "heart of Navajo due process." Why? Surely the court, could have concluded that due process requires that the aggrieved party choose an elder statesman as arbiter, participate in a group gathering, and then obtain a collective decision. It seems plausible to suggest that the Navajo Supreme Court's understanding of its tribe's customary practices was influenced by the court's understanding of what (Anglo) due process requires.
Another gauge of deep tribal court assimilation of Anglo jurisprudence is evidence of tribal courts' progressive framing of the ICRA provisions. A large number of tribal cases employ terms such as due process, fundamental rights, equal protection, substantial, probable cause, and so forth, without citing to any statutory or tribal constitutional sources. Similarly, many recent tribal court decisions that cite to an ICRA provision will then articulate the provision's legal text without citing to case law, even where other parts of the decision cite to legal authority to establish legal propositions. Ready invocation of the ICRA's terminology and doctrine without statutory and case citation suggests that the Anglo concepts have worked their ways into tribal judges' basic professional vocabularies and ways of thinking.

Other signs indicate that the ICRA has led to a deep tribal assimilation of Anglo values. For one, tribal courts sometimes attribute the legislative purposes of advancing due process and other Anglo values to tribal ordinances, and accordingly construe the ordinances in ways that reflect those doctrines. Also, tribal courts sometimes adopt federal doctrines without apparently recognizing that there are plausible alternatives. For example, in In the Matter of D.N., the Hopi Children's Court decided that a teacher's search inside a student's waistband violated the ICRA's guarantee against unreasonable searches. The court recognized that federal case law was not binding upon the court but consulted federal law for guidance in determining the merits of whether the teacher's search had, indeed, been unlawful. Upon finding a violation, the court immediately concluded that the evidence was to be excluded. The court did not cite to a single federal case to substantiate its decision to apply the exclusionary remedy, nor did it consider whether the exclusionary remedy fit the tribal context. The court's reflexive adoption of the Anglo approach suggests deep assimilation insofar as the court did not even appear to appreciate that it had made a nonaxiomatic election.

**Review of ICRA case law.** This subsection examines tribal court interpretation of the ICRA. It provides a rich sense of the nature of the questions that have been presented to tribal courts, the substantive holdings of the decided ICRA cases, and the methodologies of interpretation that the tribal courts deploy. Rather than provide a case-by-case analysis of roughly 250 claims reported in 193 cases, the subsection proceeds serially through the major ICRA guarantees and provides an overview of the most frequently litigated issues and outcomes. In the process, I point out the courts' methodologies of interpretation and identify the "hard cases," that is, the cases with results or reasoning that likely would be troubling to enthusiasts of American constitutional law (even if, in the end, they are not problematic when analyzed under a deep political theory).

The overview provides several useful vantage points to assess whether allowing tribal courts the autonomy to interpret the ICRA independently has imposed under-protection costs. The methodologies and substantive holdings suggest that the tribal courts have taken seriously their responsibilities to construe the ICRA. The case law also reflects deep assimilation of Anglo constitutional principles and an intriguing jurisprudential syncrasy, further indicia of good-faith interpretations of the ICRA. Even without invoking deep political theory, the cases' substantive holdings support the inductive conclusion that the ICRA regime has not imposed significant under-protection costs; the cases are strongly rights-protective, even if the actual doctrines vary somewhat from ordinary federal case law.

**Due Process.**

Due process was the most heavily litigated provision in the reported cases, accounting for 135 of the 248 litigated claims. Sixty-six of these claims were resolved in favor of the complainants and sixty-nine in favor of the government. Analysis of this case law reveals significant degrees of adapted adoption; tribal courts have engaged in a significant amount of tailoring and fitted incorporation and some restandardization to accommodate unique tribal values and needs. The decisions almost without exception are strongly rights protecting; only a few qualify as hard cases.

1. **(D) Doctrinal overview of due process case law.** Most due process claims concerned notice and hearing requirements. Most decisions engage in either tailoring or incorporation, and most of the cases have found violations of the complaining party's ICRA rights. Many of the cases presented the question of whether particular arms of tribal government were required to provide notice and hearing to potentially affected persons in particular instances. For example, one court utilized fitted incorporation when it held that due process was violated when the challenger of a tribal election was not given notice as to the date and time of a post-election hearing conducted by the election commission. Another court deployed stock incorporation when it held that notices of suspension from a public employer must give employees "a sufficient understanding of the facts behind the suspension so that they can consider whether to grieve the suspension." Many cases—both criminal and civil—have held ordinances void for vagueness because they provided inadequate notice of the required or prescribed behavior. In the civil cases, one tribal court reststandardized so as to provide tribal members greater protections than are afforded under federal law. There were many cases in which courts applied fitted or stock incorporation to reverse government officials' run-of-the-mill neglect to afford affected parties a hearing or the government's failure to abide by its own procedures and regulations.

Though the study uncovered no tribal courts that rejected the federal rule that due process requires hearing and notice, the tribal courts frequently engaged in tailoring and fitted incorporation to accommodate tribal customs, values, and needs. For example, to determine whether an "ordinary" person can understand a statute for purposes of void-for-vagueness analysis, one court looked to the "ordinary Navajo person, who very often will be bilingual, with English as a second language. Similarly, several tribal courts have held that notice is satisfied by posting
and other methods of public announcement that, given the realities of tribal life, are reasonably calculated to inform interested parties.117 Another set of cases utilizing subjective tailoring ruled on the basis of tribal custom that due process requirements that virtually any nonparty be provided an opportunity to have her views heard in court.118

Tribal courts have used due process to impose obligations on various arms of tribal government to proactively provide information to tribal members. In Simplot v. Ho-Chunk Nation Department of Health,119 the tribal court held that a tribal agency violated due process when it failed to inform an employee that he had a right under personnel procedures to displace less senior workers. The tribal court in Kinrade v. Ho-Chunk Nation Treasury Department ruled that due process requires that terminated public employees be given the identical data relied upon by their supervisors so the employees can adequately represent themselves during the administrative review process.120 Illustrative of a deep assimilation of Anglo values, the Kinrade court cited neither to case law nor to statutory provision. One tribal court held that due process requires judges to inform persons jailed for contempt that they are entitled to a hearing of indigence after which, if they demonstrate poverty, they will be freed from jail,114 and the court in Hopi Tribe v. Mahkewa determined that tribal police must inform persons stopped for drunk driving that they have a right to obtain an independent blood-alcohol test.121 The Mahkewa court engaged in restandardizing, ruling that due process "include[s] and require[s] that defendants have a fair chance to obtain potentially exculpatory evidence to prepare their defense."122 Neglecting to inform people of their right to an independent test, continued the court, "would in effect suppress evidence favorable to the defendant and would be violative of due process of law."123

By relying on due process, tribal courts have generated many other protections and relief. One court concluded that due process imposes a litany of requirements on the tribal police with respect to arrests.124 Another court held that due process requires that public employees have a right to representation at termination hearings.125 Yet another court restandardized and reversed a trial court's order excluding several members from the reservation.126 The court adopted a novel rule—that due process is violated where a court fails in the course of its opinion to give consideration to a liberty interest—and determined that family relationships implicate the liberty interest of "intimate associations."127 The lower court had violated due process, said the tribal appellate court, because the excluded members had wives and children on the reservation and the trial court had failed to "consider[] these relationships and the serious, resulting breakup of the appellants' families and the effect on the tribal community."128

(2) "Hard cases" involving due process. One set of potential "hard cases" spotlights the tribal court tendency to avoid highly formalistic interpretations of the law and instead to consult what they understand to be the likely real-world consequences of the legal edict at issue. In Hopi Tribe v. Lonesome Scott,129 a tribal court restandardized when it rejected a void-for-vagueness challenge to a tribal ordinance.

Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act

Eschewing the federal standard under which statutes may be void for vagueness where there is the mere "possibility of discriminatory enforcement" and lack of notice,130 the tribal court undertook a pragmatic, contextualized analysis of how the affected community understood the ordinance that was the subject of the challenge:

It seems theoretic conjecture that the defendants claim that they did not understand the plain language of the statute.... The Hopi courts have properly limited the application of this statute so as to not overstate the criminal sanctions imposed on a defendant. Its meaning and application is clear to the police, prosecutors, and the reservation communities. There have been no episodes of capricious or arbitrary arrests based on [the ordinance] and the Hopi courts have applied this criminal statute in a uniform, consistent, and limited manner.131

This scenario probably qualifies as a hard case insofar as the court upheld an ambiguous criminal ordinance because there had not yet been discriminatory enforcement.

Another hard case is the tribal appellate court's decision in Moore v. Hoopa Valley Tribe,132 which held that a trial court's poorly worded (and therefore objectively ambiguous) order for a defendant to appear at a contempt hearing did not violate due process because the defendant had actual notice of the hearing.133

How problematic from the vantage point of under-protection are these cases of subjective, realistic interpretation? Not very, for a subjective approach does not necessarily under-protect the ICRA. The federal case law's embrace of an objective approach is not necessarily tantamount to a rejection of the validity of a subjective approach in all circumstances. Indeed, federal courts' objective approach may be wise on account of the difficulties that would attend trying to identify subjective understandings across this country's large and diverse national citizenry. In the context of a small, homogeneous community, by contrast, a common subjective understanding may exist—notwithstanding "objective" ambiguity.134 Consistent with this theory, the United States Supreme Court has utilized subjective analysis to uphold criminal provisions "[notwithstanding the]e[ir] apparent indeterminateness" in the military context because the provisions are applicable to a discrete community within which "what those crimes are, and how they are to be punished" was "well known."135

Interestingly, the challenges of securing justice for indigent parties have spurred many tribal court procedural innovations under the rubric of ICRA's due process provision. For example, although the ICRA's guarantee to the right of counsel does not include a requirement that tribes provide counsel to indigents,136 one tribal court has held that due process requires counsel where charges are serious and defendants have limited education and understanding.137
Many other cases have held that due process imposes significant duties on judges to act to achieve substantive justice. One tribal appellate court ruled that trial judges must inform pro se defendants of the lesser included offense doctrine and must rule sua sponte on the sufficiency of the prosecution’s evidence at the end of the prosecution’s case. The tribal appellate court in *Teeman v. Burns Paiute Indian Tribe* imposed a duty on trial judges to research certain questions of law for pro se defendants. The trial court had refused to recognize the defense of self-defense because the defendant had not found a legal source for it. In response, the appellate court in *Teeman* held that “[w]hen all the resources, training and background knowledge in law repose within the government, it is basically unfair to shift to the presupposedly innocent defendant the burden of proving the law.” The law instead “place[s] responsibility on the trial court judge to rule upon the questions of law presented at the trial. . . . An unbelievably unfair result obtains when the guilt or innocence of a pro se defendant is decided upon his or her ability to research law.”

Many other cases have relied on due process to place other affirmative duties on trial judges. One tribal court concluded that where parties are indigent, not represented by counsel, and unversed in the law, trial court judges should take an active role akin to judges in German’s inquisitorial system. The judge’s role may include propounding legal theories and developing the facts. Another tribal court has indicated that judges may lead the questioning at legal hearings, and yet another stated that judges may have ex parte communications with potential witnesses if the court then informs the parties of the substance of the communications and permits the parties to respond.

Although these cases nobly intended to assist the indigent, one may also think that they constitute hard cases due to the significant powers they grant to judges. But further reflection deflates this concern. Similar proactive and discretionary powers are exercised by administrative law and bankruptcy judges, who “share many characteristics with the inquisitorial model of dispute resolution.” In any event, to the extent that such powers were exercised. Article III judges, such differences are not necessarily problematic. Tribal judges likely have greater political accountability to tribal communities than federal judges have over the people whose disputes they hear because tribal judges typically do not enjoy life tenure and socially interact more directly with the people over whom they exercise power. Such accountability makes discretion more palatable, for the possibility of meaningfully registering community dissatisfaction likely serves as a check on the tribal judges.

The most troubling hard cases are those instances in which tribal courts give what might be deemed as excessive weight to the community’s interests in the due process calculus. In *Ben v. Barahnd*, for instance, the court upheld a tribal ordinance that gave appellate courts the power to refuse to hear appeals absent “substantial justice” had been done between the parties. The appellant had refused to pay for construction that had been performed by a relative. After years of informal efforts to collect the debt, the relative sued successfully in court. The appellant appealed, arguing that the trial court had applied the incorrect statute of limitations and that the case should have been dismissed. The appellate court dismissed the appeal, refusing to even hear the appellant’s argument on the ground that there could not be an appellate review because there had been “substantive justice.” In upholding the ordinance limiting appellate jurisdiction, the appellate court ruled that due process rights are “fundamental, but they are not absolute, limitless or unrestricted” and held that the tribe’s interests outweighed the appellant’s interest in seeking to “hide behind her statute of limitations claim in order to avoid paying for the work.” The tribe’s interests were to achieve substantive justice, which further the “concept of community good and moral right,” as well as tribal members’ “deep feeling for responsibilities to others and the duty to live in harmony with them.”

Even more troubling is the case of *Helgeson v. Lac Du Flambeau Bank of Lake Superior Chippewa Indians*, where the tribal appellate court upheld a tribal court’s finding that the defendants had violated a noncriminal ordinance that barred the possession of certain gambling devices notwithstanding the presence of a fundamental trial court error. In a trial whose “wholly purpose . . . was to determine if the devices were contraband,” the lower court had prematurely ruled that the devices indeed were to be considered gambling devices. The appellate court analyzed the due process issue by means of a balancing test drawn from federal law, but deployed tailoring to ascertain the appropriate weight to accord to the community’s interest. Unusual for ICRA case law, the tribal court harshly criticized the ICRA, stating that “[p]rior to European influence, it was a well accepted belief throughout Indian Country that individual rights lie subordinate to the rights of the tribe” and describing the ICRA as a Western “imposition” that “infri[nges] the rights of the Indians to govern themselves.” The court proceeded to balance the costs imposed on the individuals of a monetary fine and forfeiture of a seized device against the potential costs on the tribe of loss of the right to regulate gaming activity sofar as the illegal devices violated the tribal-state gaming compact pursuant to which the tribe was permitted to run its casino. Because the tribe’s gaming operations was “one of the most precious economic resources” the tribe has ever had,” the court upheld the conviction.

The *Ben and Hegelon* cases are the types of due process decisions that most threaten to impose under-protection costs. Even so, it is not clear that the cases are, in the end, normatively problematic. The balancing that occurs in tribal court opinions is different in degree rather than kind from what occurs in federal decisions inasmuch as constitutional due process rights also typically involve de facto if not de jure balancing. Monetary considerations are deemed a relevant factor in quantifying the government’s interest in federal due process case law, and the tribal interest in securing gaming is particularly strong insofar as most tribal communities were impoverished and incapable of providing basic essentials to their members before the income streams from gambling began to flow. Moreover, consider *Ben and
Hegelson in the context of federal habeas case law, which similarly disallows habeas review for procedural defaults unless defendants can "demonstrate that the failure to consider the claim will result in a fundamental miscarriage of justice," in other words, substantive review in both the federal habeas case and the tribal court cases thus is tied to substantive fairness. Finally, even if the Ben and Hegelson courts had accorded the community's interests greater weight than would federal doctrine, this consideration would not necessarily mean that they had under-protected the ICRA. Determining whether the cases under-protected the ICRA's rights would require a normative theory to identify the quantum of weight allocated to governmental interests that are problematic. Elsewhere I have argued that these cases' holdings are not problematically under-protective from this perspective, though Hegelson's reasoning is troublesome insofar as it admits of virtually no limits.

Equal Protection

There were thirty-five published opinions concerning ICRA's equal protection guarantee. Courts ruled against the tribe in twelve cases, though two of these were later reversed by the case that most threatens to under-protect ICRA. The equal protection case law continues the twin trends of adapted adoption and assimilation that appear in the due process jurisprudence.

(1) Doctrinal overview of equal protection case law. Bennett v. Navajo Board of Election Supervisors is a strong rights-protecting equal protection decision that showcases both tailoring and assimilation. The case struck down an ordinance placing requirements on those who could run for public office. The court invoked the federal doctrine of "fundamental rights" without citing to federal case law, reflecting yet another instance of deep tribal assimilation of Anglo values. The court then tailored, looking to tribal traditions and deciding that the "political liberty" to run for office, "a part of the concept of republican participatory democracy [that is] grounded in Navajo tradition," constituted a "fundamental right" that was infringed upon by the ordinance in question.

Like federal courts, tribal courts sometimes rely on ICRA provisions as guides for construing tribal ordinances. At issue in Griffith v. Wilkie was whether an ordinance providing that "the mother of an illegitimate unmarried child is entitled to its custody" meant that fathers could not be awarded custody. Engaging in tabula rasa, the tribal court concluded that if the ordinance were "interpreted as eliminating a father of an illegitimate child as a potential custodial parent, he is denied equal protection of the law." It then interpreted the ordinance as establishing a presumption of maternal custody if paternity were undeterminable, but a "best interest of the child" test if the father were known.

Several cases have addressed allegations of the selective enforcement of tribal law. The most aggressive deployments of equal protection can be seen in two cases, each of which is a consolidation of numerous criminal cases. Mark Fox, a tribal council member who sat on the judicial committee, had been charged with assault in December of 1996, but had delayed his prosecution for more than a year by transferring the prosecutor originally assigned to him and not appointing a replacement. Fifteen tribal members who had been charged with various crimes around the same time as Fox, but whose prosecutions had gone forward, brought equal protection challenges. Without identifying a legal test, the tribal court accepted the fifteen defendants' arguments and dismissed the criminal cases against them. Similarly, the tribal court in Conney v. Bear Runner court found that an ordinance imposing an occupation tax had been selectively applied in violation of equal protection. Conney held that equal protection is violated "where the statute or ordinance, although valid on its face, is enforced so as to discriminate against certain persons, occupations, or privileges of the same class." Other tribal courts have erected a higher barrier, adopting legal tests almost identical to the federal standards. The tribal court in Southern Ute Tribe v. Davis ruled against the claim that inconsistent prosecutorial practice necessarily violates equal protection. Engaging in fitted incorporation, the court cited to federal case law to hold that "aberrational implementation of proper criminal procedures does not give rise to an equal protection claim absent a showing of intentional or purposeful discrimination." The court explained the rule by reference to tribal circumstances: "courts publish few written opinions identifying particular court practices [and] a strict equal protection rule on procedural matters which would continually elevate particular variations in court practices to the level of equal protection claims would be unwise." Similarly, the tribal court in Burns Paiute Indian Tribe v. Dike ruled that inconsistent enforcement of a tribal exclusion ordinance violates equal protection only where the tribe "has not excluded others similarly situated for similar conduct and the decision to exclude was based upon bad faith, or on impermissible grounds, as, for example, race, religion or the exercise of other constitutional rights." Tribal courts have adopted similar legal tests in response to equal protection challenges to the distribution of tribal resources.

(2) Hard cases in the equal protection context. Another set of cases in the selective enforcement context displays tribal equal protection at its most and least rights-protecting. Two cases decided on the same day by the same judge ruled that charging only males under a gender-neutral statutory rape ordinance violates equal protection but equal protection at its most protective. This ruling was overturned, however, in Winnebago Tribe of Nebraska v. Bigfire, the tribal court opinion of all the 1993 reported cases that most threatened to impose under-protection costs. Setting the stage for its analysis, the Bigfire court stated, "like most tribes, the Winnebago Tribe of Nebraska agreed to removal from their ancestral homelands and to the acceptance of new reservation lands precisely to preserve their separate cultural and political identity as a people." Accordingly, the "tribal court is free to interpret the tribal constitution independently of the meaning afforded similar language in federal law." It explained that "[t]his independence is not only a legal result of the sovereignty of the tribe as a separate
political community within the United States, but also a necessary option to protect the separate and different cultural heritage of the tribe and to adapt the meaning of legal concepts derived from Anglo-American roots to the unique cultural context of communal tribal life." Thus, there must be "sensitive adaptation of such legal concepts to the precise tribal community served by tribal law." The Bigfire tribal court then restated and tailored, adopting the compelling interest test rather than the intermediate scrutiny test for gender discrimination under federal law and finding a compelling governmental interest in gender-differentiated application of the statutory rape ordinance.

The bulk of the Bigfire opinion sought to explain why gender differentiations constituted a compelling government interest in the tribal context. "[I]n determining what constitutes a compelling governmental interest, this Court must always look to the preservation of tribal culture, traditions, and sovereignty and to the protection of the health and welfare of tribal members as the most compelling reasons for the formation and operation of tribal government." The court continued, the "traditional differentiations, commonly accepted and practiced by the Tribe without pejorative or discriminatory implications ... must be sustained as involving the compelling tribal governmental interest of preserving tribal traditions and culture." The court then cited to evidence suggesting that, under tribal customs and tradition, "gender role differentiation and gender differences in legal or customary treatment related to" roles deemed to be "natural and expected" and that such "gender differences or disparities in treatment do not signal hierarchy, lack or respect or invidious discrimination." The court upheld the gender-differentiated application of the statutory rape ordinance because "within the Winnebago culture, the male clearly is assigned the obligation of protecting the women. The areas of sexual misconduct and domestic abuse were specifically singled out as areas in which the Winnebago tradition and customary law assigned roles and responsibilities based on gender." Most troublesome about the Bigfire opinion from the perspective of underprotection is that the court articulated virtually no limits external to tribal tradition on what types of gender-based differential treatment is unacceptable; only traditional practices with "pejorative or discriminatory implications" as determined by tribal standards would be struck down. On the other hand, whose standards should govern? The Bigfire court surely is correct that the rule of women in many Native American communities "is not analogous to the roles of females in the Anglo-American cultures," and concluded that Native American (rather than contemporary American) values ought to be determinative under the ICRA. Those who take issue with Bigfire must explain why contemporary American sensibilities concerning gender should displace Winnebago sensibilities. Answering the question requires a full-fledged normative theory of what types of variations from ordinary doctrine are acceptable within a liberal polity as ours. Under the thick political theory I've put forward elsewhere, the gender differentiation upheld in Bigfire would be acceptable, though the court's reasoning does not adequately cabin tribal discretion.

Search and Seizure

Thirteen cases concerned search and seizure. Four found in favor of the parties claiming rights against tribal governments, whereas most of the others were circumstances in which the tribal court found probable cause or reasonable suspicion that upheld the challenged search. In several cases, courts were interpreting not the ICRA or a tribal constitution but instead tribal criminal codes, several of which have adopted verbatim (or nearly so) the federal doctrines. These latter cases are germane for present purposes for the same reason that tribal case law construing tribal constitutions is instructive.

The search and seizure case law continues the trend of adapted adoption found elsewhere in the ICRA jurisprudence. Without exception, the doctrines found in the thirteen cases closely track federal case law. Indeed, tribal courts in all cases utilized either incorporation or tailoring, suggesting a strong degree of assimilation. This conclusion is further buttressed by the tribal courts' tendency to recite the federal rules without citing to case law and, in one instance, the court's adoption of the federal exclusionary rule without appearing to have considered alternative remedies. Finally, there are few if any "hard cases" here; the reported search and seizure cases adopt legal tests that are at least as rights-protecting as federal law; and two cases used legal tests that are even more rights-protecting.

The case of Winnebago Tribe of Nebraska v. Pretends Eagle is representative of the interpretive approaches found in the ICRA search and seizure case law. A tribal member had placed a call to the police, in which she stated, "I'm Pretends Eagle just almost side-swiped me. I think he is drunk." Police located Pretends Eagle's car and observed him, during which time they saw neither traffic violations nor erratic driving, but they still arrested him for driving under the influence. At issue was whether this warrantless arrest satisfied the "reasonable cause" requirement that appeared in the Winnebago Criminal Procedure Code. Though it recognized that federal case law was not binding, the tribal court engaged in stock incorporation by adopting the definition of "probable cause" in Black's Law Dictionary. Looking to the "facts and circumstances within an officers' knowledge" that might lead "a person of reasonable caution in the belief that an offense has been, is being or will be committed," the tribal court held that the information provided to the tribal police "did not establish facts sufficient to show that the defendant was driving under the influence." Tribal police accordingly were without authority to conduct a stop and frisk for, there is a higher tribal "standard for a stop and frisk than the Supreme Court set out in Terry v. Ohio."

The tribal courts typically engage in careful, rights-protecting applications of the search and seizure standards. In Hopi Tribe v. Davahoya, for example, the court was asked whether an anonymous tip that the defendant was transporting an unknown quantity of alcohol in a truck on a certain road gave police "reasonable suspicion" to stop him. Engaging in stock incorporation, the tribal court answered...
in the negative because the tip did not contain sufficient indicia of reliability that could be corroborated independently by the police and could "lead to the inference that the informant had reliable access to inside information." Similarly in In the Matter of D.N., which involved a school official's search of a student, the tribal court determined that although asking a student to empty his pockets and thereafter administering a pat-down search was reasonable, it was not reasonable for a teacher to have reached under the waistband of a student's underwear. A "search will be permissible only when the measures adopted in the search are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Finally, the appellate court in Randolph v. Hopi Tribe reversed a conviction as it clarified the burdens of proof and persuasion in suppression of evidence hearings by means of fitted incorporation. The court canvassed non-Indian law, found two general approaches, and then considered "which allocation of the burden of proof comports with Hopi public policy."

It concluded that the prosecution bore the burden of proof by a preponderance of the evidence.

In search and seizure—far more than elsewhere—tribal courts have adopted federal doctrine by means of incorporation. One result is that tribal search and seizure jurisprudence is completely familiar to anyone acquainted with federal criminal law, as indicated by the presence of concepts of "reasonable suspicion," "probable cause," "stop and frisk," and the like. As discussed earlier, several reasons elucidate why this influence does not undercut the significance that it is tribal rather than federal courts that are interpreting the law. First, tribal courts sometimes conceptualize the legal test as being consistent with and advancing tribal culture. For example, after noting that "federal decisions are not binding upon this court," the tribal court in In the Matter of D.N. adopted the federal rule that a "school official may conduct a search of a student's person if the official has a reasonable suspicion that a crime has been committed or that the student is in the process of committing an offense." The tribal court engaged in fitted incorporation, partly attributing the rule to the "Hopi tradition and the Hopi's strong belief in the extended family [mosojar as a Hopi person who sends their child to school expects the school and its officials to act in loco parentis]."

Conceptualizing the legal test as consistent with tribal culture facilitates both the assimilation of Anglo jurisprudence as well as cultural syncretism.

Second, tribal courts typically are assiduous in fitting the capacious federal standards they adopt to the tribal context, a task non-Indian courts may not be suited to accomplishing. Examined earlier in detail was the Kahe case, for example, in which the tribal court took account of the Hopi concept of the "welfare check" in upholding an officer's stop as reasonable. Similarly, after adopting the federal rule that driveways are only "semi-private," such that the reasonableness of a driveway search turned on the possessor's expectation of privacy and the officer's reasons for being in the driveway, the tribal court in Hopi Tribe v. Mahape found "the attitude of the Hopi people to be concerned about the safety and welfare of others to be relevant in upholding an officer's search of a vehicle containing human occupants that had been parked on a driveway for a long period of time during the winter; Hopi concern for others led to the conclusion that it was reasonable for the officer to respond to a tribal member's concern for the safety and welfare of her family and neighbors." The last two cases—Kahe and Mahape—are the search and seizure holdings that most threaten to under-protect ICRA insofar as they sanction the most expansive searches in all the case law, though they may not strike many readers as being particularly hard cases.

With respect to remedies, all the reported tribal court decisions have engaged in incorporation and prescribed the exclusionary rule upon finding search and seizure violations. The Pretends Eagle court deployed fitted incorporation, taking tribe-specific considerations into account when it adopted the exclusionary rule. It expressly stated that its holding was provisional because "neither party brought to the attention of the Court any tribal customs or traditions which would help the Court in interpreting the Constitution," explaining that its holding "may be subject to review and revision by the court in the future upon submission of evidence as to tribal traditions and customs."

Another tribal court, in a testimonial to deep assimilation, did not appear to appreciate that adopting the exclusionary rule involved a choice. The D.N. court viewed exclusion of evidence obtained outside of a lawful search or seizure to be the natural outcome.

It is interesting to consider why tribal courts have so fully adopted federal search and seizure jurisprudence, rather than developing independent doctrines as they have done with most of the other ICRA provisions. There are several possible explanations. First, federal search and seizure case law employs particularly capacious broad standards—like "probable cause" and "reasonable suspicion"—that allow themselves to be fitted to the Indian context. Second, the Anglo jurisprudence of search and seizure may fit particularly well with traditional tribal customs. Third, it is possible that the federal doctrine approach is sound at the levels of goal and standard and may even be largely transcultural.

First Amendment Analogues

There were fourteen reported tribal court decisions construing the ICRA's First Amendment analogues of freedom of speech, the right to petition the government, assembly, and the free exercise of religion. Though too small a sample to make any but preliminary conclusions, some patterns do emerge. Here, more than in any other ICRA provisions, the tribal courts have struck out on their own to develop ICRA doctrines independent of the federal case law. This response may be the case because American First Amendment protections are more reflective of a particular Western, liberal tradition and both shape and reflect societal values more than any other constitutional protections. It also might be a product of the complexity of much First
Amendment law, particularly free speech, which makes recourse to the federal approach a time-consuming and difficult project. Even so, several cases make use of incorporation, and where there is adapted adoption one still finds that the core First Amendment values have been assimilated, even if the Anglo values are refracted more sharply through the Indian cultural prism here than with other ICRA provisions. Also present are several cases where tribal courts engaging in tabula rasa assert that a given circumstance violates the ICRA provision without making any effort to develop a rule.299

(1) Free speech case law. In one of the seven cases concerning free speech, a trial court found that a newspaper had libeled an individual and then ordered that the newspaper print a retraction. Engaging in stock incorporation, the tribal supreme court reversed the retraction order due to the "right of the press to be free of governmental intervention." Continued the court, "[t]he choice of material to be printed is a protected exercise of editorial control and judgment and the government is prevented from regulating this process. A responsible press is desirable, but it cannot be legislated by the Navajo Tribal Council or mandated by the Navajo courts."300 Although "[i]t does not mean that the press is free to print libelous material, because the government does have a legitimate interest in protecting an individual's good name,"301 a court can only assess damages.

Another case provides an interesting example of tabula rasa ipse dixit reasoning.302 A petition had garnered sufficient signatures to trigger a so-called "recall election" to summon school board members from office. A tribal ordinance provided that other candidates could run in the recall election. The tribal court concluded that the ordinance transformed the recall election into a de facto general election, thereby "harm[ing] the school board members' First Amendment rights." The court accordingly enjoined application of the tribal ordinance, limiting the election to the question of whether the board member should be recalled. The tribal court apparently thought that allowing new candidates to run burdened existing board members' ability to defend themselves against the recall petition, but the court did not provide an explanation as to why.

One of the issues in Navajo Nation v. Crockett303 was whether a tribal agency's "interest in promoting the efficiency of the public services it performs through its employees' free speech rights to 'disclose demoralizing or disruptive' but true information about possible mismanagement and misconduct. The court ruled for the employee. In dicta, though, the court provided very different rules governing employee dissatisfaction that were not matters of 'public concern,' and which subordinated the disgruntled employee's interests to the community interests in encouraging negotiated solutions over litigation. The court did not cite to federal case law, but instead proceeded via tabula rasa.304

Another case considered whether an ordinance prohibiting the damaging of public property interfered with free speech when applied to protesters who had unearthed part of the Hopi-Navajo fence. Engaging in stock incorporation, the court decided in the negative, holding that the defendants' acts "constitute[d] civil disobedience that resulted in physical damage and was not . . . protected speech and conduct. . . . [T]he activities were not speech oriented, but were 'physical and allegedly destructive.'"305

(2) Free exercise. The one reported free exercise decision exemplifies tabula rasa in service of helping to preserve distinctive tribal institutions. The Hopi Tribe's constitution provided that villages could alter their political organization by means of a village-wide referendum if 25 percent of the "voting members" of the village signed a petition. Kavena v. Hamilton306 and a companion case307 concerned a referendum in "traditional villages," where "Hopi religion and village organization . . . is virtually inseparable [and] membership in a village is in part religious as well as civil."308 The advocates of change expressly hoped to break the linkage between village membership and religion.

The specific question before the tribal court in Kavena was whether a petition containing 269 valid signatures satisfied the 25 percent voting-members requirement. An official of the federal Bureau of Indian Affairs who, under the Hopi constitution was responsible for "seeing that there was a fair vote," had determined the total number of voting members by counting the number of village residents who had voted in a previous tribal election. The tribal court found that this method of counting understated the number of voting members because "[n]o village members . . . do not reside in the village of their membership."309 Nonresidents still could qualify as members because "[v]illage membership in a [traditional] village . . . with the traditional Hopi organization, is a concept with much deeper meaning than mere physical presence or residence." Membership "involves the maintenance of religious and cultural ties and relationships with the village and its ceremonies" such that village membership is "virtually inseparable" from the practice of their religion.310 Denying the franchise to nonresident members of traditional villages accordingly infringed nonresidents' "religious freedom."311 The court permanently enjoined the election because less than 25 percent of the voting members had petitioned for the referendum, taking into account the larger number of village members.312

(3) Other First Amendment analogues. Only limited case law has construed the rest of the ICRA's First Amendment analogues, but they have almost uniformly been rights-protecting. One court confronted a claim that a tribe's "one person/one caucalula," which allowed tribal members to attend the caucus of only one candidate for tribal council, violated the "right of the people peaceably to assemble." Engaging in fitted incorporation, the tribal court adopted the federal legal test and struck down the tribal rule.313

Several reported cases involved the right to petition for redress of grievances. One court, under the impression that it was engaging in stock incorporation, held that the right to petition "extends to all departments of the government," including "access to the courts," with the result that the right to petition waived the tribe's sovereign immunity for wrongful termination actions. Another tribal court ruled
that although the right to petition did not mandate judicial review of community
council actions to remove council members, it did require that there be some
"appropriate forum" to which grievances could be brought. 243 Yet another tribal
court confronted the question of whether allowing counterclaims by governmen-
tal agencies for abuse of process unlawfully burdened the right to petition for redres-
s of grievances. 244 The tribal court looked to federal and state decisions but restandard-
ized, synthesizing its own legal test from several approaches that had been taken by
lower federal courts and state courts. 245 Interestingly, this example appears to be a
rare instance of restandardizing not to create doctrine fitted to tribal needs, but
instead to create (what the tribal court believed to be) a better rule. The tribal court
explained what plaintiffs would have to establish at trial to prevail and then
remanded the case back to the trial court. 246

(4) Hard cases. There is one hard case concerning freedom of expression. The
tribal court in Brandon v Tribal Council for the Confederated Tribes of the Grand Ronde
Community of Oregon restandardized and tailored to uphold the suspension of a tribal
councilman for making a vulgar statement to his cousin that violated an ordinance
prohibiting council members from using vulgar speech in public. From the federal
case law allowing the regulation of obscenity and fighting words, the tribal court
restandardized when it formulated free speech's applicable legal test as requiring a
"valid and compelling reason . . . to ban certain expressions or conduct upon the
part of its citizens." 247 The court then tailored this test to the tribal context, conclud-
ing that

the tribe has the right to expect its council members to conduct
themselves in public with dignity and respect, and refrain from using
words or phrases that a normal tribal member is privileged to use.
[Moreover, the type of language used by Mr. Brandon was arguably
"fighting words" that were likely to create a violent or hostile situa-
tion. . . . Finally, the Grand Ronde Tribe has a vested interest in pro-
tecting its reputation throughout the community. It thus has a
compelling reason to have enacted a provision in its tribal code pro-
hibiting tribal members from involving themselves in actions or
activities that may bring discredit or disrespect upon the tribe. 248

To be sure, it is unlikely that a provision such as the tribe's would be found to
fall within the "fighting words" exception under ordinary federal doctrine. 249 On
the other hand, the Brandon court repeatedly stressed that "council members should
be expected to conduct themselves at a higher level of restraint than other tribal
members," and there is a well-established branch of free speech doctrine that pro-
vides relaxed standards for regulating the speech of government employees. 250 It
 could be argued that the Grand Ronde ordinance is analogous insofar as main-
aining respect for political leaders could be said to be a precondition for effective pub-
lic service. In any event, a tribal court's conclusion does under-protect simply
because it deviates from what would have been the likely outcome in federal court.
Once again, if and to what extent Brandon imposes under-protection costs has to be
determined on the basis of a thick political theory. 251

Sixth Amendment Analogues
There were twenty-nine claims based on the ICRA's Sixth Amendment analogues.
Ten cases involved the right to a jury trial, eight cases addressed the right to coun-
sel, nine involved speedy trial claims, one case construed the nature and cause of
accusation clause, and one case concerned the guarantee of compulsory process.
The pattern of adapted adoption continues, although there are significant devia-
tions in right to jury and counsel cases because ICRA's language is different from
the Sixth Amendment's insofar as ICRA enumerates conditions precedent to the
vesting of jury and counsel rights. The tribal case law throughout the Sixth Amend-
ment analogues is consistently quite protective of rights; there are virtually no hard
cases here.

(1) ICRA's jury right. Three cases presented threshold questions concerning the
applicability of the ICRA's jury right. One considered whether the jury right extends to
civil matters. 252 Relying on straightforward statutory interpretation—the
ICRA provision grants the jury right only to persons "accused of an offense
punishable by imprisonment"—the tribal court held in the negative. In Nisqually
Indian Community v. J.S.K., 253 a tribal court engaged in stock incorporation and
held that juvenile defendants who were in juvenile court proceedings for conduct
that would be criminal for adults were not entitled to a jury trial. The Nisqually
court relied on federal Supreme Court precedent that distinguished the punitive
purposes of criminal proceedings from juvenile proceedings' goal of rehabilitation.
Finally, the tribal court in Pueblo of Pojoaque v. Jages 254 concluded that an adult
defendant accused of theft was not entitled to a jury. The court reasoned that there
was no jury right because the tribe's limited resources precluded imprison-
ment, and ICRA required juries only for offenses "punishable by imprisonment.
This example might qualify as a hard case. On the one hand, the Jages opinion fits
the pattern observed above of the practical prevailing over the hypertechnical;
the case might not be problematic for the reasons discussed there. 255 On the other
hand, the Jages court did not consider the possibility that "imprisonment" may be
a statutory proxy for crimes with social consequences that are of sufficient magni-
ditude to demand the jury guarantee. Under this view, the mere fact that the
defendant could not have been imprisoned would not eliminate the need for a
jury trial.

Another threshold question frequently litigated relates to the conditions under
which the jury right can be waived. In contrast to the Sixth Amendment, ICRA by
its terms contains a condition precedent: the criminal defendant must "request"
jury to trigger the tribe's obligation of not "deny[ng]" the request. Though not explicit in the statute, all tribal courts I surveyed concluded that there must be a knowing and voluntary waiver of ICRA's conditional jury right. The court in *Confederated Salish and Kootenai Tribes v. Peene*, for example, held that "the failure of the accused to make a request for a jury trial constitutes a valid waiver only when that failure to request a jury trial is made knowingly and intentionally, and the accused is aware that s/he is giving up his/her right to a trial by jury."

Similarly, in *Lamont v. Colville Confederated Tribes*, the tribal court struck down an ordinance that required parties who had requested a jury trial at the start of litigation to confirm their desire to have a jury ten days before trial. The court rejected the tribe's concern that the "difficulties of bringing in jurors over long distances and the efficient administration of justice" required confirmation. "While we are sympathetic to the concerns of the tribe, the fundamental right to a trial by jury cannot be diluted because of administrative difficulties," illustrative of the rights-protecting character of this opinion is that the tribal court rejected the tribe's argument that any burden on the right was cured by the defendant's option to move to continue the trial and then renew her demand for a jury trial, a procedural motion that both the tribe and the defendant agreed was "routinely granted." The tribal court then reversed the defendant's nonjury conviction and remanded the case to the lower court for a jury trial.

Other tribal courts have more readily found that the jury right had been waived. In *Squaxin Island Tribe v. John*, the tribal court held that although the defendant had made a timely request for a jury, he subsequently waived it by "knowingly and voluntarily failing to appear on two occasions without justification after assurances of appearance were made to the court." The court noted that "[a]rranging and preparing for the trial and summoning the jurors was done at considerable expense to the court, its staff, and the tribe," and that the defendant accordingly had "waived or forfeited his opportunity for a jury trial." In *Hummingbird v. Southern Ute Indian Tribe*, a tribal appellate court acknowledged that the "right to a jury trial is a fundamental right" under the ICRA, but noted that, "in order to take advantage of this fundamental right certain procedures need to be followed." The appellate court upheld the lower court's determination that the defendant had waived her jury right because the defendant had been informed of the applicable procedures—a written jury request and payment of a $25 jury fee—but had not followed them. Though they are less rights-protecting than *Lamont* and *Peene, John* and *Hummingbird* likely do not qualify as hard cases. After all, though federal Sixth Amendment rights must be knowingly waived, the bulk of federal constitutional rights are waivable without showing that the waiver was knowingly undertaken. Further, as the courts in both *Jones* and *Hummingbird* pointed out, the defendants had actual knowledge of the procedural requirements.

Interestingly, one tribal court conceptualized ICRA's jury right as reflecting Indian values. The court in *Downey v. Bigman* held that, with only a few exceptions, a judge's overturning of a jury's verdict violates the jury right. As explained earlier, the Downey court grounded its decision in tribal traditions of "participatory democracy." Conceptualizing juries as Anglo forms of tribal consensus-building and democracy likely facilitates the absorption of Anglo trial values insofar as the novel Anglo procedure is characterized as a traditional Indian commitment. At the same time, such a conceptualization allows the Anglo values to be reshaped in accordance with tribal values and needs, leading to cultural syncretism. The tribal court came to its conclusion by means of reframing, identifying, community participation in decision-making as the jury right's goal. It then created a novel procedure to implement the goal, allowing juries to propound questions to witnesses during trial.

(2) ICRA's right to counsel. Consistent with what is implicit in the language of the ICRA, which prohibits tribes only from "deny[ng] to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense," tribal case law is unanimous that the right to counsel can be waived. But tribal courts have required knowing waiver. Seven of the nine reported cases concerning the right to counsel presented the question of whether a particular defendant had knowingly waived the right to counsel. In two cases where tribal courts found waiver, explicit evidence existed that the defendant had been "fully informed" of his right to assistance of counsel, but that he "willingly chose" to represent himself. In two cases the defendants' insufficient effort to obtain counsel was the basis for finding waiver: One defendant had been informed of his right to counsel, but "made no effort to contact spokespersons who appear before the Suquamish Tribal Court to assist indigent tribal members" over a period of fifteen months, and another defendant "was advised at arraignment of his right to counsel throughout the proceedings but failed to exercise that right until a few days before trial," which was eighteen months after first having been informed of the right to counsel.

All three cases finding that defendants had not made informed waivers were from the Hopi courts. This circumstance is due to the extensive requirements that have been judicially created in Hopi jurisprudence for ensuring "knowing[] and intelligently" waiver. The requirements were first articulated in the case of *Hopi Tribe v. Consolidated Cases of Emerson Ame*, which tailored federal case law to the Hopi context. Speaking of the right to counsel as a "fundamental right" because it "protect[s] the defendant against the power of the Tribe," the court proceeded to construct a Hopi ordinance that required "knowing" waiver of counsel. Because the term "knowing" was not defined in the ordinance, the court looked to federal and state case law, noting that "[a]lthough federal law is not necessarily binding in Hopi courts, a review of federal law will provide an example of a standard that this Court can modify to meet the needs of the Hopi Tribe."

The tribal court in *AMI* ultimately held that defendants "must have knowledge about the dangers associated with proceeding pro se . . . the charges against them, the range of allowable punishment, possible defenses to the charges, and factors in mitigating
tion of the charge.” As true of the due process cases that seek to protect the indigent, the AMI court charged the trial judge with the duty of bringing this information to defendants. The judge is also required to consider the defendant’s “education and mental condition.” The AMI court then mandated changes to a form given to defendants to inform them of their rights. The court also held that a defendant’s signature on the form is not sufficient to constitute a waiver. Notwithstanding such a signature, the judge must make an “active inquiry.” That step was necessary, the court held, because many defendants have limited command of English, because the “novel, frightening and stressful situation” of having been arrested might further compromise comprehension, because the original form provided so much information it is “probably overwhelming to most defendants,” and because “[m]any defendants may be too embarrassed or frightened to admit that they do not understand something.” The AMI court then reversed three convictions, whereas two subsequent cases each reversed additional convictions on the ground that there had been an invalid waiver of the right to counsel.

None of the seven reported decisions concerning waiver qualifies as a hard case. Though the Hopi requirements are the most stringent, the less formalized approaches taken by the four courts that found valid waivers show no indications of being problematic. Finally, the fact that all tribal courts have some form of a knowing waiver requirement is a testimonial to their having taken the right to counsel seriously insofar as the ICRA does not expressly prescribe such a requirement.

(5) Ineffective assistance of counsel. Two reported cases rejected claims of ineffective assistance of counsel, and neither is a hard case. The tribal court’s analysis in Navajo Nation v. MacDonald, Sr290 is a fine example of cultural syncretism. The decision began by conceptualizing tribal customs in Anglo terms, stating that the “Navajo common law” includes the “right to effective assistance of counsel.” The court then engaged in fitted incorporation, adopting the federal approach but looking to tribal customs to guide its application. It concluded that the defendant “received some very aggressive and competent representation,” and that counsel “spoke for [the defendant] wisely, and with knowledge, consistent with a traditional Navajo ‘talking things out’ session.” The second effective assistance of counsel case cited to the MacDonald opinion for the proposition that the federal case law provided the applicable rules and determined that the defendant had received an “excellent defense.”

(6) Speedy trial. Six cases raised speedy trial claims. All adopted the federal standard, which instructs courts to consider the length of delay, reason for the delay, whether and when the defendant asserted his speedy trial right, and prejudice in determining if there has been a speedy trial violation.283 One tribal appellate court remanded the case back to the trial court to determine whether the defendant’s speedy trial right had been violated.284 The second reported case clarified when the clock for speedy trial purposes begins and upheld a tribal ordinance that provided that no delay of less than six months could be considered unreasonable for purposes of the speedy trial right.285

Four cases found that the speedy trial right had not been violated,286 and in none of the cases do the facts suggest under-protection. In none of the cases did the defendants allege prejudice by virtue of the delays.287 In two cases the delay had been caused largely or exclusively by the defendant.288 In the third case the defendant appeared to have behaved strategically, asserting his speedy trial objection only three working days prior to a trial that had been scheduled six weeks before and relying on the theory that the rescheduled trial, which was due to occur ninety-one days after his arraignment, violated his rights because of a Washington state court rule requiring that no more than ninety days elapse between arraignment and trial.289 In the fourth case, the delay of six-and-a-half months between arraignment and trial was due to the complexity of the case, which involved twenty-three counts of conspiracy, aiding and abetting bribery, and violations of the Navajo Ethics in Government Act that were brought against a former Navajo council member.290

The speedy trial cases exhibit tribal courts’ readiness to consult federal case law in the absence of definite tribal customs. In Komalestewa v. Hopi Tribe,291 the tribal court engaged in fitted incorporation in a manner that encouraged integration of the Anglo values behind the provision. The court stated that “Hopi custom speaks to fairness, but it does not provide specific guidance for defining when the right to a speedy trial has been violated. Therefore, we will consider foreign law and apply it to the extent it is consistent with our customs, traditions and culture.”292 Identifying the speedy trial right as part of the tribe’s cultural ethos of fairness is a fast track toward assimilation of the Anglo value. The tribal court in Sixtton-Wahpeton Dakota Nation v. Cloud293 similarly was unable to locate tribal custom bearing on speedy trial and determined that “this court [therefore] is permitted to look at other decisions that define and clarify what speedy trial is.”294 The court identified four factors looked to by federal courts and remanded the case back to the trial judge.

(5) Nature and cause of accusation. Only two cases construed ICRA’s nature and cause of accusation clause. The tribal court in Walker River Paiute Tribe v. Jake295 held that the requirements of ICRA’s nature and cause of accusation clause were not waivable. The Jake court deployed tabula rasa, most likely because it viewed the legal question as having a very simple answer,296 and dismissed the criminal complaint. The tribal appellate court in Hopi Tribe v. Consolidated Cases of Emerson AM297 decried fitted incorporation in its conclusion that the nature and cause of accusation clause requires a knowing, intelligent, and voluntary guilty plea.

(6) Compulsory process. The one reported case applying the ICRA’s guarantee of compulsory process was decided in the plaintiff’s favor. The defendant in Sixtton-Wahpeton Sioux Tribe v. Seaboy298 had been arraigned in court on May 18, 1998, and the trial was set three weeks later, for June 8. Two days before trial, the defendant applied for and was granted a continuance. No new trial date was set. At the end of August, the defendant was informed that his trial would take place in four days. After the defendant’s conviction for theft, the tribal appellate court reversed on
the ground that only four days’ notice of the trial date deprived him of the right “to have compulsory process for obtaining witnesses in his favor.” In a sophisticated analysis, the tribal court deployed tabula rasa and reasoned analogically from the notice for trials required under federal civil rules.

Fifth Amendment Analogues (excluding due process)

There were fifteen reported cases construing the ICRA’s guarantees against double jeopardy, self-incrimination, and uncompensated takings. The cases were uniformly rights-protecting; there are no hard cases here.

(1) Right against self-incrimination. Three of the eight reported cases addressing the right against self-incrimination found violations or possible violations of the right. Nearly all reported cases deployed either stock or fitted incorporation. Two cases concerned interpretation of tribal ordinances that either mirrored the ICRA provision or incorporated more detailed doctrinal formulations found in federal case law.

The right against self-incrimination has been assiduously guarded by the tribal courts. The appellate court in MacDonald v. Navajo Nation, for example, raised self-incrimination concerns sua sponte, observing that although “[t]his court will not normally address errors which are not raised by an appellant,... [w]here it is not clear that an individual has made a knowing and intelligent choice between claiming or waiving a fundamental privilege, and where this court sees errors to which no exception has been taken and they would seriously affect the fairness, integrity or public reputation of judicial proceedings, we will act.” The appellate court then analyzed a lower court order that the defendant produce personal diaries and other personal documents, directing the trial court to conduct a hearing to ensure that the requested documents did not fun afoul of the standards the appellate tribal court had adopted via stock incorporation.

Another illuminating decision is Hopi Tribe v. Consolidated Cases of Emerson AMI, where the tribal court explained at length why the right against self-incrimination is a “fundamental right” of defendants. It protects[ ] the defendant against the power of the Tribe... It forces the Tribe to prove the case against the defendant and not coerced guilty plea from an innocent defendant. When a defendant enters a guilty plea, he waives many of his other rights including the right to a trial, the right to confront witnesses against him, and the right to have his own witnesses testify. This reduces the burden on the Tribe and makes it much easier for the Tribe to impose punishments.

This may be a tabula rasa interpretation of the right, as the court did not cite to federal or state case law discussing the right against self-incrimination, though it did look to federal case law to clarify other ICRA provisions during its opinion. On the other hand, this formulation is sufficiently similar to the federal understanding that the decision more likely is an instance of deep assimilation where the values were sufficiently obvious to the court as not to require citation. Relying also on due process, the AMI court ultimately reversed the defendant’s guilty plea and imposed a set of requirements on trial judges designed to ensure that defendants knowingly and voluntarily plead guilty.

Relevant to assimilation, two of the tribal courts conceptualized the right against self-incrimination as reflecting tribal values. After explaining the core of the “fundamental” right against self-incrimination—that “an individual must not give information to be used for his or her own punishment unless there is a knowing and voluntary decision to do so”—the tribal court in Navajo Nation v. MacDonald Jr. explained,

[This is also a Navajo principle. Navajo common law rejects coercion, including coercing people to talk. Others may “talk” about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt. Navajos often admit guilt, because honesty is another high value, but even after admitting guilt, defendants in Navajo courts are reluctant to speak.

Similarly, in Lower Elwha Klallam Indian Tribe v. Bolstrom the tribal court adopted the exclusionary rule as the remedy for violations of the right against self-incrimination, justifying it on the basis of tribal values: “While there is no Lower Elwha Klallam statutory or case law (this being a case of first impression) prescribing a remedy for failing to give Minnada rights in a timely fashion, this court finds that the exclusionary rule conforms to the spirit of fundamental fairness inherent in Lower Elwha Klallam law.”

None of the three decisions finding no violation is a hard case. One found no violation because neither of the defendants had made any statements to the officer and there accordingly had been no harm from the officer’s failure to advise defendants of their right to remain silent. In the second case, the defendant had been charged with fishing in restricted waters. The tribal court carefully canvassed federal and state law and engaged in stock incorporation in concluding that the right against self-incrimination does not apply to noncriminal proceedings. The last case employed stock incorporation to define “in custody,” finding no custody when the police asked the defendant questions at the scene of an automobile accident and in a hospital emergency room.

(2) Double jeopardy. Four cases concerned double jeopardy. All four ruled in favor of the defendants, and the cases were at least as protective of double jeopardy rights as is federal case law. Three tribal courts engaged in fitted or stock incorporation. In an opinion reflecting assimilation, one court utilized the concept of double jeopardy to flesh out the meaning of a reasonableness inquiry in the context of administrative law. There are no hard cases here.
Three cases considered whether double jeopardy precludes the prosecution from appealing an acquittal. All answered affirmatively. Deploying stock incorporation, one of the three cases concerned a tribe's attempt to prosecute defendants under a tribal regulation that was distinct from the regulation the defendant had been tried for violating in a prior trial, but whose elements to be proven were "identical under the facts of this case" to what the tribe unsuccessfully had tried to prove in the earlier prosecution. Another tribal appellate court determined sua sponte that the double jeopardy provision barred the prosecution from appealing the trial court's interpretation of the tribal ordinance the defendant had been accused of violating after the defendant had been acquitted. Although the court did not cite to any case law, the legal test it used is identical to the federal approach, suggesting that the case is an example of deep assimilation and incorporation rather than tabula rasa. In the third case, Hopi Tribe v. Huma, the trial judge had ruled sua sponte after a full trial that a police officer did not have an articulable suspicion of wrongdoing prior to making a stop and for that reason had acquitted the defendant. The prosecution appealed, arguing inter alia that the trial court did not have the power to ignore evidence to which the defendant had not objected. The tribal appellate court relied on fitted incorporation and dismissed the appeal on the ground that it violated double jeopardy.

The Huma court showcases tribal openness to embracing admittedly foreign jurisprudential values that the tribal courts predict will have salutary effects on tribal life. The court noted that double jeopardy "is an elemental principle of the United States criminal law," and acknowledged that the tribe itself had neither "created a provision for the Tribe to appeal an acquittal nor expressly rejected the doctrine." Convening the purposes behind double jeopardy identified in federal case law, the tribal court concluded that double jeopardy "serves goals that will protect the Hopi people and increase the Hopi confidence in the courts."

In the last case, a tribal administrative agency had suspended Mr. Rave's gaming license for a period of one year on the basis of an alleged noncriminal violation. Rave appealed, and a tribal court found that the agency had violated its own procedures and accordingly ordered the agency to correct its errors and award Mr. Rave relief. On remand, the agency denied Rave any relief and sua sponte levied a new penalty without providing him notice or hearing. Rave appealed again. Noting that "[i]t is a well-settled tenet of administrative law that agency decision must prove reasonable under the circumstances," the tribal appellate court concluded that the agency's action was "without foundation in law," "arbitrary," "capricious," and "an abuse of discretion." Continuing the court, "[i]t is contrary to law. This is the administrative equivalent of double jeopardy or to be twice punished for the same transgression." This case is probably best read as an importation of double jeopardy concepts in the service of defining reasonableness, illustrating deep tribal assimilation of Anglo jurisprudential values insofar as the court equated double jeopardy with fundamental concepts of reasonableness and fairness.

(3) Uncompensated takings. Three decisions concerned the guarantee against uncompensated takings. In one, a tribal court engaged in tabula rasa interpretation when it held that the tribal housing authority's removal of "an abandoned vehicle hulk" that had not been moved for three years and that had been deemed by the government to be a "danger to inquisitive children and an eyesore to the community" was a taking that accordingly required compensation. In the two other decisions, tribal courts engaged in fitted incorporation and held that the appointment of counsel to represent indigents is not an uncompensated taking because the practice of law is a privilege that can be conditioned on the performance of pro bono representation.

Other miscellaneous ICRA rights. There also were several reported cases construing ICRA's protections against cruel and unusual punishment, bills of attainder, and ex post facto laws.

(1) Cruel and unusual punishment. Five decisions interpreted ICRA's ban against cruel and unusual punishment. Three upheld sentences against challenges. In Cohelech Confederated Tribes v. Sam, a tribal court engaged in objective incorporation as it cited to an earlier tribal court decision that had adopted the federal standard that cruel and unusual punishment is violated by a punishment "arbitrary and shocking to the sense of justice." Relying also on the federal rule that the trial court's sentencing will be overturned only for abuse of discretion, the tribal appellate court upheld a sentence of 720 days for multiple offenses of driving while intoxicated in light of the defendant's "lengthy criminal history; failed attempts at rehabilitation" and the fact that the sentence fell far short of the statutory maximum.

In the second case, Navajo Nation v. MacDonald, Sr., the tribal appellate court employed tailoring when it adjudged the magnitude of the offense by reference to tribal values. The defendant was a former chairman of the Navajo Nation who had been convicted of accepting bribes while in public office. Upholding a sentence of 2,160 days imprisonment and 1,800 days of labor pursuant to the applicable tribal ordinances, the appellate court explained that "[o]fficial corruption in public office is a serious offense, because it robs the Navajo people of their property. Even more seriously, using Navajo culture, it robs the Navajo people of their dignity." Continued the court, "corruption in public office through bribes, kickbacks, and violations of ethical standards results in poor goods or services, favoritism to non-Navajos, and a host of other injuries to the public good." Finally, the parties who paid the bribes were non-Navaqos, and "[w]e are not blind to past exploitations of the Navajo people, and the Navajo Nation Council was not blind to them when it enacted both a revised criminal code and an ethics code." In a subsequent case the Navajo Supreme Court relied on MacDonald, Sr. to uphold a similar sentence against another defendant in the same public corruption case.

In the Matter of A.W., a Minor, the court held that the ban against cruel and unusual punishment requires that a juvenile detention area "be provided with a padded area to lie on, a blanket, and food to eat." The court ordered that the
detention center be closed until it was in compliance with the court's understanding of what the ban on cruel and unusual punishment requires. The tribal court in *McDonald v. Colville Confederated Tribe* similarly ordered the closure of a tribal jail on grounds that the jail had an inadequate ventilation system, a faulty and outdated electrical system, and conditions that presented a danger to the health and safety of the inmates.

(2) Bills of attainder and *ex post facto* laws. Five cases addressed claims that tribal legislation violated the ICRA's ban on bills of attainder or *ex post facto* laws. Two cases entertained bill of attainder claims. One considered whether placing a tribal leader on administrative leave pending the results of a public corruption investigation qualified as a prohibited bill of attainder. After noting that "[a] bill of attainder is apparently unknown to traditional Navajo culture," the tribal appellate court engaged in stock incorporation. The appellate court directed the trial court to apply the ordinary federal standard to the administrative leave, but stressed that the trial court should tailor the standard to the tribal context; in determining whether the leave constituted a "punishment," the trial court was instructed to consider not only "what historically has been regarded as punishment for purposes of bills of attainder and bills of pains under the law of England and the United States," but also "what historically has been regarded as punishment under Navajo common law."

In *MacDonald, St. v Redhouse*, a later appeal in the case discussed immediately above, the appellant argued that amendments to the Navajo election statutes disqualifying from office people convicted of public corruption violated the ICRA's ban on bills of attainder. The tribal appellate court engaged in stock incorporation and dismissed the appellant's argument. The court took their views on whether other would-be candidates for public office who were disqualified under the amendments to conclude that the amendments did not "target" the appellant, one of the legal tests under federal law for identifying a bill of attainder. Three cases addressed *ex post facto* claims. Though none of the cases granted relief, none is a hard case. In one case, the trial court engaged in stock incorporation in holding that legislation prohibiting convicted criminals from public office had a valid legislative purpose and accordingly did not constitute an *ex post facto* law. In the second case, *Frost v Southern Ute Tribal Council*, the tribal court appears to have deployed tabula rasa. The chairman of the tribal council decided to conduct an investigation of the plaintiff, who was an elected member of the tribal council. A provision of the Southern Ute Constitution provided that "[t]he council shall establish procedures and regulations for the conduct of removal proceedings, and the tribal council enacted such regulations only a few days after the plaintiff had been served with notice of the removal proceedings. The tribal court rejected the argument that such proceedings qualified as an *ex post facto* law because another constitutional provision granted the council investigatory jurisdiction. The tribal court cited no federal case law to identify the applicable legal text. Also suggestive of tabula rasa is the existence of federal case law that squarely addresses the issue raised in the case and that would have decided the issue in the same way the tribal court did.

The final case denying relief was *Colville Confederated Tribe v. Stead*. Some background is necessary. The United States Supreme Court in the 1990 case of *Duro v. Reins* had held that tribal courts did not have criminal misdemeanor jurisdiction over Indians who were not members of their tribes (known as "nonmembers"). This conclusion was contrary to two hundred years of settled law, and Congress soon thereafter enacted temporary, and ultimately permanent, legislation that reversed *Duro*. The temporary legislation was enacted on November 5, 1990, and by its own terms was set to expire on September 30, 1991. Defendant Stead, a member of the Rosebud Sioux Tribe, was arrested for driving without a valid driver's license on the Colville Indian Reservation during the time that Congress' temporary legislation was in effect. His trial took place, however, on September 8, 1991, eight days after the temporary legislation expired and one day before Congress enacted a second piece of temporary legislation.

The question before the tribal court in *Stead* was whether the trial court had erred in denying Stead's motion to dismiss for want of jurisdiction on the day of the trial. The tribal appellate court decided that the trial court had jurisdiction. The appellate court canvassed the federal case law and engaged in stock incorporation, but the crux of the tribal court's reasoning did not turn on the niceties of *ex post facto* doctrine but rather on the proposition that the Supreme Court decision in *Duro* was incorrect ab initio and accordingly could not have extinguished the tribe's inherent authority over nonmembers. The tribal court buttressed its reasoning by quoting the legislative history for the permanent legislation, which stated that Congress intended to "[c]larify and reaffirm the inherent authority of tribal government to exercise criminal jurisdiction over all Indians on their reservations," not to delegate new powers to the tribes. The tribal court also quoted a federal court decision that similarly had decided that tribes' jurisdiction over nonmembers "had always existed and . . . continued uninterrupted, despite the *Duro* decision." This example is the decision in the *ex post facto* context that comes closest to imposing under-protection costs, yet it is difficult to say that the tribal court's decision is problematic.

The treatment of outsiders. Relevant to under-protection is how tribal courts have functioned when a party is either a nonmember of the tribe or a non-Indian (hereinafter an "outsider"). After all, the temptation always exists for one's own, and resisting it would be a sign of commitment to the rule of law. More cynically, one might attribute a well-behaved tribal judiciary to political accountability or cultural affiliation with affected parties rather than commitment to the ICRA. Because these factors are absent when an outsider's interests are involved, outsiders constitute a control group from which inferences can be drawn as to whether commitment to the ICRA or other considerations drives tribal judges. Unfortunately, generalizing is difficult because there is only a small sample of reported cases—ten—where outsiders have been parties. This sample is explicable
in no small part because tribal powers vis-à-vis outsiders are governed largely by non-ICRA doctrines for which there is federal court review. In any event, most of the tribal cases represent good-faith interpretations of the ICRA, and none involves patently outrageous reasoning or outcomes. However, two cases, though readily explicable on innocent grounds, may be instances where the reasoning and outcomes were affected by the presence of outsiders. One of the ten reported cases was resolved in favor of the outsider, five of the remaining nine are wholly unproblematic, and two other cases resulted in arguably harsh outcomes but do not signal tribal court unrelatability. This subsection reviews the cases from least to most problematic.

*Shokone Business Council v. Skillings*406 is the one reported decision that found in favor of a person who was, technically at least, an outsider. After Mr. Skillings had been adjudged to be a member of the Shokone tribe in a trial, the tribal council passed an act stating that Skillings was not a tribal member. The tribal court struck this down on the ground that revoking membership rights following a full litiga-
tion violated due process. The facts of Skillings, however, make it unprecedented vis-à-vis outsiders, for the plaintiff had obvious and significant ties to the tribe.

Five of the cases that ruled against the outsiders are not even arguably trouble-
some. In one case,414 the tribal court approved of the plaintiff’s service by mail on the outsider notwithstanding written tribal rules that appeared to require personal service. Due process was not violated because the defendants had actual notice and the “well-established procedures of this Court provide the option of service by mail for all papers, including the initial petition.”415 In another case,416 the tribal court engaged in stock incorporation when it used rational basis to review an equal protec-
tion challenge that the appellant, “as a nonmember Indian, is placed in the classifi-
cation ‘Indian’ for criminal prosecution, along with [member] Navajos, when non-Indians are not.”417 The tribal court found strong reasons to permit the prosecu-
tion of nonmember Indians, including the fact that about 6.39 percent of the popula-
tion of the Navajo Reservation was composed of nonmember Indians.418 The court’s holding is consistent with longstanding federal Indian law that permits tribes to exercise misdemeanor criminal jurisdiction over nonmember Indians but not non-Indi-
ans,419 further evidence of the reasonableness of the tribal court’s decision.

The other three unproblematic cases raised equal protection and due process challenges to tribes’ exertions of power over nonmembers on grounds that non-
members did not have adequate political representation within the tribe. Two challenges were in the jury context. Tribal courts rejected arguments in *Sanders v. Royal Associates Management, Inc.*420 and in *Hopi Tribe v. Longwell Scott*421 that tribal juries were inherently unfair because only tribal members could be jurors. Both courts observed that this method was the only way to ensure that juries constitute a representative cross-

sample of the population, a legitimate governmental interest.422 The *Sands-

ers* court also noted that the tribe has “no enforceable authority to order non-members to appear for jury duty and serve on” juries.423 These are reasonable holdings that reflect the same logic that leads states to exclude non-domiciliaries from jury service.424

Similarly, the tribal court in *Iron Cloud v. Mable*425 rejected the argument that tribal laws violated equal protection and due process because nonmembers could not vote in tribal elections or hold office. This holding resonates with longstanding federal policy permitting tribes to exercise jurisdiction over nonmembers for mis-
demeanor criminal offenses committed on the reservation. Such tribal powers are a product not of consent, but of the inherent nature of tribal sovereignty.426 For similar reasons, states are permitted to exercise criminal jurisdiction over noncit-
izens who commit crimes in the state, and the federal government can exercise crim-
inal jurisdiction over aliens when they are in the United States.427

We now move to two cases that resulted in arguably harsh outcomes but that likely do not signal tribal court disregard of outsiders. In one, the tribal court upheld against a due process challenge a $6,000 tax penalty assessed against an outsider for failing to post a bond.428 The court held that due process did not require that the tax penalty be proportionate to the actual damage incurred by a party (indeed, the tribe admitted that it had suffered no loss or harm). Though the outcome might be deemed harsh, the applicable ordinance did not by its terms apply only to outsiders, and there was no basis for believing that the outcome had anything to do with the fact that the appellant was an outsider. The same is true in the other case, where the guardian of a non-Indian’s security interest lost the interest because he failed to perfect the interest in accordance with tribal law.429 Though the tribal court noted that the guardian had been the victim of “sharp dealing,” the tribal appellate court showed that the outsider had not been treated under tribal law any differently than an insider would have been.430

The next case did not create any harsh results—in fact the outcome seems quite fair—but there is room to wonder whether the court would have been less activist had no outsider been involved. At issue in *Thorntenson v. Cadmore*431 was how to con-
strue a bylaw in the tribal constitution providing that tribal courts have jurisdiction over “disputes or lawsuits . . . between Indians and non-Indians when such cases are brought before it by stipulation of both parties.”432 The outsider argued that the tribal court did not have jurisdiction because his written contract with a member Indian did not contain a provision explicitly stipulating to the tribal court’s jurisdiction. The tribal court held that the contract on its own satisfied the “stipulation” requirement. The court relied upon the ICRA’s due process provision, reasoning that to require an express stipulation would “confound[] fundamental Lakota cultural notions of fair play that allow people the opportunity to be heard, which includes the right to have ‘their day in court’.”433 To understand the stipulation requirement otherwise would offend[] basic notions of due process in that it potentially creates situations in which the tribe affirmatively regulates the (civil) con-
duct of private parties (both Indian and non-Indian) on the reser-
vation but permits or condones the inability of injured parties to seek to enforce or to vindicate (through civil litigation) the very
legal norms the tribe expects them to comply with. You cannot, it seems to this court, establish legal norms to regulate civil conduct, but then effectively place the opportunity to pursue remedial redress in the hands of the alleged “wrongdoer.” If due process means anything, it must, at its most fundamental level, mean that the duty to obey the civil law carries with it the necessary correlative of access to the appropriate (tribal) forum to be heard. These arguments are all reasonable, but the fact remains that the Cadmore court adopted quite an activist approach. One can only speculate as to whether the tribal court’s analysis was affected by the fact that an outsider was involved. On the other hand, as shown by the numerous tribal court cases surveyed above that deployed activist reasoning when the parties were insiders, the mere fact of judicial activism is not unusual.

The most problematic case, Public Service Co. of New Mexico v. Tax Protest Panel, resulted in a harsh outcome for the outsider, but it once again is unclear whether the court’s holding was due to the fact that the losing party was an outsider. The tribal court determined that a 7 percent possessory interest tax assessed against the value of property owned by a public utility that passed through a reservation did not violate equal protection. The court engaged in stock incorporation, adopting the rule that equal protection precludes classification of taxpayers based on residence. The court determined that the tax at issue classified property on the basis of usage, which under federal law is subject to only rational basis scrutiny, and the tribal court was able to identify rationales that justified exemptions for retail businesses and homes.

The problem not recognized by the court was that the rationales turned on considerations virtually metonymic with residency. For example, the court explained that the retail business and home exemption “seems to be intended to facilitate (or at least not penalize) the building of homes, renovation of existing homes, and location of jobs on the reservation” and justified the exemptions for consumer businesses as methods to “preserve the existing services for the community as well as to encourage location of new services into the community.” On this reasoning, virtually no possessory interest tax that in effect differentiated between insiders and outsiders would be struck down. Nevertheless, the near-toothless standard adopted by the tribal court may have been a good-faith determination that high deference is appropriate in the area of local taxation. Indeed, as the tribal court correctly noted, the United States Supreme Court has adopted a highly deferential approach in the context of local taxation.

To conclude quickly, although there is only limited case law concerning outsiders, the bulk, if not the entirety, of the cases conforms to the pattern of responsible and good-faith interpretation of the ICRA observed with respect to insiders. Two cases may be instances when tribal court dispositions were affected by the presence of outsiders, and for this reason the treatment of outsiders, though not demonstrably problematic, merits further attention as case law develops over time. The fact that the bulk of the case law concerning outsiders appears to be well-functioning constitutes provisional additional evidence that tribal courts have worked well insofar as there is no indication that tribal courts have succumbed to the temptation to disadvantage the outsider. Further, outsider jurisprudence suggests that factors aside from political accountability and cultural affiliation have led tribal courts to engage in good-faith attempts to apply the ICRA.

CONCLUSIONS

Strong preliminary evidence indicates that the ICRA is a well-functioning regime of multiple authoritative interpreters, though a definitive determination requires access to more case law than currently is publicly available. The ICRA regime has realized the potential benefits of institutional diversity and sustaining valuable idiosyncratic communities, as it has allowed for the creation of doctrines and institutions that reflect the distinctive needs and values of Native Americans. The regime also has let the tribes transform their community narratives and self-understandings from mere literature to law, lending these narratives and self-understandings the weight, socializing power, and coercive potential that characterize law. All this effort supports tribal culture. The ICRA has provided extraordinary opportunities for self-governance, even as it has constrained tribal autonomy by imposing Anglo political values.

Leaving ICRA’s interpretation and enforcement in the hands of tribal courts does not seem to have created significant under-protection costs. The legal doctrines that tribal courts have created, as well as their methods of interpretation, suggest that tribal courts have interpreted the ICRA in good faith, a necessary though not sufficient condition to guard against under-protection. The ICRA has been deployed to require significant changes in tribal governmental practices and to create extensive rights for individuals. Tribal courts take federal case law seriously and tend to deviate from it only for good reasons. Moreover, tribal courts have deeply assimilated many Anglo constitutional values.

This chapter’s findings also clarify several important issues in the field of American Indian law. Two of the issues have arisen in the context of the limited matters over which federal courts have subject-matter jurisdiction over ICRA claims. First, some federal courts have not understood that legal rights such as due process may look different in Indian country. For example, in response to the argument that due process protections of Native Americans against tribal governments are different from the due process protections of non-Indians in general American society, the United States Court of Appeals for the Second Circuit has replied, “there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations.” This chapter’s empirical study corrects this severe misconception.

Second, even among those federal courts that have not made the Second Circuit’s error, some have held that variations from federal doctrines are permissible
only when the Indian practice being challenged "differ[s] significantly from those commonly employed in Anglo-Saxon society." When tribes adopt procedures akin to those found in general society, these courts have held, the tribes are subject to the ordinary federal requirements imposed by due process, equal protection, and so forth. The federal courts that have adopted this approach have not offered a theoretical justification for it, and this article's analysis suggests several notable problems with it. Insofar as it is premised on the view that only gross variations from Anglo approaches are of importance to Indian tribes, the approach is premised on a misconception; tailoring can be very important insofar as it can create significant doctrinal variations. Finally, these federal courts' approach provides an incentive for tribes to avoid procedures akin to Anglo procedures, threatening to interfere with the assimilation and valuable cultural syncretism that otherwise occurs. Finally, requiring tribes to adopt federal approaches undermines the assimilation and syncretism that ordinarily accompany the deployment of fitted incorporation. Third, and perhaps most importantly, this chapter's findings counsel strongly against the proposals advanced by some commentators and members of Congress that federal court jurisdiction over the ICRA be expanded, or that tribal court jurisdiction be curtailed, because tribal courts have not responsibly interpreted the ICRA. The concerns purportedly prompting these proposals have been based on anecdotal evidence. Close examination of the tribal case law suggests that they are grossly overstated if not misplaced. This chapter's study suggests the ICRA's regime of multiple authoritative interpreters has worked well. To be sure, the study's conclusions in this regard are limited due to the restricted sample of available tribal case law to analyze. At the very least, however, the study's preliminary findings suggest that additional research be done, or that changes like requiring publication of tribal court decisions be implemented, before drastically limiting tribal court jurisdiction.

NOTES


2. The only unambiguously provided in the ICRA is a habeas provision in 25 U.S.C. § 1903, which states that "[t]he privilege of habeus corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (2006). Based on legislative history and an assessment of the Act's "distinct competing purposes" of guaranteeing the rights of individual members of the tribe and encouraging Indian self-government, the Supreme Court has held that habeas corpus review is the exclusive path for federal court review of allegations of tribal violations of the Act. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).
SITUATION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 443 (1985) (noting that the Supreme Court's analysis in its first First Amendment case was "wholly conclusory"). Such a pattern of loose discretion-making followed by rule-generation is not surprising, but is consistent with the common law method of lawmaking that characterizes the constitutional interpretation undertaken by courts.

22. See, e.g., MacDonald v. Nebraska Nation, 18 Indian L. Rep. 6003, 6007–08 (1999) (underlining the principle of self-incrimination in the Fifth Amendment to determine whether the protection applies to personal diaries); ["while the thrust of Supreme Court decisions appears to be approaching such a holding, we are not prepared to conclude that such is the actual state of the law."]

23. Even in these circumstances, tribal courts are not necessarily inferior as incorporation is their decision, thereby advancing the value of self-government.

24. In Cheyenne River Sioux Tribe v. Williams, for example, the tribal court adopted the federal "open fields" search and seizure rule, under which an "open field is neither a house nor an effect, and therefore the government's entrance upon open fields is not an unreasonable search within the meaning of the Fourth Amendment"—only after determining that the federal doctrine was the "most appropriate and just doctrine to apply in the tribal context." 19 Indian L. Rep. 6001, 6002–3 (Ch. R. Sax. Ct. App. 1991) (citing Oliver to United States, 466 U.S. 170 (1984)).

25. I develop this point in greater detail infra at 19.

26. In practice, it can be difficult to distinguish between tailoring and fitted incorporation because it is not always clear whether a standard has become a settled standard. Though the precise characterizations may be a close call, the model is useful because locating an interpretation on the border between tailoring and incorporation still communicates much about the nature of the court's reasoning and the deviation from ordinary doctrine.


28. Id. at 6001 (citing Grenden v. Pogl, 420 U.S. 136 (1975)).

29. Id. at 6001.

30. Id. at 6001.


34. See, e.g., Lewis v. United States, 518 U.S. 322, 334 (Kennedy, J., concurring) (["The primary purpose of our jury in the legal system is to stand between the accused and the powers of the State"]; Colgrove v. Battin, 401 U.S. 132, 157 (1971) ("The purpose of the jury trial is to protect citizens from the oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues").)

35. See, e.g., Committee for Better Tribal Government, 17 Indian L. Rep. at 6097 ("Although sovereign immunity bars Indian Civil Rights Act suits against this tribe, tribal immunity only extends to tribal officials acting in their representative capacity and within the scope of their authority.") Further, it is true of states, many tribes are elected to waive sovereign immunity in particular contexts.

36. Whatever the case law analyzed in the empirical study shows that tribal sovereign immunity has not precluded meaningful utilization of the ICRA to bring about changes in tribal government, the limited case law available for this study does not permit the broader conclusion that tribal sovereign immunity has not been problematic. For a study concluding that tribal sovereign immunity sometimes has proven to be problematic, see Commissioner Report, supra note 43, at 72.
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62. 26 Indian L. Rep. at 6014.

62. The Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (noting that "wellfare recipients" at Colville v. Kelly "had a claim to receipt of welfare payments that was greater in the statute defining eligibility for them. The recipient had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so").

68. See The Civilian Limit of Self-Government, supra note 40, at 1064-68 (discussing significant socializing effect of treaty).


67. For a tribal court that has held otherwise, see Walker River Indian Tribe v. Lake, Indian L. Rep. 6024 (Wash. R.T. Ct. 1996) (stating that the probable cause determination following a warrantless arrest must be "made by a neutral tribal court judge.")

67. Id. at 6062.

67. Id. at 6062.

67. Id. at 6062.


67. Id. at 6079.

67. Id. at 6079.

67. Id. at 6079.


67. Id. at 6051.

67. Id. at 6051.

67. Id. at 6053 (internal quotation omitted).

83. The defendant "knew that the type of behavior he engaged in could result in tribal imposed sanctions" by virtue of his having lived in the "close-knit society" of the Ninigret Indian community all his life. His "knowledge of those common social sanctions imposed by traditional courts constituted adequate notice that his conduct could trigger tribal sanctions." Furthermore, continued the dissent, the defendant "also had actual notice that the reckless driving statute and other state motor vehicle offenses were being enforced on the Ninigret Reservation, and that his conduct could or would be punished." Ward deals very far [to the reservation]. To discount in existence and effectiveness in providing notice... would be to deny reality.

84. Id. at 6055. Why did the majority rule as it did? After all, the majority agreed with the dissent's description of the "realities" of tribal life. See, e.g., id. at 6051 ("We are aware that on the Ninigret Reservation would may travel quickly throughout the reservation."); and does not explain why he believes the dissent's reliance on the Ninigret cultural context to be mistaken. The majority simply asserts that written ordinances are the "proper" way to publicize what is illegal. Id. The majority's adoption of a writing requirement perhaps can best be explained as an instance of the assimilation of Anglo values.


85. See supra note 34.

85. Id. at 6146-47.

85. Id. at 6146.

85. Id. at 6146. The court also decided that "[p]laintain impartiality, all the questions will be channeled through the judge, whose authority to permit or forbid the question is discretionary." Id.


85. Id. at 6165.

86. This is a wholly new substantive rule. Under federal law, the doctrine more similar to it, void for vagueness, vouch civil statutes only if a statute is so vague and indefinite as to be no rule or standard at all." Bouie v. INS, 375 U.S. 225, 273 (1963). Legislation affecting "fundamental rights" under substantive due process—the other analogous doctrine—see reviewed under strict scrutiny. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992), a legal test that also is different from the requirement of "objectives" and "acceptable standards."

85. 6165.


89. See, e.g., Raw v. Reynolds, 22 Indian L. Rep. 6137, 6139 (Navajo Ct. 1995) (noting that other tribes' holdings are "not binding on this court").

90. Raw, 22 Indian L. Rep. at 6139.


90. Id. at 6053 (rev'ng, J., partial dissent).

90. McDonald v. Colville Confederated Tribes, 17 Indian L. Rep. 6030 (Colv'l. Ct. 1990) (ordering closure of tribal jail facility on grounds that the jail has an inadequate ventilation system, a faulty and outdated electrical system, and that the conditions of the jail present a danger to the health and safety of the inmates).


90. See, e.g., in the Matter of Consolidated Small Claims Cases, 24, 6109 (Ch. Rtg. Ct. Sup. Ct. 1996) (due process requires the court to give notice to persons that they are entitled to a hearing of independence after which, if they demonstrate poverty, they will be freed from being jailed for the contempt of court)

90. See, e.g., Hopi Tribe v. Consolidated Cases of Donald Makewa, 25 Indian L. Rep. 6146 (Hopi App. Ct. 1995) (due process requires that defendants arrested for DUIs be informed of the right to arrange to have an independent blood test); Hopi Tribe v. Consolidated Cases of Ernesto Amiel, 25 Indian L. Rep. 6143 (Hopi App. Ct. 1995) (before defendant waive their right to counsel, the court must tell them that lawyers come from the reservation and are better to help lay people, that they will be at a disadvantage without counsel, should the maximum consequences of the plea, and inform defendants of the availability of public defenders).


90. Kawano, 16 Indian L. Rep. at 6062.


90. See, e.g., Hee et al Hoopa Valley Indian Housing Authority v. Gerster, 22 Indian L. Rep. 6002, 6006 (Hoopa Ct. App. 1993) ("even though the decisions of federal courts are not controlling in this court, such decisions can be used as a guide").


90. See, Navajo Nation v. Pullen, 19 Indian L. Rep. 6049, 6049 (Nav. Sup. Ct. 1991) (tribal court uses Anglo term of "due process," "fundamental fairness," and "common law" to describe traditional and distinct Navajo law: "Navajo due process, which is fundamental fairness in a Navajo cultural context, can be found in "Navajo common law").

90. Cf Helgen v. Le Du Flamebank of Lake Superior Chippewa Indians, 25 Indian L. Rep. 6045, 6053 (Lac Du Flambeau Trib. App. Ct. 1998); Prior to European influence, it was a well accepted belief throughout the Indian Country that individual rights lie subordinate to the rights of the tribe. The notion of individual rights was foreign to Indian people and the imposition of the Indian Civil Rights Act is looked upon as an infringement on the rights of Indians to govern themselves").

Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act
116. Id. at 6034.
117. Id. at 6034.
118. Id. at 6034.
119. Id. at 6034.
123. The sort of deep animosity discussed in this chapter lends support to the critiques propounded by some that ICRA imposes Anglo values norwithstanding tribal power to consue their terms. See, e.g., Robert N. Clinton, Rebelling the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 AM. L. REV. 77, 124 (1993).
124. Johnson v. Belarde, 25, Indiana L. Rev. 6183, 6184 (Hopi App. Ct. 1996) (defining tribal ordinance term of "good cause" is requiring "reasonable notification of the hearing and an opportunity to be heard"); Martin v. Hopi Tribe, 25, Indiana L. Rev. 6185, 6186 (Hopi App. Ct. 1996) (explaining policy behind a tribal ordinance as being the protection of due process rights; the duty of the Tribal Courts to hear and determine all cases before it in a fair and impartial manner by notice in sound public policy and in statutes designed to protect a litigant's right to constitutional due process").
125. This is consistent with the point made earlier in the chapter—that precedent can blur imagination. 126. 22 Indiana L. Rev. 6071 (Hopi Ch. Ct. 1995).
127. Minnesota Tribe of Nehabdas v. Poorline Eagle, 24 L.R. 6240, 6244 (Winnebago Tr. Ct. 1997) (same; adopting exclusionary rule "without deciding the policy reasons for this action" or pointing to tribal custom).
128. See Roemer, Multiple Authoritative Interpretations, supra; unnumbered note, at 585–91.
131. White v. Ho-Chunk Nation Dept of Personnel, 24 Indiana L. Rev. 6182, 6185–86 (Ho-Chunk Nat. Tr. Ct. 1996) (pointing to federal case law for the proposition that the employee had a protectable due process interest in her employment that accrued accordingly triggered notice and hearing requirements).
133. See text supra at 59-93.
134. See text, supra at notes 90–93.
135. See, e.g., In re the Matter of R.E.C., 21 Indiana L. Rev. 6035 (Nook. Ct. App. 1990) (hearing the trial court's summary dismissal of a case after the trial court had refused to allow the party to be heard on a motion to set aside the order granting the receivership); Messimer v. Business Council of the Shoalstone Paumute Tribe, 20 Indiana L. Rev. 6020 (Duck Valley Tr. Ct. 1993) (mitigating judge of tribal court dismissed by the council without a hearing; subjective incorporation).
218. Id.
219. Id. at 6071.
220. See supra at text surrounding notes 75–78.
221. 21 Indian L. Rep. 6138 (Hopi Tr. Ct. 1994).
222. Id. at 6139.
223. Id.
225. Id. at 6244.
227. Another reason is that search and seizure legal test have been codified in many tribal ordinances or tribal constitutions; of course, this is not an independent explanation, but instead it forces the inquiry back one step to why tribal law codified the federal approach.
228. The ICRA does not have any provisions parallelizing the Fort Peck Amendment's establishment clause.
229. See supra note 21 (describing "tabula rasa" approach).
231. Id.
234. See supra at 4.
238. Id. at 6065.
239. Id. at 6061.
240. Id. at 6066.
242. Hudson v. Hopi Tribe, 21 Indian L. Rep. 6045 (Hopi Tr. Ct. 1992). The Hudson case was unusual because it required interpretation of a tribal constitution that by its terms appeared to require that its provisions be construed no differently than its sister terms in the United States Constitution. See id. at 6045, 6046. The Hudson court accordingly sought to engage in stock incorporation, citing to federal precedent to identify the appropriate legal tests. See id. at 6046. In concluding that the right to petition "must be read as a limitation upon any sovereign immunity that the Tribe may possess," however, the tribal court appeared to misconstrue the federal case law insofar as the right to petition has not meant the end of federal sovereign immunity. See, e.g., United States v. King, 355 U.S. 1, 6 (1957).
245. Id. at 6117.
246. See id.
247. 18 Indian L. Rep. 6139, 6141 (Grand Ronde Tr. Ct. 1991). The tribal courts' formulation qualifies as restandardizing because the federal legal test is not a compelling interest standard, which would permit the creation of new exceptions, but instead treats fighting words and obscenity as the only discrete exception into which new factual scenarios must fall if they are to be immunized from ordinary First Amendment constraints. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 277, 382–83 (1992).
249. In fact, the Supreme Court has not upheld a conviction on the basis of the fighting word doctrine since Chisholm because the case that created the doctrine. See Geoffrey R. Stone, Louis M. Stulman, Carol B. Sunshine, and Mark V. Tushnet, The First Amendment 83 (1999).
251. Elsewhere, I have argued this holding is not normatively problematic. See Rosen, Multiple Authoritative Interpretations, supra unnumbered note, at 554.
255. See supra at 22–23.
256. 16 U.S.C. § 1302(10) (emphasis supplied).
259. The court's reasoning technically cannot be understood under the model developed earlier in this chapter because there is no constitutional analogue to the ICRA language it was construing. Nonetheless, the court's approach can be analogized to stock incorporation because it looked to federal case law concerning waiver in other constitutional contexts.
260. Id. at 6074.
262. The court also held that disallowing a jury trial under these circumstances did not violate due process. See id. at 6011.
264. The Humphrey's Executor case did not expressly hold that the procedures were compatible with the ICRA. The appellant did not argue that the procedures violated the ICRA and the tribal court only upheld the trial court's finding that the procedures had not been followed. See Godlewski v. Moran, 509 U.S. 389, 396–99 (1993).
265. See, e.g., Daige v. Maine Medical Center, 148 Md. 484, 487 (1st Ct. 1914) (refusing to consider the constitutional claim that jury right was violated because the plaintiff did not raise it at the trial level; no showing that such waiver was knowing); Cohen v. President & Fellows of Harvard Coll., 729 F.2d 59, 60–61 (1st Cir.), cert. denied, 469 U.S. 874 (1984) (rejecting asserted constitutional claims because they were not raised at trial).
267. Namely, where "the evidence is insufficient, as a matter of law, to support the finding. . . or where the jury is confused." 131 U.S. 68, 70 (1899).
268. See supra at text surrounding notes 85–89.
269. See Supra 22 Indian L. Rep. at 6146.
275. See supra text surrounding notes 159–164.
276. Id. at 6165.
277. Id. at 6167–68.
281. See MacDonald, 19 Indian L. Rep. at 6055. "The traditional Negros' trial involved affected individuals' 'talking about the offense and offender to resolve the problem. The alleged offender had to have someone speak for him. The effectiveness of a speaker (and there could be more than one) was measured by..."
what the speaker said. If the speaker spoke wisely and with knowledge while persuading others in their search for consensus, that indicated effectiveness. If the speaker hesitated, was unsure, or failed to move the others, that person was not a good speaker and thus was ineffective.

287. See Konatelewta, 25 Indian L. Rep. at 6215 ("Appellant does not allege any prejudice caused him by the delay in prosecution"); Stepetin, 20 Indian L. Rep. at 6050 ("no prejudice occurred to the defendant"); MacDonald Jr., 19 Indian L. Rep. at 6083 ("there is no indication that evidence was lost; memories were dimmed, defense witnesses disappeared or the defense was impaired").
288. See Edwards, 16 Indian L. Rep. at 6006 (defendant caused the eighteen-month gap between arraignment and trial by twice requesting continuances and then failing to appear at trial); Konatelewta, 25 Indian L. Rep. at 6215 ("three-and-a-half month delay attributable to appellant's "own requests for delays and stipulations to continuances" and five weeks of the delay attributable to government.").
290. MacDonald Jr., 19 Indian L. Rep. at 6083.
292. Id. at 6214.
294. Id. at 6116.
296. This is suggested by the Jake court's one-sentence analysis of the question ("this court specifically rejects any concept or notion that a criminal complaint must survive even though the information required by . . . the ICRA is omitted") and the fact that elsewhere in the opinion the court looked to federal law to construe other ICRA provisions. See id. at 6205-06.
299. Id. at 6028.
300. See Lower Elwha Kallam Indian Tribe v. Bostrom 19 Indian L. Rep. 6026, 6027 (L. Elwha Ct. App. 1991) (noting that the ordinance "is essentially a statutory list of the decision of Miranda v. Arizona, 384 U.S. 436 (1966)"); Southern Ute Tribe v. Lanning, 19 Indian L. Rep. 6001, 6002 (S. Ute Tr. Ct. 1992) (ordinance requires police to inform persons of their rights "before any person who is in custody is questioned or in any manner interrogated concerning any possible criminal activity by that person.").
302. See id. at 6007-08. In a subsequent case the same court engaged in fullest incorporation, explaining that the right against self-incrimination is identical to a longstanding tribal custom. See Navajo Nation v. MacDonald Jr., 19 Indian L. Rep. 6079, 6084 (Nev. Sup. Ct. 1992), discussed infra at 59.
306. Id. at 6027.
307. Id.