

## **TRIBAL INCORPORATION OF FIRST AMENDMENT NORMS: A CASE STUDY OF THE INDIAN TRIBES OF SOUTH DAKOTA**

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### **I. INTRODUCTION**

As American culture becomes more individualistic, social and legal opposition has arisen regarding expansive judicial interpretations of First Amendment freedoms. According to this opposition, the courts have interpreted such freedoms in an almost exclusively individualistic light, with little regard for community interests and values. This debate over individual rights versus social and community interests has been raging for decades in the areas of pornography, crime prevention, and national security. In the case of constitutional protections granted to graphically violent video games, for instance, critics argue that courts should take a more balanced view of First Amendment freedoms, giving greater consideration to community interests in healthy child development and crime prevention, and less consideration to the rights of individual game distributors to sell their products to minors whose parents object to such games.

The First Amendment is a classic expression of the kind of western liberal political thought underlying American constitutional democracy. This political philosophy, in the classic sense, places great emphasis on individual freedom. Consequently, a strictly individualistic view of the First Amendment becomes almost inevitable. However, even within the borders of the United States, an alternate view and application of the First Amendment is emerging.

This article will examine how Indian tribal courts have incorporated First Amendment norms within tribal legal systems. Given the more traditionally communal nature of tribal societies, Indian tribal courts have taken a slightly different approach to the kind of individual rights articulated in the First Amendment. As this article will demonstrate, tribal courts have elevated community interest and values when considering individual rights issues. Indeed, the ways in which those interests and values have been elevated may

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prove instructive to those who advocate a more balanced approach to First Amendment freedoms within the U.S. judicial system.

Part I of this article will examine the legal obligation imposed on Indian tribes to protect certain individual rights. The article will first examine whether the First Amendment applies to Indian tribes, and then whether and how the Indian Civil Rights Act applies. In Part II, the article will analyze how federal courts have interpreted the Indian Civil Rights Act. Part III will survey Indian tribal court decisions concerning individual rights issues such as free speech, free press, and free exercise of religion. In the final part of the article, the analysis will turn away from reported tribal court decisions and focus on tribal political, social, and cultural issues relating to First Amendment-type rights. In this respect, the article will focus exclusively on the nine tribes of South Dakota, exploring how First Amendment-type issues have arisen within those tribes and how they have been resolved outside of the judicial system.

## II. THE APPLICABILITY OF THE FIRST AMENDMENT TO INDIAN TRIBES

### A. *General Constitutional Applicability*

The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>1</sup> The question of whether this Amendment applies to Indian tribes depends first on whether the U.S. Constitution in general governs Indian tribes.<sup>2</sup> In a series of cases stretching over more than a century, the Supreme Court has answered this question in the negative.

In *Talton v. Mayes*,<sup>3</sup> the Court, presented with the issue of whether the Fifth Amendment to the U.S. Constitution applied to local legislation of the Cherokee Nation, recognized that the Amendment acted as a limitation only upon the powers of the national government.<sup>4</sup> The controlling issue was whether the powers exercised by the Indian Tribe are derived from the Federal Constitution, or whether they are local powers not created by the Constitution, and thus not subject to the U.S. Constitution.<sup>5</sup> Based on a long line of precedent, the *Talton* Court concluded that because tribal governments occupy a “semi-independent position,” having exercised local self-government prior to the establishment of

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1. U.S. CONST. amend. I.

2. See generally FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 14.03[1] (Lexis Nexis 2005) (1941). It was long held that reservation Indians are not citizens. *Elk v. Wilkins*, 112 U.S. 94, 94-109 (1884). In 1924, however, the Nationality Act was amended to provide that a person born in the United States to a member of an Indian tribe shall be a national and citizen of the United States at birth. 8 U.S.C. § 1401(a)(2) (2000).

3. 163 U.S. 376 (1896) (holding that a Cherokee court which indicted and convicted a Cherokee for murder was not bound by the grand jury requirements of the Fifth Amendment).

4. *Id.* at 382.

5. *Id.*

the Constitution, they are not subject to the limitations imposed by the Constitution.<sup>6</sup> Thus, the Constitution does not apply to tribal governments when the powers being exercised are not federal powers.<sup>7</sup> Moreover, this principle has been consistently reaffirmed since *Talton*.<sup>8</sup>

In ruling upon whether the Equal Protection Clause of the Fourteenth Amendment applies to tribal governments, the Court in *Santa Clara Pueblo v. Martinez*,<sup>9</sup> reiterated that because tribes were “separate sovereigns pre-existing the Constitution, [they] have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”<sup>10</sup>

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6. *Id.* at 384; *see also* *United States v. Kagama*, 118 U.S. 375, 381-382 (1886) (describing tribes as having a “semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations,” and stating that “thus far [Indian tribes have] not [been] brought under the laws of the Union or of the State within whose limits they resided.”); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (stating that: “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . . The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) (declaring that the Cherokee Nation is a foreign state, as that term is used in the Constitution, based on the manner in which the federal government has treated the tribe in terms of treaty formation with the tribe); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 133 (10th Cir. 1959). The court stated:

Indian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive; that within their borders they have their own Government, laws and courts, and are not subject to the laws of the State in which they are located or to the laws of the United States, except where Federal laws are made applicable to them by Congressional enactment, and that Federal courts are without jurisdiction unless jurisdiction is expressly conferred by Congressional enactment.

*Id.*

7. *See* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1596 (2004). “It is a fundamental premise of American law dealing with the Indian nations in the United States that the U.S. Constitution does not apply to regulate the conduct of Indian tribal governments.” *Id.* In fact, the Tenth Circuit in *Groundhog v. Keeler* stated that “[a]n Indian tribe or nation is not a federal instrumentality and is not within the reach of the Fifth Amendment, and due process restraint places restrictions on the Indian tribes only when it is so provided by Congressional enactment.” 442 F.2d 674, 678 (10th Cir. 1971). *But see* *Colliflower v. Garland*, 342 F.2d 369, 379 (9th Cir. 1965) (holding that where a tribal court was essentially functioning as a federal agency, it was in effect a federal instrumentality and a writ of habeas corpus would lie to a person detained by that court in violation of the United States Constitution).

8. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *See also* *Tom v. Sutton*, 533 F.2d 1101, 1102-03 (9th Cir. 1976) (“[T]he Constitution [is] inapplicable to Indian tribes, Indian courts and Indians on the reservation.”); *Janis v. Wilson*, 521 F.2d 724, 726 n.1 (8th Cir. 1975) (“The United States Constitution does not limit the powers of tribal government.”); *Keeler*, 442 F.2d at 678 (recognizing that “[t]he Constitution applies to Indian nations only to the extent it expressly binds them or is made binding on them by treaty or Act of Congress.”); *Jacobson v. Forest County Potawatomi Cmty.*, 389 F. Supp. 994, 995 (E.D. Wis. 1974) (indicating that “the United States Constitution does not apply to any Indian tribe.”).

9. 436 U.S. 49 (1978).

10. *Id.* at 56. *Martinez* indicated that lower courts have extended this holding not only to several provisions of the Bill of Rights but to the Fourteenth Amendment as well. *Id.* (citing *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967); *Native American Church*, 272 F.2d 131; *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 919 (10th Cir. 1957); *Keeler*, 442 F.2d at 678. The Court in *Martinez* did, however, reaffirm its recognition in *Talton* that “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.” *Id.* at 57. In *Talton*, the Court specifically stated, “[t]rue it is that in many adjudications of

More recently, the Court in *Nevada v. Hicks*<sup>11</sup> stated that “it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.”<sup>12</sup>

### B. Judicial Rulings on First Amendment Applicability

Prior to passage of the Indian Civil Rights Act of 1968,<sup>13</sup> few cases dealt with the specific issue of whether the First Amendment of the Constitution applied to Indian tribes. In *Native American Church v. Navajo Tribal Council*,<sup>14</sup> the Tenth Circuit addressed the issue of whether an ordinance adopted by the Navajo Tribal Council prohibiting the introduction of, sale, use and possession of peyote in Navajo country violated the First, Fourth and Fifth Amendment rights of the Native American Church of North America and its members.<sup>15</sup> Recognizing previous decisions holding that the unique semi-independent status of Indian tribes prevents the application of the Constitution to the tribal governing bodies, the court stated that “[i]t follows that the Federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body for the regulation of life on the reservation.”<sup>16</sup> Specifically referring to the First Amendment, the court acknowledged that the Amendment “applies *only* to Congress” and is “made applicable to the States only by the Fourteenth Amendment.”<sup>17</sup> Therefore, given that “Indian tribes are not states,” the First Amendment does not apply to them.<sup>18</sup>

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this court the fact has been fully recognized that, although possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.” 163 U.S. at 384.

11. 533 U.S. 353 (2001).

12. *Id.* at 383 (citing *Talton v. Mayes*, 163 U.S. 376, 382-85; FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 664-65 (1982) (1941) (“Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes”).

13. 25 U.S.C.A. §§ 1301-1303 (2000).

14. 272 F.2d 131 (10th Cir. 1959).

15. *Id.* at 132.

16. *Id.* at 134. In expounding the rationale underlying this reasoning, the Court in *Williams v. Lee* provided that “[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” 358 U.S. 217, 223 (1959). *Williams* involved a non-Indian creditor who owned a business in Indian Country and was attempting to collect on a debt owed by an Indian debtor. *Id.* at 217. The fact that there was a non-Indian involved was immaterial to the Court’s holding in which the Court recognized that “[t]he cases [decided by] this Court have consistently guarded the authority of Indian governments over their reservations.” *Id.* at 223.

17. *Native American Church*, 272 F.2d at 134 (emphasis added).

18. *Id.*; see *Colliflower v. Garland*, 342 F.2d 369, 377 (9th Cir. 1965). The Tenth Circuit reiterated the holding that the First Amendment does not apply to Indian tribes in *Native American Church*. Specifically, the court held:

No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.

272 F.2d at 135. Subsequent to *Native American Church*, the D.C. Court of Appeals was presented with a similar case involving a section of the Code of Indian Tribal Offenses denouncing the sale, use, or possession of peyote in Navajo country. *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962). This section

### III. CONGRESSIONAL IMPOSITION OF FIRST AMENDMENT NORMS ON INDIAN TRIBES

The United States Supreme Court and lower federal courts have repeatedly recognized that although tribes have the authority to self-govern when exercising their tribal functions, “all such rights are subject to the supreme legislative authority of the United States.”<sup>19</sup> Finding that “tribal members’ basic constitutional rights [had] been denied at every level,” Congress in 1968 passed the Indian Civil Rights Act (ICRA) as a rider to the Civil Rights Act of 1968.<sup>20</sup> Aside from some notable exceptions, the ICRA follows the Bill of Rights of the U.S. Constitution.<sup>21</sup> These individual rights, although not constitutionally imposed, became applicable to Indian tribes through congressional mandate.<sup>22</sup> According to one scholar, “[t]he central purpose of the ICRA was to apply most of the provisions of the Constitution’s Bill of Rights to tribal governments[.]”<sup>23</sup>

#### A. THE INDIAN CIVIL RIGHTS ACT

The ICRA is composed of three sections: 1301, which provides definitions for “Indian tribe,” “powers of self-government,” “Indian court,” and “Indian;” 1302, which sets out the constitutional rights protected under the Act; and 1303, which provides the remedy available for violations of the Act.<sup>24</sup>

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had been proposed as Resolution No. CJ-1-40 by the Navajo Tribal Council and approved by the Secretary of the Interior. *Id.* at 821. To this section, the Acting Secretary of the Interior added the following subsection: “Peyote violations. Any Indian who shall introduce into the Navajo country, sell, use or have in its possession within said Navajo country, the bean known as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed \$100, or both.” *Id.* The Navajo Indians alleged that the approval of the resolution by the Secretary was a violation of the First Amendment to the Constitution and an invalid authorization of power. *Id.* at 822. Although the D.C. Circuit held that the issue was moot, it again recognized that “[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.” *Id.* at 823.

19. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *see, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *United States v. Kagama*, 118 U.S. 375, 384-85 (1886); *Oliver*, 306 F.2d at 823. *See also* *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975) (holding that Congress has explicit and plenary power to enact legislation with respect to Indian tribes); *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

20. S. REP. NO. 721, at 1864 (1968); Legislative History of the Indian Bill of Rights, 25 U.S.C.A. §§ 1301-1303 at 1863. *See* 25 U.S.C.A. §§ 1301-1303 (2000).

21. For example, the ICRA does not include an establishment clause, provide for the right to keep and bear arms, allow free assistance of counsel, or guarantee the right to a jury trial in civil cases. *Compare* 25 U.S.C.A. § 1302 *with* U.S. CONST. amends. I-X. *See* *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), in which the court noted

Among the most notable distinctions between § 1302 and cognate constitutional provisions, as interpreted, are the absence in the ICRA of a clause prohibiting the establishment of religion; the omission of a right to the assistance of counsel for the indigent accused; the absence of a right to a jury trial in civil cases; and the specific limitations on terms of imprisonment and fines.

*Id.* at 882.

22. COHEN, *supra* note 2, at § 14.03[1]. Other sources that can be invoked are tribal bills of rights, if available. *Id.*

23. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 467 (1998).

24. 25 U.S.C.A. §§ 1301-1303 (2000).

Section 1302 of the ICRA is known as the Indian Bill of Rights.<sup>25</sup> The first subsection of this section largely parallels the First Amendment to the United States Constitution.<sup>26</sup> In whole, it provides, “[n]o Indian tribe in exercising powers of self-government shall (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances[.]”<sup>27</sup>

The only specifically-mandated remedy provided by Congress under section 1301 of the ICRA is one of habeas corpus, which “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.”<sup>28</sup> Even though the ICRA provided this limited federal remedy, federal courts initially “found that the ICRA had waived tribal sovereign immunity, and the courts regularly enjoined tribal governments and even awarded damages in ICRA cases.”<sup>29</sup> In 1978, however, the Supreme Court

25. McCarthy, *supra* note 23, at 467-73.

26. See 25 U.S.C.A. § 1302. Notably, section 1302(1) does not contain an Establishment Clause as found in the First Amendment. *Id.* “The ICRA guarantee of free exercise of religion does not prohibit a tribe from establishing a religion, in recognition of the fact that to many tribes religion is inseparable from government and other areas of life.” McCarthy, *supra* note 23, at 471.

27. 25 U.S.C.A. § 1302. The remaining provisions of section 1302 are as follows:

No Indian tribe in exercising powers of self-government shall –

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(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [sic] a fine of \$5000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

*Id.* Although the ICRA restricts Indian tribes in their exercise of self-government, “[i]t imposes no restrictions on the Congress in legislating with respect to Indian tribes, nor on the Secretary of the Interior in exercising the power given to him by Congress with respect to Indian tribes and their affairs.” *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

28. 25 U.S.C.A. § 1303.

29. McCarthy, *supra* note 23, at 471. See *Dodge v. Nakai*, 298 F. Supp. 26, 31-32 (D. Ariz. 1969) (invalidating as a violation of due process an order by the Navajo Tribal Council excluding from the reservation a legal services program director who was accused of disrespectful behavior at a Council meeting). After this decision, “courts generally found federal jurisdiction to adjudicate ICRA claims under statutes providing for either federal question or civil rights jurisdiction.” McCarthy, *supra* note 23, at 471-72. See also Note, *Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 MICH. L. REV. 210, 211 (1976) (“Several courts have subsequently gone considerably further and found that

abruptly reversed this practice of creating jurisdiction for ICRA claims in federal courts.<sup>30</sup> Declaring that “[t]ribal forums are available to vindicate rights created by the ICRA,” *Martinez* put an end to federal court jurisdiction for ICRA civil violations.<sup>31</sup>

## B. THE GOALS AND PURPOSES OF THE ICRA

Motivating passage of the ICRA was the congressional belief “that the American Indian is the most neglected minority group in the history of this Nation.”<sup>32</sup> Seven years before its passage, the Senate Subcommittee on Constitutional Rights undertook an investigation of the legal status of American Indians, particularly “the problems [Indians] encounter when asserting constitutional rights in their relations with State, Federal, and tribal governments.”<sup>33</sup> Senator Sam Ervin of North Carolina, the primary sponsor of the legislation, asserted “that the rights of Indians were ‘seriously jeopardized by the tribal government’s administration of justice,’ which he attributed to ‘tribal judges’ inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system.”<sup>34</sup> The legislative history of the Act expressed “an intent to protect the individual rights of Indians while fostering tribal self-government and cultural identity.”<sup>35</sup>

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ICRA also *impliedly* created a federal civil remedy for violation of the rights guaranteed by the Act.”).

30. McCarthy, *supra* note 23, at 472.

31. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Moreover, the Court indicated that “[o]ther than federal habeas jurisdiction . . . only one alternative existed to tribal court enforcement of the ICRA: where tribal constitutions required that the Secretary of the Interior approve new ordinances, the Department of Interior might enforce the ICRA.” McCarthy, *supra* note 23, at 472 (citing *Martinez*, 436 U.S. at 66 n.22). In the 1980 case of *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), however, the Tenth Circuit Court of Appeals declared an exception to *Martinez* by holding that “the ICRA creates federal jurisdiction in non-habeas actions where there is no tribal remedy and the case involves a non-Indian and matters outside of internal tribal affairs. The Tenth Circuit has limited this exception to cases where the tribal remedy has actually been sought and refused.” McCarthy, *supra* note 23, at 475. Other federal courts have split in determining whether to adopt this exception. *Id.* at 475-76.

32. S. REP NO. 721, at 1863 (1968); Legislative History of the Indian Bill of Rights, 25 U.S.C.A. §§ 1301-1303 at 1863. The legislative history further provided that “[e]ven though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities.” *Id.*

33. S. REP NO. 721, at 1864 (1968); Legislative History of the Indian Bill of Rights, 25 U.S.C.A. §§ 1301-1303 at 1863. Senator Anderson noted: “An Indian citizen has all the rights of other citizens while he is off the reservation, but on the reservation ‘in the absence of Federal legislation’ he has only the rights given to him by the tribal governing body.” *Solomon v. LaRose*, 335 F. Supp. 715, 719 (D. Neb. 1971).

34. McCarthy, *supra* note 23, at 469 (quoting 113 CONG. REC. 13,473 (1967) (statement of Sen. Ervin, quoting conclusions of the Subcommittee on Constitutional Rights)). Accord Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 1-2 (1975) (noting that the passage of the ICRA resulted from congressional concern in the early 1960s that individual Native Americans had no constitutional rights under their tribal governments).

35. *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975). “The legislative record underlying the Indian Bill of Rights clearly shows that while Congress intended to establish important individual rights for persons under the jurisdiction of tribal governments, Congress also intended that these rights be harmonized with legitimate tribal interests.” *Janis v. Wilson*, 385 F. Supp. 1143, 1150 (D.S.D. 1974).

Initially, the drafters of the ICRA envisioned imposing upon Indian tribes “the same limitations and restraints as those which are imposed on the federal government by the United States Constitution.”<sup>36</sup> However, this whole scale application of the Bill of Rights inspired much opposition, and eventually “a substitute bill that spelled out in specific terms the rights Indians would possess in their relationships with tribal governments” was offered and enacted.<sup>37</sup>

Even after the ICRA was more narrowly tailored to fit the needs of Indian tribes, it continued to face opposition.<sup>38</sup> As one scholar notes “[t]he ICRA was passed over the objections of many tribal governments, some of which felt the economic burdens of compliance would be too great and others . . . which felt their own cultural traditions were superior to ‘white-man’s justice.’”<sup>39</sup> Opponents argued that the Indian Civil Rights Act was an “unnecessary intrusion on tribal sovereignty.”<sup>40</sup> In attempting to address these objections, the final version of the Act “indicates that the scope of the individual rights contained therein is to be determined by balancing them against the legitimate interests of the tribe in maintaining the traditional values of their unique governmental and cultural identity.”<sup>41</sup>

### C. JUDICIAL INTERPRETATION OF THE ICRA

#### 1. *Pre-Martinez Cases*

Soon after passage of the Indian Civil Rights Act, claimants began instituting suits in the federal courts alleging tribal government violations of the rights guaranteed under the Act, but only a couple of these suits involved section 1302(1) of the Act, which guaranteed rights similar to those found in the First Amendment to the U.S. Constitution.<sup>42</sup> The first issue obviously to be settled

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36. *Dodge v. Nakai*, 298 F. Supp. 17, 24 (D. Ariz. 1968). The original bill, in pertinent part, read as follows: “any Indian tribe, in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution.” *Groundhog v. Keeler*, 442 F.2d 674, 681 (10th Cir. 1971).

37. *Dodge*, 298 F. Supp. at 24.

38. An earlier version of the Act guaranteed the protections to only American Indians; this was later modified to provide protection to all people, Indians and non-Indians alike. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Dodge*, 298 F. Supp. at 24. See *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975); *Hickey v. Crow Creek Hous. Auth.*, 379 F. Supp. 1002 (D.S.D. 1974); *Tracy v. Superior Court of Maricopa County*, 810 P.2d 1030 (Ariz. 1991).

39. *McCarthy*, *supra* note 23, at 469. “The requirement of jury trials, for example, implicated both of these concerns. The potential costs were high and the jury system was foreign to traditional methods of dispute resolution among the extended families which tribes comprise.” *Id.* at 469-70.

40. *Id.* at 470. In fact, one court stated:

Whatever may have been the autonomy of the Navajo Tribe prior to the passage of [the Indian Civil Rights Act], this Act of Congress imposed new responsibilities upon the tribe with respect to both the manner in which it could exercise its governmental powers and the objectives that it could pursue through their implementation.

*Dodge*, 298 F. Supp. at 29 (D. Ariz. 1969).

41. *Janis v. Wilson*, 385 F. Supp. 1143, 1150 (D.S.D. 1974) (citing Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1360 (1969); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973)). See *McCarthy*, *supra* note 23, at 470.

42. Compare 25 U.S.C.A. § 1302 (2000) with U.S. CONST. amend. I. There were several other

was one of federal jurisdiction over these claims.

In *Dodge v. Nakai* (hereinafter *Dodge I*),<sup>43</sup> the first case involving section 1302(1), the plaintiff brought an ICRA claim against an order removing the plaintiff from the Navajo Indian Reservation.<sup>44</sup> In determining federal jurisdiction under the ICRA, the court concluded that “[b]ecause plaintiffs in this case assert rights purportedly guaranteed to them by [the Indian Civil Rights Act], this action is one arising under the laws of the United States, and this Court has jurisdiction under Title 28 U.S.C. § 1331.”<sup>45</sup> The court also found jurisdiction under Title 28 U.S.C. section 1343(4), stating that “this Court has original jurisdiction over ‘any civil action authorized by law to be commenced by any person . . . under any Act of Congress providing for the protection of civil rights.’”<sup>46</sup> Consequently, *Dodge I* found federal jurisdiction to hear the claims under the Civil Rights Act, “despite the failure of plaintiffs to seek redress in the Navajo Tribal Court.”<sup>47</sup>

Having settled the jurisdiction issue, the court in *Dodge v. Nakai* (hereinafter *Dodge II*) then went on to decide the case on its merits, which involved plaintiff’s objection to having been removed from the Navajo Reservation for obnoxiously laughing in response to an Advisory Committee member’s question.<sup>48</sup> The court indicated that “[u]nder 25 U.S.C. § 1302(1), these individuals possess the right to express views as to the wisdom and propriety of the policies and programs adopted by tribal governmental agencies.”<sup>49</sup> It then held that the plaintiff’s removal from the Reservation was unlawful under the Indian Civil Rights Act as an abridgment of both the plaintiff’s freedom of speech and due process rights.<sup>50</sup>

Federal court jurisdiction over ICRA claims was reaffirmed in *Solomon v. LaRose*.<sup>51</sup> Dismissing the argument that jurisdiction cannot lie because the only remedy provided under the Act was for habeas relief, the court indicated that “[i]t does not follow that Congress intended [habeas corpus] to be the exclusive jurisdictional basis for enforcement [of the ICRA]. Such a finding would render nugatory the rights secured by provisions (1), (5) and (8) of § 1302.”<sup>52</sup> The

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cases heard under the ICRA by federal courts that dealt with sections other than § 1302(1). *See, e.g.*, *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976) (right to counsel); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975) (voting rights, equal protection); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974) (due process); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973) (due process); *Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Res.*, 301 F. Supp. 85, 89 (D. Mont. 1969) (civil rights generally).

43. 298 F. Supp. 17 (D. Ariz. 1968).

44. *Id.* at 20.

45. *Id.* at 25.

46. *Id.*

47. *Id.* at 26.

48. *Dodge v. Nakai*, 298 F. Supp. 26, 30 (D. Ariz. 1969).

49. *Id.* at 32.

50. *Id.* at 33.

51. 335 F. Supp. 715 (D. Neb. 1971) (involving a tribal council’s invalidation of an election).

52. *Id.* at 721; *accord* *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973). Specifically the District Court said:

It has been argued that this court has no general jurisdiction over civil actions brought under the

court further explained that since 28 U.S.C. section 1343(4) also provided a jurisdictional basis to bring claims under the ICRA, a special provision within the ICRA was unnecessary.<sup>53</sup>

In *Big Eagle v. Andera*, asserting jurisdiction over ICRA section 1302 claims, a federal court overturned a tribal disorderly conduct ordinance as vague and overly broad in violation of the ICRA.<sup>54</sup> The court declared that “Indian citizens have the rights of freedom of speech and due process of law; since the enactment of 25 U.S.C. § 1302 these rights can be asserted against a tribal government just as any citizen can assert his or her rights against a state or municipal government.”<sup>55</sup> This broad recognition of federal court jurisdiction over claims brought under the ICRA, however, was short-lived and came to an end in 1978.<sup>56</sup>

## 2. *Santa Clara Pueblo v. Martinez*

The Supreme Court’s first opportunity to interpret the ICRA came in *Santa Clara Pueblo v. Martinez*.<sup>57</sup> In *Martinez*, the respondent sought declarative and injunctive relief against the enforcement of “an Indian tribe’s ordinance denying membership to the children of certain female tribal members.”<sup>58</sup> Because the ICRA did not “expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions[,]” the Court had to determine whether such remedies were in fact available under the Act.<sup>59</sup>

The *Martinez* Court first considered the issue of whether the ICRA had waived tribal sovereign immunity for such lawsuits.<sup>60</sup> It recognized that “a waiver of sovereign immunity . . . must be unequivocally expressed,” but that “[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory

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statute since it expressly grants jurisdiction to federal courts only in habeas corpus matters. Acceptance of this arguments would have the anomalous effect of emasculating the guarantees vouchsafed by the statute in subsections (1), (5) and (8) of 25 U.S.C.A. § 1302.

*Id.* at 635 (internal citations omitted).

53. *Id.* See also *Janis v. Wilson*, 521 F.2d 724 (8th Cir. 1975). In *Janis v. Wilson*, the Eighth Circuit recognized that “[j]urisdiction over claims presented under the Indian Civil Rights Act is conferred upon the federal courts by 28 U.S.C. § 1343(4).” *Id.* at 726. But the court indicated that for the sake of efficacy of the ICRA, federal courts jurisdiction is “ordinarily conditioned on the exhaustion of tribal remedies, both administrative and judicial.” *Id.* at 726-27. Thus, the Eighth Circuit remanded the case, not on the merits, but rather because the appellants failed to show that they have exhausted their tribal remedies. *Id.* at 727.

54. 418 F. Supp. 126, 129 (D.S.D. 1976). The court recognized that the application of the ordinance “offend[ed] First Amendment values incorporated in 25 U.S.C. § 1302.” *Id.* at 132.

55. *Id.* at 132.

56. See *infra* Part III.C.2.

57. 436 U.S. 49 (1978).

58. *Id.* at 51. The ordinance specifically “den[ie]d membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe.” *Id.*

59. *Id.* at 51-52.

60. *Id.* at 58.

relief.”<sup>61</sup> Consequently, the Court declared that “suits against the tribe under the ICRA are barred by its sovereign immunity from suit.”<sup>62</sup>

The Court then considered whether an action under the ICRA against the tribal officer could be heard in federal court.<sup>63</sup> It recognized that providing a federal forum for such issues would interfere with tribal autonomy and self-government.<sup>64</sup> Further, the Court demonstrated its recognition that

Subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,<sup>65</sup> [may] undermine the authority of the tribal cour[T] . . . AND HENCE . . . iNfringe [sic] on the right of the indians [sic] to govern themselves.<sup>66</sup>

Therefore, in an effort to prevent the unsettling of a tribal government’s ability to maintain order as well as to respect tribal sovereignty and the plenary authority of Congress in this area, the Court refrained from granting federal jurisdiction for claims against tribal officials as well.<sup>67</sup>

The Court further noted that the original ICRA legislation proposed a “*de novo* review in federal court of all convictions obtained in tribal courts.”<sup>68</sup> Such legislation was not adopted due to the harmful effects upon law enforcement

61. *Id.* at 58-59 (internal citations and quotations omitted). One scholar reports, nevertheless, that “the ICRA is often enforceable in tribal courts—either because a tribal court has held Indian Civil Rights Act waives sovereign immunity and creates a cause of action in tribal court, or because tribal statutory or constitutional provisions have done the same.” Kristen A. Carpenter, *Considering Individual Religious Freedoms under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL’Y 561, 569 (2005) (citing Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2004)).

62. *Martinez*, 436 U.S. at 59.

63. *Id.*

64. *Id.*

65. *Id.* (quoting *Fisher v. Dist. Court*, 424 U.S. 382, 387-88 (1976)).

66. *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

67. *Id.* at 60. This recognition of the unique cultural and sovereign identities of Indian tribes and how federal interpretation of the ICRA might infringe on that identity had been previously made in *Janis v. Wilson*, 385 F. Supp. 1143 (D.S.D. 1974), which involved the issue of “whether the defendants, in terminating plaintiffs’ tribal government employment for participation in public political demonstrations during working hours for which they were paid and while not on approved leave, violated plaintiffs’ right to free speech . . . as guaranteed by the Indian Civil Rights Act . . . .” *Id.* at 1149. The defendants instituted the termination pursuant to Oglala Sioux Tribe, Ordinance Number 71-05. *Id.* at 1151. In determining that the ordinance did not violate section 1302(1) of the ICRA, the court recognized that plaintiff’s claim under section 1302(1) of the ICRA

[M]ust not be measured by the same standards imposed by the Bill of Rights on state and federal governments, but rather these limitations must be applied with recognition of the Oglala Sioux Tribe’s unique cultural heritage, their experience in self government, and the disadvantages or burdens, if any, under which the defendant tribal government was attempting to carry out its duties.

*Id.* at 1150-51. For a similar pronouncement see *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976), in which the court declared

[C]ourts have been careful to construe the terms “due process” and “equal protection” as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution.

*Id.* at 1105 n.5.

68. *Martinez*, 436 U.S. at 67.

within the reservation.<sup>69</sup> According to the Court, the exclusive provisions of habeas corpus as a remedy for claims brought under the Act struck the perfect balance in avoiding unnecessary intrusions on tribal governments.<sup>70</sup> The Court concluded by stating that

[U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.<sup>71</sup>

The message was clear: federal courts do not have jurisdiction to hear ICRA claims, unless the remedy sought is one of habeas corpus.<sup>72</sup>

### 3. *Post-Martinez ICRA Claims*

*Martinez* put a halt to federal court jurisdiction over ICRA claims. Several federal court cases in which non-habeas claims under the ICRA were alleged were summarily dismissed on grounds of the sovereign immunity status of tribal governments.<sup>73</sup> In 1980, however, the Tenth Circuit established the *Dry Creek* exception, which recognized a federal right of action for civil claims under the ICRA under limited circumstances.<sup>74</sup> For the exception to apply, the plaintiff must demonstrate the following: that the dispute involves a non-Indian party, that a tribal forum is not available, and that the dispute involves an issue falling outside internal tribal affairs.<sup>75</sup> More recently, however, the Tenth Circuit has

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69. *Id.*

70. *Id.* at 67-69. Whereas “Congress’ authority over Indian matters is extraordinarily broad, the Court stated that the role of courts in adjusting relations between and among tribes and their members [is] correspondingly restrained.” *Id.* at 72.

71. *Id.*

72. *Id.* See also COHEN, *supra* note 2, at § 14.04[2]. “This means that civil rights cases brought against tribal governments are solely within the jurisdiction of tribal courts.” Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1056 (2007). Even in some of these situations where the tribal forum is the only forum available to a claimant, relief may still be unobtainable due to the tribe’s ability to assert sovereign immunity as its defense. *Id.* at 1112. Some tribes, nevertheless, have elected to waive their sovereign immunity, with such waivers “effectuated through tribal law, in the form of constitutional provisions, legislative acts, or by virtue of the development of a tribal common law.” *Id.* at 1110.

73. See, e.g., *Olguin v. Lucero*, 87 F.3d 401, 403 (10th Cir. 1996) (“[T]he Indian Civil Rights Act authorizes only habeas corpus actions[; therefore,] I do not have jurisdiction over [plaintiffs’ freedom of speech claim] under that act.”); *Santa Ynez Band of Mission Indians v. Torres*, 262 F. Supp. 2d 1038, 1044 (C.D. Cal. 2002) (“[I]t is the Supreme Court’s opinion that, other than for situations under which habeas relief is applicable, the tribal courts can be adequate adjudicators of civil rights violations under section 1302.”); *Barnes v. White*, 494 F. Supp. 194, 197-98 (N.D.N.Y. 1980) (indicating that the ICRA did not provide a private cause of action for alleged violations in federal courts); *Thompson v. New York*, 487 F. Supp. 212, 229 (N.D.N.Y. 1979) (recognizing that under *Martinez* habeas corpus relief is the only remedy available in federal forums); *Johnson v. Frederick*, 467 F. Supp. 956, 959 (D.N.D. 1979) (“[P]laintiff’s civil rights grievance under the ICRA may be presented only to the tribal court.”); *Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366, 367-68 (D.N.D. 1978) (“[T]he Supreme Court decided in *Santa Clara Pueblo v. Martinez* that civil suits against an Indian tribe under Subchapter I of the Indian Civil Rights Act are barred by the tribe’s sovereign immunity.” (internal citations omitted)).

74. *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980).

75. *Id.* at 685.

restricted the holding in *Dry Creek Lodge*,<sup>76</sup> and other federal courts have altogether refused to apply the *Dry Creek* exception.<sup>77</sup> Therefore, jurisdiction for ICRA claims pursuing remedies other than habeas relief seemingly lies exclusively within tribal forums. Furthermore, “there is no judicial review and no appeal for tribal government decisions.”<sup>78</sup>

#### D. TRIBAL COURTS’ INTERPRETATIONS OF THE INDIAN CIVIL RIGHTS ACT

Since the passage of the Indian Civil Rights Act, a number of tribal courts have construed the first section of the Indian Bill of Rights, which sets forth guarantees similar to those found in the First Amendment. One scholar who has studied these opinions indicates that, “[h]ere, more than in any other ICRA provision, the tribal courts have struck out on their own to develop ICRA doctrines that are independent of the federal case law.”<sup>79</sup> According to Professor Rosen, tribal courts have not applied the ICRA to tribal governments in the same way that federal courts have applied the First Amendment to state and federal governments.<sup>80</sup> Under the ICRA, “tribal members do not have those same rights in their relationship to respective tribal governments” as do U.S. citizens regarding their state and federal governments.<sup>81</sup> This is because “[t]he sovereignty of tribal governments, the perpetuation of the tribal culture and the need for self-government” plays a more important role in tribal courts.<sup>82</sup> For instance, “[w]hile state and federal governments are required to remain *neutral* on issues involving religion, tribal governments, which are often theocratic, *can and do* promote religious practices and beliefs to preserve tribal culture.”<sup>83</sup>

As Professor Rosen observes, it is a “well-established doctrine that ICRA’s statutory terms need not be ascribed the same meaning as their sister terms in the federal Constitution.”<sup>84</sup> Therefore, tribes are not required to apply federal

76. Nakai v. Ho-Chunk Nation, 2004 WL 1085214, at \*2 (W.D. Wis. May 7, 2004).

77. See, e.g., Whiteco Metrocom Div. of Whiteco Indus., Inc. v. Yankton Sioux Tribe, 902 F. Supp. 199, 202 (D.S.D. 1995).

78. Victoria Verbyla Sutton, *Divergent but Co-Existent Local Government and Tribal Governments under the Same Constitution*, 31 URB. LAW. 47, 53 (1999).

79. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 548 (2000).

80. *Id.*

81. Sutton, *supra* note 78, at 53.

82. *Id.* at 54.

83. *Id.* (emphasis in original).

84. Rosen, *supra* note 79, at 487. “Tribal courts have the authority to construe ICRA provisions in light of tribal needs, values, customs, and traditions.” *Id.* “[T]he Supreme Court has affirmed that tribes are not required to apply or interpret individual civil rights protections directly in accordance with state and federal governments. Accordingly, they may, in a sense, use tribal sovereignty to preserve their differentness—even when tribal laws are seemingly inapposite to American civil rights norms.” Riley, *supra* note 72, at 1050-51. “Consequently, tribal courts develop the meaning of the bulk of the [ICRA’s] terms, even terms like ‘due process’ and ‘free exercise.’ Tribal courts have given these terms markedly different interpretations than the United States courts have ascribed to their sister terms in the Bill of Rights.” Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1081 (1998). Such tribal court decisions are unreviewable by federal courts. Matthew L.M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14

constitutional law standards when analyzing claims under the ICRA. According to Professor Fletcher, “[t]he most critical element that tends to guide tribal court analysis of fundamental individual rights is whether the activity at issue is a distinctly Anglo-American construct versus a traditional or cultural construct.”<sup>85</sup>

In developing a doctrinal model for how tribal courts apply the ICRA, Professor Rosen has identified five different approaches.<sup>86</sup> The “Tabula Rasa” approach is used when the tribal court “ignore[s] altogether the federal case law and proceed[s] to construe the provision wholly on its own.”<sup>87</sup> Under this approach, doctrines completely distinct from existing federal constitutional law doctrine can be applied.<sup>88</sup> Rosen’s second approach is “Incorporation,” which is further divided into two subdivisions: “Stock Incorporation” and “Fitted Incorporation.”<sup>89</sup> This approach is “the polar opposite of Tabula Rasa” because “[u]nder [this approach], the tribal court completely incorporates the federal doctrine to the extent the doctrine has been developed[.]”<sup>90</sup> Stock incorporation occurs, according to Rosen, when the tribal court “adopt[s] the federal case law without explanation.”<sup>91</sup> Fitted incorporation, on the other hand, occurs when “tribal courts actively fit the federal doctrine to the tribal context[.]”<sup>92</sup>

The third approach, “Tailoring,” is used when the tribal court adopts the federal standard for a particular Constitutional Law issue, but disregards all the precedent that contributed to the standard in its present form.<sup>93</sup> Although the tribal court uses a federal standard, it tailored that standard to the case at hand, disregarding any previously-established factors articulated by the federal courts to apply that standard.<sup>94</sup> Under Rosen’s fourth approach, “Re-standardizing,”<sup>95</sup> the tribal court adopts the federal court’s description of the underlying goal of the standard applied but does not affirmatively adopt the standard, thereby creating a different standard to reach that same goal.<sup>96</sup> Finally, the “Re-Targeting” approach essentially replaces the goal of the federal standard with one that is more indicative of “tribal needs, values, customs, and traditions.”<sup>97</sup>

#### E. TRIBAL CONSTITUTIONS AND FIRST AMENDMENT TYPE RIGHTS

In a comprehensive review of tribal constitutions and their civil liberty guarantees, Professor Rusco found that twenty-two tribal constitutions had

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KAN. J.L. & PUB. POL’Y 525, 534 (2005).

85. Fletcher, *supra* note 84, at 537.

86. Rosen, *supra* note 79, at 492.

87. *Id.*

88. *Id.* at 493.

89. *Id.* at 494.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 495.

94. *Id.*

95. *Id.* at 496.

96. *Id.*

97. *Id.* at 496, 487.

adopted the ICRA word-for-word.<sup>98</sup> In terms of First Amendment-type rights, the majority of tribal constitutions contain a statement that protects, in a general fashion, “freedom of worship, conscience, speech, press, assembly, and association.”<sup>99</sup> Of the eighty-eight constitutions considered by Professor Rusco, eighty-five protected the freedom of religion, eighty-eight contained freedom of speech language, fifty-six included freedom of press or to write, eighty-eight protected the freedom of association and/or assembly (which was sometimes qualified with the word “orderly”), and thirty-four recognized the freedom of petition (sometimes specified as redress of grievances).<sup>100</sup>

Professor Rusco also found that aside from the specific references to one or more of these First Amendment rights, “[a] number of provisions on religious freedom obviously were written specifically for the situation of the tribe[,]” as reflected by various references to Native religious beliefs or practices in such provisions.<sup>101</sup> On the other hand, however, some constitutions veered away from the federal example and specifically limited certain freedoms, such as the freedom of expression and freedom of speech.<sup>102</sup>

In a more recent study of tribal constitutions, Professor Carpenter determined that there are

[A]t least four tribal constitutional approaches to the freedom of religion: (1) constitutions that track or incorporate ICRA, (2) constitutions that do not use ICRA but echo U.S. principles of individual religious freedom, (3) constitutions with unique language on religion, clearly expressing distinct tribal values and norms, and (4) constitutions that do not reference religion or related concepts at all.”<sup>103</sup>

Recognizing the differing ways in which federal and tribal courts protect religious liberty, Professor Carpenter argues that it is possible for tribes to “provide individual religious freedoms in ways that reflect tribal norms and enhance sovereignty.”<sup>104</sup>

## F. TRIBAL CASE LAW

### 1. Freedom of Speech

Tribal court case law on individual rights issues is relatively limited, with the most recent decision that of *Barnes v. Mashantucket Pequot Tribal Nation*.<sup>105</sup> In *Barnes*, after being fired by the Mashantucket Pequot Gaming

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98. Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 274 (1990). This article considered “all the provisions dealing with civil liberties in 220 tribal constitutions in force as of September, 1981, in all states except Alaska and Hawaii.” *Id.* at 270.

99. *Id.* at 275-76.

100. *Id.* at 276.

101. *Id.* at 276-77.

102. *Id.* at 279-80.

103. Kristen A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL’Y 561, 575 (2005).

104. *Id.* at 590.

105. 4 MASH. REP. 477 (Mashantucket Pequot Tr. Ct. 2007).

Enterprise, plaintiff brought suit before the Mashantucket Pequot Tribal Court arguing that his termination was retaliatory and violated his freedom of speech. In rejecting this claim, the tribal court resorted to federal case law regarding both the elements of the claim and the standard of proof.<sup>106</sup>

In a somewhat opposite approach, the Ho-Chunk Nation Supreme Court in *Brown v. Webster*<sup>107</sup> stated that, with respect to a free speech claim, it “is not required to fully adopt the precedents established by the United States Supreme Court as to the United States Constitution. Rather, [it] must rely on the [Ho-Chunk] Nation’s laws and perhaps, the Nation’s common law or tribal law.”<sup>108</sup> The Ho-Chunk Nation Supreme Court chastised the trial court for failing to “look at legal issues in a fair and objective manner in light of tribal law and custom, rather than simply wholesale adopting the laws and precedents of the United States,” and for neglecting to recognize “the importance of respect for one’s tribe and the goals of that sovereign.”<sup>109</sup> Despite this admonition, however, the Ho-Chunk Nation Supreme Court did consider certain state court precedents deemed to be consistent with Ho-Chunk values.<sup>110</sup>

In *LaPorte v. Fletcher*,<sup>111</sup> the Little River Band of Ottawa Indians Tribal Court rejected a free speech challenge to an employee’s demotion from chief of police and to a tribal statute prohibiting employees from making certain statements to the media.<sup>112</sup> Relying on federal case law precedent, the tribal court upheld the statute and allowed the demotion.<sup>113</sup>

The Sisseton-Wahpeton Oyate Court entertained in *Flute v. Labelle* a defamation action in which an elected tribal leader sued the author of an unflattering letter to the editor.<sup>114</sup> To determine whether the elements of libel were met, the tribal court applied federal and South Dakota constitutional law,

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106. *Id.* The court noted that “[t]o prevail on a First Amendment retaliation claim, an employee must establish: ‘[1] that the speech at issue was protected, [2] that he suffered an adverse employment action, and [3] that there was a causal connection between the protected speech and the adverse employment action.’” *Id.* (quoting *Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994)). The court further indicated that “the causal connection must be sufficient to support the inference ‘that the speech played a substantial part in the employer’s adverse employment action.’” *Id.* (quoting *Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 780-81 (2d Cir. 1991)). Lastly, the court established the burden of proof by providing that “[i]f a plaintiff establishes these three elements, a defendant may avoid liability by showing ‘by a preponderance of the evidence that it would have reached the same decision as to [the employment action] even in the absence of the protected conduct.’” *Id.* (quoting *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

107. 34 INDIAN L. REP. 6033 (Ho-Chunk Nation Sup. Ct. 2007).

108. *Id.* at 6034.

109. *Id.*

110. *Id.* Here the court cited a South Dakota Supreme Court case, *Helen Gilbert v. Flandreau Santee Sioux Tribe*, 2006 SD 106, 725 N.W.2d 241, which further cited a Minnesota Supreme Court case, *State v. Wickland*, 589 N.W.2d 793 (Minn. 1999), that dealt with a free speech issue. *Id.*

111. *Fletcher*, *supra* note 84, at 538.

112. *Id.* It was alleged that the employee had told the local newspaper that the local sheriff’s department and the tribe entered into an agreement; in reality, there was no such agreement. *Id.*

113. *Id.* “[O]ne of the cases relied upon heavily by the tribal court was *Gonzalez*, where the Seventh Circuit held that speech made within the context of a citizen’s employment as a police officer rarely is entitled to First Amendment protection[.]” *Id.* The precedent relied upon provided a standard of review that was “generously in favor of the tribal employer.” *Id.*

114. *Id.* at 541.

and concluded that the defendant was liable for libel.<sup>115</sup> In addition to granting nominal damages, the court also required the defendant to “write a retraction letter to the Tribal newspaper correcting the false impression she left with readers.”<sup>116</sup> Thus, although the court applied both federal and state common law to determine whether the elements of the cause of action were met, it “applied that law to fashion a tribe-specific remedy that severely limited the defendant’s liability.”<sup>117</sup>

An appeal from a Hopi tribal order to exclude plaintiff from the reservation was heard in *Monestersky v. Hopi Tribe*<sup>118</sup> by the Hopi Appellate Court. Holding that the tribe has the right to exclude members from the reservation, the court nonetheless indicated that a free speech claim was also implicated in plaintiff’s exclusion from the reservation.<sup>119</sup> In dismissing this claim, however, the court declared that “[i]t is well-settled that free speech is not absolute; for instance, one may not shout “fire” in a crowded theater, or engage in speech to incite violence.”<sup>120</sup>

In *Fletcher v. Mashantucket Pequot Tribe*,<sup>121</sup> the Mashantucket Pequot Tribal Court strictly adhered to the language in the first subsection of section 1302 of the ICRA, which states, in pertinent part, that: “No Indian tribe in exercising powers of self-government shall – (1) make or enforce any law . . . abridging the freedom of speech.”<sup>122</sup> In *Fletcher*, the plaintiff alleged that his employer interfered with his right to speak freely on matters of public concern by terminating him for trying to publish a book portraying life within the world’s wealthiest Indian tribe as being “riddled with greed, racism and favoritism that is tearing itself apart.”<sup>123</sup> The court found the plaintiff’s termination was not carried out through a promulgation or enforcement of any law, and that the ICRA did not apply.<sup>124</sup>

A free speech issue in the context of an alleged retaliation occurred in *Navajo Nation v. Crockett*,<sup>125</sup> where plaintiffs, who were employees of the Navajo Agricultural Products Industry (NAPI), claimed a free speech violation after being terminated for informing the Economic Development Committee of the Navajo Nation Council of possible NAPI mismanagement and misconduct.<sup>126</sup> The Navajo Nation Supreme Court stated that “Navajo common

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115. *Id.*

116. *Id.* at 542 (internal quotations omitted).

117. *Id.*

118. No. 01AP000015 (Hopi App. Ct. 2002).

119. *Id.* at n.1.

120. *Id.* (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). A free speech issue in the context of a removal action also arose in *LoneTree v. Funmaker*, where the tribal court similarly held that the removed tribal member had not been denied his free speech rights. 28 INDIAN L. REP. 6091 (Ho-Chunk Nation Sup. Ct. 2001).

121. 27 INDIAN L. REP. 6136 (Mashantucket Pequot Tribal Ct. 1998).

122. *Id.* at 6138 (quoting 25 U.S.C.A. § 1302 (emphasis added)).

123. *Id.* at 6136.

124. *Id.* at 6139.

125. 24 INDIAN L. REP. 6027 (Nav. Sup. Ct. 1996).

126. *Id.* at 6027.

law is the law of preference in the courts of the Navajo Nation[.]" and this is the law to be applied when adjudicating the plaintiff's free speech claim.<sup>127</sup> The court acknowledged that "an individual has a fundamental right to express his or her mind by way of the spoken word and/or actions," but then limited this right by noting: "As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle."<sup>128</sup>

Discussing how Navajo culture limited free speech rights, the court highlighted the ways in which individual rights were to be balanced against community interests and values: "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."<sup>129</sup> According to the court, "speech should be delivered with respect and honesty."<sup>130</sup> In the employment context, pursuant to the Navajo tradition, the court stated that it is only appropriate to speak directly to one's supervisor if the employee has a complaint or problem with that supervisor.<sup>131</sup> Moreover, the court stated:

[U]nder the Navajo common law concept of *nalyeeh*, the employee should not seek to correct the person by summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by "talking things out." The employee should not seek a remedy from a stranger, but should rather explain the problem to the person or one of his or her relatives and ask that "things be put right."<sup>132</sup>

Regarding the specific facts of the case in issue, the court explained that when an employee is bringing certain issues to management's attention, the employee shall abide by a few limitations: primarily, "[t]he employee must be respectful in his or her approach, and an initial inquiry with management to 'talk things out' is encouraged[.]" and if the employee provides a statement to a government committee, "the speech [and any documents provided] must involve matters of public concern and fall within the oversight authority of the committee."<sup>133</sup>

Despite recognizing all these limitations on free speech rights under Navajo

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127. *Id.* at 6028.

128. *Id.*

129. *Id.*

130. *Id.* at 6029. The court further explained this limitation:

This requirement arises from the concept of *ke'*, which is the "glue" that creates and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and arguments be resolved by "talking things out." This process of "talking things out," called *hoozhoojigo*, allows each member of the group to cooperate and talk about how to resolve a problem. This requirement places 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.

*Id.*

131. *Id.*

132. *Id.*

133. *Id.* Furthermore, as the court stated, an employee alleging a violation of her rights under section 1302(1) of the ICRA must demonstrate "some nexus between the termination or other adverse employment action and the speech." *Id.*

law, the court found that plaintiffs' speech was a matter of public concern, that they were speaking before an official body of the Navajo Nation Council, and that "NAPI's interest in promoting the efficiency of the public services it performs through its employees [is not outweighed by] the employees' right to free speech."<sup>134</sup> The court then held that plaintiffs' free speech rights had been violated by NAPI.<sup>135</sup> In its opinion, the court went to great lengths discussing the tribal cultural limitations placed on one's free speech rights; never once did the court cite to a federal case on the issue.

On the other hand, federal constitutional law was relied upon exclusively in *Rave v. Reynolds*, in which the court chose to "apply intermediate scrutiny where the tribe imposed nondiscriminatory restrictions on candidate eligibility" in an effort to prevent a "chaotic tribal caucus process."<sup>136</sup> The tribal court struck down a tribal law limiting tribal members' attendance to only one electoral caucus, relying on two U.S. Supreme Court cases dealing with freedom of association in the national electoral context.<sup>137</sup> On appeal, the tribal supreme court suggested that tribal law or community interests might preclude the application of federal constitutional law, "but no party chose to assert [such] alternative authority."<sup>138</sup> After comparing the similarities between the tribal constitution's language and the First Amendment language, the tribal supreme court "adopted the federal 'sliding scale of scrutiny in election rights cases involving the right of political association depending on whether the election regulations in question severely burden political association rights or merely constitute 'reasonable nondiscriminatory restrictions.'"<sup>139</sup> Applying the intermediate scrutiny standard, the court stated that the tribe had the burden of proving "an important governmental interest to justify the tribal statute."<sup>140</sup> However, after finding that the purpose of the statute was to avoid a disorderly election process and that "voters could still write-in the candidate removed from the ballot," the court upheld the constitutionality of the statute.<sup>141</sup> In doing so, "[t]he tribal court adopted federal constitutional law as an analog but recognized the particular tribal election circumstances that provided the requisite important governmental interest."<sup>142</sup>

In *Hopi Tribe v. Lonewolf Scott*, the Hopi Tribal Court addressed a free speech claim by an individual who had been charged with injury to public property for unearthing part of the Hopi-Navajo fence during a protest.<sup>143</sup> The

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134. *Id.*

135. *Id.*

136. Fletcher, *supra* note 84, at 539.

137. Violation of this statute by a non-electoral candidate, even unknowingly, resulted in the removal of the candidate from the ballot. *Id.* The two cases considered were *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Buckey v. Valeo*, 424 U.S. 1 (1976). *Id.* at 539 n.145.

138. Fletcher, *supra* note 84, at 539.

139. *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

140. *Id.*

141. *Id.*

142. *Id.*

143. 14 INDIAN L. REP. 6001 (Hopi Tr. Ct. 1986).

defendant argued that the charges should be dismissed for being unconstitutionally vague and overbroad, and because “the act of physically assaulting Hopi public property is conduct that is essentially protected activity.”<sup>144</sup> After holding that the statute was not facially vague, the court turned to the protected activity argument.<sup>145</sup> It stated that this activity had nothing to do with speech, but rather that “defendants’ actions constituted civil disobedience that resulted in physical damage[.]”<sup>146</sup> In making this conclusion, the court cited federal case law, ruling that “[d]efendants’ activities were not speech oriented, but were physical and allegedly destructive.”<sup>147</sup> The court then held that defendants’ actions fell outside the protections of both ICRA section 1302(1) and the U.S. Constitution.<sup>148</sup> Thus, in *Lonewolf Scott*, the court seemed to at least implicitly rely on federal precedent.

In *Brandon v. Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon*,<sup>149</sup> plaintiff contested his suspension from the tribal council for making a vulgar statement in response to his cousin’s alleged provocation.<sup>150</sup> The Grand Ronde Tribe court found that plaintiffs’ conduct had “violated the tribal code.”<sup>151</sup> The court also stated that “[b]eing a tribal councilmember is a privilege, not a right, and councilmembers should be expected to conduct themselves at a higher level of restraint than other tribal members.”<sup>152</sup> In considering whether plaintiffs’ suspension violated his free speech rights under the tribal constitution,<sup>153</sup> the court cited federal law in asserting that “[t]he right of free speech and press do not entitle a person to talk or distribute written statements when, where, and how he/she chooses, with absolute protection from the consequences.”<sup>154</sup> Finding that the tribe “has compelling reasons to have interpreted the ordinance so as to limit the vulgar language that may be uttered by councilmembers in public,” the court upheld the tribal code provisions at issue.<sup>155</sup> In its decision, the court cited various federal

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144. *Id.* at 6005.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. 18 INDIAN L. REP. 6139 (Grand Ronde Tr. Ct. 1991).

150. *Id.* at 6140.

151. *Id.*

152. *Id.*

153. *Id.* The court never discussed the right to freedom of speech provided under section 1302(1) of the ICRA. *Id.*

154. *Id.* (citing *Cohen v. California*, 403 U.S. 15 (1971)). The court also acknowledged that under certain circumstances citizens can be prohibited from expressing or conducting themselves in certain ways, such as using obscenity, “fighting words,” or other “phrases likely to result in a violent reaction by the person addressed.” *Id.* at 6141.

155. *Id.* Here the court found that Brandon’s speech could lawfully be limited because

[T]he tribe has the right to expect its councilmembers 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. Secondly, the type of language used by Mr. Brandon was arguably “fighting words” that were likely to create a violent or hostile situation, as indeed was created here. The tribe has the right to expect its tribal councilmembers to refrain from using such language so as to avoid fights or other altercations. Finally, the Grand Ronde Tribe has a vested interest in

authorities; it did not rely on tribal authority, nor did it discuss tribal tradition or custom in upholding the tribal code provisions.

## 2. Freedom of Press

Compared with the number of tribal court decisions on the issue of free speech, decisions on free press claims are almost nonexistent. Only one reported case in this area has been found.

In *Chavez v. Tome*,<sup>156</sup> the Navajo Nation Supreme Court heard Chavez's allegation of libel against Tome, doing business as *The Navajo Nation Enquiry*.<sup>157</sup> Chavez was an attorney in the Navajo Nation Department of Justice and had represented the Navajo Nation in a case on which the *Enquiry* had reported.<sup>158</sup> The *Enquiry* accused Chavez of lying to a judge, intimidating a judge, and bribing a judge to obtain favorable rulings.<sup>159</sup> The *Enquiry* also reported that Chavez had been previously ejected by the Ute Tribe for causing problems throughout that community.<sup>160</sup> The district court found Tome liable and ordered the printing of a retraction on the front page of three consecutive issues of the *Enquiry*.<sup>161</sup>

On appeal, the Navajo Supreme Court stated that, "the United States Supreme Court has held that compelling a newspaper to print that which 'reason' tells them not to publish is an unconstitutional violation of the first amendment's guarantee of freedom of the press."<sup>162</sup> It also recognized that both the Navajo Bill of Rights and section 1302(1) of the Indian Civil Rights Act "guarantees the right of the press to be free of governmental intervention."<sup>163</sup> The court further stated that "[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."<sup>164</sup> According to the court, under both the tribe's constitution and the ICRA, the tribal government cannot force the newspaper to print the retraction.<sup>165</sup> In reversing that part of the district court's order, the Navajo Supreme Court appeared to rely on federal constitutional standards, rather than on tribal custom and tradition.

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protecting its reputation throughout the community. *It thus has a compelling reason to have enacted a provision in its tribal code prohibiting tribal members from involving themselves in actions or activities that may bring discredit or disrespect on the tribe.*

*Id.* (emphasis added).

156. 14 INDIAN L. REP. 6029 (Nav. Sup. Ct. 1987).

157. *Id.* at 6029.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 6030.

162. *Id.* at 6032 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

163. *Id.*

164. *Id.*

165. *Id.*

### 3. Free Exercise of Religion

As previously noted, the ICRA contains no establishment clause similar to that contained in the First Amendment. However, a few reported tribal court decisions have involved free exercise of religion claims. In *Garcia v. Greendeer-Lee*, the Ho-Chunk Supreme Court held that the religious freedoms of a nonmember employee of the Ho-Chunk Nation were not violated by tribe personnel policies disallowing paid leave for the employee to attend a Jehovah's Witness religious event.<sup>166</sup> Under tribe policy, paid leave was provided only to employees who attended "certain tribe-specific religious events."<sup>167</sup> This policy, according to the court, did not preclude the employee from practicing her religion, and thus did not violate her religious freedom.<sup>168</sup>

In *In re T.M.M.*,<sup>169</sup> a mother of a cancer-stricken Indian child petitioned the Walker River Juvenile Court to order the cessation of "all allopathic treatment."<sup>170</sup> She based this demand on her First Amendment freedom of religion—a claim dismissed by the court, holding that "[t]he U.S. Constitution does not apply to tribal governments."<sup>171</sup> The court also denied any claim under the ICRA, stating that the "ICRA does not prohibit the Walker River Tribe from prohibiting her religion."<sup>172</sup> Finally, the court ordered the child to remain in the care of the U.C. Davis Medical Center to continue his treatment.<sup>173</sup>

### 4. Freedom of Assembly

*Keeswood v. Navajo Tribe*<sup>174</sup> involved a group of people who gathered during a tribal council debate of a highly controversial Coal Gasification Resolution.<sup>175</sup> Protestors who were arrested and criminally charged sued for "false arrest, false imprisonment, and use of unnecessary force by police in affecting the arrests."<sup>176</sup> The court first ruled that the tribe's unlawful assembly statute could not be enforced because tribal members did not have adequate notice of the statute, due to its lack of publication.<sup>177</sup> The court further held that enforcement of the statute would violate the "Navajo peoples' right to freedom

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166. Fletcher, *supra* note 84, at 544.

167. *Id.*

168. *Id.* The chief justice, who concurred in the holding, found that the tribe-specific religious activities were "fundamental to the survival of the tribe and its sovereignty, surely a compelling governmental interest."

169. 24 INDIAN L. REP. 6005 (Walker River Juv. Ct. 1996).

170. *Id.* at 6008.

171. *Id.* The court did hold, however, that tribal common law provided an enforceable civil right to traditional Northern Paiute medical treatment. *Id.* at 6009.

172. *Id.* The court found that there is no "right of full knowledge and selection of treatment" under the ICRA, the Walker River Constitution, or the Walker River Law & Order Code. *Id.* at 6009-10.

173. *Id.*

174. 1 NAV. REP. 362 (Nav. Nation Window Rock App. Ct. 1978).

175. *Id.*

176. *Id.*

177. *Id.*

of communication.”<sup>178</sup> Moreover, the court stated that “constitutional law mandates that the right of assembly must be given the most liberal and comprehensive construction to protect the peoples’ First Amendment Rights. To enforce the sanction of this law upon the facts of this case would put a chilling effect on our peoples’ First Amendment Rights.”<sup>179</sup>

Considering the false arrest and imprisonment allegations, the court focused on the “sacredness of Free Speech and Assembly,” as well as “the rights protected under the Navajo Bill of Rights, the [ICRA], and the United States Constitution and how essential it is to a free government.”<sup>180</sup> Finding the defendants liable, the court cited to a federal court case and recognized that although the facts were distinguishable, “the principles of exercising great care to protect the peoples’ First Amendment Rights are not any different.”<sup>181</sup>

#### IV. FIRST AMENDMENT NORMS IN THE SOCIAL AND CULTURAL EXPERIENCES OF SOUTH DAKOTA TRIBES

##### A. THE EMPIRICAL STUDY DESCRIPTION

Five of the nine South Dakota tribes include First Amendment language in their constitutions. Those constitutions enumerating First Amendment rights include Crow Creek Sioux,<sup>182</sup> Lower Brule Sioux,<sup>183</sup> Rosebud Sioux,<sup>184</sup> Sisseton-Wahpeton Oyate,<sup>185</sup> and Standing Rock Sioux.<sup>186</sup> The Cheyenne River Sioux, Flandreau Santee Sioux, Oglala Sioux, and Yankton Sioux Constitutions specify no First Amendment rights. The empirical portion of this study will examine the kind of First Amendment-type issues that have arisen in the South Dakota tribes and how tribal government and society have treated such issues. The results of this study demonstrate that the ICRA allows “tribes to decide for themselves what individual rights mean in each tribal community.”<sup>187</sup>

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178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (citing *Washington Mobilization Committee v. Cullane*, 566 F.2d 107 (1977)).

182. See generally 1997 AMENDED CONST. & BY-LAWS FOR THE FLANDREAU SANTEE SIOUX TRIBE OF S.D. (1937, amended 1967, 1984, 1990, 1997), available at [http://www.fsst.org/fsst\\_tribalgov.html](http://www.fsst.org/fsst_tribalgov.html).

183. CONST. & BYLAWS OF THE LOWER BRULE SIOUX TRIBE, art. IV, § 5 (1935, amended 1942, 1960, 1974, 1986), available at <http://www.state.sd.us/oia/files/lowbrulecon.pdf>. Another version of the constitution is available at <http://thorpe.ou.edu/constitution/lowbrule.html>, and the quoted language is contained in article VII, § 3.

184. CONST. & BYLAWS OF THE ROSEBUD SIOUX TRIBE OF SOUTH DAKOTA, art. X, § 1 (1935, amended 1962, 1966, 1973, 1985, 1987, 1988), available at <http://www.state.sd.us/oia/tribes.asp>. Another version of the constitution is available at <http://www.rosebudsiouxtribe-nsn.gov/constitution.htm>.

185. REVISED CONST. & BYLAWS OF THE SISSETON-WAHPETON SIOUX TRIBE, S.D., art. IX, § 1 (1959, amended 1972, 1976, 1978, 1980), available at <http://www.state.sd.us/oia/files/sisswahcon.pdf>.

186. CONSTITUTION OF THE STANDING ROCK TRIBE (1959, amended 2005), available at <http://constitutionandelection.standingrock.org/?id=3&page=Tribal+Constitution>.

187. Fletcher, *supra* note 84, at 534.

## B. STUDY METHODS

Law school researchers consulted with University of South Dakota faculty and personnel, who had experience in a variety of aspects of Indian law and social aspects, to help identify a broad range of regional Indian experts. A large representative group of people was identified. In addition to the initial pool of more than seventy individuals, researchers asked interviewees to help identify other resource people that they thought might be helpful. The pool included Indians and non-Indians, education leaders, judicial representatives, Indian affairs reporters for both Indian and non-Indian newspapers, tribal college presidents, tribal authorities including chairpersons and council members, tribal attorneys, and Indian studies faculty.

Researchers then surveyed and interviewed this pool of experts and authorities on a number of First Amendment type issues. Authorities were asked about a number of subject matters, including their perception of how First Amendment norms impact the relationship between tribal governments and religion, censorship practices of tribes, practices that govern public access to tribal records and documents, and governmental relationship with tribal presses and libraries.

Furthermore, the research was not confined to personal interviews. Electronic databases and newspaper and magazine archives were also examined by the research group. Since, in South Dakota, both Indian and non-Indian newspapers report on tribal government concerns; researchers reviewed archives of newspapers and journals for First Amendment articles. Past and current volumes of the Indian Law Reporter were scrutinized for First Amendment cases, as were electronic databases such as The Social Science Research Network, which contains scholarly writings by social science experts, VersusLaw, which maintains a tribal court database, and Westlaw's Native American Law materials, periodical, and caselaw databases.

## C. FINDINGS OF FIRST AMENDMENT SURVEYS

### 1. *Indian Civil Rights Act (ICRA) Violations*

No evidence was found of any First Amendment cases filed under the ICRA or the tribal constitution. Charles Abourezk, Supreme Court Justice for the Rosebud Sioux Tribe, says "unless a tribe adopts [the ICRA] and includes it as a tribal law it may not be enforced."<sup>188</sup> He knows of no instance when the people have tried to enforce their First Amendment rights under the ICRA. An instance that involved a civil action to prevent a 1970 Sundance<sup>189</sup> was mentioned by one expert, and an early twentieth century case concerning educating Indian children in sectarian schools, *Reuben Quick Bear v. Leupp*,<sup>190</sup>

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188. Interview with Charles Abourezk, Supreme Court Justice, Rosebud Sioux Tribe, in Sioux Falls, S.D. (Jan. 14, 2008).

189. Interview with Mario Gonzalez, Attorney, Oglala Sioux Tribe, in S.D. (Dec. 17, 2007).

190. 210 U.S. 50 (1908).

was also mentioned, but it was prior to the ICRA. Overall the respondents did not see the tribes as enforcing “First Amendment rights under the ICRA.”<sup>191</sup>

## 2. Tribal Views of Religion and the First Amendment

Spirituality is a pervasive aspect of tribal culture; nearly all community and governmental events open with a spiritual ceremony or prayer.<sup>192</sup> The prayer may be the traditional Lakota prayer or it may be offered as a Christian prayer, “both seem to be accepted.”<sup>193</sup>

Survey participants, tribal and non-tribal, view the tribes as supporting spirituality,<sup>194</sup> but no one identified the tribes as having a tribal religion or sect.<sup>195</sup> The tribes can give financial benefit or support to religion under the ICRA,<sup>196</sup> but tribes tend to “support cultural programs that can be spiritual in nature”<sup>197</sup> rather than financially supporting what would be perceived by white culture as organized religion.<sup>198</sup> If financial support is lent, it is to Sundances.<sup>199</sup>

Most tribes do not forbid participation of non-tribal members at religious ceremonies<sup>200</sup> with the exception of the Cheyenne River Sioux Tribe which passed a resolution prohibiting the practice of native religion by non-natives.<sup>201</sup> On occasion, the Holy Man or Medicine Man may deny participation of non-natives in a Sundance.<sup>202</sup> Concern was also voiced about non-natives handling eagle feathers,<sup>203</sup> but on the whole, non-tribal members are usually open to attend ceremonies including sweat lodge ceremonies.<sup>204</sup> Tribal attorney, Mario

191. Abourezk, *supra* note 188.

192. Gonzalez, *supra* note 189.

193. Abourezk, *supra* note 188.

194. Interview with B. J. Jones, Director Tribal Justice Institute, University of North Dakota School of Law, in Fargo, N.D. (Dec. 13, 2007).

195. Interview with Tim Giago, Founder, *Lakota Times*, in Rapid City, S.D. (Dec. 12, 2007). “I don’t think you’re going to find that there is such a thing as Native American based religion. You’re going to find what we call spirituality.” *Id.* Giago is a member of the Oglala Lakota Tribe.

196. Interview with Jennifer Ring, Attorney, ACLU of the Dakotas, in Bismark, N.D. (Dec. 12, 2007).

197. Interview with David Melmer, Former Editor, *Indian County Today*, in S.D. (Jan. 11, 2008).

198. *Id.*

199. Gonzalez, *supra* note 189.

Prior to the 1973 Wounded Knee occupation by the American Indian Movement, and a couple of years thereafter, the Oglala Sioux Tribe used to hold one annual Sundance for the reservation. I believe the tribe contributed financial support and benefits for these Sundances since they were tribally sponsored. I am not aware of any tribal financial support given to Native American based religions since that time.

*Id.* See Interview with Rose Cordier, Former Vice President, Rosebud Sioux Tribe, in S.D. (Jan. 25, 2008). “[T]he council may make a motion to give a certain amount of money. But it is not in the budget.” *Id.*

200. Abourezk, *supra* note 188.

201. Interview with Lanny LaPlante, Vice-Chairman, Cheyenne River Sioux Tribe, in S.D. (Jan. 21, 2008).

202. Giago, *supra* note 195.

203. Interview with Charlie Colomde, Former President and Councilman, Rosebud Sioux Tribe, in S.D. (Jan. 23, 2008).

204. Interview with Jill Callison, Reporter, *Sioux Falls Argus Leader*, in Sioux Falls, S.D. (Dec. 20,

Gonzalez, states that “tribal government is prohibited from denying any person the free exercise of religion under the 1968 Indian Civil Rights Act.”<sup>205</sup>

### 3. *Censorship on Tribal Land*

Tribal experts were questioned about censorship in such areas as: speeches that may have been sanctioned, restrictive practices of libraries, teacher or student speech policies or discipline, cultural or artistic exhibits that have been closed or censored, and defamation laws.

#### i. Libraries and cultural exhibits

Any libraries on tribal land were identified as being school libraries and no respondents perceive the libraries as having restrictive practices. Cultural or artistic exhibits are also viewed as receiving little censorship. The only instance mentioned was a poster contest for young students that was closed down because the posters were “very critical of the non-Indian community.”<sup>206</sup> The school district shut the exhibit down; in this case the censorship was apparently from the non-Indian community with no action taken by the tribes.

#### ii. News sources

Tribal newspapers and radio stations have censorship issues that arise from time to time. Respondents mentioned it is difficult for people to travel long distances for tribal meetings so tribal newspapers and radio stations report government meetings and activities, and they also enable people to register complaints against the government or tribal council members. Efforts are made by some of the “tribes to regulate libel and defamatory statements being made. But . . . there is a lively debate in the tribal newspapers and people are allowed to say whatever they want.”<sup>207</sup> While “there may [be] complaints or pressure”<sup>208</sup> to censor statements, tribal governments do not act upon them.

The only instance of censorship is recalled by a South Dakota journalist who said that a newspaper was shut down on Pine Ridge land several years ago when the owner published a story that was considered libelous by most news authority since no substantiated sources existed.”<sup>209</sup> The story was never followed up, but the journalist believed the newspaper owner moved his operation.<sup>210</sup> Community chairman of Rosebud, Todd Fast Horse, complained that he was sanctioned when the tribal newspaper would not publish his letter to

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2007).

205. Gonzalez, *supra* note 189. “Most tribes are religion neutral and treat all spirituality the same.” Jones, *supra* note 194.

206. Jones, *supra* note 194.

207. *Id.* Judge Jones notes that he “ruled against people who made defamatory remarks in a newspaper against someone, but that is not official governmental action.” *Id.*

208. Abourezk, *supra* note 188.

209. Interview with Jomay Steen, Staff Writer, *Rapid City Journal*, in Rapid City, S.D. (Dec. 10, 2007).

210. *Id.*

the editor.<sup>211</sup> He contacted the ACLU, but it declined to get involved.<sup>212</sup>

### iii. Schools

Speech and verbal expression in schools does not appear to be controlled by policy. No instances were cited of teachers or students being sanctioned by the tribes for inappropriate speech, however, one expert noted that speech in schools needs to be free of threatening language toward teachers or students.<sup>213</sup> The only school policies for speech would be policies that maintain discipline and keep language from becoming disruptive “as any school should be able to regulate.”<sup>214</sup>

### iv. General censorship complaints

Speech censorship or sanctioning is known to occur at tribal council meetings. Recently an impeachment complaint was filed against an Oglala tribal council member for comments that he made about soldiers in Iraq, but charges were dismissed.<sup>215</sup> Tim Giago, owner of the *Lakota Times*, noted that he “often clashed with the tribe because he felt they were not giving the people the whole story.”<sup>216</sup> But the most commonly referred to instance of sanctioned speech centered on the former Oglala Sioux Tribal President, Cecilia Fire Thunder, for speaking out in favor of abortion and an abortion clinic on tribal land. She was eventually impeached for her views.<sup>217</sup> Another council member indicated that though speech may not be sanctioned, “someone could make an ethics charge”<sup>218</sup> against a council member for speaking as though he was speaking on behalf of the whole tribe.

## 4. Accessibility of Tribal Meetings and Documents

An attorney for the Oglala Sioux Tribe states that the documents maintained by that tribe are of two types “purely tribal records and records from Public Law 93-638 contracts.”<sup>219</sup> Documents maintained by other tribes may vary, but tribal documents of any type are viewed as readily open to tribal members; although

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211. Interview with Todd Fast Horse, Community Chairman, Rosebud Sioux Tribe, in S.D. (Jan. 25, 2008). “I have been sanctioned and so have some other people who are trying to correct the problems here in Indian country. It is like living in a third world country.” *Id.*

212. *Id.*

213. Jones, *supra* note 194.

214. *Id.* Most teachers are federal government employees and as such may fall under the same general speech restrictions as any government employee. Abourezk, *supra* note 188.

215. Gonzalez, *supra* note 189.

216. Giago, *supra* note 195.

217. Interview with Amanda Takes War Bonnet, Editor, *Lakota Country Times*, in S.D. (Jan. 15, 2008); Interview with Alan L. Neville, Assistant Professor of Education, Northern State University, in Aberdeen, S.D. (Jan. 15, 2008).

218. Interview with Patsy Vallandra, in S.D. (Jan. 28, 2008).

219. Gonzalez, *supra* note 189. “With some exceptions, documents maintained under 638 contracts are subject to the Federal Privacy Act. Tribal members have the same right of access to these documents as other United States citizens under the Freedom of Information Act.” *Id.*

the ease of access varies from tribe to tribe. Proceedings of council meetings are available to tribal members through newspapers, radio stations, Internet, or members can request the minutes from the tribal council secretary.<sup>220</sup> Radio stations and newspapers are the easiest way to access council proceedings, but not all tribes have them.

Non-tribal members may have more trouble obtaining documents than tribal members. One expert notes that non-access may have “more to do with disorganization than it does with secrecy,”<sup>221</sup> and a non-tribal reporter stated that “it is just finding someone who is willing to help.”<sup>222</sup> There appear to be no policies restricting non-tribal members from obtaining copies of documents; in fact, a Rosebud Sioux council member states that all their documents were public.<sup>223</sup>

While tribal meetings are open to the public, it may be difficult for members to travel to meetings from remote areas where the “poverty level can be pretty serious.”<sup>224</sup> The only time respondents mentioned that both tribal and non-tribal members are asked to leave a council meeting is if the council goes into executive session when personal matters are discussed.<sup>225</sup> There are a few comments such as the one by a former staff writer for *Indian Country Today*, who states that councils seem to “go into executive session . . . quite often.”<sup>226</sup> While another expert says he hears complaints by tribal members about the “closed nature of tribal government[,] [he further noted that s]ome kinds of things, like sunshine laws . . . they complain a lot about . . .”<sup>227</sup>

##### 5. Tribal Conflicts with First Amendment Norms and Values

A common tribal attitude and practice sees that speech practices should first reflect the custom and practices of the tribal communities, with First Amendment-type protections given somewhat less importance. According to one expert, “the First Amendment is more reflective of an individual’s right, and it can totally disregard the community’s rights. . . . [T]here are certain customs, especially respect for certain persons, that may run contrary to the First Amendment.”<sup>228</sup> Thus, although some customs may run contrary to First Amendment norms, the tribes may nonetheless continue those customs because of their importance and value to the community.

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220. Interview with Robert Moore, Council Member, Rosebud Sioux Tribe, in S.D. (Jan. 22, 2008).

221. Abourezk, *supra* note 188.

222. Interview with Heidi Bell Gaese, Reporter, *Rapid City Journal*, in Rapid City, S.D. (Dec. 11, 2007).

223. Moore, *supra* note 220. “Non-members may receive minutes, resolutions, and copies of motions, etc.” *Id.*

224. Ring, *supra* note 196.

225. Giago, *supra* note 195.

226. Melmer, *supra* note 197.

227. Interview with Art Marmorstein, Professor of History, Northern State University, in Aberdeen, S.D. (Jan. 3, 2008).

228. Jones, *supra* note 194.

## V. CONCLUSION

Even though Congress through the Indian Civil Rights Act mandated that tribal governments not infringe on First Amendment-type freedoms, the enforcement of that Act has been essentially left to tribal courts. In the relatively few decisions interpreting and applying the ICRA, tribal courts have taken a much more balanced view towards individual rights. Under this balanced view, tribal courts have been more willing to constrain individual rights for the sake of community interests and values. Thus, tribal courts have not taken a strict scrutiny kind of approach to restrictions on individual rights that federal courts have taken with respect to similar restrictions on First Amendment rights. The tribal court approach has been much more fluid and accommodating toward community interests.

This approach to the Indian Civil Rights Act reflects a broader tribal attempt to navigate in a more balanced way between individualistic and communitarian models. As scholars have pointed out, tribes are much more community based than is classic western society, out of which legal norms like the First Amendment have evolved. Under the tribal approach, more emphasis is put on the group.<sup>229</sup> Whereas classical western society strives to protect the individual from the group, tribal society strives to protect the group from the individual. Consequently, tribal courts are more sensitive to balancing the interests of groups and individuals.<sup>230</sup> Whereas western society may view society as a collection of atomized individuals, the tribal view is more community based and looks at individuals more through their relationships with the society at large.

Not only are there very few reported cases dealing with the ICRA, but the present study has also revealed the reason for that paucity of cases. Because tribal society is a more community based society, and a less individualistic one, it apparently generates much fewer individual rights type conflicts than does the more dominant U.S. society. Indeed, this has been shown through our study of the Indian tribes of South Dakota. Despite an exhaustive survey of groups and individuals associated with all those tribes, very few individual rights disputes were discovered. Therefore, a lack of individual rights cases in tribal courts are obviously the result of a lack of such disputes occurring within tribal society in general.

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229. Frank Pommersheim, *Tribal Courts and Federal Courts: A Very Preliminary Set of Notes for Federal Courts Teachers*, 36 ARIZ. ST. L.J. 63 (2004).

230. *Id.*