Fletcher Class – Supplemental Tribal Law Materials

Williams v. Lee Notes

1. Professor Wilkinson described the historical context of this landmark decision as follows:

> The rendering of the *Williams* decision can fairly be set as a watershed for several reasons. For decades before, Indian law decisions had been rendered fitfully by the Supreme Court. The tribes and the federal government instituted few cases to establish or expand tribal powers. Most of the litigation to reach the Court during the twentieth century before 1959 arose out of disputes involving individual Indians or even non-Indians; as a result the decisions lacked the public law overtones of either the modern era or the nineteenth century. * * * After *Williams,* the pace of decisions began to accelerate, with the result that the Court has become more active in Indian law than in fields such as securities, bankruptcy, pollution control and international law.

Wilkinson, American Indians, Time and the Law, supra, at 1–2.

2. Justice Black cites the "courageous and eloquent" opinion of Chief Justice Marshall in *Worcester* as the source of the "basic policy" informing the infringement test announced by the Court in *Williams*: "Absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Did *Williams* depart from the basic *legal* analysis of tribal jurisdiction in *Worcester*? How would you state the *Williams* approach if you were an advocate asserting state jurisdiction over reservation Indians? If you were a tribal judge asserting exclusive tribal court civil adjudicatory jurisdiction over a non-Indian on the reservation?

3. The *Williams* decision was a sort of test case for the Navajo Nation. In 1957, the Arizona legislature introduced and nearly enacted legislation that would extend state law and state court jurisdiction into Navajo Indian Country under Public Law 280. See Raymond Darrel Austin, Navajo Courts and Navajo Common Law 49-50 (2007) (unpublished Ph.D. dissertation, University of Arizona). The Navajo tribal council was able to object to the state legislation in the

nick of time, and quickly formulated a strategy hoping to preempt any other attempts by Arizona to unilaterally invoke Public Law 280, supra at pp. __ - __, a federal statute enacted in 1953 that authorized state governments to assert criminal and civil jurisdiction over Indian reservations if they chose to do so – and without tribal consent. Id. at 50-51.

> The plan formed around two nuclei, both of which involved the exercise of Navajo Nation sovereignty. First, the Navajos had to prove to non-Indian officials that the Navajo Nation had the capacity to govern, and second, the Navajo Tribal Council had to prove to the Navajo people that it could be trusted to govern. The strategy was pursued along two complimentary paths. First, the Navajo Nation tapped the federal courts to define its sovereign rights, and second, the Navajo Nation took control of police and court functions – services typically provided by sovereigns – that were then under the administration of the Bureau of Indian Affairs.

Id. at 51. After the Navajo Nation General Counsel Norman Littell helped Paul and Lorena Williams win their case before the Supreme Court, the Tenth Circuit granted the Navajo Nation a second critical victory in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959). These two cases helped to vindicate the Navajo Nation's strategic goals, and laid the legal foundation for the establishment of the Navajo Nation's modern tribal judiciary, which took over the caseload from the Nation's CFR court on April 1, 1959. Austin, supra, at 55.

2. Tribal Courts in the Contemporary United States Legal System

One of the most significant developments to occur during the modern era of federal Indian law has been the growing importance of tribal courts as vital law making institutions of contemporary Indian self-government. The incipient efforts of tribes to revitalize their sovereign, self-governing powers over their reservations that were nurtured by the Supreme Court's landmark 1959 decision in *Williams v. Lee* have given birth to the contemporary renaissance of American Indian tribal law within the United States legal system. Tribal law, or tribal customary law as it is sometimes called, is being interpreted and enforced by hundreds of tribal courts across Indian country. And, with increasing frequency, many of those authoritative interpretations of tribal law by tribal courts are being recognized and given legal force by state

and federal court judges in cases involving Indian tribes and Indian individuals under principles of full faith and credit and comity.

The "leaps and bounds" development of tribal courts in the modern era described by Justice O'Connor has been encouraged by congressional legislation and Executive Branch policies, favorable Supreme Court decisions such as *Williams v. Lee*, and the commitment of Indian tribes, tribal judges, and tribal court personnel to create more effective law making institutions governed by an Indian vision of law and justice. The increased level of law making activity on the part of tribes has been accompanied by growing pains and concerns about the administration of justice in Indian country by tribal courts. This section takes a closer look at the complex and difficult questions raised by the growth and revitalization of American Indian tribal law making authority during the modern era of Indian law.

Native Nation Courts:

Key Players in Nation Rebuilding

Joseph Thomas Flies-Away, Carrie Garrow, and Miriam Jorgenson[*]

[A] Native nation's judicial system amounts to far more than the offices and individuals identified as "the judicial branch" on a tribal government organization chart. An effective tribal judiciary is a critical player in the process of nation building; it advances sovereignty, helps uphold the nation's constitution, helps ensure the maintenance of law and order, bolsters economic development, promotes peace and resolves conflicts within the community, preserves tribal customs, and develops and implements new laws and practices for addressing contemporary realities. In sum, a competent court (or court-like institution for dispute resolution) enhances a Native nation's self-governance capacities and expands the possibilities for nation's future.

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[*] From Rebuilding Native Nations: Strategies for Governance and Development 116-19 (Miriam Jorgenson ed. 2008).

An Effective Tribal Court Advances Tribal Sovereignty

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[A] Native nation's justice system exercises and thereby defines, protects, and enforces tribal jurisdiction. In exerting this jurisdiction, the justice system mediates and resolves disputes that arise between and among tribal citizens, families in the community, nontribal citizens, the tribal government, and outside agencies and interests. On a larger scale, a Native nation's capable exercise of authority over its territory and population through the effective functioning of its justice system defends the nation's rights as a sovereign against encroachment by other governments (local, state, and federal) and reinforces its capacity to enter into government-to-government relationships with other nations or states.

An Effective Tribal Court Supports Economic Growth

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[A]n empowered and impartial tribal court system helps create an atmosphere of fair play in the disputes that inevitably arise among those who live, work, or do business in a tribal community. A fair, reasonable, timely, and depoliticized court system creates an environment in which leases of tribal trust land are not arbitrarily cancelled; grievances involving tribal government employees are decided on the basis of cause rather than on the basis of political relationships; neither tribal citizens nor the tribal government can renege on contracts without paying damages; and so on. When tribal citizens (not to mention outside commercial interests) observe this even-handed and predictable treatment, they are much more likely to invest their time, talent, skills, and money in tribal society and in the Native nation economy. …

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There is a second connection between justice and community development. Tribal law enforcement—a partner with courts in the tribal justice system—also plays a role in supporting a vibrant economy. When a Native nation's law enforcement system does not work well, or does not work in concert with the nation's courts, the reservation can be perceived (often justifiably) as an unsafe place. This alone is detrimental to investments, if potential business people feel that the situation exposes their property or patrons to too much risk. …

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Note

1. In 1978, the National American Indian Court Judges Association reported that there were 71 tribal courts, and 32 "CFR" courts which trace their descent from the nineteenth century Courts of Indian Offenses described earlier in this chapter in the article by Professor Pommersheim. Today, likely more than 300 tribal courts and 23 CFR courts exist in the United States. See Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America 6 (Bureau of Justice Assistance, Dept. of Justice 2005) (noting that 294 tribes had received federal grants to develop and improve tribal courts). The numbers, however, tell only part of the story of the growth and diversity of these unique and evolving institutions that are in the forefront of modern tribal efforts to define the meanings and scope of tribal sovereignty in United States society. Frank Pommersheim's book, Braid of Feathers: American Indian Law and Contemporary Tribal Life (1995), provides a thought-provoking analysis of the role of modern tribal courts in serving "as a bridge between local tribal culture and the dominant legal system." For an overview of the many practice issues arising in tribal courts, see Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. Puget Sound L. Rev. 231 (1987); William C. Watt, *Practicing Indian Law in Tribal Courts*, 52 Fed. Law., March/April 2005, at 12.

2. A key question for modern American Indian tribal courts is the question of legitimacy, both within and without the tribal community:

> Much remains to be done in the building of Indian nations' judicial systems. For a number of reasons, many are currently far from establishing complete legitimacy in the eyes of non-Indian governments, individuals, and court systems. First, tribal courts tend to be less specialized that state and federal courts. For example, the court on many reservations does not have a distinct probate division. Second, the capacity of tribal courts is lacking for certain types of litigation—empaneling a jury that is comprised entirely of tribal members who have no connection to a given proceeding is exceedingly difficult in reservations that are sparsely populated. By the same token, tribal judges often have had little experience in certain areas of the law; topics such as business law are relative newcomers to their venues. Third, some tribal courts continue to lack independence from the political processes of Native nations.

The Harvard Project on American Indian Economic Development, The State of Native Nations: Conditions under U.S. Policies of Self-Determination 46-47 (2008).

3. Tribal Court Decision Making in Modern Tribal Legal Systems

Because of the diversity among Indian country tribal justice systems, it would be impossible to synthesize the decisions of all of the tribal courts into an "American Indian tribal law" on a particular topic. Each of the tribal courts operating in Indian country represents a unique response to the need felt by a particular tribal community to make its own laws and to be governed by its own customs and traditions. The materials in this section focus attention on the development of tribal law in just a few areas.

a. The Preservation and Restoration of Tribal Customs and Traditions in Tribal Common Law

One of the twentieth century's most influential legal scholars, Robert Cover, coined the term "jurisgenesis" to describe a process whereby a community engages in "the creation of legal meanings." Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4, 11 (1983). Tribal courts throughout Indian country are engaging in the creation of legal meanings by relying on tribal customs and traditions as important sources of tribal law.

What do modern tribal courts mean when they use terms like tribal customary or tribal common law? The Mashantucket Pequot Tribal Court has stated that, "in Native American terms, tribal tradition and custom serves as the customary or common law." Delorge v. Mashantucket Pequot Gaming Enterprise, No. 3 Mash. 1 (1997) (07/23/1997). See Gloria Valencia–Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L.Rev. 225, 250–51 (1994). See also Saint Regis Mohawk Tribe v. Basil Cook Enterprises, No. 95–001 (Saint Regis Mohawk 03/04/1996). The Navajo Nation Supreme Court has said, "It should come as no surprise that the customs and traditions of the Navajo people have the force of law. They provide a unique body of law known as Navajo common law." Navajo Nation v. Platero, 6 Navajo Rptr. 422, 424 (1991). The Colville Confederated Court has similarly stated, "[o]ur court system interprets and enforces laws from custom and tradition." Seymour v. Colville Confederated Tribes, 3 CTCR 40, 6 CCAR 5 (Colville Confederated Tribes Tribal Court 2001).

Tribal courts often encounter conflicting jurisdictional and conflict of laws situations. When does tribal custom prevail over other forms of conflicts of laws situations? Many tribes have statutes in their tribal codes that determine the order in which laws should be applied by the tribal court. The Code of the Winnebago Tribe of Nebraska is fairly typical in this regard: "[T]he court shall apply the tribal constitution, and the provisions of all statutory law here forth or hereafter adopted by the tribe in matters not covered by tribal statute. The court shall apply traditional tribal customs and usages, which shall be called common law." Code of Winnebago Tribe of Nebraska, Section 1–109.

Many tribal courts turn to customary law as a source of independent legal authority and a tool for interpreting federal and state law. State and federal laws provide "guidance" to the Colville Confederated tribal courts and are regarded as "persuasive when consistent with Tribal policies and customs." Colville Confederated Tribes v. LaCourse, 1 CCAR 2 (Colville Confederated 05/20/1982). The Appellate Court of the Fort McDowell Yavapai Nation described the case law from federal, state, and other tribal courts as a "resource" for interpreting Yavapai law. In re Practice of Law and Professional Conduct of Ricketts, No. PC–99–004 (Yavapai Nation 02/02/2000).

Where do tribal courts find tribal customary law? Tribal elders may be called upon to testify on customs that can be applied as law. Tribal courts may also turn to academic works on tribal customs and traditions as sources of tribal common law. Many tribal judges take judicial notice of well-known customs and traditions and apply them to issues before the court. For

example, the Hopi Tribal Court said it "may dispense with proof of the existence of a Hopi custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe [and] take judicial notice of the custom or tradition." Hopi Indian Credit Ass'n v. Thomas, No. AP–001–84 (Hopi Tribal Court 03/29/1996). Some tribal courts, however, are less receptive to taking judicial notice, and require the parties to present affirmative evidence of tribal customs or cultural practices. See, e.g., Healy v. Mashantucket Pequot Gaming Enterprise, No. MPTC–EA–97–132 (04/08/1999).

Many tribal codes permit the tribal court on its own motion to seek the advice of elders or counselors on the tribe's customary law. The Winnebago Tribe of Nebraska, for example, permits its tribal court to call on tribal members with knowledge of the tribe's customs and traditions for advice: "When in doubt as to the tribal common law, the court may request the advice of counselors and tribal elders familiar with it." Code of the Winnebago Tribe of Nebraska, Section 1–109.

Special problems of identifying, validating, and applying tribal customary and traditional law are examined in Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 Mich. J. Race & L. 57, 88-93 (2007).

Navajo Nation. The courts of the Navajo Nation were at the center of the jurisdictional dispute in the landmark 1959 Supreme Court decision in *Williams v. Lee*. The Navajo Nation operates the largest tribal court system in Indian country, located on the most populous reservation in the United States. The broad range of major issues that tribal courts deal with on a daily basis are all regularly handled by the Navajo Nation courts. Separation of powers and judicial independence, impeachment and removal of elected officials, election controversies, employment relations, family law, probate and inheritance of property, paternity and child support, enrollment, land tenure rights on the reservation, tribal bills of rights and protection of individual rights under the ICRA, tribal sovereign immunity, contracts and commercial transactions are all part of the regular business of the Navajo Nation court system. The Navajo Nation docket approaches 100,000 cases per year, providing a line of precedents large enough to constitute a common law of the tribe.

The Navajo courts have approached the difficult task of "blending the old with the new" by integrating traditional tribal dispute resolution methods with Anglo–American judicial

methods. They have exemplified professionalism, independence, and institutional competence, while maintaining an abiding and rigorous respect for the integrity of the Navajo way.

Raymond D. Austin,* ADR and the Navajo Peacemaker Court

32 Judges Journal 8, 8–11, 47–48 (1993).

Long before Europeans set foot on the Americas, the Navajo Nation had its own unique legal structure and dispute settlement traditions. Some of these traditional legal concepts have survived and have now been incorporated into modern Navajo methods of dispute resolution by the Courts of the Navajo Nation.

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FREEDOM WITH RESPONSIBILITY

One fundamental value of Navajo society is complete equality among people. Navajos have what some call "permissive" child-rearing techniques, but Navajo children are treated as equals who have their own identities. This reflects the value that equals are free to do what they please, without others telling them what they can or cannot do. When asked if another Navajo will do something or if that person's property may be used, a tribe member will reply "it's up to him." Navajos do not believe in making decisions for others. Navajo common law rejects coercion. That creates difficulties for any legal system which is built upon coercion, authority, and levels of power, such as the adversary system.

The high respect for individual freedom is balanced by concepts of responsibility and duty. Navajos have an ingrained respect for *ke'e*, or kinship. *Ke'e* encompasses extensive

*[Ed.] Justice Austin served as Associate Justice on the Navajo Supreme Court from 1985–2001.

responsibilities to others and respect for them. The others include spouses, children, immediate blood relations, clan relations, Navajos in general, and people at large. Even Father Heaven, Mother Earth, and the plants and animals are included.

Navajo families live in groups, with each person having a role for family survival. Men have duties to women, women to men, and parents have responsibilities to their children. The family, which includes extended family members, works as an economic unit. The Navajo clan system, where people trace their lineage through their mothers, is a legal system. Navajo relations and responsibilities to clan members are part of a sophisticated system that defines rights, duties, and mutual obligations in relationships. Navajos are taught their responsibilities to clan members, which they carry out, and there is a saying that "One should act towards others as if they were your relatives." Shaming is an important part of discipline, and Navajos say to a wrongdoer, "You act as if you had no relatives." Mutual dependence, cooperation, and the ethic of family and clan are the framework for freedom with responsibility.

The Navajo culture stresses *hozho*, which when generally translated means "harmony." It is, however, broader than that, with a meaning something like "a reality with a place for everything, and everything in its place, functioning well with everything else." In other words, the "Perfect State." Wrongdoing and offenses occur when something or someone is out of harmony. Navajo religious ceremonies are directed to regaining and maintaining harmony.

Another Navajo legal value, which supplements notions of freedom and responsibility, is a great respect for tradition. Navajo traditions reflect freedom, responsibility, and dealing with the things that get in the way of a good and prosperous life. Those things are "monsters" in the Navajo way of thinking. Abstract Navajo values found in religious ceremonies, the creation stories, and past Navajo practices become concrete guides for daily life. They give real meaning to ideas of equality, responsibility, and duty.

These are the primary foundations for the traditional Navajo legal system.

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TRADITIONAL PROCEDURE

A great deal of the Navajo common law is built upon relationships, and Navajo civil procedures utilize them. When someone does wrong, or injures another, there is "talking." The Navajo word for "trial" is *ahwiniti*, which roughly translated means, "Someone (or more than one person) is the focus of discussion." Navajo civil procedure requires talking things out to reach consensus. During the process of talking, it is easy to identify duties, responsibilities, and relationships, as well as examining approaches to resolve disputes. The procedural goals are to reach consensus and harmony, with plans to maintain it. Continuing relationships, a key to modern alternative dispute resolution, are a central part of the process.

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APPLICABILITY TO MODERN SETTINGS

Throughout the history of modern courts of adjudication in the Navajo Nation, Navajo judges have used these principles in cases before them. The Navajo Court of Indian Offenses was created by the United States government in 1892 to destroy Navajo culture, but history shows that the Navajo judges of that court resisted imposed methods and instead used Navajo common law to resolve disputes. Following the creation of the Navajo Tribal Courts in 1958, Navajo judges have strived to reconcile adjudication with Navajo common-law methods. * * *

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In 1981, the chief justice of the Navajo courts started a project to use the Navajo common law in the Navajo courts. That led to several initiatives. Written court opinions use Navajo common law, and it is now the law of preference. * * *

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Navajos see their common law as the base upon which their society functions. Not only does it have relevance for approaches to alternative dispute resolution, but it also has relevance

to all aspects of modern Navajo law and legal institutions. Indian courts should be leery about the miracles of modern alternative dispute resolution, because Indians had it long before the United States government imposed the adjudication system on the Indian tribes in 1883. Indian courts do not need more imposed systems, including non-Indian methods, theories, or procedures of alternative dispute resolution. While they may have value to help focus upon elements of traditional systems, the traditional values are the most important for Indians.

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In the Matter of the Appeal of Lee

Supreme Court of the Navajo Nation, 2006

No. SC-CV-32-06, 9 Navajo Rptr. __, __ Am. Tribal Law __, 2006 WL 6171261.

This case concerns whether a candidate for Navajo Nation President, who did not reside and was not continually present within the territorial jurisdiction of the Navajo Nation for the last three years prior to the 2006 election, was properly disqualified from appearing on the ballot. Immediately after oral arguments, the Court issued an order requiring the Navajo Nation Election Administration (Administration) to place Appellant [Vern Lee (Lee)] on the ballot to run for President.

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II.

The issue in this case is whether the requirement that a Navajo Nation presidential candidate reside and be continually present within the territorial jurisdiction of the Navajo Nation for three years prior to the election is valid.

IV.

This Court is once again confronted with the residency requirement the Navajo Nation Council imposes on presidential candidates. Taken together, the Election Code and Title 2 of the Navajo Nation Code purport to limit who may run for Navajo Nation President to whose who "reside" and are "continually present" within the Navajo Nation prior to the election. 2 N.N.C. § 1004; 11 N.N.C. § 8(A)(1) (2005). The Title 2 provision requires that a person be "continually … physically present" during the last three years before the election. The Election Code provision requires that a candidate not only have been "continually present," but also have had "permanent residence" within the Navajo Nation for three years prior to the election. 11 N.N.C. § 8(A)(1) (2005). Both provisions define the Navajo Nation by the boundaries of the Nation's territorial jurisdiction set out in 7 N.N.C. § 254 (2005). The Election Code includes several exceptions to the "continually present" requirement, including allowing "[a]n extended absence from Navajo Country in the course of employment or pursuit of trade or business or for purposes of attending school and serving in the military service." 11 N.N.C. § 2(1) (2005).

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In this case, the Court deals with the issue of the validity of the residency requirement in both Title 2 and the Election Code in the context of the Fundamental Law statute, 1 N.N.C. §§ 201 *et seq.* (2005). Lee makes several arguments concerning these provisions, including that they are invalid under *Diné bi beenahaz'áanii*. Importantly, Lee does not claim to fit within any exception to being "continually present" within the Nation, but instead attacks the requirements directly. The Administration disagrees, arguing, without explicitly explaining why, that the provisions are not inconsistent with *Diné bi beenahaz'áanii*, and that the residency requirement is merely a procedural framework for the people to exercise their right to choose their leaders. … The Court address the Fundamental Law issue directly because challenges to the validity of the residency requirements for reasons other than vagueness have occurred in virtually every election cycle for a number of years, and yet have never been resolved, causing confusion and disruption of the electoral process. …

The Council may establish requirements for elected offices, but such requirements must conform to *Diné bi beenahaz'áanii*. There is a basic right, highlighted in the Fundamental Law statute, that the *Diné* have the right to choose leaders of their choice. 1 N.N.C. § 203(A) (2005). Further, under *Diné bi beenahaz'áanii*, Navajo candidates have a liberty interest to participate in the political process by running for office. … The residency requirement must be considered in light of these fundamental rights. If it is in irreconciliable conflict with those rights, that is, if it defeats the ability of the people to elect leaders of their choosing and candidates to run for office, it must yield. *See In re Estate of Kindle*, No. SC-CV-40-05, slip. op. at 7 (Nav. Sup. Ct. May 18, 2007) (statute passed prior to Fundamental Law statute must yield if it cannot be reconcilied with *Diné bi beenahaz'áanii*).

Though the rights to choose leaders and to participate in the Navajo political process are fundamental, they are not absolute. A broad reading of these rights might invalidate any perceived limitation on candidates, including filing deadlines, reporting requirements, or restrictions on campaigning. Therefore, absent some regulation of those rights, the Navajo election system cannot function. Further, other principles of *Diné bi beenahaz'áanii* may preclude certain candidates from running for office, and therefore restrictions based on such principles do not improperly burden those rights. There are then election rules that justifiably limit candidate eligibility to allow the election system to function or further other principles of *Diné bi beenahaz'áanii*. Such rules can be harmonized with the fundamental rights of voters and candidates, and are therefore valid. This Court has stated that these rights are protected by requiring the restrictions on the rights must meet a reasonableness standard. [*Rough Rock Community School v. Navajo Nation*, 7 Nav. Rptr. 168, 172-73 (Nav. Sup. Ct. 1995).] In other words, Navajo laws which restrict these fundamental rights "must be based upon reasonable public policy." *Id*. The question is whether limiting presidential candidates to those who reside and are continuously present within the territorial boundaries of the Navajo Nation for three years is one such justifiable rule.

This Court holds that the residency requirement is not a justifiable limitation, and therefore is in irreconcilable conflict with the fundamental rights of voters and candidates. Several justifications exist for restricting presidential candidates to residents of the Navajo Nation. The main reason given is that the restriction purportedly guarantees that candidates are aware of sensitive to the needs of the Nation, as they live among the People and understand their conditions and culture. That purported reasons does not justify limiting the fundamental rights of voters and candidates. Even assuming the underlying belief is correct, that residents within the lines demarcating the current territorial boundaries of the Nation are more aware of the needs of the People, the Council does not need to outright prohibit the candidate from even running for office. If the People are concerned that candidates unfamiliar with Navajo life run in elections,

they are free not to vote for that candidate. The candidate's ignorance of the Navajo experience will be immediately apparent when the candidate campaigns and discusses the issues with the People. It is not for the Council to restrict the People's ability to judge the value of the candidate's message, merely because he or she did not, prior to the election, live within a statutorily-defined boundary for three years. The People can, and will, make that judgment.

Furthermore, the use of the definition of the Navajo Nation's modern territorial jurisdiction, 7 N.N.C. § 254, to demarcate the land upon which one must reside if he or she desires to run in an election is itself unreasonable. Section 254 generally establishes the lands upon which the Navajo Nation government has authority, a purpose totally different and distinct from the fundamental rights at issue. Interestingly, the Election Code requires residency and continual presence within that defined territory to run for office, but not to vote in the election itself. *See* 11 N.N.C. § 281(C) (2005). Regardless, utilization of the boundaries set by Section 254 unreasonably restricts the fundamental rights of a significant number of Diné.[4]

IV.

Based on the above, the Court struck the residency provision, and allowed Mr. Lee to run for Navajo Nation President. The effect of that ruling is that the Election Administration may no longer enforce the residency provisions.

Notes

1. Former Navajo Nation Supreme Court Justice Raymond Austin explained in greater detail the legal concept of *Diné bi beenahaz'áanii*:

> The modern Navajos endorse a perspective of law that has roots in the traditional conception of *Diné bi beehaz'aanii*. The Diné Fundamental Laws bear

[4] The Court takes judicial notice that the 2000 Census recorded approximately 45,000 Navajos living in metropolitan areas clearly outside the Navajo Nation as defined by 7 N.N.C. § 254. Navajo Nation Divisions of Economic Development, Navajo Nation Data Extracted from US Census 2000 at 64. While, of course, not all of these self-identified are of voting age, and some may not be enrolled tribal members, this statistic still shows a significant number of Navajos potentially affected by the residency requirement.

this out. The Diné have always been guided and protected by the immutable laws provided by the Diyin [Great Spirit], the Diyin Diné'e [Holy Beings], Nahasdzaan [Mother Earth] and Yadilhil [Father Heaven]; these laws have

not only provided sanctuary for the Diné Life Way but have guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial.

According to traditional Navajo philosophy, the Holy Beings established the fundamental doctrines that drive the Diné Life Way. Thus, the Diné Fundamental Laws are a modern enunciation of the traditional view that *Diné bi beehaz'aanii* have spiritual roots. Any study of Navajo common law should respect the traditional Navajo understanding that spiritual sources underlie Diné foundational law.

The view that Navajo fundamental doctrines have spiritual origins does not cause uneasiness among modern Navajo lawmakers when they enact laws for the Navajo people and Navajo homelands. The Navajo Nation Council has tremendous leeway and flexibility to make laws, but those laws should not contravene the primordial principles. The following example illustrates this limitation: Suppose the Navajo Nation Council enacted a law making English the official language of the Navajo Nation. How would a Navajo Nation court deal with this issue on a challenge? The Navajo Creation Scripture and Journey Narratives teaches that the Diné language formed from the Creator's thought process which turned into sound (called the Single Word) and then language and the Holy Beings made the Navajo language a component of Diné identity. A Council enacted law that makes English the official language of the Navajo Nation would profane the Diné language and Diné identity, both of which connect Navajos to the Holy Beings.

Navajo judges frequently use the general propositions underlying Navajo culture to resolve legal issues that arise during litigation. These same principles also apply during peacemaking to heal participants and restore them to harmonious relationships with each other, and their kin and community. E. Adamson Hoebel, an early twentieth century American anthropologist, calls similar general propositions social postulates. The Navajo Nation courts prefer to

> call the extant Navajo social postulates, and the norms, values, customs, and traditions of the Navajo people, Navajo common law.

Raymond Darrel Austin, Navajo Courts and Navajo Common Law 68-69 (2007) (unpublished Ph.D. dissertation, University of Arizona).

2. So far we have examined the extensive use and development of Navajo common law principles in the realm of what the non-Indian legal system terms public law: the qualifications for a person to run for elective office, judicial review of legislative action, and the application of Navajo Fundamental Law. Navajo common law is also frequently called upon to decide complex issues of individual, family, and communal rights and duties within the tribe in the areas of domestic relations law. Consider *In re Validation of Marriage of Francisco*, 6 Nav. Rptr. 134, 16 Indian L. Rep. 6113 (1989), which involved the question of whether the Navajo common law allowed for common law marriages such as the type sometimes approved of in state common law:

> Oliver Chaca and Loretta Francisco cohabitated as man and wife between approximately October 1978 and August 7, 1987 in Window Rock, Arizona. Chaca worked in Peach Springs, Arizona. Francisco, an enrolled member of the Navajo Tribe, and Chaca, a Hopi, combined their earnings, acquired personal property in both of their names, and accumulated debts in both of their names. The public knew of the parties' relationship. Chaca often introduced himself and Francisco as husband and wife, and visited Francisco at her place of employment. No children were born to the couple. Sometime in June 1987, they talked about marrying each other, but they did not obtain a marriage license, marry according to Arizona state law, or participate in a traditional Navajo wedding ceremony.
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> On August 7, 1987, Chaca died as the result of an automobile accident. Among the property for distribution among Chaca's heirs is the proceeds from the decedent's Federal Employees' Group Life Insurance policy. Francisco cannot collect any portion of the life insurance proceeds unless her common-law marriage is validated.
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A common-law marriage is "not solemnized in the ordinary way (i.e. non-ceremonial) but created by an agreement to marry followed by cohabitation. * * * Such marriage requires a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations. * * * Such marriages are invalid in many states." *Black's Law Dictionary* 251 (5th ed. 1979). This type of marriage is a product of Anglo practice that is unknown and unrecognized in traditional Navajo society.

By contrast, contracting a traditional Navajo marriage has been described as follows:

1) The parties to the proposed marriage shall have met and agreed to marry.

2) The parents of the man shall ask the parents of the woman for her hand in marriage.

3) The bride and bridegroom then eat cornmeal mush out of the sacred basket.

4) Those assembled in the hogan then give advice for a happy marriage to the bride and groom.

5) Gifts may or may not be exchanged.

Navajo Tribal Council Resolution CJ–2–40 (June 3, 1940).

"Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the 'Holy People.' This blessing insures that the marriage will be stable, in harmony, and perpetual." *Navajo Nation v. Murphy,* 6 Nav. R. 10, 13 (1988) [15 Indian L. Rep. 6035]. Under traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other. Thus, in traditional Navajo society the Navajo people did not approve of or recognize common-law marriages.

* * *

Navajo custom does not recognize common-law marriages, regardless of whether one or both spouses are Navajos. *See* R. Locke, *The Book of the Navajo* 20–23 (1976). Navajo tradition and custom do not recognize common-law marriage; therefore, this Court overrules all prior rulings that Navajo courts can validate unlicensed marriages in which no Navajo traditional ceremony occurred. For the same reason, this Court will not construe any section of Title 9 of the Navajo Tribal Code as authorizing judicial validation of common-law marriages. To enhance Navajo sovereignty, preserve Navajo marriage tradition, and protect those who adhere to it, Navajo courts will validate unlicensed Navajo traditional marriages between Navajos. For these reasons, the district court's refusal to validate the alleged common-law marriage between Chaca and Francisco is affirmed.

III.

As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty. The Navajo Nation must control and develop its own legal system because "the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people." T. Tso, Chief Justice's Annual Report, Judicial Branch of the Navajo Nation Annual Rep. 1 (1988). * * *

***

3. Under the Navajo Tribal Code, Navajo customary or common law must be applied by Navajo courts where not prohibited by federal law. Many Indian tribes have similar laws in their tribal codes or constitutions. How do litigants establish the tribe's customary or common law in tribal court proceedings? Navajo judges have addressed this issue in a line of leading cases.

Applicable Navajo common law may be shown through recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way, it may be judicially noticed,

or it may be established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court. See Estate of Boyd Apachee, 4 Navajo Rptr. 178, 179–81 (Window Rock D.Ct.1983). Navajo Rules of Evidence provide, however, that where no question arises regarding custom or usage, the court need not avail itself of experts in Navajo culture. Rule 5, Navajo Rules of Evidence. And, under Navajo Tribal Code, tit. 7, § 204(a), the Navajo courts are required to take judicial notice of Navajo traditional law. "Thus, if a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven." Estate of Belone, 5 Navajo Rptr. 161, 165 (1987).

Describing the circumstance of judicial notice, one tribal court judge said that there would be such notice of custom only if the custom is of the sort "every damn fool knows." Apache v. Republic National Life Insurance Co., 3 Navajo Rptr. 250 (Window Rock D. Ct. 1982). See also Tome v. Navajo Nation, 4 Navajo Rptr. 159 (Window Rock D. Ct. 1983) ("The court can 'find' the Navajo common law through its own knowledge of it, since it is a matter of common knowledge."). "[T]he courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the court." Lente v. Notah, 3 Navajo Rptr. 72, 80 (1982).

Dr. Austin cautions both Navajos and non-Navajos, particularly counsel, about the importance of Navajo custom and about the application of Navajo custom in legal cases:

> Although a party may not follow customs or traditions, when it is pleaded in the initial pleadings or anytime thereafter, it becomes relevant for the court's consideration. Moreover, not all Navajo customs are law, and the individual contributing common law knowledge may refuse to testify on custom in open court due to its sacred nature or object to its use in adversarial litigation. An in camera disclosure of the sacred custom is a possible solution. These problems arise when litigants attempt to introduce Indian common law into tribal, state, and federal courts.
>
> Legal practitioners who are not familiar with Navajo culture, including language, etiquette, and spiritual beliefs and practices, would do well to associate with a court advocate or attorney who is Navajo and a member of the Navajo Nation Bar Association. The Navajo legal practitioner can help locate sources of

> Navajo common law, including knowledgeable persons, and advise on introducing customs into court proceedings. While being Navajo does not guarantee a person will know Navajo common law, Navajo legal counselors are culturally embedded; that is knowledge of Navajo spiritual and social practices, Navajo language speaker, and an insider's view of Navajo court practice.

Austin, *supra*, at 72-73.

4. Much of the work of any tribal court system is devoted to deciding property, including wills and trusts, and contracts law disputes, private law subject areas familiar to any first year law student. The work of the Navajo Nation courts in finding the Navajo common law on property is described in S. James Anaya and Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter–America Human Rights System*, 14 Harv. Hum. Rights J. 33, 44–45 (2001).

> The Navajo courts have consistently stressed that the property rights of the Navajo people derive from their unique cultural traditions and from Navajo land tenure. The Navajo Supreme Court explained the difference between Navajo land tenure and the land tenure system of the dominant United States society in the case of *Begay v: Keedah*:
>
> > Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership.[44]
>
> The Navajo courts have stressed that land includes both cultural and economic dimensions that are of crucial importance:

[44]19 Indian L. Rep. 6021, 6022 (Navajo 1991).

> There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo People would be caused to disperse.... Land is basic to the survival of the Navajo people.
>
> While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival—the Navajo People.[45]

Thus, according to Navajo customary law, as with the customs and usages of many other indigenous communities, the ownership of land is vested in the indigenous community or group as a whole.[46] Navajo customary law does recognize, however, an individual property interest:

> Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally occupied by his ancestors. This is the customary use area concept.[47]

Id. at 44–45.

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[45]Tome v. Navajo Nation, 4 Navajo Rptr. 159, 161 (Window Rock D. Ct. 1983).

[46]*See* Yazzie v. Jumbo, 5 Navajo Rptr. 75, 77 (Navajo 1986).

[47]*In re* Estate of Wauneka, Sr., 5 Navajo Rptr. 79, 81 (Navajo 1986).

Hopi Tribe. Like the Navajo Nation, the tribal courts of the Hopi Tribe are leaders in applying tribal customary and traditional law as embodied in the Hopi language and oral teachings in deciding legal disputes. See generally Justin B. Richland, Arguing with Tradition: The Language of Law in Hopi Tribal Court (2008).

The origins of the Hopi Tribal Court are at least as complicated and dramatic as that of the Navajo courts. In 1940, Bureau of Indian Affairs area superintendent Seth Wilson helped to create the Hopi Court of Indian Offenses, "largely an agency-run institution." Id. at 37. The Hopi Tribal Council enacted Hopi Ordinance 21 in 1972, abolishing the court of Indian offenses, and creating the Hopi Tribal Court. Id. at 39-40. A Navajo man had threatened to invoke the Indian Civil Rights Act in federal court against the Hopi Tribe in a dispute over livestock, and the Hopi counsel recommended the creation of a Hopi tribal court to deal with the matter. Id. at 40-41.

Hopi tribal court procedure and proceedings are adversarial, drawing heavily from American rules. Id. at 47-50. But for purposes of applying tribal customary and traditional law, the Hopi Tribe has adopted an ordering of laws to be applied by its tribal courts. Hopi Tribal Council Resolution No. H–12–76 sets forth the following order:

(1) the Hopi Constitution and By-laws;

(2) Ordinances of the Hopi Tribal Council;

(3) Resolutions of the Hopi Tribal Council;

(4) the customs, traditions and culture of the Hopi Tribe;

(5) federal law;

(6) Arizona law;

(7) the common law.

In Hopi Indian Credit Ass'n v. Thomas, No. 98AC000005 (Hopi Tribal Court 11/23/1998), the Court noted that federal law can preempt Hopi law under certain circumstances. In other cases, federal and state law can be regarded as providing only persuasive authority. See Komales Tewa v. Hopi Tribe, No. AP–004–90 (Hopi Tribal Court 03/29/1996) (In the absence of tribal law or customary law, "we will consider foreign law and apply it to the extent it is consistent with our customs, traditions and culture").

The following case demonstrates how tribal common law can interact with and alter federal common law, borrowed by the parties as persuasive authority for the tribal court to apply.

Village of Mishongnovi v. Humeyestewa

No. 96AP000008 (Hopi App. Ct. Keams Canyon, 1998).

Before SEKAQUAPTEWA, CHIEF JUDGE, and LOMAYESVA and ABBEY, JUDGES.

Opinion and Order

This case presents the issue of whether federal standing doctrine applies in Hopi Tribal Court in a case involving a dispute over who should rightfully control a bank account held in the name of the Village of Mishongnovi. Appellant and Respondents each allege that they are the rightful governing body of the Village. The ultimate resolution of the case turns on the determination of who is the Village's legitimate governing authority. As such, this case also raises the issue of whether this central factual determination is a political question that may be resolved by the tribal court.

Statement of Facts

Appellants seek control over a bank account held by respondents in the name of the Village of Mishongnovi. Appellant is the Cultural Preservation Board (CPB), which claims to be the operating board of Mishongnovi. Appellant claims political authority was delegated to it by an individual acting as spokesperson for Cortez Lomahukluh, Mishongnovi's traditional Village leader. The CPB alleges that Lomahukluh has been considered the traditional and secular leader of Mishongnovi since 1945, although he has not been ordained kikmongwi because the necessary sacred ceremonial objects have been lost.

Respondents are members of the Board of Directors of the Village of Mishongnovi. The Board of Directors also claims to be the only legitimate governing body of the Village. Respondents trace their authority to their election to the Board of Directors in 1992. This election was held in accordance with "Operating Guidelines" approved at a Village meeting in 1988. Respondents contend that the kikmongwi has never directed the political affairs of Mishongnovi. Rather, they claim, for as long as anyone can remember, Village decisions have been made through building consensus at meetings of various Village committee meetings. The Board of Directors was created to streamline the committee system and manage the Village's political affairs.

The CPB alleges that the traditional leader of Mishongnovi dissolved the Board of Directors and authorized his spokesperson to appoint the CPB as the Village's new operating board. In November, 1992, Hopi Vice Chairman Patrick Dallas received written statements from Lomahukluh declaring that he had invested a spokesperson with "authority of leadership to speak on behalf of all Hopi Tribal matters for the Village of Mishongnovi." On that same day, Respondent Bernita HumeyesTewa closed out a Bank of America account in the name of the Village of Mishongnovi containing $68,441.63. HumeyesTewa then deposited $68,609.39 into a First Interstate Bank account in the name of the Village of Mishongnovi. Respondents are the only authorized signatories on the bank account. On December 1, 1992, HumeyesTewa and Respondent Rolanda Morris signed checks from the Village bank account payable to Roland Morris in the amount of $2065.44. Morris alone signed a check for $2600.00 to Cake Chevrolet.

Procedural History

On April 6, 1994, the Appellants filed a complaint as Mishongnovi's governing body against Respondents for conversion of Village funds contained in the Bank of America account. The complaint alleged that Respondents negligently allowed the improper expenditure of funds

from the account. The Appellants sought replevin to obtain the funds and all other Village property possessed by the Respondents. The Appellants also sought a declaratory judgment from the court recognizing themselves as the lawful owner of the funds contained in the disputed bank account.

Respondents cross-claimed to enjoin the Appellants from usurping Respondents' public authority. They also sought a declaratory judgment that the Board of Directors had not been dissolved. Both parties filed motions for summary judgment seeking the Hopi Tribal Court's recognition that their respective board was the proper governing body of Mishongnovi.

* * *

The tribal court on September 3, 1996, dismissed the entire case for lack of standing by the Appellant. The court held that the Appellant did not have standing because it sought to advance a general interest common to members of the Mishongnovi Village, rather than a particularized interest.

* * *

Decision of the Court

* * *

B. The restrictive nature of Federal standing doctrine is antithetical to Hopi traditions of open dispute resolution.

Federal standing doctrine blends constitutional requirements and so-called "prudential" considerations. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471. A plaintiff has standing in federal court only if she satisfies the "case or controversy" requirement of Article III of the Constitution. To satisfy the demands of Article III, a plaintiff must meet three "irreducible minimum requirements" of standing. Valley Forge Christian College, 454 U.S. at 472.

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The United States Supreme Court defines "particularized" to mean that the alleged injury must affect the plaintiff in a personal and individual way. Defenders of Wildlife, 504 U.S. at 560. The Court has used this narrow definition to repeatedly reject standing claims premised on an alleged injury derived from a plaintiff's taxpayer or citizen status. See United States v. Richardson, 418 U.S. 166 (1974). It is this prong of the standing test that the tribal court cited in dismissing the CPB's claim for lack of standing.

* * *

Much of the complexity and narrowness of federal standing doctrine is designed to ensure that the federal courts are confined to the limited, enumerated jurisdiction granted to them by Article III of the U.S. Constitution. The prudential considerations in particular reflect the Supreme Court's preoccupation with restricting access to federal courts in order to screen out litigation aimed at articulating and enforcing broad public values, such as the separation of church and state, Valley Forge Christian College, 454 U.S. 464, and the right to an accounting of agency expenditures. United States v. Richardson, 418 U.S. 166.

Given the institutional and philosophical foundations of federal standing doctrine, it is not surprising that transplanting its elements into the body of Hopi common law poses substantial risk of rejection. The exclusionary and highly formalistic operation of federal standing doctrine is a poor fit in the Hopi tribal court system, which exists in a radically different cultural and institutional context.

First, the Hopi tribal court system operates squarely within a custom and tradition of open and consensual dispute resolution. Hopi traditions of discussion and consensus decision-making emphasize maximizing opportunities to air grievances and encouraging participation by clan and village members. Imposing a restrictive standing regime on Hopi tribal courts would deny tribal members access to an important neutral arena for adjudication of disputes.

In addition, unlike the federal judiciary, Hopi tribal courts are courts of general jurisdiction. Ordinance 21, section 1.7.1 (a), expresses the Tribal Council's intent to authorize the Hopi Tribal Court to exercise "the broadest jurisdiction" consistent with the constitution and laws of the Hopi Tribe and the United States.

Therefore, it is inappropriate to apply federal standing doctrine to proceedings in Hopi Tribal Court.

***

1. The Proper Test Of Standing In Hopi Tribal Court Is Whether The Plaintiff Asserts Some Actual Or Threatened Injury That Is Logically Related To The Legal Claims It Seeks To Present To The Tribal Court.

This court must now articulate a tribal common law rule that will be consistent with Hopi customs of open dispute resolution and will serve certain important functions of standing doctrine. A Hopi common law standing rule should ensure that litigants in Hopi Tribal Court are truly adverse, that those parties most directly concerned are able to litigate the questions at issue, and that issues are raised in concrete cases that inform judges of the consequences of their decisions. This court has looked to the proceedings of other tribal courts for assistance in formulating an appropriate standing doctrine. The decision of the Supreme Court of the Winnebago Tribe of Nebraska in Rave v. Reynolds, 23 Indian L. Rep. 6150 (Winn. Sup. Ct. 1996), is particularly helpful on this point. The Winnebago Supreme Court articulated a common law rule of standing after rejecting the use of rigid federal standing doctrine as inconsistent with the laws and public policy of the Winnebago Tribe of Nebraska. The Winnebago Supreme Court announced that as a matter of tribal law, standing questions must be resolved by inquiring whether the party at issue is asserting some actual or threatened injury that is logically related to the legal claims it seeks to present to the court. Rave v. Reynolds, 23 Indian L. Rep. at 6158.

The Winnebago Supreme Court specifically declined to include an additional rule precluding its tribal courts from entertaining generalized grievances or claims of injury, such as those sustained by all citizens, taxpayers or voters. Id. The Winnebago Supreme Court rejected this rule "in light of the traditions of openness to the healing of disputes which have long characterized traditional Indian dispute resolution." Id. The court also expressly rejected the

causal relationship and redressability prongs of federal standing doctrine. It noted that these tests "confuse the merits of the case with the preliminary question of standing and preclude an open airing of the dispute on the merits." Id. The court held that these prongs conflicted with the "participatory traditions" of Indian dispute resolution. Id.

This court finds the Winnebago Supreme court's formulation of a standing test useful and consistent with Hopi customs and traditions. Standing doctrine should be simple and flexible and should not pose an impenetrable barrier for tribal members to challenge the actions of their village and tribal officials. This court therefore announces the rule that in order to have standing in Hopi Tribal Court, a party need only assert some actual or threatened injury that is logically related to the legal claims it seeks to present to the court.

2. The Cultural Preservation Board Meets The Standing Test Announced Today.

In this case, the CPB alleges on behalf of the Village that Respondents are holding Village funds in a bank account without proper authority; that the Respondents' status as the only signatories for the bank account is preventing the Village from accessing these funds; and that some or all of Respondents converted specific funds in a specific amount in an unlawful manner.

* * *

Because the injury it alleges logically relates to the claims it seeks to have adjudicated, the CPB has standing to bring its claim to tribal court.

3. Political Question Doctrine Does Not Bar The Tribal Court From Determining Who Is The Legitimate Governing Authority of Mishongnovi.

Respondents argue in their answering brief that the tribal court is precluded from determining who is the legitimate governing body of Mishongnovi because the dispute involves a "political question" that the Hopi Constitution has reserved for resolution by the village of Mishongnovi itself. Respondents urge the court to apply federal political question doctrine as a check on the tribal court's jurisdiction.

Like federal standing doctrine, political question doctrine is aimed at preserving the separation of powers that is one of the defining features of the United States Constitution. Federal courts regard "political question" as controversies that revolve around policy choices and value determinations that are constitutionally committed to Congress or the Executive branch, and are not subject to judicial review. Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230.

The conceptual foundation for political question doctrine is the importance of preserving the separation of powers. This principle is only imperfectly applied to the Hopi system of government. Unlike the U.S. Constitution, the Hopi constitution does not establish a tripartite system of government and depends on the separation of executive, legislative and judicial functions to provide checks and balances. The Hopi Constitution vests legislative and executive authority in one branch of government, the Tribal Council. The Hopi Constitution also empowers the Tribal Council to establish courts "for the settlement of claims and disputes, and for the trial and punishment of Indians within the jurisdiction charged with offense" against the Tribal Council's ordinances. Hopi Constitution, Article VI, Section 1(g). Through Hopi Ordinance 21, the Tribal Council has invested the Tribal Court system with the "broadest exercise of jurisdiction" consistent with the constitution and laws of the Hopi Tribe and the United States. Hopi Ordinance 21, Chapter 1.7.1.

* * *

Although the concern for separation of powers may not have the same resonance in the Hopi Tribal Court system as in the federal judiciary, political question doctrine may nonetheless be useful in determining whether the Tribal Court should refrain from deciding certain disputes. However, the factors enumerated in *Baker v. Carr*, must be modified to reflect the distinct institutional framework of Hopi government. Federal political question doctrine very specifically evolved out of a constitutional scheme that granted the federal judiciary only limited jurisdiction. In contrast, Hopi courts are courts of general jurisdiction and have been empowered by the Tribal Council to exercise broad authority to resolve disputes. Section 1.2.8(a) of Hopi Ordinance 21 gives the Hopi Tribal and Appellate Courts broad jurisdiction to answer certified questions of tribal law. This grant of authority implies that the court has broad jurisdiction to resolve issues that may arise from the Hopi system of government. Within this distinct institutional context, political question doctrine may restrain the Tribal Court's authority to resolve disputes only when

the "texturally demonstrable constitutional commitment" of the issue to another branch in the Hopi Constitution.

In essence, Respondents argue that Article III, Section 3 of the Hopi Constitution reserves "to the villagers themselves" the power to decide which rival faction is the rightful village authority.

* * *

It is not at all clear from this or any other provision of the Hopi Constitution that the village or the Tribal Council alone may hear a challenge to the legality of the actions of individuals claiming to be a village's governing body. Because the Hopi Constitution does not explicitly give another entity of the Hopi government exclusive jurisdiction over this type of dispute, we hold that the political question doctrine does not preclude the Tribal Court from resolving the issues raised in this case.[2]

4. The CPB Is Entitled To Have The Trial Court Decide Its Claims On The Merits.

On remand the trial court is faced with the daunting task of sorting through each party's claim to be the only legitimate governing body of the Village of Mishongnovi. No single factor is likely to be determinative in this case. The trial court should base its decision on the totality of the facts, taking into account, for example, whether the Village's traditional leadership is intact; whether the traditional leadership has been displaced; and who is in the best position to manage the Village's funds.

* * *

[2]"Each village shall decide for itself how it shall be organized." Hopi Constitution, Article III, Section 3.

Notes

1. Could the borrowing of the "political question doctrine" from federal law actually be consistent with a tribe's customary law? The legal mechanism of a tribal court is a newer form of dispute resolution, and one that is not necessarily indigenous. Perhaps there are some "Indian political questions" that should not be decided in court.

2. Courts, even tribal courts, are courts of persuasive – and coercive – power. Robert Cover called this "violence." Robert Cover, *Violence and the Word*, 95 Yale L. J. 1601, 1601 (1986) ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."). Relatively few pre-contact Indian communities used coercive force in government. Should modern Indian tribes? Pat Sekaquaptewa has written about the use of "sanction" in Hopi traditional law and in Hopi tribal court:

> At Hopi we have a complex persisting set of traditional sanctions, religious and secular. Maqastutavo persists and influences peoples' actions but equally effective is the making of examples of bad behavior with all the attendant chastisement and public ridicule. Some breaches of norms, such as that one should be respectful and sober during the ceremonies, are sanctioned by both the traditional and tribal systems. For example, if one is out of line during a ceremony, he or she may be publicly chastised by the disciplinary Katcina; the tribal police may be called to arrest that person for violating the criminal code provision making it a crime to be disrespectful or drunk at the ceremony, and punishable with a fine and/or jail time.

> In the area of land use rights and the duties and obligations owed with respect to land, we are still exploring the diverse local understandings. My best guess, without taking traditional expert testimony on the global question, is that our families, clans, and the wider village communities suffer from functional and/or supernatural outcomes (sanctions), where we cannot get along to make our ceremonies go. For example, where we cannot cooperate to plant or harvest at the right intervals to catch the rain or where the rain simply won't come, or even where the corn is plentiful, we might not be able cooperate to organize and hold the full ceremonial cycle because we are busy fighting over homes and fields.

> These functional and/or supernatural sanctions are reinforced by our clan uncles when they arbitrate intra-family (clan) home/land disputes and say which dutiful clan member(s) have the superior use rights. Where family members continue to fight and refuse to live with the decision of their clan uncles, or where they do not have a clan uncle who can or will arbitrate, they may go to tribal court to seek formal tribal recognition of superior use rights. As can be seen in the James case, the tribal court under the present state of Hopi law will attempt to stand in the shoes of the village or clan uncle, by applying it's version of the local custom or by reinforcing the made decision of the clan uncle. In this way, breach of duty with respect to land is sanctioned at the supernatural, clan, and tribal legal levels. This may take the form of bad weather for crops, community recognition and reinforcement of the advisements and decisions of traditional clan authorities - resulting in people talking badly about, or refusing to deal with the person in breach and with the secular state-like enforcement mechanisms of the tribal government. For example, an enforceable court order recognizing that a specific person has superior and exclusive land use rights might result in the authorization of the tribal police to evict future trespassers.
>
> The important considerations for policymaking purposes with respect to sanction include: (1) What were/are the traditional sanctions and when should they apply; (2) Whether the traditional sanctions are sufficient or whether tribal sanctions "backing them up" are desired; (3) Whether innovative tribal sanctions of a nature similar to traditional sanctions are desired, such as outing bad behavior in the tribal newspaper for example; and (4) When and how tribal courts and police should recognize and enforce the decisions, remedies, and/or sanctions issued by traditional authorities?

Pat Sekaquaptewa, *Key Concepts in the Finding, Definition, and Consideration of Custom Law in Tribal Lawmaking*, 32 Am. Indian L. Rev. 319, 367-69 (2007-2008).

3. In disputes between citizens and residents of an insular Indian community that involve internal subject matters, such as inheritance or use of property, and parties and judges that speak the indigenous language and are conversant, the law applied and the procedures used may be dramatically different from standard Anglo-American legal cases. Consider this description (and critique) of an internal property dispute at Hopi:

The tribal judge presiding was a Hopi man with 28 years of experience on the Hopi bench. A fluent Hopi speaker, and deeply involved in the traditional practices of his village, the judge did not, however, come from the village where the dispute arose.

In some significant ways, this hearing was highly unusual for a court based on a system of adversarial adjudication. Indeed, when this case was appealed to the Hopi Appellate Court, one of the appellate judges repeatedly remarked upon the form of this hearing as something that would be much more normal for a continental, inquisitorial-style court than it would for courts grounded in Anglo adversarial legal traditions.

Departing from the normal examination processes of the Hopi Tribal Court, the judge played a central role in the questioning of the elders. Though the parties were asked to prepare lists of questions to be asked of the witnesses, the judge took control of the actual questioning process, translating the parties' written English questions into Hopi and addressing them to the witnesses himself. This approach had two significant consequences. First, no opportunity was given for any sort of cross-examination. Indeed, early in the hearing, the judge informed the parties that they would not be able to speak in response to any issues raised by the testimonies. Thus, no direct challenge to the credibility of any of the witnesses or their testimony was ever made by any of the litigants, even though the parties themselves provided the witnesses. Though invoked to protect the sensibilities of the Hopi elders and their lack of experience with hostile interrogation, disallowing cross-examination under these circumstances would seem to stymie the very purpose of the hearing: to make a determination as to which party produced the more credible understanding of custom and traditional practices. As a consequence, the judge put himself in the position of being arbiter over the knowledge and experience of others, basing his arbitration on implicit perceptions of witness credibility that never got a public airing. A decision based on such hidden considerations risked accusations of arbitrariness and-given the small size of the Hopi population-undue influence (e.g., nepotism).

*** The judge had much greater control over the metadiscursive framing of witnesses' testimony in a hearing set up like this one. In an unusual mixing of roles, the fact finder and decision maker in this case had the capacity to characterize the evidence just as it was being presented before him. In effect, the judge had the power to shape his decision even before the trial was finished-by controlling how the testimony was framed as a response to a given set of questions, the judge attempted to

> control both what that evidence was and how it would support his final judgment. [T]he conflict talk between the judge and the witnesses turned precisely around the issue of the framing of this testimony, as this issue remained a continuous source of interactive trouble between the participants over the course of the hearing.

Justin B. Richland, *"What are You Going to Do With the Village's Knowledge?" Talking Tradition, Talking Law in Hopi Tribal Court*, 39 Law & Soc'y Rev. 235, 252-53 (2005).

b. Alternative Tribal Dispute Resolution Mechanisms: Peacemaker Courts and Sentencing Circles

Since at least 1982, with the establishment of the Navajo Nation's peacemaker courts, many Indian tribes have been attempting to apply traditional and customary law to discreet areas of civil and criminal law parallel to the more Anglo-American style of justice dispensed by tribal courts.

Howard L. Brown, Esq., The Navajo Nation's Peacemaker Division: An Integrated, Community–Based Dispute Resolution Forum

24 Am. Indian L. Rev. 297, 301-306 (2000)

* * *

THE PEACEMAKER DIVISION AND *HOZHOOJI NAAT'AANII*

In the early 1980s, the Navajo Common Law Project was formed as an ongoing effort to learn about, collect and use Navajo wisdom, methods and customs in resolving disputes. Project researchers soon learned of a longstanding method of dispute resolution in which respected members of the community assist disputants and other interested parties to reach noncoercive, consensual agreements to conflicts. Project participants passed what they learned to the Navajo Nation Judicial Conference, which was eager to adopt a customary method of dispute resolution as an alternative to the Anglo–American, adversarial model of achieving justice. In 1982, the Judicial Conference created the Peacemaker Court, now known as the Peacemaker Division, to implement customary methods of resolving disputes.

The Peacemaker Division institutionalizes the custom of *hozhooji naat'aanii*, or peacemaking. Peacemaking consists of a justice ceremony in which disputants and community members gather to "talk things out" with the assistance of a respected community leader, or *naat'aanii* (peacemaker), to reach a consensual settlement. *Hozhooji naat'aanii* aims to reach solutions through consensus and to solve problems through restorative justice. Wrongdoing and conflict among members of the Navajo community are "regarded as ... symptom[s] of things being out of place, or in dissonance." Thus, the object of peacemaking is not to punish, but to return individuals and the community to a state of *hozho*, or harmony.

Peacemaking assumes the superiority of an integrated approach to resolving disputes. That is, the Peacemaking process integrates and utilizes the wisdom, skills and perspectives of a variety of people, including the disputants, the disputants' relatives and friends, the *naat'aanii*, local government bodies known as chapters, judges, clerks of court, other interested parties, and in some rare circumstances, lawyers. The integrated approach to dispute resolution is consistent with Navajo principles of harmony, community and clan relationships, as well as a Navajo sense of solidarity, or oneness of "self with family, community, nature, and the cosmos—all reality."

Hozhooji naat'aanii may be used to resolve and address a variety of issues including, but not limited to, marital strife, disputes among spouses, parents and children, neighborhood conflicts stemming from nuisance or animal trespass, misconduct related to alcohol or drug abuse, transactional disputes and other conduct causing disunity to the community.

Disputes may come to the Peacemaker Division in one of two ways. District court judges may transfer cases to a *naat'aanii* when doing so is in the interest of justice. Alternatively,

disputants themselves may seek the assistance of a peacemaker by submitting a request to their local district court clerk of court. In such cases, the clerk immediately presents the request to a judge, who may meet with the disputants before granting or denying the request. If the request is granted, as is generally the case, the judge may appoint a *naat'aanii* to conduct the peacemaking.

The judge may select the *naat'aanii* from a list compiled and certified at meetings of local chapters and maintained by the court clerk. Otherwise, the court may appoint the *naat'aanii* "from qualified persons known to it or any person recommended as being qualified as a [p]eacemaker." The Navajo Peacemaker Court Manual states that:

> Any person who has the respect of the community of his or her residence, an ability to work with chapter members, and a reputation for integrity, honesty, humanity and an ability to resolve local problems shall be eligible to be appointed as a [p]eacemaker. Members of the Navajo Tribal Council, Chapter governments, Native American Church chapters, medicine men or members of any other organization or group which has the respect of the individuals who will come before the Peacemaker Court may be appointed [as] [p]eacemakers.

Alternatively, disputants may agree among themselves to retain a particular individual to serve as the peacemaker for their dispute. In such cases, the peacemaker may be any individual that the disputants select unanimously.

The *naat'aanii* is considered to be an officer of the court and thus enjoys multiple privileges and bears many responsibilities. The peacemaker is authorized to "use traditional and customary Navajo methods and other accepted nonjudgmental methods to mediate disputes and obtain the resolution of problems through agreement." In addition to fulfilling the role of mediator, the peacemaker may be authorized by the disputants to arbitrate the conflict. The *naat'aanii* may "instruct or lecture individuals on the traditional Navajo teachings relevant to their problem" as a means of resolving the dispute. Additionally, the peacemaker has the power of subpoena to compel persons involved in the dispute to participate in its resolution.

A district court judge retains supervisory authority over the peacemaker and the peacemaking sessions. In addition to ensuring that qualified peacemakers are selected and that the proceedings run smoothly and fairly, the supervising judge may issue protective orders

ending the peacemaking process on grounds including misconduct by the peacemaker. As officers of the court, peacemakers are bound by the Navajo Nation Code of Judicial Conduct and are subject to dismissal for violations of ethical standards.

The Peacemaker Division Rules do not mandate a particular technique or style of dispute resolution beyond those guidelines described above. However, the primacy of tradition and custom provides a framework for the peacemaking ceremony, and, thus, most proceedings follow a similar pattern. The *naat'aanii* opens the proceedings with a prayer to summon the assistance of the supernatural, focus the minds of the participants and create an atmosphere of *hozho*, or harmony. The participants then have an opportunity to "talk things out," express their positions and listen to one another. Often, parties sit in a circle or around a table facing one another. Relatives and other interested parties have an important role to play. A sister scolds her brother for the strife that he has caused their family; relatives explain to a wayward husband his duties to family and community; grandparents reveal knowledge of a son's paternity. * * *

The *naat'aanii* listens carefully, helps to guide the conversation and attempts to lead the disputants to *hozho*. He or she may point out the true causes of the dispute and the disputants' disharmony. The peacemaker may explain to the parties how they violated Navajo values. He or she often relates the dispute to the Navajo creation story, in which the Hero Twins engaged in lengthy odyssey of trial, assistance-seeking and education before they slew the world's *nayee*, or monsters.

Importantly, the *naat'aanii* is not, in a strict sense, "neutral." Rather, he or she offers a point of view that is grounded in Navajo values.

* * *

After all of the participants have the opportunity to speak, the peacemaker engages them in *hozhoojigo*, a process of developing a plan to settle the dispute. The process, as with all other parts of *hozhooji naat'aanii*, should be noncoercive and consensual. Further, *hozhoojigo* should be aimed at restoring harmony and creating a new, ongoing relationship among the participants and the community, which, according to Navajo justice concepts, is entitled to "the return of its members to a state of harmony."

Once the parties reach an agreement, they may opt to enter it as a court judgment. According to the Peacemaker Court Rules, a judgment may be entered if the court has proper jurisdiction, the judgment contains the agreement as reached through the peacemaking procedure and all necessary parties have actual knowledge of the judgment and agree to it. Once entered, the judgment may be enforced as any other judgment of the court. However, in actual practice most agreements reached through the peacemaking ceremony are not entered as court judgments. Instead, parties often follow the traditional practices of executing simple oral or written agreements memorializing the peacemaking settlement. In all cases, the peacemaker must report the results of the peacemaking ceremony to the supervising district court judge.

* * *

Nancy A. Costello, Walking Together in a Good Way: Indian Peacemaker Courts in Michigan

76 U. Det. Mercy L. Rev. 875, 879-80, 888-89 (1999)

The Peacemaker Court of the Grand Traverse Band essentially recreated traditional Indian justice methods practiced by Indians long before European settlers imposed the Anglo-European justice system on tribes in the late 1800s. … Unlike the Anglo-European legal system, traditional Indian peacemaking focuses not on the guilt of the wrongdoer, but on solving the problems the dispute presents. Heavy emphasis is placed on the spirit and the feelings of the perpetrator and victim, and the restoration of relationships in the family and community. Peacemaker Courts recognize that when the feelings of parties are separated from the legal process and a judge's decision does not address those feelings, dissatisfaction follows. Peacemakers recognize that when a legal system ignores the emotions of the parties, tribal relationships cannot be restored. In contrast to the dominant culture's justice system, peacemaking is an educational device that attempts to mend relationships and teach tribe members correct behavior.

“Peacemaking focuses on maintenance of relationships. If people treat each other with respect and people accept their responsibility, things move toward a feeling of harmony, and justice has really been done,” said Chief Judge [Michael] Petoskey. “If justice happens in the adversarial legal system it seems to be by accident. The adversarial system relies on who has the best lawyer, who understands the technicalities, and who can beat up on the other more.”

The focus on problem solving rather than guilt makes peacemaking an effective method to penetrate the denial of a wrongdoer. The absence of coercion or punishment allows all parties to freely discuss a problem. Wrongdoers, therefore, are more likely to overcome the psychological barrier that holds them back from acknowledging substance abuse and other problems.

The involvement of relatives and friends in the peacemaking process also assures that weak victims or silent, ashamed perpetrators have someone who can speak for them and in support of them. If an abused victim is afraid to speak, relatives can describe the victim's pain and protect that person's interests. Likewise, if a perpetrator feels shame for committing an act and is therefore hesitant to speak, relatives may speak to show mitigation of the harm and offer restitution.

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For the Grand Traverse Band, peacemaking is as much about building community as it is about resolving conflicts. The Peacemaker Court, which emphasizes the involvement of family and friends in dispute resolution, promotes tribal traditions and community harmony for a tribe that is reconstituting after a century of dislocation.

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Following federal recognition, scattered tribe members moved to the Peshawbestown region seeking newly-established health services, low-income housing, jobs, and a long-lost sense of tribal community. Tribal government provided local leadership and has spearheaded successful economic development. In 1974, the only public enterprise the Grand Traverse Band owned was a coin-operated laundry. By 1984, four years after federal recognition, the Grand Traverse Band opened a bingo hall. A casino-motel complex soon followed, as well as an Indian art store and other commercial buildings and businesses. The millions of dollars generated by these enterprises were directed back into housing, human services, and plumbing for the Tribe, and created annual payments for each tribe member. Tribe members returning to the fold sought jobs at the casinos and government agencies, and welcomed an annual dividend check provided by gaming profits.

But those who were moving to Peshawbestown were returning to a socially complex tribe. Some were familiar with Indian culture and traditions. Many were not. Some members returning to tribal territory who sought jobs and homes had brushes with the law. As tribal membership increased, juvenile wrongdoing escalated. Juveniles who got into trouble entered a tribal court system modeled after the impersonal Anglo-European system. In creating its Peacemaker Court, the Grand Traverse Band pulled together as a community to decide what would be the best justice method to govern disputes involving tribal youths.

Note

1. More and more Indian tribes are developing and relying upon peacemaker courts, and other indigenous justice systems such as sentencing circles, to handle many different types of disputes, including juvenile and adult misdemeanors, petty theft, and many kinds of civil cases between individual tribal citizens. However, peacemaker courts and sentencing circles have met with mixed outcomes in one kind of community problem – domestic violence. See generally Rashmi Goel, No Women at the Center: The Use of Canadian Sentencing Circles in Domestic Violence Cases, 15 Wis. Women's L. J. 293 (2000).

> The principles that govern the circle, while they may prove positive for the offender, also place Aboriginal women in desperate positions. Healing and family reunification may require the offender remain in the community. For instance, this forces him to feel, on a daily basis, the shame he has brought upon his family. It also permits him to interact with elders and family members, who can support and guide him. Finally, it allows him to spend time with his children (if there are any) and perhaps even to counsel them not to engage in violent behavior. Community members may feel capable of policing the offender.
>
> In contrast, as an Aboriginal, the victim also believes in family unity, but this principle does not serve her needs. As a woman living with domestic violence, protection for herself and her children is likely paramount. While the victim may not support incarceration as a long-term solution, imprisonment does provide short term protection. Her empowerment however, requires disempowering a male member of the community. In some Aboriginal nations, it is unethical to say angry things about someone in his or her presence, or to complain about the past. Will her community be

able to protect her now, when they have failed thus far? Therefore, the values of the circle can actually prevent the victim from complaining.

Shame functions paradoxically within the sentencing circle. Traditional Aboriginal dispute resolution depends upon shame (among other things) to rein the offender in. The chastisement of his peers and the knowledge that he has disgraced his family provide motivation for change. Families and community members must be fully aware of the offending behavior so they can exercise the appropriate pressure. However, the victim may not be ready psychologically to relive the abuse in the circle, especially when support for domestic violence victims is so minimal.

In Aboriginal communities where family violence has become a lifestyle, shame may also be visited upon the victim. Thus, a significant problem in addressing this issue is the change in traditional values. While respect for women may be a traditional aboriginal value, a victim's stoic resilience has become of greater value than speaking out. Domestic violence is no longer an aberration in Aboriginal communities, but the norm. Aboriginal women have responded to this epidemic by accepting violence as part of family life. Some community members may feel she provoked the abuse, others will feel she should have tolerated it longer. This promotes a culture where violence is accepted and the victim is more deserving of shame than the offender. There are those who will blame the victim simply for coming forward. The victim may be ostracized by her community. Thus, the victim's faith in shaming the offender is at odds with her desire for confidentiality.

Id. at 324-26.

2. At least one commentator has argued that the resort to peacemaker courts or other indigenous justice systems in certain cases does not go far enough, and that any kind of American-style justice system is damaging to tribal societies:

[I]n every significant aspect, the American legal system is in conflict with the manner in which native people have traditionally resolved disputes. As a result, tribes that have embraced litigation subject their citizens to a dispute resolution process that precipitates and requires a radical change in their behavior

> in order to obtain justice from the system. While behaving like an American may not seem problematic (especially for Americans), the resulting effect is that native people end up relinquishing traditional cultural values, particularly those relating to community and relationship. As native people lose their connectedness to one another, the fragmentation of their societies soon follows.

Robert B. Porter, Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies, 28 Colum. Hum. Rts. L. Rev. 235, 280-81 (1997).

c. The Rise of “Intertribal Common Law”, or A Tribal Law for Nonmembers?

Tribal courts cannot decide all tribal court cases by resorting to tribal customary and traditional law – as incorporated into modern tribal common law. Most tribal court cases involve more and more nonmembers as parties. Tribal courts decide the large majority of these cases by resort to “intertribal common law” or by borrowing federal and state law.

Matthew L.M. Fletcher, Toward a Theory of Intertribal and Intratribal Common Law

43 Hous. L. Rev. 701, 720-24, 726-28 (2006)

“Intertribal common law” is the substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct. It is this Author's sense that the vast majority of tribal court cases arise out of an Anglo-American legal construct. Intertribal common law includes the common law decisions of other tribal courts and may include a tribal court's importation of federal and state court common law. Tribal courts create intertribal common law, for example, when litigants ask the court to interpret a statute such as the ICRA or a tribal secured transactions code. Tribal courts create intertribal common law when they adopt a common law rule of another tribal court or a federal or state court, such as the doctrine of sovereign immunity.

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Despite the dearth of theorization behind the use of intertribal common law, the wide majority of tribal courts apply intertribal common law in almost every decision involving nonmembers. As the theory of intertribal common law suggests, tribal courts apply intertribal common law in a wide variety of tribal court cases, including drug-related civil forfeiture cases, contracts with nonmember businesses, and tort claims. In Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100, for example, the Muscogee (Creek) Nation Supreme Court upheld the authority of the tribal government to "regulate public safety through civil laws that restrict the possession, use or distribution of illegal drugs." [32 Indian L. Rep. 6133, 6134 (Muscogee (Creek) Nation Sup. Ct. Apr. 29, 2005)] The statutes applied to the matter--the tribal legislature's codification of laws that prohibit the possession and use of certain drugs and the confiscation of property related to the possession and use of illegal drugs -- were Anglo-American legal constructs. The federal common law that established the tribal government's exclusive jurisdiction over the casino parking lot where the tribal police found the drugs; the federal common law that established the Nation's authority to regulate the nonmembers' on-reservation actions; and the federal treaty reserving to the tribal government certain rights as against state and federal intrusion are all Anglo-American legal constructs. Even the tribal police's actions were modeled upon American law enforcement tactics. There's nothing wrong with the Nation's choices in this case--the drug ("crystal meth") came from outside the community, brought by nonmembers to the tribal casino, and so it is reasonable for the Nation to employ an outside legal construct in response. Most tribal court cases--and almost all tribal cases that involve nonmembers in significant ways--do the same thing.

When an Indian tribe engages in commercial business operations both on and off the reservation, the tribal courts resolving the disputes that arise out of these transactions employ intertribal common law to resolve them. Confederated Tribes of Grand Ronde v. Strategic Wealth Management, Inc. is a good example of a circumstance where tribal law adopted Anglo-American legal constructs as a means of adaptation to modern transactional and business needs. [32 Indian L. Rep. 6148 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005)] There, the Tribes brought suit in tribal court to vacate an arbitration panel's award of attorney fees and costs to the Tribes' former business partners, Strategic Wealth Management (SWM) and Paradigm Financial Services, Inc. (Paradigm), nonmember-owned businesses. The tribal court granted the relief because the Tribe "did not waive its sovereign immunity in any of the agreements it entered into with [SWM]." The underlying contract (a contract relating to financial and investment services) and the arbitration clause, coupled with its incorporation of tribal sovereign immunity, were all Anglo-American legal constructs utilized by the Tribes. The tribal code provisions establishing subject matter jurisdiction mirrored federal rules in significant ways. The federal common law allowing for tribal court jurisdiction over the nonmembers and the defenses raised by SWM were all Anglo-American legal constructs. The tribal court relied

upon its own authority for the background policy relating to tribal sovereign immunity and many federal court cases for much of the remainder of the issues. All of this was intertribal common law.

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As tribal courts hear more and more cases, they will be more capable of relying upon their own precedents, rather than importing federal, state, and other tribal court decisions. This exemplifies the ongoing process of tribal courts adapting Anglo-American common law in cases involving nonmembers. The oldest tribal courts of record adopted and imported Anglo-American precedents for use in cases involving nonmembers. The next generation does the same, but also relies upon the precedents of older generations of tribal courts. The process suggests that importation and adaptation of Anglo-American common law is useful for tribal courts when resolving disputes involving nonmembers--and that this process will continue.

Intertribal common law is a mixture of tribal common law, as well as the common law decisions of other tribal courts, federal courts, and state courts. While there is a definite mixture of authorities, there is no instance where a tribal court has chosen to depart in an unusual manner from the established common law of other jurisdictions once adopted. In short, it is unusual to find a tribal court decision involving nonmembers that would depart in a radical manner from the way a state or federal court would decide the case.

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As tribal courts decide more cases, they will have more opportunity to rethink these common law choices, just as federal and state courts rethink their own common law choices. Every Indian tribe is a laboratory for innovation.

Notes

1. Tribal common law is nascent in most tribal court, and many cases that would be relatively simple to decide in federal and state courts are cases of first impression in tribal courts. The wholesale adoption of state and federal law by a tribe or tribal court has consequences. Steve Aycock, the former chief judge of the Colville Confederated Tribes tribal court cautioned that tribal court judges – and tribal court litigants – all too often rely on state and federal precedents to litigate tribal court disputes:

> Over the last twenty years of practice in Tribal Courts, I have noticed that there is a tendency in some tribal courts to rely on state and federal legal principles and precedents rather than developing a truly tribal jurisprudence. … Attorneys practicing in tribal courts often cite only to federal or state law. Tribal judges have cited state or federal in many decisions.
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> The biggest concern to be pointed out here is that when one cites to or adopts a foreign case, you also cite to and adopt all of the cases it cites. You adopt its rationale. You adopt all its facts, its history and most importantly its values, but express and hidden.
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> English common law has been developing for centuries. Because of that, states tend to have massive amounts of old law that they can fall back on in deciding new and novel questions of law. But it must be remembered, every issue of law was at some point a novel issue. Everything had to be decided sometime for the first time. At some point, lawyers and judges had to be originally creative.
>
> Ultimately, tribes have to decide whether to have their law based upon their values or upon the values of those outside the Reservation.

Steve Aycock, Thoughts on Creating a Truly Tribal Jurisprudence, in Indigenous Justice Systems of North America, 2nd Annual Indigenous Law Conference, Michigan State University College of Law, at 1, 15-17 (March 17-18, 2006).

2. Part of the Supreme Court's concern with recognizing the authority of tribal courts to exercise jurisdiction over nonmembers is the question of fairness to outsiders. Justice Souter's concurring opinion in Nevada v. Hicks, infra, pp. __-__, asserted that the law that tribal courts apply in deciding cases involving outsiders is "unusually difficult to sort out." See also Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2724 (2008) ("Indian courts 'differ from traditional American courts in a number of significant respects.'") (quoting *Hicks*, 533 U.S. at 383 (Souter, J., concurring)). There is little empirical research on this assertion. What research that exists suggests that the Court's supposition is incorrect. Professor Bethany R. Berger concluded that Navajo Nation trial courts are not hostile to nonmembers in her empirical study, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L. J. 1047 (2005). She wrote:

> Through this method, 122 cases involving non-Navajo litigants were identified. Ten of these cases involve Indians that are not members of the Navajo Nation, and the rest, 91.8% of the total, involve non-Indians. The cases were read and categorized as to who won or lost the case and the subject matter of the case. The cases run the gamut in subject matter; they include, for example, cases regarding contracts, torts, child custody, employment law, practice of law, trusts and estates, and taxation. The majority of cases involve non-Indian companies, whether as employers, vendors, alleged tortfeasors, taxpayers, or insurers. In the vast majority, both sides had representation drawn from the same pool of local attorneys and advocates.
>
> Out of these cases, in sixteen, no contested issues were decided or the results were too mixed to say one party won or lost. In five, non-Navajos were on both sides, and in six, non-Navajos and Navajos were on the same side. The remaining 95 cases were almost equally divided: in 45 cases, or 47.4% of the total, the non-Navajo party won, and in 50, or 52.6% of the total, the non-Navajo party lost. Until the last few years, when non-Indians, encouraged by recent federal decisions restricting tribal civil jurisdiction, have repeatedly challenged Navajo jurisdiction and the court has repeatedly rejected these challenges, the win-loss rate was 50-50.

Id. at 1075.

d. The Special Challenge of Litigating the Indian Civil Rights Act in Tribal Courts

The Supreme Court's decision in *Santa Clara Pueblo v. Martinez* placed exclusive jurisdiction to decide civil rights questions under the Indian Civil Rights Act with tribal courts. The difficult questions of interpreting the meaning of "due process" and "equal protection," for example, concepts forced upon Indian tribes by Congress in the Act, now rest with tribal courts. Tribal courts have confronted these questions often by defining these Anglo-American legal concepts in accordance with tribal customs and traditions.

High Elk v. Veit

Cheyenne River Sioux Tribal Court of Appeals, 2006

Before Chief Justice FRANK POMMERSHEIM and Associate Justices, JAMES CHASING HAWK and ROBERT N. CLINTON

No. 05-008-A, __ Am. Tribal Law __, 2006 WL 5940784

This matter involves litigation occasioned by frustration of the expectations of Plaintiffs, Jim Veit and Fred Kost, that their grazing authorization for Tribal Range Unit Number 162, which is assigned to Appellants Paul and Clara High Elk and Codi American Horse (the High Elk Defendants), would be renewed for the 2005 grazing year. Expecting such renewal, the Plaintiffs allegedly prepaid the initial payments for the anticipated rental for the 2005 grazing year so that proper payments could be made to the Bureau of Indian Affairs in a timely fashion. They did so without any written sublease or other pasturing agreement for the range unit in question for the 2005 grazing year based on their personal anticipation of renewal for the 2005 grazing year due to the alleged long standing relationship between the parties. Unfortunately for the Plaintiffs, the High Elk Defendants did not renew their previous authorization with the

Plaintiffs for the 2005 grazing year. Instead, they entered into a pasturing authorization agreement with Duane and Sharon Keller (the Kellers), which was approved by the Bureau of Indian Affairs, and which resulted in the Kellers placing cattle on Range Unit Number 162 commencing some time in May, 2005.

This litigation and its tortuous procedural history basically involves the Plaintiffs' efforts to recoup the sums they voluntarily paid for grazing rights in 2005 based on their own expectation of renewal, but without the benefit of any written, signed pasturing authorization, The present appeal purports to be an interlocutory appeal, although for reasons stated below actually involves an appeal of a final collateral order entered at a time when the original Defendants, Paul and Clara High Elk and Codi American Horse, were no longer parties to any proceeding, that purported to attach or garnish rent payments due to the High Elk Defendants from The Kellers and directed such payments to be held in escrow, pending the outcome of the litigation. Both the High Elk Defendants and the Plaintiffs were represented by counsel in this appeal. This Court received briefs from these parties and heard oral argument on January 4, 2006. By separate Order of this Court dated January 5, 2006, this Court vacated the earlier attachment/escrow order and directed the accumulated escrow be paid to the Plaintiff, indicating that an Opinion explaining its action would be forthcoming. This Opinion explains and supports that Order.

* * *

Appellants raise a series of objections to the attachment/garnishment order including lack of effective notice, lack of any bond or other security, lack of hearing as to hardship, and deprivation of due process of law in violation of the federal Indian Civil Rights Act of 1968, 25 U.S.C § 1302(8). While some are phrased as procedural irregularities, most of these claims (other than the lack of property bond or other security) implicate the due process requirements of notice and hearing. In *Cheyenne River Sioux Tribe Housing Authority v. Howard,* No. 04-008A (Ch. Riv. Sioux Ct.App., Sept. 23, 2005) this Court recently reaffirmed the traditional Lakota values embodied in the term due process of law. Just as Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests, including their property or, as here, rent payments contractually owed to them, that they be made parties to any case or judgment that would affect those interests, and that they have a full and fair opportunity to participate as a party in any hearing on such issues. These requirements are further supplemented by the indispensable party provisions of Rule 19 of the Cheyenne River Sioux Tribal Rules of

Civil Procedure. In the *Howard* case, this Court recently summarized the requirements of due process in a civil context as follows:

> This Court has long recognized that basic Lakota concepts of fairness and respect as well as the federal Indian Civil Rights Act, 25 U.S.C § 1302(8), clearly guarantees all parties who appear before the courts of the Cheyenne River Sioux Tribe due process of law. *E.g. Dupree v. Cheyenne River Housing Authority*, 16 Ind. L. Rep. 6106 (Chy. R. Sx.Ct.App.1988). Basic to any concept of due process of law in a civil proceeding, such as this eviction case, is receipt of timely notice and the opportunity to be heard and present evidence at a hearing in support of one's case. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The basic requirements of notice and hearing, which lie at the core of civil due process of law, do not constitute mere formal requirements or hoops that must be surmounted before judgment. Rather, due process involves functional procedural prerequisites designed to assure that every party has a *realistic* opportunity to be heard in any case affecting their legal rights. Here, Mr. Howard was lighting to remain in the only home he lawfully occupied, a precious and important right, indeed, particularly for a person in Mr. Howard's fragile medical condition, even if he did own the home in question.
>
> Every court of the Cheyenne River Sioux Tribe is bound both by customary Lakota concepts of respect and by the requirements of due process of law protected by the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8), to assure that the parties before them are all afforded due process of law.... Where the trial court finds any of these elements lacking or, as here, fails by its own omission to establish their presence, it proceeds at its peril since the judgment it enters may turn out to be defective, as here, for want of basic procedural fairness that denies due process of law. Furthermore, where an appeal is brought to this Court demonstrates the denial of the fundamental procedural elements of fairness, it is the duty of this Court to reverse the judgment or order before for want of due process of law, irrespective of whether that argument was directly raised by the party. Such serious procedural errors constitute plain error that much be noted by and acted upon by the Court.

Unfortunately, precisely the same language could be applied to the procedure in this case that led to the garnishment/attachment order at issue here. First, until receipt of the Complaint in the new action, first served on counsel at the September 15, 2005 hearing, Paul and Clara High

Elk and Codi American Horse had never received any written notice of any demand for attachment or garnishment of rent payments unquestionably due to them from the Kellers pursuant to their pasturing agreement Clearly, receipt of such written notice *after* the August 23., 2005 bearing had already ordered garnishment and on the same day and at the start of the September 15, 2005 hearing where the attachment/garnishment order was reiterated does not constitute adequate or effective notice permitting a party to appear and defend. Indeed, when counsel appeared at the September 15, 2005 hearing Paul and Clara High Elk and Codi American Horse were not parties to any pending action and were not thereafter served with summons and complaint in any effective manner that would provide adequate notice for attachment of their *property on the same day.* Second, counsel for the High Elks appeared at the September 15, 2005 as an interested observer, not representing any remaining party to the proceeding. No reasonable attorney would think counsel in such a situation would be adequately prepared for and might reasonably expect to defend his clients' interests in action to attach rent payments due his clients. Third, the hearing took place the same day counsel for the High Elk Defendants first received notice of the demand. Clearly, in the absence of some life or death emergency, not obvious on the face of this record, such short notice does not constitute adequate notice to comply with due process of law under the principles set forth above. Fourth, at the time the second garnishment/attachment order was issued the High Elk Defendants had not even been served with a summons and Complaint in this new action and it is, at best dubious, that the action was effectively pending on September 15, 2005 both for lack of effective service of process and for lack of filing of the Complaint with the trial court, which under the applicable rules commences the action. Thus, precisely why the trial court thought it had before it any pending action involving the High Elk Defendants remains a mystery to this Court based on the record before it.

The only major response to these problems offered by Appellees, James Veit and Fred Kost, is that the High Elks through their attorney, Curtis L. Carrroll, waived all due process and other objections since he allegedly agreed to the attachment/garnishment order at the September 15, 2005 hearing. Curtis L. Carroll, attorney for the High Elk Defendant, flatly denies making any such agreement. No transcripts were made of the proceedings although a tape recording of the hearing exists, as it does for most proceedings in the trial court. When asked during argument if she had reviewed the tape recording before making the representations to this Court on this critical fact, the attorney for the Appellees, Cheryl F. Laurenz-Bogue, admitted that she had not. Instead she claims she relied on her notes on the issue. Unlike the attorney for the Appellees, this Court has reviewed the tape recording of the hearing, which was also available to counsel upon request from the Clerk's office. This Court can find on it no such agreement to the garnishment/attachment order by the attorney for the Hish Elk Defendants Curtis L. Carroll.

While the Kellers' attorney clearly agreed to the payment, their rights were adequately secured. It was the High Elk Defendants who were deprived of grazing rental fees due to them

and whose rights were adversely affected by the attachment/garnishment order at issue here. Agreement from the Kellers' attorney certainly is not the same and does not have the same effect as agreement from the attorney for the High Elk Defendants, the parties to whom the rental payments were due. In short, whether out of confusion in her notes or otherwise, Ms. Laurenz-Bogue has simply misrepresented the facts of the hearing to this Court. Obviously, on the actual record of this case, her waiver argument cannot be sustained.

* * *

For the reasons stated in this Opinion entry of the attachment/garnishment order at issue here constituted a departure from Lakota traditions of respect and honor, was contrary to law, and violated the guarantees of due process of law found in the federal Indian Civil Rights Act of 1968. 25 U.S.C. § 1302(8). For these reasons the order must be and has already been vacated by this Court's Order of January 5, 2006.

Ho hecetu yelo.
It is so ordered.

Notes

1. How does the *High Elk* Court define “due process”? Is it much different from the way federal courts define due process? The general definition of due process used in American courts, at its core, is notice and a meaningful opportunity to be heard, perhaps one of the vaguest legal standards possible. Has the Cheyenne River Sioux Tribal Court of Appeals improved on this by creating more certainty, or altered the protections individuals have in relation to the tribal government? How has the tribal court brought Oglala Lakota customary law into the definition?

2. In Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149 (Pueblo of Pojoaque Tribal Ct. 2001), tribal security officers detained the plaintiff after doubting the authenticity of an Immigration and Naturalization Service (INS) card he produced to prove his age. While holding the plaintiff in an "interrogation room" the guards threatened him with jail and asked him questions in a "brusque, demeaning and demanding tone." Id. at 6152. Although the security

officers had authority to detain suspected lawbreakers until law enforcement arrived, the court held that the tribe, acting through its agents (the security officers), violated the plaintiff's rights under the Indian Civil Rights Act, sec. 1302(2) (search and seizure). The violations occurred because the security officers 1) had not timely notified the plaintiff of the reason for his detention; 2) "forcibly detain[ed] him and question[ed] him in a harsh, demeaning and demanding manner while threatening him with possible imprisonment"; and 3) seized the plaintiff's INS card. Id. at 6153.

3. Section 1302 (6) of the ICRA does not require tribes to provide counsel for indigent criminal defendants tried in tribal courts. Nonetheless, many tribes have public defender or tribal court advocate programs that provide free legal assistance to individuals charged with crimes in tribal courts. Tribal court advocates are often not state licensed attorneys, but are tribal court practitioners trained and certified in tribal law and tribal court procedures and are usually admitted to practice as members of the tribal bar. In Hopi Tribe v. Ami, No. AP–003–89 (Hopi Ct. App. 1998), the appellate court set forth standards that the Hopi trial court must meet to ensure that criminal defendants knowingly waive their right to counsel. The Hopi trial court judge must:

> 1) explain [to the defendant] that an advocate or attorney knows the law and procedures better than the defendant and that the defendant will be at a disadvantage without counsel; 2) mention the possible maximum consequences in fines or sentences; 3) inform the defendant of the availability of a public defender and ask him if he wishes to pursue this option; 4) ensure that the defendant has the capacity to understand the judge (including level of education, ability to understand English, and mental capacity); 5) tell the defendant that the court will require the same level of legal skill from the defendant that it requires from attorneys; 6) ensure that the defendant was not coerced into making the plea; 7) explain the charges and possible defenses to the charges; and 8) ask the defendant if he knowingly waives the right to obtain an attorney or lay advocate at his own expense.

4. The ICRA's sentencing provisions, sec. 1302(7), state that tribal courts cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and or a fine of $5,000, or both." In Colville Confederated Tribes v. St. Peter, 20 Indian L. Rep. 6108 (Colville Confederated Tribes Ct. App. 1993), the defendant claimed that he had been subjected to cruel and unusual punishment because the tribal court had sentenced him to more than one year in jail for convictions on multiple offenses. The appellate court held that the sentence imposed was within the restriction imposed by the ICRA because the Act only

prohibits a sentence in excess of one year for a conviction on a single offense. Here the defendant had been convicted of five different offenses. See also Navajo Nation v. MacDonald, 6 Navajo Rptr. 432, 447 (1991) (the defendant's sentence of 5 years and 335 days in jail for 41 violations of Navajo criminal law is not cruel and unusual punishment); Ramos v. Pyramid Tribal Court, 621 F.Supp. 967 (D. Nev. 1985) (defendant did not suffer cruel and unusual punishment, as prohibited by the ICRA, when he was sentenced to over two years in jail upon conviction of seven offenses). Compare Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005) (holding that consecutive sentences imposed by tribal court exceeding ICRA's one year limit were illegal where the criminal acts were "a single criminal event").

Note: On Sex and Race Based Laws in Indian Country

A major hot-button issue confronting Indian Country in recent years is the adoption by a few tribes of tribal law that facially discriminates against persons on the basis of race or sex. In one case (or series of cases), the Cherokee Nation of Oklahoma has taken repeated legal steps to disenroll the so-called Cherokee Freedmen as citizens of the Nation. Another issue involves the efforts of tribal governments, including the Cherokee Nation and the Navajo Nation, to ban same-sex marriages. Other tribal governments have taken action under the rubric of tribal sovereignty that could be construed as discrimination against classes of persons that would otherwise be protected under federal or state law. But since these tribal governments did not ratify federal constitutional provisions, see *Talton v. Mayes*, *supra*, their choices are unlikely to be reversed under federal constitutional guidelines.

Tribal Laws Based on Race. African-American descendants of former slaves – the Freedmen – that had intermarried with and in some cases were owned by American Indians in the southeast, including the Cherokees and the Seminoles, have been a part of those tribal communities since at least the early 19th century. In large part, this relationship has been imposed on the tribal communities by actions taken by the United States. Consider the case of the Cherokee Nation of Oklahoma:

> It was the United States that imposed Cherokee citizenship upon the Freedmen in an 1866 treaty in a clumsy attempt to solve an "Indian problem" and a "Freedmen problem." And before that, it was the United States that sold out the Cherokee Nation to the Southern states (leading to the Trail of Tears) so that Southern

> plantation owners would have more land with which to exploit the institution of slavery. And before that, it was the United States that encouraged the Cherokee Nation to adopt the institution of slavery and other trappings of "civilization." And even before that, it was the United States that institutionalized and constitutionalized slavery in 1789.
>
> Even after the 1866 treaty, the United States' intervention into Cherokee affairs included the allotment of Cherokee lands in 1893 and the abolition of Cherokee tribal courts, probably the oldest continuously operating tribal courts in American history, in 1898. In 1906, Congress authorized the president to appoint the principal chief of the Cherokee Nation, required presidential approval of all actions of the Cherokee government and even limited the number of days when the Cherokee council could meet. Moreover, even when Congress passed the Indian Reorganization Act recognizing tribal authority to form constitutional governments, Congress forced Oklahoma tribes like the Cherokee Nation to comply with a watered-down version that maintained total federal control over the Cherokee government. It wasn't until 1999 that a modern and indigenous Cherokee constitution came into existence. Arguably, the Cherokee Nation has not been able to make its own decisions about the Freedmen until now.

Matthew L.M. Fletcher, *Editorial: The Cherokee Freedmen – U.S. Shouldn't Step In*, National Law Journal, April 16, 2007. The relationship between the tribes and the Freedmen has always been a complicated relationship, and over time the tribes often have attempted to legally separate themselves from the Freedmen.

In 2006, the Cherokee Nation Judicial Appeals Tribunal overruled its own precedent and held that a tribal statute purporting to expel from tribal citizenship many of the descendants of the Cherokee Freedmen, former slaves of the Cherokees, was unconstitutional under tribal law. See Allen v. Cherokee Nation Tribal Council, 2006 WL 5940403 (Cherokee Nation JAT 2006), overruling Riggs v. Ummerteskee, 2001 WL 36155524 (Cherokee Nation JAT 2001). After that decision, perhaps 45,000 persons once again became eligible for citizenship in the Cherokee Nation. See S. Alan Ray, *A Race or Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 Mich. J. Race & L. 387, 392-94 (2007). The tribal legislature acted quickly in proposing a tribal constitutional amendment providing that Cherokee citizenship required at least a minimum degree of Cherokee *Indian* blood – individuals tracing their ancestry only to the Cherokee Freedmen would no longer be eligible for tribal membership. In 2007, the Cherokees voted and overwhelmingly adopted this constitutional amendment. See id. at 392-94.

The Freedmen have brought suit in federal court on a theory that the Thirteenth Amendment abrogates the sovereign immunity of the Cherokee Nation and its officials. They have been partially successful. See Vann v. Kempthorne, 543 F.3d 741 (D.C. Cir. 2008). Litigation continues in the D.C. district court, the tribal court, and in an Oklahoma federal court.

Tiya Miles, focusing on one nineteenth century Cherokee Freedmen family started by a Cherokee Indian man named Shoeboots and a free black woman named Doll, highlights the arbitrariness of the legal lines that the Cherokee Nation is trying to draw to this day:

> The Cherokee lawyer's response tolerates little ambiguity. It maps out two straightforward routes to Cherokee citizenship, one for "Cherokees," and one for "Negroes." A Cherokee could trace his or her lineage to a parent or forebear on the "authenticated rolls." A black person formerly owned by Cherokees could appeal to the Treaty of 1866, which granted citizenship to freed slaves who had returned to the Cherokee Nation within six months. The Cherokee lawyers indicated that because the Shoeboots claims to be free-born Cherokees, they could not appeal to the Treaty of 1866, and because they were also descended from a black mother, they were ineligible for Cherokee citizenship though routes external to that treaty. A family like the Shoeboots that was black *and* Cherokee and had been both enslaved *and* free had no place within the streamlined, race-concious categories designated by the Cherokee and American governments. William Shoeboot's strategy of deemphasizing slavery had failed. The very freedom that he claimed for his Afro-Cherokee family made that family inconceivable in the view of the Cherokee Nation. To be a black citizen of the Cherokee Nation, the attorneys seemed to say, required always having been a slave. For reasons of clarity and expediency, and in keeping with the Cherokee Nation's fixed definitions of racial categorization and tribal belonging, no other possibility would be entertained.

Tiya Miles, Ties That Bind: The Story of an Afro-Cherokee Family in Slavery and Freedom 202 (2005).

The dispute between the Cherokee Nation and the Cherokee Freedmen is played out in tribal governments virtually every day, but usually in a context somewhat different than the stark Black-White-Indian racial dynamics. Almost invariably, tribal citizenship depends on race,

typically referred to as "blood quantum" or lineage. One commentator suggests that it may be time for Indian tribes to define tribal citizenship to include non-Indian tribal community members:

> Whatever the circumstances, these American Indian tribal nations have one element in common – nationhood – and they should behave as nations. Most nations around the world adopt citizenship rules and criteria without regard to race and ancestry, and Indian nations should consider doing the same. Citizenship involves a two-way action: the agreement of a nation and of a person that the person will become part of the nation's polity, with all of the benefits and duties associated with that status. Both parties must expressly consent to the relationship (although, ironically, many American Indians who became citizens of the United States by Act of Congress in 1924 did not have that option).
>
> There are two ways to proceed for Indian nations in this vein. The first is to change tribal citizenship criteria to immediately create an avenue for non-citizens to become citizens, regardless of race or ancestry. This may not be palatable for many Indian nations for a host of reasons. First, the federal government from Congress to the Executive branch to the federal judiciary might not be ready for such a radical change in how the United States deals with Indian nations. Second, Indian nations might not be ready for this change, either, for these reasons and many others. ***
>
> There is a second way, one that requires Indian nations to follow the old maxim to plan seven generations into the future. There is a way, potentially, to incorporate nontribal citizens into the tribal citizenry without destroying the tribal character of American Indian nations. It can be done, but it will take a great deal of time; perhaps even generations.

Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood,* **forthcoming paper….**

Tribal Laws Based on Sexual Orientation. The Navajo Nation and the Cherokee Nation of Oklahoma purported to enact laws defining marriage as between a man and a woman in attempts to prohibit same-sex marriage in 2005 and 2006. See Matthew L.M. Fletcher, *Same-Sex*

Marriage, Indian Tribes, and the Constitution, 61 U. Miami L. Rev. 53, 70 (2006). And in 2008, the Coquille Indian Tribe enacted legislation authorizing same-sex marriages on its reservation. See Bill Graves, *Gay marriage in Oregon? Tribe says yes*, The Oregonian, Aug. 21, 2008, 2008 WL 16035233. Federal law is silent as to whether Indian tribes can authorize same-sex marriage within their jurisdictions, but the federal Defense of Marriage Act does not require any other American jurisdiction to give full faith and credit to same-sex marriages. See 28 U.S.C. § 1738C; Fletcher, *Same-Sex Marriage*, supra, at 70. Indian tribes have authority to make tribal laws relating to marriage without federal or state interference, including the authorization to license or ban same-sex marriages. See, e.g., United States v. Quiver, 241 U.S. 602 (1916); Kobogum v. Jackson Iron Co., 43 N.W. 602 (Mich. 1889).

The Cherokee ban came in response to the successful attempt by two Cherokee women to apply for a tribal marriage license. See Fletcher, *Same-Sex Marriage*, supra, at 70. The Cherokee Nation Judicial Appeals Tribunal (now Supreme Court) rejected the petitions of the Nation's general counsel and the Nation's tribal council to challenge the application on grounds that neither party had standing to sue. See In re Adverse Order of Dist. Ct. against Reynolds, 2005 WL 6171271 (Cherokee JAT 2005); Anglen v. McKinley, 2005 WL 6169010 (Cherokee JAT 2005). See generally Christopher L. Kannady, *The State, Cherokee Nation, and Same-Sex Unions: In re Marriage License of McKinley & Reynolds*, 29 Am. Indian L. Rev. 363 (2004-2005). A challenge from the Nation's clerk, who likely does have standing, is pending. The Nation's application form for a marriage certificate through the Cherokee courts now reads:

> A man and woman wishing to have their marriage certificate filed in the Cherokee Nation District Court must be married within the Cherokee Nation and have their marriage vows solemnized by a Minister, Spiritual leader, or Justice/Judge of the Cherokee Nation who has a license to perform marriage issued by the Cherokee Nation Court Clerk.

Tribal Laws Based on Sex. We have already discussed tribal citizenship rules that discriminate against women in the *Martinez*, but what about laws that discriminate in *favor* of women? Some tribal communities are matriarchal, with the Haudenosaunee perhaps the most famous. Haudenosaunee women had control over the community's economic resources, and therefore had more political power. See Judith K. Brown, *Economic Organization and the Position of Women among the Iroquois*, 17 Ethnohistory, Summer-Autumn 1970, at 151; Renée Jacobs, Note, *Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers*, 16 Am. Indian L. Rev. 497, 498-507 (1991). The power of women in Haudenosaunee communities is also strongly expressed in the law. See id. at 507-09. Clause 44

of the Haudenosaunee Great Law provided that: “The lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother.” A.C. Parker, The Constitution of the Five Nations or The Iroquois Book of the Great Law 42 (1916). That law has import to this day. The children of Seneca men are not eligible for citizenship with the Seneca Nation of Indians unless their mothers are Seneca citizens. See CONST. OF THE SENECA NATION OF INDIANS OF 1848 § __, cl. __ (1848).

Other tribes have also applied laws favoring women. In *Riggs v. Estate of Attakai*, No. SC-CV-39-04, 2007 WL 5886339 (Navajo Nation Sup. Ct. 2007), the court applied Navajo customs and traditional practices and reversed a lower court decision granting a grazing permit to a man over a woman. The court wrote:

> In *Begay v. Keedah,* 6 Nav. R. 416, 421 (Nav.Sup.Ct.1991), this Court acknowledged the following Navajo Nation policies gleaned from Navajo statutes to be considered when determining the award of a grazing permit: 1) animal units in grazing permits must be sufficiently large to be economically viable, 2) land must be put to its most beneficial use, 3) the most logical person should receive land use rights, 4) use rights must not be fragmented, and 5) only those who are personally involved in the beneficial use of land may be awarded it. *Id.* The Court now holds that these factors are to be considered and applied consistent with the Navajo Fundamental Law which defines the role and authority of Diné women in our society. Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes. The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as *Yoolgaii Asdzáán Bi Beehazáanii.* These principles include *Iiná Yésdáhí* (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising, and teaching), *Yódí Yésdáhí* (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs), *Nitl'iz Yésdáhí* (a position encompassing and being a provider of and a caretaker of mineral goodness for protection), *Tsodizin Yésdáhí* (a position encompassing spirituality and prayer). This is why the women are attached to both the land base and the grazing permits. For the most part, Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.

Because they are keepers of the clan line and land base, Navajo women are often the most logical persons to receive land use rights to hold in trust for the family. They are also the ones who are burdened with putting the land base to its most beneficial use by managing the herd and the land upon which the herd graze for the benefit of the clan group. This means that keepers have to balance the number of sheep units with the size of the land base, making sure the land base remains compatible, sustainable and feasible for sufficient continued beneficial use. Overgrazed land cannot be put to beneficial use. This practice is consistent with preserving a large area by discouraging the fragmentation of grazing permits and the land base. The Navajo Nation policy is to discourage the breaking up of land. Progressive fragmentation of the land decreases usefulness of the land. *See In the matter of the Estate of Wauneka.,* 5 Nav. R. 79, 83 (Nav.Sup.Ct.1986).

When the Family Court made its decision to grant the grazing permit to Attakai, it did not apply the principles discussed above. Absent any other cooperative arrangement by the clan with which the lower court is satisfied, failure to apply the principles is an error of law, which is reviewed by this Court de novo. The issue of the ownership of the permit is therefore reviewed de novo in light of the tradition of female management of the land and livestock using the factors set out in *Keedah*.

For the foregoing reasons, this Court concludes Riggs is the appropriate person. When Riggs filed her action, Tom Attakai lived away from the Castle Butte area. He lived in Sanders and later in Fort Defiance, whereas Sista Riggs consistently lived in the family area. Riggs had already been managing not only her own herd, but the herd held in trust for the family.

By placing the grazing permit with Sista Riggs, there is assurance that the land and herd will remain with the family, and that the grazing permit will remain intact and not be fragmented. The record contains testimony that Tom Attakai and his father had attempted to either sell or rent the grazing permit to others outside the family and clan.

> The court's decision to grant the grazing permit to Attakai so he and his sisters would have a sense of home is not sufficient reason to grant the grazing permit to Attakai, because the lack of grazing permit in one's name does not prevent a Navajo from obtaining home site leases. Additionally, Phillip Attakai remains at the home site he previously shared with his late wife. The sisters are not precluded from going back to that home site simply because they do not have a grazing permit in their own names. The Court concludes that Sista Riggs should be the trustee of the permit.

Slip op. at 3-5. One Justice concurred in the result, but objected to the majority's reasoning and to its application of Navajo Fundamental Law to benefit the woman:

> While I concur in the result reached in the majority opinion, I object to the majority's use of Navajo Fundamental Law to create a preference based on gender in grazing cases. The majority has used language within its opinion that has elevated consideration of a person's gender to a degree to make the factors used in *Begay v. Keedah,* to be irrelevant. 6 Nav. R. 416, 421 (Nav.Sup.Ct.1991). Certainly, Navajo traditional law considers clan and maintaining a clan's rights to property must be preserved. I do not dispute that Navajo society is both matrilineal and matrilocal. However, the majority's focus on gender conflicts with the Navajo Bill of Rights prohibition against denying rights based on the account of sex. 1 N.N.C. § 3 (2005). Under 7 N.N.C. § 204 (2005), Navajo Fundamental Law is to be is used to interpret statutory law not to evade the operation of the law. Certainly, the Navajo Nation Bill of Rights must be considered prior to elevating gender to be the dispositive factor in awarding a grazing permit. Moreover, I find that nothing in the record supports the decision that experts in Navajo Fundamental Law would require the decision by the majority to use gender as the dispositive factor. I would affirm the continued use of the *Begay v. Keedah* factors. 6 Nav. R. at 421. Additionally, I support considering requirements imposed by the BIA to avoid imposing conflicting requirements on putative permit holders.
>
> For the majority's opinion to be consistent with *Begay v. Keedah,* one has to assume that a woman is automatically going to use the grazing permit "wisely and well". *See Id.* at 421. Under the gender preference of the majority's opinion a male that had extensive grazing experience would lose to a female that may not have any experience with managing grazing. Neither a female nor male gender

> assures the beneficial use of land. Thus, I cannot support the majority's altering of the delicate balance of factors so wisely developed in *Begay v. Keedah.*

Id. at 7-8 (Benally, J., concurring).

4. Tribal Constitutions and Code Development

Tribal constitutions and codes form the foundation of most tribal court litigation, with the exception of tribes like the Navajo Nation, which has not adopted a written tribal constitution. Many tribal constitutions originated in the 1934 Indian Reorganization Act that provided the framework for the creation of Indian tribes as constitutional governments. 25 U.S.C. § 476. The drafters of the Act, especially Felix S. Cohen, recognized that the adoption of a constitutional system of government was foreign to tribal governments, and took pains to give tribes great deference to Indian tribes in crafting their own indigenous constitutions. See generally Felix S. Cohen, On the Drafting of Tribal Constitutions (David E. Wilkins, ed. 2006). However, many of these IRA-era tribal constitutions included provisions designed to consolidate tribal governmental power in the hands of federal bureaucrats. Most of these tribal constitutions included provisions requiring that each and every tribal governmental act receive the approval of the Secretary of Interior, or his designee, before they would become effective. E.g., CONST. AND BYLAWS OF THE HANNAHVILLE INDIAN COMMUNITY art. V, § 1 cl. 6, 7, and 11 (July 23, 1936); *id*. art. VI, § 5; CONST. AND BY-LAWS OF THE KEWEENAW BAY INDIAN COMMUNITY art. VI, §§ 1(b), (j), (k), (*l*), (n), (o), (p), and (r) (Dec. 17, 1936) (requiring Secretarial approval for certain council actions); *id*. art. VI, § 2 (detailing the process for presenting tribal council actions to the Secretary for approval); CONST. AND BYLAWS OF THE BAY MILLS INDIAN COMMUNITY art. VI, §§ 1(b) and (f) (Nov. 4, 1936) (requiring Secretarial approval of tribal attorney hires and ordinances relating to tribal lands); *see also id*. Amend. II, § 3 (Aug. 7, 1959) (requiring Secretarial approval of certain tribal "adoptions" into membership). See generally Timothy W. Joranko & Mark C. Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments, 29 Gonzaga L. Rev. 81 (1993-1994).

Modern tribal constitutions allow for far less federal control, and many could be said to be much closer to truly indigenous constitutions. Consider the preamble of the Constitution of the Little Traverse Bay Bands of Odawa Indians, ratified in 2007:

> IN THE WAYS OF OUR ANCESTORS, to perpetuate our way of life for future generations, we the Little Traverse Bay Bands of Odawa Indians, called in our own language the WAGANAKISING ODAWAK, a sovereign, self-governing people who follow the Anishinaabe Traditions, Heritage, and Cultural Values, set forth within this Constitution the foundation of our governance. This Constitution is solemnly pledged to respect the individuality of all our members and their spiritual beliefs and practices, while recognizing the importance of preserving a strong, unified Tribal identity in accordance with our Anishinaabe Heritage. We will work together in a constructive, cooperative spirit to preserve and protect our lands, resources and Treaty Rights, and the right to an education and a decent standard of living for all our people. In keeping faith with our Ancestors, we shall preserve our Heritage while adapting to the present world around us.

CONST. OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS preamble (Jan. 26, 2007).

In recent years, Indian tribes have also begun the process of modernizing their tribal codes for purposes of transitioning into a modern global economy. In particular, the National Conference of Commissioners on Uniform State Laws, the authors of statutes such as the Uniform Commercial Code, have contributed model codes for tribes to consider adopting. The first code is the Model Tribal Secured Transactions Act, *available at* http://www.nccusl.org/Update/Docs/MTSTA/MTSTA_Aug05_Final.doc.

Wenona T. Singel, Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule

15 Kan. J. L. & Pub. Pol'y 357, 360-62 (2006)

In the past five years, many tribes have developed a growing interest in enacting a form of secured transactions code as tribal law. This is because tribes have developed a growing recognition of the fact that secured transactions codes are often critical tools for promoting economic growth in Indian country. Without a secured transactions code enacted as tribal law, lenders remain wary of extending credit in Indian country because they cannot predict whether or how any security interest they may take in goods will be recognized or enforced under tribal law. This problem is exacerbated because Article 9 includes a choice of law provision providing that

that the secured transactions law that governs the perfection of any security interest is generally the law of the location of the debtor. Under this choice of law rule, if the debtor is an individual or entity or Indian nation located in Indian country, then the law that governs the making and enforcement of security interests is always the tribe with jurisdiction over the Indian country in question. The result is that under the law of nearly every state, whenever a debtor is located in an area of Indian country where the relevant tribe with jurisdiction lacks a secured transactions code on the books, there is no definite set of rules that will govern the making and enforcement of a security interest. The uncertainty that results from this phenomenon creates a disincentive for lender investment in Indian country generally, and the effects of this disincentive are felt by individuals, by small and large businesses, and by tribal governments.

In response to the threat to economic growth that the absence of tribal secured transactions codes presents, many Indian nations have responded by enacting tribal secured transactions codes as tribal law. In addition, a few law schools have devoted resources to helping tribes develop tribal secured transactions codes, and the National Conference of Commissioners on Uniform State Laws (NCCUSL) also became involved in the effort to develop and promote the tribal enactment of this code. NCCUSL is a national organization that develops a wide variety of uniform laws for state enactment. In particular, NCCUSL monitors state law UCC developments and considers whether developments merit revision of the model form of the UCC. When NCCUSL creates or revises a uniform law, it combines the expertise of academics and practitioners from each of the fifty states and ultimately issues an official form of the model law in question which it then endorses for state adoption. The American Law Institute (ALI) also reviews and decides whether to endorse the model laws that NCCUSL develops. Once the model form is endorsed by NCCUSL and ALI, both organizations then encourage each state legislature to adopt the model law with as few changes as possible. A guiding principle that informs the NCCUSL's development of model codes generally is that uniformity of the law from state to state promotes greater certainty, predictability, and efficiency in the law. In the area of commercial law, this uniformity encourages efficient economic transactions because parties are able to contract with each other without a significant investment of time and resources each time a party engages in commerce in a new state law jurisdiction.

***

As the interest in enacting secured transactions codes in Indian country grew, so too did the number and variety of problems associated with successful tribal incorporation of the code. The first problem occurred at the outset, with tribes' failure to properly integrate the code into tribal law. In many cases, tribes adopted secured transactions codes by simply cutting and

pasting either the model Article 9 of the UCC or an enacted state version of Article 9 and incorporating the cut-and-pasted product as tribal law. This method of tribal incorporation was the least likely to be successful, since it often failed to take into account previously-enacted tribal laws to ensure that the incorporated code did not conflict with existing tribal law. This method also suffered because the model Article 9 of the UCC and the various state-enacted versions of Article 9 are each laden with cross-references to other bodies of law which the drafters of Article 9 presume to be enacted by each respective jurisdiction. For example, Article 9 refers to other portions of the UCC governing sales and leases, debtor-creditor law, and commercial paper. If none of these other portions of the UCC are enacted as tribal law, then a tribe that adopts a model secured transactions code with references to concepts embedded in these other codes will ultimately enact a law that cross-references itself to a series of dead-ends, or non-existent law.

*** Finally, a fourth problem that the adoption of secured transactions codes may trigger is the introduction of new meanings, norms and values regarding relationships between individuals that may not comport with and may even directly conflict with the meanings, norms and values that are integral to the community's identity and the cohesiveness of its members' relationships.

Among the various difficulties associated with the enactment of secured transactions codes as tribal law, the potential for conflict with cultural sovereignty is especially worthy of attention. As mentioned earlier, the project to promote cultural sovereignty includes efforts to develop tribal legal systems in a way that reflects tribal histories, cultures and community norms. In contrast to the goals of cultural sovereignty, transplanted law represents a further step toward modeling tribal legal systems after Anglo legal systems. Transplanted law also represents a failure to organically develop tribal legal systems to fit the unique cultures, communities, territories, and traditions of indigenous peoples. In the case of a secured transactions code modeled after Article 9 of the UCC, the code challenges the development of cultural sovereignty to the extent that it displaces or modifies tribal norms and values that relate to the ownership of property and the relationship between debtors and creditors.

Note

In *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), the court held that the National Labor Relations Act did not preempt the Pueblo's "right to work" ordinance, which provided:

> No person shall be required, as a condition of employment or continuation of employment on Pueblo lands, to: (i) resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization; (ii) become or remain a member of a labor organization; (iii) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (iv) pay to any charity or other third party, in lieu of such payments any amount equivalent to or a pro-rata portion of dues, fees, assessments or other charges regularly required of members of a labor organization; or (v) be recommended, approved, referred or cleared through a labor organization.

San Juan Pueblo Tribal Ordinance No. 96-63, quoted in *Pueblo of San Juan*, 276 F.3d at 1189. According to the court:

> A "right-to-work" law, as the term is used here, is a statute which § 14(b) of the NLRA permits states and territories to enact to invalidate agreements establishing "union shops." A closed shop, originally permitted under the NLRA, is created when an employer and a union agree that only people who are already union members may be hired. This was outlawed in 1947 by the Taft Hartley Act's amendment of the NLRA, 29 U.S.C. § 158(a)(3). A union shop is created when an employer and a union agree to require employees, as a condition of their continued employment, to have membership in a labor union "on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158(a)(3). Such an agreement between an employer and a union is a union security agreement. Provided they comply with other requirements of 29 U.S.C. § 158, and provided no right-to-work law forbids them, the NLRA permits union shops and union security agreements.

Id. at 1190 n. 3. Other Indian tribes have adopted "right-to-work" laws in order to lessen the powers of labor unions in Indian Country. E.g., SILETZ TRIBAL CODE § 5.200 (2008); 5 GRAND TRAVERSE BAND CODE § 801 (2004). See generally Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 727-29 (2004). Still other tribes have reacted to

the presence of union activity in their communities by establishing a tribal code paralleling the federal labor laws. E.g., Little River Band of Ottawa Indians, Fair Employment Practices Code, Ordinance No. 05-600-03 (2008).

Are Indian tribes acting in accordance with their customs and traditions by taking action to reduce the political and economic power of workers, at least some of whom are tribal citizens? According to Professor Singel, "[T]his strategy [of enacting right-to-work laws] is at bottom a reactive and insufficient approach that will thwart the ability of tribes to develop more progressive and comprehensive labor policies that satisfy the specific needs of tribal communities." Id. at 728.