CHAPTER 6

CIVIL RIGHTS

Like state and federal courts, tribal courts are a significant forum in which individuals under the jurisdiction of government seek a remedy for civil rights violations. Congress's enactment of the Indian Civil Rights Act (ICRA) in 1968, along with the United States Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), cemented the importance of tribal courts in vindicating civil rights.

Congress enacted ICRA as Title II of the 1968 Civil Rights Act. Portions of the ICRA that substantially mirror the Bill of Rights are popularly called the Indian Bill of Rights. The statute extends most of the constitutional protections of the American Constitution to individuals under the jurisdiction of Indian tribal governments. In order to preserve certain aspects of tribal government and sovereignty, Congress modified or left out some provisions of the Bill of Rights. The individual rights protections include the rights to free exercise of religion, free speech, press, assembly, and to petition for a redress of grievances; the right to be free of unreasonable searches and seizures without a search warrant to be issued only upon a showing of probable cause; the right to be free from being placed in double jeopardy and from self-incrimination; the right to due process and equal protection; the right to be free from taking of property without just compensation; the rights to a speedy trial, confront witnesses, and the assistance of counsel; the freedom from excessive bail and cruel and unusual punishment; the freedom from bills of attainder and ex post facto laws; and the right to a jury of at least six persons in all criminal cases carrying the possibility of imprisonment. Key differences between ICRA and the Bill of Rights include the absence of an establishment clause and a right to counsel at the government's expense. Also, the ICRA prohibited Indian tribes from sentencing convicted criminals to more than six months in prison and more than $500 in fines (later amended to one year and $5,000).

The Supreme Court had originally decided in *Talton v. Mayes*, 163 U.S. 376 (1896), that, since tribal sovereignty flowed from a time immemorial and tribes had not participated in the drafting of or consented to the United States Constitution, the individual rights protections that limited federal (and later, state) governments did not apply to tribal governments.

In the 1950s, non-Indians had brought several cases to the federal courts seeking a civil rights remedy for actions taken against them by tribal governments. In *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958), for example, the Tenth Circuit rejected a due process challenge to a tribal decision to deny membership rights to an individual Indian. In *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the Tenth Circuit ruled that the Navajo Nation was not bound by the First Amendment and could prohibit the ritual use of peyote. And in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), the Eighth Circuit ruled that the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause did not prohibit a tribe from taxing nonmembers more than members.

Judicial concern over civil rights violations by tribal courts in criminal cases came to a head in 1965, when the Ninth Circuit decided *Colliflower v. Garland*, 342 F.3d 369 (9th Cir. 1965). There, the Gros Ventre tribal court sentenced a woman to five days in jail for failure to remove her cattle from land leased to another person. The Ninth Circuit took jurisdiction over the case, even though the events took place on the reservation and the parties were all tribal members, on the theory that the federal government had funded the tribal jail. Likely, the court took the case because the tribal court had allowed Ms. Colliflower neither to have an attorney nor to confront witnesses against her, restrictions that would have been serious civil rights violations in state or federal courts.

Many senators and advocates were concerned that there were enclaves in the United States in which civil rights protections from governmental activity did not exist. The Senate took testimony from numerous individuals who claimed to have been treated unfairly by tribal governments. Others were concerned that many Indian tribes did not have an independent adjudicative body separate from the tribal council.

Specific provisions in the final version of the ICRA strongly imply that Congress intended to preserve as much of tribal culture as possible. Congress left out a provision equivalent to the Establishment Clause in order to preserve the rights of tribes to form and maintain theocratic government structures if they wished, and some tribes did.

After the enactment of ICRA, numerous individuals brought civil rights claims to federal courts that attempted to enforce the rights protected in the ICRA. In *Santa Clara Pueblo v. Martinez*, Julia Martinez brought a claim under the ICRA against her tribe seeking membership for her children. The Pueblo had enacted an enrollment ordinance that discriminated on the basis of sex against her and her children. The Supreme Court held that Congress, in enacting the ICRA, did not confer upon federal courts jurisdiction to resolve civil rights complaints against tribal governments and, in any event, tribal sovereign immunity barred her claim. The Court, per Justice Marshall, stated that complainants against tribal government actions must pursue a tribal forum.

Following *Martinez*, many Indian tribes began to more intensely develop their tribal courts. Tribes began to incorporate their own version of the Bill of Rights into new or amended tribal constitutions. As a result, tribal courts apply

their own tribal customs and traditions to civil rights cases. Moreover, many Indian tribes have adopted constitutional protections to individual rights in either legislative or constitutional formats. While many of these statutes are based on ICRA, many are either more or less extensive than ICRA.

This chapter surveys the cases that modern tribal courts decide based on ICRA, but also civil rights cases arising out of tribal constitutional provisions that may or may not incorporate the Indian Bill of Rights.

A. DUE PROCESS

Civil rights cases arise out of the American legal notion that individuals should have certain rights and privileges against the actions of government. These cases are brought under the Indian Civil Rights Act, or tribal statutory or common law recognizing individual rights. The Anglo-American conception of due process is at the heart of these claims. The government structures and relationships to individuals at issue — often administrative and business entities making decisions about employment and other economic interests of individuals — derive from American models. The entire background of these cases derives from Anglo-American law and relationships. Often tribes did not choose these models; tribes exist in a world where these models constitute the entire range of choice, forcing tribes to enter these arenas. And many tribes have done so in a manner consistent with their own traditions and culture. However, tribal courts' interpretation is well within the parameters of due process that state and federal courts apply. Due process is one of the most subjective legal doctrines in constitutional law. State and federal courts tend to apply a balancing test, reaching results that differ from those of other courts in often dramatic ways. While the Oglala Sioux tribal court might not apply due process the same way as the Little Traverse Bay Bands of Odawa Indians tribal court, they might apply the doctrine the same manner as the Idaho, South Dakota, or Michigan courts.

HIGH ELK v. VEIT

Cheyenne River Sioux Tribal Court of Appeals,
No. 05-008-A, 6 Am. Tribal Law 73, 2006 WL 5940784 (February 10, 2006)

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

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.

. . . The present appeal purports to be an interlocutory appeal, although for reasons stated below [it] 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. . . .

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 guarantee 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 Indian 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 (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 fighting to remain in the only home he lawfully occupied, a precious and important right, indeed, particularly for a person in Mr. Howard's fragile medical condition, even if he did own the home in question.

Every court of the Cheyenne River Sioux Tribe is bound both by customary Lakota concepts of respect and by the requirements of due process of law protected by the federal Indian Civil Rights Act, 25 U.S.C. §1302(8), to assure that the parties before them are all afforded due process of law. . . . 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 must 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 hearing 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 [hearing] 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 an 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. Carroll, 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. . . . This Court can find on it no such agreement to the garnishment/attachment order by the attorney for the High Elk Defendants Curtis L. Carroll. . . .

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. The *High Elk* court applies tribal customary law to reach a working definition of due process that is not dissimilar from how state and federal courts might define due process. But in Indian country, due process has more import to the courts than it might in federal or state courts. Consider the classic federal case *Mathews v. Eldridge*, 424 U.S. 319 (1976), from which the United States Supreme Court defined procedural due process for federal courts. That case involved a challenge to the statute enacted by Congress to determine whether and how Social Security benefits might be cut off in certain circumstances. A similar kind of government action by an Indian tribe would be subject to far more scrutiny on a political level than in the *Mathews* context, if for no other reason than the fact that tribal elected officials are far more likely to be answerable to adverse governmental decisions to individual citizens than is Congress or federal agencies.

How does that factor impact due process? What about in the context of an adverse governmental decision by a tribal government against a non-tribal citizen?

2. In *In re D.H.*, 2009 WL 1619635 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 2009), the court concluded that the due process protections of the tribal constitution do not require that a parent be entitled to a jury trial in an Indian child welfare proceeding, even though state law required a jury trial:

> Respondent further argues that fundamental due process rights guaranteed by the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians, and the United States Constitution dictate that Respondent should be entitled to a jury trial in this matter. While the Court agrees that Respondent is entitled to fundamental due process in this proceeding, the

> Court is not persuaded that a jury trial is a component of that due process requirement in this type of proceeding. Nor is the Court persuaded that a judge cannot adequately protect Respondent's due process rights or reach a determination while also recognizing and acknowledging tribal customs and traditions of the Grand Traverse Band regarding child rearing as required under the Children's Code.
>
> The Court agrees with Respondent that Tribal Council could adopt a provision in the Children's Code providing for a right to a jury trial, and that the Tribal Court could adopt a court rule providing for the right to a jury trial in this type of proceeding. However, neither has done so to date. . . . Again, the Court is not persuaded that a jury trial was intended by the Tribal Council in adopting the Children's Code, nor that the Tribal Judiciary has intended to provide for a jury trial in Children's Code proceedings.

2009 WL 1619635 at *2.

3. In the context of a tribal election dispute, in *Jacobs v. Zimmer*, 9 Okla. Trib. 410 (Cheyenne-Arapaho Tribal Court 2006), the court read the tribal constitution to protect the individual right to challenge an election:

> What process must the election take? Plaintiff says that Article IX, §15(c) is confusing. It states that the election article of the new Constitution does not apply to this special election. Plaintiff says that in effect that could also be read to say that even Section 15(c) does not apply.
>
> In constitutional construction a constitution is to be read where it has meaning and is not absurd. Therefore, to read it that way would make no sense. Thus, that section sets up the rules for the election. This was done to ensure that the election could occur within 30 days. However, you cannot just throw due process out the window. A key component of the elections that deals with due process are the challenges to candidates and to the election results. At the primary election there was no opportunity to challenge either. This is a due process violation.

Id. at 410.

B. EQUAL PROTECTION

While the interpretation by tribal courts of what constitutes due process may be equivalent to or even exceed the protections offered by state and federal courts, the same is not necessarily true in the equal protection context. In fact, the most famous case in this area is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which the United States Supreme Court upheld a tribal membership ordinance that discriminated against a woman and her family on the basis of gender. That case is not an aberration, as many tribal laws involve perfectly valid racial, gender, and religious classifications that might otherwise be found to violate the United States Constitution. *See generally Morton v. Mancari*, 417 U.S. 535 (1974).

Federal Indian law creates a great deal of room for Indian tribes to adopt blood quantum — and ancestry-based membership criteria, employment

preferences, and voting requirements. Tribes that continue to respect traditional and customary law may apply hereditary and gender based rules in multiple contexts, from domestic relations to electoral candidates. However, outside of the context of tribal membership criteria, tribal employment preferences, and other legal classifications that go to the heart of who is an Indian and what is a tribe, tribal courts generally do conform to state and federal constitutional norms in relation to equal protection of the laws.

1. DISCRIMINATION ON THE BASIS OF IMMUTABLE CHARACTERISTICS

Mohegan Tribal Gaming Authority v. Mohegan Tribal Employment Rights Commission

Mohegan Gaming Disputes Court of Appeals, No. GDCA-AD-03-501, 4 Am. Tribal Law 482, 2003.NAMG.0000007 (November 20, 2003)

The opinion of the court was delivered by: Guernsey, C.J.

This case presents an issue central to the implementation of the Mohegan Tribal Employment Rights Ordinance, MTO 99-2 ("TERO"); namely, whether there exists a disproportionate impact threshold that must be met before the provisions of the Ordinance barring job qualifications that serve as a barrier to the employment of Native Americans are invoked. [W]e hold that a finding of disproportionate impact on Native Americans as a group is not required before the Mohegan Tribal Employment Rights Commission (hereafter the "Commission") may examine whether job qualification criteria serve as a barrier to the employment of any Native American.

Procedural Background

In January 2002, the Mohegan Tribal Gaming Authority (MTGA) posted a job opening for the position of "Sports and Entertainment Support Services Manager." The "Minimum Qualifications" for this position were described as follows:

> Three years of progressive experience in the area of sports, entertainment and facility management. Have a working knowledge of Word, Excel and database spreadsheets for the preparation, formatting and editing of routine to complex documents. Must have an understanding of budgets and be able to track expenditures; including internal and client-related expenditures. Must be proficient in Stratton Warren and Infinium software. Must be able to perform multi-task projects in a diverse and busy environment. Excellent communication and organization skills required.

Record on Appeal at 21. A Mohegan Tribal member, Ms. Kim Baker, along with a number of non-Native Americans, applied for this position. Ms. Baker met all qualifications except for "three years progressive experience in the area of sports, entertainment and facility management." The position was offered to a non–Native American, Robin Pelletier, already employed as an Administrator in the Sports and Entertainment Department at Mohegan Sun, who apparently met this qualification.

. . . Ms. Baker filed a complaint with the Department of Tribal Employment Rights, which resulted in an investigation by Ken Janus, the TERO Director. . . . Director Janus found that the failure to hire Ms. Baker constituted a violation of §VI(A) of MTO 99-2 and Mohegan Sun Hiring Policy #3 for "failure to hire tribal/native for position".

A Mohegan Tribal Employment Rights Commission hearing in this matter (Kim Baker v. Mohegan Sun) was conducted on March 20, 2002, focusing on the position requirement of "three years of progressive experience in the area of sports, entertainment and facility management." . . .

. . . After reviewing the particular job duties as listed for a successful applicant for the position, the Commission found them to be of a "clerical, administrative or customer service nature," and held that the Mohegan Sun had failed to demonstrate that the disputed job qualification was required by a business necessity. As such, the criteria were found to serve as a barrier to the employment of a Native American. . . .

The trial court [Manfredi, J.] held that a finding by the Commission that the job qualification at issue "serve[s] as a barrier to the employment of Native Americans" was a condition precedent to Commission action under Section VII(E). Absent such a finding, which was not made by the Commission in this case, the trial court held that Section VII(E) had no application, and the Commission was not empowered to look to whether or not a particular qualification was required by business necessity. Nevertheless the trial court examined United States Supreme Court precedent under Title VII of the Civil Rights Act of 1964 in seeking to define "business necessity," and utilizing the rationale of *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), held that a job qualification was a business necessity if it was "reasonably related to job performance." The trial court further held that, on the record, the challenged job qualification was required by business necessity. . . .

Although the trial court's analysis of Section VII(E) is supported by the reference therein to "barriers to employment of Native Americans," suggestive of a *Griggs* analysis of disproportionate group impact, we hold that the fundamentally different (in fact, almost diametrically opposed) purposes of the Civil Rights Act of 1964 and TERO (MTO 99-2), coupled with the carefully designed procedures in TERO to protect the individual preference rights of Native Americans, requires the rejection of such an analysis.

Discussion

A. Disparate Impact and TERO

"The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834." *Morton v. Mancari*, 417 U.S. 535, 541 . . . (1974). The "first major piece of federal legislation prohibiting discrimination in private employment," Title VII of the Civil Rights Act of 1964, "explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations." *Morton v. Mancari*, *supra*, 417 U.S. at 544. "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." *Morton v. Mancari*, *supra*, 417 U.S. at 544, quoting 110 Cong. Rec. 12723 (1964).

Against this background the Mohegan Tribe, like many other Indian tribes, adopted an ordinance declaring Native American preference as its public policy for employers and contractors operating on Mohegan land:

The public policy of the Mohegan Tribe of Indians of Connecticut (Mohegan Tribe) is to create employment and training opportunities for its Members and for other Native Americans. The purpose of this ordinance is to assist and require fair employment of Native Americans, prevent discrimination, and set forth the Native American preference requirements for employers and contractors operating on Mohegan land.

MTO 99-2, Section II. The basic policy of Native American Preference is set forth in Section VII(A):

> Irrespective of the qualification of any non-Native American applicant or employee, any Native American applicant or Native American employee who meets the minimum qualifications required by the employment position at issue whether it concerns the hiring, promotion, training, retention, recall or any other element of said employment position, shall be selected by all covered employers before any non–Native American applicant or non–Native American employee. All covered employers shall be required to comply with all job posting requirements promulgated and issued by the Human Resources Department.

MTO 99-2 Section VII(A)(1). . . .

The term "minimum qualifications" is given a highly restrictive definition:

> Minimum Qualifications means those job-related qualifications which are essential to the performance of the basic responsibilities for each employment position or contract, including any essential qualifications concerning education, training, and job-related experience but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions or other contracts. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

MTO 99-2 Section III. This is illustrative of a fundamental difference between Native American preference under TERO and the purpose of the disparate impact analysis of *Griggs v. Duke Power Company*. Under TERO, the preference exists irrespective of whether or not Native Americans as a group are at a disadvantage, whereas the *Griggs* analysis of disparate or disproportionate impact is used to determine whether or not to allow what might reasonably be termed a form of preference based on a prohibited basis. As such, the invocation of Native American preference as set forth in MTO 99-2 is in no way dependent on the factors enumerated in *Griggs*.

. . . Section VII(E) deals with job qualifications criteria and/or personnel requirements, and Appellee asserts that the trial court was correct in holding that a finding of disproportionate impact on Native Americans as a group was a condition precedent to a TERO challenge to any job qualifications or criteria. We do not agree, and hold that MTO 99-2 Section VII(E) was intended to reinforce, rather than dilute, the Native American preference policy of Section VII(A).

In construing a statute, a court is "called upon to look beyond the literal meaning of the words to the history of the law, its language, considered in all its parts, the mischief the law was designed to remedy, and the policy

underlying it." . . . As we have discussed, the policy behind TERO is the enforcement of Native American preference, not the prevention of discrimination as set forth in Title VII of the Civil Rights Act of 1964. To impose on Native American preference a barrier to discriminatory practices, created in the context of Title VII of the Civil Rights Act of 1964, is illogical in that this preference was designed, for reasons of well-established and historically justified public policy, to promote a narrowly tailored policy of discrimination. . . .

We therefore hold that the trial court erred in requiring a finding by the Commission of disproportionate or disparate impact on Native Americans as a group as a condition precedent to Commission review of an alleged failure to comply with MTO 99-2. . . .

Standard of "Business Necessity"

The trial court [also] held that in proceedings before the Commission the challenged requirement of "three years progressive experience in the area of sports, entertainment, and facility management" had been shown to be a "business necessity." [T]he trial court held that a job qualification is a business necessity "if it is reasonably related to job performance and measures 'the person for the job and not the person in the abstract.' " . . .

The term "business necessity" is not defined in the Ordinance. Its interpretation, as the term is employed by the United States Supreme Court in *Griggs*, *supra*, ranges from "a manifest relationship to the employment in question," 401 U.S. at 432, to "a reasonable measure of job performance," 401 U.S. at 436, to "related to job performance," 401 U.S. at 432. The Supreme Court's conclusion as to the intent of Congress, however, provides further evidence of the opposing purposes of Title VII and TERO:

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.

Griggs v. Duke Power Co., *supra*, 401 U.S. at 436. As has already been shown, the purpose of MTO 99-2 is to provide for Native American preference and to curtail job qualifications that impede such preference. . . .

In the case of MTO 99-2, however, the policy of Native American preference is to be applied to any Native American job applicant who meets the "minimum qualifications" for the position. MTO 99-2, Section VII(A)(1). Inasmuch as we hold that the policies behind MTO 99-2 Section VII(A) and (E) are consistent, and that the standard of "required by business necessity" to be applied under Section VII(E) is intended to promote, not dilute, the policy Native American preference under Section VII(A), it necessarily follows that for a covered employer to establish that a job qualification is "required by business necessity" it must establish that the qualification is not a subterfuge for exceeding the "minimum qualifications" for that position. Given that the "minimum qualifications" for a position are those "essential to the performance of the basic responsibilities for each employment position or contract, including any essential qualifications concerning education, training, and job-related experience . . . ," a standard of "reasonably related to job performance" is insufficient to protect the policy behind MTO 99-2.

In view of our holding that the Mohegan Tribal Council has enacted a comprehensive, consistent procedure for the implementation and protection of the policy of Native American preference, to require a covered employer under Section VII(E) to show anything less than a compelling business necessity for job qualification criteria that serve as a barrier to the employment of a Native American applicant would be to undermine the purpose and functioning of the entire Ordinance. . . .

Accordingly, the judgment of the trial court is reversed and the case remanded to the Mohegan Tribal Employment Rights Commission for further proceedings consistent with this opinion. In this opinion the other judges concurred.

GUERNSEY, C.J.
EAGAN, J.
WILSON, J.

NOTES

1. Congress has created multiple Indian-preference-in-employment provisions. *E.g.*, 25 U.S.C. §450e(b)(1) (authorizing American Indian preference in employment for recipients of federal funds under the Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§472, 472a (authorizing American Indian preference in employment in the Bureau of Indian Affairs and Indian Health Service). *See* Kaighn Smith, Jr., *Civil Rights and Tribal Employment*, 47 FED. LAW., March/April 2000, at 34, 39.

Where Indian tribes might have a problem in equal protection terms is in the granting of a tribal preference — for example, in the Navajo Nation's rule ordering all employers on the Navajo Reservation to give preference in employment to all Navajos over members of other tribes. *E.g.*, *Cedar Unified School Dist. v. Navajo Nation Labor Commission*, 2007.NANN.0000018, at ¶31 n. 12 (Navajo Nation Supreme Court 2007) (leaving open the question whether tribal preference violates a bar on national origin discrimination); *Dawavendewa v. Salt River Project Agr. Improvement and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (holding that the Navajo tribal preference provision violated federal law), *cert. denied*, 528 U.S. 1098 (2000).

2. Suits against tribal businesses that allege race discrimination in employment decisions must navigate the fields of sovereign immunity and employment discrimination doctrine. In *Bethel v. Mohegan Tribal Gaming Authority*, 2 Am. Tribal Law 273 (Mohegan Gaming Disputes Court of Appeals 2000), the court dismissed all but one count against the tribe, but remanded on the claim of race discrimination due to the employer's failure to provide a hearing in accordance with its own procedures:

> Reading Count 8 most favorably to the plaintiff, the court holds that the allegations suffice to state a cause of action under the Discriminatory Employment Practices Ordinance. The date of the termination/transfer triggers time for hearings under the employee grievance policy. The employee incident report filed by plaintiff on June 11, 1999 describes a number of situations that occurred during the term of employment that he was unhappy with. . . . The court deems this a request for a hearing under step four of the grievance process. . . .

> Because there was no "final written notice" or "final written warning," the time period for requesting consideration by a board of review panel has not begun to run. The plaintiff is entitled under the due process clause of the ICRA, and the Employee Handbook, to a hearing by a board of review panel. Therefore, the court concludes that this matter must be reversed as to Count 8 only and remanded to the trial court with directions that the plaintiff's request to be reinstated to the slot technician position be considered by the board of review panel. . . .

Bethel, 2 Am. Tribal Law at 381-82. The court did dismiss a claim under 42 U.S.C. §§1981 and 1983, noting:

> In Count 9 plaintiff claims that the defendants violated his rights that are protected by 42 U.S.C. §1983. He alleges that the MTGA and the MTGE were acting "under color of law . . . as the employer, sovereign legislative body, and executive enforcement division for the Mohegan Tribal Nation." . . .
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> Generally, courts have held that an action by an Indian tribe is not the equivalent of the state action required to sustain an action under a 42 U.S.C. §1983 action. In *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), . . . [t]he court held [that]
>
> > no action under 42 U.S.C. 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties (citations omitted), and are not constrained by the fourteenth amendment." *R.J. Williams Company*, *supra* at 982. . . .
>
> In the present appeal the complaint is devoid of any allegations that the MTGE, the MTGA, or the individual defendant Keane were acting under any authority other than that of the Mohegan tribe. The trial court properly dismissed Count 9 of plaintiff's complaint for failure to allege an essential element of a claim under 42 U.S.C. §1983.
>
> In Count 11 plaintiff claims that the defendants discriminated against him based upon his race, in violation of 42 U.S.C. §1981. . . .
>
> . . . Title VII of the Civil Rights Act of 1964, as amended, specifically excluded Indian tribes, such as the Mohegan tribe and the MTGE, MTGA, from the definition of an "employer" for the purpose of that Act. *See* 42 U.S.C. §2000e(b)(1). Further, 42 U.S.C. §2000e-2(i) specifically exempts from the protections of Title VII businesses on or near an Indian reservation and allows those employers to have employment preferences for Indians living on or near a reservation.

Bethel, at ¶¶382-83.

3. In *Riggs v. Estate of Attakai*, 7 Am. Tribal Law 534 (Navajo Nation Supreme Court 2007), the court applied principles of the Navajo Nation's Fundamental Law to hold that a grazing permit should be devised to a female member of the family, rather than the male. One Justice objected to the majority's reasoning, and wrote:

> 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 decide the award of a grazing permit] to be

> irrelevant. 6 Nav. R. 416, 421 (Nav. Sup. Ct. 1991). . . . 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. . . .
>
> 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*.

Riggs, 7 Am. Tribal Law at 538-39 (Benally, J., concurring in the judgment). The majority responded:

> Contrary to the characterization in the dissenting opinion, this opinion does not mean that the gender of the claimant is dispositive. The dissent states that this opinion makes the *Keedah* factors "irrelevant." . . . In fact, the rule set out in this opinion is that the Keedah factors and traditional law on women's role in Navajo society should be considered together to decide the most logical trustee, not that if a female and a male both claim the permit, regardless of their connections to the land, the permit automatically must go to the female. Indeed, this opinion concludes that the Family Court erred in not applying the Keedah facts, and applies them directly to the facts, along with traditional law principles, to decide the case. . . . Further, the dissent's primary concern appears to be that the Court allegedly applies Fundamental Law where there are statutes covering a situation to improperly "evade" existing law. . . . However, this Court applies *Diné bi beenahaz'áanii* alongside statutory law as the law of the Navajo Nation, as mandated by the Navajo Nation Council. See 1 N.N.C. §203(E) ("The leader(s) of the Judicial Branch (*Alaaji' Hashkééjí Naat'ááh*) shall uphold the values and principles of *Diné bi beenahaz'áanii* in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments.").

Riggs, 7 Am. Tribal Law at 537 n. 5.

4. Tribal employers may offer specific causes of action for employees who allege discrimination in employment decisions. In *Hoopa Valley Tribal Plant Management Dept. v. Smith*, 5 NICS App. 132 (Hoopa Valley Tribal Court of Appeals, Oct. 8, 1999), the court interpreted such a provision to grant broad deference to a terminated employee alleging discrimination, even though she was an introductory or probationary employee employed at will. The relevant procedure read:

> If at any time during the introductory period it is determined that an employee's performance is unsatisfactory, the employee may be terminated without the right of appeal or hearing, *except in cases of alleged discrimination*.

Smith, at 5 NICS App. at 134 (quoting Personnel Policies and Procedures of the Hoopa Valley Tribal Council §6.1.3) (emphasis in original). The court concluded:

> The Personnel Policies do not address the effect of the tribe's failure to conduct the written evaluation thirty days prior to the conclusion of the introductory period. . . . [I]n the light most favorable to the non-moving party, Ms. Smith's written complaint can be construed as claiming that she was fired for reasons other than her job performance.
>
> It is possible that some form of discrimination occurred, based on the allegations of the employee's complaint. We therefore cannot say that it is ". . . beyond doubt that the Plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." . . . If it is possible that some form of prohibited discrimination occurred, we have no choice but to allow the employee to present her evidence. Any ambiguities are to be resolved in favor of a right of an employee to file a grievance and obtain judicial review. Hoopa Valley Tribal Code, §13.12.1; *Hoopa Valley Indian Housing Authority v. Gerstner*, 3 NICS App. 250, 256; 22 Ind. L. Rptr. 6002 (Hoopa 1993).

Smith, at 5 NICS App. at 136.

2. DISCRIMINATION ON THE BASIS OF MARITAL STATUS

Arizona Public Service Co. v. Office of Navajo Labor Relations

Navajo Nation Supreme Court, No. A-CV-08-87, 6 Nav. Rep. 246, 17 Indian L. Rep. 6105, 1990.NANN.0000003 (October 8, 1990)

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.
The opinion of the court was delivered by: Tso, Chief Justice. . . .

Case Before the Court

The Arizona Public Service Company (APS) is an Arizona corporation engaged in the business of electric power generation. . . .

On December 1, 1960, APS obtained a lease from the Navajo Nation to "construct and operate . . . a large thermal electric power plant," [the so-called Four Corners Plant]. . . .

This dispute arises from a hiring policy adopted by APS on July 15, 1983. It was a company-wide policy which sought to deal with problems of nepotism, and it addressed two categories of employees. It dealt with blood relations of current employees by providing that such relatives could be only hired for positions which were two or more supervisory levels removed from relative employees. It prohibited the hiring of applicants related by marriage to current employees, namely spouses, fathers-in-law, mothers-in-law, daughters-in-law, sons-in-law, brothers-in-law, and sisters-in-law. APS also developed an employment application form to apply the policy. It contained the question, "Do you have any relatives working for APS? Name (if yes)." If the applicant named a relative by marriage in one of the prohibited degrees, the application was rejected. . . .

The policy had a significant impact on employees and job applicants at the Four Corners Plant. For the period between November, 1983 and September,

1986, a total of 18 employees lost their jobs or were denied employment because of the policy. One employee's application was rejected because he was determined to be an in-law to an employee when the relation was in fact that of two men married to sisters, so the applicant was in fact the brother-in-law of the employee's wife and not the employee. While the mistake was corrected within ten days, the applicant had to wait two and one-half months for another opening. One employee, who was told he was ineligible for rehire because his wife was employed, obtained a divorce in order to qualify for employment. Fourteen lost their jobs or were denied employment because of a brother-in-law employee, two because of a husband, one because of a wife, and one because of a sister-in-law. One employee resigned rather than accept a reprimand for failing to disclose a relationship, her brother-in-law was fired for nondisclosure, and another was refused rehire. Fifteen of the affected positions were those of laborers, and the remaining three positions were clerical, mechanic, and management jobs. In all, thirteen men and five women were affected.

The enforcement agency which addressed this problem was the Office of Navajo Labor Relations (ONLR). . . . It has broad powers to regulate, enforce, and determine violations of Navajo Nation labor law, and it has the authority to file complaints of violations of the Navajo Preference in Employment Act with the Navajo Labor Relations Board. . . .

The Navajo Labor Relations Board is the board of directors of ONLR. . . . It has broad enumerated powers and duties to enforce Navajo Nation labor and employment law, and it has the specific power to hear complaints brought by ONLR and issue determinations and enforcement orders for violations of Navajo Nation labor laws. . . .

The law at issue here is the Navajo Preference in Employment Act (NPEA). . . . The NPEA contains requirements that employers exercise preferential hiring practices in favor of Navajos, employment procedures, just cause employment tenure, health and safety guarantees, and training requirements. 15 N.T.C. §604(b).

The two employer obligations of that section which are most applicable to this case are: "All employers shall use nondiscriminatory job qualifications and selection criteria in employment"; and "[a]ll employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment." 15 N.T.C. §604(b)(7), (9). . . .

The actual case or controversy before the Court is whether the Board correctly found that APS' nepotism policy violated 15 N.T.C. §604(b). . . .

II. Application of the Act

The inquiry here is whether the Board correctly applied 15 N.T.C. §204(b)(7) and (9) to APS' nepotism policy, and whether Navajo statutory law prohibits such a policy. Section 204(b)(7) provides: "All employers shall use nondiscriminatory job qualifications and selection criteria in employment." Title 15, N.T.C. §605(b)(9) provides: "All employers shall maintain a safe and clean working environment and provide employment conditions which are free from prejudice, intimidation and harassment."

Stated negatively, section 204(b)(7) prohibits discrimination in adopting or applying job qualification standards and selection criteria. "Discrimination" is a word of art used in both labor and civil rights law. . . .

. . . The Board and the courts are instructed that "the provisions of this chapter [i.e. the Act] be construed and applied to accomplish the purposes set forth above." 15 N.T.C. §602(b). That is a command to apply the rule of liberal construction. . . .

Here, there are two things which are prohibited: Discrimination and prejudice. Prejudice, is "[a] forejudgment; bias; preconceived opinion." BLACK'S LAW DICTIONARY 1061 (5th ed. 1979).

There is both statutory discrimination and prejudice here. The Board correctly found that there was no demonstrated business justification for the nepotism policy, other than a general conclusion that the public "felt" APS favored relatives. APS did make a distinction, and actually made two. The policy established a general category of "nepotism," which is:

> Bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship to appointing authority. BLACK'S LAW DICTIONARY 937 (5th ed. 1979).

The policy then went on to subdivide that classification into two separate ones, with different consequences for each. That is to say, those who belonged to the classification "blood relatives" could apply for and receive employment with APS so long as they were removed from the blood relation by two supervisory levels. Those who belonged to the classification "relatives by marriage" could not be employed, and where APS discovered two such relatives having a job, they were given the choice of who could quit or be fired. That was a severe Hobson's choice, given the strain between family loyalty and one's own job.

The "prejudice" of the situation arises out of a policy choice, the reasons for which are absent from the record, of why an employer would distinguish between the two groups. There was a preconceived opinion that somehow it is permissible to hire blood relatives, removing them from supervisory favors, yet not hire relatives by marriage. We hold that the prohibition on hiring and retaining relatives by marriage was a violation of the Act and that the Board correctly decided the application of the law. . . .

We are also dealing with civil rights statutes here. A civil rights statute need not spell out classifications, as we will demonstrate.

The term "civil rights" is elusive because it "implies a selective reference to interests which are deemed to be of superior quality in our scheme of legal values." 3 SUTHERLAND STAT. CONST. §74.01. The classes of rights which can fall under that category are open-ended in character, but they are most often concerned with personal liberty and, more recently, with the right to equal treatment. *Id.* We are dealing with equal treatment here.

State civil rights legislation is fairly recent, and prior to 1883, only three states had any. *Id.* §74.03. Following an 1883 Supreme Court decision that the Civil Rights Act of 1875 was unconstitutional, several states enacted statutes forbidding discrimination in public accommodations. *Id.* In modern times the states have enacted comprehensive legislation to regulate the denial of equal treatment in areas such as employment, and some deal with discrimination in

utility services or public services. *Id.* The laws are wide and varied, but the important point is "states are allowed to extend civil rights protection beyond that provided by Congress." *Id.* Finally, one of the common prohibited classifications is the prohibition of discrimination on the basis of one's marital status. *Id.*

Civil rights laws are also given liberal construction, meaning that they are liberally construed, "in order that their beneficent objectives may be realized to the fullest extent possible. To this end, courts favor broad and inclusive application of statutory language by which the coverage of legislation to protect and implement civil rights is defined." *Id.* §74.05. "Correlatively, exceptions and limitations which restrict the operation of such laws are strictly construed." *Id.*

"Remedial policies expressed in civil rights laws may be judicially extended through the influence they have in the interpretation of legislation." *Id.*

Having reviewed the ground rules for the application of civil rights legislation, do we have a prohibition of marital status discrimination here? We begin with the rule that the right to marry is a fundamental right. It is an important and fundamental right as a matter of Navajo common law as well.

> 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 ensures that the marriage will be stable, in harmony, and perpetual. 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.

Validation of Marriage of Francisco, 6 Nav. R. 134, 135-136 (1989) (quoting *Navajo Nation v. Murphy*, 6 Nav. R. 10, 13 (1988)). Navajos scorn those who have relationships out of marriage, and the man in such a relationship is called a "stay-until-dawn man." The woman shares the scorn because the term implies her need to sneak the man out before neighbors arise and go out.

Not only is marriage important in Navajo common law, but relatives and relationships are as well. "Navajos think of such relationships [kinship] in a much broader and different sense than does the general American population." B. Johnson Ed., Navajo Stories of the Long Walk Period xix (1973) (Preface explaining relationships used in the stories). There is the biological family, with husband, wife and unmarried children; the extended family, which adds married daughters and their husbands as well as unmarried children; the outfit, with mixes of extended or biological families; the clan, with relationships which are not restricted to biological connections; and linked clans, with relationships among clans. *Id.* xix-xxi.

The APS nepotism policy as applied to married relations is ridiculous in the Navajo context because of the strong ties and obligations to relations outside the scope of the policy. The reciprocal obligation required of Navajos is summed up in the saying used to describe someone who has misbehaved: "He acts as if he had no relatives." . . .

The Board made a finding of fact which shows a proper application of the law and the serious violation of the public policy favoring the sanctity of marriage. The Board's finding shows that the Minnesota court was correct in its prediction of how a marital status employment policy can discourage marriage. One of APS' employees had been a power plant mechanic for about two months, and when he updated his employment application, APS agents informed him he was ineligible for rehire because his wife was a permanent employee. The couple obtained a divorce from the Shiprock District Court so he could qualify for rehire. He could not work for APS for three months because of his marriage, and when he requalified for employment by obtaining a divorce, it took him another year to get a job. APS forced this couple to divorce, given economic conditions.

In these decisions we have a governmental employer's marital status policy prohibited on the grounds of public policy, and a marital status discrimination statute applied in light of that policy. Are there any other policy factors which support the interpretation of our law in a similar fashion against this private employer?

In their work, FAIRNESS AND JUSTICE (1986), Charles M. Haar and Daniel W. Fessler trace the history of the common law rule that those who provide a public service, including municipalities and corporations such as the one before the Court, must give equal treatment. They base their arguments upon the common law and show that equal access to basic services should be grounded in the common law and not constitutional law, which is defective in many respects. . . .

. . . Within the Navajo Nation all employers are in the nature of a public service enterprise, given high unemployment rates. We take judicial notice of the fact that when the Navajo Tribal Council enacted NPEA it did so to deal with unemployment rates much higher than the general population. There was sufficient governmental interest to enact statutes which prohibit discrimination, prejudice, intimidation, and harassment. . . .

. . . To recapitulate, one Navajo statutory provision requires that all employers use nondiscriminatory job qualifications and selection criteria, and another prohibits prejudice, intimidation and harassment in the workplace. The rights involved here are the fundamental ones of the right to marry (and have that relationship honored) and the right to a fair opportunity for employment. There are fundamental Navajo common law rights in the form of marriage, free association with relatives, and the preservation of traditions of working together. Public policy, including the ability of the state to place limitations upon arbitrary standards for employment, supports the ruling of the Board, and such underlies the Navajo Nation Preference Law.

At this point it is quite important that everyone understand what this opinion does not hold. We do not address the nepotism policy as far as it affects blood relations. We simply hold that the Board correctly interpreted and applied the law to prohibit marital status discrimination, and that our law is fully backed by principles of public policy and common law. We do not rule that APS must favor relatives in any manner, but only that employees should be chosen on the basis of their merit and qualifications and not some broadly

preconceived notion of what may be proper employment limitations, when that notion has no demonstrated relation to work performance. There are other proper means of achieving the goal of eliminating favoritism, and we leave what they are to APS and the Board. . . .

V. Conclusion

. . . Ultimately what we have is a Navajo law which regulates employment. It prohibits arbitrary discrimination, and that is what the Board found in a well-stated and well-reasoned opinion. Upon a close examination of Navajo law we found that it reasonably addressed the employment policy in question — marital status discrimination — and prohibited it. The Board's reasoning was appropriate. While that reasoning may not be the same as that used by the Court, it is sufficient that it appropriately applied the law.

The February 9, 1987 administrative decision of the Navajo Labor Relations Board is affirmed.

NOTES

1. Does the borrowing of non-tribal statutory and common law by the *Arizona Public Service* Court render the decision more or less persuasive? Does it matter to whom — the Diné (Navajo) or outsiders — the Court may have been writing? Consider that the portion of the opinion not excerpted here involved the authority of the Navajo Nation to assert regulatory jurisdiction over the public utility, a question later resolved against the Nation by the Ninth Circuit. *See Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996).
2. A general ban on nepotism is almost impossible in most parts of Indian country, given the related facts that tribal membership is usually conditioned on family and ancestry and that there are relatively few tribal members to choose from in selecting employees. How does that fact play out in this decision?
3. Tribal courts and tribal legislatures have borrowed much equal protection doctrine from American courts, especially the levels of review of government action that implicated protected classes. For example, in *Delgado v. Wilson*, 2004.NAOW.0000019 (Oneida Appeals Commission Appellate Court 2004), the court reviewed the tribal legislature's decision to prohibit tribal employment if the employee holds a position with the Oneida Appeals Commission. The court wrote:

> Next, the statute must be analyzed under strict scrutiny, intermediate scrutiny or rational basis. The standard that applies to Mr. Delgado is rational basis. This standard applies to all classifications that are not based on a "suspect" or "semi-suspect" classification (i.e. that do not involve race, national origin, alienage, gender or legitimacy) and do not impair a fundamental right (i.e., do not impair the right to vote, access the courts or migrate interstate). Under this standard, the classification will be upheld so long as it is conceivable that the classification bears a rational relationship to a legitimate government objective.

According to Oneida Resolution #8-19-91-A, there is clearly a rational relationship to a legitimate government objective; that the Oneida Appeals Commission and the Oneida Tribal Administrative Procedures Act enhance a separation of powers between the legislative, executive and judicial responsibilities of the tribe. While the Legislative Analyst position was not stated in Oneida Resolution #3-20-92-A, it is clear that the intent is to enhance the separation of powers. To have a Legislative Analyst also be an Oneida Appeals Commissioner clearly violates the separation of powers.

Delgado, at ¶¶29-30.

3. RELIGIOUS FREEDOM

Considering Individual Religious Freedoms under Tribal Constitutional Law

Kristen A. Carpenter, 14 Kan. J.L. & Pub. Pol'y 561, 564-66, 569-75 (2005)

. . .

I. Some Hypothetical Religious Freedoms Cases

To suggest the type of cases where individual religious freedoms issues might manifest in tribal settings, this section presents a series of hypothetical stories having to do with a hypothetical tribe, the Winomee Indian Nation.

Hypothetical A

A ceremonial rattle is about to be repatriated to the Winomee Indian Nation from a federally funded museum. The tribal Cultural Resources Commission draws up a repatriation plan, intending to restore the rattle to the traditional medicine society that historically . . . cared for and used the rattle in ceremonies. But right before the rattle is to come home to the reservation, a leader in the local Native American Church ("NAC"), which has had a presence on the reservation for about fifty years now, petitions the Commission for shared custody of the rattle. The NAC leaders believe that the holy rattle has a place in their religion too. The Commission denies the request. Can the NAC leader sue the tribe for violating its religious freedom?

Hypothetical B

Amelia Sandstone is a member of the Winomee Indian Nation. In 2004, the Nation proposes to store nuclear waste on land within the reservation boundaries. The proposed storage location adjoins land on the reservation that was historically considered sacred and where a small number of tribal members still go for private retreat, prayer, and ceremony. Amelia has brought her concerns to the tribal council. The council members reject her concern, saying the land in question has not been an important ceremonial site in generations and, in any event, the tribe desperately needs the fees the federal government will pay for storage. Amelia believes that the waste will nevertheless contaminate and desecrate a sacred site. Can Amelia sue for violation of her religious freedoms?

Hypothetical C

Frankie Bear is a member of the Winomee Indian Nation. He grew up on the reservation, and then earned a B.A. and M.B.A. from top universities. He worked for a long time in corporate America, but moved back to the reservation several years ago and has enjoyed two successful terms on the tribal council. When the tribal chief decides not to seek re-election, Frankie wants to run for the position. But traditionally, only members of a certain Winomee religious society could serve as chief. Frankie's family is not in that particular religious society. Even though he has complied with all other requirements, the Tribal Registrar of Elections refuses to put Frankie on the ballot, because he is not a member of the society. Can Frankie sue the tribe for violating his individual religious freedom?

Hypothetical D

Anna Belmer is a member of the Winomee Indian nation. She is a devout Christian who believes very sincerely that traditional Winomee ceremonies are, at best, superstitious. Anna's daughter Sarah attends a tribally-run elementary school on the reservation. In the spirit of cultural self-determination, the school starts to offer a "tribal language and culture class." In it, the teacher shares information about traditional tribal ceremonies, stories, songs, and their meanings. Sarah comes home brimming with these lessons — to the secret delight of her grandmother. But Sarah's mother is furious and believes that the tribe, through the school, is forcing traditional Winomee religion on her daughter. Can Anna sue the tribal council for violating her individual religious freedom? . . .

III. The Law

The question is whether these individuals would have viable legal claims for violations of their religious freedoms. The minds of most Americans probably jump immediately to the deeply ingrained text and principles of the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Indeed, if the federal government or a state government committed the above-described acts, the individuals would probably have First Amendment claims.

In the first two hypotheticals, the individuals might sue under the Free Exercise Clause, arguing that the government, by denying access to the rattle or desecrating the sacred site[,] substantially infringed on their ability to practice their religion. In the last two hypotheticals, involving religion as an eligibility requirement for tribal officials and the teaching of tribal religion in the schools, the individuals might have a claim under the First Amendment's Establishment Clause, an argument that the state imposed religious belief on them.

None of the hypothetical plaintiffs would necessarily win their cases. Indeed, the Supreme Court has narrowly interpreted the Free Exercise Clause often denying religious freedoms protections for American Indian religious practitioners. . . .

C. Religious Freedoms under Tribal Constitutions

Indian tribes may provide for religious freedoms in their statutory, decisional, regulatory, or customary law. This section focuses individual religious freedoms appearing in tribal constitutions. This article . . . discusses several examples of tribal constitutional approaches to religious freedoms. It groups these into four categories: (1) constitutions with religious freedoms language that references, incorporates, or tracks the ICRA, (2) constitutions that do not use ICRA but echo U.S. principles of individual religious freedom, (3) constitutions with unique language on religion, clearly expressing distinct tribal values and norms, and (4) constitutions that do not reference religion or related concepts at all.

In the first group are tribal constitutions with religious freedoms provisions that reference, incorporate, or track the language of the ICRA. Several of these explicitly incorporate and set forth the ICRA. For example, the Crow Tribe's constitution provides: "In accordance with Title II of the Indian Civil Rights Act of 1968 (82 Stat. 77), the Crow Tribe of Indians in exercising its powers of self-government shall not: (a) make or enforce any law prohibiting the full exercise of religion." . . . The Miami Tribe's constitution sets forth:

> The Miami Tribe, in exercising its powers of self-government, shall not take any action which is in violations of the laws of the United States as the same shall exist from time to time respecting civil rights and civil liberties of persons. This article shall not abridge the concept of self-government or the obligations of the members of the Miami Tribe to abide by this Constitution and the ordinances, resolutions, and other legally instituted actions of the Miami Tribe. The protections guaranteed by the Indian Civil Rights Act of 1968 (82 Stat. 78) shall apply to all members of the Miami Tribe. [Constitution of the Miami Tribe of Oklahoma, art. VII (1995).]

Interestingly, while this constitution broadly protects individual civil rights, perhaps even those above and beyond ICRA's guarantees, it seems to balance these against tribal "self-government" and tribal members' "obligations."

In the second group are tribal constitutions with religious freedoms provisions that do not reference, incorporate, or track the ICRA, but still seem to echo the familiar language and principles of the federal First Amendment. For example, the Big Lagoon Rancheria Constitution provides: "[N]o member shall be denied freedom of . . . religion . . . or other rights guaranteed by applicable federal law." The Ute Indian Tribe of the Uintah and Ouray Reservation provides: "All members of the . . . Tribe . . . may enjoy, without hindrance, freedom of . . . worship." One special provision that recurs in a number of constitutions, such as the Choctaw Nation of Oklahoma, is that "no religious test shall ever be required as a qualification to any office of public trust in this Nation." Others such as the Muscogee Creek Tribe of Oklahoma, have a similar statement declaring all citizens have the right to vote in tribal elections "regardless of religion, creed, or sex."

In the third group are tribal constitutions with unique language on religion, clearly expressing distinct tribal values and norms. . . . The Yup'ik People of Bill Moore's Slough, in the "Land Policy and Constitution of the People of

Bill Moore's Slough," are very clear in their "Statement of Intent" about the collective nature of tribal rights and the relationship between land, tradition, and culture.

> We the Yup'ik people of Bill Moore's Slough being the original inhabitants of our land, having been placed here by our creator, to be the keepers of our land and having maintained this land as our creator intended us to keep it since the beginning, hereby declare our intent to continue managing it as we have always managed it in the past.
>
> In the past as well as the present our land and the culture of our people have been intertwined to the point where it would not be possible to maintain our traditional values and lifestyle should our land be alienated, alterated or otherwise changed from its traditional relationship with our people.
>
> Therefore, it is our intent and the intent of this policy to maintain our land for all time forever for traditional uses.
>
> Furthermore, while others may attempt to change or eliminate our culture by methods of separating our people from our land, let it be known that we will resist such attempts.
>
> Let there be no misinterpretation nor ambiguities in this policy, it is a policy dedicated to the preservation of our traditional values, culture and lifestyle that we have maintained since the beginning.
>
> As a further point of clarification it is the position of Bill Moore's Slough that our people would not have survived as a people without maintaining our traditional relationship with the land. Therefore let this written land policy be considered by all parties concerned to be not only an integral part of the constitution of the people of Bill Moore's Slough but to be the primary law of our people and the basis for our cultural survival. [Land Policy and Constitution of the People of Bill Moore's Slough (1988).]

Having articulated the relationship between land, tradition, and survival, the Bill Moore's Slough Constitution then sets forth specific limitations on government and rights of individuals:

> **Article I**
>
> A) The Bill Moore's Slough Elders Council shall pass all resolutions and laws dealing with land issues in conformity with the Bill Moore's Slough Land Policy.
>
> B) The Bill Moore's Slough Elders Council shall protect, preserve and defend the Bill Moore's Slough land, land policy and its people's traditional relationship with the land to the best of its ability.
>
> **Article II**
>
> A) The Bill Moore's Slough Elders Council shall pass no laws jeopardizing certain freedoms and rights deemed to be given our people by our people's creator. Amongst these freedoms and rights are: the freedom to government by and for the people; the right to speak ones Conscience; the right to an education relevant to ones way of life; freedom from want, hunger, pain and fear; the right to liberty; the right to be Yupik; all rights guaranteed by Federal law including but not limited to Title II of the Indian Civil Rights Act of 1968.

The Poarch Creek Constitution speaks in terms of tribal interest, connecting religion and community survival, explaining that the purpose of the tribal government is to:

> (1) Continue forever, with the help of God our Creator, our unique identity as members of the Poarch Band of Creek Indians, and to Poarch identity from forces that threaten to diminish it;
> (2) Protect our inherent rights as members of a sovereign American Indian tribe;
> (3) Promote our cultural and religious beliefs and to pass them in our own way to our children, grandchildren, and grandchildren's children forever; . . .
> (8) Insure that our people shall live in peace and harmony among ourselves and with all other people.

[Constitution of the Poarch Band of Creek Indians, Preamble (Adopted June 1, 1985).]

It is in this context that the Poarch Creek Constitution then affords its members "the right to exercise the tribal rights and privileges of members of the Poarch Band of Creek Indians where not in conflict with other provisions of this Constitution, tribal laws and ordinances, or the laws of the United States."

Of particular interest is the "Constitution of the Iroquois Nations or The Great Binding Law, Gayanashagowa." The Iroquois Constitution is notable in that the Constitutional protections seem to be for the religion itself, and the people have responsibilities. In a section called "Religious Ceremonies Protected," the Iroquois Constitution provides:

> 99. The rites and festivals of each nation shall remain undisturbed and shall continue as before because they were given by the people of old times as useful and necessary for the good of men.
>
> 100. It shall be the duty of the Lords of each brotherhood to confer at the approach of the time of the Midwinter Thanksgiving and to notify their people of the approaching festival. They shall hold a council over the matter and arrange its details and begin the Thanksgiving five days after the moon of Dis-ko-nah is new. The people shall assemble at the appointed place and the nephews shall notify the people of the time and place. From the beginning to the end the Lords shall preside over the Thanksgiving and address the people from time to time.
>
> 101. It shall be the duty of the appointed managers of the Thanksgiving festivals to do all that is needed for carrying out the duties of the occasions.
>
> The recognized festivals of Thanksgiving shall be the Midwinter Thanksgiving, the Maple or Sugar-making Thanksgiving, the Raspberry Thanksgiving, the Strawberry Thanksgiving, the Cornplanting Thanksgiving, the Corn Hoeing Thanksgiving, the Little Festival of Green Corn, the Great Festival of Ripe Corn and the complete Thanksgiving for the Harvest.
>
> Each nation's festivals shall be held in their Long Houses.
>
> 102. When the Thanksgiving for the Green Corn comes the special managers, both the men and women, shall give it careful attention and do their duties properly.
>
> 103. When the Ripe Corn Thanksgiving is celebrated the Lords of the Nation must give it the same attention as they give to the Midwinter Thanksgiving.

> 104. Whenever any man proves himself by his good life and his knowledge of good things, naturally fitted as a teacher of good things, he shall be recognized by the Lords as a teacher of peace and religion and the people shall hear him.

[Constitution of the Iroquois Nations.]

The Iroquois Constitution, given to the people by Dekanawidah, makes clear that the people must fulfill duties to ensure the perpetuation of the ceremonies. Indirectly, of course, the duty of the people to protect the ceremonies ensures there will be ceremonies in which individuals can participate. Viewed in this light, the constitution could be read to provide an individual right to religious practice, but the more obvious focus of the provisions on festivals and ceremonial events seems to be on responsibilities. And while various other sections of the constitution outline rights of the people, including "lords," "war chiefs," and people from "foreign nations," these are similarly framed in terms of collective duties and welfare, and in the context of the Great Law. To understand this constitution more fully, we would need to see it in practice and consult with tribal leaders and members about its meaning. But, on its face, this constitution expresses the interconnected nature of people's rights and duties. . . .

NOTE

In *Townsend v. Port Gamble S'Klallam Housing Authority*, 6 NICS App. 179 (Port Gamble S'Klallam Tribal Court of Appeals 2004), the appellate court rejected a claim by a tribal citizen evicted from her tribal housing rental on grounds that she used her property for religious drumming amounting to a nuisance:

> Although not specifically stated as a ground for appeal, a reading of the record indicates that Appellant stated a defense of religious freedom, in that her exercise of the drumming and singing as a part of her worship in her church was protected by the Indian Civil Rights Act guarantee of freedom to practice her religion. . . . "Freedom of religion does not provide anyone with the right to conduct a true nuisance." . . . In interpreting the U.S. Constitution, which contains a freedom of religion clause, the U.S. Supreme Court held in *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), that the state may impose regulations that may have an indirect burden on practicing religion, in that case prohibiting retail stores from selling items on Sunday, even though it may affect persons practicing the Jewish religion, because they have as their Sabbath Saturday, and thus they wind up with two days they cannot run their stores, one prohibited by their religion, and one prohibited by the state. While the U.S. Constitution is not binding on Indian Nations, its guarantee of religious freedom may be looked to for guidance in Indian Civil Rights cases. No cases were found in Indian Nation decisions regarding freedom of religion under the Indian Civil Rights Act, so reference is made to the cases cited above. Therefore the court holds that the Port Gamble S'Klallam Tribe may enforce their nuisance ordinance, even though it may have an indirect effect on the practice of her religion by Appellant.
>
> Similarly, Appellant claims that the activities which were found to constitute a nuisance are religious activities protected by the American Indian Religious Freedom Act (AIRFA), Pub. L. 95-341, 92 Stat. 469, 42 U.S.C.

§1996. However, this Act concerns and is directed toward actions of the federal government, not actions by a tribal government or one of its entities. . . . It does not provide a private cause of action or procedures for enforcement.

Finally, when ICRA protections are raised in a sensitive context, such as protection of tribal religious practices against unwarranted intrusions, the Court is compelled to examine whether the Tribe's Constitution affords similar or greater protections. Article V — Bill of Rights, §3, Civil Liberties, states, in relevant part, that "members of the Community shall enjoy without hindrance, freedom of worship, . . . speech, . . . assembly, and association." This guarantee, however, does not mean that protection of religious activities is absolute. . . . [W]here the object of a law or regulation is not to prohibit or burden religious practices, or to coerce individuals into violating their beliefs, then a balancing of interests is not appropriate and individuals are not excused from complying with such law or regulation. Here, the purpose of the applicable law and regulation is to protect the health, safety and welfare of the community and its members, and the Appellant was given opportunity to comply or face the possibility of eviction.

Townsend, 6 NICS App. at 185-86.

C. FREEDOM OF SPEECH

Navajo Nation v. Crockett

Navajo Nation Supreme Court, No. SC-CV-14-94, 7 Navajo Rep. 237, 1995.NANN.0000006 (November 26, 1996)

Before Yazzie, Chief Justice, Cadman and Morris sitting by designation, Associate Justices.

The opinion of the court was delivered by: Cadman, Associate Justice.

This is an appeal of a jury verdict in favor of Navajo Nation entity employees and an order denying the Navajo Nation's motion for directed verdict.

I. Facts

Elvira Crockett, Lalora Charles Roy, and Charmaine Tso ("employees"), were employed by Navajo Agricultural Products Industry ("NAPI"), a Navajo Nation farming enterprise. The Economic Development Committee ("EDC") of the Navajo Nation Council is the oversight committee for NAPI. The NAPI Board of Directors reports management activity to the EDC. On November 17, 1992, the EDC held a meeting concerning NAPI. NAPI management was not informed of the meeting; however, the plaintiff employees attended.

The employees told of possible NAPI mismanagement and misconduct at the meeting. They also presented business documents to the EDC that were taken without NAPI management authorization. The EDC directed NAPI not to take retaliatory action against the employees for these actions.

Nevertheless, the employees were implicated, placed on indefinite administrative leave, and then terminated on December 23, 1992. . . . At trial, NAPI moved for a directed verdict which the district court denied. The jury

returned a general verdict in favor of the employees, awarding them monetary damages. . . .

The issues on appeal are the following: . . .

3. Whether the district court correctly denied NAPI's motion for directed verdict on the employees' freedom of speech and due process claims. . . .

III. Directed Verdict

A. Free Speech

NAPI argues that the district court erred in denying its motion for a directed verdict on the issue of free speech. Navajo common law is the law of preference in the courts of the Navajo Nation. *Navajo Nation v. Platero*, No. A-CR-01-91, slip op. at 6 (decided December 5, 1991). This Court applies Navajo common law to determine whether an individual's right to free speech has been violated. It provides that an individual has a fundamental right to express his or her mind by way of the spoken word and/or actions. As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.

The speech in this case involved 1) attending and speaking at the EDC meeting; 2) copying confidential documents; and 3) bringing the documents to the meeting. The parties debate whether the employees were fired for copying and removing the documents, a NAPI policy violation, or for attending and speaking at the meeting. The district court's determination of protected speech focused on the statements made and documents presented at the meeting. Thus, for purposes of review by this Court, the speech in question is statements made and documents presented by the employees at the EDC meeting.

Similar to the American system, however, there are Navajo traditional limitations on the content of speech. For example, on some occasions, a person is prohibited from making certain statements, and some statements of reciting oral traditions are prohibited during specific times of the year.

Furthermore, speech should be delivered with respect and honesty. This requirement arises from the concept of k e', which is the "glue" that creates and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and arguments be resolved by "talking things out." This process of "talking things out," called hoozhoojigo, allows each member of the group to cooperate and talk about how to resolve a problem. This requirement places another limitation on speech, which is that a disgruntled person must speak directly with the person's relative about his or her concerns before seeking other avenues of redress with strangers.

In the employment context, relationships are established according to the personnel policies, and other instruments. When an employee has a complaint about a supervisor, according to Navajo custom and tradition, he or she should first approach the supervisor and discuss the problem in a respectful manner. Moreover, under the Navajo common law concept of nalyeeh, the employee should not seek to correct the person by summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by

"talking things out." The employee should not seek a remedy from a stranger, but should rather explain the problem to the person or one of his or her relatives and ask that "things be put right." If this method proves unsuccessful, then the employee also has access to an internal employment grievance process. Even in this formal, modern process for addressing grievances, the traditional rules of respect, honesty, and kinship apply.

In situations where the complaint alleges employer mismanagement, distinct from internal personnel matters, an employee is entitled to consult others vested with the authority to hear such complaints, such as the organization's own committee, or an oversight of the Navajo Nation Council. An oversight committee is limited by 2 N.N.C. §191, "to legislation and policy decisions and shall not involve program administration. . . ." This removes most personnel complaints from the committees, and limits their review of director conduct to overall competence in management.

When discussing management concerns with the appropriate oversight committee, an employee must follow certain limitations. The employee must be respectful in his or her approach, and an initial inquiry with management to "talk things out" is encouraged. Second, the speech must involve matters of public concern and fall within the oversight authority of the committee. When an employee gives a statement before an official government committee, he or she speaks in a context that is inherently public in nature. This also includes any documents which the employee may distribute. Documents must be of a public nature and if they are confidential or restricted, then proper authorization for their distribution must be obtained.

An oversight committee often has to rely on information from sources other than those in positions of authority to ascertain the full picture. However, an employee is prohibited from raising internal personnel matters or other personal problems before a committee. The court should also consider whether the business is a government enterprise or private entity.

An employee must comply with these limitations when alleging that he or she was terminated or otherwise mistreated as a result of his or her speech. The employee must also show some nexus between the termination or other adverse employment action and the speech. One method for proving this element is in terms of time — whether the adverse employment action occurred shortly after the occurrence of the speech. That is, the employee must show his or her speech was a significant factor or motivation in the adverse employment action.

This Court finds the speech in question was "a matter of public concern." At the meeting, the employees expressed safety and environmental concerns, undue interference by the Bureau of Indian Affairs in P.L. 93-638 contracts, and allegations of misconduct and misfeasance on the part of NAPI management. The disclosure of misconduct or misfeasance by a government entity is a matter of public concern, as are questions of effectiveness and composition of the NAPI management board. Likewise, safety and environmental concerns have the potential to directly impact the general public, and therefore, are a matter of public interest. Members of the EDC had previously visited NAPI and invited the employees to contact them about their concerns with

management, in particular Appellee Crockett. The chairman of the EDC also advised Crockett to bring supporting documentation to the meeting.

Moreover, the employees were speaking before an official body of the Navajo Nation Council. When an employee gives a statement before an official government committee, he or she speaks in a context that is inherently public in nature.

The second point of inquiry is whether NAPI's interest in promoting the efficiency of the public services it performs through its employees outweighs the employees' right to free speech. Indeed, NAPI has an interest in ensuring compliance with office policies and to maintain order and control over its employees. The jury concluded, however, that the employees were not terminated for violations of NAPI policy, and NAPI does not contest this finding on appeal. Furthermore, the employees' attendance at the meeting did not result in any significant harm to NAPI. The documents distributed at the meeting were never made public or put in the "wrong hands," nor was there evidence of disruption or disharmony in the office as a result. NAPI's interest to not disclose demoralizing or disruptive information is not an adequate interest to outweigh an individual's right to free speech.

Based on the foregoing, this Court finds that the district court did not err in its decision that the speech was a matter of public concern. The decision of the district court that the employees' speech was protected is affirmed. . . .

NOTES*

1. Many tribal constitutions guarantee free speech rights in varying forms. Some tribes guarantee free speech even without the "state action" requirement imposed by the First Amendment's language, "Congress shall make no law. . . ." The constitution of the Confederated Tribes of Warm Springs Reservation of Oregon provides, "[a]ll members of the Confederated Tribes may enjoy without hindrance, freedom of worship, speech, press and assembly." Confederated Tribes of Warm Springs Reservation of Oregon Const. art. VII, §2. The Comanche Indian Tribe's constitution has nearly identical language: "All members of the Comanche Indian Tribe shall enjoy without hindrance freedom of worship, conscience, speech, press, assembly and association." Comanche Indian Tribe of Oklahoma Const. art. X, §1. The Sisseton-Wahpeton Sioux Tribe's constitution similarly states, "[N]o person shall be denied freedom of conscience, speech, association, or assembly. . . ." Sisseton-Wahpeton Sioux Tribe, South Dakota Const. and Bylaws art. IX, §1. Some tribes limit this protection to tribal members. The Blackfeet Constitution states, "All members of the tribe may enjoy without hindrance freedom of worship, conscience, speech, press, assembly, and association." Blackfeet Tribe of the Blackfeet Indian Reservation of Montana Const. and Bylaws art. VIII, §3.

*Much of the material in the notes first appeared in Matthew L. M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 Kan. J.L. & Pub. Pol'y 525, 536-44 (2005).

Other tribal constitutions regulate only governmental conduct that would otherwise restrict speech. The Chickasaw Constitution provides, "Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech, or of the press." CHICKASAW NATION CONST. art. IV, §4. Others substantially mirror the provisions contained in the Indian Civil Rights Act, while other tribes adopt ICRA's provisions. Many tribal constitutions do not have constitutional protections relating to freedom of speech at all.

2. Tribal courts have generally interpreted the provisions of the Indian Civil Rights Act in accordance with the method recommended in 1969 by the leading commentary on the Act: "Unless the record shows a willingness to modify tribal life wherever necessary to impose ordinary constitutional standards, courts should take this legislation as a mandate to interpret statutory standards within the framework of tribal life." Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1355 (1969). One tribal court follows a principle that, where no tribal "custom or tradition has been argued to be implicated . . . , [tribal courts] will look to general U.S. constitutional principles, as articulated by federal and [state] courts, for guidance. . . ." *Louchart v. Mashantucket Pequot Gaming Enter.*, 27 Indian L. Rep. 6176, 6179 (Mashantucket Pequot Tribal Ct. 1999).

The most critical element that tends to guide tribal court analysis of fundamental individual rights is whether the activity at issue is a distinctly Anglo-American construct versus a traditional or cultural construct. For example, tribal courts are likely to apply federal constitutional law to decide a wrongful discharge claim or an unlawful search and seizure claim as opposed to a tribal membership claim.

3. Since most free speech claims heard in tribal courts arise during the course of employment or in the exercise of political rights, tribal courts most often apply federal law as persuasive authority to decide these cases. In *LaPorte v. Fletcher*, 2004 WL 5748553 (Little River Band of Ottawa Indians Tribal Ct. 2004), *aff'd*, 2005 WL 6344557 (Little River Band of Ottawa Indians Court of Appeals 2005), the tribal court rejected a freedom of speech challenge to an employee's demotion from chief of police and his challenge to a tribal statute that prohibited employees from making statements to the media regarding issues under negotiation. The employee as chief of police had allegedly stated to a local newspaper that the tribe had entered into an agreement with a local sheriff's department when in fact the tribe had not. Relying on several federal cases, the court upheld the tribal statute and the demotion.

4. In instances in which an individual's speech rights as a candidate for tribal election are implicated, at least one court applied a sliding-scale standard of review, choosing to apply intermediate scrutiny where the tribe imposed nondiscriminatory restrictions on candidate eligibility to avoid a chaotic tribal caucus process. *See Rave v. Reynolds*, 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995) ("*Rave I*"), *aff'd in part and rev'd in part*, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996) ("*Rave II*").

5. Tribal courts apply a reduced standard of review on restrictions on the behavior of elected tribal leaders. In *Brandon v. Tribal Council for the*

Confederated Tribes of the Grand Ronde Community of Oregon, 18 Indian L. Rep. 6139 (Confederated Tribes of the Grand Ronde Community Tribal Ct. 1991), the tribal council suspended for three months one tribal council member who had made a "vulgar" statement during a public meeting, in accordance with a tribal statute that prohibited tribal council members from behaving in a manner that would bring discredit or disrespect to the tribe. The court then found a "compelling" reason for the statute, based in part on tribal traditions:

> The Grand Ronde Tribe has compelling reasons to have interpreted the ordinance so as to limit the vulgar language that may be uttered by councilmembers [sic] in public. . . . [T]he Tribe has the right to expect its councilmembers to conduct themselves in public with dignity and respect, and refrain from using words or phrases that a normal tribal member is privileged to use. Secondly, the type of language used by Mr. Brandon was arguably "fighting words" that were likely to create a violent or hostile situation, as indeed was created here. The tribe has a right to expect its tribal councilmembers to refrain from using such language so as to avoid fights or other altercations. Finally, the Grand Ronde Tribe has a vested interest in protecting its reputation throughout the community.

Id. at 6141.

The *Brandon* court created a doctrine of free speech that applied only to the tribe's elected officials. A tribe's reputation in business and intergovernmental negotiation is directly related to the quality and behavior of its elected leaders. As Professor Mark Rosen noted, the court appeared to be adopting an analogue of the federal doctrine that validly restricts the expression of federal employees. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 554 (2000). But the tribal court issued a decision that appeared to strongly imply the critical role that tribal leaders play in representing the tribe in tribal meetings, in government-to-government negotiations, and in business relationships.

6. The factual converse of the *Brandon* decision is likely *Flute v. Labelle* (Sisseton-Wahpeton Oyate Court, May 14, 2004). There, an elected tribal leader who was the subject of an unflattering letter to the editor of the local newspaper sued the author of the letter for defamation. The tribal court applied federal and South Dakota constitutional law in analogue and found that the plaintiff's petition met the requirements of libel per quod. Since the plaintiff could not show actual damages, the court awarded only nominal damages and ordered the defendant to "write a retraction letter to the Tribal newspaper correcting the false impression she left with readers. . . ." The court noted the political history of the defendant in particular, stating that she had been "one of many persons who several years ago engaged in a protest of tribal council action by occupying the Tribal Council chambers after a Council meeting ended." In short, the court applied federal and state common law in analogue that established the defendant's culpability, but applied that law to fashion a tribe-specific remedy that severely limited the defendant's liability.

7. Some tribal courts provide additional tribe-specific reasons for restricting or otherwise rewarding speech. In *Garcia v. Greendeer-Lee*, 30 Indian L. Rep. 6097 (Ho-Chunk Supreme Court 2003), the Ho-Chunk Supreme Court rejected a claim by a nonmember employee of the Ho-Chunk Nation that the tribe's personnel policies violated her right to choose her own religion. The employee, a Jehovah's Witness, sought paid leave for the time she attended a religious event. The tribe's Waksig Wogsa Leave Policy allowed for paid leave for attendance of certain tribe-specific religious events, but only unpaid leave for other events. The court majority found that the employee was not prohibited from participating in her religion and rejected the claim.

D. SPECIAL PROBLEMS OF CIVIL RIGHTS IN INDIAN COUNTRY

1. BANISHMENT/EXCLUSION

Banishment as Cultural Justice in Contemporary Tribal Legal Systems

Patrice H. Kunesh, 37 N.M. L. Rev. 85, 91-100 (2007)

. . .

II. Cultural and Legal Underpinnings of Banishment

A. Illuminating the Modern with the Primitive: The Cultural Backdrop

. . . Historically, Indian tribes have used banishment sparingly and as a last resort after exhausting customary and traditional methods of social discipline and sanction. In the past, most Indian cultures did not have the formal penal systems that exist in many tribal legal systems today. Rather, tribal communities typically addressed disputes, social transgressions, and serious offenses according to a complex system of social, cultural, and political relationships. . . .

Tribes also tend to engage respected community members, such as elders, to peacefully resolve intra-tribal disputes. . . . Some tribal peacemaking customs and traditions involve a "talking to" where a tribal elder or council member speaks to the individual about the tribe's values and beliefs and the consequences of misbehavior or misconduct. The Elder or Councilor would admonish the person against harboring vengeful feelings and encourage the restoration of harmonious relationships within the community.

Banishment was used as a last resort if all other efforts of the family and community failed. A decision to banish a tribal member was arrived at through extensive discussions and testimony about the individual's conduct and character. These discussions usually involved the governing council, the elders' council, or the entire community. In due course, a consensus was arrived at addressing the particular circumstances, the gravity of the offense,

and the terms of the banishment. Banishment has had two main focal points — the community and the individual. Serious transgressions have the potential to threaten the cohesiveness of the community, weaken the tribe's authority and political structure, and encourage other deviant or harmful behavior. Through banishment, the tribe fulfills its duty to act justly on behalf of the people as a whole. The banishment order is directed to the individual, addresses the particular conduct that has compromised the community's safety and welfare, and encourages conformity with the tribe's social and cultural standards. . . .

Like historical banishment decisions, modern banishment orders often impose conditions on the individual's exclusion from the tribe. An order may, for example, set a definite time period for the banishment sentence, require restitution for the wrongdoing, or even mandate mental health assistance. If an individual has vandalized or stolen property, an order may require the individual to repair or replace the property or compensate the owner. In the event of a personal injury or insult, an order may restrict the person's presence in the community, similar to a restraining order. If, however, an individual has committed a grievous offense against another individual or the tribe, something completely beyond the norms and standards of the tribe (such as dealing drugs, sexual assault, or murder), an order may require his or her complete expulsion from tribal lands as well as prohibit the community from having any contact with the banished person. With the gradual imposition of more severe sanctions, the individual comes to understand that his or her conduct is offensive and adherence to the tribe's social norms is expected. Failing this inducement, the individual faces the dire consequences of living outside of the community.

The histories of three tribes — the Cheyenne, the Navajo, and the Seneca — exemplify this cultural practice of conformity through social pressure and banishment. Under the laws and customs of each of these tribes, banishment is rarely used and is imposed only when all other customary measures fail to protect the community or reform the individual.

1. The Cheyenne Way: Law-Ways

. . . Governed primarily by the Great Council with significant collaboration from the military societies, the Cheyenne resolved most of their disputes amenably through consensus. This practice had several remarkable qualities: it promoted "deference to another's judgment," concluded the dispute with firm finality, and established a harmonious relationship among the disputants.

. . .

The Cheyenne did not distinguish between a civil or private wrong and a criminal or public wrong; any wrongdoing concerned the whole community. A distinction was made, however, in determining the sanction for the particular offense in question. For example, an incorrigible tribal member was severely punished by the soldier society and then rehabilitated back into the tribe by another family or tribal member. In addition, violations of hunting rules were punished by chastisement and ostracism and then resolved through rehabilitation . . . , whereas murder was punished through

banishment. . . . Other offenses, such as disobedience of the society's orders, abortion, theft, rape, incest, or abuse of power warranted reprimand, restitution, ostracism, banishment, or corporal punishment.

In addition to conventional punitive measures, "positive sanctions were also lavishly used" in shaping the character of tribal members. Successful acts of individual accomplishment and virtue were praised and publicly acclaimed. . . . Sharing and cooperation engendered harmonious relationships and spiritual and cultural beliefs were reinforced.

> [W]ealth was distributed and parents basked in the pleasures of largess and altruism, as well as of publicity. Reciprocity balanced the relationships. So, too, when young men followed the advice of their fathers in offering a good buffalo-kill to an old shaman, the shaman went to the carcass, and in accepting it performed a short sanctifying ritual in which he blessed the boy and his family. Returning through camp, he called aloud that he had received a buffalo gift and had performed the ceremony. Here too, the youth received public credit. [K.N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence 247 (1941).]

These positive sanctions reinforced community values among their youth.

The Cheyenne, a nation united around the family, guided in all aspects of tribal life by their traditions and ceremonies, have struggled against powerful forces that would corrode, if not destroy, their identity and cultural practices. Recently, the Dog Soldiers of the Crazy Dog Society and the Kit Fox Society convened a council and decided to banish an Indian Health Services doctor for performing religious ceremonies on tribal lands, actions that the societies considered to be "a sacrilege and desecration to [their] culture." The doctor, a non-Indian, "was driven to the reservation line by the societies and informed he was banished from the reservation." When the banishment was later ruled illegal by the Northern Cheyenne Tribal Court, the doctor returned to work on the reservation. The Tribe's modern formal judicial proceedings prevailed over the old Cheyenne way.

2. The Navajo Way: beehaz'aanii

The Navajo, like many other tribes, have been culturally averse to formal systems of punishment. Indeed, "[t]he Navajo Nation Supreme Court has acknowledged that 'actual coercion or punishment were actions of last resort in Navajo common law.'" Traditional Navajo law made no distinction between civil and criminal acts; both "were usually dealt with in the same fashion, by requiring restitution to the victim by the offender." In either case, the main goals of punishment "were to put the victim in the position he or she was [in] before the offense by a money payment, punish in a visible way [by] requiring extra payments to the victim or the victim's family, and give a visible sign to the community that [the] wrong was punished."

Social order within the Navajo Nation is maintained by time-honored traditions and customs and also by tribal customary law, which have all been incorporated into the Navajo Tribal Code. . . . [The] traditional way of resolving disputes within the Navajo community and conciliating problems among members of the community, "a form of local mediation," was formally institutionalized into the Navajo Peacemakers Court. Peacemakers, or naat'aanii,

are selected by parties attempting to resolve their disputes through the Peacemaker Court, and are often "community or religious leader[s] or respected elder[s]." The Peacemaker's role is to elicit discussion among all interested parties, including family members, apply Navajo customs and values, and attempt to reach a settlement agreeable to the parties involved in the dispute.

While restitution was the traditional Navajo remedy for almost all offenses, banishment, also referred to as shunning, was an acceptable sanction under Navajo customary law. " 'Shunning,' or the deliberate ostracizing of an offender by the community, was a traditional Navajo method of dealing with 'those who repeatedly offended or flaunted the will of the community.' " "Banishment, therefore, was essentially an extension of a time-honored Navajo practice" reserved for "a repeat offender, or one who committed a particularly heinous crime." Once banished, the individual was culturally excluded from the tribal community. Without significant social and financial support from family and relatives, it would be difficult, if not impossible, to continue living on the reservation.

3. The Seneca Way: Gayanashagowa

Peacemaking traditions were also vital to the Seneca Nation of Indians, one of the Six Nations of the Iroquois Confederacy, or Haudenosaunee, of New York. . . .

The Haudenosaunee peacemaking law and tradition was so integrated into the community that the "Seneca society was afflicted with little interpersonal conflict and transgressions of community norms. Individual behavior was governed by a strong unwritten social code that relied upon social and psychological sanctions, such as ridicule and embarrassment, as the primary methods of enforcement." The Seneca social structure and behavioral norms were maintained "by oral tradition supported by a sense of duty, a fear of gossip, and a dread fear of retaliatory witchcraft."

As in the Navajo culture, formal punishment was disfavored in Seneca society; social pressure and mutual consent corrected nearly all deviant behavior and resolved most disputes. However, "extreme violence, such as murder or the practice of witchcraft, were punishable by death or by restitution to the victim's family. If the wrongdoer repented, he could offer goods and services, and the matter would be resolved." Traditionally, banishment (*i.e.*, "complete ostracism") from the Seneca society was rarely needed because public indignation was considered to be a sufficiently severe punishment. . . .

4. Common Themes across Tribal Boundaries

The historical traditions and customs of the Cheyenne, the Navajo, and the Seneca share several common themes. These tribes were markedly cohesive societies, unified around their families and dependent on one another for their sustenance and survival. Families and relatives shared mutual responsibility for instructing their youth, observing ceremonies, and inculcating respect for the tribe's culture and values. Deviant or defiant behavior within their communities, outside the bounds of customarily accepted conduct, could potentially threaten the tribe's unity and ultimately its ability to survive. . . .

a. Due Process Challenges

Monestersky v. Hopi Tribe

Hopi Tribal Appellate Court, Case No. 01AP000015, 2002.NAHT.0000003
(June 27, 2002)

Before, Sekaquaptewa, Chief Justice, and Abbey and Humetewa, Justices

Brief Statement of Facts

This matter came before the Hopi trial court as an appeal from an order of exclusion issued by the Chairman of the Hopi Tribe (Appellee) pursuant to Hopi Tribal Ordinance 46. The trial court affirmed the Appellee's administrative decision to exclude Appellant from the Hopi Reservation.

Appellant asserts that Ordinance 46 is unconstitutional. Appellant argues that the decision-making process of her exclusion denied her due process and therefore violated her civil rights.

Discussion

. . .

III. The Hopi Tribe Has an Inherent Power to Exclude Nonmembers

It is well settled that the Hopi Tribe, and all Indian tribal governments, have the inherent power to exclude nonmembers as an exercise of their sovereign power in order to protect the health and safety of tribal members. . . . Therefore, by enacting Ordinance 46, the Hopi Tribal Council has acted to prescribe its authority to "provide by ordinance for removal or exclusion from the jurisdiction of any nonmembers whose presence may be harmful to the members of the Hopi Tribe." Constitution and By-Laws of the Hopi Tribe, Article VI, section 1 (i).

. . . Ordinance 46 first explains that the Hopi Reservation is closed and shall be for the exclusive use and benefit of members of the Hopi Indian Tribe. Closure "means that entry into and use of the Hopi Indian Reservation is restricted to members of the Hopi Indian Tribe and those persons authorized to be upon the Hopi Reservation in accordance with Hopi and federal laws and regulations." 46.01.06(a).

In addition, Ordinance 46 provides the process for the exclusion and removal of nonmembers in order to protect the health, safety, economic security and general welfare of the Hopi people. The ordinance allows the Chairman to initiate the exclusion process for any nonmember for certain enumerated reasons.

Persons subject to exclusion are any nonmember:

(a) who enters or remains upon a closed portion of the Hopi Indian Reservation in violation of this Ordinance; or
(b) who violates any other Ordinance or law of the Hopi Indian Tribe or any Hopi Village; or

(c) who violates any law of the United States; or
(d) who engages in conduct that would be a violation of the criminal laws of the Hopi Indian Tribe if that nonmember were subject to the criminal laws of the Hopi Indian Tribe.

(46.02.01.) Nonmembers falling into one of the above categories "shall be deemed a person whose presence on the Hopi Indian Reservation may be harmful to members of the Hopi Indian Tribe. All such persons may be excluded and removed from the Hopi Indian Reservation." *Id.* . . .

IV. Excluded Nonmembers Must Demonstrate a Protected Liberty or Property Interest in Order to Be Entitled to Due Process

Appellant asserts that she was denied her due process rights in the exclusion proceedings against her. . . . Under the Indian Civil Rights Act's (ICRA) due process clause, the tribal government may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process." In exclusion cases, the excluded would have to demonstrate either liberty or property interests that were significantly restricted by exclusion before due process would be required.

A. Appellant Has Not Demonstrated a Restriction of Her Liberty Interests

Federal courts' reviews of tribal decisions resulting in the exclusion of nonmembers have consistently held that nonmembers do not suffer a severe restriction on liberty by being excluded from tribal lands. . . . The remedy for any alleged ICRA violation or allegation of a restriction on personal liberty is limited to review under a writ of habeas corpus. Habeas corpus review is available to a person who is subject to detention. A potential issue, therefore, is whether "exclusion" constitutes detention.

In *Poodry v. Tonawanda Band of Seneca Indians*, tribal members were banished, stripped of their lands, their names, their enrollment status, and their Indian citizenship after being charged with treason. 85 F.3d 874 (2d Cir. 1996). The court found that his was a restriction on their liberty interests. While *Poodry* implied that exclusion in this case was analogous to detention, the facts of the present case are significantly different. Here, the Appellate is a non-Indian. Therefore, she can have no claim, legal or otherwise, to land within the Hopi Reservation.

In addition, those members excluded in *Poodry* were able to demonstrate that they had liberty interests on the reservation. *Poodry* implies that the exclusion as detention argument is limited to tribal members, or nonmembers who can demonstrate a significant liberty or property interest on the reservation. Appellant's argument that she has befriended many members of the Hopi Tribe and would suffer if not permitted to continue her association with those tribal members does not support a finding of restraint on personal liberty. Moreover, Appellant has no standing to assert the perceived third-party rights of any tribal member whom she claims would be detrimentally affected were she not permitted to remain on the Hopi Reservation.

B. Appellant Has Not Demonstrated a Restraint of Her Property Interests

Due process requirements are also triggered when a person's property interests are at stake. . . . However, these due process requirements are different from those required in cases where liberty is at stake. When personal liberty is threatened, and a person is being detained, they are entitled to a jury trial, representation by competent counsel, and other due process requirements. With property interests, the due process requirements are less stringent. Basic due process rights such as proper notice and an opportunity to defend oneself are included, but there is no fundamental right to a jury trial, for example.

When a party is the subject of a non-criminal investigation, where liberty is not at stake, but the party's property is at stake, that party is entitled to due process, albeit less restrictive than when liberty is at issue. . . . Appellant argues that she has personal property interests that will be jeopardized if she is required to leave the Hopi Reservation. She asserts that she owns several head of sheep, and that that ownership alone constitutes a property interest. This Court disagrees.

If Appellant's property were real property — land, in other words — she may have been able to show that she had property interests that would be threatened were she required to leave the Reservation. However, Appellant owns no land, and no property affixed to any land. This point is critical because, as a non-member, she can never qualify for land ownership or use within the Hopi Reservation. Thus, although her alleged sheep require grazing, they are tangible objects which may be removed from the land they now occupy.

Appellant's property interest in her sheep is in no way detrimentally harmed. She may either take them with her when she leaves the Hopi Reservation, or she may sell them at fair market value. It is the opinion of this Court that owning sheep does not bestow upon Appellant the type of property interests protected by the due process requirements set forth in the Indian Civil Rights Act and the Constitution of the United States. . . .

C. Ordinance 46 Satisfies Minimum Due Process Requirements

Pursuant to Ordinance 46, Appellant was given adequate notice of the proposal to exclude. She was also given the opportunity to respond in writing, and to have an administrative hearing. The process was civil in nature, and the inapplicability of Hopi criminal law to the Appellant was acknowledged. Appellant was not tried for criminal offenses, nor was she subjected to potential detention.

Ordinance 46 provides that a person subject to exclusion will have notice, a hearing, the right to present and examine witnesses, the right to be represented by counsel, and the right to present evidence as to why exclusion should not be ordered. These elements of due process satisfy what would be required in a civil administrative hearing where a party's property interests are at stake.

Due process requirements are triggered when a person's liberty or property interests are at stake. When a person's liberty is restricted, he or she is entitled to high standards. At no point was Appellant's liberty in jeopardy. . . .

Conclusion

The Hopi Tribal Court had jurisdiction to review the order of exclusion at issue on this case. The lower court found that there were no due process violations during Appellant's exclusion process. Therefore, it is hereby ordered that the judgment of the trial court, affirming Appellee's order excluding Appellant from the Hopi Reservation, is affirmed.

NOTES

1. In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir.), *cert. denied*, 519 U.S. 1041 (1996), the court held that banished members of the Tonawanda Band could utilize the federal writ of habeas corpus to challenge their banishment. The petitioners in that case alleged they had received this notice:

> It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return.
>
> According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason.
>
> Your actions to overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of Seneca Nation, and further by becoming a member of the Interim General Council, are considered treason. Therefore, banishment is required.
>
> According to the customs and usage of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members.
>
> YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.

Poodry, 85 F.3d at 878.

According to Jill Tompkins, professor and tribal judge,

> *Poodry* involved a dispute on the Tonawanda Reservation concerning alleged misconduct by certain members of the Tonawanda Council of Chiefs. The alleged misconduct included misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from tribal business affairs and burning tribal records. The plaintiffs formed an Interim General Council of the Tonawanda Band. The plaintiffs were subsequently confronted by a large group of tribal members and presented with a document notifying them that they had committed treason and were banished from the reservation. The individuals serving the notice attempted without success "to take petitioners . . . into custody and eject them from the reservation."
>
> It was undisputed that there was not tribal forum available for review of the actions of the members of the Council of Chiefs. . . .

Jill E. Tompkins, *Traditional Tribal Justice Practices and the Indian Civil Rights Act: The Tension between Tribal Autonomy and Individual Rights*

18-19, Materials published as part of the 16th Annual University of Washington Indian Law Symposium (Sept. 18-19, 2003).

Tompkins argued:

> If the view of the *Poodry* majority is adopted by other federal courts, arguments that tribal tradition and custom should inform the decision-making process will fall on deaf ears. In essence, tribes may again confront the attitude that ICRA is a federal statute, therefore federal precedents and standards should apply. . . .
>
> Tribes also need to consider whether traditional punishments are being decided upon for traditional reasons and in the most traditional manner. Historically, banishments were rare and done only in the more dire of circumstances. Present day political conflict fuels many of the exclusion and banishment decisions. . . .

Id. at 23.

2. Some tribes have outlawed banishment. In *Passamaquoddy Tribe v. Francis*, 2000.NAPA.0000001 (Passamaquoddy Tribal Appellate Court 2000), the court rejected the merits of an appeal by a tribal member sentenced to probation and who was required to seek permission before entering the reservation, despite a provision in the tribal constitution prohibiting the use of banishment. "Article IX, Section 3. Article IV, Section 2 of the Constitution provides that, 'Notwithstanding any provision of this Constitution, the government of the Pleasant Point Reservation shall have no power of banishment over tribal members.'" *Francis*, at ¶17. The court further wrote:

> Clearly, the permission requirement contained in the Tribal Court's conditions of probation does not come anywhere close to [the] severity and breadth of the banishment order at issue in *Poodry*. The burden was on Francis to demonstrate that the condition of probation requiring him to receive permission from the probation officer before coming onto the Pleasant Point constituted a "banishment"; the Court finds that he failed to meet his burden.
>
> Even if the condition of probation did constitute banishment, Francis voluntarily and knowingly accepted the condition as a means of avoiding prolonged incarceration for his multiple convictions. . . .

Id. at ¶¶26-27.

b. Equal Protection Challenges

Burns Paiute Indian Tribe v. Dick

Burns Paiute Tribal Court of Appeals, Nos. CV-15-93, CV-16-93, CV-17-93, 3 NICS App. 281 (February 14, 1994)

Roe, Chief Justice: . . .

Appellants were excluded from the Burns Paiute Indian Reservation following a joint hearing before the Burns Paiute Tribal Court. The trial court ordered the Appellants excluded from the Burns Paiute Indian

Reservation finding each Appellant violated the following sections of the tribe's Exclusion Ordinance which provides that;

> Any person, except a tribal member, may be excluded from the Burns Paiute Indian Reservation for committing any of the following acts:
>
> a. the violation of any tribal law or ordinance;
>
> b. the violation of any federal or state law; . . .
>
> e. any other act that harms the health, welfare, safety, morals, image, cultural traditions, or spirit of the Burns Paiute Tribe.

The trial court found that Appellants, who were members of the Burns Paiute Tribe, had violated tribal laws or ordinances, both traffic and criminal. . . . The Appellants had excessively used alcohol although they were not arrested and their conduct after drinking alcohol was judged harmful to the health, welfare, safety and image of the Burns Paiute Tribe. The trial judge ordered them excluded from the reservation. The judge . . . directed [tribal] officers to take the Appellants to their homes to allow the Appellants fifteen minutes to gather what personal effects they could take and then escort them off the reservation.

The Appellants are Indian men who have lived on the Burns Paiute Reservation between two and seven years. They each live with a woman who is an enrolled member of the tribe. Two of the Appellants are married and one lives as man and wife. One of the Appellants has fathered a child who is an enrolled member of the tribe. Another Appellant is the stepfather of his wife's three children, and considered to be the children's psychological father. The children are enrolled members of the tribe, whom he supports and treats as his own. All of the Appellants have also established close ties with other members of the Burns Paiute Indian community. They are helpful to and voluntarily perform various chores for others in the community. They drive their neighbors to town, take them shopping, cut wood, cut and trim their lawns and perform other chores as needed. They are all employed doing seasonal work for the Forest Service. . . .

Appellants claim that they are arbitrarily singled out for exclusion, that other nonenrolled persons who have criminal convictions, frequent the reservation and no effort has been made to exclude them. They claim this is selective enforcement of the law in violation of their right to equal protection as provided by 25 USCA Section 1302 (8) and Article 8, Section (h) of the Burns Paiute Constitution.

This Court finds that in order for Appellants to show selective or discriminatory enforcement of the exclusion ordinance they must establish (1) that the respondent has not excluded others similarly situated for similar conduct and (2) the decision to exclude was based upon bad faith, or on impermissible grounds as, for example race, religion or the exercise of other constitutional rights.

The Appellants provided criminal records of non-members who frequent the reservation against whom petitions for exclusion have not been filed. They offered no evidence that the decision to exclude them was based on impermissible grounds or bad faith in violation of their rights under the Indian Civil Rights Act of 1968, 25 USCA 1302 (hereinafter ICRA).

The due process clause of the Indian Civil Rights Act of 1968 protects individual rights including "liberty." One aspect of liberty is the right to associate with persons of one's choice. . . . The Court of Appeals finds that the relationship between the Appellants and their wives and children are highly personal relationships and protected under the liberty provision of the due process clause of the ICRA. The trial court committed reversible error by ordering Appellants excluded from the reservation without considering these relationships and the serious, resulting breakup of the Appellants families and the effect on the tribal community.

This Court finds that the Tribe's exclusion ordinance was not sufficiently explicit to inform those who are subject to it what conduct will render them liable to its penalties. The unfairness of failure to notify potential defendants of the law's scope and reach can constitute a denial of due process. . . .

The Court of Appeals also finds that the exclusion ordinance is too broadly written. Under its provisions a non-tribal member could be excluded for committing a parking violation on the reservation or having committed an infraction in Florida. Sections (a) and (b). There is no rational basis for these sections to be so broadly written. A law is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. . . .

The Appellees argue that the ordinance could be interpreted in that manner but it was not the tribe's policy to do so. Counsel for Appellee was unable to answer the Court's query regarding what notice to a non-member would advise him/her or what conduct would make him/her a candidate for exclusion. . . .

The Burns Paiute Exclusion Ordinance as applied to Appellants is unconstitutionally overbroad [and] in violation of the equal protection and due process clauses of the ICRA.

NOTE

The fact pattern in *Penn v. United States*, 335 F.3d 786 (8th Cir. 2003), a federal court challenge to a tribal court exclusion order, is as compelling as it is troubling:

> Margaret Penn is one-eighth Turtle Mountain Chippewa Indian but is not enrolled in any Indian tribe, thus her status is that of a non-Indian. At all times relevant to this action Penn lived on land that was within the Standing Rock Sioux Indian Reservation but owned in fee by a non-Indian rancher. Penn is a lawyer who was chief prosecutor on the reservation until she was fired by tribal officials in August 1996. After her termination, Penn began working for Tender Hearts Against Family Violence, a nonprofit corporation serving the reservation. While employed at Tender Hearts, Penn filed a wrongful termination suit in tribal court against the tribe, the tribal chairman, the tribal council members, the chief judge, and others. In July 1998, recently terminated employees and members of the board of directors coordinated to oust Tender Hearts Director Kathy Smith. Penn was appointed by and a supporter of Smith. On July 24, 1998, Faith Taken Alive, the co-director of Tender Hearts, petitioned the Standing Rock Tribal Court for a "Traditional Custom Restraining Order." The petition alleged that Penn had a gun, had made threats against

> tribal officials, and had filed a multimillion dollar lawsuit against the tribe. Without holding a hearing and relying solely on the uncorroborated, unsworn petition, Judge Isaac Dog Eagle issued a temporary restraining order excluding Penn from the reservation for thirty days. The July 24, 1998, order directed "any Police Officer" to "execute the Order of this Court and escort Margaret Penn from the Standing Rock Sioux Indian reservation boundaries." Although the order stated that a hearing would be scheduled at the conclusion of the thirty days, no hearing was ever held.
>
> Bureau of Indian Affairs (BIA) Captain John Vettleson received the order from the tribal court on July 24. . . . Captain Vettleson consulted with BIA Standing Rock Superintendent Larry Bodin and BIA District Commander Richard Armstrong regarding the legality of the order. Each advised him to serve the order. . . . Captain Vettleson . . . then followed Penn as she drove her vehicle to the reservation boundary.

Id. at 787-88. Penn's federal claims failed. But what about an equal protection claim in tribal court? Or a due process claim? Would Ms. Penn have a valid claim under these facts if she sued under the Indian Civil Rights Act?

2. THE FREEDMEN

Allen v. Cherokee Nation Tribal Council

Cherokee Nation Judicial Appeals Tribunal, No. JAT-04-09, 6 Am. Tribal Law 18 (March 7, 2006)

Stacy L. Leeds, Justice.

Petitioner Lucy Allen is a descendant of individuals listed on the Dawes Commission Rolls as "Cherokee Freedmen." To become a tribal member under the current legislation, she must prove she is "Cherokee by blood." She asks this Court to declare 11 C.N.C.A. §12 unconstitutional because it is more restrictive than the membership criteria set forth in Article III of the 1975 Constitution. . . .

The Power of the Cherokee People

The Cherokee citizenry has the ultimate authority to define tribal citizenship. When they adopted the 1975 Constitution, they did not limit membership to people who possess Cherokee blood. Instead, they extended membership to all the people who were "citizens" of the Cherokee Nation as listed on the Dawes Commission Rolls.

The Constitution could be amended to require that all tribal members possess Cherokee blood. The people could also choose to set a minimum Cherokee blood quantum. However, if the Cherokee people wish to limit tribal citizenship, and such limitation would terminate the preexisting citizenship of even one Cherokee citizen, then it must be done in the open. It cannot be accomplished through silence.

The Council lacks the power to redefine tribal membership absent a constitutional amendment. The Council is empowered to enact enrollment procedures, but those laws must be consistent with the 1975 Constitution. The current legislation is contrary to the plain language of the 1975 Constitution.

The 1975 Cherokee Constitution

Article III of the 1975 Constitution defines eligibility for tribal membership very broadly:

> All members of the Cherokee Nation must be *citizens* as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants. ([E]mphasis added.)

There is simply no "by blood" requirement in Article III. There is no ambiguity to resolve. The words "by blood" or "Cherokee by blood" do not appear.

Article III only requires proof of citizenship by referencing the "Dawes Commission Rolls." Article III does not exclude anyone who is listed on the Dawes Commission Rolls.

It is important to note that the phrase "Dawes Commission Rolls" is plural. While the overwhelming majority of people on the Dawes rolls are Cherokee by blood, the rolls also include other people who the Cherokee Nation recognized as citizens at the time the Dawes rolls were compiled. Membership is not limited, in Article III, to those individuals only appearing on the "Cherokee by blood" pages of the Dawes rolls. . . .

If the Freedmen's citizenship rights existed on the very night before the 1975 Constitution was approved, then they must necessarily survive today. These rights were not terminated by the adoption of the 1975 Constitution. In fact, the 1975 Constitution affirms these rights by linking citizenship to one single document: the Dawes Commission Rolls.

The Disputed Legislation

The disputed legislation sets forth "membership requirements" in 11 C.N.C.A. §12. These "membership requirements" are more restrictive than the "membership" provision of Article III. 11 C.N.C.A. §12 states:

> A. Tribal membership is derived only through proof of Cherokee blood based on the Final Rolls.
>
> B. The Registrar will issue tribal membership to a person who can prove that he or she is an original enrollee listed on the Final Rolls by blood or who can prove . . . at least one direct ancestor listed by blood on the Final Rolls.

This legislation adds new and more restrictive membership requirements than those found in the Constitution. The legislation in subsection (A) states that "tribal membership is derived only through proof of Cherokee blood." This is contrary to the plain language of the Constitution.

In subsection (B), the legislation requires proof of lineage "by blood." This too is contrary to the plain language of Article III, which lacks any "blood" requirement whatsoever. The Constitution only requires proof of lineage from a "citizen." It does not require proof of Cherokee or Indian blood.

Providing proof of Cherokee blood is clearly one way to become a member. It is not the only way to prove membership. In fact, Article III expressly mentions the Shawnee and Delaware, who possess some Indian blood, but not

Cherokee blood. The Shawnee and Delaware are not citizens "by blood" of the Cherokee Nation.

Article III expressly includes all people[] who can prove that they were "citizens" on the Dawes Commission Rolls with no mention (one way or the other) about Cherokee or Indian blood quantum. The Cherokee Freedmen, the Shawnee and Delaware were all citizens at the time the Dawes rolls were finalized and they all continue as citizens to this day. . . .

The Dawes Commission Rolls

The Dawes Commission Rolls were not created by the federal government from scratch. When the Dawes Commission compiled the rolls, they referred to previous Cherokee Nation census records which also included a broad citizenry. Most of the people listed on the Dawes Rolls will also appear on the Cherokee Nation's own tribally controlled censuses that pre-date the Dawes rolls. The Cherokee Nation's own censuses included Freedmen in addition to "native Cherokees," intermarried whites, and Indians of other tribes, all of whom were recognized by the Cherokee Nation as citizens. The 1975 Constitution makes no reference to these tribal rolls, but instead, relies on the Dawes Rolls for inclusion and exclusion.

The Dawes Commission Rolls are the final citizenship rolls of the Cherokee Nation. On the basis of their Cherokee citizenship, the people who were listed on these rolls were entitled to allotments from the Cherokee Nation, including the Cherokee Freedmen. The Dawes Rolls include several groups of people and are not limited to Cherokees by blood. . . .

The Cherokee Nation is a Sovereign. The Cherokee Nation is much more than just a group of families with a common ancestry. For almost 150 years, the Cherokee Nation has included not only citizens that are Cherokee by blood, but also citizens who have origins in other Indian nations and/or African and/or European ancestry. Many of these citizens are mixed race and a small minority of these citizens possess no Cherokee blood at all.

People will always disagree on who is culturally Cherokee and who possesses enough Cherokee blood to be "racially" Indian. It is not the role of this Court to engage in these political or social debates. This Court must interpret the law as it is plainly written in our Constitution. . . .

The laws of the other four tribes that appeared on the Dawes Commission Rolls are not, of course, binding on the Cherokee Nation. The constitutions of the other tribes are instructive, however, in terms of the type of language that would be required to clearly terminate Freedmen citizenship rights.

In 1979, the Muscogee (Creek) Nation adopted a new Constitution that provided: "Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation." [Constitution of the Muscogee (Creek) Nation, Art. II, Section 1 (1979).] In doing so, the Muscogee (Creek) Nation excluded Freedmen unless that individual can also prove Creek Indian blood pursuant to Muscogee (Creek) law.

In 1983, the Choctaw Nation of Oklahoma adopted a new constitution that limited membership to "all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation." [Constitution of the Choctaw Nation of Oklahoma, Article II, Section 1 (1983).] In doing so, the Choctaws

decided to reference the Dawes Commission Rolls for membership, but they were very clear that they were only using those pages that list "Choctaws by blood." This clearly excluded the Choctaw Freedmen.

The Chickasaw Nation Constitution restricts citizenship to "Chickasaw Indians by blood" who are listed on the Dawes Commission final rolls. [Constitution of the Chickasaw Nation, Article II, Section 1 (1990).] They clarified exactly which portion of the Dawes Commission Rolls that could be referenced.

The language in the Choctaw, Chickasaw and Muscogee (Creek) Nation constitutions makes it unmistakably clear that membership is limited to their citizens "by blood" only. The Cherokee Constitution is a completely different matter. It lacks the type of clear language to terminate the pre-existing citizenship rights of the Freedmen. . . .

Drafting the 1975 Constitution

The dissenting opinion spends significant time discussing the "intent of the framers." The dissent improperly focuses on the Preamble of the Constitution rather than on the membership provisions of Article III. The dissent suggests that the individuals who drafted the 1975 Constitution intended to exclude the Cherokee Freedmen as a means of preserving tribal culture. The dissent then speaks in terms of "Cherokee Indian identity" and of "common character and ancestry." . . .

A truly "Cherokee" Nation, in a strictly cultural sense, might have limited citizenship to Cherokee ancestry and/or required a cultural tie to clan, religion or language. The 1975 Constitution does none of these things. . . .

The dissent's discussion of the intent of the framers lacks historical context. If this Court is to engage in a retrospective review of what the framer's thought, it should also focus on what those people knew, or must have known, about the citizenship status of the Cherokee Freedmen. The individuals who drafted the 1975 Constitution were well-educated and some were attorneys. They were familiar with Cherokee Nation legal history. When they included a direct reference to the Dawes Commission Rolls in the 1975 Constitution, they knew the Cherokee Freedmen were included in that document.

These individuals were also familiar with Cherokee history under the 1839 Constitution, the Cherokee Nation's treaties and agreements, and the allotment process. The authors could not have been unaware of the citizenship status of Cherokee Freedmen. At that point in time, the Cherokee Freedmen had been legal citizens of the Cherokee Nation for 110 years.

On the eve of the new 1975 constitution, the Cherokee Nation would have been very mindful of the citizenship rights of Cherokee Freedmen. Those rights had just been the subject of two federal court cases in which the Cherokee Nation participated. Both of these cases were concluded just a few years before the 1975 Constitution was drafted.

(1) In 1967, the United States Court of Claims ruled that the Cherokee Freedmen were entitled to receive payments from the Cherokee Nation judgment fund like any other Cherokee citizen listed on the Dawes Commission Rolls. [*Cherokee Nation v. US*, 180 Ct. Cl. 181 (1967), *affirming*, 12 Ind. Cl. Comm. 570 (1963).]

(2) In 1971, a small group of individuals who were not listed on the Dawes Commission Rolls tried to be included in these payments. This group argued that they were Freedmen who were inadvertently left off the Dawes Rolls. The federal court rejected their claims. [*Cherokee Freedmen & Cherokee Freedmen's Association v. the United States and the Cherokee Nation*, 195 Ct. Cl. 39, 1971 WL 17825 (1971).] Only those Freedmen that are actually listed on the Dawes Rolls were entitled to share in Cherokee Nation funds. This case reaffirms the notion that the Dawes Rolls (in their entirety) are the final citizenship rolls of the Cherokee Nation. . . .

In light of this long and consistent history, the 1975 Constitution was adopted with a membership provision which includes "citizens" and descendants of the Dawes Commission Rolls. If the Cherokee Freedmen are to be treated differently than all the other people on the rolls, then specific language should demonstrate that the Freedmen were being excluded. There is no such language.

Further Discussion of the 1866 Treaty

It has been argued that the Cherokee Freedmen were forced on the Cherokee Nation by the federal government and that the Cherokee Nation never voluntarily accepted the Freedmen as citizens. This is simply not the case.

In the Treaty of 1866, the Cherokee Nation agreed to extend citizenship to Freedmen and agreed to give them the same rights as "native" Cherokees. Although this treaty was signed at the end of the Civil War, when the Cherokee Nation was in a weaker bargaining position, it is nonetheless an agreement between two sovereign nations.

When the Cherokee Nation enters into treaties with other nations, we expect the other sovereign to live up to the promises they make. It is rightly expected that we will also keep the promises we make.

It cannot be overstated that the 1866 Treaty, in which the Cherokee Nation agreed to extend citizenship to the Freedmen[,] is the exact same treaty where the Cherokee Nation agreed to have other Indian tribes (ultimately the Shawnee and Delaware) relocated inside the Cherokee Nation. After the 1866 Treaty, the Cherokee Nation amended the 1839 Constitution to extend citizenship to the Freedmen as a matter of tribal law. After the 1866 Treaty, the Cherokee Nation also entered into individual treaties with both the Delaware and the Shawnee Indian tribes. Both of these actions show that the Cherokee Nation complied with the terms of 1866 Treaty. . . .

However, if the Cherokee Nation is going to make a decision not to abide by a previous treaty provision, it must do so by clear actions which are consistent with the Cherokee Nation Constitution. A treaty provision cannot be set aside by mere implication. This treaty discussion leads to the same conclusion as the constitutional discussion. If the Cherokee people want to change the legal definition of Cherokee citizenship, they must do so expressly. . . .

The *Riggs* Decision

In *Riggs v. Ummerteskee*, JAT 97-03, 3 Am. Tribal Law 10, 2001 WL 36155524 (2001), this Court ruled that 11 C.N.C.A. §12 was constitutional. At the time Riggs was decided it was a case of first impression under the 1975 Constitution.

The *Riggs* Court was presented with federal court decisions that had repeatedly upheld the citizenship rights of Cherokee Freedmen class. Those federal decisions were based on the federal treaty interpretation, federal interpretation of the 1839 Cherokee Constitution, and the federal documents from the Dawes Commission.

I agree with the *Riggs* Court on one point: citizenship is an internal matter for the Cherokee citizenry to ultimately decide. I do not fault the *Riggs* Court for basing their decision solely on the 1975 Constitution. I must, however, respectfully disagree with the *Riggs* Court's interpretation of the Constitution. The conclusion of *Riggs* Court is contrary to the plain language of Article III of the 1975 Constitution. If Article III was intended to limit membership to citizens "by blood," it should have said so.

[A] legislative act [must] be held unconstitutional if it adds new requirements to a constitutional provision. 11 C.N.C.A. §12 adds a "by blood" requirement that simply does not exist in Article III.

11 C.N.C.A. §12 is hereby deemed unconstitutional. This Court's decision in *Riggs v. Ummerteskee* is hereby reversed.

IT IS SO ORDERED.

[Special concurring opinion by Justice Dowty and dissenting opinion by Chief Justice Matlock omitted.]

NOTES

1. Shortly after the Cherokee high court issued the *Allen* decision, the Cherokee voters voted to amend the Cherokee Constitution to disqualify many of the Cherokee Freedmen from citizenship. *See In re Written Protest against the Initiative Petition "Proposing an Amendment to Article IV, Section 1 of the Cherokee Constitution of 1999 and Article III, Section 1 of the Cherokee Constitution of 1975,"* 6 Am. Tribal Law 39 (Cherokee Nation Judicial Appeals Tribunal 2006); *In re: Status and Implementation of the 1999 Constitution of the Cherokee Nation*, 9 Okla. Trib. 394, 6 Am. Tribal Law 63 (Cherokee 2006).
2. In *Graham v. Muscogee (Creek) Nation Citizenship Board*, No. CV 2003-53 (Muscogee (Creek) Nation District Court 2006), the court vacated a tribal citizenship board decision to deny citizenship to a Freedmen applicant and ordered the board to reconsider the application, but the Muscogee (Creek) Supreme Court summarily reversed the district court. *See Muscogee (Creek) Nation Citizenship Board v. Graham*, No. SC-2006-03 (Muscogee (Creek) Nation Supreme Court 2006).

3. DRUG TESTING

Louchart v. Mashantucket Pequot Gaming Commission

Mashantucket Pequot Tribal Court, No. MPTC-EA-99-105, 27 Indian L. Rep. 6176 (June 17, 1999)

The opinion of the court was delivered by: [Jill Tompkins], C.J.

[T]he plaintiff, Matthew Louchart, challenges the decision of the President/CEO of the Mashantucket Pequot Gaming Enterprise (hereinafter

"Gaming Enterprise") to suspend him from his employment as a Blackjack Floor Supervisor in the defendant's Gaming Department.

I. Factual Background

. . . Sometime prior to March 1998, the Mashantucket Pequot Tribal Gaming Commission and the Connecticut State Police commenced an investigation of two Foxwoods Resort Casino employees, Tracey Macri and Miguel Rivera, for illegal drug activities. . . . Macri was described to investigators as "having a severe addiction to cocaine" . . . and was thought to possibly be assisting Rivera in the distribution of drugs on Gaming Enterprise property. . . . A composite videotape showed Macri and Louchart walking together around a corner and into view. . . . After a few steps down the hallway toward the camera, Louchart reached into an inside breast pocket and withdrew a small package which he then placed into Macri's hand. . . . The contents of the package were not identified by the Gaming Enterprise. . . .

Sometime between March 1, 1998 and August 25, 1998, Rivera was arrested by the Connecticut State Police and Macri was terminated from employment for "drug-related activities." . . . The plaintiff was interviewed by Robert M. Hargraves, Sr., Special Investigator for the Compliance Department of Foxwoods Resort Casino, on August 25, 1998, "regarding his association and/or relationship with Tracey Macri." . . .

Louchart was advised that he would be given a drug test on Wednesday morning, August 26, 1998. . . . The plaintiff, upon hearing this, notified Hargraves that he would fail the test as he had smoked marijuana on August 9, 1998 during his vacation in Aruba which took place from July 29th to August 10th. . . . On August 26th at 9:00 a.m., Louchart appeared at the Compliance Office and met Allen Longendyke of the Gaming Enterprise's Employee Relations Office at the Nurse's Station to take his drug test. . . . The Employee Health Services "Drug Free Workplace Compliance and Duty Assessment Form" contains a section in which to indicate Drug Free Workplace compliance. The option "Does Not Comply" is marked on the form for Matthew Louchart's August 26, 1998 urine screen. . . .

On September 9, 1998, the plaintiff was suspended pending further investigation for misconduct, namely "failure to comply with the Drug Free Workplace Policy." . . .

The President/CEO issued written findings of fact and conclusions of law by memorandum dated January 6, 1999. . . . He found that:

> I . . . believe that the employee did fail the drug test in violation of the Standards of Conduct for the following reasons: . . .

. . . The President/CEO . . . recommended that the termination be reduced to a suspension with no back pay. He further stated that, "Compliance with EAP and continued drug testing should be a condition of continued employment." . . .

II. Conclusions of Law

This Court's role in reviewing an appeal by a Gaming Enterprise employee brought under the Law's provisions is to determine whether the President/CEO

acted arbitrarily, capriciously or in abuse of his discretion. VIII M.P.T.L. ch. 1, §8(d), *Chickering v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 41 (1998). . . .

This Court "may not retry the case or 'second guess' the decision of management . . . [; however, it is the law] that a court has the duty to decide whether, 'in its mind,' there is sufficient evidence in the record to support management's decision." *Flint v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 43, 44 (1998). The Mashantucket Pequot Court of Appeals held in *Healy v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 63, 66 (1999) that the Mashantucket Pequot judiciary possesses "authority to review under the [Indian Civil Rights Act, 25 U.S.C. §1302] the Gaming Enterprise's actions in the application and implementation of the Tribal Council's enactments relating to employer-employee relationships." A challenge to an employment disciplinary action involving a claim of a violation of the rights secured by the Indian Civil Rights Act is subject to the general test of whether the error is "more probably than not harmless," unless "there has been a significant deviation from a constitutional rule or a specific statutory requirement, [where] plain error exists and reversal is automatic." *Grossi v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 55, 56 (1998).

The plaintiff raises three grounds for his appeal: first, that the Gaming Enterprise did not possess reasonable cause to believe that he was under the influence of drugs or in possession of the same, and that requiring him to undergo a drug test was a violation of its own policy; second, that the Gaming Enterprise's conduct in requiring him to undergo a drug test, without reasonable cause to believe that he was under the influence of, or in possession of, drugs violated his rights under Sections 1302(2) and (8) of the Indian Civil Rights Act; third, even if the drug test was appropriate, there was still no reasonable basis to conclude that he violated the "Substance and Alcohol Abuse and Drug Testing" policy or other Gaming Enterprise work rules, standards of conduct, or conditions of employment. The Court agrees with the plaintiff that the Gaming Enterprise did not have a reasonable suspicion that he was under the influence of drugs or alcohol which adversely affected or could have adversely affected his job performance and, thus, the requirement that he undergo a drug test was in violation of its own drug testing policy. Without the drug test, there is no reasonable basis for the President/CEO's decision to suspend the employee.

The Indian Civil Rights Act provides that: "No Indian tribe in exercising powers of self-government shall— . . . (2) violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures[;] . . . (8) . . . deprive any person of liberty or property without due process of law. 25 U.S.C. §1302 (2) and (8). The Mashantucket Pequot Tribal Council adopted the provisions of the Indian Civil Rights Act in 1993 as "tribal law" which "shall apply in the Tribal Court." *Healy* at 66, I M.P.T.L. ch. 3 §10(a). "To help ensure a safe and healthful working environment . . . ," the Mashantucket Pequot Tribal Nation has adopted for Gaming Enterprise employees a "Substance and Alcohol Abuse and Drug Testing" Policy (hereinafter "Drug Testing Policy"). . . . The Drug Testing Policy states that the Gaming Enterprise "prohibits any employee from having, selling, making or using any illegal

drugs on Foxwoods Resort Casino premises or while conducting business off the premises." *Id.* There is no allegation that the plaintiff engaged in any of the enumerated prohibited acts. Further, the Drug Testing Policy provides, in pertinent part, that: "If Foxwoods Resort Casino has a reasonable suspicion that an employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance, Foxwoods Resort Casino may require such employee to submit to a drug test. Refusal to submit to a drug test may result in disciplinary action, up to and including termination of employment." *Id.* . . .

The Drug Testing Policy does not define the term "reasonable cause." Section XI provides that employee appeals must be decided in accordance with tribal law; however, where no tribal law exists with respect to a particular issue, the Court "may be guided but shall not be bound by the principles of law applicable to similar claims arising under the laws of the State of Connecticut or of the United States." VIII M.P.T.L. ch. 1. This Court is mindful that: "The guarantees afforded to individuals under the ICRA, such as the right to due process, are similar but not identical to those provided for under the United States Constitution. Both federal and tribal courts have acknowledged that Congress did not intend the due process principles of the Constitution to disrupt settled tribal customs and traditions." *Johnson*, 1 Mash. at 118. In this appeal, no Mashantucket Pequot custom or tradition has been argued to be implicated. Thus, the Court will look to general U.S. constitutional principles, as articulated by federal and Connecticut courts, for guidance in this matter. . . .

The term "reasonable suspicion" is defined by Black's Law Dictionary (6th ed. 1990) as a suspicion of illegal activity which "must be based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant intrusion." . . . Tribal courts have also relied upon Fourth Amendment standards in determining the propriety of searches under tribal law and the Indian Civil Rights Act. *Duckwater Shoshone Tribe v. Thompson*, 25 ILR 6131, 6132 (Duckwater Shoshone Tr. Ct., 1998) ("Federal Indian Law experts agree that 25 U.S.C. §1302(2), which nearly mirrors the Fourth Amendment, is derived from the U.S. Constitution. . . ."); *Southern Ute Tribe v. Scott*, 18 ILR 6105 (S. Ute Tr. Ct., 1991) (utilizes U.S. Supreme Court rulings to determine voluntariness of consent to search).

In this appeal, the only basis for subjecting the plaintiff to the drug test was his association with a suspected drug user, Macri, and the passing of an unidentified item to her in a hallway. . . . There is no evidence that the item was drugs. There is no allegation that the plaintiff exhibited any physical or behavioral symptoms indicative of drug or alcohol consumption. There is no evidence that his job performance or judgment was affected in any way. The record does not support a finding of "reasonable suspicion" that the plaintiff was under the influence of drugs or alcohol. Moreover, assuming arguendo the alleged "suspicious behavior" occurring on March 1, 1998 constituted reasonable suspicion that the plaintiff was under the influence of drugs, the drug test was not ordered until five and a half months later. The event allegedly giving rise to the suspicion of drug use was too far removed in time to provide a basis

for a test over five months later. Fourth Amendment case law in the criminal context has established:

> Generally, the greater the interval between an observation of criminality and an application for a warrant, the more likely it is that circumstances will have changed so that probable cause no longer exists. . . . When the affidavit recites an isolated violation, probable cause dwindles in direct proportion to the passage of time.

American Bar Association Criminal Justice Section, Guidelines for the Issuance of Search Warrants, (1990) p. 26. . . . Likewise, in the drug testing situation there must be some freshness to the information giving rise to the suspicion that the employee is under the influence of drugs or alcohol. In this case, the delay of over five months renders the information regarding the plaintiff's suspicious behavior too stale to constitute reasonable suspicion to require a drug test.

The plaintiff's confession of arguably legal marijuana use in Aruba came only after the Gaming Enterprise ordered the plaintiff to undergo the drug test. The results of the drug test were obtained in violation of the Gaming Enterprise's Drug Testing Policy as there was no reasonable suspicion to support the testing in the first instance. The Court finds that, without the illegal drug test, the President/CEO had no reasonable basis for concluding that the plaintiff violated the applicable work rules, standards or other conditions of employment established by the Enterprise for the position held by the plaintiff. VIII M.P.T.L. ch. 1, §8(d)(1). Having found that a review of the record establishes that it is devoid of rational evidence to support the ordering of the drug test, this Court "has a responsibility in the interest of justice to set aside management's action [in suspending the plaintiff] as arbitrary and capricious." . . .

Accordingly, the plaintiff's appeal is sustained and the decision of the President/CEO is reversed.

NOTES

1. The Mashantucket appellate court affirmed the trial court on the narrow grounds that "without the drug test, the record is devoid of any rational evidence to affirm the decision to discipline the appellee." *Louchart v. Mashantucket Pequot Gaming Enterprise*, 4 Mash. Pequot Rep. 10, 11, 2000 WL 35571834 (Mashantucket Pequot Court of Appeals 2000).

2. In *Gourd v. Robertson*, 28 Indian L. Rep. 6047 (Spirit Lake Sioux Tribal Court 2001), the court reviewed the positive drug test of a tribal gaming management employee. The tribe had declared that all gaming manager positions were " 'sensitive' positions at the Casino" and, for that reason, gaming managers could be subjected to random drug tests. The tribal court concluded:

> Casino managers are in sensitive positions where they frequently have access to casino revenues and are charged with supervising other staff. Failing to properly monitor these employees may endanger the tribe's gaming enterprise and violate the tribe's Class III Gaming Compact with the State of North Dakota. These concerns undoubt[ed]ly explain why the Casino had made them "subject to greater sampling" under the random testing policy.

Gourd, 28 Indian L. Rep. at 6048.

The tribal court nevertheless overturned the Plaintiff's discharge on the basis that he had not been subject to a "truly random" drug testing process as mandated by the personnel policy.

The tribal court discussed the validity of random drug testing of government employees in safety-sensitive positions in dicta. Emulating the federal courts' "safety-sensitive"–type analysis, the tribal court wrote:

> Courts have recognized that employment-related drug testing by a governmental entity is a search as defined under the Fourth Amendment and incorporated into the Indian Civil Rights Act. . . . In general, the Indian Civil Rights Act prevents searches without warrants unless they meet the reasonableness requirement of the Fourth Amendment. Warrantless drug urinalysis testing of employees in safety-sensitive jobs may be consonant with the Fourth Amendment where part of a systematic, uniformly applied testing program (such as random testing), . . . or where based on the employer's individualized "reasonable suspicion" of drug use by the employee.

Id. (citing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989)) (other citations omitted).

3. In *Puyallup Tribe v. VanEvery*, 8 NICS App. 85 (Puyallup Tribal Court of Appeals 2008), the court offered "guidance" on the question of the tribal constitutional right to privacy in the context of the drug testing of a tribal shellfish diver:

> [T]he United State Congress enacted the Indian Civil Rights Act of 1968. This Act grants Indians federal statutory rights against a tribal government that are similar to the federal constitutional rights that they have against the federal and state governments under the Bill of Rights and the Fourteenth Amendment. Among the various statutory rights granted by the Indian Civil Rights Act, two are particularly relevant to the present case. The Indian Civil Rights Act states, in relevant part, that "[n]o Indian tribe in exercising powers of self-government shall . . . (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, . . . ; [or] (8) . . . deprive any person of liberty or property without due process of law." The language of these statutory rights parallel the constitutional language in which the United States Supreme Court has anchored the constitutional right of privacy against the federal and state governments. Presumably, it is to these statutory rights conferred by the Indian Civil Rights Act that the Tribal Court and the Appellee intended to refer when they opined that the Port Clinic procedure for collecting urine violated the Tribal shellfish diver's constitutional right of privacy.
>
> To examine this issue, we look to federal court interpretation of constitutional rights. We are not bound by these decisions, however[,] as the Navajo Supreme Court noted: U.S. Constitutional "protections are a product of moral principles, and our own morality and tribal customs frame such principles in the Navajo way." [*Plummer v. Plummer*, 17 Indian L. Rep. 6151 (Navajo 1990).] Assuming, *for the sake of argument*, that the statutory rights conferred by the Indian Civil Rights Act are equivalent in all respects to the constitutional rights that their language tracks, it is

> reasonable to further assume that the legal analysis developed by the United States Supreme Court for determining whether a particular federal or state government test procedure violates a person's constitutional right to privacy can also be used to determine whether a particular tribal government test procedure violates a tribal member's statutory right to privacy under the Indian Civil Rights Act. Thus, to evaluate the claim that the Port Clinic's procedure for collecting urine violates a Tribal member's statutory right to privacy, we may be guided by a decision of the United States Supreme Court, *Skinner v. Railway Labor Executives' Association*, in which it considered whether a similar procedure violated the test subject's constitutional right to privacy. . . .
>
> In our opinion, an analogous argument that the Port Clinic procedure does not violate a Tribal Shellfish diver's statutory right to privacy can be made on the facts of the present case. Shellfishing is an industry regulated by the Tribe. The Tribal government has an interest in regulating the conduct of shellfishing to ensure safety. The Tribal government's interest in safe shellfishing includes the safety of the Tribal shellfish divers. The Tribal government's interest in ensuring the safety of the shellfish divers themselves plainly justifies prohibiting Tribal shellfish divers from using alcohol or drugs, and this interest also requires and justifies the exercise of supervision to assure that the restrictions are in fact observed. Moreover, the urine samples are collected in a medical environment, by personnel unrelated to the diver's employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination. Finally, the expectations of privacy of Tribal shellfish divers are diminished by reason of their participation in an industry that is regulated to ensure safety. While the procedures for collecting urine samples in *Skinner* did not involve direct observation of the employee urinating, we do not believe that this difference would alter the result of the Supreme Court's analysis. The Supreme Court specifically noted "*the desirability of such a procedure to ensure the integrity of the sample*." Accordingly, we believe that Port Clinic procedure for collecting urine does not constitute an undue infringement on the justifiable expectations of privacy of the Tribal shellfish divers, and that the Tribal government's interest in reliable and accurate urine tests for Tribal shellfish divers outweighs their privacy concerns in this context.

VanEvery, 8 NICS App. at 89-90, 92.

Compare a shellfish diver to an office-bound tribal government employee. Should tribal courts apply different constitutional analyses depending on the job in question in the context of drug testing?

4. SAME-SEX MARRIAGE

The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide

Julie Bushyhead, 26 Ariz. J. Int'l & Comp. L. 509, 525-35 (2009)

Traditionally, many Indian tribes were not concerned with a member's sexual orientation. Instead, those Tribes focused on a person's contribution to the community, which was a product of his/her gender. For some Tribes, gender identity encompassed more than merely biological sex, but a person's

spiritual gender identity. Approximately 155 Indian Tribes recognized a group of people anthropologists refer to as "two-spirit" people. These people could be modernly described as people who were neither male nor female but a third gender because they spiritually embodied both male and female genders. [T]his historic native tradition embraces the biological reality that not everyone fits into the inflexible gender categories of male and female. If society holds marriage superior on the basis that marriage is reserved for people of opposite sex, then the goal of "opposites" is thwarted by the biological reality that some people may be neither male nor female. Societal education about gender marks the beginning of change in societal views encompassing gender, sexual orientation, and discrimination. Tribes have the opportunity to illustrate flaws in restricting marriage to opposite sex couples by connecting with a historical native tradition of recognizing two-spirit people. Finally, this section discusses the Tribes' inherent authority to promulgate laws regulating domestic relations.

A. Traditional Tribal View on Same-Sex Marriage

Coquille Chief Ken Tanner stated that the Coquille Cultural Committee performed thorough research in response to several members' request to address the issue of same-sex marriage and spousal benefits. The Committee found that oral history concerning "lifestyle and tribal methods of relating" revealed "no exclusions for people, in any way, [who engaged] in same sex marriages." Brian Gilley, a respected anthropologist who has conducted extensive research concerning "gay identity and social acceptance in Indian country" stated that[] "sexuality really wasn't turning the social organization on its head like it was in Euro-American society." Gilley attributes this to the fact that for many native tribes, "who an individual had sex with was not necessarily the primary concern, [tribes] were more concerned about a person's potential contribution to the community." Moreover, a person's role in the community was determined by gender identity, not necessarily biological sex. One native tradition of recognizing "two-spirit" people, historically practiced in approximately 155 tribes, illustrates the idea that gender identity is wholly separate from sexual orientation.

The name "two-spirit" is an attempt to explain this tribal tradition in the English language. In fact, most tribes had different names for people who possessed both a male and a female spirit. These individuals "were seen as being able to bridge the personal and spiritual gap between men and women." This unique gender identity was viewed as a gift from the Great Spirit, which was also named differently depending on each tribe's religious practices. The Navajo Tribe valued two-spirit people because they were "gifted with a more complex and nuanced understanding of both the masculine and feminine." They were "seen as making a valuable contribution to the whole," and as such were "treated with respect, even reverence." Two-spirit people are most clearly described as people falling into a third gender. Gilley explains that "this third gender often embodied a mixture of the social, ceremonial, and economic roles of men and women." Two-spirit people were identified through a variety of methods. Generally, two-spirit people exercised a plethora of "spiritual roles in the community including serving

as healers, ambassadors, teachers, matchmakers, parents to orphaned children, and mediators of disputes." Many two-spirit individuals would "adopt orphans . . . and raise them as their own." Gilley points out that "the structure that we would think of as a family [was] being replicated without regard to a person's sexual organs or sexuality." These two-spirit individuals were "members of [the] community and [were] showing their usefulness to society and their behavior [reflected] values of [the] community." As illustrated, gender was a product of a person's role in the community, and "who you had sex with was really more up to your preference." In other words, sexual orientation was a non-issue. . . .

B. Tribal Sovereignty

Tribal sovereignty represents a tribe's inherent authority to govern its people and territories using the "governmental and legal systems" each tribe creates or adopts for its own. While the federal government has continually narrowed tribal sovereignty, tribal governments retain their sovereignty and authority to self-govern to the extent not limited by Congress. Congress limits tribal sovereignty by imposing federal laws that divest tribes of "plenary and exclusive power over their members and their territory." In spite of federal limitations, Tribes retain the power to form their own government, determine tribal membership requirements, legislate, and levy taxes. Among these, tribes have the "undisturbed" power to regulate domestic relations affecting tribal members.

Inherent tribal authority over domestic relations permits tribes to "decide matters of domestic and family law within Indian Country. For example, tribes may make laws regarding the testate or intestate succession of a deceased tribal member's property. The American Indian Probate Reform Act (AIPRA) restricts this power only to the extent that the succession laws concern "trust and restricted lands." In addition, the United States Supreme Court recognizes tribal authority to grant valid marriage licenses and similarly dissolve tribal marriages. Given this broad authority, tribes have the power to define marriage as they choose. As such, even where a tribe adopts a definition of marriage contrary to the federal or state definitions, the tribe will prevail in defining marriage as it pertains to the tribe's members. In other words, "some Indian tribes could become islands of nonconforming law in an area where the American people appear to have spoken with finality."

Of the 562 federally recognized tribes, only a few tribal legislatures have attempted to more narrowly define marriage and consider the possibility of legalizing or banning same-sex marriage. Among these, the Cherokee and Navajo tribes have amended their marriage laws to explicitly define marriage as a union available only to persons of the opposite sex (i.e. marriage between one man and one woman). The Coquille Tribe is the only tribe to take legislative action to allow same-sex marriage. On May 8, 2008, the Coquille Indian Tribe adopted a Marriage and Domestic Partnership ordinance. . . .

The Coquille Tribe's marriage ordinance recognizes that the right to marry is a fundamental right regardless of biological sex. In approving and adopting this ordinance, the Coquille Tribe stated that recognizing "certain" domestic relationships regardless of biological sex is "essential" to preserve the "political

integrity, economic security, and the health and welfare" of the Coquille community and its recognized members. The Tribe exemplifies the meaning of "political integrity" by adopting a definition of marriage that intelligently recognizes the wholly arbitrary requirement that the parties be of opposite sex — most assuredly in the face of national, Native and non-Native, opposition to same-sex marriage.

While the Tribe broadly defines domestic relationships, it does place a few eligibility requirements on the fundamental right to marry. The Tribe permits marriage where the couple meets three requirements. First, at least one partner must be a member of the Coquille Indian Tribe at the time the marriage license is issued and at the time the marriage is solemnized. Second, both partners must be at least eighteen years of age at the time of marriage. Third, the partners must not be related by blood, "whether of the whole or half blood." Specifically, the couple must not be "first cousins or any nearer of kin," unless they are cousins by adoption only. In the situation where the partners are cousins by adoption only, the Tribe does not prohibit their marriage provided the other two requirements are met. The Tribe specifies that even where a couple meets the above three requirements, the marriage may be void or voidable in some situations.

The Tribe prohibits marriages where either party to the marriage has a current spouse or domestic partner living at the time of the marriage. This would potentially exclude those instances where a couple dissolved their previous marriage or domestic partnership prior to the marriage in question. The Tribe also has the power to annul marriages where one of the partners is incapable of making a marriage contract because of insufficient capacity due to minority or insufficient ability to understand the nature of the contract. Further, the Tribe may annul marriages where either party procured consent of the other by "fraud or force." In these instances where a marriage contract is voidable, any action by the Tribe to annul a marriage does not relieve the partners of a "married" status for purposes of spousal support and property settlement as required by Tribal law.

The Tribe also provides that it will recognize some marriages and domestic partnerships from other jurisdictions for the purpose of providing Tribal benefits. The Tribe limits this recognition to marriages and domestic partnerships where one of the parties is a member of the Coquille Tribe, both parties are eighteen (18) or older, the parties are not related by blood (excluding first cousins by adoption), providing benefits is not prohibited by federal law, and the parties present "adequate" proof of their marriage or domestic partnership. While the purpose of recognizing marriages and domestic partnerships involving a Coquille Tribal member is to provide spousal benefits, this ordinance does not limit the Tribal Council's authority to alter or eliminate the benefits available to spouses or domestic partners of Coquille members.

Just as the Coquille Tribe is making an effort to resist discrimination against same-sex couples in the community, Oregon is taking steps to recognize the "lasting, committed, caring and faithful relationships" formed by many "Gay and Lesbian Oregonians." . . .

What does it mean for same-sex couples that obtain a marriage license from the Coquille Tribe? These couples are in a unique position because of

their ability to obtain benefits under the Coquille Indian Tribe, and in addition, obtain benefits as Oregon residents. Same-sex couples that obtain a marriage license from the Coquille Indian Tribe assume the respected status of "married." In addition, if these couples apply for domestic partnership status under Oregon law, they are eligible for spousal benefits under Tribal law and Oregon law. In contrast, other Oregonian same-sex couples that apply for domestic partnership status under the Oregon Family Fairness Act will not be considered "married" but domestic partners. While these couples will enjoy all the benefits afforded to married spouses under state law, they are denied the equal recognition of being married. Though the inequality suffered by couples married by the Coquille Tribe is arguably less than those united by a domestic partnership status under Oregon law, neither the Coquille couple nor the Oregon couple will be eligible for federal benefits such as Social Security. If and when other Tribes decide to enact laws making marriage available to couples regardless of biological sex, the result may differ depending on the state marriage/domestic partnership laws where the Tribe is located. Oregon, like California, enacted a domestic partnership law extending all statutorily created spousal rights afforded to married spouses to domestic partners. Whereas, same-sex couples married by a Tribe in Oklahoma would not enjoy any state or federal benefits; these couples would be reliant on the Tribe's extension of benefits alone. . . .

NOTES

1. The relevant Coquille Tribe laws are as follows:

> **Marriages and Domestic Partners (or "Marriage" or "Domestic Partnership")** means a formal and express civil contract entered into between two persons, regardless of their sex, who are at least 18 years of age, who are otherwise capable of entering a Marriage or a Domestic Partnership (as provided below), and at least one of whom is a member of the Coquille Indian Tribe. For the purposes of this definition, "Domestic Partners" includes without limitation, persons engaged in domestic partnerships or civil unions.

COQUILLE TRIBAL REGULATION §7410.010(3)(b) (2008) (emphasis in original). And:

> Any person seeking to have their Marriage or Domestic Partnership recognized by the Tribe must apply to the Tribal Member Services Program, and provide a certified copy of their marriage or domestic partnership license from a recognized jurisdiction. In the event of a question as to whether the license meets the requirements set forth in CITC 740.030, the decision of the Tribal Member Services Program is final.

COQUILLE TRIBAL REGULATION §7410.050 (2008).

2. Conversely, the Navajo Nation and the Cherokee Nation of Oklahoma each enacted bans on same-sex marriage. *See* Matthew L. M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 55 (2006). The Cherokee legislature enacted its statute *after* Kathy Reynolds and Dawn McKinley applied for a marriage license. *See* Christopher L. Kannady, *The State, Cherokee Nation, and Same-Sex Unions:* In re: Marriage License of

McKinley & Reynolds, 29 Am. Indian L. Rev. 363, 368 (2004-2005). Litigation over the validity of the McKinley and Reynolds marriage ended on procedural grounds in favor of the marriage in 2006. *See In re: Marriage License of McKinley and Reynolds*, No. JAT-06-01 (Cherokee 2006); *Anglen v. McKinley*, No. JAT-05-11 (Cherokee 2005).

3. Navajo people continue to be split over the so-called Anderson legislation, enacted by the Navajo Nation tribal council over a veto by Chairman Joe Shirley. One commentator wrote:

> More recently, in the fall of 2007, one of the topics presented at the Diné Policy Institute was "family, marriage, and the Diné Marriage Act." The day-long session, which was conducted primarily in the Navajo language, resulted in an almost unified agreement among the participants that Navajos had traditionally recognized more than two genders. They also agreed that a third gender, the "nádleehí," was a person who had been valued in Navajo society. There were sharp disagreements on whether the "nádleehí" had engaged in same-sex sexual activity. Moreover, at least two Navajos questioned the link being made between the "nádleehí" and modern-day gay and lesbian. Traditional Navajos involved in the discussion readily cited creation narratives to make their points about traditional Navajo practices around marriage, sexuality, family, and homosexuality.

Jennifer Nez Denetdale, *Securing Navajo National Boundaries: War, Patriotism, Tradition, and the Diné Marriage Act of 2005*, 24:2 Wicaso Sa Rev. 131, 142 (2009).

E. CIVIL RIGHTS AND SOVEREIGN IMMUNITY

McCormick v. Election Committee of Sac and Fox Tribe of Indians of Oklahoma

Court of Indian Offenses for the Sac and Fox Tribe, 1 Oklahoma Tribal Court Rep. 8, 1980 WL 128844 (February 1, 1980)

Pipestem, Chief Magistrate.

Plaintiff brought this action in the Court of Indian Offenses of the Anadarko Area Office sitting at the Shawnee Indian Agency for the Sac and Fox Tribe of Oklahoma on October 9, 1979. The Plaintiff alleges that she is the duly elected Principal Chief of the Sac and Fox Tribe of Indians of Oklahoma, and that the Sac and Fox Election Committee and its members, individually and in their official capacities, have violated the rights guaranteed to the Plaintiff by the Tribal Constitution and Election Ordinance, the Oklahoma Constitution and laws as made applicable by the Tribal Constitution and Election Ordinance, and the Constitution of the United States when the Election Committee declared the election in controversy void due to alleged voter irregularities and called for a new election.

Defendant Gwendolynn McCormick filed an answer to Plaintiff's Complaint pro se in which she admits the facts as alleged in the Complaint. Defendant Cecilia Littlehead answered and generally denied the substance

of the Complaint. Defendant Wanda Brown answered and interposed the defenses of sovereign immunity, the intra-tribal dispute doctrine, legislative and judicial privilege doctrine, exhaustion of administrative remedies doctrine, and entered a demurrer for failure to state a claim. Defendants Election Committee, Emery Foster, Pearl Rolette, Henrietta Massey, Rose Allen, Irene Allen Whitlow, Jane Hope Stevens, Etheline Dooley, Virginia I. York, and Geraldine Franklin entered their special appearance and moved to quash Plaintiff's Complaint relying on the intra-tribal dispute doctrine, the political question doctrine, and sovereign immunity. . . .

IV. Sovereign Immunity

Having determined that the Election Committee functions as an authorized arm of the Tribal government and that this Court exercises the inherent judicial powers of the Sac and Fox Tribe as a part of the tribal government, the issue of sovereign immunity may now be more adroitly addressed. This Court has no doubt that Congress has plenary authority to waive the Tribe's sovereign immunity, *Lone Wolf v. Hitchcock*, 187 U.S. 552 (1903); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), or that the appropriate Tribal legislative body could waive that immunity to the extent of allowing the Tribe to be sued in the Tribal Court. The question, then, is whether Congress or the Tribal legislature have waived that immunity to the extent that this suit may be maintained in this Court.

The Sac and Fox Tribe of Indians of Oklahoma is a federally recognized Indian tribe organized and functioning through a constitutional framework adopted by the tribe pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §501 et seq. It is beyond cavil, and undisputed by any of the parties to this action, that the Sac and Fox Tribe of Indians is an Indian tribe possessed of the ordinary attributes of tribal sovereignty. Among the attributes of tribal sovereignty of Indian tribes like the Sac and Fox is the doctrine of sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), the Supreme Court reiterated this now familiar principle that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." In invoking the doctrine of sovereign immunity, the tribes do so as an expression of the tribes' inherent legal status derived from tribal law and not as a delegation of authority from any other source.

In is settled law that an Indian tribe is protected by the doctrine of sovereign immunity unless Congress has unequivocally consented to a waiver of that immunity. . . . It is also settled law that an initial lawsuit may not be brought indirectly against a tribe by suing tribal officers or the United States as trustee for the tribe. *Seneca Constitutional Organization v. George*, 348 F. Supp. 48 (W.D. N.Y. 1972); *Barnes v. United States*, 205 F. Supp. 97 (D. Mont. 1962); *Adams v. Murphy*, 165 F. 304 (C.C.A. 1908); *Santa Clara Pueblo v. Martinez*, *supra*.

Plaintiff argues that the Supreme Court in *Santa Clara Pueblo v. Martinez*, *supra*, construed the Indian Civil Rights Act as an express waiver of tribal immunity in tribal courts. Plaintiff's Response Brief, pp. 2-3. Santa Clara held that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. It would be contradiction of Santa Clara to hold

on the one hand that the Indian Civil Rights Act is ineffective to waive tribal sovereign immunity by implication in federal courts and on the other hand to hold that the same legislative enactment is effective to waive tribal sovereign immunity by implication in tribal courts. Therefore, the court rejects this argument.

Plaintiff cites no other federal or tribal enactments relating to the creation of this court by the tribe as expressly waiving sovereign immunity. Defendant Gwendolyn McCormick cites a letter from the Acting Secretary of the Interior (attached to Defendant's Brief) wherein the Acting Secretary concludes that the Courts of Indian Offenses under 25 C.F.R. 11.22 have authority of the kind necessary to hear and decide the issues in this case. Neither the Defendant nor the Acting Secretary of the Interior indicates the specifics of the source of that power in the absence of express Congressional or tribal consent to suit in tribal courts. *Parker v. Saupitty*, [CIV-79-A2, 1 Okla. Trib. 1 (Comanche CIO 1979)], by this Court expressly rejects that contention.

As immunity from suit is an inherent ingredient of the Tribal legal status as a dependent domestic nation, . . . and there has been no effective waiver of that immunity by Congress or the Tribe, I am, therefore, constrained to hold that the Sac and Fox Election Committee and the individual members thereof are immune from suit in this Court and that this action must be dismissed. It is therefore, unnecessary to address the balance of defendants' arguments.

In the evolution of tribal governments as governments, the tribal judicial forums, as the Supreme Court so adroitly pointed out in *Santa Clara*, must be the paramount mechanism for the enforcement of the substantive provisions of the Indian Civil Rights Act if tribal sovereignty is to be enhanced. Tribal constitutions and governing documents are becoming of increasing importance as tribal forums take on unprecedented responsibilities. Within the evolution of tribal government, the protection by the tribe of individual liberties and rights that may be violated by the tribe itself must be assigned a high priority.

However, the law is clear that, in the absence of an express and unequivocal waiver of sovereign immunity by the Sac and Fox Tribe, the unfinished business of providing a judicial forum for the resolution of the instant dispute remains exclusively within the province of the Sac and Fox Tribe. In the absence of that authorization, the tribal judiciary should not presume to fashion a remedy which ignores sovereign immunity, one of the inherent attributes of tribal sovereignty. . . .

NOTES

1. Other courts followed the *McCormick* Court's reasoning. For example, in *Sliger v. Stalmack*, 2000 WL 35750181 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 2000), the court reversed itself on whether ICRA constitutes a waiver of immunity:

> While Defendants concede that the Indian Civil Rights Act of 1968 (ICRA) granted certain rights, they argue that it did not necessarily grant corresponding remedies. Defendants argue that the United States Supreme

> Court has already agreed with their argument. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The Supreme Court in *Santa Clara* decided that Congress only intended habeas corpus relief because that was the only relief expressly created. Like the federal courts, it is argued by Defendants, tribal courts should provide a consistent interpretation of that federal statute. "It would be [a] contradiction of *Santa Clara* to hold on the one hand that the Indian Civil Rights Act is ineffective to waive tribal sovereign immunity by implication in the federal courts and on the other hand to hold that the same legislative enactment is effective to waive the sovereign immunity by implication in tribal courts." *McCormick v. Election Committee of the Sac & Fox Tribe*, 1 Okla. Trib. 8, 20; 1980 WL 128844 (Sac & Fox CIO 1980). In reconsideration, this Court is convinced that the ICRA, while purporting to create certain rights, should be construed by this Court in a matter consistent with *Santa Clara* and *McCormick*. Therefore, the ICRA does not waive tribal sovereign immunity.
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> *Id.* at *1.

The same court had previously kept open the question in an earlier order:

> This Court cannot say that Defendants are entitled to judgment as a matter of law. The Tribal Constitution provides a limited waiver of sovereign immunity for suits by tribal members for ". . . the purpose of enforcing rights and duties . . ." established by tribal law. *See* ARTICLE XIII, Section 2(a). However, the Indian Civil Rights Act of 1968, which applies to governmental action/inaction of all federally-recognized Indian tribes, mandates equal protection of the laws to any person within its jurisdiction. *See* 25 U.S.C., Sections 1301-1303. Furthermore, the Tribal Constitution itself provides a listing of constitutional rights in ARTICLE X. Although, the content title of Section 1 refers to members only, the specific text of subsection (h) says ". . . *any person* . . ." (emphasis [added]). Thus, the language in the federal mandate and the Tribal Constitution is exactly the same in regard to equal protection. The interplay, or apparent inconsistency, between these provisions of the law is not settled. This Court is not inclined to decide the matter in the absence of full briefing and argument so that it can make a fully-informed decision. However, it does appear that tribal members waived the sovereign immunity of their government to the extent that they could petition their courts for enforcement of "rights and duties" established by tribal law. Having done so, clearly it can be argued that the Indian Civil Rights Act of 1968 and, probably the Tribal Constitution, itself, extends the waiver to all other persons as well. Given the uncertainty of the law, this Court cannot say that Defendants are entitled to judgment as a matter of law.

Sliger v. Stalmack, 1999 WL 34986345, at *2 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 1999), *rev'd upon reconsideration*, 2000 WL 35750181 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 2000).

2. In *Davis v. Keplin*, 18 Indian L. Rep. 6148 (Turtle Mountain Band of Chippewa Indians Tribal Court 1991), the court held that ICRA did operate to abrogate tribal immunity, holding that "[t]he doctrine of tribal sovereign immunity is no longer absolute and has been effectively abrogated by this express, unequivocal expression of congressional intent to provide [ICRA] jurisdiction to the tribal court. . . ." *Id.* at 6149. *See also* Robert J. McCarthy,

Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years, 34 IDAHO L. REV. 465, 481 (1998) (discussing *Davis*).

Which line of cases has the better of the argument whether ICRA abrogates tribal immunity in tribal court?

3. Frank Pommersheim notes that Indian tribes have a difficult path to traverse in relation to the question of individual rights in Indian Country:

> Tribal councils and other decision makers are increasingly faced with the dilemma of individual rights. There is a need to fashion remedies in tribal court that allow for some resolution of individual claims against the tribe, but there is also a need to balance bona fide tribal concern that such relief might grind tribal activity to a halt or impoverish a tribal treasury.

FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 73 (1995).