
CHAPTER THREE

ICRA RECONSIDERED: NEW INTERPRETATIONS OF FAMILIAR RIGHTS

Shortly after the passage of the Indian Civil Rights Act of 1968¹ (ICRA), the *Harvard Law Review* published a Note discussing potential avenues for courts to interpret the new statute and protect both tribal interests and fundamental rights.² Nearly fifty years later, the question of how to deal with the tension between promoting tribal sovereignty and protecting individual rights remains unresolved. This Chapter reviews what Congress, the courts, and tribes have done in the meantime and explores a potential new understanding of ICRA for the future. After a brief background review of colonial European and federal approaches to Indian law, the Chapter turns to the debate between deferential and de novo review of tribal decisions by federal courts. Finding that the next battleground of this clash is in the context of the writ of habeas corpus, the Chapter then examines the benefits and drawbacks of deference in habeas review. Ultimately, it concludes that the delicate balancing act created by the Supreme Court and ICRA is best served by deferring to tribes in habeas reviews of ICRA cases. The best way to rebuild tribes' legal systems and reinforce individual Indian rights is to allow them to run governments and rights jurisprudence of their own making within the framework provided by ICRA. Such an approach to the writ of habeas corpus most suitably addresses the sometimes dueling obligations of the federal government to individual Indians and to tribes.

A. A History of Tribal Rights and Federal Distrust

From the earliest days of European contact with Indian tribes, questions emerged regarding the function of tribal governments. To the Europeans, Indians were primitive, living in “a pattern of the first ages in Asia and Europe”³ and “ignorant even of the name of law.”⁴ Yet tribes had a broad range of governmental systems, from loose bands of chiefdoms to organized confederacies and nations.⁵ Far from

¹ 25 U.S.C. §§ 1301–1304 (2012 & Supp. I 2013).

² See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

³ JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. 2, § 108, at 147 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

⁴ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

⁵ See Duane Champagne, *Remaking Tribal Constitutions*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 11, 14 (Eric D. Lemont ed., 2006) [hereinafter AMERICAN INDIAN CONSTITUTIONAL REFORM].

being “unable to cope with the intelligent and persistent demands of civilization,”⁶ Indians had successfully designed and developed advanced governments and laws to protect the rights of their peoples long before the federal government thought to suggest these institutions to tribes.⁷ But European and American distrust of, or disinterest in, Indian tribal affairs led them to apply their laws and philosophies to the exclusion of Indians’ own views in these areas.⁸ This section shows the history of colonial European and U.S. attempts to impose Western law and culture upon the tribes based on a mixture of skepticism and paternalism. Next, it illustrates how recent laws increasing rights protections for Indians nonetheless continue this historical trend.

1. *An Imposition of Laws and Constitutions.* — Despite a long history of tribal self-governance,⁹ European (and later U.S.) powers felt compelled to impose European ideas or forms of governments on Indian tribes and to judge tribes by European understandings of law. To use a traditional example, the right of Indians to land was denied to them on the basis of European conceptions of property law,¹⁰ as colonists asked only whether Locke’s theory of property would encompass the Indians’ practices with regard to the land.¹¹ There was little inter-

⁶ Charles C. Royce, *The Cherokee Nation of Indians*, in H.R. MISC. DOC. NO. 167, at 129, 225 (1887).

⁷ In fact, tribal governments had an impact on the development of the federal government. Benjamin Franklin observed in a letter to James Parker that the success of the Iroquois Confederacy, which “has subsisted ages, and appears indissoluble,” demonstrated the feasibility of union for the colonies. Letter from Benjamin Franklin to James Parker (Mar. 20, 1751), in ARCHIBALD KENNEDY, *THE IMPORTANCE OF GAINING AND PRESERVING THE FRIENDSHIP OF THE INDIANS TO THE BRITISH INTEREST CONSIDERED* 38, 41 (1752); see also H.R. Con. Res. 331, 100th Cong. (1988) (enacted) (recognizing the influence of “the Iroquois Confederacy and other Indian Nations [on] the formation and development of the United States”).

⁸ Greed, of course, was a constant background motive for applying European laws, whether overtly or covertly. Cf. NANCY SHOEMAKER, *A STRANGE LIKENESS* 10 (2004) (describing frequent “Indian complaints of greed, lies, and treachery appear[ing] openly in accounts written by the alleged perpetrators”).

⁹ The Great Law of Peace, the constitution of the Iroquois Confederacy, was drafted perhaps as early as August of 1142. ENCYCLOPEDIA OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY) 152 (Bruce Elliott Johansen & Barbara Alice Mann eds., 2000). Other tribes, like the Cherokee and Chickasaw, passed constitutions of their own in the early to mid-nineteenth century. CONSTITUTION OF THE CHEROKEE NATION July 26, 1827; CONSTITUTION Aug. 30, 1856 (Chickasaw Nation); CONSTITUTION OF THE CHOCTAW NATION Nov. 10, 1842. These constitutions often were the products of constitutional conventions and extensive thought by the tribes that drafted them. See, e.g., GARY E. MOULTON, JOHN ROSS, CHEROKEE CHIEF 32 (1978); ROBERT L. TSAI, *AMERICA’S FORGOTTEN CONSTITUTIONS* 158 (2014).

¹⁰ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 570 (1823) (summary of argument) (“According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity . . .”).

¹¹ Colonists were divided on this question. Some argued that Indians obtained property rights in the land they burned and worked. See, e.g., Letter from John Adams to William Tudor (Sept. 23, 1818), in 10 *THE WORKS OF JOHN ADAMS* 359–60 (Charles Francis Adams ed., 1856) (“Every Indian had a right to his wigwam, his armor, his utensils; when he had burned the woods

est in investigating property regimes developed by Indians themselves.¹² Rather, the governments that arrived in North America searched for the particular forms of law and government with which they were familiar and, finding them lacking, sought to impose civilization and order (of their own style¹³) upon tribes.¹⁴

(a) “*You Have No Law.*” — The British distrusted Indian adjudication. As early as 1640, Rhode Islanders agreed by treaty with the Narragansett Indians that any Indian whose fires damaged persons or property was “to be tryed by our Law.”¹⁵ Several treaties in this vein would be passed throughout the following centuries.¹⁶ The treaties demonstrate the nearly universally consistent practice of extradition of Indians to tribunals under U.S. law. The reasons advanced for this policy were simple: federal laws were based on the culmination of Western philosophy and society, while the tribes’ laws were based on

about him, and planted his corn and beans, his squashes and pompions, all these were his undoubted right . . .”). Others argued that the land was simply lying undeveloped, and left free for colonists to take and cultivate. *See, e.g.*, Robert Cushman, *Reasons and Considerations Touching the Lawfulness of Removing out of England into the Parts of America*, in 9 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 64, 68 (1832) (“[A]ll spoils, rots, and is marred for want of manuring, gathering, ordering, &c.”). This debate extends at least as far back as Christopher Columbus, who first raised the matter of Indians’ conception of private property. *See* Letter from Christopher Columbus to Luis de Santángel, Escribano de Ración, Kingdom of Aragon (Mar. 4, 1493), in THE FOUR VOYAGES OF COLUMBUS 1, 14 (Cecil Jane ed. & trans., 1988) (“I have not been able to learn if they hold private property; what seemed to me to appear was that, in that which one had, all took a share, especially of eatable things.”).

¹² *See* WILLIAM CRONON, CHANGES IN THE LAND 58 (2003).

¹³ *Cf.* THE YALE BOOK OF QUOTATIONS 299 (Fred Shapiro ed., 2006) (reporting [perhaps apocryphally] that Mohandas Gandhi, when asked what he thought of Western civilization, retorted: “It would be a good idea”).

¹⁴ *See* Tom Tso, Essay, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 232 (1989) (“[T]he Anglo world has said to tribes, ‘Be like us. Have the same laws and institutions we have. When you have these things perhaps we will leave you alone.’”).

¹⁵ William Coddington & Miantonomie, *Certain Propositions Made Interchangably on the 7th of July [1640]*, in 2 DOCUMENTARY HISTORY OF RHODE ISLAND 101, 102 (Howard M. Chapin ed., 1919). The sachem would be invited “to come & see the Tryall” of Indians by Rhode Island “for any matters of greater weight exceeding the valew of [10] fadome of beads.” *Id.* (spelling in original).

¹⁶ *See, e.g.*, Treaty with the Cherokees, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18, 19 [hereinafter Treaty of Hopewell] (“If any Indian . . . shall commit a robbery, or murder, or other capital crime, on any citizen of the United States, . . . [he shall] be punished according to the ordinances of the United States If any citizen of the United States . . . shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States; and the punishment shall be in presence of some of the Cherokees”); Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2528 (2014) (“These [nineteenth-century treaty] clauses were reciprocal in their two-way promise of compensation but asymmetrical with respect to extradition: all wrongdoers were to be haled into the courts of the United States. . . . *But see, e.g.*, Treaty of Hopewell, *supra*, at 19 (“If any citizen of the United States . . . shall attempt to settle on any of the lands westward or southward of the said boundary . . . such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please . . .”).

primal instincts, such as revenge.¹⁷ These justifications were offered even by those claiming to be advocates for Indian interests, like the Indian Rights Association.¹⁸ The Association proposed that the best way to serve the Indian was to rid him of his laws and provide him with Western laws.¹⁹ Tribes took exception to this arrangement and suggested hierarchy. Yet colonists typically responded by simply laughing off alternatives.²⁰ In essence, early colonists and U.S. citizens believed “[t]he white man’s law” was unquestionably the better law.²¹

Within their lands, however, tribes retained the ability to control Indian conduct against Indians.²² The Supreme Court, in the 1883 case *Ex parte Crow Dog*,²³ held that an Indian could not be tried under federal law for a crime committed against another Indian on tribal land.²⁴ Kan-gi-shun-ca (Crow Dog) shot and killed Sin-ta-ga-le-Scka (Spotted Tail), a Brulé Sioux chief.²⁵ Crow Dog was tracked down, captured by tribal police, and jailed.²⁶ Under tribal law, the matter was settled for \$600, eight horses, and a blanket.²⁷ Unsatisfied with this result, federal prosecutors charged Crow Dog with murder, whereupon he was tried and sentenced to hang.²⁸ Crow Dog sought a writ of habeas corpus at the Supreme Court, which was granted.²⁹ Justice Matthews, writing for the Court, argued that the tribes had traditionally been allowed to retain their own self-government and would not lose that ability without a clear congressional assertion to

¹⁷ Cf. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883) (contrasting “the red man’s revenge” and “the maxims of the white man’s morality”).

¹⁸ See, e.g., HENRY S. PANCOAST, *THE INDIAN BEFORE THE LAW* 20 (1884) (“[T]he crisis will not be past until the law of the white man is the law of the red man, and the Indian finally takes his place as a citizen of the United States.”).

¹⁹ See EIGHTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS: 1886, at 128 (1887) (statement of Rutgers College President Merrill E. Gates) (“[T]here is machinery by which these Indians can be made men. It is in those safeguards by which we, as citizens of the United States, have surrounded ourselves and our property before the law.”).

²⁰ See, e.g., JEFF C. RIDDLE, *THE INDIAN HISTORY OF THE MODOC WAR AND THE CAUSES THAT LED TO IT* 67 (1914) (recording a U.S. general’s response to a Modoc request to extradite American soldiers who had killed Modoc women and children as “[General Edward] Canby (laughing): ‘Why, . . . you have no law’”).

²¹ *Id.* at 65 (quoting General Edward Canby) (“[Y]ou Indians have got to come under the white man’s laws. The white man’s law is strong and straight.”).

²² S. REP. NO. 41-268, at 10 (1870) (“[The right of tribes] to administer justice among themselves, after their rude fashion, . . . has never been questioned; and . . . the Government has carefully abstained from attempting to regulate their domestic affairs . . .”).

²³ 109 U.S. 556 (1883).

²⁴ See *id.* at 571-72.

²⁵ SIDNEY L. HARRING, *CROW DOG’S CASE* 1 (1994).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Crow Dog*, 109 U.S. at 557-58.

²⁹ *Id.* at 557, 572.

the contrary.³⁰ Permitting federal law to apply to Indians on their own land:

judges them by a standard made for others and not for them, which takes no account of the conditions which should except them from its exactions It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law . . . which is opposed to the traditions of their history, [and] to the habits of their lives³¹

But even this modicum of independence was soon stripped away. Two years later, Congress passed the Major Crimes Act,³² which permitted federal prosecutors to charge Indians with “murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny” when committed on Indian territory.³³ Unwilling to allow such crimes to be resolved without American justice, Congress conferred jurisdiction on federal courts and federal prosecutors.³⁴ The Supreme Court upheld the statute in *United States v. Kagama*.³⁵ The federal government now shared (or had usurped³⁶) jurisdiction over major crimes. Once again, distrust of Indian law triumphed.

(b) *Writing and Rewriting Indian Constitutions.* — Having provided the “courtesy” of federal laws and trials to the tribes,³⁷ the federal government drafted constitutions for them as well.³⁸ The Indian Reorganization Act of 1934³⁹ (IRA) included a provision for “the right [of a tribe] to organize for its common welfare, and . . . adopt an ap-

³⁰ See *id.* at 568–70.

³¹ *Id.* at 571.

³² Ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)).

³³ *Id.*

³⁴ See *Tribal Courts Act of 1991 and Report of the U.S. Comm’n on Civil Rights Entitled “Indian Civil Rights Act”: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 42 (1991) (statement of Wayne Ducheneaux, President, National Congress of American Indians) (“[O]ur method of dealing with [the crime] was Crow Dog should go take care of Spotted Tail’s family, and if he didn’t do that we’d banish him from the tribe. But that was considered too barbaric, and [Congress] thought perhaps we should hang him like civilized people do . . .”).

³⁵ 118 U.S. 375 (1886). *Kagama* further described Indians as “[d]ependent [upon the United States] for their political rights.” *Id.* at 384.

³⁶ See U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 679, <http://www.justice.gov/usam/criminal-resource-manual-679-major-crimes-act-18-usc-1153> [<http://perma.cc/LAG8-XNDE>] (“It remains an open question whether federal jurisdiction [over major crimes] is exclusive of tribal jurisdiction.”).

³⁷ H.R. REP. NO. 23-474, at 13 (1834), in FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 74 (4th ed. 1945) (“[I]t is rather of courtesy than of right that we undertake to punish crimes committed in [Indian] territory by and against our own citizens. And this provision is retained principally . . . [because] it may be unsafe to trust to Indian law in the early stages of their Government.”).

³⁸ FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 3 (2006). The government prepared and provided a number of written constitutions for tribes in the years leading up to 1934, when the Indian Reorganization Act was adopted. See *id.*

³⁹ Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2012)).

appropriate constitution and bylaws.”⁴⁰ The Bureau of Indian Affairs (BIA)⁴¹ planned to “offer useful suggestions to Indians engaged in drawing up constitutions.”⁴² Felix Cohen, a drafter of the IRA and lawyer at the BIA, believed in a new approach for tribes.⁴³ Cohen thought that tribal constitutions ought to be varied to meet the needs of the different tribes.⁴⁴ But more importantly, he wanted tribes to develop constitutions on their own. A constitution provided by the BIA, he explained, would be “merely scraps of paper,” “an adopted child and not the natural offspring of Indian hearts and minds.”⁴⁵ Cohen hoped that the BIA would assist the Indian tribes in creating their own constitutions rather than foisting constitutions on them for adoption lock, stock, and barrel. He disagreed, however, with the inclusion of any bills of rights, feeling that they were “frequently violated, . . . [and] often . . . misused to obstruct needed legislation desired by a majority of people.”⁴⁶ The Supreme Court’s much-maligned foray into substantive due process in the *Lochner* era had convinced him that tribes were better without such instruments.⁴⁷ Cohen’s goal of avoiding a “model constitution” template for tribes was unsuccessful, as the BIA was heavily involved in the process of drafting many tribes’ constitutions.⁴⁸ But because of Cohen’s suggestions, many tribes omitted explicit rights protections in their constitutions.⁴⁹

2. *Modern Concern over Tribal Governance.* — The U.S. position on Indian tribes has been described as “pendulum-like,” swinging back

⁴⁰ *Id.* § 16, 48 Stat. at 987. Of course, by this time at least forty tribes already had submitted constitutions or “documents in the nature of constitutions” to the Department of the Interior. David E. Wilkins, *Introduction* to COHEN, *supra* note 38, at xi, xxi (quoting FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 129 n.59 (Univ. N.M. Press 1971)).

⁴¹ The BIA, formerly the Office of Indian Affairs, was renamed in 1947. The name “BIA” is used here anachronistically for clarity.

⁴² COHEN, *supra* note 38, at 3.

⁴³ Wilkins, *supra* note 40, at xxi.

⁴⁴ See COHEN, *supra* note 38, at 3.

⁴⁵ *Id.*

⁴⁶ *Id.* at 76.

⁴⁷ See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 894 (2003).

⁴⁸ Many of the constitutions were sent as drafts to the BIA, which then sent them back with proposed changes, with “a substantial impact on [their] content.” Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government*, in AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 5, at 49, 65. Nearly half of tribes across the United States still use BIA-suggested constitutions. See ELMER R. RUSCO, A FATEFUL TIME 301 (2000).

⁴⁹ See, e.g., CONSTITUTION AND BY-LAWS OF THE YAVAPAI-APACHE INDIAN COMMUNITY OF THE CAMP VERDE RESERVATION; PATRICK A. LEE, TRIBAL LAWS, TREATIES, AND GOVERNMENT 62 (Christopher K. Baker ed., 2013). Some tribes, however, included a few explicit rights in their constitutions. See, e.g., CONSTITUTION AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION, SOUTH DAKOTA art. VII, § 1 (establishing “the right to vote” for members over the age of twenty-one having resided on the reservation for one year immediately prior to any election).

and forth between the extremes of termination and self-determination a number of times.⁵⁰ But after President Nixon announced in 1970 that the United States was recommitted to self-determination⁵¹ (which remains its policy today⁵²), Congress readjusted its approach to deal with the prospect of long-term Indian governments. One realm it has targeted is individual rights and due process protections in tribal proceedings. While Congress's motives may be pure, there are numerous parallels to the past practice of imposing Western theories as better law.

(a) *The Indian Civil Rights Act.* — Although some tribal constitutions (like that of the Cherokee) included enumerated rights, a question emerged over whether federal constitutional rights would apply on tribal lands. In *Talton v. Mayes*,⁵³ the Supreme Court held that the Fifth Amendment did not apply to the Cherokee.⁵⁴ Furthermore, a facial reading of the Fourteenth Amendment⁵⁵ appeared to exclude tribes, placing them outside the prohibitions of the Bill of Rights.⁵⁶ Concern grew about “corrupt little tyrannies,” tribal councils “with little accountability either to the individual Indian people of their presumed constituencies or to the culture and traditions of the tribes.”⁵⁷ In 1961, Congress began “an extensive investigation into the constitutional rights of the American Indian.”⁵⁸ The members were “jarred and shocked by the conditions . . . [of] constitutional rights”⁵⁹ of Indians and took “action to bring justice . . . to the first Americans.”⁶⁰ The response was ICRA, which laid out a list of rights that began “No Indian tribe . . . shall.”⁶¹ Passed as a rider to the Civil Rights Act of

⁵⁰ Jace Weaver, *The Pendulum Swings of Indian Policy*, IIP DIGITAL (June 1, 2009), <http://iipdigital.usembassy.gov/st/english/publication/2009/06/20090612143011mlenuhreto.8493159.html>; see also Linda Medcalf, *The Quest for Sovereignty*, in NATIVE AMERICAN SOVEREIGNTY 267, 268 (John R. Wunder ed., 1996).

⁵¹ See Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564, 565 (July 8, 1970).

⁵² Weaver, *supra* note 50.

⁵³ 163 U.S. 376 (1896).

⁵⁴ *Id.* at 384.

⁵⁵ U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”) (emphasis added).

⁵⁶ Article I, Section 8 clearly distinguishes tribes from the states: “To regulate commerce . . . among the several states, and with the Indian tribes.” *Id.* art. I, § 8, cl. 3.

⁵⁷ Joseph de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59, 70 (1975).

⁵⁸ 110 CONG. REC. 17,326 (1964) (statement of Sen. Ervin).

⁵⁹ 113 CONG. REC. 35,473 (1967) (statement of Sen. Hruska).

⁶⁰ *Id.* (statement of Sen. Byrd).

⁶¹ 25 U.S.C. § 1302 (2012). The language thus appears to be an amalgamation of the Bill of Rights and the Fourteenth Amendment. Notably, several rights of the Bill of Rights are missing: there is no Establishment Clause or right to bear arms, for example. See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1353–54 (1969). The Act's sponsor described the list as “the . . . basic rights” of Americans, 113 CONG.

1968,⁶² ICRA was seen by some as a product of the civil rights movement of the times.⁶³

Courts initially agreed, at least in part, that ICRA was to render federal civil rights protections enforceable against tribal governments.⁶⁴ In the first ten years following its enactment, federal courts heard eighty cases of alleged ICRA violations, ranging from disputes in criminal proceedings to voting and even land-use regulations.⁶⁵ When resolving these cases, judges commonly took a bifurcated approach. For cases involving provisions identical to those in the Bill of Rights, courts generally turned to existing federal constitutional law and procedures.⁶⁶ Assistance of counsel, for example, was determined to require licensed attorneys, even when a tribe “had never allowed professional attorneys to practice in tribal court.”⁶⁷ For equal protection or due process issues, however, courts tended to defer more to tribes.⁶⁸

In 1978, the Supreme Court limited ICRA’s reach. In *Santa Clara Pueblo v. Martinez*,⁶⁹ the Court denied that ICRA provided any remedy for violations of its rights other than habeas corpus.⁷⁰ *Santa Clara Pueblo*’s impact on the rights of the non-Indian population on tribal land was muted by a decision handed down months earlier. *Oliphant v. Suquamish Indian Tribe*⁷¹ held that the tribes could not criminally try non-Indians in tribal courts.⁷² As a result of *Oliphant* and *Santa Clara Pueblo*, ICRA’s enforceable effects were mostly limited to Indi-

REC. 35,473 (statement of Sen. Ervin), but compromises and normative judgments appear to have been made regarding what constituted “basic rights.”

⁶² Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

⁶³ See Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1818 (1968).

⁶⁴ Most federal courts implied a right of action under ICRA and thus began hearing tribal civil rights disputes. Amy Conners, Note, *The Scalpel and the Ax: Federal Review of Tribal Decisions in the Interest of Tribal Sovereignty*, 44 COLUM. HUM. RTS. L. REV. 199, 219 & n.103 (2012).

⁶⁵ *Indian Civil Rights Act*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/lists/icra.htm> [<http://perma.cc/8JZV-K5AT>].

⁶⁶ See JOHN R. WUNDER, “RETAINED BY THE PEOPLE” 150–51, 153 (1994).

⁶⁷ Michael Reese, *The Indian Civil Rights Act: Conflict Between Constitutional Assimilation and Tribal Self-Determination*, 20 SE. POL. REV. 29, 40 (1992). One tribe had instead employed “traditional counsel, such as elders or other tribal members conversant with tribal laws and customs, as representatives.” *Id.*

⁶⁸ See, e.g., *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) (“We note in passing that the courts have been careful to construe the terms ‘due process’ and ‘equal protection’ as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution.”).

⁶⁹ 436 U.S. 49 (1978).

⁷⁰ *Id.* at 61.

⁷¹ 435 U.S. 191 (1978).

⁷² *Id.* at 195.

ans imprisoned under tribal law for crimes committed on tribal lands against Indians.

(b) *The Tribal Law and Order Act.* — ICRA had also limited tribes' ability to hold prisoners for more than one year per offense.⁷³ The Tribal Law and Order Act of 2010⁷⁴ (TLOA) extended the maximum sentence that tribal courts could hand down per offense by another two years, but only if a number of procedural requirements were met.⁷⁵ These conditions reflected federal due process developments created by the Supreme Court over the preceding decades. Additionally, these requirements, which include "effective assistance of counsel at least equal to that guaranteed by the United States Constitution," an attorney for indigent defendants, and recorded proceedings,⁷⁶ impose both a great cost on tribes interested in extending their sentencing powers and a pressure to conform their systems to match federal or state justice systems. Many tribes have nontraditional (in the sense of being unlike their federal or state counterparts⁷⁷) justice systems that include restorative justice schemes, where the presence of a lawyer may serve to antagonize or heighten tensions.⁷⁸ But federal encouragement of analogous tribal rights protections continues. A congressional advisory commission created by the TLOA suggested making tribes an offer: the removal of federal and state criminal jurisdiction and a congressional repeal of *Oliphant* in return for the adoption of

⁷³ The initial limit was six months for any one offense. Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77 (1968). The limit led to the strange result of sentencing those accused of manslaughter to six months in jail. See, e.g., *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) (*nota bene* — the tribal charge of "assault and battery," *id.* at 1390, was likely used to avoid the potentially exclusive jurisdiction of the Major Crimes Act, see *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990), *superseded by statute*, Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, 104 Stat. 1856). Congress raised the limit to one year in 1986. Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (1986). Some tribes used "stacking" to circumvent this limit. Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISCOURSE 88, 91 (2013) ("[S]ome courts, to deal with the most serious offenders, have stacked short sentences for separate charges to create total sentences longer than one year.").

⁷⁴ Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified as amended in scattered sections of the U.S. Code).

⁷⁵ *Id.* § 234, 124 Stat. at 2280. It also capped stacking sentences at nine years total. *Id.*

⁷⁶ 25 U.S.C. § 1302(c)(2) (2012).

⁷⁷ See Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3 (1997).

⁷⁸ See Colin Woodard, *Maine Tribes Seek Authority to Try Domestic Violence Cases*, PORTLAND PRESS HERALD (Feb. 26, 2015), <http://www.pressherald.com/2015/02/23/maine-tribes-seek-authority-to-try-domestic-violence-cases> [<http://perma.cc/8EPS-266Q>]; cf. *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. (1969), as reprinted in 2 AM. INDIAN L. NEWSL. 92, 94-95 (1969) (statement of Domingo Montoya, Chairman, All Indian Pueblo Council) ("Our whole value structure is based on the concept of harmony — harmony between the individual, his fellows, and his social institutions.").

“civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review.”⁷⁹

As has been shown, throughout European- and federal-Indian relations there has been a history of suspicion of Indian law and self-government. And although Congress came to accept that tribal courts would have jurisdiction over some cases, it became concerned with reports of abuse and the lack of Bill of Rights protections for tribal members. Congress passed ICRA to bring (most of) the Bill of Rights to tribal lands, but the Court in *Santa Clara Pueblo* limited the available remedies for ICRA violations. Following the passage of ICRA, however, many tribes added rights provisions to their constitutions.⁸⁰ The following section evaluates how ICRA and *Santa Clara Pueblo* have been received by tribes and courts with respect to rights protections.

B. ICRA's Application in Practice

Among the motivations behind ICRA were desires to protect individual Indians from “[p]ower hungry” tribal governments⁸¹ and to bring the protections of the Bill of Rights to Indians on reservations.⁸² In crafting the legislation, Congress made a number of adjustments in an attempt to respect tribes, including abandoning the explicit demand that tribes follow federal constitutional norms and restricting review to habeas corpus applications.⁸³ After *Santa Clara Pueblo*, an uneasy compromise was struck: federal review persisted but was limited to habeas review, leaving tribal courts as the primary fora for rights claims. The following section explores reactions to the compromise and the practical ramifications of ICRA today.

1. *Tribes' Responses: To Each His Own ICRA.* — In the wake of *Santa Clara Pueblo*, “tribal courts[, and not federal courts,] have doctrinally developed the meaning of ICRA's substantive provisions.”⁸⁴ Because most ICRA claims must first be heard in tribal court,⁸⁵ these

⁷⁹ INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 23 (2013) (emphasis omitted); see also *id.* at 27 (describing the process of tribes adopting U.S. constitutional rights protections as “Indian nations deem[ing] themselves ready”).

⁸⁰ 25 U.S.C. § 1302(c)(2) (2012).

⁸¹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 81 (1978) (White, J., dissenting) (quoting *Hearings on S. 961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 264 (1965) (statement of Sen. Ervin)).

⁸² See 113 CONG. REC. 35,474 (1967) (statement of Sen. Ervin).

⁸³ See Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 602 (1972).

⁸⁴ 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, 488 (2000).

⁸⁵ The only ICRA remedy that may be sought outside of tribal courts is a writ of habeas corpus, but even there a petitioner must normally have first exhausted remedies in tribal court. See,

courts are offered the (often exclusive) opportunity to interpret ICRA's rights.⁸⁶ These interpretations frequently adapt federal ICRA rights into rights that reflect a tribe's values.⁸⁷ Some scholars have argued that, as a result, "ICRA . . . borders on irrelevance."⁸⁸ As tribes share many of ICRA's high-level interests, with some tailoring they have been able to achieve results that would seem to be mutually agreeable to Congress and tribal citizens.⁸⁹ ICRA's function hitherto has thus encouraged tribes to formalize protections of those tribal rights they support and left federal ICRA rights determinations to habeas review. But the protection of federal rights by tribes is really just an alliance of convenience: protection mostly exists only where both the tribe and Congress agree on the right (with differences perhaps in its contours). Such an agreement nonetheless avoids the question of who should ultimately determine the right.

2. *Courts' Responses: A House Divided.* — The federal courts acceded to the Supreme Court's determination that no independent federal cause of action exists in ICRA.⁹⁰ The question that has remained before the courts is how much deference to show to tribes in interpreting ICRA. Some federal courts have rejected differences of culture as a reason for adjusting habeas review,⁹¹ while others have maintained a practice of deference (at least in part) to tribal interpretations.⁹² Those

e.g., Valenzuela v. Silversmith, 699 F.3d 1199, 1206 (10th Cir. 2012); *see also infra* p. 1724 and note 112.

⁸⁶ *See Rosen, supra* note 84, at 522 (finding that tribal courts most often tailor constitutional rights to their tribes' own values).

⁸⁷ *See id.* at 578. The Court ostensibly supported this result when it spoke of ICRA cases' resolution "depend[ing] on questions of tribal tradition and custom." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

⁸⁸ Matthew L.M. Fletcher, *Resisting Congress: Free Speech and Tribal Law*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 133, 148 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012) (describing ICRA as irrelevant because tribal courts may fill in its substance).

⁸⁹ *Id.* at 147 ("ICRA largely is redundant in many tribal communities.").

⁹⁰ *See, e.g.*, *Crowe v. E. Band of Cherokee Indians, Inc.*, 584 F.2d 45, 45 (4th Cir. 1978). The Tenth Circuit initially appeared to write an exception to *Santa Clara Pueblo* for cases where there was no potential tribal relief or remedy. *See Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980). It soon strictly narrowed that exception, however. *See White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("Necessarily the *Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara*.").

⁹¹ *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900–01 (2d Cir. 1996) ("[T]here is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive 'sovereignty' our country has long recognized and sustained.").

⁹² *See, e.g.*, *Alvarez v. Tracy*, 773 F.3d 1011, 1021 (9th Cir. 2014) ("[R]esolution of statutory issues under the ICRA will 'frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.'" (quoting *Santa Clara Pueblo*, 436 U.S. at 71)).

courts that have not deferred have used federal precedents and definitions of rights to inform the meaning of ICRA.⁹³

The question of who the ultimate determiner of rights should be cannot remain an ominous sword of Damocles, dangling over tribal courts and threatening at any moment to destroy their jurisprudence. If Congress is seeking to provide federal rights in the same way to Indians as to non-Indians, it is failing. In the same vein, if Congress instead is trying to empower tribes to protect civil rights in their own way, the uncertainty surrounding ICRA is causing tribes to hesitate and some federal courts to return to federal jurisprudence as a guide to ICRA's provisions. The next section proposes a method of interpreting ICRA that would be consistent with *Santa Clara Pueblo*, federal habeas practice, and general notions of tribal sovereignty, and would remove the uncertainty that has resulted from the divergent approaches to ICRA.

C. Redefining ICRA's Provisions

The problem that federal courts face when grappling with ICRA is in essence that they are familiar with the terms contained within ICRA (which closely resemble those of the Bill of Rights and the Fourteenth Amendment) and have interpreted them in other contexts in a specific manner. Indeed, courts have often convinced themselves that the words "require" a precise meaning, when a plain reading would provide some play in the joints.⁹⁴ Reexamining ICRA without federal precedents transforms the statute from a heavy imposition of federal procedures and norms into a textual baseline upon which tribes may erect their own rights jurisprudence and procedures.

1. *What Should ICRA Mean?* — Asking courts (or law review readers) to forget the federal interpretations of constitutional provisions may seem to be quite the conceit. But there is a sound basis for this reading, rooted in longstanding federal Indian law and canons of construction.

(a) *Indian Canons of Construction.* — The Supreme Court has treated statutes and treaties that regard Indians differently for over

⁹³ Cf. *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981) ("In light of the legislative history of the Indian Civil Rights Act and its striking similarity to the language of the Constitution, we consider the problem before us under fourth amendment standards." (citation omitted)).

⁹⁴ Compare, e.g., *Powell v. Nevada*, 511 U.S. 79, 80 (1994) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)) (stating that, in the case of pretrial determinations of probable cause, "absent extraordinary circumstances, a longer delay [than forty-eight hours] violates the Fourth Amendment"), with *Williams v. Colville Confederated Tribes*, No. AP99-003, 2002 WL 34540611, at *2 (Colville C.A. Apr. 30, 2002) (finding that the reasonableness requirement of seizures is "satisfied by an initial appearance within 72 hours of arrest").

180 years.⁹⁵ The canons of construction that the Court has employed include: (1) “[t]reaties and agreements are to be construed as the Indians would have understood them”; (2) “[t]reaties, statutes and agreements should be liberally construed in favor of the Indians”; (3) “[a]mbiguities should be resolved in favor of the Indians”; and (4) “Indian rights and sovereignty are retained unless congressional intent to diminish is clear.”⁹⁶ Most immediately relevant to ICRA are canons two through four. First, the plain text of ICRA is filled with ambiguities: “*freedom of speech*,” “*unreasonable search and seizures*,” “*just compensation*,” “*a speedy . . . trial*,” and more.⁹⁷ Certainly there is room for alternative interpretations of each of these terms; indeed, the Supreme Court itself has offered competing definitive interpretations for them.⁹⁸ Tribal courts, in construing ICRA for their own members, have taken advantage of these ambiguities to provide rights different from federal rights, while still asserting faithfulness to the text.⁹⁹ Tribes have found this ability useful to avoid disruption of “tribal custom[s], tradition[s] or cultural norm[s].”¹⁰⁰ Given the desire by tribes to maintain their traditions and cultural norms within the ambiguities of the statute, ICRA would seem a prime candidate for deferential construction.

⁹⁵ Scott C. Hall, *The Indian Law Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 496, 505 (2004); see also *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (“[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.”). Although some have recently questioned the vitality of the Indian canons, see, e.g., Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 39 (2008), federal courts continue to use them in cases involving ambiguous statutes, see, e.g., *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1081 (7th Cir. 2015), and the American Law Institute’s upcoming *Restatement of American Indian Law* endorses mandatory application of the canons by courts in such cases, see RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 8 (AM. LAW INST., Tentative Draft No. 1, 2015).

⁹⁶ Hall, *supra* note 95, at 495 n.3; see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 113–14 (Nell Jessup Newton et al. eds., 2012).

⁹⁷ 25 U.S.C. § 1302(a) (2012) (emphases added); cf. THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

⁹⁸ Compare, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (finding that compulsory flag salute was not a violation of the freedom of speech), with *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Gobitis* three years later and determining that the compulsory salute violated the freedom of speech).

⁹⁹ See, e.g., *Navajo Nation v. Rodriguez*, 8 NAVAJO RPTR. 604, 613–15 (2004) (“[T]he Indian Civil Rights Act does not require our application of federal interpretations, but only mandates the application of similar language.” *Id.* at 613–14.).

¹⁰⁰ Healy v. Mashantucket Pequot Gaming Enter., No. CV-AA-1997-0183, 1999 WL 34828700, at *5 (Mashantucket Pequot Tribal Ct. Apr. 8, 1999); cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (highlighting the relevance of “tribal tradition and custom” in ICRA cases).

(b) *Traditional Canons of Construction.* — The most tempting counterargument that defenders of a more aggressive ICRA might advance is that by making a nearly identical Bill of Rights for tribes, Congress intended to adopt federal jurisprudence on those rights as part of the terms employed.¹⁰¹ Under this canon, statutory terms of art incorporate federal jurisprudence unless Congress otherwise dictates.¹⁰² This argument fails for two reasons. First, when “the Indian law canons clash with competing canons[,] . . . [the Indian law canons] usually should displace other competing canons.”¹⁰³ But perhaps even more convincingly, traditional statutory interpretation also tends to show that the provisions of ICRA are intentionally left ambiguous for tribes to imbue with their own meanings. By way of illustration, the TLOA added a provision to ICRA requiring that, in cases involving terms of imprisonment greater than one year, tribes must provide “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.”¹⁰⁴ No other provision directly ties the rights in ICRA to those in the Federal Constitution. Under the canon of *expressio unius est exclusio alterius*, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁰⁵ At the very least, Congress’s express introduction of the federal standard in the instance of effective assistance of counsel removes from ICRA the term-of-art presumption, because such a presumption would render the entire clause superfluous.¹⁰⁶

(c) *Arriving at a Meaning.* — Using these canons, federal courts should defer to tribal interpretations of ICRA. But whence should the courts draw tribal meaning? Fortunately, in habeas cases tribes will already have weighed in on the meaning of the provision at issue. Federal courts may hear habeas reviews only after a petitioner has exhausted his tribal remedies.¹⁰⁷ A tribal court (or similar adjudicative

¹⁰¹ See *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas . . . attached to each borrowed word . . . and the meaning its use will convey to the judicial mind unless otherwise instructed.”); see also *Kepner v. United States*, 195 U.S. 100, 133 (1904).

¹⁰² See *Morrisette*, 342 U.S. at 263.

¹⁰³ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 96, § 2.02[3], at 119.

¹⁰⁴ 25 U.S.C. § 1302(c)(1) (2012).

¹⁰⁵ *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

¹⁰⁶ See *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”).

¹⁰⁷ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 96, § 9.09, at 781 & n.17. In fact, a recent survey found that fifty percent of federal habeas petitions filed under ICRA are

body) will have heard the case and ruled on the merits of the ICRA claim, so the federal court will have an articulated reason why the tribe believes the provision does not prohibit the tribe's action. In cases where the tribe's interpretation is a reasonable reading of the ambiguous terms in ICRA, the canons indicate that a federal court should adopt that reading.¹⁰⁸

The most reasonable interpretation of ICRA for federal courts to adopt is that the language of ICRA requires tribes to address each provision and define a right that fits within its terms. In so doing, ICRA encourages tribes to interpret and build off of the scaffolding of rights articulated in ICRA in developing their own jurisprudence. Federal courts should not ask, "Does the tribe's practice accord with a federal understanding of a 'reasonable seizure'?" but rather, "Does the tribe's practice accord with a permissible understanding of a 'reasonable seizure'?"

2. *Why Reinterpret ICRA?* — While the canons would seem to compel courts to interpret ICRA in a deferential manner, a number of federal courts have disagreed.¹⁰⁹ Even courts that have indicated some interest in deferring to tribes have created limits to that deference.¹¹⁰ But tribes have continued to interpret ICRA in their own manner regardless.¹¹¹ What then are the stakes of changing the federal interpretation?

dismissed as a result of failure to exhaust tribal remedies. Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 137 (2015).

¹⁰⁸ This understanding of ICRA does not provide 567 different versions of a federal statute. See *Who We Are*, U.S. DEP'T INTERIOR INDIAN AFF., <http://www.bia.gov/WhoWeAre> (last updated Feb. 6, 2016) [<http://perma.cc/YD6E-ZT49>] ("There are 567 federally recognized American Indian tribes and Alaska Natives in the United States."). Rather, it provides that ICRA is a framework for rights and a minimum standard that tribes must meet in order for their sentences to survive habeas review. How a tribe's interpretation reaches or exceeds that minimum matters not, only that it does.

¹⁰⁹ See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900 (2d Cir. 1996) (rejecting influence of "cultural relativism" on ICRA interpretation in favor of "general American legal norms [and] certain universal principles").

¹¹⁰ See, e.g., *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (suggesting a balancing approach "[w]here the tribal court procedures under scrutiny differ significantly from those 'commonly employed in Anglo-Saxon society'" (quoting *Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 238 (9th Cir. 1976))). Of course, after years of federal imposition of federal law and procedures on tribes, see *supra* section A.1, pp. 1710–14, it is likely that most tribes will have rights and procedures that are similar, at least in part, to their federal counterparts. The question for these federal courts is simply how close an ICRA right is to a constitutional right. Compare, e.g., *Alvarez v. Tracy*, 773 F.3d 1011, 1022 (9th Cir. 2014) ("Because the ICRA, by its plain language, requires a defendant to request a jury, it differs significantly from the Sixth Amendment right to a jury trial."), with *id.* at 1035 (Kozinski, J., dissenting) (preferring to apply Sixth Amendment precedent as opposed to the tribe's "rough and tumble justice").

¹¹¹ See generally Rosen, *supra* note 84 (describing how tribes interpret ICRA).

(a) *Practical Implications.* — Given that the status quo is that tribes have essentially adopted their own understandings of ICRA, why does it matter if federal courts reinterpret ICRA as well? After all, as a result of the exhaustion doctrine, tribal courts receive the first (and often only) opportunity to address the question of ICRA's scope.¹¹² But with the introduction of the TLOA, restrictions on tribal sentencing authority have been relaxed, raising the maximum possible sentence from one year¹¹³ to nine.¹¹⁴ Consequently, the chances that a habeas petition would be heard in federal court through all of its stages of appeal before the sentence had been served have increased significantly.¹¹⁵

Furthermore, permitting federal courts to impose federal procedures on tribes is likely to create a strange loophole in the *Santa Clara Pueblo* compromise: if a prisoner is in jail for a shorter period, he receives tribal rights, but if he is in jail long enough for a federal habeas petition to succeed, he receives federal rights. The *Santa Clara Pueblo* compromise was that “questions of tribal tradition and custom” had a role to play in defining ICRA, and in practice has meant that tribes have some say in defining rights.¹¹⁶ Using federal habeas review as a return to pre-*Santa Clara Pueblo* jurisprudence once a habeas petition is filed in federal court then puts tribes to a choice: sentence offenders for shorter lengths of time to maintain their tribal rights and distinctions, adapt to federal standards, or have their judgments vacated by the federal government. While this avenue may be tempting for those interested in importing federal rights, there are numerous problems with the approach, particularly concerning the federal relationship with tribes and tribal sovereignty.

(b) *Sovereign Rights of a People.* — It bears repeating that, despite their status as “domestic” and “dependent,” tribes remain *nations*.¹¹⁷

¹¹² Cf. Garrow, *supra* note 107, at 148 & n.89 (“None of the[] cases [dismissed for failure to exhaust tribal remedies] reappeared in the federal courts.” *Id.* at 148.). Indeed, few cases make it to or through the federal process at all. *See id.* at 147 (finding a total of thirty ICRA habeas petitions filed in federal court since 1968 that involved detention for a criminal violation and that were not ruled moot).

¹¹³ *But see* Fortin, *supra* note 73, at 91 (describing tribal practice of “stacking” one-year sentences to achieve effectively longer sentences).

¹¹⁴ 25 U.S.C. § 1302(a)(7)(D) (2012). The TLOA also capped tribal stacking of offenses tried at the same proceeding. *See id.*

¹¹⁵ For example, in *Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016), the underlying conviction occurred in January 2008, *id.* at 853, and the petitioner was denied en banc review of a denial of habeas in February 2016, Order, *Kelsey*, No. 14-1537 (6th Cir. Feb. 8, 2016). Another case, *Valenzuela v. Silversmith*, had a sentencing date in June 2008, Amended Proposed Findings & Recommendation on Disposition at 2, *Valenzuela*, No. 1:10-cv-01127 (D.N.M. Sept. 1, 2011), and the final federal appeal was rejected in October 2013, 134 S. Ct. 58, 58 (2013) (mem.).

¹¹⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

¹¹⁷ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

Tribes have “*inherent powers of a limited sovereignty*,” which are not “*delegated powers granted by . . . Congress*.”¹¹⁸ Centuries ago, at the birth of the United States, the Declaration of Independence asserted that it was the “Right of the People” to establish the “principles and . . . form” of their government.¹¹⁹ The remnants of this notion survive for modern Indian nations in the presumption that tribes retain as much sovereignty as Congress does not expressly claim to abrogate.¹²⁰ The TLOA amendment to ICRA clearly intended to force tribes to provide “assistance of counsel” within the meaning of the Federal Constitution in instances where the sentence to be imposed is greater than one year.¹²¹ But this explicit requirement contrasts with the other provisions of ICRA, which leave tribes to their own judgments.¹²² The courts have traditionally interpreted federal legislation to respect and preserve tribal sovereignty in such cases.¹²³

Members of the founding generation of the United States recognized that a proper and effective government should have the consent of the governed when defining their rights.¹²⁴ The Supreme Court intimated a similar value for tribes in *Santa Clara Pueblo* when it described ICRA as an attempt “to fit the unique political, cultural, and economic needs of tribal governments.”¹²⁵ Tribes vary culturally and politically to a far greater extent than states do.¹²⁶ While U.S. jurisprudence has rallied around certain core ideas of process and protection (for example, jury trials), these notions come from a particular (English) history and context. Tribes do not share this history, and they have traditions of their own to which they adhere.¹²⁷ Sovereignty means the ability of tribes to make governance decisions for them-

¹¹⁸ Powers of Indian Tribes, 55 Interior Dec. 14, 19 (Oct. 25, 1934), 1934 WL 2186, at *4.

¹¹⁹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

¹²⁰ See Hall, *supra* note 95, at 495 n.3 (“Indian rights and sovereignty are retained unless congressional intent to diminish is clear.”).

¹²¹ See 25 U.S.C. § 1302(c) (2012).

¹²² See *id.* § 1302(a).

¹²³ See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (“[U]nless and ‘until Congress acts, the tribes retain’ their historic sovereign authority.” (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978))).

¹²⁴ See Letter II from the Federal Farmer to the Republican (Oct. 9, 1787), reprinted in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 10, 11 (Walter Hartwell Bennett ed., 1978) (“[R]ights should be made the basis of every constitution; and if a people be so situated, or have such different opinions that they cannot agree in ascertaining and fixing them, it is a very strong argument against their attempting to form one entire society, to live under one system of laws only.”).

¹²⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978).

¹²⁶ See Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 838 (2014).

¹²⁷ For example, historically, some tribal cultures have determined rights by identifying the best interests of the tribe or finding “harmonious outcomes.” WUNDER, *supra* note 66, at 12.

selves.¹²⁸ The guarantees of trial by jury and just compensation, for example, make sense for a nation that formed out of disenchantment with autocratic power and that values individual property rights and protections but may make less sense perhaps for a tribe used to communal decisions and common property regimes.¹²⁹ Likewise, a tribe might decide that accuracy in prosecuting wrongdoers is worth more than the protection against double jeopardy when evidence beyond all doubt is later discovered; is such a system in fact consistently less just than one that ostensibly denies double jeopardy but permits prosecutions by both state and federal governments for the same crime?¹³⁰ Tribes have different methods of addressing the issues at which these rights are focused, but that does not mean that these methods are inherently inadequate.

(c) *Consistency with Tribal Culture.* — Respecting and reinforcing tribal culture and norms not only acknowledges tribal sovereignty but also promotes good governance. For years, tribes have been told by others how to run their governments and have reaped few benefits.¹³¹ But when tribes have a government and laws that match their culture, “the odds of success for tribal development increase.”¹³² Tribes and their citizens tend to view such governments as more legitimate, and these governments in turn bring economic returns to the tribes.¹³³

¹²⁸ *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18–19 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978) (“Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. To abrogate tribal decisions, . . . for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it.”).

¹²⁹ It is important to note that even among Western nations, trial by jury is not sacrosanct. See, e.g., *Clap de fin pour les jurés populaires en correctionnelle*, LE MONDE (Apr. 27, 2013, 12:21 PM), http://www.lemonde.fr/societe/article/2013/04/27/clap-de-fin-pour-les-jures-populaires-en-correctionnelle_3167750_3224.html [<http://perma.cc/5J TZ-X9MZ>] (reporting that, except for a failed three-year experiment ending in 2013, France has gone more than two centuries without sitting jurors for minor criminal trials).

¹³⁰ See *United States v. Lanza*, 260 U.S. 377, 382 (1922).

¹³¹ See generally Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS 3 (Miriam Jorgensen ed., 2007) (describing the traditional approach to Indian government and the social and economic problems that have ensued).

¹³² Singel, *supra* note 126, at 838 (citing Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 1, 16–18 (Stephen Cornell & Joseph P. Kalt eds., 1992)).

¹³³ See Cornell & Kalt, *supra* note 131, at 25. Tribal citizens do not feel that federal courts have a good grasp of their culture. See DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE 107 fig.4.5 (2012) (finding in a survey that less than 24% of non-Public Law 280 reservation residents felt that federal courts had a good understanding of their culture, compared to 75% who felt tribal courts did). Notably, non-Public Law 280 reservation residents find troubling federal courts’ “exercise of non-tribal values within court processes.” *Id.* at 109.

Moreover, a “cultural match” approach, in which tribes are permitted to have differing interpretations of rights, avoids the “one-size-fits-all mentality” that characterized much of the federal relationship with tribes in the past.¹³⁴ The diversity of tribal approaches to governance and citizenship¹³⁵ should not be eclipsed by federal precedents developed using an outside culture and context, especially when such an effort would likely harm tribes’ long-term prospects. Such a system would not accord with the spirit of the federal government’s trust obligations with respect to tribes.¹³⁶

(d) *Comity and International Choice of Law.* — An additional reason for deferring to tribal interpretations of rights, as long as they fit within the framework of ICRA, is the traditional notion of comity. Federal courts are well aware of the notion of comity with respect to tribal courts in the ICRA context.¹³⁷ In international cases, federal courts will generally enforce foreign judgments so long as the foreign tribunal used procedural rules “according to . . . a civilized jurisprudence, and . . . [kept] a clear and formal record.”¹³⁸ Some form of due process is required, but it certainly need not be identical to U.S. federal due process.¹³⁹ But in dealing with comity for tribal courts, federal courts have changed the standard, using federal due process as their

¹³⁴ Manley A. Begay, Jr. et al., *Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?*, in REBUILDING NATIVE NATIONS, *supra* note 131, at 34, 49.

¹³⁵ *See id.* at 48.

¹³⁶ *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) (“The Government, following ‘a humane and self imposed policy . . . has charged itself with moral obligations of the highest responsibility and trust,’ obligations ‘to the fulfillment of which the national honor has been committed.’” (citations omitted) (first quoting *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); then quoting *Heckman v. United States*, 224 U.S. 413, 437 (1912))).

¹³⁷ For instance, federal courts created the exhaustion requirement of ICRA habeas review entirely out of comity concerns. *Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation*, 554 F.2d 845, 846 (8th Cir. 1977) (“As to tribal remedies, we have held, as a matter of comity, that tribal remedies must ordinarily be exhausted before a claim is asserted in federal court under the Indian Civil Rights Act . . .”).

¹³⁸ *Hilton v. Guyot*, 159 U.S. 113, 205–06 (1895); *see also id.* at 202–03 (“[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . .”).

¹³⁹ *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (“It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own [n]otions of ‘civilized jurisprudence,’ comity should not be refused.” (quoting *Hilton*, 159 U.S. at 205)).

touchstone.¹⁴⁰ It would seem that the reasons for disparate treatment must derive from distrust of tribal courts or the belief that federal standards apply regardless of comity concerns. Granting deference to tribal courts that do not display “outrageous departures from our own [n]otions of ‘civilized jurisprudence’”¹⁴¹ would demonstrate increased respect for tribal sovereignty.

An examination of the comity given by the federal government to the states further confirms that deference in these matters is appropriate. When the Antiterrorism and Effective Death Penalty Act of 1996¹⁴² was passed, it “impose[d] a ‘highly deferential standard for evaluating state-court rulings,’ and ‘demand[ed] that state-court decisions be given the benefit of the doubt.”¹⁴³ Federal courts are instructed that “state-court convictions are given effect to the extent possible under law.”¹⁴⁴ Such deference engenders an appropriate hesitance to intervene in another sovereign’s affairs, and undermines any intent to correct another sovereign’s courts at every instance.

D. Remaining Challenges

This approach is not without its challenges. The federal courts would face two major stumbling blocks in deferring to tribes on ICRA matters: First, they would need to decide what to do when a tribe lacks a judicial forum. Second, they would have to deal with cases involving non-Indians. With regard to the former, the most likely scenarios involve an alternative adjudicative body such as a tribal council. In such cases, federal courts might certify a question to the tribal council.¹⁴⁵ With regard to the latter, the issue of non-Indians being tried under the Violence Against Women Reauthorization Act of

¹⁴⁰ *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1144 (9th Cir. 2001) (“[O]ur conception of due process for these tribal courts should be similar to that for federal and state courts.”). *Bird* provides an interesting example of the contradictions involved in Indian law. It held that because “procedures in the Blackfeet tribal court system are similar to those of *Anglo-Saxon* law,” *id.* at 1143 (emphasis added), federal due process standards and precedents should apply, but only after citing a case applying a significantly relaxed due process standard to an *English* judgment rather than using a federal due process standard, *id.* at 1142 (citing *British Midland Airways Ltd.*, 497 F.2d at 871).

¹⁴¹ *British Midland Airways Ltd.*, 497 F.2d at 871 (quoting *Hilton*, 159 U.S. at 205).

¹⁴² Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

¹⁴³ *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted) (first quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); then quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

¹⁴⁴ *Bell v. Cone*, 535 U.S. 685, 693 (2002).

¹⁴⁵ *Cf.* UNIF. CERTIFICATION OF QUESTIONS OF LAW §§ 2–3 (UNIF. LAW COMM’N 1995). Such certifications also occur with some tribal courts. See Steven Chestnut, *Firsthand Accounts: Governmental Institutions, in* AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 5, at 220, 225.

2013¹⁴⁶ presents another problem. Here, though, the law takes a narrow scope, including only non-Indian defendants that have “significant ‘ties’ to the tribe.”¹⁴⁷ Given that the law respects the Supreme Court’s concerns with the rights of non-Indians in tribal court,¹⁴⁸ it is quite possible that defendants are completely subject to tribes’ jurisdiction, including tribes’ interpretations of ICRA. And indigent defendants in tribal court may well receive better treatment than their counterparts in state courts.¹⁴⁹ Regardless of the implications of these complications, a federal court reevaluation of ICRA would bring about benefits for tribes that would greatly outweigh potential drawbacks.

E. Conclusion

The TLOA amendment to ICRA demonstrates that Congress has some interest in permitting tribes to function with more autonomy. But in enacting the TLOA, Congress has opened the door to more tribal cases entering federal courtrooms. The federal courts that encounter these cases will face a choice: was *Santa Clara Pueblo* in essence simply federal justice deferred or was it more of a compromise, requesting a balance of federal law and Indian interests? Upon an analysis of statutory interpretation, practical implications, rights jurisprudence, tribal development, and comity, the best approach for federal courts is to permit tribes to continue to do what they have done in the years since *Santa Clara Pueblo*: define their own rights within the framework of ICRA to bind their citizens in ways that will be seen as legitimate and that will rebuild the tribe’s self-governance abilities. The old, paternalistic federal method of establishing law for Indians under the assumption that they would be incapable of doing it themselves no longer holds sway. If federal courts understand their habeas obligation under ICRA as solely a responsibility to confirm that tribes are within the broad framework set by Congress for rights, rather than as a duty to implement federal precedents, they will avoid the impulse that dominated early U.S. policy toward tribes and instead assist tribes in creating strong rights jurisprudence of their own to follow. Doing so would fulfill ICRA’s purpose, as no longer would “the American Indian . . . [be] without full protection from either tribal, State, or Feder-

¹⁴⁶ Pub. L. No. 113-4, 127 Stat. 54.

¹⁴⁷ Recent Legislation, 127 HARV. L. REV. 1509, 1517 (2014) (quoting Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. at 122).

¹⁴⁸ *Id.* at 1517–18.

¹⁴⁹ Because the statute permitting trial of non-Indians requires assistance of counsel at least equal to that of the Federal Constitution, *see* Pub. L. No. 113-4, § 904, tribal lawyers “will compare favorably to . . . the state or local . . . defense attorneys who participate in similar criminal proceedings,” 78 Fed. Reg. 71,645, 71,655 (Nov. 29, 2013); *see also* NAT’L LEGAL AID & DEF. ASS’N, A RACE TO THE BOTTOM 23 (2008) (describing Detroit’s public defenders as having an average of thirty-two minutes per case).

al governmental organizations.”¹⁵⁰ Instead, he would receive protection of his rights from an Indian tribe that understands his culture and from a court that his fellow tribal citizens recognize. Working together, the two sovereigns can arrive at a result that, while a compromise for both, protects many of the core values that each holds fundamental. And ultimately, despite the history between them, their values are not so incompatible after all.

¹⁵⁰ 113 CONG. REC. 35,474 (1967) (statement of Sen. Ervin).