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THE FEDERAL DUE PROCESS AND EQUAL PROTECTION RIGHTS OF NON-INDIAN CIVIL LITIGANTS IN TRIBAL COURTS AFTER *SANTA CLARA PUEBLO V. MARTINEZ*

GREGORY SCHULTZ*

I. INTRODUCTION

Indian tribal courts can and do exercise jurisdiction over non-Indians in reservation related civil matters.[1] Tribal courts and governments, however, unlike the state and federal governments, are not subject to federal constitutional restraints.[2] As a result, until 1968 non-Indians and Indians alike suffered in tribal courts and before tribal councils what would have amounted to, in state and federal courts, denials of due process and equal protection of the laws.[3] Wishing to change this situation, Congress in 1968 passed the Indian Civil Rights Act, which provides, among other things, that "No Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."[4] The Act on its face furnishes no remedy by which to enforce the rights granted therein, other than habeas corpus relief.[5] Nevertheless, until the Supreme Court decided *Santa Clara Pueblo v. Martinez*,[6] most federal courts hearing claims under the Act found an implied right of action and granted injunctive or declaratory relief accordingly.[7]

In *Santa Clara*, however, which concerned an equal protection challenge by an Indian against her tribe and its governor, the Supreme Court held that the tribe's sovereign immunity from suit barred suits against the tribe under the Act, except those pursuant to the habeas writ.[8] The Court also held that the Act did not impliedly authorize a private cause of action for declaratory or injunctive relief against tribal officials.[9] The decision, therefore, resulted in an Act which provides rights but no remedy, other than the habeas writ or an action under the

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1. *See* Williams v. Lee, 358 U.S. 217 (1959). *See generally* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH. L. REV. 206.

2. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

3. *See* U.S. CONST. amend. XIV, § 1.

4. 25 U.S.C. § 1302(8) (1982).

5. 25 U.S.C. § 1303 (1982).

6. 436 U.S. 49 (1978).

7. *See infra* note 122 and accompanying text.

8. *Santa Clara*, 436 U.S. at 58-59 (1978).

9. *Id.* at 72.

Act in the tribal court itself, to preserve such rights. The habeas writ protects only against takings of liberty, not property, without due process, and so is of no use in civil litigation. Nor, as cases decided under the Act indicate,[10] do the tribal courts always enforce the rights granted by the Act against themselves or against those tribal councils which elect tribal judges. As a result, since *Santa Clara*, non-Indians and Indians involved in civil litigation in the tribal courts have had no effective relief, federal or tribal, from deprivation of due process or equal protection of the laws.

This situation is undesirable for non-Indians and Indians involved in civil litigation in the tribal courts, and ultimately for the tribes themselves. Non-Indians have hesitated to invest capital on the reservations, or to do business with Indians in general without an ultimate safeguard of state or federal relief. They are reluctant to face the possible deprivation of their property without due process by the tribal courts or councils.[11] The fact that the tribal courts themselves are now supposed to preserve the rights granted under the Act, but cannot be held by federal courts to do so, means no guarantee of due process or equal protection exists.[12] The result of this fear of tribal courts by non-Indians is a denial to the tribes of private investment capital and, consequently, perpetuates the tribes' economic dependence on federal outlays.[13] Such dependence conflicts with the federal objective, recognized by the *Santa Clara* Court, of fostering tribal autonomy and self-government.[14]

Various solutions to the problem present themselves. First, the *Santa Clara* opinion could be read narrowly, as denying a federal remedy other than habeas corpus only to Indians, not to non-Indians, and only in situations involving intratribal disputes. This solution, however, incongruously entails interpreting an act which was predominantly intended to provide Indians with constitutional-type rights against their governments[15] as providing only non-Indians with federal remedies to

10. *See, e.g.*, Shortbull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982); Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981); R.J. Williams Co. v. Fort Belknap Hous. Auth., 509 F. Supp. 933 (D. Mont. 1981), *rev'd*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 3476 (1985).

11. *See* Schwechten, *Epilogue: In Spite of the Law—A Social Comment on the Impact of* Kennerly *and* Crow Tribe, 33 MONT. L. REV. 317 (1972); Comment, *Jurisdiction and the Indian Credit Problem: Considerations for a Solution*, 33 MONT. L. REV. 307 (1972).

12. *See supra* note 10.

13. *See* AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 307 (1977) [hereinafter cited as AIPRC]. The American Indian Policy Review Commission was established pursuant to Pub. L. No. 93-580, 88 Stat. 1910 (1975) (as amended by Pub. L. 94-80, 89 Stat. 415, 416 (1975)) and was a bipartisan body charged with reviewing the historical and legal basis of the Indian relationship with the federal government, and with reporting its recommendations to the President of the Senate and the Speaker of the House, who were in turn to refer the report to standing committees to consider the enactment of recommended legislation.

14. *Santa Clara*, 436 U.S. at 62-65. *See also* Message from President Nixon to Congress, H.R. Doc. No. 363, 91st Cong., 2d Sess. 2-3, 116 CONG. REC. 23258 (1970) (the goal of national Indian policy is "to strengthen the Indian's sense of autonomy without threatening his sense of community.").

15. *See* S. REP. No. 841, 90th Cong., 1st Sess. 6 (1967).

enforce the same rights. The more logical reading of *Santa Clara* is that the opinion is applicable to both Indians and non-Indians. In this case, the solution to the problem of remedy for Indians and non-Indians should be a congressional amendment to the Indian Civil Rights Act, permitting appeal by both Indians and non-Indians to a federal district court from a tribal court if the appellant can demonstrate a *prima facie* denial of the rights enumerated in the Act. The appellant should also have to demonstrate, in his petition for appellate review, an exhaustion of tribal appeals.[16]

The Act, if amended as proposed, would intrude only minimally on the federal policy, recognized by the *Santa Clara* Court, of protecting tribal sovereignty and self-government.[17] The amended Act would also be consistent with the predominant legislative intent which was to provide some constitutional-type rights to all who find themselves before tribal courts or councils.[18] The proposed appellate solution is more consistent with the modern status of federal Indian law, including the Indian Civil Rights Act itself, than is the *Santa Clara* Court's decision that tribal sovereignty and autonomy bar injunctive and declaratory relief under the Act.

The focus of this article is the plight of non-Indians in tribal courts. Accordingly, Section II describes the erosion of tribal sovereignty in matters involving non-Indians, showing that the sovereignty doctrine no longer serves as a legal impediment to review of tribal court opinions by federal appellate courts. The great degree of federal control over the Indian reservation is also examined. Section III presents a description of those features of tribal court litigation which would amount to denials of due process in state and federal courts. The tribal courts' inability to prevent equal protection violations by tribal councils is also examined, followed by a consideration of the extent to which the tribal courts are dependent upon federal funding and dominated by federal regulation. Section IV examines the Act itself, its legislative history, the *Santa Clara* opinion, and the negative responses to *Santa Clara* by federal courts. A proposal is offered in Section V to amend the Act to permit federal appellate review of tribal court decisions which involve *prima facie* violations of the rights provided by the Act. Finally, the paper closes with a brief examination of the economic benefits which would accrue to the tribes if the amended Act causes an increased willingness on the part of non-Indian investors to invest capital on the reservations.

16. The American Indian Policy Review Commission also suggested such appellate review in its FINAL REPORT, AIPRC, *supra* note 13, at 19.

17. *Santa Clara*, 436 U.S. at 62-65.

18. *E.g., Hearings on the Constitutional Rights of the American Indian, S. 961-68 and S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965). *See also supra* note 15.

II. THE LEGAL STATUS OF INDIAN TRIBES

A. *Tribal Sovereignty*

The legal status of Indian tribes is unique in the American legal system. It is best described as "dependent sovereignty." The sovereignty is inherent because the tribes were once completely independent nations, separate from and pre-dating our own government,[19] and they gave up their complete sovereignty only by conquest and treaties. The tribes are now unique political aggregations, retaining certain attributes of their inherent sovereignty which pertain to their members and their territory.[20] The first significant federal Indian decision was *Worcester v. Georgia*, in which Mr. Chief Justice Marshall described the Indian nation as

> a distinct community, occupying its own territory, with boundaries . . . in which the laws [of the states] can have no force, but . . . in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.[21]

Today the retained inherent sovereignty of tribes includes the power to establish governments and courts, and to pass laws to govern the conduct of their members.[22]

The inherent sovereignty of the tribes, however, is subject to the sovereignty of the United States. The tribes exist within the geographical limitations of the United States, and it has been established that Indian title to the lands on which they live is "only a right of occupancy . . . extinguishable only by the United States."[23] Congress has plenary authority to make laws concerning the Indian tribes.[24] This power derives from Congress' constitutional responsibility for regulating commerce with the tribes and for treatymaking.[25]

Tribal sovereignty as it exists today, thus, the product of an inherent sovereign's incorporation within the territory of a greater sovereign, the United States. This incorporation has entailed a loss, by treaty and federal statute, of some aspects of the sovereignty which the tribes previ-

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19. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); Williams v. Lee, 358 U.S. 217, 218 (1959).

20. United States v. Mazurie, 419 U.S. 544, 557 (1975).

21. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832).

22. *See, e.g.*, Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

23. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974). *See also* United States v. Kagama, 118 U.S. 375, 381 (1886).

24. United States v. Wheeler, 435 U.S. 313, 319 (1978).

25. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). *See* U.S. CONST. art. I, § 8, cl. 3; art. 11, § 2, cl. 2. The power over the tribes has also been held to derive from the necessity of giving protection to a dependent people. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 219 n.4 (1959). Mr. Chief Justice John Marshall, calling the tribes "domestic dependent nations," likened the relation of the United States to the tribes to that of a ward to his guardian. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). This wardship theory, at least as a source of federal power over the Indian, has lost favor. *But cf.* AIPRC, *supra* note 13, at 4-6.

ously enjoyed.[26] Tribal sovereignty is of a limited character, subject to complete defeasance by Congress, but to be retained until Congress so acts.

The tribes now possess only those aspects of sovereignty not withdrawn by treaty or statute, or "by implication as a necessary result of their dependent status."[27] Such implicit divestiture by virtue of the tribes' dependent status occurs where the exercise of tribal sovereignty is inconsistent with overriding federal interests.[28] Divestiture of sovereignty is therefore the result in those cases involving the relations between an Indian tribe and non-members of the tribe, usually non-Indians.[29] The exercise, therefore, of tribal power beyond that of self-government and the control of internal relations is inconsistent with the tribes' dependent status.[30]

It follows from the limited nature of tribal sovereignty that if Congress decided that there was a federal interest in endowing non-Indians with constitutional-type rights in the tribal courts, then tribal sovereignty should be no bar to the federal enforcement of such rights. Relations between non-Indians and the tribes do not concern strictly internal tribal matters. As such, the implicit divestiture of tribal sovereignty that results when the tribes interact with non-Indians would allow the federal courts to intrude on tribal government at least to the extent of permitting a federal appeal from certain tribal court decisions.

B. *Federal Control of Tribal Government*

In addition to limited sovereignty, another unique feature of the present legal status of the tribes is the extent of federal control of tribal governments. Because of retained inherent tribal sovereignty, tribal self-government is not an exercise of delegated federal power; that is, tribal governments are not federal agencies.[31] The exercise of tribal

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26. United States v. Wheeler, 435 U.S. 313, 323 (1978).

27. *Id.*

28. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151 (1980) (observing that federal law "has not worked a divestiture of Indian taxing power").

29. *Wheeler*, 435 U.S. 313, 326 (1978).

30. Montana v. United States, 450 U.S. 544, 564 (1981). *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959); United States v. Kagama, 118 U.S. 375, 382 (1886). The implicit divestiture of tribal sovereignty by reason of the tribes' dependent status sometimes occurs when the Court is concerned for the states' legitimate interest in regulating the affairs of non-Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973). The test for when the states' interest divests tribal sovereignty is laid down in *Williams*, 358 U.S. at 219-20:

> Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

In short, a state can assert jurisdiction over non-Indians on a reservation, at the expense of tribal sovereignty, only if it can do so without weakening tribal self-government.

31. *Wheeler*, 435 U.S. at 326-28. *See also* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN SELF DETERMINATION AND THE ROLE OF TRIBAL COURTS, at 20 (1977) [hereinafter cited as "AILTP"].

self-government[32] does remain subject to ultimate federal control, but federal regulations do not create the Indians' power to govern themselves.[33] "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power."[34] In accordance with the notion that tribal courts and governments are not, as a matter of law, federal agencies or instrumentalities, the Supreme Court has held that they are not subject to the Constitution.[35]

The current federal policy objective of fostering tribal self-government is not inconsistent with the legal doctrine that the source of power behind tribal self-government is tribal, not federal, sovereignty.[36] As a matter of legal history, however, federal attempts to foster tribal government have always taken the form of deep intrusions into tribal life and organization.[37] This intrusion continues today, as federal regulations dictate the form and even the existence of some tribal governments.[38]

Federal Indian policy has vacillated between the extremes of assimilating the Indians into white society and preserving tribal autonomy and self-government. The former policy has been dominant historically. Following the range wars, which ended in the 1870s and subjected most tribes to military rule, Congress passed the Indian General Allotment (Dawes) Act.[39] The Act attempted to "civilize" the Indian population by dissolving tribal relations.[40] This was to be accomplished by the destruction of tribal governments, then still in the form of the authority of chiefs and elders.[41] The Act provided for farm-sized allotments to each tribal Indian, and was designed to transfer ownership of reservation land to individual Indians in fee after a period of ownership in trust and thereby to extend state jurisdiction to the Indians and their lands. Tribal land beyond that needed for the allotments was opened to non-Indi-

32. There are some 287 tribal governments within the United States. AIPRC, *supra* note 13, at 5 (1977). As of 1977, a total of 289 tribes and bands lived on 268 "federally recognized" reservations or otherwise defined "trust areas" in 26 states. *Id.* at 90.

33. *Wheeler*, 435 U.S. at 328. As examples of the federal regulation of tribal governments the *Wheeler* Court lists, first, the Code of Indian Tribal Offenses and the Courts of Indian Offenses, both products of the Bureau of Indian Affairs, noting:

> Such Courts of Indian Offenses, or "CFR Courts," still exist on approximately 30 reservations "in which traditional agencies for the enforcement of tribal law and custom have broken down [and] no adequate substitute has been provided." 25 C.F.R. § 11.1(b) (1977). We need not decide today whether such a court is an arm of the Federal Government . . . .

Id. at 327 n.26. As further examples of federal regulation, the Court mentioned the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1982), and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1982). *Id.* at 327.

34. *Wheeler*, 435 U.S. at 328.

35. Talton v. Mayes, 163 U.S. 376, 382-84 (1896).

36. *See* Message from President Nixon to Congress, *supra* note 14; AIPRC, *supra* note 13, at 154 (1977). For an example of a recent United States Supreme Court decision relying heavily on this policy for a rationale, see *Santa Clara*, 436 U.S. 49 (1978).

37. *See* Canby, *supra* note 1, at 206-11.

38. *See infra* notes 47-53 and accompanying text.

39. 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 381 (1982).

40. Montana v. United States, 450 U.S. 544, 559 n.9 (1981).

41. *Id.*

ans.[42] Concurrent to the allotment process, the Bureau of Indian Affairs promulgated administrative rules and devices, such as the Courts of Indian Offenses, designed to efface the tribal way of life.[43]

The assimilationist approach eventually resulted in non-Indian acquisition of most of the Indian land. As a result, Congress in 1936 adopted the Indian Reorganization (Wheeler-Howard) Act,[44] which remains the predominant federal legislative device for fostering tribal self-government. This Act ended the allotment practice, provided for the organization of tribal governments under written constitutions, and was generally intended to preserve Indian government and the Indian land base.[45] Indian tribes, today, however, regard the Act as an obstacle to their assertion of self-government because of the power the Act bestows upon the Secretary of the Interior to veto tribal governmental actions.[46]

The Indian Reorganization Act, under which the majority of tribes today have formed their governments,[47] has, in effect, permitted the Secretary of the Interior to mold tribal governments in the form he has desired. The Act provides that the tribes can organize and adopt "an appropriate constitution and bylaws" which become effective after a tribal election "called by the Secretary of the Interior under such rules and regulations as he may prescribe."[48] However, the constitution, bylaws and amendments are subject to the approval of the Secretary.[49] The tribe's choice of a lawyer, under the Act, is also subject to secretarial approval.[50] More significantly, much of the present authority of the Secretary to pass upon the validity of tribal laws stems from the particular constitutions which the tribes adopted under the Act. These constitutions are modeled after a constitution drafted by the Bureau of Indian Affairs after the passage of the Act, and provide that enactments of the tribe are not effective until such laws have been approved by the Secretary.[51] This review process has hindered tribes in their efforts to assert their inherent sovereignty within the reservation "through the simple expedient of a Secretarial veto of tribal ordinances which he conceives as being beyond the power of a tribe."[52] Aside from reviewing tribal

42. Canby, *supra* note 1, at 210.

43. AIPRC, *supra* note 13, at 148. However, note that a 1935 opinion of the Secretary of the Interior concerning the authority of the Secretary to issue rules and regulations applicable in the Courts of Indian Offenses begins with the admission that there is no federal statute which vests the Secretary with authority to "govern the conduct of Indians on the reservation or to promote law and order thereon in anyway at all." Solicitor's Opinion of Feb. 28, 1935 (unpublished), entitled "Secretary's Power to Regulate Conduct of Indians," *quoted in* AIPRC, at 149-50.

44. 25 U.S.C. §§ 461-79 (1982).

45. *See*, Canby, *supra* note 1, at 210. Section 461 of the Act ended the allotment process, 25 U.S.C. § 461 (1982), and § 462 extended the federal trusteeship of those lands which had not been allotted.

46. AIPRC, *supra* note 13, at 188.

47. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 n.6 (1978).

48. 25 U.S.C. § 476 (1982).

49. *Id.*

50. *Id.*

51. AIPRC, *supra* note 13, at 188.

52. *Id.* For example, the efforts of the Colville Tribe to impose a water use code

ordinances, the Secretary has also on occasion revoked outright the constitutions of tribes that had not organized under the Act.[53]

Thus, despite a stated federal policy of respecting tribal sovereignty and fostering tribal self-government, tribal governments and tribal law have often taken the form desired by the Secretary of the Interior and the Bureau of Indian Affairs, to which the Secretary can delegate his power and duties. Indeed, the American Indian Policy Review Commission, in 1977, came to the conclusion that the Bureau of Indian Affairs has acted directly to undermine tribal self-government.[54] A final contradiction of the present federal policy of respecting tribal sovereignty and of minimizing intrusions into tribal self-government is that tribal government, including the tribal courts, is predominantly federally-funded.[55]

In sum, although tribal governments and courts are the product of tribal sovereignty and have been held not to be subject to the Constitution,[56] they are molded and controlled by the Secretary of the Interior and the Bureau of Indian Affairs and are financially supported by federal outlays. One may therefore ask, especially in view of the truly limited nature of tribal sovereignty discussed above, whether anyone, particularly non-Indians, should ever suffer denial of due process and equal protection of the laws by these *de facto* federal instrumentalities. If the response is no, and if the tribes, as a matter of Supreme Court decisions, are destined to remain free of the strictures of the Constitution, then a practical solution to the conflict between the status of tribal government in law and in fact would be to hold tribal governments and courts to the statutorily-bestowed constitutional-type restrictions of the Indian Civil Rights Act as a means of an effective federal remedy.

III. Tribal Court Proceedings

This section describes denials of due process and equal protection by tribal courts and councils. The Supreme Court has held that tribal courts themselves should enforce the constitutional-type rights granted by the Indian Civil Rights Act.[57] The tribal courts, however, sometimes

within the boundaries of their reservation were thwarted by the refusal of the Secretary to approve their proposed code. The Commission has recommended that section 476 of the Act be amended to permit Secretarial review only of tribal ordinances which conflict with the federal trust responsibility over tribal natural resource assets. *Id.* at 15.

53. *Id.* at 189. For his authority to revoke the Secretary has invoked 25 U.S.C. § 2 (1982), which vests in the Secretary "the management of all Indian Affairs and of all matters arising out of Indian relations." *Id.* The Secretary can delegate his powers and duties to the branches and divisions of the Bureau of Indian Affairs. 25 U.S.C. § 1(a) (1982).

54. AIPRC, *supra* note 13, at 189. The Commission has compiled an extensive catalog of instances of such undermining of tribal government. The catalog consists chiefly of examples of failure to aid the tribes in their attempts at self-government.

55. *Id.* at 222-23. *See also* AILTP, *supra* note 31, at 58.

56. *See Santa Clara*, 436 U.S. at 56; United States v. Wheeler, 435 U.S. 313 (1978); Talton v. Mayes, 163 U.S. 376 (1896). The tribes are probably subject to the thirteenth amendment, which limits the private action of owning slaves. *See In re* Sah Quah, 31 F. 327 (D. Alaska 1886).

57. *Santa Clara*, 436 U.S. at 65.

can neither remedy equal protection violations by the councils, which control the judges' jobs,[58] nor remedy their own due process violations, as revealed by the claims against such courts brought subsequent to the *Santa Clara* decision.[59]

Indian tribes are not required to establish distinct, equal branches of government to provide for a separation of powers. Rather, tribal courts are considered subordinate to the tribal council on about one-half of the reservations.[60] As a result, the councils try to influence court decisions when they desire a particular outcome.[61] Tribal council control of tribal courts, on most reservations, includes the power to select judges and to decide the length of their tenure in office.[62] Terms in office are short, and the judge who desires reappointment faces frequent pressure to placate the appointing council.[63] Impeachments and recalls of judges are frequent, and when the recall can be effected by a simple majority vote of the council, the judge is particularly susceptible to removal if he makes an unpopular decision.[64]

Tribal court judges are almost always Indians and non-lawyers. Few Indian judges have had any legal education other than that received in attendance at National American Indian Court Judges Association seminars. These seminars provide training only in criminal law.[65] Although the judges' lack of legal education obviously makes non-Indian litigants anxious about mistaken rulings of laws, this lack of formal legal training is irrelevant to resolving intratribal disputes in the Indians' traditional, more informal manner. Members of the tribe have few procedural due process expectations and are often content to submit to the authority of an elder, such as a judge, out of court.[66] Litigants, including non-Indians, in tribal courts find themselves under pressure from the bench to settle, rather than to stand firm on legal positions.[67] Even while the matter is pending before the court, Indian judges often try to settle dis-

58. *See infra* notes 60-64. *See also* note 162 and accompanying text, discussing Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) (non-Indian plaintiffs denied access to tribal court, to make an equal protection claim against the tribal council, by the council itself), *cert. denied*, 449 U.S. 1118 (1981).

59. *See generally* AILTP, *supra* note 31, at 24-29. *See also supra* note 10 and accompanying text.

60. AILTP, *supra* note 31, at 86.

61. *Id.* at 39.

62. Canby, *supra* note 1, at 216. *See, e.g.*, SAN CARLOS APACHE TRIBE, ARIZ., REV. LAW AND ORDER CODE 1.6 (1956).

63. AILTP, *supra* note 31, at 94.

64. *Id.* at 40-41.

65. *Id.* at 53. Federal regulations require only that a tribal judge be a member of the tribe served by the court, never have been convicted of a felony, and not have been convicted of a misdemeanor within the preceding year.

66. Traditional tribal justice tended to be more informal and consensual than adjudicative and emphasized restitution rather than punishment. *See Wheeler*, 435 U.S. at 332 n.34. The AIPRC described traditional tribal justice as follows:

> Indian tribes and societies generally did not consider private property as central to a government's relationship to citizens: communal property concepts are far more prevalent in tribal societies than are individual property concepts. Because of this, theft within tribes was "virtually unknown."

AIPRC, *supra* note 13, at 161.

67. Canby, *supra* note 1, at 217. "Tribal judges are more likely to encourage full

putes outside of the courtroom.[68] The judge is usually acquainted with the Indian parties and, as a result, *ex parte* contacts and attempts to influence the judge are pervasive,[69] often made by the litigants' families while trying to explain the circumstances of the particular case.[70] Non-Indians who are strangers on the reservation can be at a disadvantage.

A non-Indian party feels the effects of the judge's lack of legal training more than Indian parties do in intratribal disputes because tribal judges apply federal regulations or state law in litigation involving non-Indians. Most tribal codes are modelled after the Code of Indian Tribal Offenses, which was published by the Bureau of Indian Affairs after the passage of the Indian Reorganization Act.[71] Although a few tribes have expanded upon the Code[72] and those tribes organized under the Act can adopt their own code, subject to the approval of the Secretary of the Interior, few have done so.[73] Thus, in some cases involving non-Indians, tribal judges administer an antiquated federal code.[74] Furthermore, some tribal council decisions are not incorporated into the code being used by the tribe, with the result that the decisions are unknown by the judge who must interpret them in future cases.[75]

In much civil litigation with non-Indian parties, tribal courts apply the law of the state in which the reservation is situated, a body of law with which the courts are even less familiar than federal regulations. Tribal use of state law is authorized by the Code of Indian Tribal Offenses itself, which requires the tribal courts to apply: (1) federal regulations, and ordinances or customs of the tribe not prohibited by federal law; and (2) in matters not covered by federal law, the law of the state "in which the matter in dispute may lie."[76] Thus, in tort and contract cases, for which there are no applicable federal regulations or tribal customs, state law is applied.[77] For example, most tribes apply state traffic laws to reservation motorists, many of whom are often non-Indians just passing through Indian country.[78] The non-Indian in tribal court,

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agreement among the parties through open-court negotiations then to decide that one party should win and the other lose." *Id.* at 218.

68. AILTP, *supra* note 31, at 67.

69. *Id.* at 69.

70. *Id.*

71. *See, e.g.*, PAPAGO TRIBE, ARIZ. LAW AND ORDER CODE (1937); WHITE MOUNTAIN APACHE TRIBE, ARIZ. LAW AND ORDER CODE (1938). *See generally*, Canby, *supra* note 1, at 216; AILTP, *supra* note 31, at 38. The Code of Indian Tribal Offenses was adopted at 22 Fed. Reg. 10,515 (1957) (to be codified at 25 C.F.R. § 11).

72. AILTP, *supra* note 31, at 38.

73. "The Navajo Code . . . resembles state law more than federal regulations. NAVAJO TRIBAL CODE (1969). The Hopi Tribe adopted a new tribal code in 1972. The Salt River-Pima Maricopa Indian Community, the Gila River-Maricopa Indian Community, the White Mountain Apache Tribe . . . all have code revision projects under way." Canby, *supra* note 1, at 216.

74. AILTP, *supra* note 31, at 97.

75. *Id.* "Sometimes the first the court hears of a change in existing law is when a defendant calls it to the court's attention." *Id.* at 38.

76. 25 C.F.R. § 11.23 (1984).

77. Canby, *supra* note 1, at 216.

78. AILTP, *supra* note 31, at 85. The next most frequently applied state laws on reservations are probate laws. *Id.*

therefore, will be reasonably able to anticipate the body of substantive law that the tribal court will apply in his case.

He may, however, have little idea what to expect procedurally. Tribes use elements of federal, state, and National American Indian Court Judges Association (NAICJA) rules of civil procedure,[79] and use them irregularly.[80] Hearings and motions are not commonly used in tribal courts.[81] Few reservations have rules of evidence in their codes, and most rely on a mixture of federal, state, and NAICJA rules.[82] These rules, too, are followed loosely: hearsay is admissible, and expert witnesses, are rarely used.[83] Few tribal courts permit jury trials in civil cases,[84] and in those that do, jurors are selected only from the tribal rolls and the selection is not subject to challenge.[85]

A final point about trial procedure in tribal courts is the scarcity, and in some instances, the exclusion from the court, of licensed attornies.[86] The tribal equivalent of an attorney is the "lay advocate," a non-lawyer who may or may not have had litigation experience.[87] Lay advocates generally represent Indian defendants while licensed attorneys represent most non-Indians in tribal courts. Because most of the licensed attorneys themselves are non-Indians,[88] there is a significant risk of alienating or intimidating the tribal judge. This is particularly true when the tribe itself is involved in the case and represented by a tribal attorney who has *ex parte* access to the judge.[89]

If a tribal court litigant suffers even a blatant deprivation of due process, or if a tribal court fails to remedy an equal protection violation by the tribal council, and the litigant therefore desires to appeal, he may be further and fatally hindered by the lack of a transcript of the trial court proceedings and the absence of an appellate court. Few tribal courts are "courts of record," utilizing a clerk and a seal and regularly recording their proceedings and decisions.[90] When records of proceedings are kept, the quality is often poor, and they are not transcribed until after counsel decides to appeal.[91] Even more troubling is that no tribal trial courts render written decisions, and that only a few do even at the appellate level.[92]

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79. AILTP, *supra* note 31, at 44.
80. *Id.* at 68.
81. *Id.* at 62.
82. *Id.* at 68.
83. *Id.*
84. *Id.* at 72.
85. *Id.* at 73. *See also Recent Developments*, 46 WASH. L. REV. 541, 545 (1971); Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdiction Maze*, 18 ARIZ. L. REV. 503, 561 (1976).
86. Canby, *supra* note 1, at 218.
87. *Id.*
88. AILTP, *supra* note 31, at 64.
89. *Id.* at 55. "On one reservation the tribal attorney/prosecutor also gives the judge legal advice and obtains a 90% conviction rate in court."
90. *Id.* at 30.
91. *Id.* at 68. Some tribes now use a tape recorder or a shorthand clerk to record proceedings. *Id.*
92. *Id.* at 69.

Tribal appellate systems vary greatly. On many reservations there is simply no appellate system.[93] Where tribes utilize CFR Courts, an administrative appeal may be taken to the Department of the Interior.[94] Many appellate systems do not function because of a lack of funding or because tribal members, unfamiliar with the idea of appeal as a right, do not understand the courts to be an available remedy.[95] Of the Indian appellate courts that do operate regularly, such as those of the Navajo and the Oglala Sioux, the courts typically allow for review only on the trial court record, which often is incomplete, although on occasion they will hear oral argument and accept newly discovered evidence.[96]

In sum, the litigant, whether Indian or non-Indian, who ventures into tribal court on a civil matter faces a strong possibility of a denial of due process. Furthermore, as indicated by challenges to tribal council decisions filed under the Indian Civil Rights Act, tribal courts sometimes fail to remedy equal protection violations by the councils.[97] Accordingly, federal courts administering the Indian Civil Rights Act[98] before *Santa Clara*[99] held that under the Act the tribal courts, while they did not have to adhere to every procedural due process requirement to which the states are subject under the fourteenth amendment, did have to furnish certain basic elements of due process, such as providing adequate notice and fair and impartial hearings.[100] In similar fashion the federal courts under the Act held the tribal councils to a standard of equal protection tempered by tribal values and resources.[101]

Another indication of the quality of justice in tribal courts comes from the state courts' treatment of tribal judgments. Only two states, and those only to a limited degree, recognize tribal court judgments.[102]

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93. AIPRC, *supra* note 13, at 164.

94. *Id. See* 25 C.F.R. § 11.6 (1984); *see also id.* §§ 11.6C-.6CA.

95. AILTP, *supra* note 31, at 75. *See also Recent Developments*, 46 WASH. L. REV. 541, 546 (1971).

96. AILTP, *supra* note 31, at 75.

97. *See, e.g.*, O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973). The tribal courts have also failed after *Santa Clara* to restrain the tribal councils. *See supra* text accompanying note 58.

98. 25 U.S.C. §§ 1301-1303 (1982).

99. 436 U.S. 49 (1978).

100. *See, e.g.*, Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (4th Cir. 1974); *cf.* National Farmers Union Ins. Cos. v. Crow Tribe, 560 F. Supp. 213 (D. Mont.), *rev'd*, 736 F.2d 1320 (9th Cir. 1983), *aff'd*, 105 S. Ct. 2447 (1985). The right to a fair and impartial hearing is sustained when there is blatant bias on the part of the judge. *See, e.g., In re* Murchison, 349 U.S. 133 (1955). A serious bias against non-Indians discovered in tribal courts was that Indian judges consider non-Indians a source of revenue for the courts, and so fine them heavily. AILTP, *supra* note 31, at 79.

101. *See, e.g.*, Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974).

102. Those states are New Mexico and Arizona. AILTP, *supra* note 31, at 80. In Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (1975), which concerned an attempted repossession of an auto on the Navajo reservation by a non-Indian creditor, the New Mexico Supreme Court held that the Navajo Nation was a territory for the purposes of 28 U.S.C. § 1738 (1982), the enabling statute for the full faith and credit clause, and that therefore, on remand, the district court was to determine whether Navajo law was to apply to the sales contract. The case thus concerned choice of law more than recognition

If Indian courts could consistently be held to fundamental constitutional standards, even those provided by the Indian Civil Rights Act,[103] and they maintained records of their proceedings, states would have little rational basis for refusing to recognize tribal court judgments.[104] In turn, recognition of tribal judgments by state courts would effectively prevent parties from fleeing or removing property from the reservation to escape execution of tribal court judgments. This would foster the authority of tribal courts,[105] and so satisfy the *Santa Clara*[106] policy mandate of strengthening tribal autonomy. Instead, *Santa Clara*, by denying a federal remedy other than the habeas writ under the Indian Civil Rights Act,[107] and thereby severely limiting the effectiveness of the Act as a means of forcing tribes to meet some constitutional standard of due process and equal protection, left to the tribes the problem of attaining state court recognition. The tribes have been unable to do so. The Court's decision, therefore, works against the objective of fostering tribal governmental autonomy which is ironic, because the Court found that objective to be determinative in its reading of the congressional intent behind the Act.[108]

IV. THE INDIAN CIVIL RIGHTS ACT AND *SANTA CLARA PUEBLO V. MARTINEZ*

A. *Purpose and History of the Act*

In April, 1968, Congress passed the Indian Civil Rights Act,[109] to remedy tribal abuses of judicial and legislative power in denying constitutional-type rights to persons subject to tribal jurisdiction.[110] The Act imposes constitutional-type restrictions on the functioning of tribal gov-

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of judgments. Similarly, the Arizona Supreme Court has held that a Navajo will admitted to probate in a tribal court should be given the same force and effect as a will originally probated in an Arizona state court. *In re* Lynch's Estate, 92 Ariz. 354, 377 P.2d 199 (1962). *See also* Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855) (Cherokee Nation's letters of appointment for testamentary purposes entitled to full faith and credit).

103. 25 U.S.C. §§ 1301-03 (1982).

104. AILTP, *supra* note 31, at 31.

105. *Id.* at 30.

106. 436 U.S. 49 (1978). Commentators have called for amending 28 U.S.C. § 1738 to specifically include Indian tribes among those governments to whom full faith and credit should be given. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 145 (1977). *See* AIPRC, *supra* note 13, at 19.

107. 25 U.S.C. §§ 1301-03 (1982).

108. *Santa Clara*, 436 U.S. at 62.

109. 25 U.S.C. §§ 1301-03 (1982).

110. *See generally* S. REP. No. 841, 90th Cong., 1st Sess. 6 (1967); *Hearings on the Constitutional Rights of the American Indian, S. 961-68 and S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965); *Hearings on the Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 234-45 (1962); 87th Cong., 1st Sess., pt. 2, at 285-86 (1963); 87th Cong., 2d Sess., pt. 3, at 511-12 (1963); 88th Cong., 1st Sess., pt. 4, at 815 (1964); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 89th Cong., 2d Sess., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1965); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88th Cong., 2d Sess., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1964).

ernment, including the courts.[111] The most important provision of the Act for the purpose of this article states that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."[112]

The legislative history of the Act reveals that it deliberately extends equal protection and due process rights to any person, including non-Indians, within the jurisdiction of the tribe. United States Senator Ervin, the Act's sponsor, originally proposed that the full constitutional protection of the Bill of Rights be granted to anyone, Indian or non-Indian, who came before a tribal court.[113] The Department of the Interior responded with an alternative version of the bill which provided only certain constitutional-type rights, to be enumerated by statute, and only to members of the tribes.[114] The Department asserted that granting the complete protection of the Bill of Rights to anyone who came before a tribal court would disrupt tribal life, especially if non-Indians used the equal protection right to claim the benefits of tribal membership.[115] In drafting the final version of the Act, Senator Ervin incorporated the Interior Department's approach of granting only select constitutional-type rights. The final version, nevertheless, continued to guarantee equal protection and due process to any person within the tribe's jurisdiction,

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111. The Act provides:

> No Indian tribe in exercising powers of self-government shall—
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;
> (4) compel any person in any criminal case to be a witness against himself;
> (5) take any private property for a public use without just compensation;
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
> (9) pass any bill of attainder or ex post facto law; or
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1982).

112. *Id.* § 1302(8).

113. *Hearings on S. 961-968 and S.J. Res. 40 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

114. *Id.* at 318.

115. Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 557, 591 (1972).

including non-Indians as well as Indians.[116] Some time after the passage of the Act, the Pueblo tribe, in Senate hearings, expressed concern about the way the courts were applying the Act, and in particular, how non-Indians living in the Pueblo communities had utilized the equal protection right to gain the full benefits of tribal membership.[117] In response, Senator Ervin introduced an amendment to the Act which restricted the meaning of "any person" in the Act to "American Indian," thereby denying non-Indians on reservations the guarantee of equal protection of tribal laws.[118] Ervin himself offered no support for the amendment, which he felt went against the spirit of his bill, and it died under advisement in the Senate.[119]

B. *Applications of the Act Before* Santa Clara Pueblo v. Martinez

The Act on its face provides no injunctive or declaratory remedy by which to enforce the rights it enumerates. Section 1303, however, does furnish habeas corpus relief.[120] Even though the Act provides no explicit remedy other than the habeas writ, until *Santa Clara Pueblo v. Martinez*,[121] most federal courts found an implied right of action under the Act and granted injunctive or declaratory relief accordingly.[122]

Concern, however, about the federal policies of fostering tribal self-government and cultural autonomy divided federal courts on the question of what standard of constitutional protection is provided by the constitutional-type rights of the Act. Some courts, denying the importance of Indian values, held the tribes and their courts to the constitutional standards of the federal courts themselves.[123] Another held that the Act did not necessarily incorporate the rights guaranteed by the Constitution, holding instead that the actions of tribal governments must be measured "in light of tribal practice" and that "essential fairness in the tribal context, not procedural punctiliousness, is the standard against which the disputed actions must be measured."[124] Variations from the standards of federal law were sanctioned in ques-

116. *Id.* at 602. *See also Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, SUMMARY REPORT ON THE CONSTITUTIONAL RIGHTS OF AMERICAN INDIANS, 49th Cong., 2d Sess. 10 (1966).

117. *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 94 (1969).

118. Burnett, *supra* note 115, at 614.

119. *Id.* at 615.

120. "The privilege of the writ of habeas corpus shall be available to any person in a court of the United States, to test the legality of his detention by order of an Indian Tribe." 25 U.S.C. § 1303 (1982).

121. 436 U.S. 49 (1978).

122. *See, e.g.*, Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 n.5 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 700 (8th Cir. 1972).

123. *E.g.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973) (holding Indians to the federal "one-man, one-vote" doctrine); *accord*, White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973); Dodge v. Nakai, 298 F. Supp. 26 (D.C. Ariz. 1969).

124. McCurdy v. Steele, 506 F.2d 653, 655 (10th Cir. 1974).

tions involving election district apportionment[125] and eligibility to vote in tribal elections.[126]

In an attempt to further the congressional goal of preserving tribal culture by permitting the tribal government to resolve tribal disputes and make tribal policy, before they would grant relief under the Act, most federal courts prior to *Santa Clara* insisted upon a showing by the plaintiff that he had exhausted all tribal remedies.[127] Premised on the idea that Indian governments themselves should be given every possible opportunity to meet the mandates of the Indian Civil Rights Act, the exhaustion practice in essence turned federal district courts into appellate courts for the tribal courts.

C. *The Supreme Court's Reading of the Act in* Santa Clara

Santa Clara was a suit brought in federal court by a female tribe member and her daughter against her tribe and its governor. Martinez sought declaratory and injunctive relief against enforcement of a tribal ordinance which denies membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male tribe members who marry outside the tribe. Martinez and her daughter claimed that the rule discriminates on the basis of sex and ancestry, in violation of the equal protection provision of the Indian Civil Rights Act.[128] The issue in the case was whether, under the Act, a federal court could pass on the validity of such a tribal ordinance when the Act itself does not expressly authorize civil actions for declaratory or injunctive relief in the enforcement of its substantive provisions.

The Court first noted that the inherent sovereignty of the tribes and their power to make law on intratribal affairs was subject to congressional authority "to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess,"[129] and that the Indian Civil Rights Act is an exercise of such authority.[130] The Court then observed that Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers.[131] Accordingly, the Court held that, because a waiver of sovereign immunity cannot be implied but must be express, and because the Act does not expressly subject tribes to the jurisdiction of federal courts in civil actions for injunctive or declaratory relief, such suits against tribes under the Act are barred by the tribe's sovereign immunity.[132]

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125. *Daly*, 483 F.2d at 700.

126. Wounded Head v. Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975).

127. *See, e.g.*, St. Mark's v. Chippewa-Cree Tribe, 545 F.2d 1188 (9th Cir. 1976); Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); *see also* Rosebud Sioux Tribe v. Driving Hawk, 534 F.2d 98 (8th Cir. 1976) (exhaustion required only if plaintiff cannot receive a fair hearing from the tribal council); Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975) (same).

128. 25 U.S.C. § 1302(8) (1982). *See supra* note 111.

129. *Santa Clara*, 436 U.S. at 56 (citing Talton v. Mayes, 163 U.S. 376 (1896)).

130. *Id.* at 57.

131. *Id.* at 58.

132. *Id.* at 58-59.

A more difficult issue was whether tribal officers, not protected by the tribe's immunity, could be subject to a cause of action implicit in the terms of the Act. Holding that they could not, the Court first asserted that providing a federal forum for issues arising under section 1302 would interfere with tribal autonomy, undermining the authority of tribal courts and thereby infringing upon the right of Indians to govern themselves.[133] The Court then turned to the factors identified in *Cort v. Ash*,[134] to determine whether a cause of action is implicit in the Act, if not expressly provided.

The Court first acknowledged that a central purpose of the Act was to secure constitutional-type rights for individual Indians, and that the respondents were members of the class intended to benefit from the Act.[135] The Court decided, however, that inferring a private cause of action was not necessary to fulfill the purposes of the Act and that both the statutory scheme and legislative history suggest that the failure to establish a federal remedy other than habeas corpus was deliberate on the part of Congress.[136]

The Court then identified two competing purposes of the Act: strengthening the legal position of individual tribal members (the Court made no mention of non-Indians) against the tribe, and promoting a federal policy of furthering Indian self-government by avoiding undue interference with it.[137] The Court found a commitment to furthering tribal self-government in Congress' selective incorporation of constitutional safeguards into the final version of the Act, indicating a concern for "the unique political, cultural, and economic needs of tribal governments."[138] Creating a federal cause of action to enforce the rights set forth in the Act, while perhaps "useful . . . in securing compliance [with the Act], plainly would be at odds with the Congressional goal of protecting tribal self-government."[139]

Furthermore, the Court held, it was not necessary to imply a federal remedy, in addition to habeas corpus relief, to give effect to Congress' objective of extending constitutional norms to the tribes because tribal forums are available. The Court noted that tribal courts have long been recognized as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[140]

The legislative history of the Act also supported the Court's deci-

133. *Id.* at 59.
134. 422 U.S. 66 (1975). The four factors involve first, whether the plaintiff is within the class of persons to be protected by the statute; second, whether there is an indication of legislative intent either creating or denying a remedy; third, whether it would be consistent with the underlying legislative purpose to imply a remedy; and fourth, whether the claim is one traditionally relegated to state or tribal law. *Id.* at 78.
135. *Santa Clara*, 436 U.S. at 61.
136. *Id.*
137. *Id.* at 62.
138. *Id.*
139. *Id.* at 64.
140. *Id.* at 65.

sion not to find a private right of action in the Act. By rejecting the version of the Act which provided for *de novo* federal review of tribal court criminal convictions, and instead settling on the habeas remedy, Congress opted for a less intrusive review mechanism.[141] For similar reasons, said the Court, Congress rejected those versions of the Act which would have required review by the Attorney General or the Secretary of the Interior of alleged civil violations of the Act.[142] In short, congressional rejection of proposals that would have authorized causes of action other than petitions for habeas corpus persuaded the Court that Congress intended to create only the limited review provided expressly by the habeas corpus remedy.[143]

As a final matter, the Court noted the cultural difference between federal jurisprudence and tribal tradition, and surmised that Congress may have limited the federal remedies because "Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[144] The Court, thus, decided that a federal remedy to enforce the statutory prohibitions of the Act, at least in a civil context, might interfere with a tribe's ability to maintain its political and cultural integrity.[145] For all of the above reasons, the Supreme Court held that the Indian Civil Rights Act does not impliedly authorize actions in federal court for declaratory or injunctive relief against either the tribe or its officers.

Justice White dissented. He stated that the only declared purpose of the Act is "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans."[146] Implicit in this purpose, he asserted, was an authorization to bring civil actions in federal court against tribal officials for declaratory and injunctive relief to enforce the provisions of the Act.[147]

D. *Federal Decisions Subsequent to* Santa Clara

Despite its broad holding, the facts of *Santa Clara*, construed narrowly, raise the question of whether the case can be distinguished when non-Indian parties are involved, since in such litigation the matters disputed are not intratribal and rarely concern tribal custom. Perhaps, in light of the limited nature of tribal sovereignty when non-Indians are concerned,[148] *Santa Clara* can be read to permit federal injunctive and declaratory relief for non-Indians under the Act. The obvious problem

141. *Id.* at 67.
142. *Id.* at 68.
143. *Id.* at 70.
144. *Id.* at 71.
145. *Id.* at 72.
146. *Id.* at 72 (White, J., dissenting) (quoting S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967)).
147. *Id.* at 74 (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969)).
148. *See supra* notes 20 through 30 and accompanying text.

with such a reading is that it goes against the Act's legislative intent of providing the rights of the Act to Indian and non-Indian alike in the tribal courts. This has not stopped some federal courts, however, from distinguishing *Santa Clara* in such a limiting fashion.

Since *Santa Clara*, federal courts have been in dispute about the application of the decision to non-Indians. The general tenor of some recent decisions has been disbelief that the Supreme Court, by denying an effective federal remedy under the Act, intended to allow non-Indian American citizens to suffer denials of the constitutional-type rights of the Act in their civil dealings with the tribes. The present situation is ironic. The Indian Civil Rights Act, intended primarily to provide constitutional-type rights to individual Indians, but subsequently interpreted by the Supreme Court to provide no federal injunctive or declaratory remedies to enforce such statutory rights, is now read by some courts to grant such remedies to non-Indians, but not Indians.

All post-*Santa Clara* decisions concerning the rights of individual Indians under the Indian Civil Rights Act have denied the Indians a federal remedy. The Eighth and Ninth Circuit Courts of Appeals, are in agreement on the question. In *Shortbull v. Looking Elk*,[149] an Indian who was a tribal member but whose name was kept from the tribe's voting list sued tribal officers under section 1985 of Title 42 of the United States Code, and under the Indian Civil Rights Act, alleging that tribal officials had deprived him of his right, as determined by a tribal court and a council resolution, to have his name put on the ballot. The court held that the plaintiff had no cause of action under section 1985, and that even though he had a claim under the Indian Civil Rights Act, the Act provided no federal remedy. However, the court expressed its frustration with the *Santa Clara* decision, noting that Shortbull's lack of federal remedy defeats the purpose of the Indian Civil Rights Act, which is to protect individual Indians from arbitrary and unjust actions of tribal governments. The court also questioned whether rendering meaningless the rights afforded by the Act was justified on the grounds of maintaining tribal autonomy.[150]

The same complaint is echoed in those post-*Santa Clara* cases concerning the rights of non-Indians under the Act. The most frequently cited post-*Santa Clara* decision denying non-Indians a federal remedy under the Indian Civil Rights Act is *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*.[151] In *Trans-Canada*, the plaintiff non-Indian, a

149. 677 F.2d 645 (8th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982).

150. *Id.* at 650. *See also* Boe v. Fort Belknap Indian Community, 642 F.2d 276 (9th Cir. 1981) (no federal remedy under the Act available to individual Indian alleging that tribe had deprived him of tribal office in violation of tribal statutes); Bruette v. Knope, 554 F. Supp. 301 (E.D. Wisc. 1983) (In civil rights complaint by individual Indians against reservation police officers, sovereign immunity extends to officers acting in their official capacity and so bars suit against them under the Act.); Toineeta v. Andrus, 503 F. Supp. 605 (W.D.N.C. 1980) (In dispute over possessory right to tribal land, plaintiff Indian cannot bypass *Santa Clara* by suing individual tribal officers in place of the tribe and bringing the action under 42 U.S.C. § 1983 and § 1985(3)).

151. 634 F.2d 474 (9th Cir. 1980).

developer of fee land within reservation boundaries, refused to comply with a tribal business licensing ordinance. The tribal court enjoined the developer's construction activities in order to compel compliance with the ordinance. The plaintiff, in turn, sued the tribe in federal court, seeking injunctive relief against enforcement of the ordinance and alleging jurisdiction under, and violations of, the Indian Civil Rights Act. In particular, he claimed due process and equal protection rights of tribal law. The court cited *Santa Clara* in holding that it lacked subject matter jurisdiction. The court reasoned that because the Act did not provide the plaintiff with a remedy other than habeas corpus, the Act did not, in this case, furnish the court with federal jurisdiction.[152]

The United States District Court of Montana expressed dissatisfaction with this Ninth Circuit holding, but grudgingly followed it in *R.J. Williams Co. v. Fort Belknap Housing Authority*.[153] In *R.J. Williams*, the plaintiff non-Indian construction company entered into a contract with the defendant tribal housing authority. A dispute arose, and the tribal court, without notice or a hearing, ordered the attachment of the plaintiff's property on the reservation. Furthermore, by tribal statute, the tribal court did not have the jurisdiction which it exercised over the plaintiff. The district court held that the tribal court-ordered seizure of the property violated the plaintiff's right to due process under the Indian Civil Rights Act.[154] The district court granted the plaintiff injunctive relief and damages for conversion against the tribal housing authority which had a waiver-of-immunity clause in its charter of incorporation. The injunction restrained the authority from selling what had been attached and from pursuing any further action in tribal court.

The district court also held, however, that it could not grant the plaintiff relief in the form of damages against the tribe itself because the Indian Civil Rights Act did not provide the court with jurisdiction over the tribal court or its officers.[155] The court, in frustration, said that

> [t]his case illustrates the absurd results that the broad rule of [*Santa Clara*] can cause. The . . . tribal code states that the tribal courts shall have no jurisdiction over non-Indians. The Tribal Court nonetheless exercised jurisdiction over plaintiffs who are non-Indians. The Tribal Court next ordered plaintiffs' property attached, allegedly in clear violation of plaintiffs' due process rights. Plaintiffs, however, have no remedy in federal court to enforce their statutory right to due process.[156]

The court then considered distinguishing the tribal sovereignty concerns of *Santa Clara* by noting that in the instant case the plaintiff was a non-Indian, that the dispute was one of contract law, and not tribal law, and that the plaintiff had no forum.[157] It acknowledged the Tenth Cir-

152. *Id.* at 476.
153. 509 F. Supp. 933 (D. Mont. 1981), *rev'd*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 3476 (1985).
154. *Id.* at 939.
155. *Id.* at 938-39.
156. *Id.* at 939.
157. *Id.* at 939-40.

cuit decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*,[158] which had utilized similar distinctions to avoid the *Santa Clara* ruling. Nonetheless, the court felt that it had to defer to its own circuit's *Trans-Canada* decision, and denied the plaintiffs any further remedy.[159]

Other courts have not felt so restrained by the *Santa Clara* interpretation of the Act and have provided federal remedies to non-Indians under the Act, or at least implied that such remedies are available to non-Indians. In *United States v. Clifford*,[160] an action for declaratory relief, the convicted non-Indian plaintiff moved to suppress evidence seized at his arrest by tribal police on the reservation. The Eighth Circuit held that, even though there was no search and seizure violation in the given case, the plaintiff had a claim under the Indian Civil Rights Act.[161] The court used the Act to hold tribal officers to constitutional standards of evidence-gathering. The case implies that a violation by tribal officers of certain of a non-Indian's rights under the Act could entitle the non-Indian to a new trial in federal court if the plaintiff had been convicted in tribal court.

In more evident conflict with *Santa Clara* is the Tenth Circuit's decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*.[162] The *Dry Creek* decision, in direct contradiction of the Ninth Circuit's *Trans-Canada* ruling, distinguished *Santa Clara* on both factual and policy grounds. In *Dry Creek*, the plaintiffs were a non-Indian corporation and its owners, located on fee land within reservation boundaries. The tribal council ordered the blocking of the plaintiffs' access road. The plaintiffs sought a remedy in tribal court but were denied access to it, because of personal hostility from certain council members. They then sought injunctive relief in federal court, alleging that their personal and property rights under the Indian Civil Rights Act had been violated. The district court deferred to *Santa Clara* and denied jurisdiction.

The Tenth Circuit reversed, distinguishing *Santa Clara* on the basis that *Dry Creek* did not involve a strictly intratribal matter, that non-Indians were involved, and that no tribal forum was available. The court held that the plaintiffs had to be afforded a remedy and, thus, remanded the case to the district court.[163]

The *Dry Creek* approach admittedly provides an effective federal

158. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). *See infra* note 162 and accompanying text.

159. The limited success that the plaintiffs enjoyed with respect to the claims against the Indian housing authority was short lived. On appeal, the Ninth Circuit reversed on the grounds that the district court had improperly decided whether the housing authority was under tribal court jurisdiction, when the question should have been decided by the tribal court itself. 719 F.2d 979 (9th Cir. 1983). *See also* Snow v. Quinault Indian Nation, 709 F.2d 1319, 1323 (9th Cir. 1983) (Indian tribe immune from suit in federal court by non-Indian plaintiff), *cert. denied*, 104 S. Ct. 2655 (1984).

160. 664 F.2d 1090 (8th Cir. 1981).

161. *Id.* at 1091 n.3. The court found the claim justified under 25 U.S.C. § 1302(2). *See also* United States v. Lester, 647 F.2d 869 (8th Cir. 1981).

162. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

163. *Dry Creek*, 623 F.2d at 685. *See also* Ramey Constr. Co. v. Apache Tribe, 673 F.2d 315, 319 (10th Cir. 1982) (non-Indian construction company's contract damage claim

remedy for non-Indians under the Act, at least in the situation where a tribal government denies the non-Indian equal protection by denying him access to the tribal forum. The decision is also facially consistent with *Santa Clara*, which did not consider the treatment of non-Indians under the Act, and did not reach the question of whether tribal sovereignty merits less respect when non-Indians raise a claim under the Act which the tribal court refuses to hear.[164]

The numerous cases filed under the Act by Indians before *Santa Clara*, however, indicate that Indians also suffer the same type of due process and equal protection violations in tribal courts as non-Indians.[165] Indeed, an important motive behind the passage of the Act was to remedy such violations.[166] While the rights of non-Indians in tribal courts is of primary concern, the similar plight of Indian litigants, as expressed at the passage of the Indian Civil Rights Act itself, cannot be ignored. Accordingly, *Santa Clara* should not be read in such a way as to grant non-Indians, but not Indians, the rights provided by the Act. An obvious solution to the problem would be for Congress to override *Santa Clara* by amending the Act to explicitly provide those federal remedies which the Supreme Court found lacking. A more realistic alternative, however, since it would not be in direct conflict with *Santa Clara* and would effectuate the purposes of the Act, is the appellate solution proposed in the next section.

V. Conclusion and Proposal

Tribal courts frequently have jurisdiction over non-Indians involved in civil litigation arising on the reservation.[167] In the tribal courts non-Indian and Indian litigants can suffer denials of due process of law. These litigants suffer such denials even when measured by constitutional standards tempered by an awareness of the tribal context, as done by numerous pre-*Santa Clara* cases decided under the Act.[168] Litigants are also often denied equal protection of the laws by tribal councils, as

against tribe did "not rise to the level of constitutional deprivation to be redressed under the ICRA," implying that a more serious deprivation would so state a claim).

164. The Tenth Circuit has recently emphasized that where a non-Indian plaintiff has not first attempted to pursue a remedy in a tribal forum, the *Dry Creek* rule does not apply. White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984). *See also Eleventh Annual Tenth Circuit Survey: 1983-1984*, 62 Den. U.L. Rev. 59, 76-77 (1985).

165. *See generally* AILTP, *supra* note 31, at 24-29.

166. *See supra* notes 113-19 and accompanying text.

167. Federal courts have criminal jurisdiction over the reservations. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 557 n.281 (1976). The General Crimes Act, 18 U.S.C. § 1152 (1982), confers on federal courts jurisdiction over Indians who victimize non-Indians in violations of federal enclave law. The Major Crimes Act, 18 U.S.C. § 1153 (1982), grants to federal courts jurisdiction over Indians who commit enumerated crimes on the reservation, regardless of the race of the victim, and regardless of whether the Indian has already been punished under tribal law. The final major federal intrusion into tribal criminal jurisdiction over member Indians is the Indian Civil Rights Act itself, 25 U.S.C. § 1302(7) (1982), which limits the sentencing power of tribal courts, and is enforceable by § 1303, the right to the writ of habeas corpus.

168. *See supra* note 101 and accompanying text.

measured by a similar tempered standard, and cannot depend on tribal courts to remedy such violations.[169]

To rectify this situation, in 1968 Congress passed the Indian Civil Rights Act,[170] which guarantees constitutional-type rights, including due process and equal protection, to all Indians and non-Indians who come before tribal courts. The Supreme Court, however, in *Santa Clara Pueblo v. Martinez*,[171] held that Congress intended no federal remedy other than habeas corpus for violations of the rights enumerated in the Act. This weakened the Act as a means of imposing constitutional-type restrictions on tribal courts. Identifying two purposes behind the Act, protecting the legal interests of individuals as against tribal governments, and furthering tribal government by avoiding federal interference, the Court in essence decided that Congress had intended to promote the former interest only to the extent that it did not impinge upon the latter.[172]

In reaction to the Supreme Court's interpretation of the Act, the Tenth Circuit in *Dry Creek*[173] read the *Santa Clara* decision literally and held that the non-Indian plaintiffs who were denied access to the tribal forum had a federal cause of action under the Act.[174] However, *Dry Creek* does not provide a satisfactory solution to violations of constitutional-type rights suffered by non-Indians in tribal courts. First, the decision grants a federal remedy under the Act only in the situation where the tribe has denied a non-Indian access to the tribal forum. Second, even limiting the federal remedy for non-Indians under the Act to such a situation necessarily misreads the congressional intent behind the Act. Congress by no means intended to provide only non-Indians, but not Indians, the rights enumerated in the Act.[175] *Dry Creek* is consistent with the Supreme Court's mandate to respect tribal sovereignty in intratribal disputes, but is inconsistent with the intent of the Act. The ideal solution to the problem of the deprivation of tribal litigants' rights should reconcile these apparently conflicting values of tribal sovereignty in intratribal matters, and the individual rights of both Indians and non-Indians.

The following solution is therefore proposed. The Indian Civil Rights Act should be amended to permit appeal to federal district courts, in both civil and criminal matters, by anyone subject to the jurisdiction of a tribal court who makes a *prima facie* showing of a deprivation by the tribal court of any right bestowed by the Act. In order to foster tribal self-government, this federal appeal should be available only after

169. *See supra* notes 10, 58-59 and 97; *see also* Olney Runs After v. Cheyenne River Sioux Tribe, 437 F. Supp. 1035 (D.S.D. 1977); White v. Tribal Council, Red Lake Band of Chippewa Indians, 383 F. Supp. 810 (D. Minn. 1974).

170. 25 U.S.C. §§ 1301-1303 (1982).

171. 436 U.S. 49, 59 (1978).

172. *Id.* at 64.

173. Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

174. *Id.* at 685.

175. *See supra* notes 113-19 and accompanying text.

exhaustion of tribal remedies.[176] The rights of due process and equal protection, as furnished by the Act, should be interpreted on federal appeal as interpreted by federal courts previous to *Santa Clara*, and not according to the strict procedural requirements of federal case law, but rather by a lower standard of fundamental fairness which takes into account the needs and customs of the tribes.[177]

This federal appellate solution would protect the rights of the Act by means similar to taking an appeal on a constitutional question from a federal Article I court. It would be consistent with the predominant legislative purpose behind the Act of providing constitutional-type protections to anyone who comes before a tribal court.[178] It is, furthermore, only minimally inconsistent with the other congressional objective of the Act, as emphasized by the Supreme Court in *Santa Clara*, of fostering respect for tribal sovereignty and self-government.[179] The requirements of an exhaustion of tribal remedies and interpretation of the equal protection and due process rights with an eye to tribal needs and capabilities should lessen the intrusion on tribal sovereignty in even strictly intratribal disputes. Also, federal enforcement of the constitutional-type requirements of the Act should promote the recognition of tribal judgments by the states, which in turn should foster the authority of tribal government by preventing the flight from reservations, which presently occurs, to escape execution of tribal judgments.[180]

Nor is the proposed federal appellate solution inconsistent with other contemporary aspects of federal Indian law and policy, as depicted previously in this article. The current state of tribal sovereignty is that it is subject to the greater sovereignty of the United States.[181] By virtue of their dependent status the tribes have lost whatever aspects of their sovereignty are inconsistent with federal interests, which has historically meant that the tribes have lost most of their sovereignty where relations between Indians and non-Indians were concerned. Tribal sovereignty is not limited to protecting their self-government and controlling strictly intratribal matters.[182]

In accord with this limited tribal sovereignty, federal criminal jurisdiction has been extended to serious crimes committed between Indians on the reservation,[183] and, more important, to deny tribal criminal jurisdiction over non-Indians on the reservation.[184] This latter intrusion

176. *See* AIPRC, *supra* note 13, at 19, for an identical proposal.

177. The proposal in essence entails a return to the attitude of those federal courts that interpreted the Indian Civil Rights Act before *Santa Clara*: the actions of tribal courts should be measured in light of tribal practice and "essential fairness in the tribal context," is the standard against which tribal actions should be measured. *See supra* notes 101, 124-28 and accompanying text.

178. *See supra* notes 113-19 and accompanying text.

179. *Santa Clara*, 436 U.S. at 62.

180. *See supra* notes 102-08 and accompanying text.

181. *See supra* notes 23-30 and accompanying text.

182. *Id.*

183. *See supra* note 167.

184. *Id.*

into tribal sovereignty resulted from the overriding federal interest in protecting non-Indians from "unwarranted" deprivations of their liberty.[185] It is a short step from this rationale, and consistent with the truly limited state of tribal sovereignty, to assert the federal interest in protecting non-Indians from "unwarranted" deprivations of their property. If, out of respect for whatever is left of tribal sovereignty, tribal civil jurisdiction over non-Indians cannot be denied, then federal interests would be best protected by permitting a federal appeal to vindicate the rights granted by the Indian Civil Rights Act.

Admittedly, permitting a federal district court, in a case involving strictly intratribal litigation, to find that a tribal court violated an Indian party's rights under the Act, and then to remand the matter to the tribal court, would represent an intrusion on that intratribal aspect of tribal sovereignty which federal courts have traditionally respected. Under the amended Act, such an intrusion on the mechanics of tribal government would be unavoidable, but its impact would be limited. A federal appeal would not harm those concerns underlying the policy of preserving tribal sovereignty, such as the protection of tribal culture.[186] The appeal right cannot increase the influence of the states on the reservation, nor significantly affect tribal culture, since tribal courts themselves are not an Indian cultural product but a non-Indian imposition on the tribes. Traditional dispute resolution, with which most Indians remain content, and which operates mainly outside of court, should continue unimpaired. Only those Indians who are dissatisfied with the traditional informality, and want the rights which the Act gives them, will challenge the traditional method.

The proposed federal appellate solution is therefore also consistent with the limited nature of tribal sovereignty currently reflected in tribal governments and courts. While, as a matter of case law, inherent tribal sovereignty may be an underpinning of tribal government and courts,[187] as a matter of fact the exercise of tribal power is subject to such a great degree of federal influence that tribal governments and courts are effectively federal instrumentalities.[188] Most tribal governments formed under the Indian Reorganization Act remain subject in numerous ways to the control of the Secretary of the Interior,[189] and are heavily dependent upon federal funding, as are most tribal courts. The truly limited sovereignty manifest in tribal governments and courts should not bar the proposed compromise solution of protecting tribal court litigants by imposition of the constitutional-type rights of the Indian Civil Rights Act,[190] and enforcing those rights by an effective fed-

185. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978).

186. *See Santa Clara*, 436 U.S. at 71-72 (injunctive and declaratory relief under the Act is undesirable because of the threat to a tribe's ability to "maintain itself as a culturally . . . distinct entity.").

187. *See supra* notes 31-35 and accompanying text.

188. *See supra* notes 31-56 and accompanying text.

189. *See supra* notes 47-53 and accompanying text.

190. 25 U.S.C. §§ 1301-1303 (1982).

eral remedy.

A final reason to amend the Indian Civil Rights Act is that it would be in the best economic interest of the tribes themselves to ensure non-Indians the constitutional-type rights of the Act. The horrifying poverty and underdevelopment of the reservations are undeniable.[191] The stark contrast in the economic conditions of reservations and adjoining communities startles even the casual observer. The immediate cause of the economic plight of the tribes is the dearth of private capital invested on the reservations.[192] The lack of private development of the reservation stems primarily from the lack of an awareness of its possibility on the part of the tribes themselves because of their present and historical reliance on federal "welfare" outlays.[193] This dependency, in turn, is a product of the strict federal supervision of the development of tribal natural resources stemming from the federal trust responsibility for the tribes.[194]

To ensure tribal autonomy through economic self-sufficiency, the tribes must begin to make their own investment decisions about their own resources.[195] Two profound changes must occur to bring about this state of affairs. First, the federal trust responsibility must be severely curtailed, to force upon the tribes the responsibility for the investment of their undeniably bountiful resources.[196] Then, assuming a situation in which the tribes do have access to their own resources which could serve as collateral for an infusion of private, non-Indian capital, the tribes must then lure such investment by providing a legal environment with far fewer risks than now face non-Indian businessmen in their dealings with Indians. The tribes at present have little incentive to furnish non-Indian investors with a legal process subject to constitutional restrictions because the Secretary of the Interior, not the tribes, makes the ultimate investment decisions concerning tribal resources.[197] The tribes feel unaccountable, and so the spirit of entrepreneurship which characterizes American economic life is missing among Indians. As a result of this lack of entrepreneurial spirit, non-Indians, as well as Indi-

191. *See generally* AIPRC, *supra* note 13, at 91, 355. The Commission noted that the small amount of revenue earned on the reservations by Indians inevitably leaks out to the surrounding nonreservation communities.

192. *Id.* at 7-8, 307, 358-59.

193. *Id.* at 305-07.

194. *Id.* at 7-8, 16, 359. The Commission noted that all tribal income originates from the sale or lease of trust resources, judgment funds, and interest from investments and Treasury deposits. All such revenues are considered tribal trust funds.

195. *Id.* at 307.

196. *Id.* at 16. The Commission recommends that whenever the Secretary disapproves of a tribal initiative in the use of tribal resources, he should have to file a written statement with the tribe notifying it of the reason for his disapproval and afford the tribe an opportunity for a hearing. For a brief description of the extent of tribal natural resources, see *id.* at 305.

197. *See, e.g.*, 25 U.S.C. § 415 (1982) (authorizes leases of tribal lands for business and other purposes subject to approval of the Secretary); 25 U.S.C. § 396(a) (1982) (authorizes mining leases of tribal lands subject to Secretarial approval); 25 U.S.C. § 398 (1982) (authorizes oil and gas leases on tribal lands, subject to Secretarial approval); 25 U.S.C. § 407 (1982) (authorizes timber leases, under regulations of the Secretary).

ans, are subjected to due process violations in tribal courts, and even occasional intentional denials of equal protection of tribal law by tribal councils.[198]

An obvious means of assuaging the concerns of non-Indian businessmen about falling within tribal court jurisdiction is to amend the Indian Civil Rights Act to provide the "backstop" of a federal appeal to protect the constitutional-type rights of due process and equal protection bestowed by the Act. The reluctance of non-Indian creditors to extend credit to Indians when they face the possibility of having to rely on tribal courts to enforce their contracts is well-documented. After the *Williams v. Lee*[199] and *Kennerly v. District Court*[200] decisions denied non-Indian creditors the use of the state courts in which to collect their debts, the reservations suffered a marked decline in extension of credit by banks, mortgage companies, car dealers, and other merchants.[201] Interest rates rose markedly because of the fear of being unable to recover losses in tribal courts due to Indian defaults on payments.[202]

It is apparent that only by guaranteeing to non-Indian businessmen that they will suffer no worse treatment in tribal than in non-Indian courts can the tribes gain access to necessary investment capital. The prospect of an ultimate federal appeal in the case of deprivation of their property without due process of law should provide the needed reassurance to non-Indian investors.

198. *See generally supra* notes 57 to 107 and accompanying text.
199. 358 U.S. 217 (1959).
200. 400 U.S. 423 (1971).
201. *See* Mudd, *Jurisdiction and the Indian Credit Problem: Considerations for a Solution*, 33 MONT. L. REV. 307, 310-11 (1972); Schwechten, *Epiloque in Spite of the Law: A Social Comment on the Impact of* Kennerly *and* Crow Tribe, 33 MONT. L. REV. 317 (1972); *see also* Schaab, *Indian Industrial Development and the Courts*, 8 NAT. RESOURCES J. 303 (1968) (Congress and federal courts should consider the impact that the policy of tribal sovereignty has on business relations of Indians).
202. *See* AILTP, *supra* note 31, at 85.