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Burrell v. Armijo: The Role of Comity in Federal Court Review of Tribal Court Judgments

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BURRELL V. ARMIJO: THE ROLE OF COMITY IN FEDERAL COURT REVIEW OF TRIBAL COURT JUDGMENTS

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Erin Garcia discusses the on-going issue of tribal versus federal judicial power. While tribal courts have been recognized as an important aspect of tribal sovereignty, federal precedent has diluted tribal authority. This dilution of authority is evident by the restriction on jurisdiction given to the tribal courts by the federal government. The author explores this issue using the case of *Burrell v. Armijo*. She contends that this Tenth Circuit case demonstrates the continued undermining of tribal jurisdiction and that the general rule for federal courts to give great deference to tribal courts was not properly applied, leading to continued weakening of tribal jurisdiction and tribal sovereignty by the federal judiciary.

I. INTRODUCTION

Tribal courts have played a significant and unique, if somewhat uncertain, role in both federal and Indian jurisprudence. At various times throughout their history, tribal courts have been recognized as important institutions representing tribal authority and protecting tribal

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sovereignty[1] while at the same time the legitimacy of tribal court power is undermined by federal precedent.[2]

An important and inherent power of any sovereign is the ability to make and enforce its own laws.[3] The federal government[4] has recognized that this inherent power is vested in Indian tribes. This recognition is reflected in the federal policy of promoting tribal justice systems.[5] At the same time, however, the federal government, and the federal courts in particular, have severely restricted the jurisdiction of tribal courts.[6] For example, while tribal courts maintain exclusive or concurrent jurisdiction over Indians,[7] they have no criminal jurisdiction over non-Indians.[8] Further, civil jurisdiction over non-Indians is slowly being whittled away.[9]

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[1] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); *see also* United States v. Wheeler, 435 U.S. 313, 324 (1978) (enforcing laws is an "exercise of retained tribal sovereignty"); Williams v. Lee, 358 U.S. 217, 220 (1959) (a state may not infringe on a tribe's rights to "make their own laws and be ruled by them").

[2] *See infra* note 9.

[3] *E.g.*, *Wheeler*, 435 U.S. at 320.

[4] Congress has "paramount" authority over Indians. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). This is so because "it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *Id.* at 567. Congress' plenary power over Indian tribes gives it the authority to limit and/or recognize tribal sovereignty, which includes limiting or recognizing the power of tribal courts. *See Santa Clara Pueblo*, 436 U.S. at 56. Conversely, the federal judiciary's role is reputed to be more limited. *See id.* at 72. Thus, if the court oversteps its bounds in trying to limit tribal court authority, Congress can supersede it with legislation. *See e.g.*, the Indian Pueblo Land Act Amendments, P.L. 109-133, 119 Stat. 2573 (2005), in response to State v. Romero, 84 P.3d 670 (N.M. App. Ct. 2003); *see also* the "*Duro* fix", an amendment to the Indian Civil Rights Act, Pub. L. 101-511 § 8077(b) (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000)), in response to Duro v. Reina, 495 U.S. 676 (1990).

[5] *See* Indian Tribal Justice Act, 25 U.S.C. § 3601(5) (2000) ([T]ribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."); Montana v. Gilham, 133 F.3d 1133, 1140 (9th Cir. 1998) ("Development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged.").

[6] A limit on tribal authority may be through an express act of Congress or it may be implied. *See Wheeler*, 435 U.S. at 323. The theory of "implicit divestiture" introduced by the Supreme Court contends that tribes were "divested . . . of some aspects of . . . sovereignty" because of their incorporation into the U.S. *See id.*

[7] *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 756-57(Nell Jessup Newton et al. eds., ed. 2005) ("As sovereigns, tribes possess the power to exercise at least concurrent jurisdiction over all crimes committed by an Indian against the person or property of another Indian in Indian country. Tribes also have exclusive jurisdiction over all crimes committed by an Indian in Indian country not listed as major crimes in the Major Crimes Act (MCA); however, Congress may have altered some tribes' traditional powers by authorizing states to exercise concurrent or exclusive jurisdiction.") [hereinafter COHEN].

[8] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that a tribal court has no criminal misdemeanor jurisdiction over non-members on tribal lands).

[9] *See* Montana v. United States, 450 U.S. 544 (1981) and Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding tribes do not have civil jurisdiction over non-Indians on non-Indian fee land unless one of two exceptions apply); Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (holding federal courts have the authority to review jurisdiction of tribal court); Nevada v. Hicks, 533 U.S. 353 (2001) (holding tribes do not have jurisdiction over non-Indian state actors performing state discharged duties on tribal lands, tribal courts do not have jurisdiction to hear § 1983 claims, and tribal courts may lose jurisdiction if there are substantial off-reservation effects).

The Tenth Circuit case *Burrell v. Armijo*[10] is another blow to tribal court jurisdiction. The case arose from a dispute between a non-Indian couple and various tribal officials over a farm lease on Indian land.[11] The case was dismissed from tribal court on grounds of sovereign immunity.[12] On appeal from the tribe's request for enforcement by the federal district court, the Tenth Circuit granted the plaintiff non-Indian's request to declare the tribal court judgment null and void.[13]

This note argues that a federal court's employment of comity to declare a tribal court judgment null and void based on tribal violation of due process is potentially devastating for tribal courts because it swallows the general rule that federal courts should give great deference to tribal courts.[14] The rule is swallowed in two ways. First, Congress and the Supreme Court have already precluded federal courts from reviewing due process violations through passage of the Indian Civil Rights Act (ICRA)[15] and the decision in *Santa Clara Pueblo v. Martinez*.[16] The *Burrell* holding completely disregards federal policy.[17] Second, because tribal courts are only bound by the ICRA, traditional notions of due process under comity, as the court applied here, should not apply to tribal judgments.[18]

This note concludes that the most disturbing aspect of *Burrell* is that the Tenth Circuit could have refused to recognize the tribal court judgment based on jurisdiction, thereby reaching the same result without impugning the tribal court.[19]

II. BACKGROUND

This case arose from a farm lease granted to the non-Indian Burrells for land owned by Santa Ana Pueblo.[20] The original lease was granted in 1980 for ten years and was extended twice.[21] The Burrells claimed that they were continually assured by pueblo officials that they would be able to stay on this land as long as they sustained the farming operation.[22] By most accounts, the Burrells had an amicable relationship with pueblo leaders as well as other members of the community.[23] However, in early 1997, a change of administration in the pueblo leadership disrupted this relationship.[24]

The Burrells claimed that certain individuals of this new administration, including newly named Governor Leonard Armijo, wanted the Burrells off of their leased farm land and off the

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[10] 456 F.3d 1159 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007).
[11] *Id.* at 1161.
[12] *Id.* at 1165. Like all other sovereigns, tribes enjoy immunity from civil suit. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian nations are exempt from suit.").
[13] *Burrell*, 456 F.3d at 1175.
[14] *See infra* note 57.
[15] 25 U.S.C. §§ 1301-03 (2000) (originally enacted Apr. 11, 1968).
[16] 436 U.S. 49 (1978).
[17] *See infra* Section IV-A.
[18] *See infra* Section IV-B.
[19] *See infra* Section IV-C.
[20] Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006).
[21] *Id.* at 1162.
[22] *Id.*
[23] *Id.*
[24] *Id.*

pueblo.[25] They further claimed that the tribal council voted for a resolution offering them $500,000 to buy out the lease but individual officials ignored the tribal council resolution and tried to negotiate a lower price in lieu of offering other terms.[26] Ultimately, it was alleged life was made so miserable for the Burrells that they were effectively driven off their leased land and forced to abandon their lease.[27]

In April 1998, the Burrells brought an action against the tribe and the individual tribal officials in the Federal District Court for the District of New Mexico for civil rights violations under 42 U.S.C. §§ 1981, 1983 and 1985.[28] The district court dismissed the case because the Burrells had not exhausted their tribal court remedies.[29] Thus, the Burrells filed the same claims in Santa Ana Tribal Court in October 1998.[30] The tribal court held two days of evidentiary hearings in February 2000. However, motions filed by the Burrells[31] were never ruled on and no other action was taken on the case in tribal court as of May 2002.[32] This was approximately three and half years since the Burrells originally filed their tribal court claim.

Due to this extended delay, the Burrells re-filed their claims in district court.[33] This time the district court stayed the proceedings and gave the tribal court six months to take action on the case.[34] The tribal court, under a different judge than the judge presiding over the initial tribal proceedings, dismissed the case on grounds of sovereign immunity.[35]

The tribal court then informed the district court of its ruling and asked the court to dismiss the federal claims still pending in the district court.[36] At the same time, the Burrells asked the district court to declare the tribal court judgment null and void because they were not afforded due process in the tribal court proceedings.[37] Thus, the question before the district court was whether to enforce the tribal court judgment by dismissing the federal case or decline to enforce it by declaring it null and void.

The district court found in favor of the tribe.[38] The Burrells then appealed and the Tenth Circuit reversed in part[39] finding that the Burrells were denied due process by the tribal court,

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[25] *Id.*

[26] *Burrell*, 456 F.3d at 1162.

[27] *Id.* at 1162-63. In response to the Burrells' claims, the tribe claimed that no such tribal resolution for a $500,000 offer was ever made and the Burrells had informed tribal officials they were abandoning their lease because their loan had been foreclosed. *See* Brief of Defendants-Appellees at 6, Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006) (No. 03-2223), 2003 WL 25514935.

[28] *Burrell*, 456 F.3d at 1164.

[29] *Id. See infra* Section IV-C for an explanation of the exhaustion doctrine.

[30] *Burrell*, 456 F.3d at 1164.

[31] The Burrells filed several motions in tribal court including "motions to compel discovery, a motion for an evidentiary hearing, and a motion for a temporary restraining order and/or a preliminary injunction to prevent tribal official from harassing tribal members who provided assistance to the Burrells." *Id.*

[32] *Id.* at 1165.

[33] *Id.* at 1164-65.

[34] *Id.* at 1165.

[35] *Id.*

[36] *Id.* at 1165-66.

[37] *Id.*

[38] *Id.* at 1166. The district court held it could not re-adjudicate issues previously decided in tribal court even if there were due process concerns. However, it did reach the merits of the Burrells' due process claims and held that the Burrells were afforded adequate due process in the tribal court. *Id.*

[39] Reversed in part because the Tenth Circuit dismissed the § 1983 claim for failure to state a claim and further held that the tribe was, in fact, immune from suit; thus, the Burrells could only pursue their claims against the individual tribal officials. *Id.* at 1175. However, under *Santa Clara Pueblo*, the tribal officials are still immune from suit if

thus the tribal court judgment was not entitled to recognition by the district court.[40] The case was then remanded to the district court to proceed on the merits of the Burrells' civil rights claims against individual tribal officials.

III. RATIONALE

The Tenth Circuit refused to recognize the tribal court judgment holding that the tribal court proceedings failed to meet basic tenants of due process under principles of comity and collateral estoppel.[41] The court held that both of these doctrines applied but did not distinguish between the two in the holding. This note will briefly discuss the court's discussion of each and then discuss its holding in a separate sub-section.

A. Comity

Citing a Tenth Circuit case and a Ninth Circuit case, the court held that comity is the proper doctrine to apply to the recognition of tribal court judgments.[42] Comity is "neither a matter of absolute obligation, on the one hand, nor mere courtesy and good will, upon the other."[43] Thus, under comity, federal courts have wide latitude to review any and all aspects of tribal court judgments and are not bound to recognize them. Further, under comity, there are "two mandatory grounds for refusing to recognize or enforce a tribal court judgment . . . if the tribal court lacked personal or subject matter jurisdiction, or if the defendant was denied due process of law."[44]

Under the doctrine of comity, the court held that due process means an "opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and . . . there is no showing of prejudice in the tribal court or in the system of governing laws."[45] Further, the Court cited other possible due process violations which would preclude comity including evidence that "the judiciary is dominated by the political branches or by an opposing litigant, or that a party was unable to obtain counsel, or secure documents or attendance of witnesses, or to have access to appeal."[46]

B. Collateral Estoppel

In its motions to dismiss, the tribe claimed that the Burrells should not be allowed to pursue remedies in federal court based on collateral estoppel.[47] That is, the tribe claimed that the Burrells were precluded from attempting to re-litigate their claims in federal court because the

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they were acting in their official capacity. *See* United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) (citing Davis v. Littell, 398 F.2d 83 (9th Cir. 1968); White Mountain Apache Indian Tribe v. Shelley, 480 P.2d 654 (Ariz. 1971)).

[40] *Burrell*, 456 F.3d at 1175.

[41] *Id.* at 1173.

[42] *Id.* at 1171 (citing Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002)).

[43] Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

[44] *Burrell*, 456 F.3d at 1171.

[45] *Id.* at 1171-72.

[46] *Id.* at 1172.

[47] *Id.* at 1165.

tribal court "had fully adjudicated the Burrells' claims."[48] The Tenth Circuit ruled against the tribe on this issue as well because collateral estoppel also has a due process element.

The court may only apply collateral estoppel as a bar to re-litigation if four requirements are met, only one of which is relevant here: "*the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action*."[49] This requirement, the court held, is an element of due process.[50] Thus, the court can also reverse on due process grounds under collateral estoppel.[51] Some factors the court considers when determining whether a party had a full and fair opportunity to litigate include, "whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature of the relationship of the parties."[52]

C. Holding

The court refused to recognize the tribal court judgment for the following reasons which, the court held, fall under either the due process analysis of comity or collateral estoppel, or both. The Tenth Circuit was especially troubled by the close relationship between the tribal court, the Pueblo, and the individual tribal officials.[53] Other violations the court pointed to were the procedural posture leading up to the courts discussion including the fact the first judge did not rule on motions for nearly four years and the second judge dismissed the case without any hearings.[54] Furthermore, the dismissing judge did not reference any of the prior hearings in the decision or give explanation for the ruling.[55] Finally, the Tenth Circuit was concerned that the tribal judiciary lacked an appellate court.[56]

IV. ANALYSIS

The Tenth Circuit makes a passing reference to the general rule of deference to tribal courts.[57] However, *Burrell* makes clear that the Tenth Circuit will not follow the general rule when faced with the opportunity to do so. By using comity, the decision creates a broad and potentially devastating exception which swallows the general rule. The 'exception' is at odds with Supreme Court precedent, federal legislation, and federal policy.

First, federal legislation and Supreme Court precedent have precluded federal courts from reviewing due process in tribal courts. Second, even if federal courts can apply comity to tribal court judgments, traditional notions of comity should not be applied to tribal courts because of

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[48] *Id*. at 1166.
[49] *Id.* at 1172. The other requirements are: the issue previously decided is identical with the one presented in the action in question, the prior action has been finally adjudicated on the merits, and the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication. *Id.* The court held these requirements were satisfied. *Id.*
[50] *Burrell*, 456 F.3d at 1172 ("[D]ue process requires that a party have a full and fair opportunity to litigate its case." (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461(1982))).
[51] *Id.*
[52] *Id.*
[53] *Id.* at 1173.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] "[T]he federal policies promoting tribal self-government and self-determination instruct us to provide great deference to tribal court systems, their practices, and procedures." *Id.*

their unique nature, their responsibility under the ICRA, and the federal policy promoting self-government. Rather, it should be applied in a manner that takes into consideration the unique law that applies to Indian tribes. Finally, and perhaps most troubling, the court could have avoided this 'exception' all together and still reached the same result.

A. Indian Civil Rights Act and Santa Clara Pueblo v. Martinez

The Tenth Circuit declaring that a federal court can refuse to recognize a tribal judgment for denial of due process creates an avenue to federal review of tribal court due process that is in conflict with the intent of the Indian Civil Rights Act (ICRA)[58] and Supreme Court precedent[59]. Both leave no room for review by a federal court of whether a tribe has followed, or should follow, certain due process requirements.

This is not to say that tribal courts do not have to provide any due process rights to litigants. In fact, they do have to provide very specific ones,[60] but it is important to remember that tribes are not bound by the U.S. Constitution.[61] The ICRA contains *only* rights the U.S. government has mandated tribes to provide to people appearing before their courts.[62] Further, and perhaps more importantly, these are the only rights that *Congress* thought appropriate to impose on Indian tribes.

The fact that the ICRA protected rights are not as extensive as constitutionally protected rights is intentional. "The legislative history of ICRA indicates that these omissions reflect a

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[58] 25 U.S.C. §§ 1301-03 (2000).

[59] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[60] *See* 25 U.S.C. § 1302 (2000). No tribe in exercising power 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 one year and a fine of $5,000, 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.

[61] *Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority"); Talton v. Mayes, 163 U.S. 376, 382 (1896) ("[T]he powers of local government exercised by [the tribe] are [not] federal powers created by and springing from the Constitution of the United States.").

[62] *See* COHEN, *supra* note 7, at 959-60. Of course, tribes can include other rights in their constitutions. *See id.* at 950-51.

deliberate choice by Congress to limit its intrusion into traditional tribal independence."[63] Thus, in its efforts to promote tribal self-government, Congress affirmatively legislated on the issue and since Congress has exercised its plenary power in the area, federal courts should decline from extending or implying other due process restrictions on tribes.[64]

After the passage of the ICRA, federal courts tried to interpret the statute by allowing individuals to bring suit against tribes for ICRA violations.[65] However, the ICRA not only contains what rights a tribe must provide but also provides that the only federal remedy for violation is the writ of habeas corpus.[66] There is no provision in the ICRA allowing individuals to bring due process claims against a tribe in federal court for review.

The central holding in *Santa Clara Pueblo*[67] which challenged this lack of federal remedy is that any ICRA violation should be addressed exclusively by the tribal court.[68] Thus, the practice of federal court review of the ICRA is effectively stopped and Congress has never limited the *Santa Clara Pueblo* holding.[69]

In *Santa Clara Pueblo*,[70] a female tribal member brought suit against the tribe claiming that the tribe's membership requirements were discriminatory and that they violated a section of the ICRA which provides that "[n]o Indian tribe . . . shall . . . deny to any person within its jurisdiction the equal protection of its laws."[71] The Supreme Court held that the ICRA provides no federal remedy on its face and the Court would not find one implicitly, especially when Congress has such broad power over Indian affairs.[72] Allowing suits would not only "undermine the authority of tribal forums . . . but it would also impose serious financial burdens on already "financially disadvantaged" tribes."[73] Further, the Court held, tribal courts are an appropriate and available forum to "vindicate rights created by ICRA."[74]

The ruling in *Burrell* makes *Santa Clara Pueblo* meaningless in respect to review of tribal court due process analysis, at least in the Tenth Circuit. Granted, the Burrells were not suing the tribe for the alleged due process violations, as they did not bring an ICRA suit. They simply wanted to re-litigate their claims in federal court. Thus, this case can be distinguished from *Santa Clara Pueblo* and, therefore, it cannot be said that the Tenth Circuit directly disregarded controlling Supreme Court precedent. But, in effect, that is exactly what the court

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[63] *Id.* at 953.
[64] *Santa Clara Pueblo*, 436 U.S. at 72.
[65] *See e.g.*, Howlett v. Salish Kootenal Tribes, 529 F.2d 233 (9th Cir. 1976); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Johnson v. Lower Elwha Tribal Cmty., 484 F.2d 200 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698 (8th Cir. 1972).
[66] 25 U.S.C. § 1303 (2000).
[67] *Santa Clara Pueblo*, 436 U.S. at 49.
[68] *Id.* at 65.
[69] *See also*, THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 74 (June 1991) (discussing that in 1986, Congress enlisted the U.S. Commission on Civil Rights to conduct a study of the enforcement of ICRA. The Commission concluded that with proper federal support and money, tribes are fully capable of effectively enforcing the ICRA and amending ICRA to provide for federal review should be a "means of last resort.") [hereinafter ICRA REPORT].
[70] *Santa Clara Pueblo*, 436 U.S. at 49.
[71] *Id.* at 51.
[72] *Id.* at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").
[73] *Id.* at 64.
[74] *Id.* at 65.

did and apparently exactly what the court wanted to do in respect to reviewing the due process accorded by a tribal court. In other words, the court wanted to give the Burrells a way around the ICRA and *Santa Clara Pueblo* by allowing relief not otherwise permitted under the Supreme Court ruling in *Santa Clara Pueblo*, and the Court found a way through the doctrine of comity.[75]

The ICRA and *Santa Clara Pueblo* encompass the federal policy that there should be limited federal intrusion on tribal court proceedings.[76] Thus, although the Tenth Circuit did not specifically disregard precedent, it *did* disregard this federal policy. Since tribal court litigants are barred from bringing a direct suit against a tribe for due process violations, the Tenth Circuit found another way to intrude on tribal court proceedings by reviewing due process under misguided principles of comity. While the facts and legal principles in *Burrell* may be different, this holding has accomplished the result that Congress, via the ICRA, and the Supreme Court, via *Santa Clara Pueblo*, were trying to prevent: federal review of due process in tribal courts.

B. Comity

Even though the Tenth Circuit found a way around the ICRA and *Santa Clara Pueblo* to review due process, it still erred because traditional notions of due process under comity should not be applied to tribal courts. First of all, comity may not even be the appropriate principle for federal courts to apply to tribal courts. However, if it is, it must be adjusted to adhere to the unique and inherent differences in tribal courts.

i. Comity v. Full Faith and Credit

Comity has commonly been applied by states to tribal judgments and vice versa.[77] This case stands out because it is a federal case. The federal approach to tribal court judgments has been deference[78] or application of the exhaustion doctrine.[79] Except for a few notable exceptions,[80] including this case, comity in its traditional sense has not been applied by federal courts to tribal courts.[81]

The application of comity by federal courts also seems to be in conflict with the Congressional policy of requiring recognition of tribal court judgments based on the full faith and credit doctrine. While there is no consensus or positive legislation on whether states and/or the federal courts should apply full faith and credit to *all* tribal court judgments,[82] Congress has recognized several instances where tribal court judgments *must* be afforded full faith and credit.[83]

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[75] *See infra* Section IV-B.
[76] COHEN, *supra* note 7, at 956.
[77] *Id.* at 660-61.
[78] *See* Burrell v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006).
[79] *See infra* notes 178-80 and accompanying text.
[80] *See* AT & T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899 (9th Cir. 2002); MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002); Bird v. Glacier Elec. Coop., 255 F.3d 1136 (9th Cir. 2001); Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).
[81] Exhaustion has been referred to as a matter of comity. *See* Iowa Mut. Ins. Co. v. LaPlante 480 U.S. 9, 16 (1987). However, here I refer to cases in which federal courts use the traditional doctrine of comity as described in Section III-A, *supra*.
[82] Indian tribes are not recognized specifically in the Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, nor the subsequently enacted statute, 28 U.S.C. § 1738 (2000). It could be argued that Indian tribes are "territories" under the meaning of the statute. *See id.* ("The records and judicial proceedings of any court of any such State, Territory, or Possession . . . shall have the same full faith and credit in every court within the United States

Two state cases have also explicitly held that tribal court judgments are entitled to full faith and credit. First, in *Sheppard v. Sheppard*,[84] the Idaho Supreme Court held "[t]ribal court decrees, while not precisely equivalent to decrees of the courts of sister states, are nevertheless entitled to full faith and credit."[85] The court rested its reasoning on the desire to "facilitate better relations between courts of this state and the various tribal courts within Idaho."[86] Second, *Jim v. CIT Financial Services Corp.*[87] was a choice of law case rather than an enforcement action; however, the New Mexico Supreme Court held that the Navajo Nation's laws, which plaintiff sought to apply to his claim in state court, "are entitled by Federal Law, 28 U.S.C. 1738, to full faith and credit in the Courts of New Mexico because the Navajo Nation is a 'territory' within the meaning of the statute."[88] Further, in *Santa Clara Pueblo*,[89] the United States Supreme Court also held in dicta that "[j]udgments of tribal courts, to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts."[90] While neither state cases nor Supreme Court dicta are binding on the Tenth Circuit, these examples are persuasive authority, particularly the New Mexico case and the *Santa Clara Pueblo* dicta.

Thus far neither the individual statutes nor the state court decisions have been extended to require full faith and credit as to tribal court judgments in general, however, they seem to indicate a trend towards recognizing tribal court judgments. Such recognition falls in line with the overall federal policy of protecting tribal sovereignty.

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and its Territories and Possessions as they have by law or usage in courts of such State, Territory or Possession from which they are taken."). However, there is no indication that Congress intended to include Indian tribes within the meaning of the statute and, further, considering Indian tribes as territories is at odds with federal Indian law treating tribes as separate sovereigns. *See* Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 652 (1990). Interestingly, as Laurence points out, federal courts are not explicitly mentioned in the statute, however, there is little question that states, territories and possessions must recognize federal court judgments. *Id.*

[83] *See e.g.*, Violence Against Women Act 18 U.S.C. § 2265(a) (2000) ("Any protection order issued...by the court of one State, Indian tribe, or territory. . . shall be accorded full faith and credit by the court of another State, Indian tribe, or territory."); Indian Child Welfare Act 25 U.S.C. § 1911(d) ("The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings . . ."); Uniform Child Custody Jurisdiction and Enforcement Act 28 U.S.C. § 1738(b) ("[E]ach State shall enforce . . . a child support order made...by a court of another State . . . "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18)."); *see also* Indian Land Consolidation Act 25 U.S.C. § 2207 (2000) (providing full faith and credit to tribal actions under tribal ordinances limiting descent and distribution of trust or restricted or controlled lands); National Indian Forest Resources Management Act, 25 U.S.C. § 3106(c) (2000) (providing for full faith and credit to tribal court judgments regarding forest trespass); American Indian Agricultural Resources Management Act, 25 U.S.C. § 3713(c) (2000) (providing for full faith and credit to tribal court judgments regarding Indian agricultural land trespass).

[84] 655 P.2d 895 (Idaho 1982).

[85] *Id.* at 901.

[86] *Id.* at 902.

[87] 533 P.2d 751 (N.M. 1975).

[88] *Id.* at 752.

[89] 436 U.S. 49 (1978).

[90] *Id.* at 66 n.21 (citing United States ex rel. Mackey v. Coxe, 18 How. 100 (1856); Standley v. Roberts, 59 F. 836, 845 (CA8 1894).

Under full faith and credit, parties are only allowed to bring procedural arguments against non-enforcement, i.e. that the rendering court lacked jurisdiction.[91] Substantive defenses are not allowed, i.e. lack of due process.[92] Thus, unless the rendering court lacked jurisdiction, the receiving court *must* enforce the judgment. Because of the limited review allowed under full faith and credit, this doctrine is more compatible with the federal policy of protecting tribal sovereignty. Recognizing a tribal court judgment under full faith and credit limits federal intrusion and demonstrates respect of tribal courts as competent institutions, which in turn is recognition of tribal sovereignty itself.

ii. Comity as Applied to Tribal Courts

Even if comity is the right principle to apply when considering federal recognition of tribal court judgments, it necessarily requires adjustment for tribal courts. The unique nature of tribal courts and the federal policy of promoting tribal self-government require some adjustment in the application of comity to tribal court judgments.

Arguably, the federal courts adhering to the doctrine of comity have been more than willing to adjust it when applied to tribal courts but in a way that hurts tribes rather than promotes tribal authority. Comity, however, is designed to facilitate inter-governmental co-operation. This is evidenced by the fact that if a "[judgment] was issued in a nation that abides by the rule of law and the court issuing the judgment has fair procedures, it is exceedingly rare for a United States court to refuse to enforce the foreign judgment."[93] The underlying reason behind this policy is that there is "no one particular set of procedures that embody due process."[94] Further, "this doctrine does not ordinarily result in the nonenforcement of foreign nation judgments."[95] Rather "it is premised on the mutual respect that nations have for the ability of each nation to govern events there in accord with their own norms and procedures."[96]

Federal courts, however, have taken the exact opposite approach than the one described above when applying comity to tribes. They do not use comity as a way of enhancing inter-governmental relations and showing respect for tribes as independent sovereigns capable of enforcing laws with equality and fairness. Instead, federal courts posture the importance of tribal courts and then completely de-legitimize them.[97] This departure from the norms of comity is not sensible because the policy reasons for recognizing tribal court judgments are just as strong as the reasons for recognizing those of foreign nations, and perhaps even stronger.

> Indian tribes . . . have been made fragile through dealings with the United States government, dealings that have not always met modern standards of humanity and fairness. Given this historical background, we non-Indians must by very careful

[91] *See* Laurence, *supra* note 82, at 650-51.
[92] *See id.* at 651.
[93] COHEN, *supra* note 7, at 659.
[94] *Id.*
[95] *Id.* at 662.
[96] *Id.*
[97] Before holding that a litigant was denied due process in tribal court, the Ninth Circuit wrote "[t]he importance of tribal courts and the dignity we accord their decisions will weigh in favor of comity in any case where we have discretion to recognize and enforce a tribal court judgment." Bird v. Glacier Elec. Coop., 255 F.3d 1136, 1142 (9th Cir. 2001).

> that our later dealings with the Indians do not result in further degradation or destruction of these important governments.[98]

With these important policy reasons in mind, if the court is going to use comity, then it should be modified for tribal courts and the ICRA should be the standard against which tribal court proceedings are weighed. The traditional notions of due process implicit in the comity doctrine discussed supra in Section III-A should not be applied in such a strict sense to tribal courts. This proposition was asserted in *Wilson v. Marchington*[99] but without much elaboration and it has not been clearly developed since. The Tenth Circuit does little if anything to help with the cause. However, it seems intuitive that the most obvious adjustment of comity for tribal courts is that federal courts should look at the ICRA provisions, as well as the Congressional policy behind it, for guidance when reviewing due process.

The balancing test referred to in *Santa Clara Pueblo* is most instructive.[100] When interpreting the nature of the right involved, the court should weigh "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people."[101] The balancing test is appropriate because it takes into account the fact that vast differences in tribal courts make it difficult to apply a single notion of due process to all tribes across the country. The differences among tribal courts are a result of many things including "the size of tribes, their wealth and other resources, the importance of traditions, and the needs of the community."[102] Further, tribes are free to set up their courts however they feel appropriate, save for the restrictions found in the ICRA.[103] The effect of this freedom is that not all tribal courts look or operate the same. These differences should be taken into account whenever a federal court undertakes a due process review of tribal court proceedings.

The balancing test also shows a respect for tribal customs and traditions. When applying the balancing test, the court must keep in mind that Congress intentionally left out certain constitutional rights.[104] Thus, when interpreting the rights provided by the ICRA, tribal customs and any practices which provide due process must also be taken into account because the ICRA was not intended to disturb customary law. Subsequent Congressional legislation has also affirmed the position that tribal customs are important tools for tribal courts.[105] Further, federal courts should apply the ICRA as interpreted by tribes. "[T]here is a definite trend by tribal courts toward the view that they ha[ve] leeway in interpreting the ICRA's due process and equal

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[98] Robert Laurence, *Martinez, Oliphant, and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 413 (1988).

[99] "[S]pecial considerations arising out of existing Indian law merit some modification in the application of comity to tribal judgments." Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997).

[100] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66.

[101] *Id.*

[102] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 103 (3rd ed. 2004).

[103] *Id.*

[104] "The main reason Congress enacted the ICRA was to protect individuals from certain abuses, but Congress also was concerned about the unique political, cultural, religious, and financial needs of the tribes." *Id.* at 281.

[105] *See* Indian Tribal Justice Act, 25 U.S.C. §§ 3601-02, 3611-14, 3621, 3631 (2000). "The Congress finds and declares that...traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes . . ." *Id.* § 3601(7). "Nothing in this chapter shall be construed to . . . alter in any way any tribal traditional dispute resolution forum." *Id.* § 3631(4).

protection clauses and need not follow the U.S. Supreme Court precedents jot for jot."[106] This is especially important when considering the fact that the concept of individual rights is at odds with the communal nature of tribal life. "[M]ost indigenous communities . . . define their existence in terms of *relatedness* among individuals and groups, not in terms of the rights of isolated contingent individuals."[107] Thus, while enforcing individual rights is important to tribes, it is not a central theme in tribal societies. Therefore, this difference, as well as others, must be taken into account in determining whether tribes must enforce individual rights under the ICRA.

If on the other hand, a federal court pays no mind to the ICRA or the balancing test when reviewing due process under comity, the probability that the court is relying on 'westernized' notions of due process becomes pronounced.[108] In discussing the application of the ICRA, the Ninth Circuit wrote "defining the limits of due process protection under the Act is not an easy process, because . . . [due process] concepts are not readily separated from their attendant cultural baggage; due process especially implies a number of particular procedural rights derived from Anglo-American history."[109] However, "Even as they have recognized that ICRA grants . . . rights comparable to those contained in the Bill of Rights, the courts routinely have ruled the meaning and application of ICRA is not determined by Anglo-American constitutional interpretations."[110]

Thus, if a federal court deems it necessary to review due process in the first place, it must be mindful of not simply imposing 'westernized standards' of due process on tribal courts. "The dominant society's courts may be understandably anxious to protect the rights of non-Indians in tribal court proceedings, but those courts should not forget that the Congress has spoken about those very matters in ICRA."[111] In the face of positive law, the court seemingly has no choice but to adhere to it. However, the Tenth Circuit seems to take or leave federal legislation to best accommodate its own agenda.

iii. Specific Due Process Concerns in Burrell v. Armijo

The court in *Burrell* held that tribes do not necessarily have to use "procedures identical to the U.S. Courts and federal courts should be careful to respect tribal customs and limitations of tribal court systems."[112] However, the *Burrell* court did not seem inclined to follow its own instruction. The court did not take the ICRA into account let alone the tribal interpretation of it or any customary traditions that may have affected the tribal court proceedings. This is very troubling because many of the court's concerns are things which tribes are not legislatively

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[106] Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (internal quotation marks omitted).

[107] FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 116-17 (1995); *see also* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 271 (Winter 1997) ("The ICRA introduced a jurisprudence of rights to the Indian Nations that fundamentally changed the manner in which tribal courts dealt with cases that came before them. The requirements of due process and equal protection . . . significantly altered the focus of attention away from the tribal community towards the individual.").

[108] The court in Burrell did not refer to ICRA once in its analysis of due process in the Santa Ana Tribal Court. *See Burrell* v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006).

[109] Bird v. Glacier Elec. Coop., 255 F.3d 1136, 1143 (9th Cir. 2001) (internal quotation marks omitted).

[110] Robert McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496 (1998).

[111] Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIPIAC L. REV. 115, 135 (Spring 1998).

[112] *Burrell*, 456 F.3d at 1172.

mandated by Congress to have, namely an appellate structure and an explicit doctrine mandating separation of powers. The court seems to disregard federal policy of Indian self-determination.[113] The goal of this policy was described by President Johnson as "[a] policy of maximum choice of the American Indian."[114]

Closely related to self-determination is the doctrine of inherent sovereignty. Tribal sovereignty is inherent in each tribe. Their sovereignty is not a delegation.[115] Thus, while the federal government can divest tribes of some of their authority,[116] that which remains is not delegated, it is inherent. This difference in sovereignty is important to remember in any discussion about Indian tribes. A tribe's right to self-determination does not exist because of federal policy of self-determination; rather, a tribe's right to self-determination exists because it has always existed. The federal policy, then, can be seen as recognition, not a delegation, of this authority.

Thus, mindful of the policy guidelines and tribal circumstances the court *should* have considered in reviewing tribal court proceedings under comity, this note now discusses the Tenth Circuit's specific concerns about the Santa Ana Tribal Court proceeding.

a. Lack of Appeal

A major concern of the Tenth Circuit was the lack of tribal or appellate review at the tribal level.[117] The fact that tribes are not required, by the ICRA or otherwise, to have an appellate court,[118] yet are at risk of having their judgments voided for lack of one undermines inherent tribal sovereignty to its core. If tribal judgments are voided because tribes lack an appellate court, tribes may feel forced to implement an appellate court. This, in effect, takes away the ability of tribes to govern themselves. Further, it highlights the distrust federal courts have towards processes that differ from American processes and federal court preference for applying western notions of 'fairness.'

It should also be kept in mind that the purposes of tribal dispute resolution and federal court proceedings vary greatly. Because of the small size of tribal communities, one of the main objectives in dispute resolution is to restore community harmony.[119] Unsettled acrimony in small communities "can be disastrous."[120] Thus, the finality of the judgment is crucial so that the same dispute does not keep coming up and continue indefinitely. The parties to a tribal dispute will most likely be involved in each others daily and/or traditional lives,[121] thus a final judgment is necessary to maintain tribal relations. An appellate review process is therefore not conducive to the purposes of this type of system because it prolongs resolution. In comparison, the western requirement of an appellate review is more concerned with ensuring individual rights are

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[113] The so called self-determination period began around 1960. *See* COHEN, *supra* note 7, at 98. "The self-determination era and the concept of self-governance are premised on the principle that Indian tribes are, in the final analysis, the primary or basic governmental unit of Indian policy." *Id.*

[114] AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS: A SURVEY OF TRIBAL COURTS 33 (1997) [hereinafter THE ROLE OF TRIBAL COURTS].

[115] *See* COHEN, *supra* note 7, at 206 (citing United States v. Wheeler, 435 U.S. 313, 322-23 (1978)).

[116] *See Wheeler*, 435 U.S. at 323.

[117] *Burrell*, 456 F.3d at 1173.

[118] *See* PEVAR, *supra* note 102, at 104.

[119] *See* Porter, *supra* note 107, at 258.

[120] *Id.* at 278.

[121] *Id.*

protected. The prolonged acrimony perpetuated by the western adversarial appellate system does not have the same effect on the parties because they most likely are not as inextricably involved in each others daily lives and once the dispute is over, they will probably not encounter each other again, or want to.[122] However, this avoidance is not possible in tribal communities where relationships are "key cultural coordinates in seeking to render justice."[123]

If a tribe does not feel that it is necessary to have an appellate court, then a federal court should not question the tribe's judgment on this matter, especially to the extent that the choice is based on tribal custom. Instead, if a federal court should find itself reviewing a tribal court judgment, it should limit itself to reviewing due process in those institutions a tribe *has* decided to implement.

b. Close Relationship

The court was also troubled by the close relationship between the tribal court, council, and individual tribal officials.[124] This encompasses two concerns generally associated with tribal courts. First is a lack of separation of powers within tribal governments.[125] Second is the perception that a tribal judge will not be impartial because s/he knows one or more of the parties involved.[126]

Many tribes were re-organized through the adoption of constitutions under the Indian Reorganization Act (IRA).[127] These constitutions were adopted from a 'model' constitution provided by the Bureau of Indian Affairs and did not require a separation between the branches.[128] Thus, IRA tribes typically set up their courts at the discretion and direction of the tribal council.[129] The main reason behind this lack of separation was because of limited tribal resources to "support separate governmental departments."[130]

Santa Ana Pueblo, however, did not adopt a constitution under the IRA, instead "[t]he pueblo functions under a traditional form of government without any written constitution or organic governing document."[131] Thus, it is governed by the traditional methods in which the pueblo cannot and does not separate their government from their traditional and religious customs. "In the case of the Pueblos . . . native religious custom call for a theocratic system in

[122] *Id*. at 278.
[123] Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 VT. L. REV. 7, 42 (1996).
[124] Burrell v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006).
[125] *See* McCarthy, *supra* note 110, at 491 ("The source of much suspicion of the ability of tribal courts to guarantee due process in tribal governments is an alleged lack of independence of tribal judiciaries from powerful political forces.").
[126] *See* Porter, *supra* note 107, at 279 ("Too frequently . . . the judge will be known to at least one of the parties and maybe even to both of them. Having such a person in a decision-making position will more than likely result in at least one of the litigants believing that some factor not germane to the litigation had something to do with the outcome.").
[127] 25 U.S.C. §§ 461-79 (2000) (originally enacted June 18, 1934).
[128] COHEN, *supra* note 7, at 258.
[129] *See id.*
[130] *See* ICRA REPORT, *supra* note 69, at 37.
[131] *See* THE ROLE OF TRIBAL COURTS, *supra* note 114, at D-153.

which the religious leader appoints the governor and council, who perform both governmental and religious functions."[132]

It is clear that this notion of separation of powers is not inherent in Pueblo tradition; rather, it is imposed by western society. Thus, the inevitable question is, if a tribe cannot, because of their constitution, or will not, because of religious custom, set up independent branches like those of the U.S. government, why should they be held to such a standard? Further, if the legislative and/or executive branches of the federal government did not require the tribes to set up their governments exactly like the federal and state systems, then why should a federal court be allowed to impose this type of system on tribes and/or withhold recognition of tribal judgments for such differences? Again, holding tribal courts to a westernized standard that is not an aspect of their political structure and/or against their religious beliefs only serves to inhibit their sovereignty and is inconsistent with self-determination policy.

To be fair, tribal councils ***may*** have undue influence over tribal courts in some instances.[133] However, to imply that tribal judges are powerless against influential tribal councils is a gross generalization and further, an insult to tribal judges. In *Burrell*, there was no evidence of impropriety or interference on the part of the tribal council,[134] the Tenth Circuit was merely "troubled" by the close relationship. This is not unusual for judges indoctrinated in the American legal system; however, a close relationship cannot be interpreted to mean that tribal court judges are inherently less trustworthy and unbiased than "American" judges.[135] Elected state court judges can certainly be susceptible to similar political influences; however, there is faith in the American system and in the judges to carry out equal justice. Similar faith can and should be put in tribal judges especially when there is much evidence to suggest that tribal court judges are committed to remaining impartial and fair.

Many tribal judges understand the importance of establishing an independent judiciary and are not afraid to stand up to tribal councils when they feel that their independence is being encroached on. For example, one Tribal judge testified to how she had chastised council members who criticized her for enforcing a judgment against the tribe by telling them they were fortunate to have a court, and that was her job to enforce the order.[136] Another tribal judge testified that after he told the council to "give us our due as an independent entity"[137] both he and another judge "got lifetime appointments."[138] These two examples show that despite the perceived limitations in tribal constitutions (or other forms of government) it is possible for tribal court judges to maintain independence, moreover, councils are willing to give it to them. The U.S. Commission on Civil Rights concluded that "a key factor in achieving judicial independence also appeared to be the education of tribal council members on the role of the

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[132] ICRA REPORT, *supra* note 69, at 36. Santa Ana's tribal council and tribal officials are appointed by the cacique. *See* Burrell v. Armijo, 456 F.3d 1159, 1170 (10th Cir. 2006). The cacique is "the leader of the Pueblo that is appointed for life." *Id.* at 1171 n.7.

[133] *See* ICRA REPORT, *supra* note 69, at 44 ("In 1978 the National American Indian Court Judges Association reported that "[a] lack of independence of the judiciary seems to be a serious problem with many tribes….removal of tribal judges by councils takes place for may reasons other than just cause . . . Short terms of office, council removal power, and the tribal politics combine to make a judge susceptible to pressures from those in power to dispose of cases in particular ways.").

[134] The Burrells made allegations of bias and impropriety, however, the record does not reflect any evidence of this.

[135] In fact, the two judges who sat on the Burrell case were both law trained and neither were Santa Ana tribal members. Both of these factors weigh in favor of impartiality and help to dispel any notions of impropriety.

[136] ICRA REPORT, *supra* note 69, at 46 n. 84.

[137] *Id.* at 48.

[138] *Id.*

judiciary and the need for independence."[139] This finding relates to a point made earlier that this notion of separation of powers is not inherent in tribes.[140] If tribal councils accept the concept and the importance of it, they will be inclined to implement it. If they are educated on the subject, they may be more willing to give it a try. Of course tribes will need adequate funding for such education to take place.[141]

Further, tribal court judges, like other judges, have an ethical duty to maintain integrity and legitimacy in their courts. Tribal judges understand that their decisions are not isolated events that affect only the parties involved; rather, they understand their decisions "constitute 'social events' that ultimately form an important and revealing mosaic concerning the meaning and value of law on the reservation."[142]

Especially during this time of development and scrutiny of tribal courts, tribal judges understand that each decision they make impacts not only how the "outside" world will view the court but also how their own community will perceive the court. Professor Frank Pommersheim defines this awareness as a "Sacred Trust."[143] According to Pommersheim, this trust is "not so much a legal, but rather a cultural charge . . . providing continuity and a nuanced sense of adaptation of tradition in contemporary circumstances, while also incorporating the best from dominant jurisprudence."[144] Pommersheim also states that the role of tribal courts is to heal a community that has been "seriously impaired" by years of oppression. Thus, charged with such a duty, tribal court judges have strong incentive not to interfere inappropriately in tribal court matters. If problems do exist in individual tribes, however, Pommersheim notes that change must come from "the inside out rather than the top down."[145] Tribes must build systems that work for them. Threats and demands from federal courts to implement systems exactly like the American system will have little or no effect on tribes, other than perhaps creating animosity. Left to exercise their sovereignty, however, tribes will develop procedures that treat everyone fairly. Granted, these procedures may not look exactly like the American system but respect of tribal court procedures will reflect each individual tribe's needs, which ultimately is the greatest exercise of tribal sovereignty.

The second concern stemming from the 'closeness' of the parties, council, and other tribal officials is that a tribal judge will not be impartial because she or he knows one or more of the parties.[146] The first response is that the small size of tribes and the interconnectedness that permeates tribal life make it "hard to believe that a person appointed or elected a tribal judge from that community does not bring to the bench a lifetime of personal experiences that will influence his or her decision making process."[147]

Thus, the fact that one or more parties will know the tribal judge is, most likely, unavoidable. However, this does not necessarily mean that the judge will be unfair or that the proceedings will lack due process. Here is where tribal beliefs and Western ideas diverge once

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[139] *Id.* at 47.
[140] *See supra* notes 129-34 and accompanying text.
[141] *See infra* notes 158-67 and accompanying text.
[142] Pommersheim, *supra* note 123, at 32.
[143] *Id.* at 41.
[144] *Id.*
[145] *Id.* at 43.
[146] *See* Burrell v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006) ("As an initial matter, we note that the close relationship between the tribal court, the Pueblo, and the individual officials causes us to carefully scrutinize the tribal court proceedings in this case").
[147] *See* Porter, *supra* note 107, at 279.

again. "Tribes, even the largest ones, are highly interconnected and dependent upon strong interpersonal relationships."[148] The fact that both judges and litigants, know each other and, more importantly, having a 'close interpersonal relationship' actually plays a crucial role in traditional forms of Indian dispute resolution. The communal nature of a tribe is the foundation for traditional means of dispute resolution which involves the entire community. "In closed tribal communities" it is each member's duty to "perpetuate established norms."[149] Thus, involving closely related or connected people in dispute resolution is not a breach where the entire community is responsible for ensuring that cultural norms are adhered to.

More importantly, a judge's relationship to parties helps enforce the judgment as "[t]ribal methodology begins with . . . focusing on duties and legitimate expectations attached to . . . relationships."[150] Thus, when the judgment is issued by someone that one not only knows but has a relationship with, there is an increased possibility of compliance because of the sense of duty to one another as a part of that relationship.

Therefore, a judge familiar with the norms *and* the members of the community necessarily presides to achieve not only the results in traditional dispute resolution but also compliance.

c. Time

The court's final concern was the length of time the tribal court took to issue a decision.[151] Tribal courts are still developing especially when compared to American courts with more than a 200 year history. Tribal court growth has increased significantly in the past fifty years and these courts are currently in a period of transition.[152]

> Overall, Indian courts have been retarded by their history. They originally were vehicles of an outside force. Later, their intended growth as integral parts of an Indian government was stunted by a lack of effective programming or funding, as well as policy vacillations. However, for the past several years it has become increasingly important that they develop as strong elements of Indian government in order to protect the residual sovereignty of tribes . . . and to fulfill Congress' own requirements under the ICRA.[153]

Adding to their comparative state of "infancy" is the fact that tribal courts lack many of the resources needed to run efficient justice systems even though they are confronted with many of the same issues as state and federal courts.[154] While lack of resources certainly should not excuse a violation of due process, lack of resources necessarily affects every aspect of a tribal court case including timeliness. Some of the common problems faced by tribal courts include

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[148] *Id*. at 278.
[149] *Id*. at 254.
[150] Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y 74, 76 (Winter 1999).
[151] *Burrell*, 456 F.3d at 1173.
[152] *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Courts*, 22 AM. INDIAN L. REV. 285, 293 (1998).
[153] ICRA REPORT, *supra* note 69, at 31-32.
[154] U.S. COMMISSION ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 78-79 (July 2003), *available at* http://www.usccr.gov/pubs/na0703/na0731.pdf. [hereinafter A QUIET CRISIS].

court personnel turnover, lack of training, inadequate funding for judicial salaries, inability to conduct jury trials because of lack of funding, inadequate facilities, and need for technical assistance.[155] Any or all of these things could affect the length of time a tribal court takes to rule on a case.

Most of these problems could be adequately addressed by more funding.[156] The U.S. Commission on Civil Rights came to this conclusion[157] and recommended that Congress provide more funding to tribal courts.

> The Commission strongly supports the pending and proposed Congressional initiatives to authorize funding of tribal courts in an amount equal to that of an equivalent State Court . . . increased funding will allow for much needed increases in salaries for judges, the retention of law clerks of tribal judges, the funding of public defenders/defense counsel, and increased access to legal authorities.[158]

In response, in 1993, Congress passed The Indian Tribal Justice Act in which funds were authorized for such purposes.[159] However, funding was never appropriated.[160] In 2003, the U.S. Commission on Civil Rights released another report which detailed the state of tribal justice systems.[161] The Commission found that funding for Native American justice programs represented "roughly one percent" of the Department of Justice's "total discretionary budget for the last six years."[162] Further, many of the Native American programs are discretionary and therefore, "they are subject to the priorities of the appropriators, and as a result, funding fluctuates from year to year."[163] The effects of such funding are significant on tribal courts:

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[155] *See generally id.* at 79; ICRA REPORT, *supra* note 69, at 37-44.

[156] Tribes rely heavily on government funding for essential government services. When the U.S. negotiated treaties with tribes it promised to "protect the tribes, . . . [and would] provide food, clothing, and services to the tribe." PEVAR, *supra* note 102, at 32. Since the treaty period, this language has developed into a more comprehensive doctrine of Trust Responsibility.

> The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

Id. at 33.

Tribes may generate other sources of revenue from excise taxes and leases from economic activities on the reservation, natural resource development, tribally owned businesses, gaming operations, and to some extent taxation on activities of non-members. (The regulatory scheme allowing tribes to tax non-members is complex and outside the scope of this note. *See generally* COHEN, *supra* note 7, at 715-20, 724-26 for a discussion of this matter.). Tribes also have the power to tax its own members. As a general matter, however, tribes do not impose income and/or property taxes on its members. Thus, an important source of government funding relied on by federal and state governments is not utilized by tribes. Thus, if the federal government does not keep its promises to tribes, they are left with their own limited resources.

[157] *See* ICRA REPORT, *supra* note 69, at 37-44.

[158] *Id.* at 72-73.

[159] 25 U.S.C. § 3621 (2000).

[160] *See* COHEN, *supra* note 7, at 959.

[161] *See* A QUIET CRISIS, *supra* note 154, at 67-82.

[162] *Id.* at 71.

[163] *Id.* at 81.

> As long as tribal courts are underfunded and unable to deal with tribal jurisprudence, the burden . . . will continue to fall on the federal court system, where punishments are typically harsher, perpetuating a system of dual justice for Native Americans on reservations. Moreover, effective resolution of civil disputes is an essential component of the governance infrastructure that tribes must provide. Thus, in addition to ensuring order and justice, tribal courts are key to economic development and self-sufficiency.[164]

The effect most prevalent from underfunding is the ability of courts to secure and retain qualified judges and court staff. Lack of money means that courts cannot afford to pay competitive salaries and in many cases cannot even afford to pay full-time salaries. High turnover rates and part-time judges fitting in duties to the tribal court around another fulltime job will certainly affect the timeliness of court proceedings. State and federal courts certainly are not trying to function with part-time judges and court staff. One tribal court judge complained of having only $15,000 to run her tribal court.[165]

The disparity between tribal court and federal/state court funding only highlights further the reasons why a federal court should not view tribal court judgments through the lens of American courts. Of course, cases cannot drag on for years, but for the reasons just described, the time issue should not be a predominant factor in analyzing due process. It may be one of many to consider but weighed against the amount of time should be the resources readily available to the court at that time, including such things as how many judges are employed, whether they are full or part-time, support staff available to the judge and whether support staff are full or part time. Thus, while four years may appear to be an unreasonably long time, it becomes more understandable when considered in the context of inadequate funding and unfulfilled Congressional promises.

d. What does this mean for non-Indians?

A valid and logical response to this discussion is that traditional methods are fine for Indians but how and why should they apply to non-Indians? First, the ICRA applies to all parties appearing before a tribal court regardless of nature of the tribal court.[166] Thus, non-Indians are guaranteed those protections in both more Americanized tribal courts as well as the more traditional tribal courts. Tribal courts have been able to successfully protect important rights provided under the ICRA while at the same time maintaining traditional customs.[167]

> [T]ribal courts have demonstrated concern for the availability of effective remedies when tribal actions disregard individual rights . . . when lawsuits go forward in tribal court under ICRA, tribal courts often reverse convictions and grant remedies based on ICRA violations, their decisions strikingly consistent with federal law. Persistent critics of tribal governments seem to presuppose that tribal courts are incapable or unwilling to enforce the Indian Bill of Rights

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[164] *Id.* at 79-80.
[165] *See* ICRA REPORT, *supra* note 69, at 37 n. 46.
[166] *See* 25 U.S.C. § 1302 (2000) (protecting the enumerated rights of "any person." Thus, "ICRA's protections are available to non-Indians subject to jurisdiction of tribal governments.") Bird v. Glacier Elec. Coop., 255 F.3d 1136, 1143 (9th Cir. 2001).
[167] *See* COHEN, *supra* note 7, at 958.

> without close federal supervision. Yet a systematic study of 30 years of enforcement of ICRA and other scholarly research examining tribal court decisions have concluded otherwise.[168]

Further, after a study of eighty-five tribal court opinions, Professor Nell Jessup Newton came to the conclusion that "tribal court judges work hard to make the tribal judicial system fair for all parties appearing before them . . . the tribal member does not always defeat the non-Indians."[169] In another study, Christian M. Freitag found that when tribal courts interpret what due process means under the ICRA, their interpretation is strikingly similar to the American principles of due process including such things as notice, opportunity to be heard, impartiality, and fairness.[170]

This should be sufficient to ease the qualms of non-Indians appearing before a tribal court, however, if it is not, it has been suggested tribal courts implement one system for non-Indians and one system for Indians.[171] However, as I have shown, currently most tribal courts are not adequately funded to maintain one system. A dual system, if implemented solely under pressure from the U.S. government, would also conflict with a tribe's right to make their own decisions about their government. In the spirit of self-determination a tribe should be free to choose the best system that works for them. Thus, a tribe may choose to use an American infrastructure for its court, in which case a non-Indian may feel more comfortable; however, the Supreme Court held in *Santa Clara Pueblo* that even "[n]onjudicial tribal institutions have . . . been recognized as competent law-applying bodies."[172] In either case a tribe must abide by the ICRA and therefore, non-Indians are not totally without protection. Congress has also affirmed tribal court use of traditional customs.[173]

Thus, under the federal policy of self-determination, tribal courts can utilize many different tools. The fear that non-Indians will not be afforded due process in tribal courts is not well-founded. Tribal courts afford due process similar to federal and state courts and, accordingly, have interpreted and implemented the ICRA fairly with respect to both Indians and non-Indians.

When the relevant cultural circumstances are taken into account it becomes clearer that the Burrells were afforded sufficient due process in the tribal court. They were given two days of evidentiary hearings, thus, were given an opportunity to be heard. Since tribes are immune from suit,[174] the adverse ruling based on sovereign immunity probably would not have been different if any of the other factors mentioned by the court[175] had been different. The other factors discussed such as the purposes of traditional dispute resolution and the theocratic nature of Santa Ana Pueblo's tribal government may have also played a part in the functioning of the tribal court. However, the court did not focus on or consider the possibility of any of this, it

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[168] *Id.* at 958-59.
[169] *See* Newton, *supra* note 152, at 352.
[170] Christian M. Freitag, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 864 (Summer 1997) (citing cases from The Navajo Nation, The Hoopa Valley Tribe, The Colville Confederated Tribes, The Ponca Tribe, The Citizen Band Potawatomi, the Cheyenne-Arapaho Tribes, the Squaxin Island Tribe, and Lummi Indian Tribe, and the Nisqually Tribe).
[171] *See e.g.* Porter, *supra* note 107.
[172] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).
[173] *See supra* note 105 and accompanying text.
[174] Unless waived by themselves or Congress. *See* Burrell v. Armijo 456 F.3d 1159, 1165 (10th Cir. 2006).
[175] For example, time, separation of powers, appeal.

instead focused on whether tribal court due process conformed to American notions of due process. Such reliance, with no consideration of relevant tribal customs and interpretations, is neither fair nor applicable to tribal courts.

C. Jurisdiction

Perhaps the most troubling aspect of the *Burrell* decision is that the Tenth Circuit could have reached the same result without impugning the tribal court. That is, the Court could have refused to recognize the judgment based solely on jurisdiction. This would have been a better way to rule for two reasons. First, it falls in line with more acceptable federal review of tribal courts. Second, it would have preserved the legitimacy of the tribal court.

With a few limited exceptions,[176] the doctrine of exhaustion is the only way a federal court has disturbed a tribal court judgment. Exhaustion applies only to civil cases and requires that a plaintiff whose claim arises on Indian land, exhaust his or her tribal court remedies before seeking federal relief.[177] If tribal court remedies are exhausted, the federal court is limited to reviewing whether the tribal court had jurisdiction.[178] The court did not apply the exhaustion doctrine in *Burrell*, but even under its preferred doctrine of comity it could have reviewed jurisdiction.

The court held that the Burrells did not make a clear jurisdictional argument, thus it did not rule on this issue.[179] However, the court could have raised the issue of jurisdiction sua sponte. "There is no controlling precedent on raising the jurisdiction of the tribal court sua sponte, but the best conclusion is that we may do so."[180] Judge McConnell went on to note in his concurring opinion:

> Without a discretionary power to raise a tribal court's jurisdiction sua sponte, the federal court could be in the awkward position of acceding to the judgment of a court that self-evidently lacked jurisdiction. Justice requires not only recognizing the judgments of courts of competent jurisdiction but also refusing to recognize a judgment that manifestly lacks legal validity.[181]

As noted above, under comity there are two mandatory grounds for refusing to recognize a tribal court judgment, lack of jurisdiction and lack of due process.[182] In *Burrell*, the court was adamant that comity was the appropriate doctrine to apply. However, it did not adhere to the doctrine when it only applied comity to find a due process reason to void the tribal judgment but did not apply the other part of the comity analysis and review jurisdiction. If it had done this first, it could have reached the same result without ever reaching the merits of the Burrell's due process claim. The fact that the court went directly to due process analysis and did not raise jurisdiction seems to be another indication of the distrust the federal courts have towards tribal courts and, perhaps, even an indication of the Tenth Circuit's underlying agenda to withhold comity.

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[176] *See Burrell*, 456 F.3d 1159; Bird v. Glacier Elec. Coop., 255 F.3d 1136 (9th Cir. 2001).
[177] Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).
[178] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).
[179] *Burrell*, 456 F.3d at 1170.
[180] *Id.* at 1175 (McConnell, J., concurring).
[181] *Id.* at 1176 (McConnell, J., concurring).
[182] *Burrell*, 456 F.3d at 1171.

Had the court raised jurisdiction sua sponte, it could have found that the tribal court had no jurisdiction over the Burrell's constitutional claims. For example, *Nevada v. Hicks*[183] held that tribes do not have jurisdiction over § 1983 claims.[184] *Nevada* involved a state official executing a search warrant on tribal land. The tribal member/owner of the land then sued the official in tribal court claiming violations of § 1983.[185] The Supreme Court held the tribal court lacked jurisdiction over that claim in particular, because tribal courts are not courts of general jurisdiction[186] and because if these types of suits are brought in tribal court, defendants would be denied the right of removal.[187] The *Burrell* court could have easily and logically extended this same reasoning to §1981 and §1985 actions and found that no jurisdiction over these claims lie in tribal court. In fact, in a concurring opinion of *Burrell*, Judge McConnell argued as much. "I see no reason to distinguish the § 1983 claim in *Hicks* from the Burrells' § 1981 and § 1985 claims . . . It follows that the tribal court was not a "court of competent jurisdiction," and its ruling is therefore entitled neither to deference nor to preclusive effect."[188]

Of course this piece meal, case by case, stripping of tribal court jurisdiction is also bad for tribal courts and incongruous with federal policy promoting tribal self-government. However, at least a holding based solely on jurisdiction falls in line with controlling precedent, which the *Burrell* holding arguably does not. Further, a jurisdictional ruling gives grounds on which the court could have rested its decision without de-legitimizing the tribal court.

Many other cases, even those adhering to the traditional comity doctrine, have declined to recognize tribal court judgments based solely on lack of jurisdiction.[189] In fact, the *Wilson* case relied on heavily in *Burrell* was decided this way.[190] Relatively few cases have declined to recognize a tribal court judgment based on alleged lack of due process in the tribal court.[191] Thus, by far, the more acceptable way for federal courts to refuse comity to tribal courts has been based on a finding of lack of jurisdiction.

V. IMPLICATIONS AND SUGGESTIONS

The implications of this decision are potentially devastating for tribal courts. The court in Burrell has given the impression that federal courts might properly be general appellate bodies

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[183] 533 U.S. 353 (2001).
[184] *Id.* at 374.
[185] *Id.* at 356-57.
[186] *Id.* at 367-68.
[187] Because tribes are not mentioned in the removal statute, 28 U.S.C. § 1441 (2000), a defendant of § 1983 claim in tribal court would not be able to remove to federal court and, thus, he would be denied a right which would be afforded to him if he were defending the same claim in state court. Nevada v. Hicks, 533 U.S. 353, 368 (2001).
[188] Burrell v. Armijo, 456 F.3d 1159, 1175 (10th Cir. 2006) (McConnell, J., concurring).
[189] *See, e.g.*, AT & T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899 (9th Cir. 2002); Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).
[190] *Wilson*, 127 F.3d 805 (holding that a tribal court had no jurisdiction over a traffic accident occurring on a US highway within a reservation between an Indian and a non-Indian). This case is also troubling. Although it is one of the few cases to apply comity to tribal courts and set out the mandatory requirements cited in Burrell (i.e. jurisdiction and due process), there was no due process claims at all in this case, the question was purely a jurisdictional one. The court could have held entirely on exhaustion principles and did not need to go into the due process discussion, yet it felt it necessary to set out this comity analysis now responsible for the Burrell holding.
[191] *See* Bird v. Glacier Elec. Coop., 255 F.3d 1136 (9th Cir. 2001) (holding that racial overtures in a closing argument violated defendant's due process rights in tribal court).

for tribal courts. This is in stark contrast to the dual sovereignty doctrines set out in *Wheeler*.[192] This doctrine holds that federal courts and tribal courts derive their power from separate sources and therefore, unless specifically prohibited by Congress, tribal courts are allowed to enforce their own laws at their own discretion without being inhibited by other sovereigns.[193] Accepting this proposition as true, how can a court from one sovereign act as a general reviewing body of another? Would the federal court allow such review of its proceedings by a tribal court?

Nevertheless, the Tenth Circuit has now opened the door for federal court review of tribal court judgments. If the tribes want to keep federal courts out of their proceedings, they will have to make substantial changes. Most profoundly, allowing civil suits in tribal courts against tribal officials for various offenses. An underlying theme in many cases withholding comity from tribal courts is the doctrine of sovereign immunity. Federal courts seem troubled by the fact that plaintiffs, especially non-Indian plaintiffs, have no relief when alleging wrongs by a tribe and/or its officials.[194] Tribes may even want to consider allowing suits against the tribe itself in certain circumstances similar to the Federal and various state Tort Claims Acts.

Another possible implication of the *Burrell* holding is that the Santa Ana Tribal Court did not or cannot adequately protect litigant's due process rights. If generalized, this could lead to more or stricter rules for tribal courts as well as open the door for federal court review of due process violations in tribal courts. This however, is in conflict with the findings that tribes have been able to effectively implement the ICRA and have successfully protected individual's rights.[195] Tribes, not federal courts, are in the best position to enforce ICRA rights[196] and more rules will lead to restricting tribal sovereignty even further. Even if no further guidelines are imposed, this decision may nevertheless have a chilling effect on the development and use of tribal courts.

The Tenth Circuit leaves the impression that tribal courts are inherently unfair because they do not conform to American notions of due process. If the Burrells were truly concerned about their due process rights and the court truly wanted to "provide great deference to tribal court systems, their practices and procedures,"[197] the district court should have ordered the Burrells to vindicate their due process claims in tribal court under an ICRA proceeding as set out in *Santa Clara Pueblo*.[198] The tribal court should have had the first chance to review the due process challenges of its own court. However, the Santa Ana Tribal Court was not afforded that right, the reviewing function having been usurped by the federal court. The *Burrell* case now puts in jeopardy that important right held by tribes since *Santa Clara Pueblo*.

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[192] 435 U.S. 313 (1978).

[193] *Id.* at 331.

[194] *See* Stephan Lafferty, *Sovereignty: Tribal Sovereign Immunity and the Claims of Non-Indians Under the Indian Civil Rights Act*, 9 AM. INDIAN L. REV. 289, 308 (1981).

> [R]eal tension exists between sovereign immunity, which is crucial for tribal self-preservation, and individual rights, which are equally crucial in defining tribal sovereignty. This tension is one the tribes must resolve so that Congress and the Supreme Court do not act to further modify tribal sovereignty. The tribes' viability as true sovereigns requires that they take steps to harmonize their inherent right of tribal immunity with the individual civil rights of both Indian and non-Indians on the reservation.

[195] *See supra* notes 168-75 and accompanying text.

[196] *Santa Clara Pueblo*, 436 U.S. 49, 65 (1978) (Court held, tribal courts are an appropriate and available forum to "vindicate rights created by ICRA.").

[197] Burrell v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006).

[198] *Santa Clara Pueblo*, 436 U.S. at 49.

There may be one possible positive outcome of this case. It is and has been apparent to Congress that tribal courts need more funding.[199] Thus, a hopeful implication of this ruling is that Congress will be informed to appropriate the money necessary for tribal courts to function as properly funded institutions protecting tribal sovereignty. While it is clear that Congressional policy is to promote tribal self-government and self-determination, words alone are not enough. If Congress wants to make clear to federal courts and to tribes that the federal government is really committed to the current policy of self-determination and self-sufficiency, it must provide proper funding.

VI. CONCLUSION

As part of the overriding federal policy of promoting tribal government, federal courts have already been precluded from reviewing due process in tribal courts. Further, as this note has indicated, tribes are bound only by the ICRA and tribes can and have upheld the provisions of the ICRA in their courts. All of these factors are at odds with the doctrine of comity as applied by the Tenth Circuit and further, seem to conclusively limit the role of federal courts in reviewing tribal court judgments. However, the federal courts seem intent on interfering with tribal court judgments and extending stricter requirements on tribal courts.

The *Burrell* holding has the potentially devastating effect on tribal court cases increasingly being reviewed for due process violations by federal courts. While the Burrells may or may not have been treated unfairly in their particular tribal proceedings, the Tenth Circuit announcing so, especially when it did not have to, makes the Santa Ana Tribal Court suspect. *Burrell* is highly inconsistent with the federal policy of tribal self-determination and puts the legitimacy of all tribal courts in jeopardy.

POSTCRIPT

The Burrells were awarded $1.3 million by a jury in the Federal District Court for the District of New Mexico.[200] As to the Burrells' 1981 & 1985 claims against the individual tribal officials, the jury found that Leonard Armijo, Santa Ana Governor and acting Police Chief in 1997, and Lawrence Montoya, Lieutenant Governor, conspired and violated the Burrells' civil rights regarding their farm lease.[201] On April 27, 2010, the Tenth Circuit overturned the Federal District Court's ruling that the Governor was not immune and affirmed the Federal District Court's ruling that the Lieutenant Governor was immune, thus ruling both officers acted within their official capacity and were immune.[202]

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[199] *See supra* notes 158-67 and accompanying text.
[200] Scott Sandlin, *Couple Awarded $1.3M in Lawsuit*, Abq. Journal, May 9, 2008.
[201] *Id.*
[202] Burell v. Santa Ana Pueblo, No. 09-2034, 2010 WL 1662482 (10th Cir. Apr.27, 2010).