BANISHING HABEAS JURISDICTION: WHY FEDERAL COURTS LACK JURISDICTION TO HEAR TRIBAL BANISHMENT ACTIONS

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Abstract: The Indian Civil Rights Act (ICRA or "the Act") of 1968 grants members of federally recognized Indian tribes individual civil rights similar to those enumerated in the federal Bill of Rights and Fourteenth Amendment. However, the Act provides only one explicit federal remedy for violations of the rights secured therein: the writ of habeas corpus. The U.S. Supreme Court has refused to read an implied cause of action into the Act. Some federal courts assert habeas jurisdiction to review tribal banishment actions alleged to violate ICRA, but not over disenrollment actions. Tribal banishment means an individual tribal member is cast out from tribal lands and often removed from tribal membership rolls. Tribal disenrollment means an individual tribal member is removed from tribal membership rolls and often denied access to some or all tribal facilities. This Comment argues that federal courts should not assert habeas jurisdiction over tribal banishment actions because: (1) exercising habeas jurisdiction over tribal banishment actions contravenes federal Indian law canons of construction; (2) expansive habeas jurisdiction disturbs the careful balance struck by Congress and the Court between individual rights and tribal sovereignty; (3) declining jurisdiction protects tribes' sovereign authority to determine their own membership; and (4) the line between banishment and disenrollment is arbitrary because tribes have authority to exclude nonmembers from tribal lands. Though it may leave a few individual tribal members without a remedy to challenge tribal banishment alleged to violate ICRA, such a uniform rule best protects tribal sovereignty, preserves congressional intent, and promotes robust tribal court systems.

INTRODUCTION

Imagine yourself as a federal court judge in a region where the local Indian tribe has struggled for decades to retain tribal sovereignty and preserve cultural unity in the face of powerful state governments, loss of territory, and erosion of tribal traditions. A member of that local tribe is a repeat criminal offender and is the primary supplier of illicit drugs on the tribe's reservation. The tribal court has convicted and imprisoned the individual numerous times, but federal authorities refuse to get involved for the more serious drug offenses.[1] Exasperated and left with few

1. Federal courts have concurrent jurisdiction over major crimes committed in "Indian Country." *See* 18 U.S.C. § 1151 (2006) (defining "Indian Country" as Indian reservations, communities, and allotments); 18 U.S.C. § 1153 (2006) (describing "major crimes" committed by an Indian against another Indian over which federal courts have jurisdiction, including murder, manslaughter, assault with a dangerous weapon, arson, and burglary, among others). Tribes do not have criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978), but

options, the tribal council moves to banish the individual. Banishment will mean the individual is cast out from tribal lands and removed from the tribe's membership rolls.[2] After a full hearing before the tribal council and an option to appeal to the tribal court, the individual is banished from tribal lands. The tribal member now appears before your court on a writ of habeas corpus,[3] alleging that the banishment constitutes unlawful detention under the Indian Civil Rights Act (ICRA or "the Act").[4] If you side with the tribe and deny the writ of habeas corpus, it means that the banished individual has no further remedy. But if you agree with the banished tribal member and grant the writ of habeas corpus, you risk undermining the tribe's sovereignty by interposing a federal court in matters of tribal membership. This issue is one federal courts have struggled with in recent decades as a result of increased tribal banishment and limited federal jurisdiction over ICRA violations.

In 1968, after years of hearings, Congress enacted ICRA to provide substantive civil rights—similar to those protected by the Bill of Rights and Fourteenth Amendment—to tribal members.[5] Though ICRA championed individual rights typical of the Civil Rights Era, it also reflected Congress's attempt to increase tribal sovereignty. While the Act requires tribes to recognize substantive rights for tribal members,[6] only one federal court procedure is available to remedy ICRA violations: the writ of habeas corpus.[7] ICRA's habeas provision, 25 U.S.C. § 1303, provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[8] Habeas is a limited remedy,

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they do have criminal jurisdiction over nonmember Indians. *See* Pub. L. No. 101-511, 104 Stat. 1892, 1892–93 (codified at 25 U.S.C. § 1301 (2006)) (overturning *Duro v. Reina*, 495 U.S. 676, 679 (1990), where the U.S. Supreme Court held that tribes do not have criminal jurisdiction over nonmember Indians, *see infra* note 113).

2. *See* sources cited *infra* notes 19, 20, 23 (tribal banishment codes, as well as newspaper articles and cases addressing tribal banishment).

3. *See* 25 U.S.C. § 1303 (2006) (habeas provision allowing individuals to challenge in federal court their tribal detention alleged to violate the Indian Civil Rights Act).

4. *Id.*

5. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (2006)).

6. 25 U.S.C. § 1302 (2006 & Supp. IV 2010).

7. 25 U.S.C. § 1303. In *Santa Clara Pueblo v. Martinez*, the U.S. Supreme Court declined to find any implied federal cause of action for ICRA violations, making the narrow habeas provision the sole method of redress in federal courts for ICRA violations. 436 U.S. 49, 69–70 (1978).

8. 25 U.S.C. § 1303.

available only when there are "severe restraints on individual liberty,"[9] whether physical custody or another immediate restraint like parole.[10]

In the seminal 1996 case of *Poodry v. Tonawanda Band of Seneca Indians*,[11] the U.S. Court of Appeals for the Second Circuit found that permanent tribal banishment is a severe enough restraint on liberty to warrant habeas jurisdiction under ICRA.[12] Two years later, the Second Circuit limited *Poodry*, finding that tribal *disenrollment* was not a severe enough restraint on liberty to warrant the exercise of habeas jurisdiction.[13] The Second Circuit's finding of habeas jurisdiction for banishment but not disenrollment informed similar lower court cases that followed.[14] No other federal circuit court of appeals considered the banishment/disenrollment issue again until the Ninth Circuit in 2010. Adopting the Second Circuit's reasoning, the Ninth Circuit declined to exercise habeas jurisdiction over a tribal disenrollment action,[15] despite an impassioned dissent advocating for jurisdiction.[16]

Banishment is an ancient punishment used by tribes to preserve order and rehabilitate tribal members.[17] Historically, tribal members who committed grievous crimes like murder would be cast out of the tribe for a period of time to reflect on their actions.[18] Such banishments helped maintain tribal cohesion, essential to cultural identity and protection.[19] In

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9. Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973).

10. *Id.*; Jones v. Cunningham, 371 U.S. 236, 243 (1963). Other immediate restraints the U.S. Supreme Court has found to be severe enough for habeas jurisdiction include parole, *Jones*, 371 U.S. at 243, and being released on one's own recognizance pending a criminal appeal, *Hensley*, 411 U.S. at 351.

11. 85 F.3d 874 (2d Cir. 1996).

12. *Id.* at 880. This Comment addresses only the exercise of habeas *jurisdiction*—the merits of a habeas claim are beyond of the scope of this Comment. Federal courts must find jurisdiction before reviewing a habeas claim on the merits. *See* 28 U.S.C. § 2241(a)–(c) (2006). In particular, an individual must be in custody or detained for a federal court to exercise habeas jurisdiction. *See infra* Part IV (discussing habeas custody requirement).

13. Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 714 (2d Cir. 1998).

14. *See, e.g.*, Sweet v. Hinzman (*Sweet I*), 634 F. Supp. 2d 1196, 1200 (W.D. Wash. 2008); Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 964 (E.D. Cal. 2004).

15. Jeffredo v. Macarro, 599 F.3d 913, 920 (9th Cir. 2010), *cert. denied*, 130 S. Ct. 3327.

16. *Id.* at 921–22 (Wilken, J., dissenting).

17. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1103 (2007); *accord* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 88 (2007).

18. Michael Cousins, *Aboriginal Justice: A Haudenosaunee Approach*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 141, 154–55 (Wanda D. McCaslin ed., 2005) ("Banishment rarely occurs for life, and individuals often return home after a prescribed period of exile. They are allowed to remain if they have fully embraced the principles of peace and unity.").

19. *Id.*; Riley, *supra* note 17, at 1103 (discussing the necessity of tribal community for survival).

the past two decades, tribes have begun using banishment again to combat drug abuse and crime ravaging tribal communities.[20] Until recently, tribes could only imprison individuals for up to one year,[21] so often banishment has been used as a last resort against repeat offenders.[22] Unfortunately, some tribes also use banishment as a retaliatory measure against members who speak out against the tribal government.[23] Banishment today most often includes permanent expulsion from tribal lands and loss of tribal citizenship.[24] Due to the harsh consequences of banishment and its reemergence as a sanction from tribal courts, tribal members have been challenging their banishment in federal courts under ICRA's habeas provision.[25]

Tribes still use banishment to maintain order and cohesion. *See, e.g.*, COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-4(a) (2010), *available at* http://www.narf.org/nill/Codes/colvillecode/title_3_2.pdf (permitting banishment when a tribal member "substantially threatens or has some direct effect on the political integrity, institutional process, economic security or health or welfare" of the tribe); NEZ PERCE TRIBAL CODE § 4-4-3(a), *available at* http://www.nezperce.org/~code/pdf%20convert%20files/Code_master_27sep11.pdf (last visited Nov. 22, 2011) (permitting banishment when an individual "unlawfully threatens the peace, health, safety, morals or general welfare of the tribe").

20. *See, e.g.*, Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. TIMES, Jan. 18, 2004, at 1; Renee Ruble, *Banishment Laws Revived Among Indians; Some Native Tribes Are Renewing Practice to Help Deal with Gangs and Drugs*, WASH. POST, Jan. 25, 2004, at A9; *see also* Kunesh, *supra* note 17, at 88 ("Hindered by their limited civil and criminal jurisdiction, frustrated with their inability to impose meaningful sanctions, and fearful of further disruption, harm, and violence to their communities, tribal governments recognize that the old customs of banishment and exclusion are powerful and effective means of reestablishing order and safety in their communities." (footnotes omitted)).

21. Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (codified at 25 U.S.C. § 1302(7) (2006)); *see also infra* notes 75–79 (discussing limitations on amount of time tribes may imprison tribal members). *But see* Pub. L. No. 111-211, 124 Stat 2279 (codified at 25 U.S.C. §§ 1302(a)(7)(C)–(D), (b) (Supp. IV 2010)) (increasing maximum sentence permitted under ICRA to three years for any one offense for repeat offenders and up to nine years of stackable sentences).

22. *See* Kershaw & Davey, *supra* note 20 ("While the Lummi use banishment to root out drug dealers, other tribes, like the Chippewa of Grand Portage, Minn., are using it to rid the reservation of the worst troublemakers and to preserve what they say is a shared set of core values.").

23. *See, e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 876–78 (2d Cir. 1996); Sweet v. Hinzman (*Sweet I*), 634 F. Supp. 2d 1196, 1198–99 (W.D. Wash. 2008); Lynda V. Mapes, *A Tribe Divided: Snoqualmie Members Fight for Control of Government, Casino*, SEATTLE TIMES, Apr. 25, 2008, at A1.

24. *See* Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 962 (E.D. Cal. 2004) (involving permanent disenrollment and physical banishment); sources cited *supra* note 20 (cases and newspaper articles discussing tribal banishment). Sometimes tribal members are temporarily banished, similar to historic banishment, as a way to contemplate their crimes against the tribe. *See* Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 255–57 (2004).

25. *See, e.g.*, *Poodry*, 85 F.3d at 876; *Sweet I*, 634 F. Supp. 2d at 1198; *Quair I*, 359 F. Supp. 2d at 962; Alire v. Jackson, 65 F. Supp. 1124, 1129 (D. Or. 1999).

Individuals also use the same ICRA habeas provision to challenge their tribal disenrollment, often relying on similar arguments as in banishment cases.[26] Also on the rise in recent decades,[27] disenrollment usually involves loss of tribal citizenship and denial of access to tribal facilities.[28] Despite the line federal courts have drawn between disenrollment and banishment, the functional difference between the two is often not significant. Tribes have sovereign authority to exclude nonmembers from tribal lands.[29] As a result, once tribal members are stripped of their tribal citizenship—through banishment or disenrollment—the tribe can then expel that individual from tribal lands.

Both banishment and disenrollment impose significant hardship on individuals through loss of tribal citizenship, benefits, and access to tribal facilities. But federal courts should refrain from exercising habeas jurisdiction over banishment actions, given tribal sovereignty and tribal authority to make membership decisions.[30] Tribal sovereignty was hard won and tribes continue to struggle for the right to determine membership and governance free from federal interference.[31] Without sovereign authority to determine its own membership, a tribe's cultural identity is in peril. Denying habeas jurisdiction over banishment actions may leave some tribal members without a remedy, but such a result is necessary to preserve tribal sovereignty and promote tribal self-government.[32] Such a result also corresponds to the careful balance struck by Congress and the U.S. Supreme Court between individual rights and tribal sovereignty.[33]

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26. *See, e.g.*, Jeffredo v. Macarro, 599 F.3d 913, 920 (9th Cir. 2010), *cert. denied*, 130 S. Ct. 3327; Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 714 (2d Cir. 1998).

27. *See* Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 312–14, 320 (2010) (noting that tribes in California alone have disenrolled over 5000 members since 2002); Marc Cooper, *Tribal Flush: Pechanga People "Disenrolled" en Masse*, LA WEEKLY (Jan. 3, 2008), http://www.laweekly.com/2008-01-03/news/tribal-flush-pechanga-people-disenrolled-en-masse/ (discussing how tribes have disenrolled thousands of members in recent years due to gaming corruption and greed).

28. *See, e.g.*, *Jeffredo*, 599 F.3d at 918–19; *Shenandoah*, 159 F.3d at 711, 714.

29. *See infra* notes 52–53 and accompanying text.

30. A tribe's authority to determine its own membership is critical to its existence as an independent, self-governing body. *See infra* notes 49–52 and accompanying text.

31. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.06–.07, at 89–113 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN] (describing federal policy toward Indian tribes from the termination era to the self-governance era).

32. *See* Fisher v. Dist. Ct., 424 U.S. 382, 390–91 (1976) (finding that a jurisdictional holding that sometimes denies relief to an individual tribal member may be necessary to preserve tribal sovereignty, which in turn will benefit more individual tribal members on the whole).

33. *See infra* Part II.C. (discussing ICRA's legislative history); *infra* Part III (discussing the U.S.

Part I of this Comment provides an overview of historic tribal sovereignty and Indian law canons of construction, which govern judicial interpretation of statutes regulating tribal affairs. Part II describes the historical context, statutory text, and legislative history of ICRA relevant to interpreting the Act's habeas provision. Part III discusses *Santa Clara Pueblo v. Martinez*,[34] in which the U.S. Supreme Court interpreted ICRA for the first time and foreclosed any implied causes of action, leaving habeas as the only federal remedy for ICRA violations. Part IV details U.S. Supreme Court interpretations of general federal habeas jurisdiction to inform proper interpretation of ICRA's habeas provision. Part V discusses federal court cases addressing whether ICRA's habeas provision can be used to challenge tribal banishment or disenrollment. Lastly, Part VI argues that federal courts should not assert habeas jurisdiction over tribal banishment, because: (1) exercising habeas jurisdiction over tribal banishment actions contravenes federal Indian law canons of construction; (2) expansive habeas jurisdiction upsets the delicate balance struck by Congress and the U.S. Supreme Court between individual rights and tribal sovereignty; (3) declining jurisdiction protects tribes' sovereign authority to determine their own membership; and (4) the line between banishment and disenrollment is arbitrary because tribes have authority to exclude nonmembers from tribal lands. Federal courts should refrain from exercising habeas jurisdiction under ICRA in challenges to tribal banishment actions. Tribal courts are available to vindicate individual tribal members' rights guaranteed under ICRA in a manner that preserves and advances tribal sovereignty.

I. TRIBAL SOVEREIGNTY INFORMS HOW THE FEDERAL GOVERNMENT AND COURTS ACT TOWARD TRIBES

Tribes were sovereign entities prior to their relationship with the United States.[35] They retain a limited form of that sovereignty, with the power to self-govern and determine tribal membership.[36] Although Congress retains plenary power over the tribes,[37] Congress and federal

Supreme Court's seminal *Martinez* case interpreting ICRA).

34. 436 U.S. 49, 65 (1978).

35. *See infra* note 41 and accompanying text.

36. *See infra* notes 42–45 and accompanying text.

37. "Plenary power" is a term of art in federal Indian law. It means that the federal government has broad power to regulate Indian affairs exclusive of state authority. United States v. Lara, 541 U.S. 193, 200 (2004). This broad authority comes largely from the U.S. Constitution's Indian Commerce Clause, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989), which

courts nonetheless recognize that tribal sovereignty requires deference to tribal decision-making.[38] In turn, this deference informs Indian law canons of construction, which guide how federal courts interpret statutes regulating Indian tribes.[39]

A. Federal Court Deference to Tribal Sovereignty Reflects Tribes' Historic Power as Independent, Self-Governing Communities

One of the fundamental principles of Indian law is that tribes are sovereign entities.[40] Tribes acted as independent, self-governing nations prior to their relationship with the United States and they retain some aspects of that sovereignty under contemporary law.[41] Tribal sovereignty means the U.S. government treats tribes[42] as "distinct, independent political communities."[43] Although Congress retains plenary power to regulate tribal affairs,[44] tribes are nonetheless considered self-governing, separate peoples.[45] Tribal justice systems are vital to this self-

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permits Congress "to regulate Commerce . . . with the Indian Tribes," U.S. CONST., art. I, § 8, cl. 3. *But see* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115 (2002) (arguing that there is no legitimate historical or textual basis for federal plenary authority over tribes).

38. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980) (discussing federal deference to tribal development and self-government).

39. *See infra* Part I.B.

40. *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . ."). *See generally* COHEN, *supra* note 31, § 4.01, at 204–11 (discussing tribal sovereignty as the basis of federal Indian law).

41. *See* United States v. Wheeler, 435 U.S. 313, 322–23 (1978) ("Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." (citation omitted)).

42. In general, when the federal legal system or government refers to an Indian tribe, it means a federally recognized tribe that has political affiliation with the U.S. government. *See* COHEN, *supra* note 31, §3.02[2], at 137; *see also* Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §§ 479a, 479a-1 (2006).

43. *Worcester*, 31 U.S. at 519.

44. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56–57 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." (citing cases)). Despite this plenary power, tribes retain their inherent sovereignty and powers of self-government unless and until Congress regulates tribal affairs. *Wheeler*, 435 U.S. at 323.

45. *See Martinez*, 436 U.S. at 55 (recognizing that tribes have powers of self-government); Talton v. Mayes, 163 U.S. 376, 382–84 (1896) (holding that tribes are not constrained by federal Constitution); United States v. Kagama, 118 U.S. 375, 381–82 (1886) (noting that tribes are considered a separate people with powers of internal regulation). A concomitant tribal right is the authority to exercise jurisdiction over and impose criminal sanctions on tribal members, absent any

government.[46] Federal law encourages tribes to develop tribal justice systems based on their own cultural traditions and customs.[47] So long as they do not violate ICRA, tribal courts may enact and interpret laws based on their own unique justice traditions.[48]

Also integral to tribal sovereignty is a tribe's power to determine its own membership.[49] Although Congress can regulate tribal membership,[50] the U.S. Supreme Court accords deference to tribal membership determinations: "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[51] Consequently, courts should not infer abrogation of tribal power to determine membership absent explicit congressional intent.[52] Inherent in tribal power to determine membership is the power to exclude nonmembers from tribal territory.[53] Tribes maintain sovereign authority over their territory and members through this exclusionary power.[54]

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abrogating federal law. *See Ex parte* Crow Dog, 109 U.S. 556, 568 (1883) (recognizing that tribes have the right to maintain "order and peace among their own members by administration of their own laws and customs").

46. *See* Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(5) (2006) ("[T]ribal justice systems are an essential part of tribal governments . . . ."); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987) (recognizing the long-standing importance of tribal court systems).

47. *See* 25 U.S.C. § 3601(7) ("[T]raditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes . . . ."); United States v. Quiver, 241 U.S. 602, 603–04 (1916) (explaining that a dispute between two tribal members should be resolved "according to their tribal customs and laws"); *cf. Martinez*, 436 U.S. at 72 (limiting federal court "interfere[nce] with a tribe's ability to maintain itself as a culturally and politically distinct entity" (footnote omitted)).

48. *See* 25 U.S.C. §§ 3601(4)–(7); *accord* Angela R. Riley, *(Tribunal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 839 (2007) ("Indian tribes are authorized and encouraged to apply ICRA's provisions consistent with tribal values and traditions." (citing *Martinez*, 436 U.S. at 57)).

49. *Martinez*, 436 U.S. at 72 n.32.

50. *See, e.g.*, Agreement Between the United States and the Choctaws and Chicksaws, §§ 27–35, July 1, 1902, 32 Stat. 641 (specifying rules for enrollment of Choctaw and Chicksaw citizens and freedmen); Treaty with the Seminole Indians, U.S.–Seminole Nation of Indians, art. 2, Mar. 21, 1866, 14 Stat. 756 (regulating tribal membership based on descent).

51. *Martinez*, 436 U.S. at 72 n.32 (citing Cherokee Intermarriage Cases, 203 U.S. 76 (1906) and Roff v. Burney, 168 U.S. 218 (1897)).

52. *See id.*

53. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (recognizing tribes' "inherent power to exclude nonmembers"); 55 Interior Dec. 14, 48 (1934) (recognizing the "power of an Indian tribe to exclude nonmembers of the tribe from entering upon the reservation . . . ."); *see also* Water Wheel, Inc. v. LaRance, 642 F.3d 802, 810–11 (9th Cir. 2011) (discussing well-established tribal authority to exclude nonmembers from tribal lands).

54. *See* COHEN, *supra* note 31, § 4.01[a][e], at 220.

B. Courts Employ Indian Law Canons of Construction to Interpret Federal Statutes Regulating Tribes

Tribal sovereignty informs how courts interpret federal Indian law. Indian law canons of construction provide unique modes of interpretation for courts to apply in Indian law cases,[55] in light of the "unique trust relationship" between tribes and the federal government.[56] Courts originally developed these canons to interpret tribal treaties,[57] but have since applied them to federal statutes.[58] Three Indian law canons are pertinent to this discussion. First, courts should construe statutes liberally in favor of the tribe.[59] Second, courts should resolve any statutory ambiguities in favor of the tribe.[60] And third, courts should uphold tribal sovereignty unless congressional intent to abrogate it is clear and unambiguous.[61] Thus, these canons direct courts to construe statutes in favor of tribes, which in turn protects tribal sovereignty and self-governance.[62]

II. ICRA REFLECTS CONGRESS'S ATTEMPT TO BALANCE INDIVIDUAL RIGHTS WITH TRIBAL SOVEREIGNTY AND SELF-DETERMINATION

Congress enacted ICRA at a time when the federal government was

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55. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.").

56. Oneida Cnty. v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). This trust relationship creates a presumption that the federal government acts in good faith toward the tribes, *see id.*, because tribes have a "government-to-government relationship" with the federal government, much like the states. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (referring to a tribe as a "domestic dependent nation").

57. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 551–52 (1832) (using Indian law canons to interpret a tribal treaty).

58. *See, e.g.*, *Blackfeet Tribe*, 471 U.S. at 766 (using Indian law canons to interpret a federal statute regulating tribal affairs).

59. *Id.* ("[S]tatues are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").

60. Choate v. Trapp, 224 U.S. 665, 675 (1912) ("[D]oubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor [of the tribes].").

61. *See* United States v. Dion, 476 U.S. 734, 739–40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978).

62. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy encouraging tribal independence." (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174–75 & n.13 (1973)).

strengthening policies of tribal self-determination and self-governance. The historic Civil Rights Movement concurrently championed individual rights. The controversial Act attempted to strike a balance between these two divergent movements.[63] To that end, Congress deliberately provided a narrow federal remedy for ICRA violations so as not to impose an undue burden on the tribes or unnecessarily abrogate their sovereignty.[64]

A. Congress Enacted ICRA During the Civil Rights Era, When Federal Policy Embraced Tribal Sovereignty

From World War II to the early 1960s, the U.S. government practiced a policy of tribal termination.[65] Forced assimilation, relocation, loss of tribal lands and traditional tribal governments, along with transfer of jurisdiction over Indian Country from federal to state courts,[66] severely weakened tribal sovereignty during this period.[67] The 1960s signaled a shift away from termination.[68] Presidential initiatives promoted tribal self-determination and self-governance.[69] Tribes became more vocal during this period, demanding the right to develop their own policies and governments.[70] Amid this increasing emphasis on tribal self-

63. *See infra* Part II.B–C.

64. *See infra* Part II.B–C.

65. *See, e.g.*, S. 2726, 81st Cong., 1st Sess. (1949) (proposing to eliminate the Bureau of Indian Affairs); *see also* 25 U.S.C. § 232 (1948) (authorizing New York to assume criminal jurisdiction over all Indians in the state). The goal of termination was to end federal support to the tribes and assimilate them into mainstream American culture. *See, e.g.*, H.R. Rep. No. 82-2503, 82d Cong., 2d Sess. (1952) (calling for legislature to "promote the earliest practicable termination of all federal supervision and control over Indians"). Congressional bills during the time also proposed to terminate specific tribes, with a devastating impact. *See, e.g.*, 25 U.S.C. § 891 (1954) (terminating Menominee Tribe), *repealed by* Menominee Restoration Act, Pub. L. 93-197, § 3(b), 87 Stat. 770 (1973).

66. *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (repealed and reenacted as amended in ICRA, 25 U.S.C. § 1321) (transferring criminal and civil jurisdiction over tribes from federal to state governments).

67. COHEN, *supra* note 31, § 1.06, at 95–96.

68. *See generally* THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961–1969 (2001).

69. *See, e.g.*, Special Message to the Congress on Indian Affairs, July 8, 1970, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1970, at 564–76 (1971) (calling for increased tribal self-determination); Special Message to Congress on the Problems of the American Indian: "The Forgotten American," Mar. 6, 1968, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON JOHNSON, 1968–69 BOOK I, at 335–44 (1970) (declaring the new goal of tribal self-determination).

70. *See* STEPHEN CORNELL, THE RETURN OF THE NATIVE 119–20, 123–26 (1988) (describing numerous multitribal gatherings designed to promote tribal rights); *see also* COHEN, *supra* note 31, § 1.07, at 100 (citing *Declaration of Indian Purpose*, American Indian Chicago Conference 1961).

determination, Congress enacted the period's most controversial tribal legislation: the Indian Civil Rights Act of 1968.[71]

B. ICRA Requires Tribes to Recognize Substantive Individual Rights and Provides a Limited Federal Remedy for Violations of Those Rights

Title II of ICRA delineates substantive individual rights similar to those enumerated in the Bill of Rights and the Fourteenth Amendment.[72] These substantive rights include the free exercise of religion, freedom of speech and press, protection against unreasonable searches and seizures, freedom from double jeopardy, protection from self-incrimination, assistance of counsel, prohibition of cruel and unusual punishment, equal protection, and due process, among others.[73] Section 1302 of the Act requires that "[n]o Indian tribe in exercising the powers of self-government shall" abridge these substantive provisions.[74]

Section 1302(a)(7), which forbids cruel and unusual punishment, also originally prohibited tribes from imposing more than six months' imprisonment and a $500 fine as punishment for violating tribal laws.[75] As part of a national effort to fight drug abuse,[76] Congress amended this

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71. *See* 25 U.S.C. §§ 1301–1303 (2006). One author described ICRA as a "complex compromise intended to guarantee that tribal governments respect civil rights while minimizing federal interference with tribal culture and tradition." Robert McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 467 (1998) (footnote omitted). The Act was controversial because many believed it did not go far enough to protect tribal members' rights, while others argued it went too far in imposing the U.S. legal system on traditional tribal governments. *See* COHEN, *supra* note 31, § 14.04[2], at 956–57.

72. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303. Section 1301 of ICRA provides key definitions for interpreting the statute. 25 U.S.C. § 1301. For instance, it defines "Indian tribe" as "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." *Id.* The statute defines "powers of self-government" to be "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses." *Id.* In that same definition, the statute recognizes "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." *Id.*

73. 25 U.S.C. § 1302 (2006 & Supp. IV 2010). Although the language of § 1302 resembles the Bill of Rights, some provisions in the Bill of Rights are notably absent from ICRA, including the Establishment Clause of the First Amendment, as well as the entire Second, Third, and Seventh Amendments. *Id.*; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 n.14 (1978).

74. 25 U.S.C. § 1302.

75. 25 U.S.C. § 1302(7) (1970).

76. *See* Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-137 (finding alcoholism and drug abuse to be the "most severe health and social problem facing Indian tribes"). The Indian Alcohol and Substance Abuse Prevention and Treatment Act was part of the larger Anti-Drug Abuse Act of 1986, which altered many other federal statutes. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as

provision in 1986 to allow tribal courts to impose a maximum sentence of one year imprisonment and a $5000 fine.[77] Congress again amended this limitation in 2010 to allow for three years maximum imprisonment for any one offense for repeat offenders, a $15,000 fine, and up to nine years of stackable sentences.[78] With this recent amendment, Congress aimed to assist tribes in reducing crime, drug abuse, and domestic violence in tribal communities.[79]

Despite these numerous substantive provisions, Congress delineated only one federal procedure through which individuals can challenge tribal violations of ICRA: the writ of habeas corpus.[80] Section 1303 of the Act provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[81] The statute does not define "detention" or otherwise articulate the scope of appropriate habeas jurisdiction.[82] For ten years after ICRA's enactment, many federal courts inferred broad federal civil jurisdiction over alleged ICRA violations.[83] In 1978, however, the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez* foreclosed these implied causes of action and limited federal court jurisdiction to the Act's habeas provision.[84]

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amended in scattered sections of U.S.C.).

77. Pub. L. No. 99-570, 100 Stat. 3207-137, 146 (codified at 25 U.S.C. § 1302(7) (1988)).

78. Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, 124 Stat. 2279 (codified at 25 U.S.C. §§ 1302(a)(7)(C)–(D), (b) (Supp. IV 2010)).

79. *See id.*

80. 25 U.S.C. § 1303 (2006).

81. *Id.*

82. *See id.*

83. *See, e.g.*, Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975) (finding implied federal jurisdiction based on 28 U.S.C. § 1343(4) for ICRA due process and equal protection violations); Crow v. E. Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974) (same); Johnson v. Lower Elwha Tribal Cmty., 484 F.2d 200, 203 (9th Cir. 1973) (same).

84. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–70 (1978); *see also infra* Part III (discussing *Martinez*). The *Martinez* decision fundamentally altered the scope of federal review of ICRA violations by foreclosing all implied causes of action. *Id.*; *see also* cases cited *supra* note 83. After *Martinez*, federal courts may only exercise jurisdiction over ICRA actions if they fall within the narrow scope of habeas review. *See Martinez*, 436 U.S. at 69–70. *But see* Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). Ignoring the *Martinez* decision, the Tenth Circuit in *Dry Creek Lodge* permitted tribal members to proceed with a civil action brought under ICRA against their tribe. *Id.* at 685. *Dry Creek Lodge*, described as "clearly wrong," has been met with much criticism by courts and scholars. COHEN, *supra* note 31, § 14.04[2], at 957.

C. *ICRA's Legislative History Demonstrates Congress's Concern with Balancing Tribal Sovereignty and Individual Rights*

In 1961, Congress, motivated by the Civil Rights Movement, initiated hearings to investigate purported violations of tribal members' civil rights by tribal, state, and federal governments.[85] Disconcerted that tribes were not bound by the U.S. Constitution,[86] the primary sponsor of the bill, Senator Sam Ervin, intended ICRA to "grant the American Indians rights which are secured to other Americans."[87] Opponents of ICRA believed it would abrogate tribal sovereignty by imposing substantive constitutional provisions on the tribes.[88] Proponents, on the other hand, argued the Act would in fact protect tribal sovereignty.[89]

The original proposed legislation included eight bills guaranteeing individual rights, providing methods for vindicating those rights, and enhancing federal jurisdiction over major crimes committed in Indian Country.[90] The first bill in the proposed legislation, Senate Bill 961, imposed on Indian tribes all the "same limitations and restraints" as the

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85. *See generally Constitutional Rights of the American Indian*: *Hearing on S. Res. 53 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. (1961). For a thorough discussion of these alleged civil rights violations, as well as constitutional guarantees available in tribal courts prior to ICRA, see generally Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972).

86. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (explaining that tribes existed prior to the U.S. Constitution and are therefore not bound by the Fifth Amendment's requirement of indictment by a grand jury). Lower federal courts subsequently expanded the holding of *Talton* to exempt tribes from the purview of the First and Fourteenth Amendments, among others. *See, e.g.*, Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134–35 (10th Cir. 1959) (tribes not constrained by First Amendment); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553, 556 (8th Cir. 1958) (tribes not constrained by Fifth and Fourteenth Amendments). *Talton* is still good law, and tribes remain free from constrictions of the U.S. Constitution. *See Martinez*, 436 U.S. at 56 (discussing the ramifications of *Talton* and its progeny).

87. *Rights of Members of Indian Tribes*: *Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the H. Comm. on Interior & Insular Affairs*, 90th Cong., 2d Sess. 131 (1969) [hereinafter *House Hearings*] (statement of Sen. Sam Ervin, Jr.).

88. *Id.* at 37 (testimony of Domingo Montoya, Chairman, All Indian Pueblo Council of New Mexico); *id.* at 39 (Resolution of All Indian Pueblo Council), *id.* at 42 (testimony of Tom Olson, Attorney, All Indian Pueblo Council).

89. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63–64 (1978) (citing 114 CONG. REC. 9596 (1968) (remarks of Rep. Lloyd Meeds); *House Hearings, supra* note 87, at 108). For instance, Title III of ICRA, 25 U.S.C. §§ 1321–1326, prohibits states from exercising jurisdiction over a tribe without the tribe's express consent. *Id.*

90. *See Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. 5–13 (1965) [hereinafter *1965 Hearings*] (S. 961–68).

U.S. Constitution.[91] Many individuals objected to this provision because it imposed Western legal and cultural norms wholesale onto tribes, which critics believed would unduly interfere with tribal sovereignty.[92] Consequently, Congress instead opted to impose only some constitutional provisions on the tribes out of deference to tribal culture and self-government.[93]

Additionally, the original proposed legislation afforded a number of different avenues for federal court review of tribal actions.[94] For instance, the original bill provided for federal de novo review of all tribal court convictions.[95] While those testifying before the committee agreed that some form of federal appellate review was necessary to protect individual tribal members' rights,[96] tribal representatives argued that de novo review would displace tribal courts and burden already overworked federal courts.[97] In light of these critiques, Congress eliminated the de novo review provision from the final version of the Act.[98] The original proposed legislation also included a provision that allowed the Attorney General to investigate civil complaints filed by tribal members alleging ICRA violations.[99] Similarly criticized as

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91. *Id.* at 5 (S. 961).

92. *See, e.g.*, *id.* at 17–18 (statement of Frank J. Barry, Solicitor, Department of the Interior); *see also Constitutional Rights of the American Indian: Summary Rep. of Hearings and Investigations by the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 2d Sess. 9–10 (1966) [hereinafter *1966 Summary Report*] (summarizing some of the criticisms of wholesale imposition of the U.S. Constitution on tribes).

93. *See* Pub. L. No. 90-284, 82 Stat. 78, 77–78 (codified at 25 U.S.C. § 1302 (2006 & Supp. IV 2010)); *1965 Hearings*, *supra* note 90, at 318–19 (noting that the Department of Interior originally suggested incorporating only some constitutional provisions); *see also supra* note 73 (discussing Bill of Rights provisions absent from ICRA).

94. *See, e.g.*, *1965 Hearings*, *supra* note 90, at 6–7 (S. 962, 963); *see also* Burnett, *supra* note 85, at 592–95 (discussing hearings on S. 962 and S. 963).

95. *1965 Hearings*, *supra* note 90, at 6–7 (S. 962).

96. *1966 Summary Report*, *supra* note 92, at 12 (explaining that no one appearing before the Senate subcommittee opposed *some* type of appellate review of tribal actions).

97. *See, e.g.*, *1965 Hearings*, *supra* note 90, at 22 (statement of Solicitor Barry) (expressing concern that de novo review would overburden federal dockets and harm independence of tribal governments); *id.* at 79 (Res. No. SR–442–65 of Salt River Pima-Maricopa Indian Community Tribal Council, Scottsdale, Ariz.) (explaining that de novo federal review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation"); *id.* at 157 (statement of William Day, Jr., Trial J., Rosebud Tribal Court, Winner, S.D.) (expressing concern over potential financial burden of de novo appeal for individual Indian defendants).

98. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (2006)).

99. *1965 Hearings*, *supra* note 90, at 7–8 (S. 963).

intrusive and impractical,[100] the Attorney General provision was also eliminated from the final version of the Act.[101] Instead, the Act contains only the limited federal habeas provision for challenging tribal detention.[102]

Congress has since reconsidered whether to provide additional federal court remedies for tribal members alleging ICRA violations.[103] In 1991, the U.S. Commission on Civil Rights issued a report examining the effects and successes of ICRA.[104] The Report stated that the biggest problem with vindicating tribal members' rights under ICRA was not lack of federal jurisdiction over claims, but rather lack of funding, resources, and training in tribal courts.[105] Given these findings, the Report recommended increased support for tribal courts instead of increased jurisdiction for federal courts.[106] This, the Report concluded, would in turn improve respect for tribal sovereignty.[107] In response to this Report, Congress passed the Indian Tribal Justice Act of 1993 to strengthen tribal court systems through additional funding and support.[108] Again affirming tribal sovereignty, Congress declined to enact a separate bill—the American Indian Equal Justice Act of 1998—that would have waived tribal sovereign immunity in federal courts for civil ICRA violations.[109] Thus, ICRA's limitation on federal court

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100. *See, e.g.*, *1965 Hearings*, *supra* note 90, at 235 (statement of Edison Real Bird, Rep., Crow Tribal Delegation) (voicing concern that the proposed bill "would in effect subject the tribal sovereignty of self-government to the Federal Government"); *id.* at 343 (statement of Wendell Chino, President, Mescalero Apache Tribal Council) (arguing that the proposed legislation "would be used to undermine and harass existing tribal governments" by dissatisfied individual Indians).

101. *See* 82 Stat. at 77–78; *see also 1966 Summary Report*, *supra* note 92, at 11 (explaining that the final bill aimed to "prevent[] injustices perpetuated by tribal governments, on the one hand, and, on the other, avoid[] undue or precipitous interference with the affairs of the Indian people").

102. 82 Stat. at 78. *Compare 1965 Hearings*, *supra* note 90, at 6 (S. 962) (de novo review provision), *and id.* (S. 963) (Attorney General review provision), *with* 25 U.S.C. § 1303 (enacted habeas provision providing the only federal remedy for tribal violations of the Act).

103. *See generally* American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998); U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT (June 1991) [hereinafter 1991 ICRA REPORT].

104. *See* 1991 ICRA REPORT, *supra* note 103, at 1–2.

105. *Id.* at 71–74.

106. *Id.* at 74.

107. *Id.*

108. *See* Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601–3621). The Indian Tribal Justice Act also affirmed congressional dedication to tribal sovereignty, including tribal "self-determination, self-reliance," and "inherent authority to establish their own form of government, including tribal justice systems." 25 U.S.C. §§ 3601(2)–(4) (2006).

109. American Indian Equal Justice Act, S. 1691, 105th Cong. §§ 1, 4 (1998) (calling for "Indian

jurisdiction remains in full force today.

III. THE *MARTINEZ* COURT LIMITED FEDERAL COURT REVIEW OF ICRA VIOLATIONS AND DEFERRED TO TRIBAL ENROLLMENT DECISIONS

In 1978, the U.S. Supreme Court considered the scope of ICRA in the landmark case *Santa Clara Pueblo v. Martinez*.[110] Attempting to balance individual rights and tribal sovereignty, the Court found no implied federal civil remedy for ICRA violations.[111] This holding limited federal court review to challenges brought under ICRA's habeas provision, making tribal courts the primary arbiters of ICRA's substantive provisions.[112] Given this limited remedy, relatively few ICRA cases have been brought in federal courts, and the U.S. Supreme Court has analyzed ICRA's habeas provision in only one other instance.[113]

A. Santa Clara Pueblo v. Martinez *Limited the Scope of Federal Court Jurisdiction over Tribal Government Actions Challenged Under ICRA*

In *Santa Clara Pueblo v. Martinez*, a group of female members of the Santa Clara Pueblo tribe and their children instituted a class action alleging that a tribal ordinance violated ICRA's equal protection provision.[114] The ordinance specified that Santa Clara Pueblo men who married outside the tribe could pass on their tribal membership to their

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tribal governments [to be] subject to judicial review with respect to certain civil matters" and giving federal courts "original jurisdiction in any civil action or claim against an Indian tribe").

110. 436 U.S. 49, 65 (1978).

111. *Id.* at 52.

112. *Id.* at 65.

113. In *Duro v. Reina*, the U.S. Supreme Court considered whether a tribe had criminal jurisdiction over an Indian defendant who belonged to another tribe. 495 U.S. 676, 679 (1990). The Court's holding, that tribes do not have criminal jurisdiction over nonmember Indians, *id.*, was subsequently overturned by an ICRA amendment extending tribal criminal jurisdiction to "all Indians" (called the "*Duro* Fix"). *See* 25 U.S.C. § 1301(2) (1990), *amended by* Pub. L. No. 101-511, 104 Stat. 1856, 1892–93; *see also* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 598–602 (2d ed., 2008). In 2004, the Court upheld this ICRA amendment in *United States v. Lara*, 541 U.S. 193, 210 (2004). A search of the leading Indian law treatises and subsequent case law revealed no other instances where the U.S. Supreme Court has addressed Title II of ICRA or reconsidered the scope of ICRA's habeas provision.

114. *Martinez*, 436 U.S. at 51, 53; *see also* 25 U.S.C. § 1302(a)(8) (Supp. IV 2010) (forbidding Indian tribes from "deny[ing] . . . any person within its jurisdiction the equal protection of its laws").

children, while tribal women could not.[115] Julia Martinez, the named class representative and a full-blooded Santa Clara Puebla, was permitted to live on the reservation with her family after she married a Navajo Indian.[116] Under the ordinance, however, her children would have no right to remain on the reservation or inherit family lands after her death.[117]

Both the district court and Tenth Circuit Court of Appeals found an implied civil cause of action under 28 U.S.C. § 1343(4) for ICRA violations,[118] but disagreed on the merits of the equal protection claim.[119] The Tenth Circuit reasoned that because Congress delineated substantive rights in ICRA, it must have intended to permit civil suits against the tribe to vindicate those rights.[120] Reaching the merits, the Tenth Circuit found that the tribe's ordinance violated ICRA's equal protection provision.[121] The U.S. Supreme Court reversed the Tenth Circuit and held that ICRA could not be read to imply a federal civil cause of action and therefore did not even reach the merits of the equal protection claim.[122] Simply put, the Court found ICRA's specific enumeration of a habeas remedy to exclude all other implied remedies.[123]

B. Relying on ICRA's Legislative History and Structure, the Martinez *Court Emphasized Tribal Sovereignty and Self-Determination*

The Court reached its decision in *Martinez* by conducting a thorough review of ICRA's historical context, statutory structure, and legislative

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115. *Martinez*, 436 U.S. at 51.

116. *Id.* at 52.

117. *Id.* at 52–53. Fortunately, Julia Martinez's children were not actually forced to relinquish their tribal lands and leave the reservation after their mother's death. In fact, many of her descendents still live on the reservation. Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103, 112 (2004) (citing *Obituary of Myles Martinez*, SANTA FE NEW MEXICAN, Oct. 30, 2001, at B2).

118. *Martinez*, 436 U.S. at 53–55. Section 1343(4) of the U.S. Code gives federal courts "jurisdiction of any civil action *authorized by law* to be commenced by any person . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." *Id.* at 53 n.4 (alteration in original) (citing 25 U.S.C. § 1343(4)). Before *Martinez*, many federal courts permitted civil suits against tribes under ICRA by inferring a federal civil cause of action based on 25 U.S.C. § 1343(4). *See* cases cited *supra* note 83. Basically, lower federal courts were implying a federal cause of action separate from and broader than ICRA's habeas provision—the only enumerated federal cause of action in ICRA.

119. *Martinez*, 436 U.S. at 53–55.

120. *Id.* at 55.

121. *Id.*

122. *Id.* at 52, 55.

123. *See id.* at 69–70.

history.[124] Principles of tribal sovereignty formed the backdrop for the Court's analysis.[125] Reading it in this context, the Court interpreted ICRA to be a limited exercise of plenary congressional power, because it requires tribes to recognize individual rights.[126] However, the Court acknowledged that tribes retain the right to regulate internal relations, develop substantive laws, and enforce those laws in their own tribal forums.[127]

In reviewing ICRA's legislative history, the Court found it instructive that Congress considered and rejected a number of more comprehensive forms of federal review before settling on the habeas provision.[128] The *Martinez* Court held that that Congress's decision to provide only the habeas remedy was a deliberate attempt to balance tribal sovereignty with individual rights.[129] Given this legislative history, the Court determined that Congress intended § 1303 to be the only mechanism for relief in federal court.[130]

In reaching its decision, the Court emphasized the importance of tribal self-determination, especially in tribal enrollment decisions: "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[131] Ultimately, the Court concluded that *tribal* courts, not *federal* courts, must protect and uphold ICRA's substantive provisions.[132] Foreclosing a civil cause of action, the Court explained, also prevents federal courts from undermining tribal authority and

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124. *Id.* at 56–72.

125. *Id.* at 60. The Court also briefly addressed the issue of tribal sovereign immunity. *Id.* at 58–59. The Court concluded that the Act did not abrogate a tribe's sovereign immunity except in the limited circumstance of habeas, which is not considered a suit against the sovereign. *Id.*

126. *See id.* at 57.

127. *Id.* at 55–56.

128. *Id.* at 67; *see also supra* text accompanying notes 92–101 (discussing originally proposed provisions of ICRA, including provisions for federal de novo review of all tribal convictions and Attorney General investigation of civil complaints of ICRA violations).

129. *Martinez*, 436 U.S. at 67.

130. *Id.* at 69–70.

131. *Id.* at 72 n.32 (citing Cherokee Intermarriage Cases, 203 U.S. 76 (1906) and Roff v. Burney, 168 U.S. 218 (1897)); *see also supra* text accompanying notes 49–54 (discussing tribal power to determine membership).

132. *Martinez*, 436 U.S. at 65–66 ("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." (citations omitted)). Given the availability of tribal forums and traditional deference to tribal sovereignty, the Court concluded that it was "reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief." *Id.* at 66.

protects tribes from the heavy financial burdens of regularly defending tribal actions in federal court.[133] To implement the congressional vision of ICRA as balancing individual rights and tribal sovereignty, the U.S. Supreme Court made clear that habeas was the only federal remedy available for ICRA violations.[134]

The significance of *Martinez* cannot be overstated.[135] Indeed, one year later in *Cannon v. University of Chicago*,[136] the Court explained that at that time, *Martinez* was the *sole* exception to the general rule that the Court will imply a cause of action when Congress explicitly creates an affirmative right for a group of people.[137] The *Cannon* Court went on to explain that *Martinez* involved a "virtually unique situation" where an individual asked for an implied cause of action, but was rebuffed because tribes are "protected by a strong presumption of autonomy and self-government, as well as by a special duty on the part of the Federal Government to deal fairly and openly, and by a legislative history indicative of an intent to limit severely judicial interference in tribal affairs."[138] Thus, the *Martinez* Court followed Congress's perceived intent and protected tribal sovereignty from unwarranted federal intrusion.

IV. FEDERAL COURTS MAY EXERCISE HABEAS JURISDICTION ONLY WHEN THERE ARE SEVERE RESTRAINTS ON INDIVIDUAL LIBERTY

The U.S. Supreme Court has not further defined the scope of ICRA's habeas provision since *Martinez*.[139] Traditionally, individuals use the writ of habeas corpus to challenge the legality of their custody.[140] The Court interprets "custody" to include not only physical custody, but also "severe restraints on individual liberty,"[141] like parole.[142] Though ICRA's habeas provision uses the term "detention" rather than

133. *Id.* at 64–65; *see also supra* note 97 (citing testimony at Senate Committee hearings).

134. *Id* at 69–70.

135. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979).

136. 441 U.S. 677.

137. *Id.* at 690 n.13.

138. *Id.* (citing *Martinez*, 436 U.S. at 55, 58–59, 63–64, 67–70 & n.30).

139. The *Duro* Court addressed whether tribes had criminal jurisdiction over nonmember Indians, but did not discuss the scope of habeas jurisdiction under ICRA. Duro v. Reina, 495 U.S. 676, 679 (1990); *see also supra* note 113 (discussing *Duro*).

140. *See, e.g.*, 28 U.S.C. § 2241(c)(3) (2006).

141. Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973).

142. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

"custody," lower federal courts interpret "detention" coterminously with "custody" in other federal habeas statutes.[143]

A. Habeas Is a Limited Remedy, Available When There Are Severe and Immediate Restraints on Individual Liberty

Habeas is a historic remedy, adopted by the American legal system from English common law.[144] Today, it is often used to obtain federal court review of state court criminal convictions.[145] The basic statutory provision that governs federal habeas jurisdiction is 28 U.S.C. § 2241, which allows a person to petition for habeas when "in custody in violation of the Constitution or laws or treaties of the United States."[146] The statute does not define "custody,"[147] but the U.S. Supreme Court analyzes common law and historical uses of habeas in the United States and England to determine when the writ can be used to challenge a restraint on liberty.[148]

Habeas is an "extraordinary remedy" available only in instances of "special urgency" to challenge "severe restraints on individual liberty."[149] Individuals must use "more conventional remedies" where liberty restraints are "neither severe nor immediate."[150] Despite this limited scope, the U.S. Supreme Court has explained that the writ is not

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143. *See infra* Part IV.B.

144. *See* U.S. CONST. art. I, § 9, cl. 2. The U.S. Constitution explicitly protects the right of habeas corpus in the Suspension Clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1153–54 (6th ed. 2009) (explaining that habeas was traditionally used to challenge non-judicial executive detentions).

145. FALLON, *supra* note 144, at 1154.

146. 28 U.S.C. § 2241(c)(3) (2006). Section 2254 of the U.S. Code governs federal review of state court convictions, while 28 U.S.C. § 2255 governs habeas petitions from prisoners in federal custody. 28 U.S.C. §§ 2254(a), 2255 (2006).

147. *See Jones*, 371 U.S. at 238 ("[T]he statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used.").

148. *Id.*

149. Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973).

150. *Id.* An example of a "more conventional remedy" is a civil rights action brought under 42 U.S.C. § 1983. For instance, the U.S. Supreme Court recently held that § 1983, not habeas, was the proper method for prisoners to seek access to DNA evidence for additional testing. *See* Skinner v. Switzer, 562 U.S.__, 131 S. Ct. 1289, 1298 (2011). The Court explained that a proper habeas action must "necessarily imply" the invalidity of a conviction. *Id.* at 1298 (citing Heck v. Humphrey, 512 U.S. 477, 487 (1994)). Access to DNA evidence does not necessarily imply invalidity of a conviction, because it may be inconclusive or incriminating. *Id.* at 1298–99.

a "static, narrow, formalistic remedy."[151] Rather, "custody" encompasses more than just physical incarceration.[152] Indeed, as early as 1722, English courts allowed individuals to use habeas to challenge restraints beyond just physical imprisonment.[153]

The U.S. Supreme Court's most generous construction of habeas jurisdiction comes from *Jones v. Cunningham*[154] and *Hensley v. Municipal Court*.[155] In *Jones*, the Court held that parole imposed sufficient restraints on liberty to warrant habeas jurisdiction, despite the fact that the petitioner was released from physical custody.[156] In that case, Virginia released a prisoner into the "custody and control" of the state parole board.[157] Conditions of his parole required him to live with his aunt and uncle, make monthly reports to his parole officer, and get permission to leave the community, change his job or home, or drive a car.[158] One misstep and his parole would be revoked, resulting in incarceration.[159] Given all these parole conditions and the constant threat of imminent jail time, the Court found that the parolee was subject to substantially more restraints on his liberty than the public at large.[160] Therefore, the *Jones* Court found parole to be a severe enough restraint on liberty for the petitioner to be considered in "custody" for the

151. *Jones*, 371 U.S. at 243.

152. *See, e.g.*, *Hensley*, 411 U.S. at 346–47 (petitioner in "custody" where he was released on his own recognizance pending appeal, but was required to appear for court); Strait v. Laird, 406 U.S. 341, 342 (1972) (petitioner in "custody" where he was called by the military for active duty); *Jones*, 371 U.S. at 243 (ex-convict petitioner in "custody" where he was released on parole with significant restraints on his movement).

153. *Jones*, 371 U.S. at 238–39 (citing Rex v. Clarkson, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722)) (woman required to stay away from her husband against her will properly used habeas corpus to challenge the action). For a detailed discussion of the Court's interpretation of the custody requirement, see Ira P. Robbins & Susan M. Newell, *The Continuing Diminishing Availability of Federal Habeas Review to Challenge State Court Judgments*: Lehman v. Lycoming County Children's Services Agency, 33 AM. U. L. REV. 271, 275–81 (1984).

154. 371 U.S. 236.

155. 411 U.S. 345; *see also* Justices of Bos. Mun. Ct. v. Lydon, 466 U.S. 294, 301 (1984) (finding habeas jurisdiction where petitioner's conviction was vacated but he was awaiting a trial de novo, could be criminally liable for failing to appear, and was not permitted to leave the state of Massachusetts).

156. *Jones*, 371 U.S. at 243.

157. *Id.* at 237.

158. *Id.* at 237, 242.

159. *Id.* at 242 ("Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison . . . .").

160. *See id.* at 242–43.

purposes of habeas jurisdiction.[161]

Relying on *Jones*,[162] the Court in *Hensley* expanded "custody" to include release on one's personal recognizance pending appeal of a criminal conviction.[163] The *Hensley* Court conceded that a parolee's liberty and movements are more restricted than an individual released on his own recognizance or on bail.[164] However, the individual in *Hensley* would be immediately arrested if he failed to appear in court as required by the terms of his release.[165] The state court could revoke his bail at any time,[166] and unless he prevailed on appeal, the petitioner in *Hensley* would be sent to jail.[167] These obligations and restrictions meant the petitioner's "freedom of movement rest[ed] in the hands of state judicial officers."[168] Because he was subject to much more significant restraints than the law imposes on the general public, the petitioner was in "custody" for the purposes of habeas jurisdiction.[169] Under *Jones* and *Hensley*, restraint is relative: courts must compare restrictions on the petitioner's liberty with restrictions imposed on the public generally to determine whether the petitioner is in "custody" for habeas purposes.[170]

B. Lower Federal Courts Interpret "Detention" in ICRA's § 1303 Coterminously with "Custody" in Other Federal Habeas Statutes

ICRA's habeas provision, 25 U.S.C. § 1303, makes federal habeas jurisdiction available to an individual "to test the legality of his *detention*

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161. *Id.* at 243.

162. Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973) (citing *Jones*, 371 U.S. at 240).

163. *Id.* at 351–52.

164. *Id.* at 348.

165. *Id.* at 351.

166. *Id.* at 348 (citing CAL. PENAL CODE § 1318.4(c)).

167. *Id.* at 351–52.

168. *Id.* at 351.

169. *Id.* Concurring and dissenting Justices found the majority's interpretation of "custody" to be far too tenuous. *See, e.g.*, *id.* at 354 (Blackmun, J., concurring in the result) ("[T]he Court has wandered a long way down the road in expanding traditional notions of habeas corpus . . . the Court seems now to equate custody with almost any restraint, however tenuous. One wonders where the end is."); *id.* (Rehnquist, J., dissenting) ("If there is any vestige left of the obvious and the original meaning of 'custody' the court below was right and the majority opinion of this Court today has further stretched both the letter and the rationale of the statute . . . . Petitioner was under no greater restriction than one who had been subpoenaed to testify in court as a witness.").

170. *See id*. at 351 (majority opinion); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (comparing parolee's restraints to those of the general public); *see also* Robbins & Newell, *supra* note 153, at 279–80 (explaining that the Court looks to whether there are "restraints on liberty in excess of those imposed by the state on others").

by order of an Indian tribe" in federal court.[171] Neither Congress nor the U.S. Supreme Court has defined "detention," but all federal circuit courts considering the issue interpret "detention" coterminously with "custody" in other federal habeas provisions.[172] In *Poodry v. Tonawanda Band of Seneca Indians*, the petitioners argued that "detention" should be interpreted more broadly because of the different terminology and ICRA's purpose of protecting individual tribal members.[173] Unpersuaded, the Second Circuit concluded that ICRA's habeas provision should be interpreted coterminously with other federal habeas provisions.[174] The court found that because other federal habeas statutes appear to use the terms "custody" and "detention" interchangeably,[175] there was no convincing evidence that Congress intended "detention" to have a different or broader meaning for ICRA habeas cases.[176] Following *Poodry*'s reasoning, the Ninth Circuit in *Moore v. Nelson*[177] likewise interpreted "detention" in ICRA coterminously with "custody" in other federal habeas statutes.[178] The Ninth Circuit found that ICRA's habeas provision may only be used to challenge *severe* restraints on liberty, such as parole or bail, as opposed to a monetary fine only.[179]

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171. 25 U.S.C. § 1303 (2006) (emphasis added).

172. *See, e.g.*, Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001) (citing Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 889–93 (2d Cir. 1996)); Dry v. CFR Ct. of Indian Offenses for the Choctaw Nation, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999) (same); *Poodry*, 85 F.3d at 889–93. These courts compared ICRA's habeas provision with 28 U.S.C. § 2241 (2006) (federal habeas jurisdiction over state court convictions), 28 U.S.C. § 2254 (2006) (federal habeas review of state court convictions), and 28 U.S.C. § 2255 (2006) (federal habeas review of federal court convictions).

173. 85 F.3d at 890.

174. *Id.* at 890–91.

175. *Id.* at 891 (citing 28 U.S.C. §§ 2242, 2243, 2244(a), 2245, 2249, 2253, 2255 (2006)).

176. *See id.*

177. 270 F.3d 789.

178. *Id.* at 792. In *Moore*, the court was asked to determine whether a fine of over $18,000 alone satisfied "detention" within the meaning of § 1303. *Id.* at 790. Concluding that the scope of "detention" was coterminous with "custody," the Ninth Circuit relied on *Hensley* and determined that a fine alone was not a severe enough restraint on liberty to come within U.S. Supreme Court habeas jurisprudence. *Id.* at 791 ("Bail status clearly restricts liberty in a way that a purely monetary fine does not." (citing Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973)). A prior set of Ninth Circuit cases found a tribal court fine to be sufficient for the "custody" requirement under 28 U.S.C. § 2241. *Id.* (citing Settler v. Yakima Tribal Ct. (*Settler I*), 419 F.2d 486 (9th Cir. 1969); Settler v. Lameer (*Settler II*), 419 F.2d 1311 (9th Cir. 1969)). However, the Ninth Circuit determined that because this pair of cases was decided prior to *Martinez* and *Hensley*, they could not "survive" these subsequent controlling decisions. *Id.* at 791–92.

179. *See Moore*, 270 F.3d at 792 (quoting *Hensley*, 411 U.S. at 351); *accord* Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010) (affirming *Moore*), *cert. denied*, 130 S. Ct. 3327.

V. SINCE *MARTINEZ*, FEDERAL COURTS GENERALLY ASSERT HABEAS JURISDICTION TO REVIEW TRIBAL BANISHMENT, BUT NOT DISENROLLMENT

Among *Martinez*'s unanswered questions is whether ICRA's habeas provision is broad enough to give federal courts jurisdiction to review tribal banishment and disenrollment actions. Only two circuit courts have considered this issue. In 1996, the Second Circuit found banishment to be a severe restraint on liberty warranting habeas jurisdiction.[180] Two years later, however, the Second Circuit limited that holding by ruling that *disenrollment* does not constitute a sufficiently severe restraint on liberty to justify habeas jurisdiction.[181] With a dearth of controlling cases, most federal courts follow the Second Circuit's reasoning.[182] The Ninth Circuit followed suit in 2010 when it declined to exercise habeas jurisdiction over a tribal disenrollment action.[183]

A. The Second Circuit Exercises Habeas Jurisdiction over Banishment, but Not Disenrollment, Actions Where It Finds a Severe Actual or Potential Restraint on Liberty

In its 1996 decision, *Poodry v. Tonawanda Band of Seneca Indians*, the Second Circuit became the first federal court of appeals to permit tribal members to challenge the legality of their tribal banishment in federal court under ICRA's habeas provision.[184] Five members of the federally recognized Tonawanda Band of Seneca Indians were summarily found guilty of treason and sentenced to permanent banishment for alleging that tribal council members misused funds, suspended elections, and committed other acts of fraud.[185] The tribe ordered the individuals to "leave now and never return," stripping them of their lands, tribal citizenship, Indian names, and all rights guaranteed to members of the tribe.[186] The tribe attempted but failed to drive the banished individuals off the reservation.[187] After this attempt, the

180. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 901 (2d Cir. 1996).

181. Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 714 (2d Cir. 1998).

182. *See, e.g.*, Sweet v. Hinzman (*Sweet I*), 634 F. Supp. 2d 1196, 1198–200 (W.D. Wash. 2008); Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 964–67 (E.D. Cal. 2004); *cf.* Alire v. Jackson, 65 F. Supp. 1124, 1129 (D. Or. 1999).

183. *Jeffredo*, 599 F.3d at 921.

184. *See Poodry*, 85 F.3d at 879.

185. *Id.* at 876–78.

186. *Id.* at 876.

187. *Id.* at 878.

petitioners were allegedly harassed, assaulted, and deprived of electricity at their homes and businesses.[188]

The five banished tribal members sought habeas relief in federal district court, alleging violations of substantive provisions of ICRA.[189] The district court dismissed their suit for lack of subject matter jurisdiction, finding banishment to be insufficient for § 1303 habeas jurisdiction.[190] The Second Circuit reversed on appeal, holding that banishment is a sufficient restraint on liberty to constitute "detention" within the meaning of § 1303, thereby warranting the exercise of habeas jurisdiction.[191]

The challenged banishment in *Poodry* presented a novel question of federal Indian law.[192] Citing *Jones*, the *Poodry* court concluded that banishment was a "severe actual or potential restraint on liberty" and was therefore sufficient for habeas jurisdiction.[193] The Second Circuit found that revocation of lifelong citizenship, threats, deprivation of electrical service, and unsuccessful attempts to remove tribal members from the reservation[194] constituted severe restraints on liberty.[195] The *Poodry* court even went so far as to say that banishment orders alone, "even absent attempts to enforce them," would be sufficient for habeas jurisdiction.[196] Thus, the Second Circuit created a categorical rule that banishment, when used as a criminal sanction, is sufficient for habeas

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188. *Id.*

189. *Id.* at 879 (including, among others, the right to trial, right to counsel, and right to be free from "deprivations of liberty and property without due process of law").

190. *Id.*

191. *Id.* at 901.

192. *Id.* at 879.

193. *Id.* at 880; *see also* discussion *supra* Part IV.A. (discussing the *Jones* and *Hensley* Courts' interpretation of "custody"). The *Poodry* court also pointed to other circuit courts' expansive interpretations of habeas. *Poodry*, 85 F.3d at 894 (comparing Edmunds v. Won Bae Chang, 509 F.2d 39, 41–42 (9th Cir. 1975) (modest fine not enough for "custody"), and Harts v. Indiana, 732 F.2d 95, 96 (7th Cir. 1984) (one-year suspension of driver's license not enough for "custody"), with Dow v. Cir. Ct., 995 F.2d 922, 923 (9th Cir. 1993) (fourteen hours of alcohol rehab program enough for "custody," because it required petitioner's physical presence at a particular place, like *Jones* and *Hensley*)).

194. Although the banished tribal members still lived on the reservation, the banishment orders allowed the tribe to expel them at any time. *Poodry*, 85 F.3d at 895.

195. *Id.* ("We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement for habeas relief—but with the coerced and peremptory deprivations of the petitioners' membership in the tribe and their social and cultural affiliation."). The *Poodry* court also emphasized that petitioners would have no remedy without federal court intervention, *id.* at 885, even though the U.S. Supreme Court in *Jones* and *Hensley* did not consider lack of remedy as a factor in the jurisdictional analysis.

196. *Id.* at 895.

jurisdiction under ICRA.[197]

Two years after its *Poodry* decision, the Second Circuit in *Shenandoah v. U.S. Department of the Interior*[198] considered whether tribal members may challenge their disenrollment under ICRA's habeas provision. Disenrolled tribal members of the Oneida Nation alleged various restraints on their liberty, including loss of tribal membership and employment, lost tribal benefits like health insurance and access to tribal facilities, loss of their tribal "voice," and alleged harassment due to their opposition to the tribe's attempt to build a hotel and casino.[199] Failing to find a sufficiently severe restraint on liberty, the district court dismissed the habeas petition for lack of jurisdiction.[200]

Affirming the district court's dismissal,[201] the Second Circuit declined to exercise habeas jurisdiction in *Shenandoah*, finding that tribal disenrollment was not a severe restraint on liberty as defined by *Poodry*.[202] The *Shenandoah* court recognized that habeas could be used to challenge more than just physical custody,[203] but distinguished the *Shenandoah* facts from *Poodry*.[204] In *Poodry*, the tribe convicted the petitioners of treason, permanently banished them, and stripped them of their citizenship, lands, Indian names, and all benefits of tribal membership[205]—which the Second Circuit found to be significantly more severe than the punishment in *Shenandoah*.[206] The Second Circuit drew the line at *Shenandoah*, finding that banishment, but not disenrollment, warrants the exercise of habeas jurisdiction.[207]

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197. *See id.* The *Poodry* court found banishment sufficient for habeas jurisdiction, even absent attempts to enforce it, because the tribe used it as punishment for alleged crimes. *Id.* While the *Poodry* court did not call this holding a categorical rule, federal courts since *Poodry* generally treat it as such. *See* discussion *infra* Part V.C.

198. 159 F.3d 708 (2d Cir. 1998).

199. *Id.* at 711, 714.

200. *Id.* at 710.

201. *Id.* at 714.

202. *Id.* at 710, 714.

203. *Id.* at 714 (citing Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 893–94, 897 (2d Cir. 1996)).

204. *See id.* (explaining that the plaintiffs in *Shenandoah* had not "alleged that they were banished from the Nation, deprived of tribal membership, convicted of any crime, or that defendants attempted in anyway [sic] to remove them from Oneida territory").

205. *Id.* (quoting *Poodry*, 85 F.3d at 876, 878).

206. *Id.*

207. *See id.* For a discussion about whether this is a valid distinction, see *infra* Part VI.D.

B. The Ninth Circuit Adopted the Second Circuit's Reasoning and Declined to Exercise Habeas Jurisdiction over a Tribal Disenrollment Action

No other federal circuit court of appeals considered this issue again until 2010, when the Ninth Circuit in *Jeffredo v. Macarro*[208] declined to exercise habeas jurisdiction over a tribal disenrollment action.[209] The Ninth Circuit found that the district court properly dismissed the disenrolled tribal members' petition for habeas because they were not "detained" within the meaning of § 1303.[210]

In *Jeffredo*, enrollment committee members of the federally recognized Pechanga Band of the Luiseño Mission Indians received tips that some tribal members were not original Pechanga descendants.[211] After investigating these tips, the enrollment committee determined that petitioners did not meet the original lineal descent requirement for tribal membership.[212] The tribe provided hearings and subsequently disenrolled the petitioners.[213] Disenrollment meant that petitioners lost their tribal citizenship and were denied access to the tribe's senior citizens' center, health care clinic, and school.[214]

The Ninth Circuit relied extensively on the Second Circuit's reasoning and adopted the rule of *Poodry* and *Shenandoah* that § 1303 requires "a severe actual or potential restraint on liberty" to support federal habeas jurisdiction.[215] The Ninth Circuit found the facts of *Jeffredo* most similar to those in *Shenandoah*.[216] Like in *Shenandoah*, the petitioners in *Jeffredo* were not banished, nor were they evicted from their land, fined, detained, or arrested.[217] Neither "the potential threat of

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208. 599 F.3d 913 (9th Cir. 2010), *cert. denied*, 130 S. Ct. 3327.

209. *Id.* at 921.

210. *See id.* The court also found that petitioners failed to exhaust all tribal remedies available, a prerequisite for ICRA habeas jurisdiction in the Ninth Circuit. *Id.* Exhaustion of tribal remedies is beyond the scope of this Comment.

211. *Id.* at 915–16.

212. *Id.* at 916–17.

213. *Id.* at 917. The tribe required a detailed process for disenrollment, including adequate notice to the affected member and a meeting where the enrollment committee must show its reason for disenrollment. *Id.* at 916. An appeal can follow, but the tribal member is not entitled to legal representation. *Id.*

214. *Id.* at 918–19.

215. *Id.* at 919 (quoting Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996)).

216. *See id.*

217. *Id.*

future eviction"[218] nor denial of access to certain tribal facilities were severe enough restraints on liberty for habeas jurisdiction, based on *Poodry* and *Shenandoah*.[219] Lastly, the Ninth Circuit found that even though loss of tribal citizenship seemed categorically unjust,[220] a tribe's right to determine its own membership is paramount.[221] Guided by its lack of jurisdiction over tribal membership decisions and long-standing principles of tribal sovereignty, the Ninth Circuit stayed its hand and denied the petition for habeas,[222] even though "fairness may seem to dictate otherwise."[223]

The majority's refusal to accept loss of citizenship as a severe restraint on liberty drew a sharp dissent.[224] Because tribes have the power to exclude nonmembers from tribal lands,[225] Judge Wilken in dissent found disenrollment to be the functional equivalent of banishment even where the threat of exile is not actualized.[226] In Judge Wilken's view, the combined effect of stripped tribal citizenship, denial of access to tribal facilities, and potential exclusion from tribal lands is a sufficiently severe restraint on liberty to justify habeas jurisdiction.[227]

C. *Following* Poodry *and* Shenandoah*, District Courts Generally Exercise Habeas Jurisdiction over Challenges to Banishment, but Not Disenrollment*

Since the pair of Second Circuit decisions, lower courts reviewing challenges to tribal banishment generally adopt the reasoning of *Poodry*.[228] In *Quair v. Sisco* (*Quair I*),[229] two female tribal members

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218. *Id.* at 920. In the Ninth Circuit, potential jail time for failure to pay a court-imposed fine does not justify habeas jurisdiction "until confinement is imminent." *Id.* at 919–20 (citing Edmunds v. Won Bae Chang, 509 F.2d 39, 41 (9th Cir. 1975)).

219. *Id.* at 919. The Ninth Circuit explained succinctly, "[t]his is not *Poodry*." *Id.* In contrast to *Jeffredo*, petitioners in *Poodry* "were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members." *Id.*

220. *See id.* at 921 ("[This] case is deeply troubling on the level of fundamental substantive justice." (quoting Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005)).

221. *See id.* at 920 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 n.32 (1978)); *id.* at 921 ("[W]e do not have jurisdiction to review membership decisions.").

222. *See id.* at 920–21.

223. *Id.* at 921 (quoting *Lewis*, 424 F.3d at 963).

224. *Id.* at 921–25 (Wilken, J., dissenting).

225. *See supra* notes 51–54 and accompanying text.

226. *See Jeffredo*, 599 F.3d at 923 (Wilken, J., dissenting).

227. *Id.* at 925.

228. *See, e.g.*, Sweet v. Hinzman (*Sweet I*), 634 F. Supp. 2d 1196, 1199 (W.D. Wash. 2008) ("The court adopts the reasoning and holding in the *Poodry* decision."); Quair v. Sisco (*Quair I*),

were disenrolled and physically banished from the Santa Rosa Rancheria Tachi Tribe for alleged misuse of tribal funds, defamation, and undermining the tribal government, among other things.[230] Adopting the *Poodry* court's expansive interpretation of ICRA's habeas provision, the *Quair I* court found a sufficient restraint on liberty to warrant habeas jurisdiction.[231]

After the *Quair I* decision, the Rancheria Tribe held a review hearing to reconsider the two tribal members' disenrollment and banishment.[232] After the tribe affirmed both actions, the women again filed a habeas petition in federal district court.[233] In *Quair II*, the court determined that habeas jurisdiction was proper for both disenrollment and banishment actions, provided they restrict the petitioner's freedom of movement.[234] Applying this principle, the *Quair II* court denied habeas jurisdiction over the disenrollment because it did not limit petitioners' physical movement under the facts of the case.[235] The court also dismissed the banishment claim on grounds that the tribe's rehearing partially mooted the case and because petitioners failed to show that their interests in procedural safeguards outweighed any countervailing tribal interests.[236]

Likewise, in *Sweet v. Hinzman*,[237] a federal district court found a sufficient restraint on liberty to exercise habeas jurisdiction when the Snoqualmie Tribe banished nine members for their alleged treason in

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359 F. Supp. 2d 948, 964 (E.D. Cal. 2004) ("There is no question that the most authoritative discussion of this issue is that in *Poodry v. Tonawanda Band of Seneca Indians*." (citation omitted)). *But cf.* Alire v. Jackson, 65 F. Supp. 2d 1124, 1129 (D. Or. 1999) (finding exclusion not to be a severe restraint on liberty where an individual belonging to another tribe was excluded from the reservation, but was neither denied any of her own tribe's benefits nor stripped of her tribal citizenship).

229. 359 F. Supp. 2d 948.

230. *Id.* at 962. Like *Poodry* and *Shenandoah*, *Quair I* has received substantial scholarly attention. *See, e.g.*, Kunesh, *supra* note 17, at 128–35; Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 VA. L. REV. 793, 808–16 (2006).

231. 359 F. Supp. 2d at 971.

232. Quair v. Sisco (*Quair II*), No. 1:02-CV-5891, 2007 WL 1490571, at *1–2 (E.D. Cal. May 21, 2007).

233. *Id.* at *2.

234. *Id.* at *3.

235. *Id.* at *4.

236. *Id.*

237. Sweet v. Hinzman (*Sweet I*), 634 F. Supp. 2d 1196 (W.D. Wash. 2008) (denying a motion to dismiss); *see also* Sweet v. Hinzman (*Sweet II*), No. C08-844JLR, 2009 WL 1175647 (W.D. Wash. Apr. 30, 2009) (granting habeas petition on denial of due process grounds); Mapes, *supra* note 23 (newspaper article discussing the Snoqualmie Tribe banishment controversy).

attempting to create an opposition government.[238] The petitioners asserted that they would lose their tribal identity, tribal lands, and access to services like health care and tribal employment.[239] Though the court acknowledged the importance of tribal self-determination,[240] it concluded that banishment impinged on the petitioners' "liberty interests" and found habeas jurisdiction to hear their case.[241]

As demonstrated in these cases, tribal courts sometimes use banishment as a punishment for treason, dissident political views, and other purported crimes against the tribe.[242] In response, some federal courts extend ICRA habeas jurisdiction to the claims of aggrieved tribal members banished from their tribes.[243] But federal courts simultaneously refuse to expand habeas jurisdiction where the tribe only *disenrolls* a tribal member, even when disenrollment means loss of tribal citizenship, access to tribal facilities, and eventual exclusion from tribal lands—similar to banishment.[244]

VI. FEDERAL COURTS SHOULD REFRAIN FROM EXERCISING HABEAS JURISDICTION OVER TRIBAL BANISHMENT ACTIONS

Loss of tribal citizenship and banishment from tribal lands can be devastating for tribal members. The U.S. Supreme Court recognizes that being stripped of citizenship is a tremendous loss and can be "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[245] Though

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238. *Sweet I*, F. Supp. 2d at 1198–99; *see also Sweet II*, 2009 WL 1175647, at *6.

239. *Sweet I*, F. Supp. 2d at 1198.

240. *See Sweet II*, 2009 WL 1175647, at *7 ("[T]he court is wary of wading into these waters because discretion should be left to the Tribal Council to determine, under the laws and customs of the Tribe, who it wishes to place before the general membership for banishment.").

241. *Id.* at *8. The court set aside the full banishment and placed a ninety-day time limit on petitioners' social banishment, at which time the tribe could seek full banishment with procedural protections for the petitioners. *Id.* at *10.

242. *See, e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 876–78 (2d Cir. 1996); *Sweet I*, F. Supp. 2d at 1198–99; Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 962 (E.D. Cal. 2004); sources cited *supra* note 20 (news stories discussing recent tribal banishments).

243. *See* cases cited *supra* note 242.

244. *See, e.g.*, Jeffredo v. Macarro, 599 F.3d 913, 920–21 (9th Cir. 2010), *cert. denied*, 130 S. Ct. 3327; Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 714 (2d Cir. 1998).

245. Trop v. Dulles, 356 U.S. 86, 101 (1958). However, the Court's cases addressing loss of citizenship cited by courts and parties in banishment cases, like *Trop* and *Klapprott v. United States*, 335 U.S. 601 (1949), are not directly on point. The U.S. Supreme Court finds loss of *United States* citizenship to be a particularly extreme punishment because it leaves an individual stateless. *See Trop*, 356 U.S. at 101–02 ("The punishment strips the citizen of his status in the national and

tribal banishment is inarguably severe, broadly interpreting habeas jurisdiction to encompass tribal banishment is problematic for a number of reasons. First, it contravenes Indian law canons of construction, which direct courts to interpret statutes in favor of tribes. Tribal banishment is not a form of custody or detention, even under the Court's broadest interpretation of custody in *Jones* and *Hensley*. Second, broad federal habeas jurisdiction interferes with tribes' sovereign right to determine their own tribal membership. Lastly, the distinction courts draw between disenrollment and banishment is arbitrary. Banishment, like disenrollment, is a membership decision over which tribes have sovereign authority. Federal courts should follow the reasoning of their disenrollment cases and refrain from exercising habeas jurisdiction over tribal banishment actions. Refusing to exercise jurisdiction in such actions properly protects tribal sovereignty and promotes respect for tribal court systems.

A. Asserting Habeas Jurisdiction over Tribal Banishment Actions Impermissibly Broadens U.S. Supreme Court Habeas Jurisprudence and Contravenes Indian Law Canons of Construction

Interpreting ICRA's habeas provision to encompass jurisdiction over banishment actions contravenes Indian law canons of construction intended to preserve tribal sovereignty.[246] These canons direct courts to (1) resolve any statutory ambiguities in favor of the tribe,[247] (2) interpret statutes liberally in favor of the tribe,[248] and (3) uphold tribal sovereignty unless congressional intent to abrogate it is clear and unambiguous.[249] By interpreting habeas jurisdiction broadly, federal courts contravene all three of these canons.

Congress did not define the scope of ICRA's habeas provision.[250] Nor

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international political community."); *id*. at 102 ("The civilized nations of the world are in virtual unanimity that *statelessness* is not to be imposed as punishment for crime." (emphasis added)). Though loss of tribal citizenship can be a significant hardship, it does not leave the individual stateless. Native Americans are both tribal citizens and U.S. citizens. *See* Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (2006) (granting citizenship to all Indians and Alaskan Natives born in the United States). Though these U.S. Supreme Court cases are useful for considering the effects of loss of citizenship, they are not on point.

246. *See generally* discussion *supra* Part I.B. (discussing Indian law canons of construction).

247. Choate v. Trapp, 224 U.S. 665, 675 (1912).

248. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

249. *See* United States v. Dion, 476 U.S. 734, 739–40 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978).

250. *See* 25 U.S.C. § 1303 (2006); *see also supra* Part IV.B.

has the U.S. Supreme Court, except to say that it is the only federal remedy available for ICRA violations.[251] Given this statutory ambiguity, courts should construe the statute liberally in favor of the tribe, which means interpreting habeas narrowly.[252] Lower federal courts have properly concluded that the term "detention" in ICRA's habeas provision has an identical meaning to "custody" in other federal habeas statutes.[253] Indeed, Indian law canons of construction dictate that "detention" be interpreted coterminously with "custody," because interpreting "detention" to be broader than "custody" cuts against tribal sovereignty.[254] Thus, federal courts must apply U.S. Supreme Court interpretations of "custody" and the attendant scope of habeas jurisdiction to ICRA habeas petitions.

The Court's most generous construction of "custody" comes from *Jones* and *Hensley*.[255] Under the test developed in those cases, courts must look to whether there are "severe restraints on individual liberty."[256] Though an individual need not be physically incarcerated to be in "custody" for habeas jurisdiction, the restraints on liberty must be both severe and immediate.[257] For instance, parole constitutes "custody" because it involves actual restraints on movement plus the real threat of incarceration in the event of any parole violations, as in *Jones*.[258] The same is true where petitioners are released on their own recognizance pending appeal of a criminal conviction, as in *Hensley*.[259] As with parole, release on one's own recognizance means that an individual's freedom "rests in the hands of state judicial officers"[260] and jail time may be imminent.[261] Thus, under the Court's broadest interpretation,

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251. *Martinez*, 436 U.S. at 69–70.

252. *See* cases cited *supra* notes 247–249.

253. *See supra* Part IV.B. (discussing how lower federal courts have compared ICRA's habeas provision to other federal habeas statutes).

254. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (recognizing that courts must construe statutes liberally *in favor* of the tribes).

255. *See supra* text accompanying notes 154–170 (discussing *Jones* and *Hensley*).

256. Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973); *accord* Jones v. Cunningham, 371 U.S. 236, 242 (1963) (describing "significant restraints" on parolee's liberty).

257. *Hensley*, 411 U.S. at 351; *accord id.* at 346–47 (holding that an individual released on his own recognizance was subjected to sufficient immediate restraints on liberty for habeas jurisdiction); *Jones*, 371 U.S. at 242 (holding that parole imposed sufficient immediate restraints for habeas jurisdiction).

258. *Jones*, 371 U.S. at 242.

259. *Hensley*, 411 U.S. at 346–47.

260. *Id.* at 351.

261. *Id.* at 348.

"custody" requires (1) actual restraints on freedom of movement and (2) the real, as opposed to speculative, possibility of incarceration as a consequence of any misstep.[262]

Neither banishment nor disenrollment constitutes custody within the Court's broadest habeas jurisprudence. Banishment does not entail imminent incarceration like the parole or release on one's own recognizance situations at issue in *Jones* and *Hensley*.[263] Once tribal members are banished, they are free to go anywhere they please except tribal lands. While banishment is a more significant restraint than those experienced by other tribal members, it is no greater than restraints on other nonmembers,[264] who may be excluded from tribal lands. More significantly, banishment is unlike parole, where the parolee is subject to continuing restrictions and any violation means jail time. Banishment is similarly unlike being released on bail, because banishment imposes no affirmative obligation to appear at a given time at the tribe's behest or else be returned to jail. Essentially, banishment does not impose any real—or even speculative—possibility of incarceration. Therefore, finding habeas jurisdiction for tribal banishment goes beyond *Jones* and *Hensley*'s holdings. Binding U.S. Supreme Court precedent and deference to tribal sovereignty require that courts decline habeas jurisdiction over banishment actions. Narrow habeas jurisdiction best protects tribal sovereignty and the integrity of tribal court systems.[265]

Lastly, congressional intent to abrogate tribal sovereignty is not clear

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262. *See, e.g.*, *id.* ("His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control.").

263. Furthermore, the Second Circuit in *Poodry* took the U.S. Supreme Court's "severe restraint on individual liberty" language and added *potential* restraints on liberty, impermissibly expanding habeas jurisdiction. *See* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880, 895 (2d Cir. 1996) (holding that habeas jurisdiction is proper where there is a "severe actual or *potential* restraint on liberty" (emphasis added)); *see also* Kunesh, *supra* note 17, at 123 (arguing that the court's holding in *Poodry* "extends far beyond federal habeas corpus jurisprudence," particularly because "it reaches to potential and threatened restraints on an individual's liberty rather than limiting it to actual restraints under the U.S. Supreme Court's detention analysis"). Neither threatened nor actual banishment fit within the scope of ICRA's habeas jurisdiction. Finding a future potential restraint sufficient for habeas jurisdiction further contravenes the requirement that a restraint be *immediate*. *Hensley*, 411 U.S. at 351. The *Poodry* court's unprecedented extension of *Jones* and *Hensley* raises the question when a potential restraint will be immediate or severe enough to permit habeas jurisdiction.

264. *See supra* note 170 and accompanying text (explaining that restraints on the petitioner must be compared to restraints on society at large). Only when a habeas petitioner is subject to much more severe restraints on liberty than society at large should courts exercise habeas jurisdiction. *See supra* note 170.

265. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

and unambiguous. Although ICRA's habeas provision partially abrogates tribal sovereignty,[266] it is a very limited abrogation because individuals may only challenge their tribal detention or custody within the U.S. Supreme Court's broadest construction of the term. On the other hand, ICRA's legislative history demonstrates clear and unambiguous congressional intent to provide only one limited remedy in order to *protect* tribal sovereignty.[267] Courts must not apply the habeas remedy in a manner that frustrates ICRA's fundamental purposes or violates Indian law canons of construction.[268]

B. Expansive Habeas Jurisdiction Disturbs the Careful Balance Struck by Congress and the U.S. Supreme Court Between Individual Rights and Tribal Sovereignty and Violates Tribes' Right to Determine Their Own Membership

In addition to violating Indian law canons of construction, broadly interpreting ICRA's habeas provision disturbs the careful balance struck by Congress and the U.S. Supreme Court between protecting individual tribal members and promoting tribal sovereignty. Federal policy at the time of ICRA's enactment supported tribal self-governance.[269] Against this historical backdrop, Congress considered and rejected several proposals for expansive federal jurisdiction to review tribal court decisions.[270] Instead, Congress deliberately chose the narrow habeas remedy, which limits federal intrusion into tribal affairs.[271]

Furthermore, since enacting ICRA, Congress has consistently

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266. *See supra* note 126 and accompanying text (explaining that ICRA is considered to be a partial abrogation of tribal sovereignty because it imposes affirmative obligations on tribes to protect individual rights). ICRA is not considered to abrogate tribal sovereign immunity, however. Tribes are generally immune from suit in state and federal courts. *See Martinez*, 436 U.S. at 58. However, habeas is not considered to be a suit against the sovereign, but rather a suit against an individual custodian, like a prison warden. *Id.* at 59 (citing 28 U.S.C. § 2243). As a result, traditional principles of tribal sovereign immunity do not come into play in ICRA habeas cases. *See id.* at 59.

267. *See supra* Part II (discussing ICRA's historical context, text, and legislative history). Similarly, other provisions of ICRA serve to protect tribal sovereignty rather than abrogate it. *See supra* note 89.

268. *See supra* Part I.B. (explaining that Indian law canons of construction require deference to tribal sovereignty).

269. *See supra* notes 68–69 and accompanying text (discussing federal policy of tribal self-determination).

270. *See supra* text accompanying notes 94–102 (discussing original ICRA bill's rejection of de novo and Attorney General forms of federal review).

271. *See supra* text accompanying notes 90–102; *see also Martinez*, 436 U.S. at 69–70.

promoted tribal sovereignty[272] and declined to expand federal jurisdiction over ICRA claims.[273] Congress twice amended ICRA to increase maximum tribal imprisonment for violations of tribal law: from six months to one year in 1986,[274] then from one year to three years with up to nine years of stackable sentences in 2010 for repeat offenders.[275] These amendments increase tribal authority to prosecute crimes committed by both member and nonmember Indians.[276] Similarly, Congress treats tribal courts, not federal courts, as the ultimate arbiters of ICRA's substantive provisions.[277] The 1991 congressional report on ICRA's impact emphasized that increased funding and support for tribal courts, not increased federal jurisdiction over tribal actions, was the best way to remedy ICRA violations.[278] Congress affirmed this finding when it passed the Indian Tribal Justice Act in 1993,[279] which aimed to strengthen tribal court systems through additional funding and training.[280] Federal courts should follow this cue and refrain from expanding jurisdiction where Congress has so consistently acted to augment tribal sovereignty.[281]

Furthermore, when federal courts exercise habeas jurisdiction over tribal membership decisions, they contradict one of *Santa Clara Pueblo*

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272. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (recognizing the "firm federal policy of promoting tribal self-sufficiency and economic development").

273. *See supra* notes 103–109 and accompanying text (discussing congressional report advocating for increased tribal court funding, as well as a failed Senate bill that would have abrogated tribal sovereign immunity in federal court for civil violations of ICRA).

274. Pub. L. No. 99-570, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302(7) (1986)).

275. Pub. L. No. 111-211, 124 Stat. 2258, 2279 (codified at 25 U.S.C. §§ 1302(a)(7)(C)–(D), (b) (Supp. IV 2010)). The most recent 2010 amendment allowing for up to nine years of stackable sentences may decrease the need for tribes to impose banishment to solve the problem of repeat offenders. *See id.* (permitting up to three years imprisonment for a tribal member who "has been previously convicted of the same or a comparable offense").

276. *See supra* note 1 (discussing tribal authority to prosecute both member and nonmember Indians).

277. *See* 25 U.S.C. §§ 3601–3621 (2006); *cf.* 1991 ICRA REPORT, *supra* note 103, at 71–72, 74. This Report essentially defers to the U.S. Supreme Court's statement in *Martinez* that tribal courts are to be the ultimate arbiters of ICRA, not federal courts. *See id.*; *see also Martinez*, 436 U.S. at 65–66.

278. *See* 1991 ICRA REPORT, *supra* note 103, at 69–72, 74.

279. Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. § 3601–3621).

280. *See* 25 U.S.C. §§ 3601(2)–(4) (affirming the importance of tribal "self-determination, self-reliance," and "inherent authority to establish their own form of government, including tribal justice systems").

281. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 691 n.13 (1979) (finding ICRA's "legislative history indicative of an intent to limit severely judicial interference in tribal affairs"); *cf. Martinez*, 436 U.S. at 58–59 (emphasizing that congressional intent to abrogate tribal sovereignty must be clear and unequivocal before subjecting tribes to suit).

v. Martinez's core principles.[282] There, the Court stated emphatically that a tribe's membership decisions are "central" to its self-government and "existence as an independent political community."[283] Expanding habeas jurisdiction to encompass banishment actions vitiates a tribe's sovereign right to determine its own membership. Where Congress has not explicitly regulated tribal membership decisions, courts should not presume abrogation of tribes' power to make such determinations.[284]

C. The Line Drawn Between Banishment and Disenrollment Is Arbitrary Because Tribes Have Authority to Exclude Nonmembers from Tribal Lands

Both disenrollment and banishment are forms of tribal membership decisions, because both are essentially determinations of who may participate in tribal life.[285] Banishment involves formally expelling a tribal member from tribal lands.[286] Disenrollment involves stripping an individual of tribal membership.[287] Historically, tribal banishment did not always include loss of tribal citizenship,[288] but modern banishment usually does. Despite the traditional distinction between banishment and disenrollment, today they are often functionally equivalent. Because tribes may exclude nonmember individuals from tribal lands,[289] disenrolled individuals are subject to the exclusionary authority, just like banished tribal members. Receipt of federal tribal membership

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282. *See Martinez*, 436 U.S. at 72 n.32 (finding tribal membership decisions essential for tribal self-government).

283. *Id.*

284. *See id.* ("Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.").

285. *See* Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLINE L. REV. 97, 120 (2007) ("It is not reasonable to conclude that tribes are the gatekeepers of membership, but at the same time do not have the authority to exile those who are not fulfilling their duties as tribal members."); Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, 51 FED. LAW. 37, 39 (2004) ("Banishment is closely tied to tribal membership because the punishment suggests that the banished individual is no longer part of the tribe.").

286. *See, e.g.*, *Poodry*, 85 F.3d at 878; Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 961–62 (E.D. Cal. 2004); sources cited *supra* note 19 (tribal banishment codes); sources cited *supra* note 20 (newspaper articles discussing tribal banishment).

287. *See, e.g.*, Jeffredo v. Macarro, 599 F.3d 913, 916–17 (9th Cir. 2010), *cert. denied*, 130 S. Ct. 3327; Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 714 (2d Cir. 1998); sources cited *supra* note 27 (sources discussing tribal disenrollment).

288. *See supra* notes 17–19 and accompanying text.

289. *See supra* notes 53–54 and accompanying text.

benefits[290] is also dependent upon tribal enrollment, so both banishment and disenrollment can result in similar denial of such benefits.

As a result, the distinction between disenrollment and banishment is not as stark as the Second Circuit asserted in *Shenandoah*.[291] There, the petitioners were stricken from the membership rolls, though not formally banished.[292] In contrast, the *Poodry* petitioners were technically banished from tribal lands, but not actually forced to leave.[293] Petitioners in *all three* circuit court cases—*Poodry*, *Shenandoah*, and *Jeffredo*—lost their tribal citizenship and many benefits of tribal membership, including access to tribal facilities.[294] Furthermore, the petitioners in all three also faced a real threat of physical removal from tribal lands, regardless of whether they were banished or disenrolled.[295] Despite these commonalities, only the threat of physical banishment in *Poodry* was sufficient for habeas jurisdiction,[296] while potential physical exclusion from tribal lands after disenrollment in *Shenandoah* and *Jeffredo* was not.[297] In the end, the semantic distinction between "disenrolled" and "banished" proved dispositive for ICRA habeas jurisdiction.

Even where courts attempt to draw less arbitrary distinctions, the result is the same. In *Quair II*, the district court explained that it would have habeas jurisdiction over disenrollment actions that restricted the

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290. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (2006); Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1601 (2006); Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 (2006).

291. *See Shenandoah*, 159 F.3d at 714.

292. *See id.*

293. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 877–78 (2d Cir. 1996).

294. Jeffredo v. Macarro, 599 F.3d 913, 919–20 (9th Cir. 2010), *cert. denied*, 130 S. Ct. 3327; *Shenandoah*, 159 F.3d at 714; *Poodry*, 85 F.3d at 878.

295. *See supra* notes 53–54 and accompanying text (discussing tribal exclusionary authority over nonmembers). Furthermore, the hardship suffered by banished and disenrolled tribal members may be equally significant. *See Jeffredo*, 599 F.3d at 921–25 (Wilken, J., dissenting) (discussing the hardship of loss of tribal citizenship, whether via disenrollment or banishment).

296. *Poodry*, 85 F.3d at 895.

297. *Jeffredo*, 599 F.3d at 919–20; *Shenandoah*, 159 F.3d at 714. *Compare Jeffredo*, 599 F.3d at 920 (declining habeas jurisdiction when there is only a "*potential* threat of future eviction" (emphasis added)), *with Poodry*, 85 F.3d at 880 (exercising habeas jurisdiction when there is a "severe actual or *potential* restraint on liberty" (emphasis added)). The Ninth Circuit has not reviewed a banishment action like the Second Circuit in *Poodry*. However, the Ninth Circuit adopted *Poodry* and *Shenandoah*'s reasoning in declining habeas jurisdiction over a tribal disenrollment action. *Jeffredo*, 599 F.3d at 919 ("We agree with our colleagues on the Second Circuit and hold that § 1303 does require a 'severe actual or potential restraint on liberty.'" (quoting *Poodry*, 85 F.3d at 880)). Because the Ninth Circuit adopted the Second Circuit's reasoning for a disenrollment case similar to *Shenandoah*, it seems likely that it would follow *Poodry* in a banishment case.

petitioners' physical movements.[298] However, with tribal exclusionary authority, both banishment and disenrollment may involve physical exclusion from tribal lands. On the other hand, both banishment and disenrollment may present no actual, immediate restraints on movement, as demonstrated in *Poodry*.[299] Attempting to distinguish categorically between disenrollment and banishment is also problematic because these actions arise in a wide variety of circumstances,[300] often because of intratribal disputes. Either may be a punishment for political opposition,[301] troublemaking,[302] drug abuse,[303] improper lineal descent,[304] treason,[305] or other perceived violations of tribal unity. Some of these are treated as legitimate (*Jeffredo*) and others illegitimate (*Poodry*) reasons for exclusion from the tribe. However, even perceptibly legitimate reasons for exclusion from a tribe may be the result of tribal corruption.[306] In either case, federal courts should not rush to interfere with these disputes in light of tribes' broad authority to self-govern in addition to congressional and U.S. Supreme Court deference to tribal sovereignty. A tribe's sovereign right to determine its membership dictates that federal courts refuse to review such actions.

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298. *See* Quair v. Sisco (*Quair II*), No. 1:02-CV-5891, 2007 WL 1490571, at *3 (E.D. Cal. May 21, 2007).

299. *See Poodry*, 85 F.3d at 895. Further confusing disenrollment and banishment is the issue of exclusion. In *Alire v. Jackson*, a federal district court declined to find habeas jurisdiction for tribal exclusion, which it labeled as banishment. 65 F. Supp. 2d 1124, 1129 (D. Or. 1999). In that case, a member of the Shoshone-Paiute Tribe was excluded from another tribe's lands for tribal ordinance violations. *Id.* at 1125. The district court distinguished this exclusion from *Poodry* by emphasizing that the petitioner had not been stripped of her tribal citizenship or Indian name, or excluded from her own tribal lands. *Id.* at 1129. The *Alire* court seemingly treated loss of citizenship as a necessary element for habeas jurisdiction over a tribal banishment action. *Id. But see Jeffredo*, 599 F.3d at 920–21 (holding that loss of tribal citizenship is not enough for federal habeas jurisdiction).

300. *See, e.g.*, *Jeffredo*, 599 F.3d at 915–16 (tribal lineal descent); *Shenandoah*, 159 F.3d at 711 (opposition to tribal development); *Poodry*, 85 F.3d at 877–78 (treason).

301. *E.g.*, *Shenandoah*, 159 F.3d at 711; Sweet v. Hinzman, 634 F. Supp. 2d 1196, 1198–99 (W.D. Wash. 2008); Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 962 (E.D. Cal. 2004); *see also* Cooper, *supra* note 27 (presenting a different explanation for the Pechanga Tribe disenrollments in *Jeffredo*: that tribal members who opposed casino expansion deals were subsequently disenrolled for sham reasons, like lack of lineal descent).

302. *E.g.*, Alire v. Jackson, 65 F. Supp. 2d 1124, 1125 (D. Or. 1999); sources cited *supra* note 20 (recent news stories about tribal banishment).

303. *E.g.*, sources cited *supra* note 20.

304. *Jeffredo*, 599 F.3d at 915–16.

305. *Poodry*, 85 F.3d at 876–78.

306. *See* Cooper, *supra* note 27 (discussing recent disenrollments from the Pechanga Tribe—the disenrollments at issue in *Jeffredo*—due to tribal gaming corruption).

CONCLUSION

The struggle for tribal sovereignty has defined the relationship between tribes and the federal government. Though the devastating termination era is fortunately over, the struggle for tribal sovereignty continues. Congress has acted in a number of positive ways to increase recognition of tribal sovereignty and support development of robust tribal governments. Though ICRA imposes affirmative obligations on tribes, Congress nonetheless acted carefully to prevent federal courts from unnecessarily intruding on tribal affairs and governance. Both Congress and the U.S. Supreme Court have since affirmed this balance and accorded special solicitude to tribal sovereignty. Though still underfunded, tribal justice systems need freedom to develop according to tribal traditions and customs without undue interference from federal courts.

Declining federal jurisdiction in these cases may result in isolated incidents where individuals banished from their tribal lands or stripped of their lifelong tribal citizenship are left without a remedy. However, the supremacy of tribal sovereignty sometimes dictates such a result:

> [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.[307]

Federal courts demonstrate respect for tribal systems when they refrain from exercising jurisdiction over banishment cases. Refusing to exercise jurisdiction properly preserves the appropriate balance between ICRA's protection of individual tribal member rights and its deference to sovereign tribal governments.

307. Fisher v. Dist. Ct., 424 U.S. 382, 390–91 (1976).