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Indian Tribes, Civil Rights, and Federal Courts

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INDIAN TRIBES, CIVIL RIGHTS, AND FEDERAL COURTS

Robert D. Probasco[†]

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I. INTRODUCTION

All civil rights¹ are not created equal. A citizen's civil rights include protections against actions by three different governments—federal, state,² and tribal. Although the substantive content of your rights

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1. *Black's Law Dictionary* defines "civil rights" as:

The individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp. the right to vote, the right of due process, and the right of equal protection under the law.

BLACK'S LAW DICTIONARY 240 (7th ed. 1999). Functionally, these are restraints on government, although the term is also often applied to similar restraints on the private sector, whose origin is statutory rather than constitutional. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1994) (prohibiting discrimination by employers based on race, color, religion, sex, or national origin). For purposes of this Article, I include within the definition individual rights guaranteed against government intervention either by the Constitution or by equivalent measures—in this context, the Indian Civil Rights Act. See *infra* notes 52–58 and accompanying text. I exclude restraints against the private sector, such as Title VII.

2. Unless the context indicates otherwise, by "state" I refer to states, their political subdivisions, and municipalities.

against these different sovereigns is essentially identical,³ the forum in which you can seek to vindicate your rights depends upon which sovereign has violated them. If a federal or state government violates your civil rights, you can seek a remedy in federal court, including injunctive or declaratory relief and damages.⁴ In *Santa Clara Pueblo v. Martinez*,⁵ however, the Supreme Court ruled that you cannot challenge a civil rights violation by an Indian tribe in federal court, with the limited exception of habeas corpus relief.⁶

The *Martinez* decision has garnered a significant amount of controversy⁷ and has led to frequent proposals by academics and politicians for Congress to explicitly establish jurisdiction in federal court for a cause of action for civil rights violations by tribes.⁸ To date, no such

3. See *infra* text accompanying note 57 (regarding your rights against tribal governments). The substantive protections against the federal government contained in the Bill of Rights have mostly been incorporated into the Fourteenth Amendment's prohibition against state action.

4. If your civil rights are violated by a federal official, an implied cause of action in federal court will support both injunctive relief, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414–16 (1968), and damages, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971). Comparable relief for violation of civil rights by a state official is statutory and is available under the terms of, among other things, 42 U.S.C. § 1983.

5. 436 U.S. 49 (1978).

6. *Id.* at 72. One commentator referred to *Martinez* as “possibly . . . the most interesting decision ever written regarding civil rights.” Christina D. Ferguson, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 276 (1993). Another commentator went further, calling *Martinez*, which combines issues of civil rights, sovereignty, and jurisdiction of the federal courts, “the single most interesting case in all of Anglo-American jurisprudence.” Robert Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307, 307 (1991) [hereinafter Laurence, *Quincentennial Essay*]. *Martinez* has also been called “the most interesting case ever litigated in English.” *Id.* at 310.

7. See, e.g., Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1 (1993); Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 170 (1991); Ferguson, *supra* note 6, at 276; Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355, 355 (1990); Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988) [hereinafter Laurence, *Overruling Martinez*]; Laurence, *Quincentennial Essay*, *supra* note 6, at 307; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65 (1990); Alvin J. Ziontz, *After Martinez: Indian Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979).

8. See, e.g., *Federal Court Review of Tribal Courts Rulings in Actions Arising Under Indian Civil Rights Act: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 2–4 (1991) [hereinafter *ICRA Hearing*] (statement of Sen. Gorton); *Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights Entitled "Indian Civil Rights Act": Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 49–51 (1991) [hereinafter *Tribal Courts Hearing*] (prepared statement of Sen. Gorton); 144 CONG. REC. S1,155–56 (daily ed. Feb. 27, 1998) (statement of Sen. Gorton) (introducing the American Indian Equal Justice Act, S. 1691); 142 CONG. REC.

action has been taken, and Congress adjourned without acting on the most recent bill;⁹ but there is little likelihood that the issue will go away. This Article reviews the Supreme Court's decision and proposals for congressional enactment of such federal jurisdiction.

In Part II, I provide a brief summary of the background against which proposals for change must be considered. Sections A and B provide an overview of the legal status of Indian tribes and Congress's decision in 1968 to establish protections, similar to the Bill of Rights, against tribal governments. Section C examines *Martinez* and its effect on these civil rights, enacted merely ten years earlier. Since *Martinez*, litigants have searched for ways to bypass that restriction and to bring actions in federal court for civil rights violations by Indian tribes. In Section D, I review these "avoidance" attempts and why they have been unsuccessful.

Part II summarizes what *is*; Parts III and IV consider what *should be*, that is, whether Congress should overturn the result of *Martinez* by creating federal jurisdiction over lawsuits for violations of civil rights by Indian tribes. Part III begins with general considerations concerning whether access to federal court is desirable. These considerations include questions about the relative capabilities of other courts, invasion of the autonomy of subordinate sovereign governments, and the deterrence effect of federal jurisdiction. As will be seen, these factors illuminate the issue but do not clearly resolve it.

In Part IV, I turn to an examination of whether the problem of civil rights violations by Indian tribes is serious. Fundamentally, this concerns the ability and willingness of these subordinate governments to comply with and enforce civil rights. How frequent and severe must civil rights violations become before federal jurisdiction is warranted? I suggest that a relevant comparison is to Congress's decision to grant federal jurisdiction over civil rights violations by *state* governments.

The comparison between civil rights violations by state officials and civil rights violations by tribal officials supports the conclusion that

E1704 (daily ed. Sept. 26, 1996) (statement of Rep. Hyde, criticizing the lack of review in federal courts of violations of the ICRA and proposing review by Congress); 138 CONG. REC. S11,804-05 (daily ed. Aug. 6, 1992) (remarks by Sen. Simpson, introducing, on behalf of Sen. Gorton, a proposed amendment to another bill providing for a study to "address the circumstances under which Federal court review of actions arising under the Indian Civil Rights Act may be appropriate or warranted"); 135 CONG. REC. 3,527-32 (1989) (statement of Sen. Hatch, introducing the Indian Civil Rights Act Amendments of 1989, S. 517); 134 CONG. REC. 21,932-36 (1988) (remarks by Sen. Hatch, introducing the Indian Civil Rights Act Amendments of 1988, S. 2747); Christofferson, *supra* note 7, at 179-85 (proposing, for gender-based violations of civil rights only, access to federal courts and waiver of sovereign immunity); Laurence, *Overruling Martinez*, *supra* note 7, at 427-38 (proposing extension of federal court review for violations of ICRA with important qualifications); Laurence, *Quincentennial Essay*, *supra* note 6, at 339 (proposing overruling *Martinez* with important qualifications).

9. American Indian Equal Justice Act, S. 1691, 105th Cong. (1998).

the answer given by *Martinez* should not be overturned. Based on the available evidence, violations by tribal officials are relatively infrequent. As discussed in Part III, there are serious potential concerns associated with jurisdiction by federal courts over subordinate sovereigns. While the problem of civil rights violations by state governments is serious enough to outweigh these concerns, the problem of civil rights violations by tribal governments is not.

II. BACKGROUND

A. *Indian Tribes and Sovereignty*¹⁰

The sovereignty of Indian tribes is based on a unique relationship with the United States and is limited by specialized doctrines of geographical, personal, and subject matter jurisdiction. In *Cherokee Nation v. Georgia*,¹¹ Chief Justice Marshall stated that “[t]he acts of our government plainly recognize the Cherokee nation as a state,”¹² but characterized tribes as “domestic dependent nations”¹³ whose “relation to the United States resembles that of a ward to a guardian.”¹⁴ A year later, the Supreme Court held in *Worcester v. Georgia*¹⁵ that states did not have jurisdiction over Indian tribes located within their boundaries.¹⁶ Although the tribes are sovereign governments, their sovereignty is circumscribed.

Jurisdiction by Indian tribes is generally limited geographically to “Indian country,” as defined in 18 U.S.C. § 1151, for civil as well as criminal cases.¹⁷ “Indian country” is defined as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished”¹⁸ This generally recognizes the tribes’ jurisdiction over their communal land, whether federally-owned reservations or owned in fee simple.¹⁹

There are two important qualifications to the geographic scope of tribal jurisdiction. The first relates to the diminishment of reserva-

10. This section intentionally presents only an abbreviated overview of the issue of tribal sovereignty as background for the discussion that follows. It vastly oversimplifies a very complicated question, which is beyond the scope of this Article. See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 *YALE L.J.* 1 (1999), for an in-depth discussion on the issue of tribal sovereignty.

11. 30 U.S. (5 Pet.) 1 (1831).

12. *Id.* at 16.

13. *Id.* at 17.

14. *Id.*

15. 31 U.S. (6 Pet.) 515 (1832).

16. *Id.* at 561.

17. *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975).

18. 18 U.S.C. § 1151 (1994).

19. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 *ARIZ. L. REV.* 503, 508–13 (1976).

tions through the process of "allotment." Under the terms of legislation such as the General Allotment Act of 1887,²⁰ the executive branch could divide up a reservation, allotting some to individual tribal members, reserving a small amount for the tribe to be held communally, and selling the remainder ("surplus") for the Indians' benefit.²¹ Land allotted to individual Indians is still Indian country as long as an Indian holds title to it²² while the "surplus" land may still be part of Indian country, and therefore subject to tribal jurisdiction, depending upon the circumstances surrounding the allotment.²³ Indian tribes are thus unique in that their sovereignty may depend upon who owns the land. State sovereignty, in contrast, does not depend upon ownership of the land by citizens or residents of that state.

The second important geographical qualification is "Public Law 280,"²⁴ which gave states the opportunity to exercise both civil and criminal jurisdiction over most, if not all, reservations within their territory.²⁵ Reservations, therefore, may be subject to state jurisdiction even though the land is owned by the tribe or its members. Six states (the so-called "mandatory states") were specifically given such jurisdiction in Public Law 280,²⁶ and other states were given the option of exercising such jurisdiction.²⁷ Ten did, in whole or part,²⁸ before tribes were given the right to veto such an assumption of jurisdiction.²⁹ No states have assumed jurisdiction since then.³⁰

20. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (1994) (§§ 331-333 repealed 2000)).

21. *See id.* The right of Congress to alter reservation boundaries was upheld in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903).

22. 18 U.S.C. § 1151(c).

23. *See Hagen v. Utah*, 510 U.S. 399 (1994), for a general overview and an application of the analytical framework.

24. Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1994)).

25. *Id.*

26. Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1994).

27. Public Law 280, § 7, 67 Stat. at 590.

28. Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *See* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 362-63 n.125 (Rennard Strickland et al. eds., 1982 ed.).

29. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 401-403, 82 Stat. 73, 78-79 (codified as amended at 25 U.S.C. §§ 1321-1323 (1994)). Congress decided to give the tribes veto power because of criticism by the tribes and concerns that tribal laws had been unnecessarily preempted in some situations, resulting in a breakdown in law and order. S. REP. NO. 90-721 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, 1865-66 (Additional Views of Mr. Ervin). Other than in these "additional views," this provision is not mentioned in the legislative reports as it was not part of the bill reported out of the committee. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557, 607-08 (1972). The proposed ICRA, including this limitation of Public Law 280, was defeated in the Senate Judiciary Committee but added as an amendment on the Senate floor. *Id.* at 608-11. The views of Senator Ervin are particularly relevant as he was a prime mover behind this legisla-

Restrictions on tribal sovereignty are not limited to geographical considerations. Tribes are sovereign in the portions of reservations that are "Indian country" and over which states have not assumed jurisdiction pursuant to Public Law 280. That sovereignty is limited, however, depending upon the subject matter and the person over whom the tribe seeks jurisdiction. In this respect, tribal jurisdiction differs dramatically from state jurisdiction, which is almost exclusively defined in terms of territory.³¹

Tribal jurisdiction is limited most severely with respect to criminal jurisdiction. Tribes initially had exclusive jurisdiction over intra-tribal crimes committed in Indian country.³² This jurisdiction is no longer exclusive because the federal government has jurisdiction over certain major crimes³³ as well as over crimes committed by Indians against non-Indians in Indian country.³⁴ Tribal jurisdiction does not extend to crimes committed by non-Indians³⁵ unless such authority has been delegated by Congress.³⁶ Generally, such crimes are the jurisdiction

tion and "the only member of the Senate who fully understood it." *Id.* at 574-76, 588-89, 602-03.

30. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 492 (4th ed., 1998).

31. Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. INDIAN L. REV. 65, 65 (1998).

32. See, e.g., *Ex parte Crow Dog*, 109 U.S. 556, 570-72 (1883). Crow Dog murdered Spotted Tail, according to prosecutors, because of a political dispute concerning conciliation with whites, which Spotted Tail advocated and Crow Dog opposed (although other explanations have been advanced). Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 198, 207 (1989). The Sioux tribal council negotiated a payment, to redress the killing and restore tribal harmony, of \$600, eight horses, and one blanket. *Id.* at 199. The federal court sentenced him to death. *Id.* at 212; *Crow Dog*, 109 U.S. at 557. See also *infra* text accompanying note 255.

33. The "major" crimes in question are

murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title.

Indian Major Crimes Act, 18 U.S.C. § 1153(a) (1994). This statute was originally passed in 1885 in reaction to *Crow Dog*. See Haring, *supra* note 32, at 223.

34. See 18 U.S.C. § 1152. This statute provides for concurrent tribal jurisdiction; it is not clear whether the Indian Major Crimes Act does so.

35. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). Tribes did not have criminal jurisdiction over Indians who were members of other tribes. *Duro v. Reina*, 495 U.S. 676, 688 (1990). Shortly after *Duro*, Congress "provided for tribal criminal jurisdiction over nonmember Indians." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 n.5 (1997) (citing 25 U.S.C. § 1301(2) (1994)).

36. *United States v. Mazurie*, 419 U.S. 544, 553-54 (1975).

of either the federal government, if the victim is an Indian,³⁷ or the state government, if the victim is a non-Indian.³⁸

Tribes have greater civil jurisdiction over non-Indians than their corresponding criminal jurisdiction.³⁹ Nevertheless, in *Montana v. United States*,⁴⁰ the Supreme Court concluded that because of the tribes' dependent status, their sovereignty did not extend beyond the control of internal relations and the protection of their self-government unless authority was explicitly delegated by Congress.⁴¹ The Court recognized two exceptions under which the tribe could exercise regulatory/legislative authority over nonmembers: (1) consensual (usually commercial) relationships between the nonmembers and the tribe or its members; and (2) nonmember conduct on the reservation that threatens or affects the tribe's political integrity, economic security, or health and welfare.⁴² The Court subsequently confirmed that decision and applied it to tribal judicial authority as well in *Strate v. A-1 Contractors*.⁴³ These limitations generally apply to land within the reservation that is owned by non-Indians; the tribe has greater authority over land that is owned by the tribe or individual members.⁴⁴ Because non-members may own much of a reservation's area, however, these limitations can significantly reduce the tribe's sovereignty.⁴⁵

37. See 18 U.S.C. § 1152.

38. See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (“This Court’s more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands.”).

39. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855–56 (1985). This case established a “tribal exhaustion” doctrine under which a party challenging the tribal court’s jurisdiction must do so first in the tribal court system. *Id.* at 856–57. See White, *supra* note 31, for a critique of the tribal exhaustion doctrine.

40. 450 U.S. 544 (1981).

41. *Id.* at 564 (holding that the Crow Tribe had no authority to regulate hunting and fishing by non-Indians on lands within the Tribe’s reservation owned in fee simple by non-Indians).

42. *Id.* at 565–66.

43. 520 U.S. 438, 453 (1997) (“[A] tribe’s *adjudicative* jurisdiction [as to nonmembers] does not exceed its *legislative* jurisdiction.”) (emphasis added).

44. *Id.* at 454 (stating that “tribes retain considerable control over nonmember conduct on tribal land”); *Montana*, 450 U.S. at 557 (holding that “the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe” although the Tribe could not “regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe”). *Strate* involved an accident that took place on a right-of-way for a state highway, which the Court considered equivalent to land owned by nonmembers. *Strate*, 520 U.S. at 454. This is the background for the infamous comment by Justice Scalia during oral argument concerning how to avoid tribal jurisdiction when crossing a reservation: “Just stay on the good roads, and you’ve got nothing to worry about.” Steve Lash, *Justices Map Alternate Route for Determining Tribal Court Jurisdiction in Non-Indians’ Personal Injury Suits*, WEST’S LEGAL NEWS, Jan. 8, 1997, 1997 WL 4267.

45. See, e.g., Sam Howe Verhovek, *Test of Indian Sovereignty and Government Resolve*, N.Y. TIMES, National Edition, Dec. 24, 2000, at 10. On the Yakama reservation, “nearly 80 percent of the 25,000 people are not Indians,” and the conduct in

B. *Civil Rights and Indians*

The unique status of Indian tribes⁴⁶ has profound implications for civil rights. Most significantly, in *Talton v. Mayes*,⁴⁷ the Supreme Court held that because Indian tribes predated the Constitution and did not derive their authority from it, they were not subject to constitutional limitations on the federal government in the Fifth Amendment.⁴⁸ Subsequent cases held that Indian tribes were not constrained by other provisions of the Bill of Rights.⁴⁹ Similarly, Indian tribes are not states and therefore not subject to the restrictions on state action encompassed in the Fourteenth Amendment.⁵⁰ These distinctions, of course, concern limits on tribal governments rather than on rights of individual members of tribes; Indians have the same civil rights, and the same recourse to federal courts, as do non-Indians.⁵¹

In 1968, Congress addressed this anomaly by passing the Indian Civil Rights Act⁵² ("ICRA") as part of the Civil Rights Act of 1968.⁵³ Although congressional investigations found that civil rights of individual Indians had been violated by "all three sovereigns in the federal system: state, national and tribal,"⁵⁴ the solution was addressed exclusively to violations by tribal governments.⁵⁵ With a few excep-

question (alcohol sales) is largely conducted "on privately owned land within the reservation." *Id.*

46. "In contrast to many of the states, Indian tribes are arguably truly distinct sovereigns." Resnik, *supra* note 7, at 679 (footnote omitted). "They have a status higher than that of states." *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). These observations, however, seem fundamentally inconsistent with the deep encroachments into tribal sovereignty. *See supra* text accompanying notes 17-45.

47. 163 U.S. 376 (1896).

48. *Id.* at 384.

49. *See, e.g., Native Am. Church of N. Am.*, 272 F.2d at 134-35 (freedom of religion under the First and Fourteenth Amendments).

50. *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556-57 (8th Cir. 1958).

51. "The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course, does not relieve State and Federal Governments of their obligations to individual Indians under these provisions." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978). Indians in the United States were granted citizenship by means of the Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1994)), and thus stand on the same footing as other citizens with regard to protection by the Constitution against actions by federal or state governments.

52. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified as amended at 25 U.S.C. §§ 1301-1341 (1994)). This statute contains a number of provisions in addition to those concerning civil rights protections against tribal governments. 25 U.S.C. §§ 1301-1303 (1994) (concerning civil rights protections).

53. *See Burnett, supra* note 29, for a comprehensive review of the development and enactment of the ICRA.

54. Berry, *supra* note 7, at 20.

55. *Id.* An early version of the ICRA apparently protected Indians only. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978).

tions tailored to particular concerns of the tribes,⁵⁶ the ICRA essentially adopts most of the Bill of Rights:

No Indian tribe in exercising powers of self-government shall

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.⁵⁷

56. "[T]he ICRA resembles provisions in the United States Constitution's first, fourth, fifth, sixth, and eighth amendments, and the equal protection and due process provisions of the 14th amendment." U.S. COMM'N ON CIVIL RIGHTS, *THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS* 5 (1991) [hereinafter *COMM'N REPORT*]. One exception relates to the Establishment Clause of the First Amendment which was not considered appropriate for an "Indian Bill of Rights" because of "the role of religion in the structuring of tribal life, culture, and sometimes government." *Id.* Also, the right to "free counsel for criminally accused or a jury trial for civil cases" was not considered appropriate because the cost could prove onerous for some of the poorer tribes. *Id.*

57. 25 U.S.C. § 1302. This section is incorrectly labeled "Constitutional rights," *id.*, because the rights are statutory rather than derived from the Constitution.

In addition, the ICRA explicitly provided for habeas corpus review in federal courts.⁵⁸

At the time, at least some commentators assumed that remedies other than habeas corpus would also be available in federal court for violations of the ICRA.⁵⁹ This was certainly a logical assumption because limiting the federal remedy to habeas creates some obvious problems:

If no remedy other than habeas corpus were available, a large portion of the rights guaranteed by the statute — all those which might be infringed without “detention by order of an Indian tribe” — would be unprotected and therefore ineffectual. For instance, exclusion of members from the reservation or revocation of tribal membership rights, discriminatory allocation of communal resources, prevention of religious practices on the reservation and the taking of private property for public use without just compensation would be infringements of rights declared by the statute that would receive little or no protection from the habeas corpus provision. Lack of other remedies would clearly defeat congressional purpose.⁶⁰

The federal courts asserted jurisdiction over such cases in a number of instances.⁶¹ However, in 1978, just ten years after the passage of the ICRA, the Supreme Court finally addressed the issue of whether remedies other than habeas corpus were available and concluded that they were not.

C. Martinez

In *Martinez*, Julia Martinez challenged the membership ordinance of the Santa Clara Pueblo,⁶² which provided patrilineal membership rights under the equal protection clause of the ICRA.⁶³ Because her husband was Navajo, her children lost several rights associated with membership.⁶⁴ After the tribe refused to change the membership or-

58. “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.” *Id.* § 1303.

59. *E.g.*, Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1371–72 (1969).

60. *Id.* at 1371.

61. *See generally* *Two Hawk v. Rosebud Sioux Tribe*, 534 F.2d 101 (8th Cir. 1976); *Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233 *passim* (9th Cir. 1976); *Crowe v. E. Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1233–34 (4th Cir. 1974).

62. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 n.2 (1978).

63. 25 U.S.C. § 1302(8). *See supra* text accompanying note 57, for the text of the ICRA provision.

64. *Martinez*, 436 U.S. at 52. As a result, the children “may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother’s death, or to inherit their mother’s home or her possessory interests in the communal lands.” *Id.* at 52–53. Failure to qualify for membership could, and in this case apparently did, have serious consequences.

dinance, she brought a class action suit in federal court.⁶⁵ The district court apparently concluded that the availability of declaratory and injunctive relief was implicitly authorized by the substantive provisions of the ICRA and found for Ms. Martinez on the merits.⁶⁶ The court of appeals reversed on the merits but agreed that the federal courts had jurisdiction, concluding that Congress must have intended to allow individuals to sue the tribe for violations of the ICRA, as otherwise, the protections of the ICRA would constitute “a mere unenforceable declaration of principles.”⁶⁷

The Supreme Court disagreed and reversed,⁶⁸ concluding that it was inappropriate to infer a cause of action⁶⁹ other than that explicitly provided by the ICRA. While this may have been the correct decision, Justice Marshall’s reasoning is not completely convincing. The starting point was the well-established principle that Indian tribes had sovereign immunity from suit, absent consent or congressional abrogation and subject to Congress’s plenary power.⁷⁰ Tribal officials, however, were not protected by sovereign immunity; it was therefore necessary to determine whether the availability of declaratory and injunctive relief, although not mentioned in the ICRA, was nevertheless implicit.⁷¹ The opinion cited previous cases that inferred a cause of

“Deprivation of material benefits, especially medical care, was a central hardship factor driving the *Santa Clara* case. Julia Martinez’s daughter was denied medical treatment because she had no tribal recognition and later died from strokes relating to her terminal illness.” Christofferson, *supra* note 7, at 174 n.42.

65. *Martinez*, 436 U.S. at 53.

66. *Id.*

67. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042 (1976), *rev’d*, 436 U.S. 49 (1978).

68. *Martinez*, 436 U.S. at 55.

69. As pointed out by Professor Worthen, this case differed from the typical implied cause of action ruling which addresses *who* can bring an action enforcing a federal statute—specifically, whether a private party can do so. See Worthen, *supra* note 7, at 88–89. In *Martinez*, the issue was not *who* can bring an action but *where* it can be brought—specifically, whether it can be brought in federal court. *Id.*

70. *Martinez*, 436 U.S. at 58. This was the “common-law immunity from suit traditionally enjoyed by sovereign powers.” *Id.* Part III is the only section of the opinion that Justice Rehnquist did not join, although he did not explain his decision. *Id.* at 51. He did join Part IV, *id.*, which held that tribal officials were also immune from suit in federal court, *id.* at 69–70. In contrast, Justice White did not agree that tribal officials were immune but did agree with Part III that the tribe itself retained sovereign immunity. *Id.* at 73 & n.2 (White, J., dissenting).

71. *Id.* at 59. Cf. *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (allowing suits for injunctive relief against state officials, although not directly against the state); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) (holding that states are immune from suit by citizens, based on the Eleventh Amendment to the Constitution). Suing the state official under the *Ex parte Young* doctrine utilizes a legal fiction:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Young, 209 U.S. at 159–60.

action for violations of civil rights statutes, which did not specify remedies, and then dismissed the previous cases as inapposite without drawing clear distinctions.⁷²

The basis for Justice Marshall's conclusion can be summarized as: (1) the ICRA is intended not only to protect individuals against the tribe but also to further Indian self-government;⁷³ (2) federal enforcement of civil rights against the tribe conflicts with the goal of strengthening self-government;⁷⁴ (3) Congress rejected proposals for other methods of federal review of ICRA violations;⁷⁵ (4) the tribes who testified at the House hearings apparently did not think that federal jurisdiction for causes of action other than habeas corpus was authorized by the ICRA;⁷⁶ (5) federal remedies other than habeas corpus are not essential to the enforcement of these limitations on tribal power;⁷⁷ and (6) the tribal courts would be more familiar than federal courts with traditions and customs relevant to actions to enforce ICRA provisions.⁷⁸ While these arguments have a certain force, some also have obvious flaws.

The fact that the ICRA had dual purposes is hardly surprising given its nature as "omnibus legislation."⁷⁹ Under such circumstances, one would expect that not all portions of the legislation would be directed at both goals. This is particularly the case when the two purposes are essentially in conflict. Merely enacting these restraints on tribal governments was inherently, and intentionally, a significant intrusion on the right of self-government, regardless of the forum in which suits could be heard.⁸⁰ Another example is the requirement of tribal consent before states assumed civil and criminal jurisdiction over areas occupied by Indian tribes.⁸¹ This requirement presumably addressed the furtherance of self-government by making it more difficult for the states to take over vital functions of tribal governments.⁸² It is equally clear that the requirement is facially neutral with respect to the goal of

72. *Martinez*, 436 U.S. at 61. The cases in question were *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

73. *See Martinez*, 436 U.S. at 62-63.

74. *Id.* at 64-65.

75. *Id.* at 67-68.

76. *Id.* at 70 n.30.

77. *Id.* at 65. "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." *Id.*

78. *Id.* at 71.

79. GETCHES ET AL., *supra* note 30, at 505.

80. *Martinez*, 436 U.S. at 82-83 (White, J., dissenting).

81. 25 U.S.C. §§ 1321-1322 (1994).

82. Previously, Public Law 280 allowed states to assume such jurisdiction at any time; several did so without tribal concurrence. This change eliminated the states' ability to act unilaterally, and since then "[n]o tribe has consented to state jurisdiction under Public Law 280." GETCHES ET AL., *supra* note 30, at 488-92.

protecting the civil rights of individuals subject to tribal authority and arguably undermines it.⁸³ That is not to say that the requirement is a bad idea, only that it is not unreasonable, with two conflicting goals, to find provisions that support one purpose and oppose another. This is not evidence that Congress *intended* federal jurisdiction other than habeas corpus, but neither is it as strong an indication as Justice Marshall implied that Congress did *not* intend such a remedy.⁸⁴

The Court reached its conclusion that Congress decided against remedies other than habeas corpus in part because Congress considered and rejected other proposals for federal review of alleged ICRA violations arising in a civil context.⁸⁵ That argument, however, loses its power upon examination. The proposals in question were significantly different from simply allowing lawsuits for injunctive or declaratory relief or for damages in federal courts. The first proposal required the Attorney General to investigate complaints of ICRA violations and bring appropriate “*criminal* or other action[s].”⁸⁶ This would screen out some civil cases, but it would also allow criminal cases. Further, the plaintiff in suits against the tribe would be the federal government, a very formidable opponent, rather than the individual whose civil rights were allegedly violated. From the tribes’ perspective, fewer cases to defend, but against a more sophisticated plaintiff with greater resources, could well be a bad bargain. The second proposal involved adjudication of tribal actions by the Interior Department, which could be initiated by the Department (even without a request by the Indian whose rights were allegedly violated) with available review in federal court of final decisions.⁸⁷ Again, the dissimilarity between this proposal and the relief sought by Ms. Martinez is such that the conclusions drawn by Justice Marshall are problematic.⁸⁸

83. The argument that the requirement undermines protection of civil rights would be based on an assumption (not necessarily valid) that state courts are, because more independent than tribal governments, more likely to protect individuals against tribal authority than would be tribal courts. See *infra* notes 162, 259–60 and accompanying text.

84. *Martinez*, 436 U.S. at 62–63.

85. *Id.* at 67. The Court found the rejection of these proposals regarding *civil* actions more relevant to the decision in *Martinez* than Congress’s rejection of the provision in the original version of the ICRA, authorizing the federal courts to conduct an independent review of all *criminal* convictions obtained in tribal courts. *Id.* The rejection of alternative remedies in criminal cases, where habeas corpus can provide a remedy, is arguably less significant than the rejection of alternative remedies in civil cases, where habeas corpus is generally useless. See *supra* text accompanying note 60, for examples of rights that would not be vindicated in a habeas corpus proceeding.

86. *Martinez*, 436 U.S. at 67–68 (emphasis added).

87. *Id.* at 68 & n.26.

88. See also *id.* at 75–79 (White, J., dissenting) (providing additional arguments that the changes from the original proposals do not support Justice Marshall’s inferences).

The argument that the tribes did not think the ICRA authorized federal jurisdiction for the cause of action pursued by Ms. Martinez is not very persuasive. As the Court noted, testimony at the hearings on the ICRA was only given by a few tribes, which makes such a contention a bit of a stretch.⁸⁹ In any event, the relevance is indirect at best, because surely it is Congress's understanding, rather than that of the tribes, that controls.

Another issue inadequately addressed by the ruling in *Martinez* is the general question of congressional power to limit federal jurisdiction.⁹⁰ This is a basic component of law school courses on Federal Courts⁹¹ and also constitutes an area of the jurisprudence of federal-state relations that is hotly debated by academics.⁹² However, as Professor Worthen points out, neither the majority nor the dissent even discussed whether prohibiting jurisdiction by federal courts over ICRA violations, if that was indeed what Congress intended, would violate Article III of the Constitution.⁹³ In any event, because the Supreme Court did not object to the limits imposed by Congress, the question has been answered implicitly in this context: Congress has the power to limit federal court jurisdiction over claims arising under this particular federal law.

The result in *Martinez* is probably correct, primarily because of the argument that federal jurisdiction would constitute an assault on tribal autonomy, but the Court did not develop its argument well.⁹⁴ Whether the decision in *Martinez* was "correct" or not, it is the law. With no indication that it is likely to be overturned by the Court, alternative strategies for gaining access to federal courts have been suggested.

D. *Getting Around Martinez*

Martinez essentially foreclosed suits in federal court for violations of the ICRA. The front door is firmly shut, but there are alternative "back door" ways of getting to federal court that should be considered

89. *Id.* at 70 n.30.

90. "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

91. See, e.g., PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 213-39 (3d ed., 1994).

92. See Worthen, *supra* note 7, at 65 n.2, for a collection of law review articles on the topic of "the constitutionality of legislative proposals limiting federal court jurisdiction over claims arising under federal law." *Id.* at 65.

93. *Id.* at 92.

94. The flaws, noted above, in some of the Court's arguments, combined with its failure to present a stronger case for the tribal autonomy argument, see *infra* Part III.B, made the opinion less persuasive than it might have been.

before evaluating whether Congress should provide a remedy like 42 U.S.C. § 1983.⁹⁵

One possible way to get around *Martinez* would be to attack the tribe's sovereignty. In *Oliphant v. Suquamish Indian Tribe*,⁹⁶ the Court held that there were certain inherent restrictions on what powers can be exerted by the tribe over non-Indians on the reservation.⁹⁷ The Court articulated a (somewhat unclear) test for determining whether such a restriction applies: "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their [dependent] status.'" ⁹⁸ Under this approach, an individual whose civil rights have allegedly been violated can, instead of challenging that violation, challenge the very existence of tribal governmental power with which the violation is associated.

Such a defense is apparently a legitimate way to prevent violations of civil rights, although it also has limitations: it is only available to non-Indians,⁹⁹ the federal court may find that the tribe has *not* lost sovereignty for the specific function challenged,¹⁰⁰ and it is not clear whether damages (as opposed to injunctive or declaratory relief) would be available. More important than whether such a defense *will* work is whether it *should* work, and here, there is a very strong argument against it. A defense based on *Oliphant* is pernicious, a sledgehammer meant to destroy rather than the carefully calibrated restraints on tribal sovereignty offered by the ICRA.¹⁰¹ It should also be noted that one of the reasons underlying the *Oliphant* decision appears to have been concerns that the tribes might violate individuals' civil liberties¹⁰²—the very problem which *Martinez* provided could be left up to the tribal courts.¹⁰³

95. The following is a brief overview of potential avenues that have been explored. See Kevin Gover & Robert Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 *HAMLINE L. REV.* 497 (1985), for a full discussion of some of these alternatives.

96. 435 U.S. 191 (1978). *Oliphant* was decided only two months before *Martinez*.

97. *See id.* at 208.

98. *Id.* (emphasis omitted) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd*, 435 U.S. 191 (1978)). The specific holding was that the tribe lacked criminal jurisdiction over non-Indians. *Id.* at 195. The important issue for this Article is the general test enunciated for determining whether a particular aspect of sovereignty has been lost. *See id.* at 208.

99. *See* Gover & Laurence, *supra* note 95, at 520.

100. *See* *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (collecting cases holding that tribes could exercise jurisdiction over non-members as to specific functions).

101. *Id.*

102. *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 361 (D.N.M. 1981).

103. This appears to be a substantial and fundamental inconsistency between *Oliphant* (which tribes generally dislike) and *Martinez* (of which they generally approve). Because of this tension, Professor Laurence has consistently linked his proposals for overruling the latter with overruling the former. *See* Laurence, *Overruling Martinez*, *supra* note 7, at 414–23; Laurence, *Quincentennial Essay*, *supra* note 6, at 339.

Another obvious approach is to avoid the ICRA completely and instead make a claim that *constitutional* rights have been violated. Tribes are not ordinarily subject to the restrictions on governmental power included in the Constitution,¹⁰⁴ but that simply puts them on an equivalent basis to private individuals. Both tribes and private individuals can be made subject to the constraints of the Constitution by a finding that their action constitutes "state action."¹⁰⁵ However, the degree of entanglement with the state or federal government necessary to invoke the state action doctrine is such that the doctrine will rarely apply. The Ninth Circuit did reach such a holding in *Colliflower v. Garland*,¹⁰⁶ involving tribal courts which were, in effect, parts of the federal government;¹⁰⁷ but that was a highly unusual situation. As the court pointed out, these courts had been created by the federal, rather than tribal, government and were still subject to partial federal control.¹⁰⁸ Such holdings remain isolated exceptions, and the state action doctrine is unlikely to apply in most circumstances.

Theoretically, the state action requirement could be bypassed by asserting a cause of action under 42 U.S.C. § 1985(3), which refers to acts by "persons."¹⁰⁹ Such an approach was tried before *Martinez in Means v. Wilson*.¹¹⁰ Although the Eighth Circuit allowed a cause of action against the tribe in that case,¹¹¹ the court's analysis was inconsistent with the framework later enunciated in *Martinez*.¹¹² In any event, the Supreme Court has since held in *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*¹¹³ that there must be some involvement by or effect on a state or federal government to meet the

104. See *supra* notes 47–50 and accompanying text.

105. A discussion of the state action doctrine is beyond the scope of this Article. See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, pts. 1 & 2, 34 HOUS. L. REV. 333 (1997), for a thorough review of the doctrine.

106. 342 F.2d 369 (9th Cir. 1965). A similar result was reached in *Settler v. Yakima Tribal Court*, 419 F.2d 486, 488–89 (9th Cir. 1969).

107. *Colliflower*, 342 F.2d at 379.

108. *Id.*

109. The provision, in relevant part, is as follows:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1994).

110. 522 F.2d 833 (8th Cir. 1975).

111. *Id.* at 838–39.

112. *Martinez* applied the principles of *Cort v. Ash*, 422 U.S. 66 (1975), in analyzing at length whether the ICRA was *intended* to apply to tribal officials. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59–70 (1978). *Means* never considered this fundamental question. *Means*, 522 F.2d at 838–39; Gover & Laurence, *supra* note 95, at 529–35.

113. 463 U.S. 825 (1983).

requirements of § 1985(3).¹¹⁴ Thus, this approach is likely no more viable than a cause of action under § 1983.

Finally, at least one specific exception to *Martinez* has been enunciated. The Tenth Circuit allowed federal jurisdiction in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*¹¹⁵ by distinguishing *Martinez*.¹¹⁶ The crucial distinction was that the case involved a non-Indian plaintiff denied a tribal forum (because the tribes did not consent to suit).¹¹⁷ However, as pointed out by Gover and Laurence, the decision in *Dry Creek Lodge* does not convincingly distinguish its facts from *Martinez*, and it has rarely been followed.¹¹⁸

Thus, most of the methods of bypassing the *Martinez* decision are questionable, if not completely invalid. The “*Oliphant* spin-off” appears to be sound but limited in effectiveness and destructive in its application. There is no good way to “avoid” the decision in *Martinez*. The question therefore becomes whether Congress should effectively overrule *Martinez* by enacting legislation explicitly providing federal jurisdiction, as many have suggested.¹¹⁹ For the answer to that question, it is appropriate to first review basic principles underlying decisions on the propriety of providing jurisdiction to federal courts.

III. GENERAL CONSIDERATIONS

A. *Federalists, Nationalists, and the Parity Principle*

As described below, the question of granting jurisdiction to federal courts, rather than state courts, has often divided judges and commentators into two opposing camps. The respective positions seem to turn on three underlying rationales: (1) the proper relationship between the federal government and states, that is, federalism; (2) the competence and willingness of the state courts to enforce civil rights; and (3) the relative independence of the state courts. Although the discussion normally focuses on the relationship between federal and state courts, similar arguments should be applicable to the relationship between

114. *Id.* at 833.

115. 623 F.2d 682, 685 (10th Cir. 1980).

116. *Id.* at 685.

117. *Id.* at 684.

118. The Tenth Circuit's concerns seem to have been that *Dry Creek Lodge* involved a non-Indian plaintiff without a tribal forum. Gover & Laurence, *supra* note 95, at 501. The reason for denying federal court jurisdiction against the tribe in *Martinez*, however, was the tribe's sovereign immunity against suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978). The *Martinez* Court did not rest that conclusion on the identity of the plaintiff or the availability of a tribal forum. *Id.* The Tenth Circuit noted factual differences from *Martinez*, *Dry Creek Lodge*, 623 F.2d at 684–85, but its conclusion that those facts were critical to the decision in *Martinez* seems unwarranted as *Martinez* spoke directly and unequivocally to the issue of federal court jurisdiction for a suit against a tribe for violations of the ICRA. Gover & Laurence, *supra* note 95, at 499–515.

119. *See supra* note 8.

federal and tribal courts. Nevertheless, many individuals have switched camps when the focus shifts from states to Indian tribes.

Professor Fallon has described two opposing models of "judicial federalism" as ways to think about, among other things, granting jurisdiction to the federal courts.¹²⁰ Professor Fallon uses this term to address essentially all questions, in cases where both the state and federal governments have interests, involving the proper forum for adjudication.¹²¹ The Nationalist model assumes that "state sovereignty interests must yield to the vindication of federal rights and that, because state courts should not be presumed as competent as federal courts to enforce constitutional liberties, rights to have federal issues adjudicated in a federal forum should be construed broadly."¹²² Under the Federalist model, state courts, which are not presumed to be inferior, are ultimately responsible for protecting constitutional rights; federal courts have limited jurisdiction over the sovereign state.¹²³

Professor Fallon points out that many jurists and commentators tend to consistently follow one or the other of these models.¹²⁴ Prominent Nationalists include Justices William Brennan and Thurgood Marshall and Professor Akhil Amar; consistent Federalists include Chief Justices William Rehnquist and Warren Burger and Justices John Marshall Harlan, Felix Frankfurter, and Lewis Powell.¹²⁵ Nevertheless, proponents of both positions, on occasion, take the other side,¹²⁶ undoubtedly in part because not all questions arising in this area are close enough for one's theoretical preference to be dispositive:

It is a feature of many federal courts debates—or so I have argued—that the relevant materials are sufficiently indeterminate to support, or at least not to foreclose, alternative resolutions. But when the evidence points with sufficient clarity to only one conclusion, as it sometimes does, then the conscientious judge must reach it, however badly it may accord either with previously held theories of judicial federalism or with personal normative preferences.¹²⁷

Others try to steer a middle course.¹²⁸

120. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

121. *Id.* at 1142 n.1.

122. *Id.* at 1145 (footnote omitted).

123. *Id.* at 1143–44.

124. *Id.* at 1146.

125. *Id.*

126. *Id.* at 1225.

127. *Id.* at 1230–31.

128. For example, one prominent federal judge concluded that "if left alone, state courts are fully capable of vindicating the rights of most citizens against governmental oppression when the ultimate responsibility is theirs. But they tend to default when their judgments are too often reviewed and revised by federal courts." J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST.

Nationalists often see the need for federal jurisdiction as strongest in the area of civil rights. In fact, one of the most important cases in the jurisprudence of 42 U.S.C. § 1983, *Monroe v. Pape*,¹²⁹ explicitly discussed the fear that the states could not be trusted to safeguard civil rights:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.¹³⁰

Inadequate protection by the state courts was of concern particularly for civil rights because such rights are fundamentally different than other types of injuries.¹³¹ Presumably, this concern was behind the Court's decision to dramatically expand the scope of access to federal courts for civil rights violations: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."¹³² One might expect Nationalists to be particularly fervent in demanding, and Federalists most likely to acquiesce in, federal jurisdiction over civil rights violations by state and tribal governments.

Although the Federalist and Nationalist models do not provide absolute answers to issues of judicial federalism, they at least focus attention on a relevant question in deciding policy: Are the state courts equally competent at the vindication and enforcement of federal rights?¹³³ Many commentators, most notably Professor Neuborne,¹³⁴

L.Q. 165, 181 (1984). Judge Wright advocated "greater self-restraint by the federal courts and increased respect for the competence of the state judiciary," *id.* at 185, which is not consistent with a pure Nationalist position. Neither does he fit into the Federalist mold as he would not remove the power from federal courts to enforce constitutional rights. *Id.* at 188.

129. 365 U.S. 167 (1961).

130. *Id.* at 180.

131. See *id.* at 196 (Harlan, J., concurring) (endorsing the view that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right"). See also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 672 (1998) ("In accord with the idea expressed in Justice Harlan's concurrence that constitutional rights are especially important, the *Monroe* Court took the view that adequate protection of constitutional rights requires a federal remedy in federal court.").

132. *Monroe*, 365 U.S. at 183. "[*Monroe*], coupled with the expansion of constitutional rights which occurred during the 1960s, has led to what some commentators have termed an 'explosion' of federal lawsuits to redress violations of constitutional rights." Stephen J. Shapiro, *Suits Against State Officials for Damages for Violations of Constitutional Rights: Comparing Maryland and Federal Law*, 23 U. BALT. L. REV. 423, 423-24 (1993) (footnote omitted).

133. Fallon, *supra* note 120, at 1153. "This issue has been labeled the question of 'parity' between federal and state courts." Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 233 (1988).

have contended that state courts are less competent than federal courts, that is, that there is no parity between federal and state courts; others have disagreed.¹³⁵ Even Professor Neuborne admits today that state courts rarely refuse to enforce clearly established federal rights,¹³⁶ and his preference for the federal courts rests on a theoretical, rather than empirical, basis.

Professor Neuborne's conclusion that parity between federal and state courts does not exist is based on historical patterns in the nineteenth and early twentieth centuries¹³⁷ and on an analysis of institutional factors ("technical competence," "psychological set," and "insulation from majoritarian pressures")¹³⁸ rather than empirical studies of their rulings.¹³⁹ His preference for a federal forum is also clearly driven by his desire, as a civil liberties lawyer, for decisions favoring the individual over government.¹⁴⁰ Institutional factors, particularly technical competence, "may be troublesome to future civil liberties lawyers," and a results-driven approach might therefore favor jurisdiction in the state courts "if the Supreme Court retrenches from [the Warren Court's] expansive decisions."¹⁴¹ Such a "preference for a mistake-prone tribunal . . . of course, hardly constitutes a serious forum allocation argument."¹⁴²

Professor Chemerinsky concludes that "parity is an empirical question for which there is no empirical answer."¹⁴³ Even if that conclusion, based largely on the absence of a widely agreed definition of quality and the difficulty of aggregating evaluations across courts and issues,¹⁴⁴ is correct on an aggregate basis, there are undoubtedly many situations where it *is* possible to reach an intuitive conclusion about the relative competence of the court systems. All indications are that policy-makers, who address issues of granting federal jurisdiction, tend to discuss the competence of the lower courts. Federal question jurisdiction was not granted until 1875, at least in part because Congress trusted state courts to adjudicate such issues.¹⁴⁵ During the early

134. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

135. See Chemerinsky, *supra* note 133, at 234 & nn.4-5, for a review of the "proponents of parity." See also *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (rejecting the idea that state courts are less protective of federal constitutional norms).

136. Neuborne, *supra* note 134, at 1119. His concern lies more with situations that do not involve clear law, where there are "strong legal and moral claims" on both sides. *Id.*

137. *Id.* at 1106-15.

138. *Id.* at 1121-28.

139. *Id.* at 1116.

140. *Id.* at 1115-16.

141. *Id.* at 1124.

142. *Id.*

143. Chemerinsky, *supra* note 133, at 236.

144. See *id.* at 257-61.

145. *Id.* at 240. Federal question jurisdiction, 28 U.S.C. § 1331 (1994), was enacted by the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. Failure to enact such jurisdiction earlier was hardly an oversight on Congress's part. The issue was specifically consid-

twentieth century, Congress expanded federal court jurisdiction because of concerns that state courts did not support the Supreme Court's decisions relating to economic substantive due process.¹⁴⁶ Such explanations are not merely post hoc speculation by the commentators; both Congress¹⁴⁷ and the Supreme Court¹⁴⁸ have used the same paradigm to explain decisions about jurisdiction.

Similarly, recent congressional discussions have explicitly referenced situations where ICRA rights have been violated to justify proposals for federal court jurisdiction over ICRA claims.¹⁴⁹ Even the decision in *Martinez* assumed that congressional authorization of such jurisdiction would be based on inadequate performance by the tribal courts,¹⁵⁰ rather than the institutional factors advanced by Professor Neuborne¹⁵¹ or general considerations of federal-state relations.

The controversy about federal jurisdiction over civil rights violations by Indian tribes, however, provides some interesting insights into the general preference for federal courts. At least some individuals from *both* sides of the Federalist-Nationalist debate seem to reach conclusions opposite to their normal inclinations. For example, as Professor Resnik points out, Senator Hatch has proposed federal jurisdiction for ICRA violations¹⁵² despite the fact that he often has supported legislation to restrict federal jurisdiction in other areas.¹⁵³ Similarly, the opinion in *Martinez*, which reaches an essentially Federalist outcome, was authored by Justice Marshall and joined by Justice Brennan, both of whom Professor Fallon identifies as most often taking Nationalist positions.¹⁵⁴

ered when the lower federal courts were established in 1789. See, e.g., Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65-68 (1923).

146. Chemerinsky, *supra* note 133, at 242.

147. "Likewise, congressional creation of habeas corpus relief for state prisoners and the establishment of general federal question jurisdiction were accompanied by statements of distrust in the state courts." *Id.* at 241.

148. "At a time of increasing litigation, the Supreme Court was called on to define federal court jurisdiction and frequently did so with reference to conclusions about the relative competence and trustworthiness of federal and state courts." *Id.* at 244. See also *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (rejecting the idea that state courts are less protective of federal constitutional norms).

149. See, e.g., 135 CONG. REC. 3528-31 (1989) (remarks by Sen. Hatch, introducing the Indian Civil Rights Act Amendments of 1989, S. 517).

150. "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (emphasis added).

151. See *supra* text accompanying notes 137-41.

152. See *supra* note 8.

153. Resnik, *supra* note 7, at 738. Legislative proposals from Senator Hatch to eliminate federal jurisdiction include, for example, S. 37, 99th Cong., 131 CONG. REC. 101, 104 (1985) (enacted) (busing cases), and S. 583, 97th Cong., 127 CONG. REC. 3208-09 (1981) (enacted) (abortion cases).

154. Fallon, *supra* note 120, at 1146.

Martinez was a lopsided 6-1-1 decision, with Justice Blackmun not participating, Justice Rehnquist joining all but the section on tribal sovereign immunity, and only Justice White dissenting (but concurring that the tribe itself was immune from suit).¹⁵⁵ This could well mean that *Martinez* is best understood as a case where the decision was so clear that the Federalist and Nationalist models were irrelevant.¹⁵⁶ On the other hand, *Martinez* emphasized that "providing a federal forum . . . constitutes an interference with tribal autonomy and self-government beyond that created by" the Fourteenth Amendment.¹⁵⁷ It is difficult to visualize Justice Marshall, if there were no explicit congressional authorization such as 42 U.S.C. § 1983, being similarly concerned about *state* autonomy in a case involving state officials and minority appellants seeking federal jurisdiction. Perhaps the decision is actually best understood as illustrative of Professor Fallon's observation that liberals most often fit within the Nationalist tradition, except when a "liberal" result is better supported by Federalist philosophy.¹⁵⁸

Federalism concerns probably constitute the strongest argument for the decision in *Martinez*,¹⁵⁹ but these concerns would also argue against federal jurisdiction over civil rights violations by states. As such, federalism does not explain the changed positions in the Federalist-Nationalist debate. Indian tribes may have a unique status¹⁶⁰ that implicates federalism concerns for tribes more than for states. The reluctance to invade tribal judicial sovereignty by asserting federal jurisdiction in civil rights cases, however, seems inconsistent with the overwhelming invasion of tribal sovereignty in general.¹⁶¹ The independence of the courts from majoritarian pressure also fails to explain the flip-flop, because tribal courts seem, if anything, even less independent than state courts.¹⁶² The relative positions of state and tribal courts regarding competence and willingness to enforce civil rights is less clear, but, if anything, this factor argues for empirical comparison—as discussed in Part IV.

Martinez and subsequent efforts to extend federal jurisdiction over civil rights violations by Indian tribes, in which prominent Nationalists have "changed sides," suggest another underlying rationale for the Nationalist position. The flip-flop could be explained by inferring

155. See *supra* note 70.

156. See *supra* text accompanying note 127.

157. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

158. Fallon, *supra* note 120, at 1146.

159. See *infra* Part III.B.

160. See *supra* note 46.

161. See *supra* text accompanying notes 17-45.

162. "Real power in many tribal governments rests with the tribal council or legislative branch. . . . Where courts do exist, they are often a creation of the tribal council and therefore subject to and dependent on the council." 134 CONG. REC. 21,932-33 (daily ed. Aug. 11, 1988) (statement by Sen. Hatch). See also Ziontz, *supra* note 7, at 11. But see *infra* note 260 and accompanying text.

that, in substantial part, the debate about federal jurisdiction is simply an issue of political power. The relevant paradigms by which Nationalists are guided might be minority citizens oppressed by the white governments (concerning federal jurisdiction over civil rights violations by state governments) as compared to the minority-controlled governments trying to protect themselves from white neighbors (concerning federal jurisdiction over civil rights violations by tribal governments). The flip-flop would be entirely consistent with an underlying assumption by Nationalists that, regardless of who controls the government, whites control the power structure and are likely to exploit minorities. Federal jurisdiction over civil rights violations by Indian tribes would therefore be unnecessary because serious violations would be improbable and plaintiffs would more likely use litigation as a coercive tactic. If this Legal Realist perspective is really what underlies the Federalist-Nationalist debate, however, the general preference for federal courts should *not* apply in a comparison with tribal courts.

B. *Sovereigns in a Foreign Forum*

The strongest argument for the result in *Martinez* is that federal jurisdiction would constitute a double assault on tribal autonomy. This is so, not only because lawsuits over which the tribal courts have jurisdiction¹⁶³ could be removed to a foreign forum, but also because those lawsuits would be directed against official representatives of the tribal government.¹⁶⁴ A federal forum thus constitutes an attack on the judicial capacity of the tribe by allowing a foreign forum to take jurisdiction; it also attacks the executive and legislative functions of the tribe by subjecting action of tribal officials to review by another government.

Such assaults on a sovereign's judicial capacity are perhaps best understood as resulting from a belief that the sovereign's courts cannot be trusted. A familiar example is the provision for federal jurisdiction over lawsuits arising under state law causes of action on grounds of diversity of citizenship.¹⁶⁵ The Constitution permits such jurisdiction,¹⁶⁶ and Congress decided to grant it.¹⁶⁷ Many scholars think that diversity jurisdiction was granted to the federal courts because Congress feared prejudice by state courts against citizens of other

163. See *supra* note 77 and accompanying text.

164. "[S]uits against the tribe under the ICRA are barred by its sovereign immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Officials of the tribe, however, are subject to suit. *Id.* Because the ICRA applies to actions of the "Indian tribe in exercising powers of self-government," 25 U.S.C. § 1302 (1994), actions by tribe members in their individual capacities are not subject to lawsuit under the ICRA. *Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975).

165. 28 U.S.C. § 1332 (1994).

166. U.S. CONST. art. III, § 2, cl. 1.

167. 28 U.S.C. § 1332 has its origins in the Federal Judiciary Act of 1789, § 11, 1 Stat. 73, 78-79.

states.¹⁶⁸ Such prejudice, however, is probably no longer a significant factor in state courts.¹⁶⁹

The attack on *both* judicial and executive/legislative capacity constitutes an important distinction between *Martinez* and other cases that found an implied federal cause of action for the enforcement of civil rights, although Justice Marshall failed to present such an argument clearly in *Martinez*. In *Jones v. Alfred H. Mayer Co.*,¹⁷⁰ the Court concluded that injunctive relief was available in federal court for a violation of 42 U.S.C. § 1982.¹⁷¹ Although this statute establishes rights without any mention of enforcement, the Court inferred enforcement authority by federal courts.¹⁷² In *Sullivan v. Little Hunting Park, Inc.*,¹⁷³ the Court extended the holding in *Jones* to allow injunctive relief for violations of 42 U.S.C. § 1982 not only in federal court but also in state court, so long as the state already had such equitable power generally.¹⁷⁴ Similarly, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁷⁵ the Court concluded that damages were available for a violation of constitutional rights.¹⁷⁶ However, *Bivens* involved a suit in a federal forum for alleged violations committed by federal officials¹⁷⁷ and thus did not implicate the same concerns about a foreign forum. In *Jones*, the alleged violations of the federal civil rights statute were committed by private individuals¹⁷⁸ and thus did not constitute an attack on executive or legislative actions. Neither of these cases involved suing a government or its officials in a foreign forum.¹⁷⁹

It is also interesting to note that the pending decision in *Jones* was discussed in hearings referred to in congressional debates of the 1968 Civil Rights Act.¹⁸⁰ Thus, while Congress was debating the Civil Rights Act of 1968, which included the ICRA, they may well have considered the possibility that the courts would imply a federal cause of action and federal jurisdiction for a civil rights statute that was only

168. Abolition of Diversity of Citizenship Jurisdiction, H.R. REP. NO. 95-893, at 2 (1978).

169. *Id.* at 5.

170. 392 U.S. 409 (1968).

171. *Id.* at 414.

172. *Id.* at 414 n.13.

173. 396 U.S. 229 (1969).

174. *Id.* at 238.

175. 403 U.S. 388 (1971).

176. *Id.* at 392, 395-96. "And 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

177. *Id.* at 389.

178. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968).

179. Neither did the cases focus on the distinction between providing jurisdiction in state courts and providing jurisdiction in federal courts. These cases are better examples of the typical implied cause of action ruling. See *supra* note 69.

180. *Jones*, 392 U.S. at 415 & nn.16-17, 416 & n.18.

facially declaratory. This might support an inference that Congress assumed federal jurisdiction would also be available for violations of the ICRA. However, in 1968, the ICRA portion of the Civil Rights Act may have received relatively little attention compared to the other titles of the Act, so this argument is uncertain.

The assault on judicial and executive/legislative capacity is not a trivial factor. For example, the federal courts generally have exclusive jurisdiction over claims involving torts alleged to have been committed by “any employee of the Government while acting within the scope of his office or employment,”¹⁸¹ although such cases presumably involve state rather than federal law. Similarly, federal officials and members of the armed forces can remove suits in which they are defendants to federal court.¹⁸² The Supreme Court has also held that state courts cannot grant habeas corpus relief to federal prisoners.¹⁸³ The most plausible explanation for all of these limitations on jurisdiction by state courts is the reluctance of the United States to expose itself or its employees to litigation in a “foreign forum.” This reluctance is hardly a unique concern of the federal government. States often waive their sovereign immunity from suit, but only allow suit in state court.¹⁸⁴

This combined assault on both judicial and executive/legislative capacity in *Martinez* is perhaps enough to distinguish the decisions in *Jones*, *Sullivan*, and *Bivens*, which are indeed “simply not dispositive here,”¹⁸⁵ even if Justice Marshall did a poor job of explaining why. The proper analogy for *Martinez*, rather than to these cases, would be to federal jurisdiction for violation of civil rights by *state officials*. Such remedies exist—most notably, as explicitly provided by statute. The most familiar example, 42 U.S.C. § 1983, establishes a cause of action against anyone who deprives citizens of “any rights, privileges, or immunities secured by the Constitution and laws.”¹⁸⁶

The fact that the cause of action in 42 U.S.C. § 1983 was explicitly enacted rather than implied from the Fourteenth Amendment provides a further argument in favor of the decision reached in *Martinez*. A similar point was made in dissent in one of the cases implying a federal cause of action:

A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress

181. 28 U.S.C. § 1346(b)(1) (1994 & Supp. IV 1999).

182. 28 U.S.C. §§ 1442, 1442a (1994).

183. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408–09 (1872).

184. *Sovereign Immunity: Hearing on Oversight Hearing to Provide for Indian Legal Reform Before the S. Comm. on Indian Affairs*, 105th Cong., pt. 3, 5 (1998) [hereinafter *1998 Hearing Part 3*] (statement of Thomas LeClaire, Director, Office of Tribal Justice, Department of Justice).

185. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

186. 42 U.S.C. § 1983 (1994).

desires such lawsuits, it has before it a model of valid legislation, 42 U.S.C. § 1983, to create a damage remedy against federal officers.¹⁸⁷

The invasion of state sovereignty represented by 42 U.S.C. § 1983, however, was not undertaken lightly. Neither should a comparable invasion of tribal sovereignty be undertaken without strong justification, at least part of which would depend on the extent of civil rights violations by tribal officials that are not adequately addressed by tribal courts.

C. *How Much Deterrence Is Enough?*

If state/tribal courts are already available to hear civil rights complaints, why grant jurisdiction to the federal courts as well? The most plausible justification from proponents of federal jurisdiction, it seems, rests on their assumption that the federal courts will enforce civil rights more effectively, in the process increasing deterrence and therefore compliance.¹⁸⁸ Using this as a rationale for granting federal jurisdiction, however, assumes that increased deterrence of civil rights violations by state/tribal officials is always positive. This is not necessarily the case. The optimal level of deterrence cannot be that which completely prevents *any* civil rights violations. This would be equivalent to saying that such civil rights are absolute and inviolable. But even the most important civil rights can be curtailed without violating the Constitution under the appropriate circumstances.¹⁸⁹

Professor Schuck points out that monetary liability for their official actions creates some undesirable incentives for "street-level officials."¹⁹⁰ As a result, they may be *over*-deterred; that is, enforcement

187. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 429 (1971) (Black, J., dissenting).

188. See *supra* notes 129-32 and accompanying text. It is *theoretically* possible that such proposed changes are motivated by a belief that it would allow defendants to remove cases to federal court and win there when they could not in state/tribal court—but that seems far-fetched, to say the least. The common perception is that federal courts are more, not less, protective of civil rights than other courts. See, e.g., *supra* text accompanying note 140.

189. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."). Any given application of strict scrutiny analysis may, of course, be controversial (as this one surely is), but generally the principle is not. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 356-57 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (requiring that the challenged action further a compelling government purpose and that no less restrictive alternative is available to overcome strict scrutiny analysis).

190. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 62-63 (1983).

of legitimate government functions may be less than optimal.¹⁹¹ The skewed incentives to which Professor Schuck refers are that: (1) if the officials act, the general public receives associated benefits (e.g., reduced levels of crime)¹⁹² while the officials bear associated costs (e.g., lawsuits for civil rights violations);¹⁹³ and (2) if the officials do not act, the general public bears resulting costs (e.g., increased crime levels)¹⁹⁴ while the officials generally do not incur any costs.¹⁹⁵ Several unique aspects of the work of street-level officials (as compared to private organizations) exacerbate these basic incentives by increasing the likelihood of lawsuits. For example, police interactions with individual citizens are often non-consensual and coercive¹⁹⁶ and may risk serious injury to citizens.¹⁹⁷ These officials' objectives are often subjective and difficult to measure,¹⁹⁸ and are underfunded.¹⁹⁹ The officials' actions are often discretionary rather than ministerial, but the circumstances in which they act often increase the risk of error.²⁰⁰ Finally, the individual official is often the *only* potential defendant who the injured party can sue.²⁰¹

Professor Schuck argues that officials, faced with these incentives, are likely to engage in bureaucratic tactics designed to protect their interests at the expense of the public's interests.²⁰² These tactics in-

191. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 266 (2000).

192. See SCHUCK, *supra* note 190, at 64 ("nonmarketable collective goals"). "[O]fficials cannot retain any of the benefits that flow from their decisions." *Id.* at 68. "This nonappropriability of benefits flowing from official choices is central to evaluating public tort remedies." *Id.*

193. See *id.* at 69-70.

194. See *id.* at 68.

195. Because their conduct is discretionary and difficult to monitor, "any official duty to act affirmatively is as a practical matter unenforceable;" alternatively, "their inaction may primarily harm people who are likely to remain passive or silent." *Id.*

196. *Id.* at 61.

197. *Id.* at 64.

198. *Id.* at 61.

199. See *id.* at 67.

200. *Id.* at 65-66.

201. *Id.* at 62-63 ("Because of governmental immunity rules, many victims of official error can proceed only against individual employees . . ."). The state is generally immune from suit, absent consent or congressional abrogation. See *supra* note 71. Although cities are not protected by the Eleventh Amendment, their liability for civil rights violations is generally limited. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. If the violation does result from official policy, however, the city (unlike individual officials) has no immunity at all. *Owen v. City of Independence*, 445 U.S. 622, 658 & n.18 (1980) (Powell, J., dissenting).

202. SCHUCK, *supra* note 190, at 71.

clude inaction, delay, overly formalistic behavior, and modification of their decisions, and the result of employing such means is overdeterrence and societal loss.²⁰³ Professor Schuck's analysis is not universally accepted in its entirety,²⁰⁴ but most observers believe it is accurate at least in some circumstances:

Hard data are not available, nor are they likely to become so. The best I can say is that the overdeterrence rationale for qualified immunity seems sometimes sound to me. More to the point, it seems sound to the Supreme Court. Recent decisions support a robust conception of qualified immunity, one that protects against damages liability whenever a (barely) reasonable officer could have believed his or her actions to be lawful.²⁰⁵

This overdeterrence problem should be considered when discussing the appropriate level of civil rights enforcement.

The primary response of the judicial system to these problems, in the context of actions against state and local officials under 42 U.S.C. § 1983,²⁰⁶ has been the official immunity doctrines. Although officials can be sued for injunctive or declaratory relief,²⁰⁷ actions seeking compensatory damages are generally limited. The judiciary,²⁰⁸ the legislature,²⁰⁹ and prosecutors²¹⁰ have absolute immunity for actions taken in their official capacity. Other officials (or judges, legislators, and prosecutors for actions taken other than in their official capacity) generally have qualified immunity, under which "government officials performing discretionary functions generally are shielded from liabil-

203. *Id.* at 71–77.

204. See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (noting that such analyses of incentives often rely on a market paradigm that does not accurately reflect how governments operate).

But government does not internalize costs in the same way as a private firm. Government actors respond to political incentives, not financial ones—to votes, not dollars. . . . If the goal of making government pay compensation is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse.

Id. (emphasis omitted). See generally *id.* at 361–87 (utilizing models of government behavior to analyze the deterrent effect of damages remedies).

205. Jeffries, *supra* note 191, at 269.

206. With some slight variation, the same immunity doctrines apply to suits against federal officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389, 397–98 (1971). The primary differences are that: (1) immunity for Congress is based on the Constitution rather than common law, U.S. CONST. art. I, § 6, cl. 1, and is somewhat broader than that of state legislators; and (2) the President has absolute immunity for official misconduct, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 & n.27 (1982). The presidential absolute immunity, however, does *not* extend to private conduct occurring before he takes office. See *Clinton v. Jones*, 520 U.S. 681, 694 (1997).

207. See *supra* note 71.

208. *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967).

209. See *Tenney v. Brandhove*, 341 U.S. 367, 376–77 (1951).

210. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

ity for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²¹¹ The primary rationale for immunity law is to prevent any distortion of the official’s decision-making,²¹² although arguably, immunity defenses are also appropriate in some circumstances to conserve the official’s time and energy for his official duties rather than responding to the lawsuit.²¹³

Professor Schuck’s analysis essentially concludes that neither the immunity doctrines nor shifting the cost from officials to government, through indemnification or insurance, adequately preserves the decision-making process of these officials.²¹⁴ Other suggested solutions to the overdeterrence problem include expanding the liability of government itself as an alternative to liability of officials²¹⁵ or replacing damages remedies with alternatives that create incentives based on politics rather than on market forces.²¹⁶ It may be that the appropriate solution will vary based on the type of civil rights violation involved.²¹⁷ But ultimately, some solution to the overdeterrence problem is essential—if the *remedy* is not limited, the *right* will be.²¹⁸

The result in *Martinez* is essentially a middle point on the continuum of solutions balancing deterrence and the effective functioning of government. Tribal officials who allegedly violate the ICRA cannot be sued in a federal forum,²¹⁹ thus theoretically providing them *slightly* more protection against lawsuits, assuming that comparable immunity doctrines develop, than street-level executive officials (other than prosecutors) of state and local government. On the other hand, tribal officials can still be sued in tribal court for violations of

211. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

212. *See Clinton v. Jones*, 520 U.S. 681, 692–93 (1997).

213. *Id.* at 720 (Breyer, J., concurring in judgment) (justifying immunity by either “official decision *distortion*” or “time and energy *distraction*”). This second justification is particularly appropriate to presidential immunities and may be much less so for other officials because of the President’s status as the sole individual in whom the federal executive authority is vested by the Constitution. *Id.* at 711–13.

214. *See generally* SCHUCK, *supra* note 190, ch. 4 (describing the factors that influence street-level officials).

215. *See generally id.* ch. 5 (title: “Toward Remedial Justice: Expanding the Damage Remedy Against Government”).

216. Levinson, *supra* note 204, at 417. *See generally id.* at 416–20 (illustrating situations where damages are not an effective deterrent to breaches of constitutional rights).

217. *See* Jeffries, *supra* note 191, at 263. “[T]he law of qualified immunity should be refined and rethought. It not only should differentiate damages from other remedies, but also should differentiate damages among rights. Neither the rationales for, nor the arguments against, qualified immunity apply equally to all constitutional violations.” *Id.*

218. *See id.* at 273–79. “In these cases, the Court sometimes avoids unwanted civil liability not by limiting the damages remedy, but by narrowing the underlying right. Restriction of rights therefore functions as an alternative to qualified immunity. So far as damages are concerned, the two strategies are equivalent.” *Id.* at 275.

219. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59–70 (1978).

the ICRA,²²⁰ thus providing them less protection than officials who receive absolute immunity. Such absolute immunity for judges, prosecutors, and legislators is widely accepted, despite the fact that some citizens will not be compensated for violations of their civil rights, because of the importance of protecting the decision-making of those officials. Particularly given the interest in promoting tribal self-government,²²¹ a lesser degree of immunity for tribal officials seems reasonable. Ultimately, it depends on a balancing of the societal goals supported by immunity against the cost to uncompensated victims of civil rights violations. Any such balancing, however, needs to include an evaluation of the extent of such civil rights violations that are not adequately addressed by tribal courts.

IV. EVIDENCE OF CIVIL RIGHTS VIOLATIONS

None of the general considerations seem to provide sufficient support for a decision to provide federal jurisdiction over civil rights violations by Indian tribes. When the Federalist-Nationalist debate is examined, one rationale (rarely acknowledged) for the Nationalist position actually argues *against* federal jurisdiction in these circumstances. The other two general considerations, the autonomy of subordinate sovereigns and the appropriate level of deterrence, seem to argue for a balancing test: How serious is the problem, and does it justify the drawbacks associated with granting jurisdiction to the federal courts?

With that in mind, I turn now to an examination of the available evidence. Proponents of federal jurisdiction often attempt to justify jurisdiction with evidence concerning the existence of civil rights violations by Indian tribes.²²² What is missing in their arguments, and what I try to add, is a measuring stick; that is, how serious should the problem become before federal jurisdiction is made available? Luckily, such a measuring stick exists. Congress has already faced the decision of whether to grant federal jurisdiction over civil rights violations by a subordinate sovereign in 1871, when 42 U.S.C. § 1983 was enacted. A useful comparison, therefore, would be between the relative ability and willingness to enforce civil rights of state governments in 1871 and that of tribal governments today. There are important distinctions between the states and the tribes that may limit the utility of the comparison,²²³ but it still has value.

220. *Id.* at 65.

221. *See supra* text accompanying note 73.

222. *See supra* note 8.

223. *See, e.g., Resnik, supra* note 7, at 680, 744-45.

A. *State Governments*

The federal cause of action for state violations of constitutional rights, codified at 42 U.S.C. § 1983, came from the Ku Klux Klan Act of 1871.²²⁴ The Act was passed in response to a “rising tide of violence”²²⁵ that involved “a wave of murders and assaults . . . against both blacks and Union sympathizers.”²²⁶ State governments were evidently unwilling or unable to enforce civil rights, creating the need for federal enforcement.²²⁷ This was evidently not “inability” in the same sense as for Indian tribes, which has to do with inadequacy of resources. Here, the resources were clearly sufficient in Congress’s opinion; federal laws were vigorously enforced by the states against, but not on behalf of, Union sympathizers.²²⁸ At that time, the federal government relied on state courts to enforce the Constitution and federal laws protecting all citizens,²²⁹ but such reliance was misplaced.

The debate over the Ku Klux Klan Act of 1871 (and other enforcement acts related to the Reconstruction Amendments) was acrimonious, as might be expected, with Democrats downplaying the violence and Republicans emphasizing it.²³⁰

Dixie was not the utopia which the Democrats pictured, nor, in all probability, was life, liberty, and property so insecure as the Republicans claimed. Admitting this, however, one is still left with the fact that Negroes were discriminated against at the polls and that several states were either unable or unwilling to provide protection. There was need.²³¹

There was substantial evidence of widespread violence and lynching, directed at both blacks and whites, throughout the South,²³² and Klansmen could not be convicted, regardless of the sufficiency of evidence.²³³ One state reported over 150 cases of murder, vicious beatings, and people forced to flee for their lives; similar events were taking place in most other Southern states.²³⁴ Both before and after the Act was passed, federal action, including the use of military force, was necessary to safeguard citizens and suppress the Klan.²³⁵ A Texas

224. *See* *District of Columbia v. Carter*, 409 U.S. 418, 419 n.1 (1973).

225. *Id.* at 426.

226. *Id.* at 425.

227. *Id.* at 426.

228. *CONG. GLOBE*, 42d Cong., 1st Sess., 505 (1871) (statement by Sen. Pratt).

229. *Zwickler v. Koota*, 389 U.S. 241, 245 (1967).

230. *See generally* EVERETTE SWINNEY, *SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870-74* (1987) (discussing the background, debates, and implementation of the Thirteenth, Fourteenth, and Fifteenth Amendments and related acts).

231. *Id.* at 86 (discussing the Fifteenth Amendment).

232. *E.g., id.* at 94-96, 131-33, 144-46.

233. *Id.* at 134. “[N]o Klan member had ever been convicted [in North Carolina], despite the fact that thousands of crimes had been committed.” *Id.* at 136.

234. *CONG. GLOBE*, 42d Cong., 1st Sess., 321 (1871) (statement by Rep. Stoughton).

235. *See* SWINNEY, *supra* note 230, at 189-94.

Senator argued that only the military could be trusted to enforce the Act because in some areas, law enforcement officers were participating in violations of the Act.²³⁶

Establishing federal jurisdiction for violations of constitutional rights by state officials was clearly not a casual decision but an emergency measure. Similarly, increased use of 42 U.S.C. § 1983 during the 1960s was based on widespread failure of Southern courts to protect civil rights.²³⁷

In contrast, when Congress extended the provisions of 42 U.S.C. § 1983 to actions by officials of the District of Columbia in 1979,²³⁸ the discussion focused on the theoretical inability of a District citizen to sue in federal court under § 1983.²³⁹ There was no discussion about the frequency or severity of violations of constitutional rights nor of the failure of the District government to enforce those rights.²⁴⁰ Instead, the District of Columbia supported this expansion of its liability specifically to give its citizens the same rights as citizens of other states and territories.²⁴¹ Indeed, the legislation was unopposed at the hearing by the Subcommittee on Judiciary.²⁴² In that respect, it provides a poor model for the appropriate congressional response when a subordinate government does *not* want federal enforcement against it.

B. Tribal Governments

The record is much less clear in the case of alleged violations of civil rights by tribal governments. Even before passage of the ICRA, such violations were not considered deliberate. The Senate Subcommittee on Constitutional Rights concluded that although actions by tribal governments seriously jeopardized their members' rights, violations were generally due to the tribal judiciary's inexperience and inadequate training with respect to American legal traditions and forms rather than malice on the part of tribal officials.²⁴³ The problems identified by the Subcommittee included: (1) over half of the tribal constitutions of organized tribes did not protect individual civil rights;

236. *Id.* at 77.

237. See Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 794-99 (1965).

238. Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (codified as amended at 42 U.S.C. § 1983 (1994)).

239. See H.R. REP. NO. 96-548, reprinted in 1979 U.S.C.C.A.N. 2609.

240. *Id.* In fact, the District of Columbia had been granted home rule authority only six years earlier in 1973, see *id.*, not very much time in which to have developed a history of failing to redress frequent and severe civil rights violations by the District's court system.

241. *Id.* at 3. This sounds very much like the District of Columbia's well-known concern about second-class status compared to the states rather than concern about adequate enforcement of rights.

242. *Id.*

243. 113 CONG. REC. 13,473 (1967) (statement of Sen. Ervin).

(2) tribal courts did not always provide adequate due process (primarily jury trials, appellate review, freedom from self-incrimination, and right to counsel); and (3) there were instances of abuse of council power (e.g., prohibiting the use of peyote in violation of freedom of religion and ordinances prohibiting private drunkenness).²⁴⁴

While these problems were serious, they did not necessarily require federal review of alleged violations. Of the three categories of problems, the first would be rendered moot by enactment of the ICRA, and the second could often be remedied by the habeas corpus review provided by the ICRA. The third, to the extent federal habeas corpus review was not available, would be subject to protection only by the tribal courts after *Martinez*, but other than inadequate funding and the separation of powers issue,²⁴⁵ no reasons were advanced why such protection would be inadequate. It was also true that lack of resources for law enforcement was the principal cause behind violations of civil rights.²⁴⁶ This lack of resources also influenced tribal resistance to any review of their courts' decisions by federal courts which would likely have required the tribes to expend scarce resources for more prosecutors, maintenance of detailed court records, and the implementation of formal procedures.²⁴⁷ More importantly, the violations by tribal governments were relatively minor compared to those by other governments.²⁴⁸

The tribes that testified before the Subcommittee appeared cautiously open to the proposals, with concerns primarily related to inadequate funding and submission to a foreign legal tradition.²⁴⁹ The Pueblos appear to have been the main opponent of the proposals.²⁵⁰ Some non-Indians shared these concerns. For example, during debate on the bill, Representative Aspinall expressed concerns that the Civil Rights Act was benefiting one minority (blacks) at the expense of another (Indians) and that tribal courts might be destroyed as a result of the requirements of the ICRA.²⁵¹

Indications since enactment of the ICRA have been mixed. There has been testimony of uncorrected violations of the ICRA²⁵² as well as testimony that the tribal courts have been adequately protecting

244. See Burnett, *supra* note 29, at 579–82.

245. See *supra* note 162.

246. Burnett, *supra* note 29, at 581.

247. *Id.* at 593.

248. “[I]f the volume of complaints is any guide to the seriousness of a problem, the greatest threat to the civil liberties of Indians was presented by the enforcement of state criminal laws by local authorities in communities relatively near Indian reservations.” *Id.* at 584. See *id.* at 584–87, for an extended discussion of violations by state and local authorities.

249. COMM’N REPORT, *supra* note 56, at 7–10.

250. *Id.* See also Burnett, *supra* note 29, at 601.

251. Burnett, *supra* note 29, at 613.

252. See, e.g., ICRA Hearing, *supra* note 8, at 36–44 (statements of J. Tonny Bowman, James A. Manley).

civil rights under the ICRA.²⁵³ It is clear that the Indians themselves feel that their system does an acceptable job of administering justice,²⁵⁴ if not better than that of the United States. A tribal representative claimed superiority for tribal justice by referring to one of the most famous cases in Indian law:

Before all this came about we had our own method of dealing with law-breakers and in settling disputes between members. That all changed when Crow Dog killed Spotted Tail. Of course, our method of dealing with that was Crow Dog should go take care of Spotted Tail's family, and if he didn't do that we'd banish him from the tribe. But that was considered too barbaric, and thought perhaps we should hang him like civilized people do, so they passed the Major Crimes Act that said we don't know how to handle murderers and they were going to show us.²⁵⁵

Structured studies, as opposed to anecdotal evidence, have shown that violations of civil rights by tribal governments are less serious than might be anticipated. One review of published tribal court opinions during the twenty years after *Martinez* concluded that tribal courts were as protective of civil rights as were federal courts despite the tribes' serious financial constraints.²⁵⁶ Only thirty-two tribal court cases involving the ICRA were reported from 1983 through 1996, and approximately ten federal district court ICRA cases per year nationwide have been reported in the ten years between passage of the ICRA and *Martinez*.²⁵⁷ A review of those cases shows that the tribal courts have generally done a good job. Although not all ICRA claims have won, when the conditions warranted overturning action by the tribal government, the tribal courts have not been reluctant to do so.²⁵⁸ One of the greatest fears of *Martinez* opponents, that tribal courts were not sufficiently independent of the executive and legislative functions,²⁵⁹ was contradicted by the review's finding that when tribal courts and tribal councils disagreed in interpreting and enforcing

253. See, e.g., *id.* at 24–27 (statement of Robert Laurence, Professor, School of Law, University of Arkansas); *Tribal Courts Hearing*, *supra* note 8, at 7–10 (statement of Monroe G. McKay, Judge, U.S. Circuit Court of Appeals).

254. See, e.g., *ICRA Hearing*, *supra* note 8, at 6–23 (statements of Alex Lunderman, Tribal President, Rosebud Sioux Tribe; Nelson Gorman, Speaker, Navajo Nation Tribal Council; Patrick Lee, Chief Tribal Judge, Oglala Sioux Tribe; Mark Van Norman, Tribal Attorney, Cheyenne River Sioux Tribe).

255. *Tribal Courts Hearing*, *supra* note 8, at 42 (statement of Wayne Ducheneaux, President, National Congress of American Indians). See *supra* note 32, for a description of the case to which the speaker referred.

256. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 489 (1998).

257. See *id.* at 491.

258. See generally *id.* at 492–513 (demonstrating tribal courts overturning tribal government actions when appropriate).

259. See *supra* note 162.

ing the ICRA and tribal law, the courts' position generally won.²⁶⁰ Although "tribal courts are desperately underfunded,"²⁶¹ civil rights violations by tribal governments are not a serious problem:

Persistent critics of tribal governments seem to presuppose that tribal courts are incapable or unwilling to enforce the Indian Bill of Rights without close federal supervision. The evidence suggests that efforts to strip tribes of sovereign immunity or to greatly expand federal review of tribal courts are overbroad remedies for an exaggerated problem, unfairly based on anecdote and cultural prejudice.²⁶²

Similar results are shown in data outside the tribal court system. For example, during the seven years before *Martinez*, just over eighteen percent of civil rights complaints involving Indians that were received by the Justice Department were ICRA complaints.²⁶³ Apparently, most tribal governments committed few, if any, civil rights violations.²⁶⁴ Of seventy-one complaints concerning the ICRA from 1978 through 1988, only four tribes had more than two complaints lodged against them.²⁶⁵

In recent years, congressional concerns about tribal governments and their exercise of power have focused more on the overall question of sovereign immunity rather than on whether a federal forum is available for challenging violations of the ICRA.²⁶⁶ This is, of course, an analytically distinct issue—*whether* the tribe can be sued as opposed to *where* it can be sued—and it encompasses a much broader range of causes of action.²⁶⁷ In *Martinez*, the Court analyzed the question of sovereign immunity first, answering it in the affirmative for the tribe

260. McCarthy, *supra* note 256, at 493. Of course, this observation does not *completely* address the question of whether tribal courts might be avoiding clashes with tribal councils by reaching decisions that might differ if the courts were truly independent. At most, their success in those clashes which do occur implies that they are less concerned about, and less likely to avoid, such clashes than might otherwise be assumed.

261. *Id.* at 513.

262. *Id.*

263. 135 CONG. REC. 3529 (1989) (remarks by Sen. Hatch).

264. *Id.*

265. *Id.* at 3531.

266. See, e.g., *Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong., pt. 1 (1998); *Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong., pt. 2 (1998) [hereinafter *1998 Hearing Part 2*]; *1998 Hearing Part 3*, *supra* note 184; *Tribal Sovereign Immunity: Hearing on Tribal Sovereign Immunity Before the S. Comm. on Indian Affairs*, 104th Cong. (1996) [hereinafter *1996 Hearing*].

267. It is also sometimes a misleading issue. The 1996 proposal was a "blanket waiver of tribal sovereign immunity and authoriz[ation of] actions for injunctive relief and damages, in Federal and State courts." *1996 Hearing*, *supra* note 266, at 8 (statement of Robert T. Anderson, Associate Solicitor, Division of Indian Affairs, Department of the Interior). In comparison, the federal and state governments have waived part, but not all, of their sovereign immunity. *1998 Hearing Part 2*, *supra* note 266, at 38 (statement of Susan Williams); *1998 Hearing Part 3*, *supra* note 184, at 5, 18–20

itself and in the negative for an individual officer of the tribe, before proceeding to the question of the availability of a federal forum.²⁶⁸

Because recent congressional hearings have focused on the broader issue, many of the complaints and anecdotal evidence presented have related to problems other than violations of the ICRA: commercial disputes, tribal jurisdiction over non-Indian lands within the reservation, taxation, Indian gaming, speeding tickets issued by state authorities on the basis of reports by tribal law enforcement officers, land ownership, rent increases, etc.²⁶⁹ A review of reported cases (in federal, state, and tribal courts) involving a claim of sovereign immunity showed that only 22 out of 214 cases involved alleged civil rights violations.²⁷⁰ The number involving alleged ICRA violations was even less, as the twenty-two cases identified involved not only the ICRA but also 42 U.S.C. § 1983 and similar causes of action.²⁷¹

While some anecdotal evidence points to inadequate protection of ICRA rights, the balance of evidence from more thorough reviews²⁷² supports a conclusion that violations of the ICRA by tribal officials are not a serious problem today. While additional funding and training may be appropriate, the problems that do exist today are several orders of magnitude less than those which justified establishing federal jurisdiction for violation of constitutional rights by state officials.

V. CONCLUSION

In determining whether to provide federal jurisdiction for violations of civil rights by a state or tribal government, there are two potential perspectives. Such a remedy can be considered either a normal state of affairs in today's world of a dominant federal government or an extreme remedy justified only by extreme need. If the first paradigm is the appropriate way to think about inter-government relations, it would clearly be appropriate to provide federal jurisdiction, not limited to habeas corpus, for ICRA violations. If the second paradigm is more appropriate, providing federal jurisdiction should depend on evidence of widespread and frequent violations of ICRA rights for which tribal courts do not provide adequate relief. Although any violation of civil rights is serious, under this paradigm the evidence to date seems insufficient to support federal jurisdiction.

(statements of Thomas LeClaire, Director, Office of Tribal Justice, Department of Justice; Eric Eberhard).

268. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

269. *See, e.g., 1996 Hearing, supra* note 266, at 749-868 (letters to Sen. Gorton). Actual violations of civil rights under ICRA seem few and far between.

270. *Id.* at 93-96 (testimony of Lawrence Long, Chief Deputy Attorney General, State of South Dakota).

271. *Id.*

272. *See supra* text accompanying notes 256-60, 263-65, 270.

The enactment of what came to be 42 U.S.C. § 1983 was an instance of the second paradigm, and it was clearly justified. Without such justification, it would likely not have been enacted. It is not entirely clear whether, with a *tabula rasa* and based on evidence of minimal violations of civil rights comparable to that for tribal governments, such a statute making state officials subject to suit in a foreign forum could be passed today.²⁷³ Although the experience of the District of Columbia²⁷⁴ suggests it might, that situation is atypical. The decisions by the federal and state governments to limit when and where they can be sued,²⁷⁵ which may be a better indication of how states would react to such a proposal, point instead toward the second paradigm. Based on this analysis, the most appropriate response seems to be to leave federal jurisdiction for ICRA violations where *Martinez* placed it—limited to habeas corpus. Any proposal to extend federal jurisdiction should take into account how the states would react in a comparable position and afford the tribes equal dignity.

273. This is, of course, distinct from the question whether existing remedies against state governments should be eliminated.

274. *See supra* text accompanying notes 238–42.

275. *See supra* note 267.