

## SEX DISCRIMINATION UNDER TRIBAL LAW

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## I. BACKGROUND AND INTRODUCTION

This article broadly identifies and then briefly examines tribal laws that prohibit sex discrimination and secondarily addresses laws that make sex-based distinctions. As explained below, the project is somewhat limited in scope due to the lack of widespread availability of

many tribes' laws.

Specifically, this article addresses tribal equal protection guarantees as well as all types of tribal statutory and constitutional laws that explicitly prohibit sex discrimination. It also discusses tribal case law addressing such discrimination, including case law addressing equal protection guarantees, cases interpreting tribal codes or policies, and case law creating tribal common law.

#### A. *The Indian Civil Rights Act*

Any article that attempts to comprehensively explore tribal laws that protect against discrimination based on a suspect classification has to address, in some measure, the Indian Civil Rights Act (ICRA),<sup>1</sup> the 1968 law through which Congress imposed many Bill of Rights obligations, including equal protection, on Indian tribes.<sup>2</sup> This is particularly true of tribal sex discrimination laws<sup>3</sup> because, as explained below, the Supreme Court's 1978 decision in *Santa Clara Pueblo v. Martinez*<sup>4</sup> led to a widespread, monolithic impression that tribes were not protective of the rights of women.

Although the final version of the ICRA reflects important compromises between protection of the tribal right to self-government

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1. 25 U.S.C. §§ 1301–1303 (2006). Federal courts have since held, in addition to the protections imposed under the ICRA, that some federal anti-discrimination statutes of general applicability apply to tribes, while others do not. *See, e.g.*, *Arostook Band of Micmacs v. Ryan*, 484 F.3d 41, 56 (1st Cir. 2007) (reciting the fact that tribes are specifically excluded from the definition of “employer” under Title VII of the Civil Rights Act, but holding that particular tribe to be subject to state employment laws); *San Manuel Band of Mission Indians v. Nat'l Labor Relations Bd.*, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (citing cases addressing the applicability of the Age Discrimination in Employment Act and the Americans with Disabilities Act to tribes). Aside from tribal enforcement of the ICRA, tribal enforcement of federal statutes pursuant to federal law is beyond the reach of this article. Additionally, it should be noted that *Nevada v. Hicks* has called into question tribal courts' ability to hear federal law cases other than those involving the ICRA. 533 U.S. 353, 367 (2001) (“This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts.”).

2. *See* 25 U.S.C. §§ 1301–1303.

3. I generally use the term “sex” rather than “gender” throughout this article because it refers more precisely to distinctions and discrimination based on biological sex, in other words based on being male or female. *See, e.g.*, Lara Stemple, *Male Rape & Human Rights*, 60 HASTINGS L.J. 605, 619 nn.138–39 (2009). However, as explained *infra* Part I.E, my searches of sources included the word “gender,” which is increasingly employed by legislative drafters and courts as a milder substitute for the word “sex.”

4. 436 U.S. 49 (1978).

and individual rights,<sup>5</sup> the initial motivation for the statute was a perception that tribal courts were not adequately protecting the rights of individual Indians.<sup>6</sup> Ten years after the Act was passed, in *Santa Clara Pueblo v. Martinez*,<sup>7</sup> the Supreme Court concluded that the civil rights obligations that the ICRA imposed on tribes could not be enforced via a private right of action in federal court, except through the limited remedy of habeas corpus. As explained further below, although the decision was a strong victory for tribal sovereignty, it also arguably had the unintended effect of fueling both prejudice against tribal courts and future judicial incursions on tribal sovereignty.<sup>8</sup>

*B. The Supreme Court's Decision in Santa Clara v. Martinez*

*Martinez* was a sex-based equal protection case brought under the ICRA. The plaintiff in *Martinez* was a mother whose daughters could not be enrolled in the Tribe under current tribal enrollment provisions, which allowed enrollment of children whose fathers had married outside the Tribe but not children whose mothers had married nonmembers.<sup>9</sup> The Supreme Court's decision meant that Ms. Martinez could only sue for this purported violation of the ICRA's equal protection guarantee in tribal court.<sup>10</sup>

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5. See, e.g., *id.* at 62 (“Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal ‘policy of furthering Indian self-government.’” (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))).

6. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 469–70 (1998) (“Tempered by respect for tribal sovereignty, growing concern for the civil rights of Native Americans led to enactment of the ICRA following several years of hearings by the Senate Subcommittee on Constitutional Rights. The primary sponsor of the ICRA legislation was Senator Sam Ervin of North Carolina, who had concluded that the rights of Indians were ‘seriously jeopardized by the tribal government’s administration of justice,’ which he attributed to ‘tribal judges’ inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system.”).

7. 436 U.S. 49 (1977).

8. See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1133 (2004) (stating that some scholars “have claimed . . . that the *Santa Clara* Court did tribes a disservice in the long run by finding no private right of action in the ICRA, because the non-reviewability of tribal decisions has led to the piecemeal divestment of tribal jurisdiction over non-Indians”).

9. *Martinez*, 436 U.S. at 59.

10. See *id.* at 59. The ICRA’s equal protection guarantee can be found at 25 U.S.C. § 1302(8) (2006).

*Martinez* was decided in 1978, just a few years after the U.S. Supreme Court had begun to strike down sex-based classifications under the Equal Protection Clause of the Fourteenth Amendment<sup>11</sup> and only two years after the Court had adopted the intermediate scrutiny test for sex-based classifications alleged to violate the Equal Protection Clause, which it still applies today.<sup>12</sup> The Supreme Court's official recognition that sex-based classifications are inherently suspect under the Constitution occurred about nine years after the very first federal ban on sex discrimination in 1967, which was in the form of an Executive Order.<sup>13</sup>

Although U.S. federal policy prohibiting sex discrimination was still in its early stages when *Martinez* was decided, the outcry against the *Martinez* case by mainstream feminists and other advocates of individual rights was extensive and has been well-documented.<sup>14</sup> In fact, feminist "discontent with the decision continues to fuel discourse about gender equality and whether tribal law should be force-fit into an external norm."<sup>15</sup> In contrast, proponents of the decision point to the important cultural values and traditions that the decision supports and protects.<sup>16</sup> Additionally, some Native scholars and commentators argue that sex-based oppression in tribal cultures derives from

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11. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971) (holding that an Idaho statute preferring males to administer estates violated the Fourteenth Amendment).

12. *Craig v. Boren*, 429 U.S. 190 (1976), represents the Court's first application of the intermediate scrutiny standard for sex-based classifications. *See, e.g.*, Brian Johnson, *Admitting that Women's Only Public Education is Unconstitutional and Advancing the Equality of the Sexes*, 25 T. JEFFERSON L. REV. 53, 62–63 (2002) (describing *Craig v. Boren* and other early cases). The standard was applied most recently by the Supreme Court in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

13. *See, e.g.*, Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 221 (2008) ("[O]n October 13, 1967, President Lyndon B. Johnson amended his Executive Order No. 11,246 to include the first prohibition of discrimination on the basis of sex.").

14. *See, e.g.*, Gloria Valencia-Weber, *Santa Clara Pueblo v. Martinez: Twenty-Five Years of Disparate Cultural Visions: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 14 KAN. J.L. & PUB. POL'Y 49, 50, 53–54 (2004); *see generally* Catharine A. MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo* (1983), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE & LAW* 63–69 (1987).

15. Valencia-Weber, *supra* note 14, at 53.

16. *Id.* at 54–57; *see generally* Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004) (discussing how the *Martinez* decision acknowledged a way of life which traditionally honored nurturing and feminine qualities).

Western colonial influences<sup>17</sup> and that it stems from the hierarchical nature of Western society and its valuing of all opposites as good or bad.<sup>18</sup> Indeed, it appears that, in Santa Clara society, gender was traditionally—and to some extent still is—a mutable concept.<sup>19</sup>

Rather than further exploring this dichotomy between those who bemoan the decision and those who applaud it, however, this article examines how tribal laws approach sex-based categorizations, particularly focusing on tribal prohibitions of sex discrimination.

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17. ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 18, 139 (2005) (describing Native societies in the colonial period as “more . . . egalitarian” than those of the colonizers, noting that “[i]n contrast to the deeply patriarchal nature of European societies, prior to colonization, Indian societies for the most part were not male-dominated,” and arguing that “[i]t has been through sexual violence and through the imposition of European gender relationships on Native communities that Europeans were able to colonize Native peoples in the first place”); Swentzell, *supra* note 16, at 99, 101 (suggesting that the sex-based membership provision at Santa Clara Pueblo resulted from non-Indian attorneys’ drafting the Tribe’s constitution and describing sex-based oppression generally as a concept that was foreign to the traditional Santa Clara worldview); accord Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1430 n.158, 1463 n.324 (2003) (describing how Canada’s Indian Act imposed patriarchal membership criteria on matrilineal indigenous cultures).

18. Swentzell, *supra* note 16, at 98, 101; see also SMITH, *supra* note 17, at 18 (stating that, in Indian societies prior to colonization, “[a]lthough there existed a division of labor between women and men, women’s labor and men’s labor was accorded similar status”).

19. Swentzell, *supra* note 16, at 98. As Ms. Swentzell explains:

At Santa Clara Pueblo, the social order was not traditionally either/or, not matriarchal or patriarchal. It was both. Even today, every child is born as a Winter person or a Summer person with the option to become the other if the sensibilities are of the other. To know and acknowledge both is encouraged, because ultimately, the goal is to embrace the whole . . . . It is believed that every person has feminine and masculine, warm and cold, dark and light qualities. And, living is about acknowledging the other, the opposite, and balancing those forces within us and within our human society . . . . At Santa Clara, the ideal person was and still is the *gia*. Earth, who gave the people birth is called *gia*, so is the biological woman who gives birth, and so are the community women who nurture and take care of many extended families. They give ceremonial or political advice, physical shelter and food, if needed, and housing. Most unusual is that men in the community who behave as nurturing, embracing people in the political and ceremonial realms are also called, *gias*, that is, mothers. The best way to behave in that world is as a mother . . . .

*Id.* For a discussion of another tribe’s view of gender as a mutable concept, see WILL ROSCOE, THE ZUNI MAN-WOMAN 22 (1st ed. 1991) (“While the traditional roles of men and women were well-defined, the Zunis viewed gender as an acquired rather than an inborn trait. Biological sex did not dictate the roles individuals assumed.”).

Scant scholarly attention has been devoted to analysis of tribal law,<sup>20</sup> and this lack of analysis undoubtedly contributes to federal courts' and other outsiders' misconceptions and prejudice with respect to tribal systems of governance and tribal laws.<sup>21</sup> Indeed, the outcry against *Martinez* can be understood as part of a widespread mistrust of tribal justice systems generally.<sup>22</sup>

Thus, this article attempts to begin to set the record straight about tribal laws in the specific area of sex discrimination. Tribal laws prohibiting sex discrimination (and those few tribal laws providing for sex-based distinctions) illuminate the diverse approaches that tribes take toward the concept of sex-based equal protection and sex discrimination.<sup>23</sup> Accordingly, this article undertakes a broad-based survey of tribal laws that pertain to sex-based classifications.

### C. Organization of the Article

The most important part of this article, Part II, contains the survey of tribal sex discrimination laws. The survey begins with broader laws and proceeds to more specific or narrower laws. A second, subsidiary organizing principle within this framework is the number

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20. Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law & Tribal Identity*, 56 AM. J. COMP. L. 29, 30 (2008).

21. See, e.g., McCarthy, *supra* note 6, at 468, 485–89 (examining federal Indian policy developed through acts of Congress and judicial decisions from 1960 to the present day).

22. See, e.g., Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 285–87 (1998) (describing the incorrect general mistrust of tribal justice systems by the public and the Federal Government); see also Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 106 (2006) (describing Justice Souter's concern that tribal law is "unusually difficult for an outsider to sort out" and his implicit belief that "substantive tribal law is unknown and even unknowable by outsiders") (quoting *Nevada v. Hicks*, 553 U.S. 333, 384–85 (2001) (Souter, J., concurring)); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 685–86, n.163 (2009) (describing how prejudice against tribal courts both drives and results from judicial divestment of tribal sovereignty).

23. Tribes take diverse approaches to their ICRA obligations based on tribal needs, values, customs, and traditions; accordingly, ICRA-based rights under tribal law do not necessarily mirror the corresponding protections under federal law. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Tribal Courts & the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 487 (2000). Additionally, of course, tribal guarantees of equality and tribal prohibitions on sex discrimination that are not related to the ICRA may well be interpreted differently than would similar provisions under federal law. See *id.* at 487–89.

of tribes that have enacted a given type of law. Thus, a specific type of broad law (*e.g.*, employment discrimination) that has been enacted by five tribes would be examined before another type of equally broad law that has been enacted by only one tribe (*e.g.*, public accommodations). Equal protection guarantees, the broadest type of law examined here, are addressed first.

Part II first examines equal protection guarantees and similar provisions,<sup>24</sup> paying close attention to the limited tribal court case law interpreting equal protection guarantees in the context of sex discrimination claims.<sup>25</sup> Secondly, this Part examines explicit steps tribes have taken to protect those within their jurisdictions from sex discrimination. These protections range from the Navajo Nation's broad-based protection in Title 1, section 3 of the Navajo Nation Bill of Rights,<sup>26</sup> which exceeds the protections available under existing federal law<sup>27</sup> and which has been interpreted by Navajo Courts to

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24. Many tribes include an equal protection guarantee in their constitutions. *See, e.g.*, CONSTITUTION OF THE COQUILLE INDIAN TRIBE, ART. VI, § 3(b) (11), *available at* [http://www.tribalresourcecenter.org/ccfolder1/coquille\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/coquille_const.htm); CONSTITUTION OF THE SAC & FOX NATION, ART. X, § 8, *available at* [http://www.tribalresourcecenter.org/ccfolder1/sac\\_fox\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/sac_fox_const.htm); CONSTITUTION AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, ART. VIII, *available at* [http://www.tribalresourcecenter.org/ccfolder1/sault\\_chippewa\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/sault_chippewa_constandbylaws.htm). Such constitutional guarantees may pre-date the ICRA and thus may be unrelated to it. *See* Cooter & Fikentscher, *supra* note 20, at 31 (noting that some tribal governments enacted tribal constitutions immediately after passage of the Indian Reorganization Act of 1934). At least some of these pre-ICRA constitutions included some form of an equal protection guarantee. *See, e.g.*, CONSTITUTION AND BYLAWS OF THE SWINOMISH INDIAN TRIBAL COMMUNITY, art. VII, § 2 (preserving "equal economic opportunities" for all members), *available at* [http://www.swinomish.org/departments/tribal\\_attorney/tribal\\_code/pretitle%201/constitutionbylaws.pdf](http://www.swinomish.org/departments/tribal_attorney/tribal_code/pretitle%201/constitutionbylaws.pdf). This section was included in the original constitution passed in 1935. *See id.* (documenting legislative history). Additionally, even equal protection guarantees that came into effect after the ICRA may not be related to the ICRA, and a lack of detailed legislative history often makes it impossible to tell.

25. Although the published tribal court cases construing the ICRA are by no means numerous, for example, *see* McCarthy, *supra* note 6, at 491, a few such cases are available that address sex discrimination claims. *Winnebago Tribe of Nebraska v. Bigfire*, 24 Indian L. Rptr. 6232 (Winnebago Tribal Ct. 1997), *aff'd* 25 Indian L. Rptr. 6229 (Winnebago Sup. Ct. 1998); *Griffith v. Wilkie*, 18 Indian L. Rptr. 6058 (Northern Plains Intertribal Ct. App. 1991); *see also* Rosen, *supra* note 23, at 541 (discussing the Winnebago Supreme Court's opinion in *Bigfire* as well as two earlier Winnebago equal protection cases relating to sex discrimination).

26. NAVAJO NATION BILL OF RIGHTS tit. 1, § 3 (2008) ("Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex . . .").

27. *See* Krakoff, *supra* note 8, at 1138 (discussing how the Navajo Nation has



protect both men and women,<sup>28</sup> to the more common, context-specific code protections such as section 95-13(c) of the Eastern Band of Cherokee Indians' Wages/Employment Rights Code, which provides that "[n]o covered employer shall discriminate against any employee on the basis of gender."<sup>29</sup> Tribal court case law that interprets specific code or policy provisions, or bars sex discrimination as a matter of common law, is also examined.

Part III briefly analyzes the identified tribal laws that create sex-based distinctions. Part IV looks at the impact of tribal sovereign immunity laws on the enforceability of protections against sex discrimination. Part V addresses the possibility that potential sex discrimination plaintiffs may be pursuing other avenues of relief in tribal courts and tribal agencies. Finally, Part VI concludes that a significant percentage of tribes appear to have adopted laws or policies prohibiting sex discrimination.

The goal of this survey of existing tribal protections against sex discrimination is to illuminate the positive, and often innovative, steps that tribes have taken to eliminate sex discrimination within their jurisdictions, while remaining realistic about the fact that such protections are not available in the case of every tribe.<sup>30</sup> Given the inherent difficulty of researching tribal law,<sup>31</sup> it is hoped that this article will serve as a useful starting point for practitioners, scholars, and state and federal court personnel seeking to understand tribal approaches toward sex discrimination.

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enacted laws that protect individual rights and liberties, some of which exceed the protections in the U.S. Constitution).

28. See *Help v. Silvers a.k.a. Silver Fox*, No. A-CV-01-82, ¶¶ 31-34 (Navajo May 6, 1983) (holding that the proper analysis of the Navajo Equal Rights guarantee is that there can be no legal result on account of a person's sex), available at <http://www.tribal-institute.org/opinions/1983.NANN.0000001.htm>.

29. CHEROKEE CODE art. II, § 95-13(c), available at <http://www.tribalresourcecenter.org/ccfolder/eccodetoc.htm>. These context-specific protections can be found in a wide range of subject areas where explicit protections would not typically be found under federal or state law. See, e.g., SISSETON-WAHPETON SIOUX TRIBE CODE, ch. 31, § 31-01-01, available at [http://www.njrc.org/ccfolder/sisseton\\_wahpeton\\_codeoflaw31.htm](http://www.njrc.org/ccfolder/sisseton_wahpeton_codeoflaw31.htm) (prohibiting disparate treatment of prisoners based on sex and other grounds).

30. See, e.g., Valencia-Weber, *supra* note 14, at 50, 59 (noting that the enrollment ordinance at issue in *Santa Clara Pueblo* is still in place, but explaining that the ordinance serves important tribal interests).

31. See, e.g., Cooter & Fikentscher, *supra* note 20, at 32-35 (describing the research process and the difficulty in studying various tribal codes, including the idiosyncrasies present in some tribes' recording methods).

#### D. Methodology

The sources relied on include the tribal codes, constitutions, and cases available online from the National Tribal Justice Resource Center, cases included in the Indian Law Reporter from 1983 through early 2008,<sup>32</sup> the University of Washington's 1988 microfiche compilation of tribal codes and constitutions, the decisions of the Northwest Intertribal Courts, the limited tribal law resources available on Westlaw, and, occasionally, legal resources downloaded from the websites of individual tribes and obtained from other miscellaneous sources.

Researching tribal law is inherently difficult, and it is literally impossible without visiting each tribe's reservation to ensure that one has the most recent and comprehensive set of tribal laws available from each tribe.<sup>33</sup> While tribal cases are generally more difficult to obtain than tribal codes,<sup>34</sup> which are equivalent to tribal statutory law, obtaining a complete version of either source from a given tribe is likely to be somewhat difficult because "tribal officials seldom circulate their laws outside the reservation and tribal judges seldom document their decisions in writings that outsiders can access."<sup>35</sup>

Indeed, in most cases, the particular sources I relied on did not purport to be comprehensive even as to the tribes whose laws were included. For example, the Indian Law Reporter, which exists solely in hard copy format, is the "only national reporter of tribal court decisions."<sup>36</sup> However, it does not publish all of the tribal court decisions submitted to it, typically publishing about "one hundred decisions per year that come from about twenty-five tribes."<sup>37</sup>

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32. 1983 was the first year that the Indian Law Reporter included tribal court decisions. David A. Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1254 (2006).

33. See Cooter & Fikentscher, *supra* note 20, at 32–34 (explaining the difficulty of researching tribal law).

34. See The Honorable Korey Wahwassuck, *The New Face of Tribal Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 739 (2008) ("[R]elatively few tribal courts keep records of their proceedings, and of those that do, even fewer publish those opinions in the Indian Law Reporter"); Cooter & Fikentscher, *supra* note 20, at 34–35.

35. Cooter & Fikentscher, *supra* note 20, at 31.

36. Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 275 (2002).

37. Rosen, *supra* note 23, at 510; accord Cooter & Fikentscher, *supra* note 20, at 35 (describing the Indian Law Reporter as "collect[ing] a small number of cases from

Moreover, some of the Indian Law Reporter volumes I used have missing pages, and the Indian Law Reporter also has irregular indexing over time, which made it difficult to ensure consistency.

Similarly, the 1988 microfiche compilation contains codes and constitutions from only fifty-six tribes and is not only now out-of-date, but is also incomplete even with respect to the tribes who are represented.<sup>38</sup> Additionally, visual searching of microfiche tends to be an inexact science, and my search of the microfiche was primarily limited to provisions explicitly mentioning “sex” or “gender.” Finally, the National Tribal Justice Resource Center does not guarantee that its sources are up-to-date or comprehensive with respect to the tribes that are included,<sup>39</sup> and I identified a couple of instances in which codes or constitutional provisions provided on the site were in fact not currently in place.<sup>40</sup> Thus, because of the virtual impossibility of conducting an all-inclusive survey, this article provides a snapshot of numerous tribal approaches to sex as a classification in the hopes of facilitating greater understanding of the diverse ways that tribes approach the issue of sex discrimination and the significant protections that many tribes afford against it.

The most comprehensive portion of this survey was my search of the online tribal codes and constitutions available on the National Tribal Justice Resource Center site. On that site, I examined all the hits for the following terms: “sex,” “gender,” “equal protection” (with quotes), “male,” “female,” “father,” “mother,” “sexual harassment” (with quotes), and “sexually harass” (without quotes). During the period of my searches in August 2008, the National Tribal Justice Resource Center webpage stated that it had archived on its site the codes and resolutions of 69 tribes<sup>41</sup> and the constitutions and bylaws of 116 tribes.<sup>42</sup> Despite the potential incompleteness of this

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reservations throughout the United States”).

38. Cooter & Fikentscher, *supra* note 20, at 33.

39. *See id.* (noting that online collections, such as that of the National Tribal Justice Resource Center, are not yet “close to complete” and that “[t]o gain access to a complete set of codes for a tribe, one must go to reservations and speak to officials”).

40. *See infra* notes 45 and 102.

41. *See* National Tribal Justice Resource Center, Directory of Tribal Codes and Tribal Resolutions, <http://www.ntjrc.org/triballaw/codesdirectory.asp> (last visited Aug. 18, 2008).

42. *See* National Tribal Justice Resource Center, Directory of Tribal Constitutions and By-Laws, <http://www.ntjrc.org/triballaw/constdirectory.asp> (last visited Aug. 18, 2008).

resource, the percentages of tribes that had particular types of sex discrimination laws in place are provided, usually in the footnotes to the discussions of such laws.

In fall 2008, additional tribal law resources became available on Westlaw (although still of very limited scope). Thus, in late January and in February 2009, I ran the following search in the Westlaw Tribal Cases and the Tribal Codes and Indexes databases: “sex gender ‘equal protection’ male female father mother ‘sexual harassment’ ‘sexually harass.’” During this time period, Westlaw had cases from ten tribes online as well as a somewhat overlapping database of Oklahoma tribal decisions. Additionally, it had the tribal codes of two tribes, the Navajo Nation and the Mashantucket Pequot Tribe, in its tribal codes database. In many instances, materials found through Westlaw had already been identified through earlier searches of other resources. However, any newly discovered sex discrimination materials were added to the article at that point.

## II. TRIBAL SEX DISCRIMINATION LAWS

At the outset it should be noted that whether or not a tribal code or constitution protects against sex discrimination is not determinative of whether its tribal court would recognize such a claim. Even in the absence of a code provision or constitutional provision that prohibits sex discrimination, either explicitly or implicitly, a tribal court may hold such conduct to be actionable as a matter of common law.<sup>43</sup>

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43. See, e.g., Michael Taylor, *Modern Practice in Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 239 (1986–87) (“The lack of a code provision in a specific area does not mean that the tribal court may not exercise inherent jurisdiction in that area of the law.”); see also *Bank of Hoven v. Long Family Land & Cattle Co.*, No. 03-002-A/R-120-99, slip op. at 6–9 (Cheyenne River Sioux Tribal App. Ct., Nov. 24, 2004), available at <http://turtletalk.files.wordpress.com/2007/12/tribal-coa-opinion-bank-of-hoven.pdf> (recognizing a race discrimination claim under tribal common law), *aff’d*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F. Supp. 2d 1070 (D.S.D. 2006), *aff’d*, 491 F.3d 878 (8th Cir. 2007), *rev’d on other grounds*, 128 S. Ct. 2709 (2008); *Hoopa Forest Industries v. Jordan*, 25 Indian L. Rptr. 6159, 6160 & n.1 (Hoopa Valley Tribal Ct. 1998) (reversing a tribal agency’s determination that the employer was liable for sexual harassment based upon the facts that the agency had not entered findings of fact and conclusions of law, that the agency had relied on an exhibit that was not in the record, and that the conduct at issue did not rise to the level of severity required under federal standards, which the court appeared to be using in an advisory capacity despite the statement in tribal personnel policies that only an individual harasser could be held liable for sexual harassment).

A. *Equal Protection and Related Guarantees*

Numerous tribal laws provide equal protection guarantees that, like the language in the Fourteenth Amendment of the U.S. Constitution, generally provide that the tribe “will not deny to any person within its jurisdiction the equal protection of its laws.”<sup>44</sup> Many such laws are part of tribal constitutions<sup>45</sup> while others have been enacted

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44. CONSTITUTION OF THE STANDING ROCK SIOUX TRIBE, art. XI, § 8, *microformed on Indian Tribal Codes: A Microfiche Collection of Indian Law Codes* (Ralph Johnson ed. 1988).

45. CONSTITUTION OF THE CITIZEN POTAWATOMI NATION, art. 16, § 1(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/potawatomi\\_nation\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/potawatomi_nation_const.htm); CONSTITUTION AND BYLAWS OF THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION ARIZONA AND CALIFORNIA, art. III, § 3, *microformed on Indian Tribal Codes: A Microfiche Collection of Indian Law Codes* (Ralph Johnson ed. 1988); CONSTITUTION OF THE COQUILLE INDIAN TRIBE, art. VI, § 3(b)(11), *available at* [http://www.tribalresourcecenter.org/ccfolder1/coquille\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/coquille_const.htm); CROW TRIBAL CONSTITUTION, art. XI, § 4(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/crow\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/crow_const.htm); CONSTITUTION OF THE DUCKWATER SHOSHONE TRIBE OF THE DUCKWATER RESERVATION, NEVADA, art. IV, § 2(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/duckwater\\_shoshone\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/duckwater_shoshone_const.htm); CONSTITUTION & BYLAWS OF THE ELY SHOSHONE TRIBE, art. VIII, §§ 1, 2(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/ely\\_shoshone\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/ely_shoshone_const.htm); CONSTITUTION & BY-LAWS OF THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, art. III, § 3(k), *available at* [http://www.tribalresourcecenter.org/ccfolder1/grand\\_ronde\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/grand_ronde_constandbylaws.htm); CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. X, § 1(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/grand\\_traverse\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/grand_traverse_const.htm); CONSTITUTION OF THE HO-CHUNK NATION, art. X, § 1(a)(8), *available at* [http://www.tribalresourcecenter.org/ccfolder1/hochunk\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/hochunk_const.htm); CONSTITUTION OF THE NATIVE TRIBE OF HUSLIA, ALASKA, art. 12, § 3(8), *available at* [http://www.tribalresourcecenter.org/ccfolder1/huslia\\_al\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/huslia_al_const.htm); CONSTITUTION OF THE KICKAPOO TRADITIONAL TRIBE OF TEXAS, art. X, § 2(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/kickapoo\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/kickapoo_const.htm); CONSTITUTION OF THE NATIVE TRIBE OF KOYUKUK, ALASKA, art. 11, § 3(8), *available at* [http://www.tribalresourcecenter.org/ccfolder1/koyukuk\\_al\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/koyukuk_al_const.htm); LITTLE RIVER BAND OF OTTAWA INDIANS CONSTITUTION, art. III, § 1(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/little\\_river\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/little_river_const.htm); REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE, art. XIII, *available at* [http://www.tribalresourcecenter.org/ccfolder1/chippewa\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/chippewa_constandbylaws.htm); CONSTITUTION AND BYLAWS OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, art. X, § 1(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/mississippi\\_choctaw\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/mississippi_choctaw_const.htm); CONSTITUTION OF THE SIPAYIK MEMBERS OF THE PASAMAQUODDY TRIBE, art. IV, § 1(h), *available at* [http://www.wabanaki.com/tribal\\_constitution.htm](http://www.wabanaki.com/tribal_constitution.htm); CONSTITUTION & BYLAWS OF THE ROSEBUD SIOUX TRIBE OF SOUTH DAKOTA, art. X, § 3, *available at* <http://www.tribalresourcecenter.org/ccfolder1/rosebudconst.htm>; CONSTITUTION OF THE SAC & FOX NATION, art. X, § 8, *available at* [http://www.tribalresourcecenter.org/ccfolder1/sac\\_fox\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/sac_fox_const.htm); SALISH & KOOTENAI CONSTITUTION & BYLAWS CODIFIED, app., *available at* [http://www.tribalresourcecenter.org/ccfolder1/salishandkootenai\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/salishandkootenai_constandbylaws.htm) (explicitly incorporating and setting forth the

as part of the tribal code.<sup>46</sup> Still other tribes have enacted equal

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text of the ICRA, including its equal protection guarantee); CONSTITUTION & BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, art. VIII, *available at* [http://www.tribalresourcecenter.org/ccfolder1/sault\\_chippewa\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/sault_chippewa_constandbylaws.htm); CONSTITUTION OF THE SKOKOMISH INDIAN TRIBE [AND RELATED DOCUMENTS], art. IX, *available at* [http://www.tribalresourcecenter.org/ccfolder1/skokomish\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/skokomish_const.htm); SAINT REGIS MOHAWK TRIBE CONSTITUTION, art. IV, § 1(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/saint\\_regis\\_mohawk\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/saint_regis_mohawk_const.htm); CONSTITUTION OF THE STANDING ROCK SIOUX TRIBE, art. XI, § 8 *microformed on* Indian Tribal Codes: A Microfiche Collection of Indian Law Codes (Ralph Johnson ed. 1988); CONSTITUTION OF THE TORRES MARTINEZ DESERT CAHULLA INDIANS TORRES MARTINEZ RESERVATION, CALIFORNIA, art. V, § 1(H), *available at* <http://www.tribalresourcecenter.org/ccfolder1/torresconst.htm>; CONSTITUTION & BYLAWS OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, art. XIV, § 3, *available at* <http://www.tmbci.net/PDF/Constitution.pdf> (judiciary to ensure “equal protection”); CONSTITUTION OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), art. III, § 1(d), *available at* [http://www.tribalresourcecenter.org/ccfolder1/wampanoag\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/wampanoag_const.htm); CONSTITUTION OF THE YAVAPAI-APACHE NATION, art. IX, § (h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/yavapai\\_apache\\_const.html](http://www.tribalresourcecenter.org/ccfolder1/yavapai_apache_const.html); CONSTITUTION OF THE FORT MCDOWELL YAVAPAI NATION, art. VIII, § 1(H), *available at* [http://www.tribalresourcecenter.org/ccfolder1/yavapai\\_ftmcdowell\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/yavapai_ftmcdowell_const.htm).

Thus, roughly twenty percent of the tribal constitutions available on the National Tribal Justice Resource Center site had equal protection clauses. *See supra* Part I.E. (explaining that 116 tribal constitutions and bylaws were archived on the National Tribal Justice Resource Center site during the relevant period). Note that the Turtle Mountain Band of Chippewa Indians’ constitution was available online on the National Tribal Justice Resource Center website but that another of that Tribe’s documents downloaded from the National Tribal Justice Resource Center appeared to be out-of-date, so I downloaded the constitution from the Tribe’s own website to ensure I had the most current version. *See infra* note 102. Because the Turtle Mountain Band of Chippewa Indians’ Constitution was available on the National Tribal Justice Resource Center website, I included it in the count of tribal constitutions available from that website and also included its equal protection clause in the calculation of the number of tribes having such clauses. Similarly, the Pasamaquoddy Constitution was designated a draft on the National Tribal Justice Resource Center site, so I downloaded the version from that tribe’s own website. Likewise, the Hopi Constitution on the National Tribal Justice Resource Center site has both an equal protection clause and an explicit, broad-based prohibition on sex-discrimination, CONSTITUTION OF THE HOPI TRIBE, art. IX, § 1(i), *available at* [http://www.tribalresourcecenter.org/ccfolder1/hopi\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/hopi_const.htm), but it appears to be an unapproved draft, based on information communicated by the Hopi Tribal Secretary’s Office. Personal Communication with Hopi Tribal Secretary’s Office (Oct. 1, 2008); *see also* CONSTITUTION & BY-LAWS OF THE HOPI TRIBE, art. IX, § 1 (1993), *available at* [http://hopicourts.com/index.php?option=com\\_docman&Itemid=50&group=13](http://hopicourts.com/index.php?option=com_docman&Itemid=50&group=13). Therefore, the Hopi provision from the Tribal Justice Resource Center was not counted, although the Pasamaquoddy Tribe’s Constitution was counted.

46. *See* Colville Tribal Civil Rights Act, ch.1-5, § 1-5-2(h), *available at* [http://www.tribalresourcecenter.org/ccfolder1/colville\\_lawandorder\\_CHPT1-5.html](http://www.tribalresourcecenter.org/ccfolder1/colville_lawandorder_CHPT1-5.html); CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA AND SIUSLAW INDIANS TRIBAL CODE, tit. I, ch. 1-5, § 1-5-1(g), *available at* [http://www.tribalresourcecenter.org/ccfolder1/coos\\_umpqua\\_siuslaw\\_tribalcode\\_1\\_5.htm](http://www.tribalresourcecenter.org/ccfolder1/coos_umpqua_siuslaw_tribalcode_1_5.htm); MASHANTUCKET PEQUOT TRIBAL LAWS, tit.

protection guarantees, or other guarantees of equality, that apply in specialized circumstances.<sup>47</sup> These context-specific protections may be in addition to general equal protection guarantees<sup>48</sup> or they may stand alone.<sup>49</sup> Finally, some tribes have expressly adopted the

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XX, ch. 1, § 1(a)(8), *available at* <http://www.tribalresourcecenter.org/ccfolder/masht20.htm>; STATUTES OF THE NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS, BAND STATUTE 1011-MCL-5, § 8; SISSETON, S.D., ORDINANCE No.79-02 (1979), *available at* [http://www.tribalresourcecenter.org/ccfolder1/sisseton\\_wahpeton\\_codeoflaw20.htm](http://www.tribalresourcecenter.org/ccfolder1/sisseton_wahpeton_codeoflaw20.htm) (stating that judiciary of the tribe is to provide “equal protection and justice” pursuant to the Indian Civil Rights Act).

47. *See, e.g.*, CONSTITUTION AND BYLAWS OF THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION ARIZONA AND CALIFORNIA, art. III, § 3, *microformed on* Indian Tribal Codes: A Microfiche Collection of Indian Law Codes (Ralph Johnson ed. 1988) (providing for “equal political rights and equal opportunity to participate in the economic resources and activities of the tribes” in addition to equal protection); NISQUALLY TRIBAL CODE, tit. 38, § 38-01-03, *available at* <http://www.tribalresourcecenter.org/ccfolder1/nisqcode38.htm> (“no person shall be denied the equal protection of the terms of” the sub-chapter pertaining to tobacco revenue taxation); CONFEDERATED TRIBES OF THE SILETZ INDIANS, OR., STANDING COMMITTEE ORDINANCE 84-06, § 4 (1999), *available at* <http://www.tribalresourcecenter.org/ccfolder1/silcode6standcommord.htm> (“Committee Members may also be removed for cause following a hearing before the Tribal Council, which provides applicable standards of due process and equal protection.”); *id.* § 12 (“The Tribal Chairman shall attempt to ensure that all members of the Siletz Tribe have an equal opportunity to serve on committees . . . .”); CONSTITUTION OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), art. III, § 3(b), *available at* [http://www.tribalresourcecenter.org/ccfolder1/wampanoag\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/wampanoag_const.htm) (requiring the Tribal Council to “[e]nsure that tribal members have free access to the clay in the cliffs on an equal basis provided that such access is subject to reasonable regulation in order to protect and preserve the resource”).

Some of the guarantees that are phrased somewhat differently than an ordinary “equal protection” guarantee may in fact be just as broad as the concept of equal protection. *See, e.g.*, CONSTITUTION & BY-LAWS OF THE HOPI TRIBE, art. IX, § 1 (1993), *available at* [http://hopicourts.com/index.php?option=com\\_docman&Itemid=50&group=13](http://hopicourts.com/index.php?option=com_docman&Itemid=50&group=13) (providing for “[a]ll resident members of the Tribe [to] . . . be given equal opportunities to share in the economic resources and activities of the jurisdiction”).

48. *See, e.g.*, STANDING ROCK SIOUX CODE OF JUSTICE, tit. XVIII, ch. 1, § 18-102(c) (“compensation for work will be based on the principles of equal pay for equal work.”), *microformed on* Indian Tribal Codes: A Microfiche Collection of Indian Law Codes (Ralph Johnson ed. 1988); *see also* CONSTITUTION OF THE STANDING ROCK SIOUX TRIBE, art. XI, § 8, *microformed on* Indian Tribal Codes: A Microfiche Collection of Indian Law Codes (Ralph Johnson ed. 1988) (providing general Equal Protection guarantee).

49. For example, nothing in the Nisqually Tribe’s constitution or code, assuming the complete version is available on the National Tribal Justice Resource Center website, appears to provide for “equal protection” except for the provision relating to tobacco revenue taxation. NISQUALLY TRIBAL CODE, tit. 38, § 38-01-03, *available at* <http://www.tribalresourcecenter.org/ccfolder1/nisqcode38.htm> (“no person shall be denied the equal protection of the terms of” the sub-chapter pertaining to tobacco

provisions of the ICRA as a matter of tribal law, and, to the extent any of these tribes lack separate equal protection guarantees, they should be viewed to have such guarantees in place, based on the terms of the ICRA.<sup>50</sup>

Without tribal court case law on point, however, it is difficult to know how a particular tribe would apply such equal protection guarantees in the context of a sex discrimination claim and whether, even if the tribal court followed the federal model of differing levels of scrutiny for different types of classifications, it would apply heightened scrutiny to a sex-based classification.<sup>51</sup> This is because

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revenue taxation). However, the Tribe's constitution does provide for "[a]ll members of the Tribe . . . [to] be accorded equal opportunities to participate in the economic resources and activities of the Tribe." CONSTITUTION AND BYLAWS OF THE NISQUALLY TRIBE OF THE NISQUALLY INDIAN RESERVATION, art. VII, § 2, *available at* <http://www.ntjrc.org/ccfolder/nisqconst.htm>.

50. *See, e.g.*, CONSTITUTION OF THE COQUILLE INDIAN TRIBE, art. VI, § 3(b)(11), *available at* [http://www.tribalresourcecenter.org/ccfolder1/coquille\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/coquille_const.htm) ("The Tribal Council and other officials of the Tribe shall not deny to any person the equal protection of tribal laws . . . . The Tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968."); CONSTITUTION & BY-LAWS OF THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, art. III, §3(k), *available at* [http://www.tribalresourcecenter.org/ccfolder1/grand\\_ronde\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/grand_ronde_constandbylaws.htm) ("The Tribal Council shall not deny to any person the equal protection of tribal laws . . . . The Tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968."); SAN ILDEFONSO PUEBLO CODE, tit. XVIII, ch. 57, § 57-3, *available at* <http://www.narf.org/nill/Codes/sicode/sanildcodet18consumer.htm#chapter57> ("Any person who has probable cause to believe that his or her civil rights guaranteed by the Indian Civil Rights Act of April 11, 1968, PL 90-284 (82 Stat. 77) or by the traditions and customs of the Pueblo, [sic] may file a complaint with the Tribal Court pursuant to the Rules of Civil Procedure set forth in this Code."); SALISH & KOOTENAI CONSTITUTION & BYLAWS CODIFIED, APPENDIX, *available at* [http://www.tribalresourcecenter.org/ccfolder1/salishandkootenai\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/salishandkootenai_constandbylaws.htm) (explicitly incorporating and setting forth the text of the ICRA, including its equal protection guarantee); CONSTITUTION OF THE SKOKOMISH INDIAN TRIBE [AND RELATED DOCUMENTS], art. IX, *available at* [http://www.tribalresourcecenter.org/ccfolder1/skokomish\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/skokomish_const.htm) ("The tribal government shall not deny to any person the equal protection of tribal laws . . . . The tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968."); CONSTITUTION & BYLAWS OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, art. XIV, § 3, *available at* <http://www.tmbci.net/PDF/Constitution.pdf> (judiciary to ensure "equal protection" and "protection of rights arising under the Indian Civil Rights Act of 1968, as amended").

51. *See, e.g.*, Rosen, *supra* note 23, at 487–88, 511; Taylor, *supra* note 43, at 255–57 (suggesting that this potential for diverse interpretations of rights based on tribal cultural norms furthers tribal sovereignty and allows individual tribal cultures to flourish and that forced standardization of rights would threaten the viability of tribal cultures as unique institutions); Matthew L.M. Fletcher, *Tribal Employment Separation:*



tribal “needs, values, customs, and traditions” play an important role in tribal interpretation of civil rights guarantees,<sup>52</sup> regardless of whether a litigant is proceeding under tribal law or the ICRA.<sup>53</sup> Therefore, especially with regard to a facially sex-neutral guarantee like “equal protection,” tribal court case law, where available, is an enormously important resource.<sup>54</sup>

For most of the tribal laws cited above, I was unable to locate tribal court case law construing the equal protection guarantee in the context of a sex discrimination case. However, the Northern Plains Intertribal Court of Appeals has considered the scope of the ICRA’s equal protection guarantee in the context of a custody dispute, and that court invalidated a family law provision of the Turtle Mountain

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*Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 MICH. J.L. REFORM 273, 273–74 (2005) (“External rules and interpretations . . . would destroy the unique traditional, cultural and community attributes of tribal communities . . . [and] would destroy the diversity that exists among the many tribal communities themselves. The essence of sovereignty is the right of the people of a nation to decide what their body of jurisprudence shall be.”) (citations and internal quotation marks omitted); *see also* Krakoff, *supra* note 8, at 1153 (describing Navajo officials’ view that “sovereignty and [the] survival of the Navajo people” are linked and quoting Navajo Nation Legislative Counsel Raymond Etcitty’s complaint that tribes are not looked upon as “laboratories of democracy”).

52. Rosen, *supra* note 23, at 487; *see also* Colville Confederated Tribes v. Bearcub, 35 Indian L. Rptr. 6011, 6012 (Confederated Tribes of the Colville Tribal Ct. 2005) (explaining tribe’s right to interpret free speech rights differently under the ICRA than a federal court would under the U.S. Constitution).

53. Rosen, *supra* note 23, at 511; Taylor, *supra* note 43, at 239, 255–56; *see also* Winnebago Tribe of Nebraska v. Bigfire, 25 Indian L. Rptr. 6229, 6230 (Winnebago Sup. Ct. 1998); *accord* Winnebago Tribe of Nebraska v. Bigfire, 24 Indian L. Rptr. 6232, 6235–36 (Winnebago Tribal Ct. 1997), *aff’d* 25 Indian L. Rptr. 6229 (Winnebago Sup. Ct. 1998); Fletcher, *supra* note 51, at 273–74. However, the Winnebago Supreme Court in *Bigfire* suggested that its analysis of equal protection might be somewhat different under the ICRA than under the tribal constitution. *Bigfire*, 25 Indian L. Rptr. at 6230, 6233.

54. Although some scholars have suggested that tribal courts are much less likely to follow precedent than American courts, Cooter & Fikentscher, *supra* note 20, at 59, my limited experience practicing before tribal courts in the Northwestern United States suggests that precedent from the particular tribal court deciding a case, where available, is immensely important and that tribal courts often look to opinions from other tribes as persuasive authority. *See also* Taylor, *supra* note 43, at 240 (“Tribal courts will generally follow their own precedents and give considerable weight to the decisions of other Indian courts.”); *accord* Nevayaktewa v. Hopi Tribe, 1998.NAHT.0000003, Nos. 97CR000931 and 97CR000932 ¶¶ 31–32 (App. Ct. of the Hopi Tribe, Mar. 20, 1998), *available at* <http://www.tribalresourcecenter.org/opinions/opfolder/1998.NAHT.0000003.htm> (considering whether defendants’ allegations meet the requirements of an equal protection test created by Burns Pauite Court of Appeals).

Tribal Code that severely limited the rights of an unmarried father.<sup>55</sup> By contrast, the Winnebago Tribal Court upheld a sex-neutral tribal criminal prohibition on sexual intercourse with an unemancipated minor against an as-applied challenge that was based on the equal protection guarantee in the tribal constitution, and its decision was affirmed by the Winnebago Supreme Court.<sup>56</sup> The Tribal Court of the Grand Traverse Band of Ottawa and Chippewa Indians took somewhat of a middle ground, rejecting a former employee's equal protection claim based on the court's conclusion that the female plaintiff was not similarly situated to a male who had not been discharged three years before.<sup>57</sup> Finally, the Mashantucket Pequot Tribal Court has suggested that sex discrimination is covered by its statutory equal protection clause, although it does not appear that a litigant has yet brought a successful sex discrimination claim under the clause.<sup>58</sup>

*1. The Northern Plains Intertribal Court of Appeals' Decision Regarding the Application of ICRA's Equal Protection Guarantee in the Context of the Turtle Mountain Band of Chippewa Indians' Law*

In *Griffith v. Wilkie*, the Northern Plains Intertribal Court of Ap-

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55. *Griffith v. Wilkie*, 18 Indian L. Rptr. 6058, 6059 (Northern Plains Intertribal Ct. App. 1991).

56. *Bigfire*, 24 Indian L. Rptr. 6232 (Winnebago Tribal Ct. 1997), *aff'd* 25 Indian L. Rptr. 6229 (Winnebago Sup. Ct. 1998). The Winnebago Tribal Court also decided three other cases dealing with similar issues, two of which were ultimately consolidated on appeal with *Bigfire*. *Winnebago Tribe of Neb. v. Frazier*, 25 Indian L. Rptr. 6021 (Winnebago Tribal Ct. 1997); *Winnebago Tribe of Neb. v. Levering*, 25 Indian L. Rptr. 6022 (Winnebago Tribal Ct. 1997); *Winnebago Tribe of Neb. v. Whitewater*, 25 Indian L. Rptr. 6022 (Winnebago Tribal Ct. 1997); *see also Bigfire*, 25 Indian L. Rptr. at 6229; Rosen, *supra* note 23, at 541.

57. *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, Case No. 95-067-048-CV (Tribal Ct. of the Grand Traverse Band of Ottawa & Chippewa Indians, July 20, 2001), slip op. at 3-4.

58. *Barnes v. Mashantucket Pequot Tribal Nation*, 4 Mashantucket Rptr. 477, 485, 2007 WL 2728330 (Mashantucket Pequot Tribal Ct. 2007) (rejecting the plaintiff's argument, under the statutory equal protection clause, "that the Gaming Enterprise treats African American men differently than African American women" because the witness' testimony did not support the claim, and concluding that plaintiff therefore "failed to make a *prima facie* showing of gender discrimination"); *see also Sawyer v. Mashantucket Pequot Tribal Nation*, 3 Mashantucket Rptr. 413, 2001 WL 36037904 (Mashantucket Pequot Tribal Ct., Nov. 27, 2001) (granting dismissal of plaintiff's claims for sex discrimination in employment because the claims accrued before passage of the law containing the equal protection guarantee and the law was not intended to be retroactive).

peals examined a provision of the Turtle Mountain Tribal Code that granted the “custody, services, and earnings” of an illegitimate child to the mother.<sup>59</sup> The court had ordered, and considered supplemental briefing, on the issue of “the constitutionality” of the provision.<sup>60</sup> Without providing the details of its analysis on the issue, the court concluded that, “in situations where paternity is established or acknowledged,” the provision “denie[s the father] equal protection of the law” and therefore violates 25 U.S.C. § 1302(8).<sup>61</sup> It thus remanded the case to the trial court to determine the best interests of the child.<sup>62</sup>

Although *Griffith* appears to be a strong affirmation of the concept of equal protection as construed in American culture, it is important to recognize the harshness of the law at issue, which accorded the mother of an illegitimate child custody as a matter of law. Given the severity of the law, the case does not necessarily shed light on how the court would respond to a less drastic incursion on the unmarried father’s rights, such as a presumption in favor of maternal custody. Moreover, perhaps also due to the harshness of the law, the court is not explicit about its methodology for evaluating equal protection questions. Thus, these issues will most likely have to await a more difficult case for definitive resolution.

## 2. *The Winnebago Courts’ Construal of the Equal Protection Guarantee in the Tribal Constitution*

This subsection examines the trial court’s decision in *Bigfire* and that of the Winnebago Supreme Court. The Winnebago courts’ decisions do not entirely reject traditional federal analysis and, in fact, incorporate some federal concepts like the requirement that a plaintiff show she was similarly situated to someone not in the protected class who was treated more favorably and also the concept of differing levels of scrutiny. Nonetheless, the decisions reveal considerable discomfort with, and resistance to, the federal approach, at least in the context of a claim based on the tribal constitution.

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59. *Griffith*, 18 Indian L. Rptr. at 6059.

60. *Id.*

61. *Id.*

62. *Id.* at 6059–60.

a. *The Trial Court's Decision Upholding the Law*

In *Bigfire*, the Winnebago Tribal Court upheld a facially neutral statutory rape law against the defendant's allegation that prosecuting only the male under such a law violated the equal protection provision of the Tribe's constitution.<sup>63</sup> The trial court appeared dismissive of federal law, even as persuasive authority, and skeptical both of whether the federal three-tiered approach to equal protection analysis based on the type of classification at issue would serve the interests of the Winnebago Tribal Court and of whether intermediate scrutiny would be an appropriate standard for sex-based classifications.<sup>64</sup> Additionally, because the parties had not provided any information on traditional tribal approaches to rape, the court solicited its own expert information on the matter, and set forth in the opinion the substance of that information, which detailed violent disfigurement as a punishment for a wife's unfaithfulness and the punishment of death for a man's rape of a female aged thirteen or above.<sup>65</sup>

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63. *Winnebago Tribe of Nebraska v. Bigfire*, 24 Indian L. Rptr. 6232, 6236, 6239 (Winnebago Tribal Ct. 1997), *aff'd* 25 Indian L. Rptr. 6229 (Winnebago Sup. Ct. 1998). Other tribal court decisions had gone the other way but were either overruled or reversed by the tribal supreme court. *See* *Winnebago Tribe of Nebraska v. Frazier*, 25 Indian L. Rptr. 6021 (Winnebago Tribal Ct. 1997); *Winnebago Tribe of Nebraska v. Levering*, 25 Indian L. Rptr. 6022 (Winnebago Tribal Ct. 1997); *Winnebago Tribe of Nebraska v. Whitewater*, 25 Indian L. Rptr. 6022 (Winnebago Tribal Ct. 1997); *see also Bigfire*, 25 Indian L. Rptr. at 6229; Rosen, *supra* note 23, at 541.

64. *Bigfire*, 24 Indian L. Rptr. at 6238–39. This somewhat dismissive attitude toward federal law does not appear to be typical of tribal courts, most of which, in the absence of precedent from their own courts, appear to seriously consider both the parameters of the right at issue under federal law and whether it is appropriate to follow federal law in construing the right. *See, e.g., Nevayaktewa v. Hopi Tribe*, 1998.NAHT.0000003, Nos. 97CR000931 and 97CR000932 ¶¶ 28–32 (App. Ct. of the Hopi Tribe, March 20, 1998), *available at* <http://www.tribalresourcecenter.org/opinions/opfolder/1998.NAHT.0000003.htm>. Indeed, Matthew Fletcher has studied ICRA cases and determined that there is a high probability that a tribal court will use federal and state law as persuasive authority when construing the ICRA, especially in cases involving nonmembers. Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data* 16, 20 (MSU Legal Studies Research Paper, No. 06-05, 2008), *available at* <http://ssrn.com/abstract=1103474>.

65. *Bigfire*, 24 Indian L. Rptr. at 6239. Such harsh traditional punishments are also part of the historical fabric of Western culture. *See, e.g., SMITH, supra* note 17, at 18 (explaining that “because English women were not allowed to express political opinions, a woman who spoke out against taxation in 1664 was condemned to having her tongue nailed to a tree near a highway, with a paper fastened to her back detailing her offense”); *see also* A COLLECTION OF ALL THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 339–40 (1733) (providing that “where any such Negro, Mullatto, or Indian, shall, upon due Proof made . . . be found to have given a

In rejecting the defendant's challenge to the law, the trial court did not officially reject intermediate scrutiny or rely on the traditional punishments.<sup>66</sup> Rather, having determined that it was premature to make decisions on those issues, the trial court rejected the defendant's arguments because it determined, in essence, that he was not similarly situated to the female victim.<sup>67</sup> The court referred to the "ample evidence that force or coercion was present," the fact that the statute was facially neutral or "benign," the fact that the defendant had failed to provide evidence that the law was being applied in a discriminatory fashion, and finally, possibly based on the evidence of force or coercion, the fact that "consent was not an issue" in this case.<sup>68</sup> Thus, in rejecting the defendant's challenge, the trial court concluded that "there seems to be little gained and huge detriments both psychologically and in law enforcement in charging victims of violent sexual assault with criminal sanctions."<sup>69</sup> Most likely, the fact that the victim was twelve at the time of the attack while the perpetrator was seventeen-and-a-half also played a part in the court's decision.<sup>70</sup>

*b. The Winnebago Supreme Court's Decision*

This opinion was later affirmed by the Winnebago Supreme Court. In that case, the court heard two consolidated appeals, that of Mr. Bigfire and that of C.L., a fifteen-year-old male, who was charged with second-degree sexual assault (*i.e.*, statutory rape) of a thirteen-year-old girl; a third appeal had been dismissed on double jeopardy grounds.<sup>71</sup> The Winnebago Supreme Court adopted a strict scrutiny test for sex but determined that the compelling tribal interest

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false Testimony, every such offender shall, without further Trial, be ordered by the said Court to have one Ear nailed to the Pillory, and there to stand for the Space of one Hour, and then the said Ear to be cut off; and thereafter, the other Ear nailed in like Manner, and cut off, at the expiration of one other Hour; and moreover, to order every such Offender Thirty-Nine Lashes, well laid on, on his or her bare Back, at the common Whipping-Post"). However, it is somewhat surprising and even disturbing, at least from a Western perspective, to see such harsh punishments explicitly set forth as a possible source of authority for a current decision.

66. *Bigfire*, 24 Indian L. Rptr. at 6238–39.

67. *Id.* at 6239.

68. *Id.*

69. *Id.*

70. *Id.* at 6233.

71. *Winnebago Tribe of Nebraska v. Bigfire*, 25 Indian L. Rptr. 6229, 6229 (Winnebago Sup. Ct. 1998).

requirement was satisfied in the case because traditional cultural differentiations based on sex always constitute a compelling tribal interest.<sup>72</sup> The court considered “whether the use of different roles based on gender, particularly in areas of sex and procreation, is of a similar discriminatory and patriarchal nature [as in Anglo culture] when employed within the Winnebago Tribe.”<sup>73</sup> The court concluded that, “[i]n Ho-Chunk [or Winnebago] culture . . . gender differences or disparities in treatment do not signal hierarchy, lack of respect or invidious discrimination,” and therefore, held that “it is not accurate to attribute archaic stereotypes of the Anglo-American culture to the Winnebago Tribe’s culture.”<sup>74</sup> This conclusion was supported in part by the statement of one of the judges deciding the case, a woman who was a member of a related tribe; she explained that she had “no . . . feeling of inequality . . .” as a result of tribal differentiations in sex roles.<sup>75</sup>

The Winnebago Supreme Court’s decision has been considered troubling to some scholars because of the court’s indication that culture would always trump the guarantee of equal protection.<sup>76</sup> However, the court also emphasized the age differences between the perpetrators and the victims in the cases and the fact that there were only three prosecutions, a number that was too small, in the court’s view, to demonstrate a pattern of sex discrimination.<sup>77</sup> Furthermore, the court appeared to place importance on the fact that it was not construing the ICRA but rather the tribal constitution.<sup>78</sup> Additionally, the court recognized that the result in the case, namely the Winnebago Supreme Court’s decision to uphold this sex-neutral statutory rape law against a selective enforcement challenge, is not at variance with federal law, given that the U.S. Supreme Court has upheld a sex-based statutory rape law based on its conclusion that young women and men are not similarly situated with respect to pregnancy.<sup>79</sup> Also, reading

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72. *Id.* at 6231; Rosen, *supra* note 23, at 541–44 (citing *Bigfire*, 25 Indian L. Rptr. at 6229). This was not a traditional federal-style strict scrutiny analysis because the court did not look at whether the governmental action was narrowly tailored to the compelling tribal interest. *See, e.g.*, *Fed. Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 464–65 (2007).

73. *Bigfire*, 25 Indian L. Rptr. at 6232.

74. *Id.*

75. *Id.* at 6233.

76. Rosen, *supra* note 23, at 543–44.

77. *Bigfire*, 25 Indian L. Rptr. at 6231.

78. *Id.* at 6230, 6233.

79. *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464, 467 (1981); *Bigfire*,

the lower court opinion in *Bigfire* demonstrates the weakness of the defendant's equal protection challenge considering the circumstances of the case and the injustice that would evidently occur if the crime of forcible rape of a twelve-year-old girl were to go unpunished.<sup>80</sup> Finally, the Winnebago Supreme Court indicated that, if sex-based prosecutions continued, it might begin to strike them down as violative of the sex-neutral statute; thus, it saw the statute as overriding, at least to some extent, traditional tribal customs.<sup>81</sup>

In both the Winnebago Supreme Court's discussion of the fact that it was construing the tribal constitution rather than the ICRA and its intimation that it might hold that future prosecutions, if shown to be sex-based, violate the sex-neutral statute, the court evidenced a desire to protect the uniqueness of Winnebago law, especially as embodied in the tribal constitution, from being subsumed by federal law.<sup>82</sup> For instance, in the discussion preceding its conclusion that the "Ho-Chunk tradition and customary law certainly was not rendered illegal by the Tribe's own constitution,"<sup>83</sup> the court explained:

Since the legal concept of equal protection . . . is an Anglo-American legal concept, this Court must look in part to the current American legal tradition . . . . But this analysis must stop short of simply applying another standard to a different cultural system with a unique legal tradition without adjustments for or taking any account of that which is unique in that system.<sup>84</sup>

The court also noted that the sex-neutral statutory rape statute showed that the "Tribal Council plainly adopted a current tribal policy of furthering gender neutrality in this area as much as possible,"<sup>85</sup> and it distinguished this current tribal policy from the more

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25 Indian L. Rptr. at 6233.

80. See generally *Winnebago Tribe of Nebraska v. Bigfire*, 24 Indian L. Rptr. 6232, 6236, 6239 (Winnebago Tribal Ct. 1997), *aff'd* 25 Indian L. Rptr. 6229 (Winnebago Sup. Ct. 1998). Although the defendant objected on appeal to the trial court's conclusion that force or coercion had been at play, the evidence of force to which the lower court alluded may still have had an emotional effect on the appellate judges. *Bigfire*, 25 Indian L. Rptr. at 6229. Note that the trial court did not hear the substantive issues in the case involving the other defendant, C.L., because his pre-trial motion to dismiss had been granted. *Id.* A third defendant had been acquitted after trial, so retrial was barred by double jeopardy. *Id.* at 6229, 6234.

81. *Bigfire*, 25 Indian L. Rptr. at 6233-34.

82. *Id.* at 6233-34.

83. *Id.* at 6233.

84. *Id.*

85. *Id.*

permanent equal protection guarantee of the tribal constitution, which, in the court's view, did not mandate treating both sexes the same.<sup>86</sup> Thus, the Winnebago Supreme Court's decision in *Bigfire* should be read in part as an attempt to preserve the uniqueness of tribal custom and tradition against the threat of wholesale incorporation of federal ideas. At the same time, however, the court showed that it was willing to enforce federal legal constructs such as gender neutrality if it could be demonstrated both that they had been adopted as law by the Tribal Council and that they were being violated by the tribal prosecutor. Thus, it could be said that the Winnebago Supreme Court in *Bigfire* simply adopted a presumption against construing tribal constitutional provisions identically to the way similar provisions would be interpreted in a federal court but that, outside of the context of the tribal constitution, for example in construing the ICRA or a law adopted by the Tribal Council, the court may well be more open to federal analysis.

### 3. *The Decision of the Tribal Court in Koon v. Grand Traverse Band of Ottawa and Chippewa Indians*

In *Koon*, a tribal conservation officer who had been dismissed from employment after she was convicted of drunk driving brought suit alleging violation of the tribal constitution's equal protection guarantee.<sup>87</sup> The basis of her claim was that a male employee was not dismissed for a similar incident three years before.<sup>88</sup> The court, however, accepted the defendant's argument that the plaintiff was not similarly situated to this male employee because, although both plaintiff's job and that of the male employee involved driving, it had become much more difficult to insure those convicted of drunk driving in the intervening three years.<sup>89</sup> Thus the *Koon* court applied the federal requirement that a plaintiff show that she is similarly

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86. *Id.* at 6234.

87. *See generally* *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, Case No. 95-067-048-CV (Tribal Ct. of the Grand Traverse Band of Ottawa & Chippewa Indians, July 20, 2001); *see also* *Koon v. Grand Traverse of Ottawa & Chippewa Indians*, Case No. 95-067-048-CV (Tribal Ct. of the Grand Traverse Band of Ottawa & Chippewa Indians, Aug. 31, 1996) (stating that the court understands plaintiff's equal protection claim to be grounded in the tribal constitution).

88. *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-067-048-CV, slip op. at 3-4 (Tribal Ct. of the Grand Traverse Band of Ottawa & Chippewa Indians, July 20, 2001).

89. *Id.* slip op. at 4.



situated to a male employee who was treated more favorably before she can win a sex-based equal protection case.<sup>90</sup>

#### 4. *Summary of Tribal Equal Protection Cases*

The limited available tribal case law on sex-based equal protection demonstrates that tribes take different approaches to construing equal protection guarantees in the context of a charge of sex discrimination. Some tribes, such as Turtle Mountain and Grand Traverse, appear to undertake an equal protection analysis that is more similar to the federal approach to the question, while other tribes, such as Winnebago, will be more likely to reject sex discrimination claims that implicitly challenge traditional tribal gender roles. Given the legacy of colonialism and the fact that tribes have had to strive to maintain their separate existence against numerous federal policies that were designed to assimilate them,<sup>91</sup> it is not surprising to see at least some tribes forging definitions of equal protection that differ from federal definitions. It is perhaps more surprising that some tribes appear to accept the federal framework as is.<sup>92</sup> Regardless of whether one sees it as advantageous for tribes to adopt discrimination laws that are similar to federal laws or hopes that tribes will adopt unique frameworks of discrimination law, it is clear that even this small number of cases demonstrates that tribes do take diverse approaches to the issue of sex discrimination and that the tribes whose laws were examined here view equal protection guarantees as protecting individuals from sex discrimination.

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90. *Id.*; see also Matthew L.M. Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Band of Ottawa & Chippewa Indians*, 7 TRIBAL L. J. § 6.02 & n.117 (2006-07) (describing *Koon* as requiring a female employee to show that she is similarly situated to a male who was treated more favorably).

91. See, e.g., ANDERSON ET AL., AMERICAN INDIAN LAW: CASES & COMMENTARY 103–04, 139–42 (2008) (describing federal assimilationist policies such as allotment and termination).

92. See, e.g., Fletcher, *supra* note 51, at 273, 279 (stating that, “[o]verall, any solution that rejects the dominant culture’s model and accommodates the particular needs of Tribal communities would be an improvement” over wholesale incorporation of the federal conception of due process and that “[t]he central premise of this Article is that Euro-American law and jurisprudence is uniquely unsuited to Indian Tribes and Tribal Courts”).

*B. Tribal Constitutions Explicitly Incorporating U.S. Constitutional Rights*

In addition to the tribal statutes and constitutions providing general guarantees of equal protection, several tribal constitutions were identified that explicitly incorporate federal constitutional rights.<sup>93</sup> For example, the Minnesota Chippewa Tribe's Constitution provides that "no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States."<sup>94</sup> In contrast to a general equal protection guarantee under the applicable tribal constitution or under the ICRA, which may, as discussed above, be subject to diverse interpretations in the context of a sex-based classification, tribal courts construing tribal constitutional provisions that explicitly incorporate federal constitutional rights appear to be likely to treat sex-based classifications similarly to federal courts construing the U.S. Constitution and therefore will most likely view such classifications as inherently suspect and subject to intermediate scrutiny.<sup>95</sup> It is possible that these provisions are common, and they

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93. See, e.g., CONSTITUTION AND BYLAWS OF THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION ARIZONA AND CALIFORNIA art. III, § 3, *microformed on* Indian Tribal Codes: A Microfiche Collection of Indian Law Codes (Ralph Johnson ed. 1988) ("All rights secured to the citizens of the United States of America by the Federal or State Constitutions shall not be impaired or abridged by this constitution and bylaws."); CONSTITUTION AND BYLAWS OF THE LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON AS AMENDED art. VIII, *microformed on* Indian Tribal Codes: A Microfiche Collection of Indian Law Codes (Ralph Johnson ed. 1988) ("All members of the Lummi Indian Tribe shall be accorded equal rights pursuant to tribal law. No member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States . . . ."); REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE art. III, *available at* [http://www.tribalresourcecenter.org/ccfolder1/chippewa\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/chippewa_constandbylaws.htm) ("no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States . . . ."); *Hudson v. Hoh Tribal Bus. Comm.*, No. HOH-CIV-4/91-015, 2 Tribal Appellate Court Opinions of the Northwest Intertribal Ct. Sys. 160, 161 (Hoh Tribal Ct. of App., May 28, 1992) (quoting Article IX of the Hoh Tribal Constitution as stating that "[a]ll members of the Hoh Tribe shall be accorded equal protection of the law under this constitution" and that "[n]o member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States").

94. REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE art. III, *available at* [http://www.tribalresourcecenter.org/ccfolder1/chippewa\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/chippewa_constandbylaws.htm).

95. See, e.g., *Hudson*, 2 Tribal Appellate Court Opinions of the Northwest Intertribal Ct. Sys. at 163–64 (construing right to petition for redress of grievances provided for in the Hoh tribal constitution according to federal constitutional principles because the tribal constitution explicitly incorporated federal constitution-

should be taken into account in any attempt to determine whether a given tribe prohibits sex discrimination.<sup>96</sup>

*C. The Navajo Nation's Broad-Based, Explicit Prohibition on Sex Discrimination*

The Navajo Nation was the only tribe identified that had a broad-based provision of law in place that prohibits governmental sex discrimination in all facets of tribal life.<sup>97</sup> The Navajo Nation Bill of Rights provision, enacted in 1980, provides that “[e]quality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex.”<sup>98</sup> Moreover, Navajo’s broad-based statutory provision functions similarly to a constitutional provision in that it empowers the tribal court to strike down conflicting statutory enactments.<sup>99</sup>

No tribal constitution was identified that contained a similarly broad prohibition on sex discrimination,<sup>100</sup> although several tribes constitutionally prohibit sex discrimination in voting,<sup>101</sup> and it appears

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al rights).

96. Because my electronic searches were for explicitly sex-based terms, the prevalence of such provisions is probably significantly underrepresented here. See *supra* Part I.E (explaining searching methodology).

97. 1 NAVAJO NATION CODE § 3 (“Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex . . .”), available at <http://www.navajocourts.org/Harmonization/NavBillRights.htm>.

98. *Id.*; Bennett v. Navajo Bd. of Election Supervisors, No. A-CV-26-90, 1990.NANN.0000016, ¶ 63 (Navajo Sup. Ct., Dec. 12, 1990), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1990.NANN.0000016.htm>.

99. Bennett, No A-CV-26-90, 1990.NANN.0000016, ¶¶ 39–40.

100. Additionally, Elmer Rusco undertook a survey of the civil liberties protections provided for in 220 tribal constitutions that were in place as of September 1981, and he identified no broad-based prohibitions on sex discrimination. Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 270, 284, 290 (1990). However, as his survey is now out-of-date, it is possible that some tribal constitutions explicitly prohibit sex discrimination generally, although I was not able to locate them in my searches.

101. CONSTITUTION OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION MONTANA art. VII, § 1, available at [http://www.tribalresourcecenter.org/ccfolder1/fort\\_belknep\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/fort_belknep_const.htm); CONSTITUTION OF THE MUSCOGEE (CREEK) NATION art. IV, § 2, available at [http://www.tribalresourcecenter.org/ccfolder1/muscogee\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/muscogee_const.htm); CONSTITUTION & BY-LAWS OF THE CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION OREGON AS AMENDED art. IV, § 5, available at [http://www.tribalresourcecenter.org/ccfolder1/warm\\_springs\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/warm_springs_constandbylaws.htm); see also CONSTITUTION & BY-LAWS OF THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA art. IV, § 4 available at <http://thorpe.ou.edu/IRA/ias&fcons.html> (prohibiting sex-based disqualification from holding tribal office).

that at least two tribes have seriously considered adopting broad-based constitutional proscriptions against sex discrimination.<sup>102</sup>

To the extent a culture's responsiveness to sex discrimination can be seen as a measure of its progressiveness, Navajo appears to be more progressive than the United States, given the United States' failure to ratify a proposed amendment to the constitution that would have definitively outlawed sex discrimination.<sup>103</sup> The Navajo law is written to capture a broad spectrum of discriminatory conduct. The Nation's Bill of Rights prohibits the Navajo Nation from "den[ying] or abridg[ing]" "[e]quality of rights under the law . . . on account of sex . . ." <sup>104</sup> While it is not clear whether the concept of "equality of rights" differs from that of "equal protection," the Nation's prohibition on abridging equality increases the breadth of the provision because, as the Navajo Supreme Court has suggested, the provision allows for challenges to practices that burden some groups more than others (rather than requiring a stronger showing of explicit or intentional discrimination).<sup>105</sup> In consonance with the provision's

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102. Initially, it appeared that the Turtle Mountain Band of Chippewa Indians had in place such a broad-based provision, based on a document downloaded from the National Tribal Justice Resource Center. See TURTLE MOUNTAIN BAND OF CHIPPEWA BILL OF RIGHTS (2001), available at [http://www.tribalresourcecenter.org/ccfolder1/turtle\\_mountain\\_billofrights.htm](http://www.tribalresourcecenter.org/ccfolder1/turtle_mountain_billofrights.htm). However, the document appeared to be a draft and was not included in the tribe's constitution, which is also available from the National Tribal Justice Resource Center. CONSTITUTION & BY-LAWS OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS BELCOURT, NORTH DAKOTA, available at <http://www.tribalresourcecenter.org/ccfolder1/tmconst.html>. To resolve the question, I contacted the tribal government; the Records Manager reported that she had no knowledge of the Bill of Rights and did not believe it was current law. E-mail from Jolean Peltier, Records Manager, Turtle Mountain Band of Chippewa Indian Belcourt, North Dakota, to Ann Tweedy, Teaching Fellow, California Western School of Law, (Aug. 8, 2008) (on file with author). Similarly, the Hopi Tribe initially appeared to have such a constitutional provision in place, CONSTITUTION OF THE HOPI TRIBE art. IX, § 1 (i), available at [http://www.tribalresourcecenter.org/ccfolder1/hopi\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/hopi_const.htm), but, based on my communication with the Hopi Tribe Secretary's Office, it appears that only a 2003 unapproved Draft Constitution contains this provision. Interview with Hopi Tribal Secretary's Office (Oct. 1, 2008); see also CONSTITUTION & BY-LAWS OF THE HOPI TRIBE art. IX, § 1 (1993), available at [http://hopicourts.com/index.php?option=com\\_docman&Itemid=50&group=13](http://hopicourts.com/index.php?option=com_docman&Itemid=50&group=13).

103. See, e.g., Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 971 n.2 (2008); Krakoff, *supra* note 8, at 1138, 1138 n.160.

104. 1 NAVAJO NATION CODE § 3, available at <http://www.navajocourts.org/Harmonization/NavBillRights.htm>.

105. *Bennett v. Navajo Bd. of Elections Supervisors*, No. A-CV-26-90, 1990.NANN.0000016, ¶ 64 (Navajo Sup. Ct., Dec. 12, 1990), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1990.NANN.0000016.htm> (suggesting that a law that caused disparate impact based on sex would violate the

language, the Court of Appeals of the Navajo Nation has interpreted the provision regarding sex discrimination very broadly, in a manner that would appear to invalidate any sex-based distinction that caused either sex disproportionate harm:

The proper analysis of the Navajo Equal Rights guarantee is that there can be no legal result on account of a persons [sic] sex, no presumption in giving benefits or disabilities gaged by a person's sex and no legal policy which has the effect of favoring one sex or the other.<sup>106</sup>

Although, based on this opinion and other case law, it appeared

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Navajo Bill of Rights). The language regarding denial or abridgment is derived from the proposed Equal Rights Amendment to the United States Constitution. *Bennett*, No. A-CV-26-90, 1990.NANN.0000016 at ¶ 63. Similar language is contained in the voting rights amendments to the United States Constitution. U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX. But these Amendments, by their terms, are limited to voting issues. Outside of the voting context, the United States has been less protective of potential victims of discrimination than the Navajo Nation appears to be, and the United States has upheld sex-based classifications in some circumstances and sharply limited disparate impact claims, particularly in the equal protection context. *See, e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (upholding the validity of federal distinctions between unmarried mothers and unmarried fathers that affect a child's ability to benefit from the parent's immigration status in order to gain admittance to the United States); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistical evidence that black defendants were more likely to get the death penalty for killing white victims was not problematic under the Equal Protection Clause of the Fourteenth Amendment because of the lack of evidence of discriminatory intent); *cf.* 42 U.S.C. § 2000e-2(k) (2006) (providing for employment discrimination claims based on disparate impact under Title VII of the Civil Rights Act of 1964 but only where the employer cannot show that the challenged practice is "job related for the position in question and consistent with business necessity"). Furthermore, the Supreme Court recently made clear that it views disparate impact as merely a secondary part of Title VII, which it sees as more directly concerned with disparate treatment, and that an employer who wishes to voluntarily eliminate disparate impacts will face a high burden to justify its behavior when affected employees can plausibly claim disparate treatment as a result of the employers' efforts. *See generally Ricci v. DeStefano*, 129 S.Ct. 2658 (2009); *cf.* *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1117 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) (arguing that a casino's employee grooming requirements that mandated that women wear full-face make-up obviously burdened women more than men, who were not subject to a similarly burdensome grooming requirement, and that the Majority should, therefore, have struck down the requirements under Title VII); ANNA KIRKLAND, *FAT RIGHTS* 87-88 (2008) (describing the majority opinion in *Jespersen*). Moreover, even in the voting rights context, the U.S. Supreme Court has sometimes seemed loathe to look closely at potential disparate impacts. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622-23 (April 28, 2008); *see also id.* at 1626 (Scalia, J., concurring).

106. *Help v. Silvers*, No. A-CV-01-82, 1983.NANN.0000001, ¶ 32 (Navajo May 6, 1983), available at <http://www.tribal-institute.org/opinions/1983.NANN.0000001.htm>.

that any sex-based distinction that favored one sex over the other in any measure would not survive a Navajo Nation Bill of Rights challenge,<sup>107</sup> one Navajo Supreme Court case allowed sex, based on traditional Navajo cultural norms that highly-valued grazing rights generally are to descend to female relatives, to factor into the issue of the descent of such rights.<sup>108</sup> From the main opinion, it does not appear that the Bill of Rights issue was raised by the parties, but Justice Benally argued in a concurring opinion that the court's holding violated the Bill of Rights' prohibition of sex discrimination.<sup>109</sup> The majority responded to this argument in a footnote, stating that

Contrary to the characterization in the dissenting<sup>110</sup> [sic] opinion, this opinion does not mean that the gender of the claimant is dispositive . . . . In fact, the rule set out in this opinion is that the *Keedah* factors<sup>111</sup> and traditional law on women's role in Navajo society should be considered together to decide the most logical trustee, not that if a female and a male both claim the permit, regardless of their connections to the land, the permit automatically must go to the female.<sup>112</sup>

Thus, in the above footnote, the court functionally characterizes

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107. *Bennett v. Navajo Bd. of Elections Supervisors*, No. A-CV-26-90, 1990.NANN.0000016, ¶¶ 63–65 (Navajo Dec. 12, 1990), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1990.NANN.0000016.htm> (rejecting the plaintiff's unelaborated claim that a requirement of prior tribal employment for holding elected office constituted impermissible sex discrimination under the Navajo Bill of Rights and stating that “Bennett did not show how or why it caused a discriminatory or disparate impact on those of her gender, excluding or inhibiting them from public elective office” and that “[w]hile it may be true that in the past women have been excluded or discouraged from the ranks of the Navajo Nation Council . . . Bennett was denied a place on the ballot because she had not been employed by the Navajo tribal organization. The Court is sensitive to the possibility of a past pattern and practice of excluding women from public office, but there are sufficient numbers of women employed by the Navajo Nation to make it possible for many to run for public office under the statute”).

108. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. at 3–4 & 4 n.5 (Navajo June 13, 2007), available at <http://www.navajocourts.org/NNCourtOpinions2007/09Sista%20Riggs%20v%20Estate%20of%20Tom%20Attakai.pdf>.

109. *Id.* slip op. at 7 (Benally, J., concurring).

110. The majority appears to be mistakenly characterizing the concurrence as a dissent. *See id.*

111. *Begay v. Keedah*, No. A-CV-09-91, 1991.NANN.0000007 (Navajo Nov 26, 1991) available at <http://www.tribalresourcecenter.org/opinions/opfolder/1991.NANN.0000007.htm>.

112. *Riggs*, No. SC-CV-39-04, slip op. at 4 n.5.

the language set forth below, which occurs slightly earlier in the opinion, as allowing sex to be factored into the grazing permit descent decision:

Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes . . . This is why women are attached to both the land base and the grazing permits. For the most part, Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.<sup>113</sup>

The Majority's characterization of women's traditional role is, as the concurring opinion acknowledges, consistent with the matrilineal and matrilocal character of Navajo society.<sup>114</sup>

Thus, despite the very strong language prohibiting sex discrimination in Navajo's Bill of Rights and the absolute terms of one Navajo Appellate opinion, it appears that the Navajo Supreme Court is willing to allow sex to be a factor in at least the area of grazing rights inheritance when consistent with traditional Navajo culture. Nonetheless, depending on how broadly or narrowly the Navajo Supreme Court is willing to make such distinctions, Navajo law concerning sex discrimination may well be considerably more stringent than U.S. law in terms of the types of distinctions the Navajo courts will uphold.<sup>115</sup> In fact, it is quite possible that such distinctions may be limited to highly traditional aspects of Navajo culture. Moreover, given the Navajo Supreme Court's statement that disparate impact falls within the purview of the Bill of Rights provision,<sup>116</sup> it appears that the Navajo Bill of Rights provision is considerably broader than the U.S. concept of equal protection in the very significant area of disparate impact.<sup>117</sup>

#### *D. Context-Specific Protections*

In addition to Navajo's explicit, broad-based provision and the more general equal protection provisions discussed above, twenty-five

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113. *Id.*, slip op. at 3.

114. *Id.*, slip op. at 7 (Benally, J., concurring).

115. *See, e.g., supra* notes 79, 105 (citing U.S. law).

116. *Bennett v. Navajo Bd. of Elections Supervisors*, No. A-CV-26-90, 1990.NANN.0000016, ¶ 64 (Navajo Dec. 12, 1990), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1990.NANN.0000016.htm>.

117. *See supra* note 105 and accompanying text.

tribes were identified that have at least one context-specific law explicitly prohibiting sex discrimination.<sup>118</sup> Although most of the

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118. CONSTITUTION OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION MONTANA art. VII, § 1 (providing for voting rights regardless of sex), *available at* [http://www.tribalresourcecenter.org/ccfolder1/fort\\_belknap\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/fort_belknap_const.htm); CONSTITUTION OF THE MUSCOGEE (CREEK) NATION art. IV, § 2, *available at* [http://www.tribalresourcecenter.org/ccfolder1/muscogee\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/muscogee_const.htm) (providing for voting rights regardless of sex); CONSTITUTION & BY-LAWS OF THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA art. IV, § 4, *available at* <http://thorpe.ou.edu/IRA/ias&fcons.html> (prohibiting sex-based disqualification from holding tribal office); CONSTITUTION & BY-LAWS OF THE CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION OREGON AS AMENDED art. IV, § 5, *available at* [http://www.tribalresourcecenter.org/ccfolder1/warm\\_springs\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/warm_springs_constandbylaws.htm) (providing for voting rights regardless of sex); BAY MILLS INDIAN COMMUNITY LAW & CODES, ORD. TO REGULATE THE OPERATION OF GAMING BY THE BAY MILLS INDIAN COMMUNITY § 7.27, *available at* <http://www.tribalresourcecenter.org/ccfolder1/bmgaming.htm> (prohibiting sex discrimination in operation of gaming enterprise); BLACKFEET TRIBAL LAW & ORDER CODE ch. 3, § 4(A)(1), *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkftcp3equal.htm> (prohibiting creditors from engaging in sex discrimination); THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE EASTERN BAND OF CHEROKEE INDIANS ch. 95, art. II, § 95-13(c), *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech95wages.htm> (prohibiting sex discrimination in employment); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE & CHITIMACHA COMPREHENSIVE "RULES OF THE COURT" tit. VI, ch. 3, § 304(c), *available at* <http://www.tribalresourcecenter.org/ccfolder1/chitimcodet6family.htm> (providing that there should be no sex-based presumption in child custody cases); THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON [ORDINANCES], § 480(P)(5)(F), *available at* <http://www.tribalresourcecenter.org/ccfolder1/gr480tribhou.htm> (providing that the landlord's sex discrimination against the tenant can be used as a defense to eviction); FORT PECK COMPREHENSIVE CODE OF JUSTICE 2000, tit. X, ch. 3, § 304(b), *available at* [http://www.tribalresourcecenter.org/ccfolder1/fortpeck\\_justicecode\\_10.htm](http://www.tribalresourcecenter.org/ccfolder1/fortpeck_justicecode_10.htm) (providing that "there shall be no presumption that a parent is better suited to be custodial parent based on that parent's gender"); GRAND TRAVERSE BAND CODE: STATUTES OF THE GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, tit. 18, ch. 8, § 825, *available at* <http://www.tribalresourcecenter.org/ccfolder1/travcode18gaming.htm> (prohibiting gaming operators from discriminating based on sex); LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES & REGULATIONS ch. 600, § 2.2, *available at* [http://www.tribalresourcecenter.org/ccfolder1/little\\_river\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/little_river_ottawa_ordandreg.htm) (prohibiting sex discrimination in employment except where sex is a bona fide occupational qualification); OGLALA SIOUX LAW & ORDER CODE ch. 17, pt. II.B., § I, *available at* [http://www.tribalresourcecenter.org/ccfolder1/oglala\\_lawandorder17.htm](http://www.tribalresourcecenter.org/ccfolder1/oglala_lawandorder17.htm) (declaring it to be the policy of the tribe not to discriminate in employment based on sex or other grounds); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE ch. 83, subch.VII, § 83.702(6), *available at* [http://www.tribalresourcecenter.org/ccfolder1/sault\\_stmarie\\_tribalcode.htm](http://www.tribalresourcecenter.org/ccfolder1/sault_stmarie_tribalcode.htm) (providing that the landlord's sex discrimination against the tenant can be used as a defense to eviction); SISSETON-WAHPETON SIOUX TRIBE ch. 59, § 59-07-03, *available at* [http://www.tribalresourcecenter.org/ccfolder1/sisseton\\_wahpeton\\_codeoflaw59.htm](http://www.tribalresourcecenter.org/ccfolder1/sisseton_wahpeton_codeoflaw59.htm) (setting out an administrative complaint procedure for worker who believes she has been discriminated against based on sex or other grounds); SKOKOMISH TRIBAL CODE



provisions identified were part of tribal code, some were constitutional provisions, and a few were either created by common law or contained in administrative materials.<sup>119</sup> In terms of code-based laws alone, this means that roughly twenty-two percent of tribes whose codes were available online from the National Tribal Justice Resource Center had some statutory protection from sex discrimination in place.<sup>120</sup> All of the sex discrimination laws cited above generally demonstrate that each of these twenty-five tribes has a policy against

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tit. 4, § 4.02.150(ee), *available at* [http://www.tribalresourcecenter.org/ccfolder1/skocomish\\_tribalcode\\_4.htm](http://www.tribalresourcecenter.org/ccfolder1/skocomish_tribalcode_4.htm) (prohibiting gaming operators from discriminating based on sex and other grounds); SUSANVILLE RANCHERIA [TRIBAL ORDINANCES] tit. I, § 7.6.2, *available at* <http://www.tribalresourcecenter.org/ccfolder1/susvillegamingentire.htm> (prohibiting gaming operation from discriminating based on sex); WHITE EARTH BAND OF CHIPPEWA RULES OF CRIM. P. 1.02, *available at* [http://www.tribalresourcecenter.org/ccfolder1/whtearth\\_lawandorder.htm](http://www.tribalresourcecenter.org/ccfolder1/whtearth_lawandorder.htm) (prohibiting discrimination based on sex and other grounds in application of rules of criminal procedure); YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.20(F), *available at* <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm> (defining intentional sexual harassment as a civil infraction); *Brooks v. Cherokee Nation*, 5 Okla. Trib. 178, 1996 WL 1132752 (Cherokee Nov. 6, 1996) (discussing the sexual harassment law of the Cherokee Nation of Oklahoma); *White v. Day*, 7 Am. Tribal L. Rptr. 246, 2008 WL 2690792, at \*2 (Ho-Chunk Tribal Ct., 2008) (quoting the Employment Relations Act of 2004, which prohibits “discriminat[ion] based on individual’s sex”); *Hoopa Forest Indus. v. Jordan*, 25 Indian L. Rptr. 6159 (Hoopa Valley Tribal Ct., 1998) (reviewing and reversing, apparently under tribal common law while looking to federal law in an advisory capacity, an agency determination of hostile work sexual harassment because the conduct alleged failed to rise to the required level of severity and because of other evidentiary problems and also quoting the tribal personnel policy’s narrower proscription against sexual harassment); *Fargo v. Mashantucket Pequot Gaming Ent.*, 2 Mashantucket Rptr. 145, 147, 153, (Mashantucket Pequot Tribal Ct. Oct. 6, 1997), *available at* <http://www.tribalresourcecenter.org/opinions/opfolder/1997.NAMP.0000030.htm> (upholding plaintiff’s termination due to sexual harassment); *LaVigne v. Mohegan Tribe of Indians*, 32 Indian L. Rptr. 6044 (Mohegan Tribal Ct. 2005) (upholding the plaintiff’s termination from employment due to “sexual harassment”); *cf. Renecker v. Tulalip Casino*, No. TUL-EMP-11/96-667, 5 Northwest Intertribal Court App. 1, 1–2 (May 29, 1997) (reversing appellant’s termination because of procedural errors in the administrative process but noting that “any one of the four allegations [of racial and gender slurs] involves ‘major offenses’” as defined in the Tribe’s Human Rights Ordinance).

Notably, Navajo also has other context-specific sex-discrimination laws in place, as discussed below. *See, e.g.,* NAVAJO NATION CODE ANN., 21 Navajo Code § 509(B) (prohibiting telecommunications service providers from discriminating based on sex).

119. *See supra* note 118 and accompanying text.

120. *See supra* note 118. Fifteen of the laws cited in note 118 are code provisions downloaded from the National Tribal Justice Resource Center. *See also supra* Part I.E (explaining that the codes of sixty-nine tribes were available on the site during the period of my research).

sex discrimination, although in the case of tribes that both legally prohibit sex discrimination in some circumstances and make sex-based distinctions in others, the policy is necessarily a complicated one.<sup>121</sup> Some tribes, such as the Eastern Band of Cherokee Indians, have several anti-discrimination laws that cover sex discrimination in different, rather broad contexts, while other tribes, such as Chitimacha Tribe, appear to have only one or two very narrow laws in place.<sup>122</sup> Below is a brief summary of the sex-discrimination laws by category, beginning with broader laws and proceeding to narrower ones.

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121. The Oglala Sioux and the Blackfeet are two of the tribes that have both multiple laws prohibiting sex discrimination as well as laws that explicitly make sex-based distinctions. *See, e.g.*, BLACKFEET TRIBAL LAW & ORDER CODE ch. 3, § 4(A) (1), *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkftcp3equal.htm> (prohibiting creditors from engaging in sex discrimination); THE FAMILY COURT OF THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION FAMILY CODE, CODE OF ETHICS FOR BLACKFEET FAMILY COURT MEMBERS R. 6, *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkft1to22familyct.htm> (providing that “[t]he Blackfeet Family Court Members will serve and respond to requests without bias because of race, religion, sex, age, national origin or handicap”); BLACKFEET TRIBAL LAW & ORDER CODE ch. 2, § 7, *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkftcode2civil.htm> (allowing for imprisonment of only male debtors in cases of fraud, potential abscondment, or removal or concealment of property); OGLALA SIOUX LAW & ORDER CODE ch. 17, pt. II.B., § I, *available at* [http://www.tribalresourcecenter.org/ccfolder1/ogllala\\_lawandorder17.htm](http://www.tribalresourcecenter.org/ccfolder1/ogllala_lawandorder17.htm) (declaring it to be the policy of the tribe not to discriminate in employment based on sex or other grounds); OGLALA SIOUX LAW & ORDER CODE ch. 18, ch. 1, ¶ 8, *available at* [http://www.tribalresourcecenter.org/ccfolder1/ogllala\\_lawandorder18.htm](http://www.tribalresourcecenter.org/ccfolder1/ogllala_lawandorder18.htm) (stating in “Declaration of Policy” that Contractors and Sub-Contractors shall not, in exercising the Tribe’s employment preference for Indians, discriminate among Indians on the basis of sex or on other grounds); OGLALA SIOUX LAW & ORDER CODE ch. 9, § 104, *available at* [http://www.tribalresourcecenter.org/ccfolder1/ogllala\\_lawandorder9.htm](http://www.tribalresourcecenter.org/ccfolder1/ogllala_lawandorder9.htm) (creating the crime of having carnal knowledge of a female under the age of sixteen).

122. *Compare* THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE EASTERN BAND OF CHEROKEE INDIANS, ch. 95, art. II, § 95-13(c), *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech95wages.htm> (prohibiting sex discrimination in employment), *and* THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE EASTERN BAND OF CHEROKEE INDIANS ch. 16, art. IV, § 16-4.09(a)(4), *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech16gaming.htm> (providing that “[t]here shall be no discrimination in any gaming operations by reason of race, color, sex or creed”), *and* THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE EASTERN BAND OF CHEROKEE INDIANS, ch. 14, art. I, § 14-1.5, *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech14criminallaw.htm> (providing for compliance with, subsection to, charging under, and jurisdiction pursuant to criminal laws to be without regard to sex or other prohibited grounds), *with* CHITIMACHA COMPREHENSIVE CODES OF JUSTICE & CHITIMACHA COMPREHENSIVE “RULES OF THE COURT” tit. VI, ch. 3, § 304(c), *available at* <http://www.tribalresourcecenter.org/ccfolder1/chitimcodet6family.htm> (no sex-based presumption in custody cases).

### 1. *Employment*

#### a. *Sex Discrimination Explicitly Prohibited in Employment Generally*

Four tribes have broadly worded, explicit prohibitions on sex discrimination in employment in their tribal codes,<sup>123</sup> and two other tribes appear to have such laws in place based on discussions in tribal court opinions.<sup>124</sup> One of the four tribes, the Little River Band of Ottawa Indians, carves out an exception to the prohibition where sex is a bona fide occupational qualification (BFOQ).<sup>125</sup> This BFOQ

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123. THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE EASTERN BAND OF CHEROKEE INDIANS ch. 95, art. II, § 95-13(c), *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech95wages.htm> (prohibiting sex discrimination in employment); LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES & REGULATIONS ch. 600, § 2.2, *available at* [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm) (prohibiting sex discrimination in employment except where sex is a bona fide occupational qualification); OGLALA SIOUX LAW & ORDER CODE ch. 17, pt. II.B, § I, *available at* [http://www.tribalresourcecenter.org/ccfolder1/oglala\\_lawandorder17.htm](http://www.tribalresourcecenter.org/ccfolder1/oglala_lawandorder17.htm) (declaring it to be the policy of the tribe not to discriminate in employment based on sex or other grounds); SISSETON-WAHPETON SIOUX TRIBE ch. 59, § 59-07-03, *available at* [http://www.tribalresourcecenter.org/ccfolder1/sisseton\\_wahpeton\\_codeoflaw59.htm](http://www.tribalresourcecenter.org/ccfolder1/sisseton_wahpeton_codeoflaw59.htm) (setting out administrative complaint procedure for a worker who believes she has been discriminated against based on sex or other grounds).

Note that a provision in the Susanville Indian Rancheria's Bylaws also requires the Tribal Council to "[c]ommit to providing an environment that is free from discrimination." SUSANVILLE INDIAN RANCHERIA CONSTITUTION & BYLAWS art. III, § 4(6), *available at* <http://www.tribalresourcecenter.org/ccfolder1/susanvilleconst.htm>. The later mention of "sexual harassment" in this provision may imply that the generic reference to "discrimination" is meant to include sex discrimination. *Id.* However, because the reference to sex discrimination was not explicit, this provision is only relied on in the sexual harassment discussion.

124. *White v. Day*, 7 Am. Tribal L. Rptr. 246, 2008 WL 2690792, at \*2 (Ho-Chunk Tribal Ct. Jan. 14, 2008) (quoting the Employment Relations Act of 2004, which prohibits "discriminat[ion] based on individual's sex"); *Renecker v. Tulalip Casino*, No. TUL-EMP-11/96-667, 5 Northwest Intertribal Court App. 1, 1-2 (May 29, 1997) (reversing appellant's termination because of procedural errors in the administrative process but noting that "any one of the four allegations [of racial and gender slurs] involves 'major offenses'" as defined in the Tribe's "detailed Human Rights Ordinance"); *see also* *Funmaker v. Doornbos*, 24 Indian L. Rptr. 6095, 6095 (Ho-Chunk Nation Tribal Court, August 22, 1996) (quoting prohibition on sex discrimination in employment in the Tribe's Personnel Policies & Procedures Manual).

125. LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES & REGULATIONS ch. 100, § 2.2, *available at* [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm). A bona fide occupational qualification means that "[e]mployment in particular jobs may not be limited to persons of a particular sex, religion, or national origin unless the employer can show that sex, religion, or national origin is an actual qualification for performing the job." BLACK'S LAW DICTIONARY 177 (6th ed., 1990); *see also* KIRKLAND, *supra* note 105, at 90-93 (explaining the concept of a

exception also applies to age and disability; however, it does not apply to race, marital status, national origin, or other specified suspect classes.<sup>126</sup> This differentiation may indicate that sex is considered to be less inherently suspect in that Tribe than the categories, such as race, that are not subject to the exception.<sup>127</sup> Federal law similarly provides that a bona fide occupational qualification may be a defense to allegations of sex discrimination but not race discrimination.<sup>128</sup> It may be the case that the three tribes whose codes do not provide for a BFOQ defense would not allow for one under common law if the issue was raised in a case or administrative proceeding. Thus, these three tribes may take a harder line on sex discrimination than would a federal court.<sup>129</sup> However, it is difficult to make predictions about such issues.

*b. Specialized Categories of Employment*

*i. Employment by Contractors and Subcontractors*

One of the six tribes that has in place a general prohibition on sex discrimination in employment, the Oglala Sioux, also has a law providing that “[c]ontractors or subcontractors extending such preference [to Indians] shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference [for Indian employees] shall not excuse a contractor or subcontractor from complying with the other requirements contained in this chapter.”<sup>130</sup>

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BFOQ exception and its meaning under federal law, particularly its indication that sex differentiations need not be eliminated in all cases, in contrast to race differentiations).

126. LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES & REGULATIONS, ch. 100, § 2.2, available at [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm).

127. See, e.g., KIRKLAND, *supra* note 105, at 90–93 (explaining that, under federal law, the BFOQ exception indicates that laws creating sex differentiations need not be eliminated in all cases, in contrast to laws creating race differentiations and that this difference indicates more societal tolerance for sex-based distinctions than for race-based distinctions).

128. 42 U.S.C. § 2000e-2(e) (2006); see also KIRKLAND, *supra* note 105, at 90–93 (explaining the concept of a BFOQ and its meaning under federal law, particularly its indication that laws providing for sex differentiations need not be eliminated in all cases, in contrast to laws providing for race differentiations).

129. See Cooter & Fikentscher, *supra* note 20, at 35 (explaining that tribal “codes usually aspire to cover all eventualities”).

130. OGLALA SIOUX LAW & ORDER CODE, ch. 18, ch. 1, ¶ 8, available at <http://www>

*ii. Gaming*

A total of six tribes, including two of the six that have prohibitions on sex discrimination in employment and one, the Navajo, that has a broad-based general prohibition on sex discrimination generally, prohibit sex discrimination in the operation of their gaming enterprises.<sup>131</sup> Given that these tribes' gaming enterprises may well be the largest employer among the tribal government and its enterprises or even in the geographical area for some of the more rural tribes, these laws are a significant source of protection.

*c. Sexual Harassment*

Evaluating tribal protections against sexual harassment is complicated somewhat by the fact that some tribes, contrary to the traditional federal view, consider sexual harassment to be an act perpetrated by one individual against another, rather than an employment rights issue.<sup>132</sup> Such tribes may treat harassment, implicitly or explicitly including sexual harassment, as a civil infraction, a misdemeanor, or even a tort.<sup>133</sup> Other tribes consider sexual harassment to be an

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.tribalresourcecenter.org/ccfolder1/oglala\_lawandorder18.htm.

131. BAY MILLS INDIAN COMMUNITY LAW & CODES, ORDINANCE TO REGULATE THE OPERATION OF GAMING BY THE BAY MILLS INDIAN COMMUNITY, § 7.27, *available at* <http://www.tribalresourcecenter.org/ccfolder1/bmgaming.htm> (prohibiting sex discrimination in operation of gaming enterprise); THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE EASTERN BAND OF CHEROKEE INDIANS, ch. 16, art. IV, § 16-4.09(a) (4), *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech16gaming.htm> ("There shall be no discrimination in any gaming operations by reason of race, color, sex or creed . . ."); GRAND TRAVERSE BAND CODE: STATUTES OF THE GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, tit. 18, ch. 8, § 825, *available at* <http://www.tribalresourcecenter.org/ccfolder1/travcode18gaming.htm> (prohibiting gaming operators from discriminating based on sex); NAVAJO NATION CODE tit. 5, § 2039(B) (3) (2008) ("[t]he Navajo Nation, the gaming enterprise and a Management Contractor shall not discriminate in the employment of persons to work for the gaming enterprise or the Gaming Facility on the grounds of . . . gender . . ."); SKOKOMISH TRIBAL CODE, tit. 4, § 4.02.150(ee), *available at* [http://www.tribalresourcecenter.org/ccfolder1/skokomish\\_tribalcode\\_4.htm](http://www.tribalresourcecenter.org/ccfolder1/skokomish_tribalcode_4.htm) (prohibiting gaming operators from discriminating based on sex and other grounds); SUSANVILLE INDIAN RANCHERIA [ORDINANCES], tit. I, § 7.6.2, *available at* <http://www.tribalresourcecenter.org/ccfolder1/susvillegamingentire.htm> (prohibiting gaming operation from discriminating based on sex or other grounds).

132. *See, e.g.*, YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.20(F) (defining intentional sexual harassment as a civil infraction), *available at* <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm>.

133. *See, e.g.*, POARCH BAND OF CREEK INDIANS CODE, ch. 8, § 8-2-2 (defining the crime of harassment, without explicit mention of sexual harassment, as a misdemean-

employment issue but define it as a potential basis for discipline of the harassing employee rather than explicitly defining it as the basis for a cause of action by the injured employee.<sup>134</sup>

Because this subpart is specifically limited to laws that explicitly apply to sex discrimination, this section on sexual harassment does not include the laws that simply provide protection against harassment without discussion of sexual harassment. However, the Ysleta Pueblo del Sur law that defines “sexual harassment” as a prohibited

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or that involves “strick[ing], shov[ing], kick[ing], or otherwise touch[ing] a person or subject[ing] him to physical contact; or . . . direct[ing] abusive or obscene language or mak[ing] an obscene gesture toward another person”); YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.20(F), *available at* <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm> (defining intentional sexual harassment explicitly as a type of harassment that is punishable as a civil infraction); *Hoopa Forest Industries v. Jordan*, 25 Indian L. Rptr. 6159, 6160 (Hoopa Valley Tribal Ct. 1998) (quoting the tribe’s personnel policy as providing that “[e]mployees shall be provided a safe work environment, free from harassment of any sort, i.e., verbal, physical, visual. The Tribal Council accepts no liability for harassment of one employee by another. The individual who makes unwelcome advances, threatens or in any way harasses another employee is personally liable for such actions and their consequences.”).

The tribal view of sexual harassment as a crime is similar to that of the French law, under which sexual harassment is treated as a criminal matter specific to the perpetrator (rather than creating any employer liability). Abigail C. Saguy, *What is Sexual Harassment? From Capitol Hill to Sorbonne*, 27 T. JEFFERSON L. REV. 45, 47–48 (2004). Although there is also a sexual harassment provision in the French Labor Code, this merely protects an employee from retaliation, rather than imposing direct employer liability. *Id.* at 48.

134. *See, e.g.*, *Brooks v. Cherokee Nation*, 5 Okla. Trib. 178, 1996 WL 1132752 (Nov. 6, 1996); *Fargo v. Mashantucket Pequot Gaming Enterprise*, 2 Mashantucket Rptr. 145, 147, 153, 1997 WL 34639655 (Mashantucket Pequot Tribal Ct. Oct. 6, 1997); *LaVigne v. Mohegan Tribe of Indians*, 32 Indian L. Rptr. 6044 (Mohegan Tribal Ct. 2005); *see also Yazzie v. Sanitation*, 7 Am. Tribal L. Rptr. 543, 2007 WL 5884947, \*3–4 (Navajo July 11, 2007) ((1) reciting the fact that Navajo Nation has a sexual harassment policy for tribal employees, (2) dismissing plaintiff’s claim against her employer for sexual harassment, which had originally been brought before the Navajo Nation Labor Commission, because it was not cognizable under the Navajo Nation Preference in Employment Act and because such a claim should not be read into the Act as sexual harassment was still in a “nascent stage” of development in the Navajo environment, and (3) suggesting the possibility that the claim could be heard in the Navajo district court); *cf. Schock v. Mashantucket Pequot Gaming Enterprise*, 3 Mashantucket Rptr. 129, 1999 WL 34828705 (Mashantucket Pequot Tribal Ct. Sept. 20, 1999) (holding plaintiff’s sexual harassment claim against the tribal gaming enterprise to be barred by sovereign immunity because, although the perpetrator acted during work hours, he did not, according to the court, act within the scope of his employment, but allowing plaintiff’s negligent supervision claims that were based on the same harassing behavior to go to trial because the tribe had enacted a waiver of sovereign immunity for negligence-based actions).

type of harassment is included although the application of that law is personal to the perpetrator and applies more broadly than solely in the employment context.<sup>135</sup> Although some ambiguities remain, in all, nine tribes appear to have policies or laws in place that prohibit sexual harassment in the workplace<sup>136</sup> and one tribe has directed its

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135. See, e.g., YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.20(F), available at <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm> (defining intentional sexual harassment as a civil infraction). Similarly, the Hoopa Valley Tribe is included based on case law that suggests that that Tribe may allow both claims against the employer and claims against the individual perpetrator in the employment context. *Jordan*, 25 Indian L. Rptr. at 6160 & n.1.

136. OGLALA SIOUX LAW & ORDER CODE, ch.17, pt. III (under section heading entitled "Interviewing, Screening, and Testing," requiring comprehensive background check on all applicants for employment, including determination of whether the applicant has been subject to "dismissal[s] from previous jobs due to sexual harassment"); SUSANVILLE INDIAN RANCHERIA CONSTITUTION & BYLAWS, BYLAWS, art. III, § 4(6), available at <http://www.tribalresourcecenter.org/ccfolder1/susanvilleconst.htm> (requiring the Tribal Council to "[c]ommit to providing an environment that is free of discrimination, harassment, violence, and intimidation and that is drug free, as required by law. The Tribal Business Council shall not tolerate any form of threatening or abusive behavior, nor tolerated [sic] sexual harassment or other forms of harassment or discrimination . . ."); YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.20(F), available at <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm> (defining intentional sexual harassment as a civil infraction); *Brooks v. Cherokee Nation*, 5 Okla. Trib. 178, 1996 WL 1132752 (Nov. 6, 1996) (upholding dismissal of tribal employee for sexual harassment); *Lonetree v. Garvin*, 34 Indian L. Rptr. 6126 (Ho-Chunk Nation Sup. Ct. Oct. 8, 2007) (Plaintiff, who had been dismissed from tribal employment for sexual harassment, challenged the administrative proceedings based on due process, and, "[b]ecause the [plaintiff did] . . . not deny that he committed sexual harassment," the Ho-Chunk Nation Supreme Court "affirm[ed] the trial court's decision to remand to the GRB [Grievance Review Board] to resolve the sole issue of whether the [defendant] . . . would have terminated the [plaintiff's] . . . employment even if the pre-deprivation hearing had occurred"); *Jordan*, 25 Indian L. Rptr. at 6160 & n.1 (reversing a tribal agency's determination that the employer was liable for sexual harassment based upon the facts that the agency had not entered findings of fact and conclusions of law, that the agency had relied on an exhibit that was not in the record, and that the conduct at issue did not rise to the level of severity required under federal standards, which the court appeared to be using in an advisory capacity, despite the statement in tribal personnel policies that only an individual harasser could be held liable for sexual harassment); *Fargo v. Mashantucket Pequot Gaming Enterprise*, 2 Mashantucket Rptr. 145, 147, 153, 1997 WL 34639655 (Mashantucket Pequot Tribal Ct. Oct. 6, 1997) (upholding tribal employee's termination for sexual harassment and citing Employee Handbook's provision on sexual harassment); *LaVigne*, 32 Indian L. Rptr. at 6045 (finding as fact that "Mohegan Tribe Policy #51 strictly forbids sexual harassment in the workplace"); *Yazzie*, 7 Am. Tribal L. 543, 2007 WL 5884947, at \*3 (citing the fact that Navajo Nation has a sexual harassment policy for tribal employees); see also *Toledo v. Bashas' Diné Market*, 6 Am. Tribal L. 796, 2006 WL 6168967 (Navajo Nation Sup. Ct. Aug. 17,

general manager to create such a policy,<sup>137</sup> so it may now in fact have a policy in place. Two of these tribes also prohibit employment discrimination based on sex generally, and two of them prohibit it in the gaming context.<sup>138</sup> Finally, Navajo, one of the two that has both a prohibition on sexual harassment and a prohibition on sex discrimination in its gaming operation, also has a broad-based tribal prohibition on sex discrimination, as discussed above. Thus, it appears that some tribes recognize sexual harassment that do not explicitly recognize other forms of sex discrimination.<sup>139</sup>

*d. Maternity and Paternity Leave and Related Laws*

While not a sex discrimination law per se, at least one tribe, the

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2006) (affirming private on-reservation employer's dismissal of employee based on sexual harassment under the employer's personnel policy, despite the ambiguity of the policy).

Note that the language of the Ysleta del Sur Pueblo law appears to be particularly relevant to the employment context: "Sexual Harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly." YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.22 (emphasis omitted), available at <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm>.

137. THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OREGON [ORDINANCES], § 370(d)(3), available at <http://www.tribalresourcecenter.org/ccfolder1/gr370personnel.htm> ("The General Manager shall develop and implement policies and procedures to prevent the sexual harassment of employees, applicants, clients and Tribal members.").

138. NAVAJO NATION CODE tit. 5, § 2039(B)(3) (prohibiting sex discrimination by gaming operation); OGLALA SIOUX LAW & ORDER CODE, ch. 17, pt. II.B., § I, available at [http://www.tribalresourcecenter.org/ccfolder1/oglala\\_lawandorder17.htm](http://www.tribalresourcecenter.org/ccfolder1/oglala_lawandorder17.htm) (declaring it to be the policy of the Tribe not to discriminate in employment based on sex or other grounds); SUSANVILLE INDIAN RANCHERIA [ORDINANCES], tit. I, § 7.6.2, available at <http://www.tribalresourcecenter.org/ccfolder1/susvillegamingentire.htm> (prohibiting gaming operation from discriminating based on sex or other grounds); *Funmaker v. Doornbos*, 24 Indian L. Rptr. 6095, 6095 (Ho-Chunk Nation Tribal Ct. August 22, 1996) (quoting prohibition on sex discrimination in employment in the Tribe's Personnel Policies & Procedures Manual).

139. The Ysleta Pueblo del Sur law is the most probable example of this. See YSLETA DEL SUR PUEBLO CODE OF LAWS, art. 4, pt. 6, § 4.6.20(F), available at <http://www.tribalresourcecenter.org/ccfolder1/ysletaarticle4.htm>. The two other tribes' recognition of sexual harassment claims is evident from case law, and thus it is entirely possible either that their courts would hold that sex discrimination is also prohibited as a matter of common law or that the tribes have formal laws or policies prohibiting such conduct. *Jordan*, 25 Indian L. Rptr. at 6160 & n.1; *LaVigne*, 32 Indian L. Rptr. at 6045.



Little River Band of Ottawa Indians, has enacted a law allowing its employees to take maternity or paternity leave.<sup>140</sup> Such laws are relevant to sex discrimination because of the disproportionate impacts that women suffer in employment because of pregnancy.<sup>141</sup> Similarly, the Ho-Chunk Nation currently has a law in place that prohibits pregnancy-based discrimination<sup>142</sup> and the Navajo Nation progressively requires all on-reservation employers to provide breastfeeding accommodations for their employees who are working mothers.<sup>143</sup>

One interesting aspect of the Little River Band of Ottawa Indians' law is that its express purpose is to protect the children that would be affected by a failure to grant maternity (or paternity) leave to full-time employees: "The Little River Band recognizes that its children are its most precious asset and that the promotion of strong families is critical. With this recognition, the Tribe has adopted the following policies regarding maternity leave."<sup>144</sup> Thus, although it clearly

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140. LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES AND REGULATIONS, ch. VI, § 6.10, available at [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm).

141. See, e.g., 42 U.S.C. § 2000e(k) (2006) (codifying federal Pregnancy Discrimination Act); see generally Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Working Women*, 17 COLUM. J. GENDER & L. 275 (2008).

142. *White v. Day*, 7 Am. Tribal L. Rptr. 246, 246, 2008 WL 269072, at \*2 (Ho-Chunk Trial Ct. 2008).

143. NAVAJO NATION CODE tit. 15, § 704 (2008). By contrast, in the United States outside of Indian reservations, breastfeeding accommodations appear to be largely a matter of employer choice. See generally Sara J. Welch, *Nursing Mothers Aloft*, N.Y. TIMES, Feb. 10, 2009, at B6 (discussing two U.S. employers who voluntarily provide breastfeeding accommodations to working mothers who must travel while breastfeeding and the difficulty of traveling while breastfeeding generally); Jodi Kantor, *On the Job, Working Mothers Are Finding a 2-Class System*, N.Y. TIMES, Sept. 1, 2006, at A1 (noting that working class women have much more difficulty continuing with breastfeeding while working than do professional women, that there is no federal law providing for breastfeeding accommodations on the job, and that most state laws on the issue are "merely symbolic"). However, as of 2007, fourteen states had laws that protected or encouraged breastfeeding on the job, at least to some degree. Lisa Hansen, *A Comprehensive Framework for Accommodating Nursing Mothers in the Workplace*, 59 RUTGERS L. REV. 885, 908-11 (2007).

Because my electronic searches of tribal codes and constitutions did not target the words "pregnancy," "breastfeeding," "maternity," or "paternity," there may be many other similar tribal laws in existence that I did not discover.

144. LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES AND REGULATIONS, ch. 600, ch. VI, § 6.10 (2001), available at [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm); see also NAVAJO NATION CODE tit. 15, § 702 (2008) ("The purpose of this Act is to provide for opportunities for working

protects women's ability to maintain employment while pregnant (and therefore protects women from discrimination), the primary purpose of this particular tribal law was not to protect against employment discrimination.

*e. Summary of Employment-Related Tribal Sex Discrimination Laws*

A significant percentage of tribes appear to have some statutory protection against sex discrimination in place that applies to employment.<sup>145</sup> The most common types of anti-discrimination laws appear to apply to employment generally, gaming, and sexual harassment. There are likely to be many additional protections in tribal personnel policies, but, because such policies are not widely available, they were not addressed here except to the extent that discussion of such policies was included in tribal case law.

*2. Voting and Other Political Rights*

*a. Voting Rights*

The constitutions of three tribes, namely the Fort Belknap Indian Community, the Muscogee (Creek) Nation, and the Confederated Tribes of the Warm Spring Reservation, outlaw sex discrimination in voting.<sup>146</sup> These provisions are roughly analogous to the Nineteenth

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mothers to obtain the health benefits of breast-feeding . . .").

145. As explained above, roughly twenty-two percent of tribes whose codes were available online from the National Tribal Justice Resource Center had some statutory protection from sex discrimination in place. This figure is based on the fact that fifteen of the laws cited in *supra* note 118 are code provisions downloaded from the National Tribal Justice Resource Center. Part I.E. explains that the codes of sixty-nine tribes were available on the site during the period of my research. Eight, or about twelve percent, of tribal codes available on the National Tribal Justice Resource Center site contained some proscription against discrimination that applied to employment.

146. CONSTITUTION OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION MONTANA art. VII, § 1 (providing for voting rights regardless of sex), *available at* [http://www.tribalresourcecenter.org/ccfolder1/fort\\_belknap\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/fort_belknap_const.htm); CONSTITUTION OF THE MUSCOGEE (CREEK) NATION art. IV, § 2, *available at* [http://www.tribalresourcecenter.org/ccfolder1/muscogee\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/muscogee_const.htm) (providing for voting rights regardless of sex); CONSTITUTION & BY-LAWS OF THE CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION OREGON AS AMENDED art. IV, § 5, *available at* [http://www.tribalresourcecenter.org/ccfolder1/warm\\_springs\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder1/warm_springs_constandbylaws.htm) (providing for voting rights regardless of sex).

Amendment to the United States Constitution.<sup>147</sup>

*b. Rights to Hold Elected Office*

The constitution of the Sac and Fox Tribe of the Mississippi in Iowa proscribes sex-based disqualification from holding public office.<sup>148</sup>

*3. Application of the Laws and Rules of Procedure*

Three tribes have code provisions that either prohibit or set a policy against sex discrimination in the application of laws or the rules of procedure.<sup>149</sup> For instance, the Rules of Criminal Procedure for the White Earth Band of Chippewa set out an intent not to discriminate in purpose or effect: “These rules are intended to provide for the just and speedy determination of criminal proceedings without the purpose or effect of discrimination based upon race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, handicap in communication, sexual orientation, or age.”<sup>150</sup> The Rules’ protection against discrimination in both “purpose” and “effect” appears to evince a legislative intent that the operation of the rules be free from discriminatory intent as well as free from disparate impact on suspect classes such as sex. Although, given the use of the word “intent,” the section may be merely precatory rather than creating an enforceable obligation, it is interesting that it encompasses such a broad conception of fairness,

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147. U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

148. CONSTITUTION AND BY-LAWS OF THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA art. IV, § 4 (prohibiting sex-based disqualification from holding tribal office), available at <http://thorpe.ou.edu/IRA/ias&fcons.html>.

149. THE FAMILY COURT OF THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION FAMILY CODE, CODE OF ETHICS FOR BLACKFEET FAMILY COURT MEMBERS R. 6 (1999), available at <http://www.tribalresourcecenter.org/ccfolder1/lkft1to22familyct.htm>; THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS ch. 14, art. I, § 14-1.5 (2005), available at <http://www.tribalresourcecenter.org/ccfolder1/eccodech14criminallaw.htm#1>; WHITE EARTH BAND OF CHIPPEWA RULES OF CRIMINAL PROCEDURE R. 1.02 (2000), available at [http://www.tribalresourcecenter.org/ccfolder1/whtearth\\_lawandorder.htm#criminal](http://www.tribalresourcecenter.org/ccfolder1/whtearth_lawandorder.htm#criminal).

150. WHITE EARTH BAND OF CHIPPEWA RULES OF CRIMINAL PROCEDURE R. 1.02, available at [http://www.tribalresourcecenter.org/ccfolder1/whtearth\\_lawandorder.htm#criminal](http://www.tribalresourcecenter.org/ccfolder1/whtearth_lawandorder.htm#criminal).

which can be contrasted with the “fear of too much justice” that often characterizes the American judicial system.<sup>151</sup>

Because the Blackfeet provision is part of the Family Court’s “Code of Ethics,” it, like the White Earth Chippewa provision, may not be directly enforceable, although, alternatively, its strong language could be interpreted to dictate enforceability: “The Blackfeet Family Court Members will serve and respond to requests without bias because of race, religion, sex, age, national origin or handicap.”<sup>152</sup>

Finally, the Eastern Band of Cherokee provision uses even stronger wording and therefore probably creates enforceable obligations.<sup>153</sup> Additionally, the Cherokee provision may be the most remarkable in that it appears to put a complementary onus on the individual not to seek exemptions or more favorable treatment based on membership in a particular class:

(a) All persons, regardless of race, age, or sex will comply and be subject to the laws of the Eastern Band of Cherokee Indians whenever they are within the boundaries of Qualla Boundary and its territories.

(b) All persons, regardless of race, age, or sex will be subject to all of the same charges, convictions, and fines that enrolled members of the Eastern Band are subject to.

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(e) Tribal jurisdiction on all persons shall be equal and nondiscriminatory towards anyone, regardless of race, age, or sex as long as they are visiting or living or doing business on the lands of the Eastern Band of Cherokee Indians.<sup>154</sup>

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151. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

152. THE FAMILY COURT OF THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION FAMILY CODE, CODE OF ETHICS FOR BLACKFEET FAMILY COURT MEMBERS R. 6 (1999), *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkft1to22familyct.htm>.

153. THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS ch. 14, art. I, § 14-1.5 (2005), *available at* <http://www.tribalresourcecenter.org/ccfolder1/eccodech14criminallaw.htm#1>.

154. *Id.* The Washington State Constitution’s Equal Rights Amendment appears to be somewhat similar in terms of defining rights to go hand in hand with responsibility. *Machioro v. Chaney*, 582 P.2d 487, 491 (Wash. 1978) (quoting the state Equal Rights Amendment as stating that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex”).

#### 4. *Prohibition on the Use of Sex-Based Presumptions in Child Custody Matters*

Somewhat similar to the laws described above prohibiting discrimination in the application of rules and laws, three tribes have code provisions that prohibit the use of sex-based presumptions for one parent or another in custody matters.<sup>155</sup> A fourth tribe has, in case law, rejected as “sexist” the American rule that the domicile of a child follows that of his or her mother.<sup>156</sup>

#### 5. *Miscellaneous Prohibitions on Sex Discrimination*

Finally, a few tribes have prohibitions on sex discrimination that apply in other diverse contexts, such as applications for financial credit, housing, provision of health services, treatment of prisoners, and education.

##### a. *Credit Applications*

The Blackfeet Tribe disallows creditors from discriminating based on sex or other listed grounds “in any aspect of a credit transaction.”<sup>157</sup> This provision contains much of the same language as the Federal Equal Credit Opportunity Act<sup>158</sup> and was most likely modeled on that Act.

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155. See CHITIMACHA COMPREHENSIVE CODES OF JUSTICE & CHITIMACHA INDIAN TRIBAL COURT “RULES OF COURT” tit. VI, ch. 3, § 304(c) (2003), available at <http://www.tribalresourcecenter.org/ccfolder1/chitimcodet6family.htm>; FT. PECK COMPREHENSIVE CODE OF JUSTICE tit. X, ch. 3, § 304(b) (2000), available at [http://www.tribalresourcecenter.org/ccfolder1/fortpeck\\_justicecode\\_10.htm](http://www.tribalresourcecenter.org/ccfolder1/fortpeck_justicecode_10.htm); GRAND TRAVERSE BAND CODE: STATUTES OF THE GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, tit. 10, ch.5, § 514(b) (2003), available at <http://www.tribalresourcecenter.org/ccfolder1/travcode10childfameld.htm#5>; see also *In re Custody of C.A.G.*, 5 Am. Tribal L. 148, 2004 WL 5599397, at \*2 (Fort Peck Ct. App. 2004) (applying the tribal code’s prohibition on gender-based presumptions).

156. *Father v. Mother*, 3 Mashantucket Rptr. 204, slip op. ¶ 28 (Mashantucket Pequot Tribal Ct. Mar. 9, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAMP.0000010.htm> (following a Cheyenne River Sioux Tribal Court opinion and rejecting in a child custody case “the historically gendered and sexist rules of Western common law” regarding a child’s domicile) (citations omitted); see also Fletcher, *supra* note 78, at 18–20 (discussing *Father v. Mother*).

157. BLACKFEET TRIBAL LAW & ORDER CODE ch. 3, § 4(A)(1) (1999), available at <http://www.ntjrc.org/ccfolder/blkftcp3equal.htm>.

158. 15 U.S.C. § 1691(a)(1) (2006).

*b. Health Services*

The Bylaws of Susanville Indian Rancheria's health clinic require the Board of Directors "[t]o ensure operation of the clinic without limitation by reason of race, creed, sex or national origin except as provided by Congress and federal rules and regulations."<sup>159</sup>

*c. Education*

The Oglala Sioux Education Code requires the local school board "to develop and implement a student activity program" and requires that the development and implementation be conducted in an "equitable manner with respect to . . . gender."<sup>160</sup> While the United States has a statute generally prohibiting discrimination in education based on sex or other enumerated grounds,<sup>161</sup> the Oglala Sioux provision applies in a much narrower context.

*d. Treatment of Prisoners*

Probably the most unique provision at least among these miscellaneous provisions is the Sisseton-Wahpeton Sioux Tribe's anti-discrimination provision for prisoners: (1) There shall be no discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.<sup>162</sup>

While it is difficult to know how this law operates in practice, the law itself is clearly at odds with the federal trend of limiting prisoners' rights and ability to seek relief.<sup>163</sup> Moreover, there appears to be no

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159. SUSANVILLE INDIAN RANCHERIA [ORDINANCES], BYLAWS LASSEN INDIAN HEALTH CTR. art. II, § 2(15) (2003), *available at* <http://www.tribalresourcecenter.org/ccfolder1/susvillehealth.htm>.

160. OGLALA SIOUX LAW & ORDER CODE, ch. 26, § VI, 600.10 STANDARD (1996), *available at* [http://www.tribalresourcecenter.org/ccfolder1/ogla\\_la\\_wandorder26.htm](http://www.tribalresourcecenter.org/ccfolder1/ogla_la_wandorder26.htm).

161. 20 U.S.C. § 1681(a) (2006) (providing, with limited exceptions, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"). For an additional historical discussion, see Kiselewich, *supra* note 13, at 219 n.13.

162. SISSETON-WAHPETON SIOUX TRIBE, ch. 31, § 31-01-01 (1998), *available at* [http://www.ntjrc.org/ccfolder/sisseton\\_wahpeton\\_codeoflaw31.htm](http://www.ntjrc.org/ccfolder/sisseton_wahpeton_codeoflaw31.htm).

163. *See, e.g.*, Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1509–10, 1509 n.159 (2008) (describing

federal statutory counterpart to the law; rather, state and federal prisoners typically seek relief for sex discrimination by alleging a constitutional violation of their right to equal protection under the Fourteenth Amendment's Equal Protection Clause or the Fifth Amendment's Due Process Clause.<sup>164</sup> Additionally, while federal courts do, at least formally, apply intermediate scrutiny in such cases, deference to the prison administration plays a large role.<sup>165</sup> By contrast, this law, on its face, unqualifiedly prohibits sex discrimination.

Thus, like the White Earth Chippewa provision requiring equal treatment under the tribe's rules of criminal procedure and like the broad-based Navajo proscription on sex discrimination, this Sisseton-Wahpeton Sioux provision evidences a strong concern for substantive fairness. Moreover, the Sisseton-Wahpeton Sioux provision extends the concern to one class of persons whose right to fairness under federal law has been considerably diminished.

*e. Allowing Tenants to Defend Against Eviction Based on a Landlord's Sex-Based Discrimination*

Two tribes have adopted laws that allow a tenant to defend against an eviction on the basis that the eviction is occurring because of the tenant's sex or for other specified discriminatory reasons.<sup>166</sup> These laws are similar to a federal Fair Housing Act regulation that prohibits landlords from evicting tenants based on sex or other prohibited grounds.<sup>167</sup> Thus, as with the Oglala Sioux education provision, these two provisions are in accord with a corresponding

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the Prison Litigation Reform Act and other recent developments in federal law).

164. See, e.g., *Jackson v. Thornburgh*, 907 F.2d 194 (D.C. Cir. 1990) (holding federal law that grants early release to some prisoners, but not long-term female offenders in a federal facility, does not violate equal protection); *Ashann-Ra v. Commonwealth of Virginia*, 112 F. Supp. 2d 559 (W.D. Va. 2000) (holding prison grooming policies that differ with respect to gender not to violate equal protection).

165. See *Ashann-Ra*, 112 F. Supp. 2d at 570–71.

166. THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON [ORDINANCES], § 480(P)(5)(F) (2003), available at <http://www.tribalresourcecenter.org/ccfolder1/gr480tribhou.htm> (stating that the landlord's sex discrimination against the tenant can be used as a defense to eviction); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 83, sub-ch. VII, § 83.702(6) (2001), available at [http://www.tribalresourcecenter.org/ccfolder1/sault\\_stmarie\\_tribalcode.htm](http://www.tribalresourcecenter.org/ccfolder1/sault_stmarie_tribalcode.htm) (providing that a landlord's sex discrimination against the tenant can be used as a defense to eviction).

167. 24 C.F.R. § 100.60(b)(5) (2009).

federal policy against housing discrimination, but they apply more narrowly.<sup>168</sup>

*f. Prohibition on Sex Discrimination by Telecommunications Service Providers*

The Navajo Nation has a law in place that provides that “[n]o telecommunications service provider shall, as to rates or service, make or grant any unreasonable preference or advantage to any person, or subject any person to unreasonable prejudice or disadvantage based upon . . . sex.”<sup>169</sup> It is not clear how the qualifier “unreasonable” would be interpreted here, but it appears to allow the companies to make some types of sex-based distinctions. At least one state, Texas, has a similar administrative rule prohibiting telecommunications service providers from discriminating based on sex.<sup>170</sup>

*g. Workers’ Compensation for Sex Organ Losses*

Mashantucket Pequot’s inclusion, as of 2000, of loss of female genitalia on its table of compensable injuries is another apparent move toward gender equity, given that the loss of male genitalia had already been included in the table.<sup>171</sup> The amendment was apparently based upon a similar amendment enacted by the State of Connecticut.<sup>172</sup>

*6. Summary of Context-Specific Sex Discrimination Laws*

Tribes have adopted a broad range of policies and laws that protect against sex discrimination in myriad contexts. While many of them apply in narrow circumstances, such as eviction, others are quite broad, applying for example to all sex-based employment discrimination. Often these laws appear to reflect a deeper level of concern for

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168. *See, e.g.*, 42 U.S.C. § 3604 (2006).

169. NAVAJO NATION CODE, tit. 21, § 509(B) (2008).

170. Public Utilities Commission of Texas, Substantive Rules, ch. 26, § 26.21 (1999), available at <http://www.puc.state.tx.us/rules/subrules/telecom/26toc-I/26toc-I.pdf> (prohibiting the certified telecommunications utilities from discriminating based on race, nationality, color, religion, sex, marital status, income level, source of income, and from unreasonable discrimination on the basis of geographic location).

171. *See* MASHANTUCKET PEQUOT TRIBAL LAWS ANN., tit. 13, ch. 4, § 12(b) (2008), available at <http://www.narf.org/nill/Codes/mpcode/13workerscomp.pdf>; *see also* tit. 13, ch. 4, § 12(b) cmt. B(6).

172. *Id.* tit. 13, ch. 4, § 12(b) cmt. B(6).



substantive fairness than do federal laws, and the laws sometimes apply in contexts, such as prisoner rights, that are unusual by U.S. standards. In a few cases, the laws appear to be modeled after similar federal laws. The diversity of these laws suggests that tribes are indeed “laboratories for democracy,” as Raymond Etcitty, Legislative Counsel for the Navajo Nation, has argued.<sup>173</sup>

### III. SEX-BASED DISTINCTIONS UNDER TRIBAL LAW

As might be expected given the vast diversity tribal cultures, although a significant portion of tribes have prohibitions on sex discrimination in place, some tribes continue to make sex-based distinctions in their laws. Indeed, some of the tribes that have enacted context-specific prohibitions on sex discrimination make sex-based distinctions in other contexts.<sup>174</sup>

One of the most well-known of tribal laws that makes sex-based distinctions is the membership rule for Santa Clara Pueblo, which has been reported to be still in place.<sup>175</sup> Although most membership provisions appear to be sex-neutral, I identified one additional sex-based enrollment law that favors women<sup>176</sup> and one that appears to limit the rights of unmarried fathers with respect to their children’s eligibility for membership.<sup>177</sup> With a few exceptions,<sup>178</sup> most other sex-

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173. See Krakoff, *supra* note 8, at 1153 (quoting Navajo Nation Legislative Counsel Raymond Etcitty).

174. See *supra* note 121 and accompanying text.

175. Valencia-Weber, *supra* note 14, at 50.

176. CONSTITUTION AND BYLAWS OF THE KILAGEE TRIBAL TOWN OKLAHOMA, art. III, §§ 3–5, available at [http://www.tribalresourcecenter.org/ccfolder1/Kialegee\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/Kialegee_const.htm) (allowing children of female members to automatically become members but requiring case-by-case approval for children of male members whose mothers are from other tribes). Sex-neutral enrollment provisions include those of the Citizen Potawatomi Nation and the Mississippi Band of Choctaw Indians, among others. See, e.g., CONSTITUTION OF THE CITIZEN POTAWATOMI NATION, art. III, § 1, available at [http://www.tribalresourcecenter.org/ccfolder1/potawatomi\\_nation\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/potawatomi_nation_const.htm); REVISED CONSTITUTION & BYLAWS OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, art. III, § 1, available at [http://www.tribalresourcecenter.org/ccfolder1/mississippi\\_choctaw\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/mississippi_choctaw_const.htm). For a discussion of other sex-based membership provisions, see Rusco, *supra* note 100, at 284. However, the Hopi provision that Rusco discusses does not remain in force. See CONSTITUTION & BY-LAWS OF THE HOPI TRIBE, art. II, § 2 (1993), available at [http://hopicourts.com/index.php?option=com\\_docman&Itemid=50&group=13](http://hopicourts.com/index.php?option=com_docman&Itemid=50&group=13); Personal Communication with Hopi Tribal Secretary’s Office, Oct. 1, 2008 (regarding most recent amendment of the Hopi Constitution).

177. FORT PECK COMPREHENSIVE CODE OF JUSTICE 2000, tit. IV, § 202, Group 4, available at [http://www.tribalresourcecenter.org/ccfolder1/fortpeck\\_justicecode\\_4.htm](http://www.tribalresourcecenter.org/ccfolder1/fortpeck_justicecode_4.htm). A somewhat similar provision of federal immigration law was upheld in *Nguyen*

based laws that were identified pertained to the family law context,<sup>179</sup>

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*v. I.N.S.*, 533 U.S. 53 (2001).

Additionally, I identified one sex-based voting provision but have serious doubts about whether it remains in force. CONSTITUTION FOR THE ISLETA PUEBLO, art. II, ¶ 2, *available at* <http://thorpe.ou.edu/IRA/isnmcons.html>. This Constitution is dated 1947, *id.*, although other information indicates this Tribe's constitution was revised in 1991. *See, e.g.*, Center for Legal Education, State Bar of New Mexico Indian Law Section, Tribal Justice & Court Systems, "Pueblo of Isleta Appellate Court & Tribal Court" 3 (2006), *available at* <http://tj.unm.edu/handbook/pdfs/isleta2006.pdf>. Indeed, Rusco discusses the Isleta Pueblo Constitution in parts of his article but does not mention the Tribe in his discussion of tribal sex discrimination. Rusco, *supra* note 100, at 273, 284.

178. BLACKFEET TRIBAL LAW & ORDER CODE, ch. 6, § 14(1), *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkftcode6enforce.htm> (allowing tribal police officers to command the assistance of males over eighteen years old); BLACKFEET TRIBAL LAW & ORDER CODE, ch. 2, § 7, *available at* <http://www.tribalresourcecenter.org/ccfolder1/blkftcode2civil.htm> (allowing for imprisonment of only male debtors in cases of fraud, potential abscondment, or removal or concealment of property); MASHANTUCKET PEQUOT TRIBAL LAWS ANN., 24 M.P.T.L. ch. 8, § 7(d) (2008) (providing, under the Mashantucket Pequot Uniform Gifts to Minors Act, for the default custodian of the minor in certain circumstances to be the child's father, unless the parents are divorced and the mother has been awarded custody, in which case the mother becomes the default custodian); OGLALA SIOUX LAW & ORDER CODE, ch. 9, § 64 (making it a criminal offense for a man to have sex with an unmarried woman if she becomes pregnant and gives birth), § 103 (defining the victim of the crime of assault with intent to commit rape as "female"), § 104, *available at* [http://www.tribalresourcecenter.org/ccfolder1/ogllala\\_lawandorder9.htm](http://www.tribalresourcecenter.org/ccfolder1/ogllala_lawandorder9.htm) (making it a crime for "any Indian" to have sex with a female under the age of sixteen); SAN ILDEFONSO PUEBLO TRIBAL CODE, ch. 31, § 31.2(10), *available at* [http://www.tribalresourcecenter.org/ccfolder1/sanildefonso\\_pueblo\\_tribalcode.htm](http://www.tribalresourcecenter.org/ccfolder1/sanildefonso_pueblo_tribalcode.htm) (providing that heirlooms and other articles descend down the maternal line to female relatives and down the paternal line to male relatives); WHITE MOUNTAIN APACHE PROBATE CODE, ch. 4, § 4.11(A), *available at* [http://www.tribalresourcecenter.org/ccfolder1/wht\\_mtn\\_apache\\_tribalcode\\_probate.html](http://www.tribalresourcecenter.org/ccfolder1/wht_mtn_apache_tribalcode_probate.html) (providing that only fathers of legitimate children (with consent of the mother) and mothers of illegitimate children, or one parent alone if the other is incapable of consent, have the right to appoint testamentary guardians); *see also* Riggs v. Estate of Attakai, No. SC-CV-39-04 (Navajo June 13, 2007), slip op. at 3-4, 4 n.5, *available at* <http://www.navajocourts.org/NNCourtOpinions2007/09Sista%20Riggs%20v%20Estate%20of%20Tom%20Attakai.pdf> (explaining that the tradition of prized grazing rights descending to female relatives should be part of the analysis in determining who should be awarded such rights in individual cases).

179. *See, e.g.*, LAW & ORDER CODE OF THE FORT MCDOWELL YAVAPAI COMMUNITY, ARIZONA, art. III, § 10-34(a)(1)(d), *available at* [http://www.tribalresourcecenter.org/ccfolder1/yavapai\\_ftmcdowell\\_lawandorder10.htm](http://www.tribalresourcecenter.org/ccfolder1/yavapai_ftmcdowell_lawandorder10.htm) (providing with regard to parental consent to adoption of a child that "[c]onsent is not necessary from a father who is not married to the mother of the child both at the time of its conception and at the time, of its birth, unless the father under oath has acknowledged [parentage] in a document filed with the court at or prior to the time the petition for adoption is filed, or unless the parentage of the father has been previously established by judicial proceedings"); OGLALA SIOUX LAW & ORDER CODE,

an area where sex-based distinctions have been, and to some extent continue to be, common in American law.<sup>180</sup>

Two of the most interesting sex-based laws relate to traditional tribal governmental functions. The Constitution of the Iroquois Nations: The Great Binding Law, Gayanashagowa, sets out male and female roles in the traditional government.<sup>181</sup> One section provides that a Lord who oversteps his rightful authority will be dismissed after repeated warnings, and “[h]is nation shall then install the candidate nominated by the female name holders of his family.”<sup>182</sup>

Another law that appears to codify tribal tradition is an alternative dispute resolution provision of the Little River Band of Ottawa Indians, which utilizes a “Peacemaking System” “to provide a traditional conflict resolution process to children, youth and families.”<sup>183</sup> This law provides that “[p]eacemaking sessions are conducted by two Peacemakers: one male and one female to create balance.”<sup>184</sup>

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ch. 3, § 30, ¶¶ 2–3, available at [http://www.tribalresourcecenter.org/ccfolder1/oglala\\_lawandorder3.htm](http://www.tribalresourcecenter.org/ccfolder1/oglala_lawandorder3.htm) (providing for females to be able to consent to marriage at an earlier age than males and providing that males will be considered minors, and therefore entitled to some parental support, until they are twenty-one, whereas females will only be considered minors until the age of eighteen); THE LAW & ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION UTAH, tit. V, ch. III, § 5-3-9, available at [http://www.tribalresourcecenter.org/ccfolder1/ute\\_lawandorder.htm](http://www.tribalresourcecenter.org/ccfolder1/ute_lawandorder.htm) (creating presumption in custody proceedings that the mother is best suited to custody of the children).

180. See, e.g., *Ex parte Devine*, 398 So.2d 686 (Ala. 1981) (striking down presumption in favor of mother’s custody under equal protection clause); *Gordon v. Gordon*, 577 P.2d 1271 (Okla. 1978) (upholding presumption in favor of mother’s custody against equal protection challenge). Note also that the U.S. Supreme Court continues to uphold laws treating unmarried fathers less favorably than unmarried mothers. *Nguyen*, 533 U.S. 53 (upholding the validity of federal distinctions between unmarried mothers and unmarried fathers that affect a child’s ability to benefit from the parent’s immigration status in order to gain admittance to the United States).

181. CONSTITUTION OF THE IROQUOIS NATIONS: THE GREAT BINDING LAW, GAYANASHAGOWA, available at [http://www.tribalresourcecenter.org/ccfolder1/iroquois\\_const.htm](http://www.tribalresourcecenter.org/ccfolder1/iroquois_const.htm).

182. *Id.* § 25; see also Valencia-Weber, *supra* note 14, at 56 (discussing the allocation of authority between males and females and the primacy of women in the clan system of the Onondaga of New York, one of the Nations that comprises the Iroquois Confederacy); Onondaga Nation, <http://www.onondaganation.org/>.

183. LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES AND REGULATIONS, GDA DWENDAAGNANANIK: PEACEMAKING GUIDELINES, §§ 1–2, available at [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm).

184. *Id.* § 3. Notably, a Washington state case has upheld such legally-mandated sex-balancing in the composition of the Washington State Democratic Committee against a state constitutional challenge based on Washington’s Equal Rights

Both the Little River Band of Ottawa Indians' law and the Constitution of the Iroquois Nations appear to be integral to preserving those tribes' unique traditions. While some tribal laws make sex-based distinctions that may be troubling to other Americans, it is hard to fathom the degree to which tribal cultures would be compromised if such distinctions were outlawed.<sup>185</sup>

#### IV. TRIBAL SOVEREIGN IMMUNITY

It is very possible that tribal sovereign immunity could impede a plaintiff's ability to enforce equal protection guarantees or tribal prohibitions on sex discrimination or to challenge a law creating a sex-based distinction. Therefore, a brief discussion of the doctrine is warranted here. Under the doctrine of tribal sovereign immunity, tribes, like other sovereigns,<sup>186</sup> are immune from suit in state, federal, and tribal courts, although either the tribe or the federal government may expressly waive this immunity.<sup>187</sup>

However, most tribes will permit ICRA suits in which only equitable relief is sought to be brought against them in tribal court.<sup>188</sup> Other civil rights claims based on the tribal constitution or a statutory

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Amendment. *Machioro v. Chaney*, 582 P.2d 487, 490–92 (Wash. 1978).

185. See, e.g., *Valencia-Weber*, *supra* note 14, at 53–56.

186. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (addressing state sovereign immunity).

187. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05 (2007).

188. *Taylor*, *supra* note 43, at 253–55; see also *Dupree v. Cheyenne River Sioux Hous. Auth.*, 16 Indian L. Rptr. 6106, 6108 (Cheyenne River Sioux Ct. App.1988); *McCallister v. Spirit Mountain Gaming*, 33 Indian L. Rptr. 6057, 6061 (Confederated Tribes of the Grand Ronde Community Tribal Ct. 2007); *Healy v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6189, 6191 (Mashantucket Ct. of App. 1999); *Jackson v. Kahgegab*, 33 Indian L. Rptr. 6105, 6108 (Saginaw Chippewa Indian Tribe App. Ct. 2003); see also *DeCoteau v. Ft. Peck Tribes*, \_\_ Am. Tribal L. \_\_, 2002 WL 34432659, \*5, \*7 (Ft. Peck. Ct. of App., Dec. 5, 2002) (holding that ICRA claims for equitable and injunctive relief may be brought against tribal officials and tribal employees but imposing heightened pleading requirements); accord *Rosen*, *supra* note 23, at 509 (explaining that ICRA suits for prospective injunctive relief are usually allowed but that allowance of such suits does not technically constitute a waiver of tribal sovereign immunity); cf. *Thomas v. Coquille Indian Tribe*, No. C03-001, 2004.NACQ.0000001, ¶¶ 77–78 (Coquille Indian Tribal Court, March 9, 2004), available at <http://www.tribalresourcecenter.org/opinions/opfolder/2004.NACQ.0000001.htm> (noting that neither the ICRA nor the tribal constitution “create[s] remedies in this tribal court for denial of due process or equal protection” but that, because the plaintiff failed to state a claim on which relief could be granted, “[w]hether such remedies exist . . . is an issue to be resolved, if at all, on another day”).

bill of rights also appear to be permitted fairly commonly when only equitable relief is sought.<sup>189</sup> However, more difficult issues tend to arise when a plaintiff seeks to sue under an ordinary tribal code provision. It appears that many tribes have enacted narrow waivers for specific types of such claims, and thus tight filing deadlines and sharp limitations on the claims that may be pursued and the remedies available should be expected.<sup>190</sup> In some cases, a waiver may not be available at all,<sup>191</sup> although, in rare cases, plaintiffs have convinced tribal councils to create waivers especially for them.<sup>192</sup> Even if no waiver is available, however, the policy inherent in law can still serve important functions and can influence community standards of right and wrong.

#### V. OTHER AVENUES OF RELIEF

Despite the fairly widespread existence of tribal sex discrimination laws, case law construing such laws appeared to be largely lacking. Given the numerous cases regarding employment-related due process claims, it is possible that plaintiffs who could bring sex discrimination claims are focusing on due process instead.<sup>193</sup> Another possibility is

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189. *McCallister*, 33 Indian L. Rptr. at 6061; *Johnson v. Navajo Nation*, 14 Indian L. Rptr. 6037, 6040 (Navajo 1987); cf. *Thomas*, No. C03-001, 2004.NACQ.0000001 at ¶¶ 77–78, available at <http://www.tribalresourcecenter.org/opinions/opfolder/2004.NACQ.0000001.htm> (noting that neither the ICRA nor the tribal constitution “create[s] remedies in this tribal court for denial of due process or equal protection” but that, because the plaintiff failed to state a claim on which relief could be granted, “[w]hether such remedies exist . . . is an issue to be resolved, if at all, on another day”).

190. *McCallister*, 33 Indian L. Rptr. at 6058–59; *Beebe v. Ho-Chunk Nation*, 32 Indian L. Rptr. 6155, 6156 (Ho-Chunk Nation Sup. Ct., July 18, 2005); *Schock v. Mashantucket Pequot Gaming Enterprise*, 3 Mashantucket Rptr. 129, 1999 WL 34828705 (Mashantucket Pequot Tribal Ct., Sept. 20, 1999); *Bethel v. Mohegan Tribal Gaming Authority et al.*, No. GDTC-T-98-105, 1998.NAMG.0000005 ¶¶ 34–35, 42–43 (Mohegan Gaming Disputes Ct. of App., Dec. 14, 1998), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1998.NAMG.0000005.htm>; *Long v. Mohegan Tribal Gaming Auth.*, 25 Indian L. Rptr. 6111, 6112–13 (Mohegan Gaming Disputes Tribal Ct., Dec. 5, 1997); *Renecker v. Tulalip Tribes*, No. TUL-EMP-11/96-667, 5 Northwest Intertribal Court System App. 1, 4–5 (May 29, 1997); *Chatterson v. Confederated Tribes of the Siletz Nation of Indians of Oregon*, 24 Indian L. Rptr. 6231, 6231–32 (Siletz Ct. App., Oct. 9, 1997).

191. See, e.g., *Pawnee Tribe of Oklahoma v. Fransen*, 19 Indian L. Rptr. 6006 (Ct. Indian App. 1991).

192. See, e.g., *Shippentower v. Confederated Tribes of the Umatilla Indian Reservation of Oregon*, 20 Indian L. Rptr. 6026, 6026–27 (Umatilla Tribal Ct. 1993).

193. See, e.g., *Fletcher*, *supra* note 51, at 293 (noting that “Tribal Courts are inundated with personnel cases” based on due process claims). For an example of a

that some tribes may take a broader view of discrimination, not conceptualizing it to be limited to suspect classes, and, therefore, plaintiffs may be bringing generic discrimination claims, rather than sex discrimination claims.<sup>194</sup> Undoubtedly, however, a proportion of potential sex discrimination claims are not heard on the merits due to plaintiffs' failure to meet the strict filing deadlines that many tribes apply to employment discrimination claims or claims against the tribe.<sup>195</sup>

## VI. CONCLUSION

There are numerous tribal protections against sex discrimination in force, ranging from equal protection guarantees, to explicit broad-based constitutional or statutory protections, to context-specific proscriptions against discrimination that apply in anywhere from fairly broad to quite narrow contexts. Although it is difficult to generalize, the wording of several statutory laws and some case law suggests a greater concern for disparate impact than inheres in federal anti-discrimination law. Moreover, all of these protections evidence tribal

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due process case in the employment context, see *Lonetree v. Garvin*, 34 Indian L. Rptr. 6126, 6126–27 (Ho-Chunk Nation Sup. Ct. 2007).

194. See, e.g., LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES & REGULATIONS, CH. 600, § 2.2, available at [http://www.tribalresourcecenter.org/ccfolder1/littleriver\\_ottawa\\_ordandreg.htm](http://www.tribalresourcecenter.org/ccfolder1/littleriver_ottawa_ordandreg.htm) (prohibiting discrimination based on suspect class membership or “other non-merit factors”); SUSANVILLE INDIAN RANCHERIA CONSTITUTION & BYLAWS, BYLAWS, art. III, § 4(6), available at <http://www.tribalresourcecenter.org/ccfolder1/susanvilleconst.htm> (requiring the Tribal Council to “[c]ommit to providing an environment that is free from discrimination”); see generally *Warner v. Ho-Chunk Nation*, 34 Indian L. Rptr. 6084 (Ho-Chunk Nation Sup. Ct. 2007) (addressing the possibility that the plaintiff’s demotion was a pretext as defined under tribal law without appearing to view the concept of pretext to necessarily be tied to discrimination based on membership in a suspect class); see also *DiPietro v. Mashantucket Pequot*, 34 Indian L. Rptr. 6092 (Mashantucket Pequot Tribal Ct. 2007) (referring to plaintiff’s disparate treatment claim without mention of the claim’s being based on membership in a suspect class).

Yet another possibility is that the apparent lack of sex discrimination case law is a misperception resulting from the general difficulty of obtaining tribal case law compared to tribal statutory law. See *supra* note 40 and accompanying text. Although this difficulty may partially account for the apparent lack of tribal sex discrimination case law, it is doubtful that this general difficulty in obtaining case law is the only issue at play.

195. See, e.g., *McCallister*, 33 Indian L. Rptr. at 6058–59; *Bethel v. Mohegan Tribal Gaming Authority et al.*, No. GDTC-T-98-105, 1998.NAMG.0000005 ¶¶ 34–35, 42–43 (Mohegan Gaming Disputes Ct. of App., Dec. 14, 1998), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1998.NAMG.0000005.htm>; *Chatterson*, 24 Indian L. Rptr. at 6231–32.

policies against sex discrimination. However, it is important to be realistic about the fact that all tribes do not have such protections in place, and, similarly to the United States, some tribes continue to make sex-based distinctions (including a few of the tribes that prohibit sex discrimination in some contexts). Nonetheless, the diversity of tribal approaches to the issue of sex discrimination and the breadth of existing legal protections are impressive.

More research is needed to better understand the scope, application, and frequency of these laws. As more tribes begin to make their laws available outside of their judicial systems, this research will become more feasible. In the meantime, it is possible to focus in significant depth on individual tribes that do have codes and case law that either are available on the tribes' own websites or by visiting the tribal courts in person. While obtaining materials in this way is less likely to allow for electronic searching<sup>196</sup> or to facilitate large-scale comparisons among tribes, it would be a fruitful area of research and would add significantly to the growing base of scholarship on tribal law.

One thing that should be clear from existing information is that tribes collectively do not take a monolithic approach to sex discrimination and that many tribes have made a significant commitment to eradicating it. Moreover, it should also be apparent that individual tribes' laws can, in many circumstances, be located, albeit with some work.

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196. For example, the Hopi Tribal Courts Website, [http://hopicourts.com/index.php?option=com\\_docman&group=13&Itemid=50](http://hopicourts.com/index.php?option=com_docman&group=13&Itemid=50), provides access to tribal statutory and constitutional law, as well as to appellate court decisions dating back to 1984. At least some of the sections of the tribal code appear to be electronically searchable within each document (*e.g.*, electronic searching is possible within the Enrollment Code), but the tribal constitution is not electronically searchable. Similarly, the cases are provided in lists grouped by date and are not electronically searchable.