2023

Due Process and Equal Protection in Michigan Anishinaabe Courts

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DUE PROCESS AND EQUAL PROTECTION IN MICHIGAN ANISHINAABE COURTS

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In 1968, largely because the United States Constitution does not apply to tribal government activity,[1] Congress enacted the Indian Civil Rights Act–a federal law that requires tribal governments to guarantee due process and equal protection to persons under tribal jurisdiction.[2] In 1978, the Supreme Court held that persons seeking to enforce those federal rights may do so in tribal forums only; federal and state courts are unavailable.[3] Moreover, the Court held that tribes may choose to interpret the meanings of "due process" and "equal protection" in line with tribal laws, including customary laws.[4] Since the advent of the self-determination era of federal Indian law in the 1970s, Michigan Anishinaabe tribal governments have adopted constitutions that also guarantee individual rights, usually using the same or substantively similar language as federal law does.[5] Despite the opportunity to interpret the Due Process and Equal Protection Clauses in accordance with tribal customs, tribal courts have usually applied (or modified) federal precedents to such claims. Given the practical nonexistence of court precedents and legal scholarship on Anishinaabe legal customs and traditions until recently, the reliance on the precedents of the colonizers was inevitable.

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[1] Talton v. Mayes, 163 U.S. 376 (1896).

[2] 25 U.S.C. § 1302(a)(8).

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

[4] *Id.* at 71–72.

[5] *See e.g.*, Grand Traverse Band of Ottawa and Chippewa Indians, Const., art. X, § 1(h) ("equal protection" and "due process"); Pokagon Band of Potawatomi Indians, Const., art. XVI(h) (same); Sault Ste. Marie Tribe of Chippewa Indians, Const. and Bylaws, art. VIII ("equal protection" and "rights or guarantees enjoyed by citizens under the Constitution of the United States").

In recent years, Michigan Anishinaabe tribal nations have begun to point to traditions, customs, and culturally relevant sources to interpret positive tribal laws such as constitutions, statutes, and regulations. For example, the juvenile justice and domestic violence codes of the Nottawaseppi Huron Band of the Potawatomi incorporate the Noeg Meshomsenanek Kenomagewenen, the Seven Grandfather Teachings.[6] The Nottawaseppi election code does as well. There, the Seven Grandfathers Teachings are defined to include "Wisdom, Love, Respect, Bravery, Honesty, Humility, and Truth."[7] Additionally, scholarship on Anishinaabe legal philosophy and customary law is growing.[8]

This essay opens with a short description of why tribal governments have the duty and opportunity to interpret the obligations to provide "due process" and guarantee "equal protection" to persons under tribal jurisdiction. The next part delves into federal and state interpretations of those principles. The third part introduces and summarizes some Anishinaabe legal philosophies. The final part offers suggestions on how those legal philosophies can be used by tribal governments to interpret "due process" and "equal protection" in light of Anishinaabe culture.

I. THE POWER OF TRIBAL GOVERNMENTS TO INTERPRET "DUE PROCESS" AND "EQUAL PROTECTION"

In 1968, Congress chose to exercise its plenary power in Indian affairs to mandate that tribal governments guarantee minimum individual rights modeled on the federal Bill of Rights to persons under tribal jurisdiction.[9] Included within that federal mandate was the following

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[6] Nottawaseppi Huron Band of the Potawatomi, Juvenile Justice Code, § 7.3-6; Nottawaseppi Huron Band of the Potawatomi, Domestic Violence Code, § 7.4-6.
[7] Nottawaseppi Huron Band of the Potawatomi, Election Code, § 3.1-4.
[8] *See e.g.*, Aimée Craft & Lucas King, *Building the Treaty #3 Nibi Declaration Using an Anishinaabe Methodology of Ceremony, Language and Engagement*, 13 *Water* 532 (2021); Kekek Jason Stark, *Anishinaabe Inakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293 (2021).
[9] 25 U.S.C. § 1302.

provision: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]"[10] As with much federal Indian affairs legislation, the goals of Congress in enacting this provision and the rest of the Indian Bill of Rights are uncertain. Congress could have intended to curb individual rights abuses by tribal governments that it learned were occurring before 1968; Congress could have intended to force tribal governments to conform to federal constitutional rights protections as a matter of good public policy; or Congress could have intended to continue an ugly process of assimilating tribal governments and undermining tribal cultures.

Ten years later, the Supreme Court held in one of the most important Indian affairs decisions of the 20th century that federal and state courts have no jurisdiction to enforce the federal rights provided for in the Indian Bill of Rights.[11] Instead, relying on statements of congressional intent specific to the 1968 Act and on statutory interpretation principles applicable to all federal Indian affairs statutes, the Court held that only tribal forums possess jurisdiction to enforce the individual rights guarantees. Not only that, but the Court also held that tribal courts could interpret those federal rights in line with tribal culture.

In retrospect, the decision seems obvious. The claim in that case involved a challenge to a tribal law barring enrollment with the tribe unless the father was a citizen of a tribe. This was a clear case of sex discrimination that would violate the Equal Protection Clause of the Indian Bill of Rights, as that clause is understood under federal law. But the tribe defended by arguing that tribal custom and tradition supported such a rule. The plaintiff disagreed. The federal district court

[10] 25 U.S.C. § 1302(a)(8).
[11] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

judge took testimony from both sides, identifying one side's position as the correct one.[12] No doubt the judge acted in good faith, but the very fact that a federal judge utterly ignorant of the tribe's customs and traditions was called upon to interpret a tribe's customs and traditions is simply absurd.

In the four and a half decades since that decision, tribal courts around the nation have issued thousands of opinions interpreting the "Due Process" and "Equal Protection" Clauses of the Indian Bill of Rights, as well as tribal constitutions and codes that have adopted those terms. In a study I conducted with the help of a Michigan State University law student many years ago, we showed that the vast majority of tribal courts used federal and state precedents to interpret these provisions.[13] Rarely, if ever did tribal courts invoke tribal customs and traditions in interpreting those terms. As we will see, that is beginning to change.

II. FEDERAL UNDERSTANDINGS OF "DUE PROCESS" AND "EQUAL PROTECTION"

Due process and equal protection are fundamental constitutional rights guaranteed to individuals in their relations to federal and state governments. In short, government cannot strip individuals of liberty and property without due process.[14] Neither can government treat similarly situated persons differently.[15] These are core principles of American government.

The Due Process Clause is embedded in the Fifth Amendment to the Constitution. The language is tied to the prohibition on the government's arbitrary taking of a vested property interest without compensation for the loss of that property interest. American Indian people can justly feel that the Due Process Clause has almost no teeth, given that Congress confiscated hundreds of

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[12] Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 12–16 (D. N.M. 1975).
[13] Matthew L.M. Fletcher & Alicia Ivory, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data* (Mar. 6, 2008), available at https://ssrn.com/abstract=4321885.
[14] U.S. CONST. amend V; U.S. CONST. amend. XIV, § 1.
[15] U.S. CONST. amend. XIV, § 1.

millions of acres of tribal lands, most notably during the allotment era, without consent or meaningful compensation.[16] The Supreme Court enabled the confiscation of tribal property by denying that Indian people possessed a vested property right in their aboriginal lands.[17] It is difficult to enforce the due process requirement when the judiciary rejects the premise that an individual possesses a legally protected interest.

The Supreme Court later extended the protections of the Due Process Clause to other federal actions, most notably, criminal procedure[18] and government entitlements.[19] The Supreme Court concluded that the government can take an adverse action against an individual so long as the individual receives notice and a meaningful opportunity to be heard.[20]

The Equal Protection Clause originated in the Fourteenth Amendment and was one of the Reconstruction Amendments designed to eradicate the legal basis of slavery and to remedy the badges and incidents of racial discrimination. The Supreme Court has ensured that the Equal Protection Clause does little or nothing to remedy past discrimination.[21] Instead, the Court held that it really only bars intentional discrimination.[22] More recently, the Court has imposed a color-blindness standard on the Equal Protection Clause, eradicating any governmental effort to promote the goals and purposes of the Reconstruction Amendments.[23]

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[16] *Lone Wolf v. Hitchcock*, 187 U.S. 556 (1903), enabled Congress and the Department of the Interior to abrogate treaty-protected tribal lands without compensation or meaningful judicial review.
[17] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).
[18] Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. (2001).
[19] Goldberg v. Kelly, 397 U.S. 254 (1970).
[20] Hoopa Valley Housing Authority v. Gerstner, 3 NICS App. 250, 259 (Hoopa Valley Tribal S. Ct. 1993) (interpreting and applying *Goldberg*).
[21] Gratz v. Bollinger, 539 U.S. 244 (2003).
[22] Washington v. Davis, 426 U.S. 2299 (1976).
[23] Theodore K. Johnson, *How Conservatives Turned the "Color-Blind Constitution" against Racial Progress*, THE ATLANTIC (Nov. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/.

These principles derive from an understanding and expectation – a philosophy – of relentless contradiction and even cynicism. The notion of federal and state sovereignty, borrowed from European nations, emphasizes a hierarchy of elite individuals (some elected, some not) that exercise enormous power over individuals and entities within the jurisdiction of government. The underlying philosophy (one doesn't have to dig hard or deep) is that a sovereign entity is necessary for peace and security. This philosophy understands humanity to be violent, competitive, selfish, and superior to all other creatures and things on earth (and some humans superior to others). Without a sovereign employing a monopoly on violence, human life would be nasty, brutal, and short, in the words of Hobbes. But naturally, such power consolidated by the Constitution in the sovereign potentially leads to abuses, which necessitates constitutional protections for individuals facing the might of the sovereign. These protections include due process and equal protection.

It is far from clear that the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments do much to protect individual rights of underprivileged persons in the United States. Poverty, inequality, incarceration, and other social ills remain intractable in the United States.

III. FUNDAMENTAL ANISHINAABE LEGAL PRINCIPLES

The fundamental philosophies of the Anishinaabe tribal nations differ radically from those of the state and federal governments in the United States. My understanding of the fundamental law of the Anishinaabeg starts with the principles of Mino-Bimaadiziwin[24] and Inaawendewin.[25] Mino-Bimaadiziwin translated loosely means the act of living a good life. Inaawendewin means something like relating and invokes relational accountability. Both principles demand that

[24] Stark, *supra* note 8, at 303–06.
[25] Nicholas J. Reo, *Inawendiwin and Relational Accountability in Anishnaabeg Studies: The Crux of the Biscuit*, 39:1 J. OF ETHNOBIOLOGY 65, 68 (2019).

Anishinaabe people acknowledge their obligations to each other and the greater world, which includes all things and places, animate and inanimate.

From these principles, which some Anishinaabe elders have described as the unwritten constitution of Anishinaabe people, we can derive the Nizhwaaswi Mishomis/Nokomis Kinomaagewinowaan, or Seven Grandfather/Grandmother Teachings.[26] These teachings include Nibwaakaawin (Wisdom), Zaagidwin (Love), Manaadjitiwaawin (Respect), Aakodewin (Bravery), Gwekowaadiziwin (Honesty), Dibaadendizowin (Humility), and Debwewin (Truth). It would easy to compare these teachings to the American Bill of Rights, but they are much more inclusive and expansive than a mere listing of rights. In fact, these teachings are in many respects *obligations* imposed on Anishinaabe people and, by extension, Anishinaabe tribal nations.

Fundamental Anishinaabe legal principles derive from philosophies and ways of being and knowing that originate from a much different understanding than American laws. The original difference is that Anishinaabe people do not understand humans to have the power and obligation to exercise dominion over the earth and its creatures. Instead, humans are lesser creatures whose obligation is to ensure harmony in Anishinaabewaki, the world of the Anishinaabe. The great gifts of the lesser creatures known as humans are imagination and creativity, important skills helpful toward fulfilling our obligation to promote harmony. Our philosophies do not presume the need for a sovereign entity. In fact, if the theories undergirding American legal structures were empirically true, there might never have been organized groups of humans anywhere in history.[27]

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[26] Amy Klemm Verbos & Maria Humphries, *A Native American Relational Ethic: An Indigenous Perspective on Teaching Human Responsibility*, 123 J. BUS. ETHICS 1, 2–3 (2014).

[27] *See generally* DAVID GRAEBER & DAVID WENGROW, THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY (2021) (reassessing world history that led to the philosophies undergirding western political thought).

IV. POSSIBLE ANISHINAABE UNDERSTANDINGS OF "DUE PROCESS" AND "EQUAL PROTECTION"

Understanding the philosophical difference between American and Anishinaabe law is helpful to theorizing how Anishinaabe lawmakers interpret law, even the laws of the colonizer. In my view, this is the great work tribal lawyers and judges must strive for in all instances.

Consider "due process." The notion of due process originated with the concerns of the American founding generation, exclusively represented by landed, wealthy, white men — many of whom were slavers or slavery-enablers. Those concerns primarily involved worries that government would act to confiscate their private property or strip them of their freedom. These men believed that government should be able to do either of those things, but only for good reason and by following a fair process. In these proceedings, which were and are adversarial, winners and losers emerged.

In tribal nations where individual Anishinaabe people and families possessed robust property rights, there was little or no worry about a sovereign government. Anishinaabe nations governed according to a clan system where seven dodemaag, or clans, would meet periodically to address issues of governance. Every voice was heard. Debate was free and respectful. Ceremonies were sacred and ceremonies provided the process. If an Anishinaabe family disputed a hunting territory with another, for example, the entire tribal nation would meet to discuss how to ensure harmony, peace, and justice.

Michigan Anishinaabe tribal courts are beginning to assess what the due process requirement means in the contemporary context. For example, the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals expressly incorporated Mino-Bimaadiziwin into its analysis: "[T]he notion of due process emanates from the concept of achieving harmony in life, to live in

balance with all of creation, otherwise known to the Anishinaabe as mino-bimaadiziwin."[28] The court invoked several additional principles as well, analogous to the Kinomaagewinowaan, teachings: "Our Anishinaabe teachings of nibwaakaawin (wisdom-use of good sense), zaagi'idiwin (practice absolute kindness), minadendmowin, (respect – act without harm) as well as ayaangwaamizi (careful and cautious consideration) must guide this Court's decision-making."[29] The court added that Anishinaabe people "are no stranger to listening to the position of all interested persons on any important issue. To be sure, one only need to look to the Seven Grandfather Teachings of the Anishinaabe to understand that Indian nations did not learn 'due process' and 'fairness' from Anglo–American cultures."[30] The court analogized the talking circle, the process and structure by which Anishinaabe people participate in governance, to due process:

> [T]his Court is called upon to consider the last time its members participated in a talking circle – we think of the order of the circle as it exists in our traditional ways, the importance of the talking stick or eagle feather as the object that enables respectful discussion as well as demands respectful listening. We also think of expected outcomes and finality of the decisions made that result from the open, honest and respectful discussion. It could be said that the application of the Ojibway talking circle principles speak to the essence of due process - a governmental respect for all individuals subject to its authority. Like other Indian communities, this respect can be pragmatically translated in legal proceedings to

[28] Payment v. Election Committee, No. APP-2022-02, at 4 (Sault Ste. Marie Tribe of Chippewa Indians Ct. App., Dec. 6, 2022), https://turtletalk.files.wordpress.com/2022/12/app-22-02-opinion-and-order.apvelec.pdf.
[29] *Id.*
[30] *Id.* at 4–5.

> mean notice and the opportunity to be heard when the deprivation of property or liberty is at stake.[31]

Compare a talking circle to the adversarial procedures that dominate judicial and administrative process. American due process is no more than the bare minimum. Anishinaabe people can do better.

Now consider "equal protection." Equal protection as a legal concept originated in the aftermath of the American Civil War when the American people amended the Constitution to require governments to treat persons equally. Those persons are not identified in the text of the Fourteenth Amendment, but we know them to include formerly enslaved persons. The Fourteenth Amendment also introduced birthright citizenship to all persons born within the United States, but Indian people were excluded from that protection. It is now understood that the equal protection doctrine protects people based on their race, gender, religion, sexual orientation, and other immutable characteristics. Generations of Anishinaabe people know all too well that state and federal courts offered virtually no enforcement of the requirement that government ensure equal protection of the laws.

There is no tradition of imposing punitive or otherwise unfair obligations on our people based on race or gender. There were certainly gender roles, but they were fluid; many of the most powerful Anishinaabe ogemaag, or leaders, were women. Many Anishinaabe ogichidaawaag, or warriors, were also women. Many tribal nation citizens were also non-Anishinaabe. Anishinaabe people freely adopted non-Anishinaabe people, who then became equal members of the Anishinaabe polity.

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[31] *Id.* at 5.

Michigan Anishinaabe tribal courts are confronted with far fewer equal protection cases than due process cases. However, tribal citizenship decisions are uniquely fraught with questions of equal treatment under the law. These issues appear more and more. Recently, I wrote the opinion for the Nottawaseppi Huron Band of the Potawatomi Supreme Court interpreting the Equal Protection Clause of the tribal Constitution in a membership case.[32] Like the Sault Tribe appellate court, we began our analysis with mino-bimaadiziwin: "Bodéwadmi people, in contrast, hope to achieve harmony by living life correctly, which is the essence of Mno Bmadzewen."[33] We identified the teaching of Love and its healing elements as the most relevant principle associated with equal protection: "Debanawen 'transcends time and space; it links us inexplicably to our ancestors and future generations' . . . . In times of great difficulty and even violence, Bodéwadmi people reacted with Debanawen, a great healing tool. [The tribal constitution]'s guarantee of equal protection must be interpreted in light of the corrective and reparative principle of Debanawen."[34] Compare the notion that equal protection demands action to correct and repair, to heal, in other words, with the state and federal equal protection doctrine, which does no such thing.

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Not so long ago, Justice Souter of the United States Supreme Court lamented that the ability of tribal courts to "have leeway" to interpret the "Due Process" and "Equal Protection" Clauses of the Indian Civil Rights Act and "need not follow U.S. Supreme Court precedents 'jot-for-jot.'"[35] He reasoned that since tribal laws, as he understood them, are "frequently unwritten, being based

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[32] Wright v. Nottawaseppi Huron Band of the Potawatomi, No. 21-154-APP (Nottawaseppi Huron Band of the Potawatomi S. Ct., June 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/06/2022-6-3-Filed-NHBP-Supreme-Court-Opinion-Order-in-Wright-et-al-v-NHBP-et-al-21-154-APP.pdf.
[33] *Id.* at 28.
[34] *Id.* (citations omitted).
[35] Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n. 238 (1998)).

instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'"[36]

Then and now, I find this lament baffling. After reading the Sault Tribe's appellate court opinion on "due process" or the Nottawaseppi appellate court's opinion on "equal protection," it is plain that there is nothing about tribal laws that are so mystifying or terrifying. There really is nothing particularly comforting about United States Supreme Court precedent either.

Michigan Anishinaabe tribal nations and judiciaries are going to continue to interpret "due process" and "equal protection" in the way best suited to the needs and philosophies of Anishinaabe people. This is just the beginning.

[36] *Id.* (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130–31 (1995)).