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ARTICLE

GOOD (NATIVE) GOVERNANCE

*Angela R. Riley**

American Indian nations are largely unconstrained by the U.S. Constitution, and are only bound to follow provisions similar to those contained in the Bill of Rights by statute. Even then, the Supreme Court has affirmed that tribes are not required to apply or interpret civil rights protections directly in line with state and federal governments. Accordingly, they may, in a sense, utilize their tribal sovereignty to preserve their differentness—even when tribal laws are seemingly inapposite to American civil rights norms. Building on arguments presented in a companion piece, (Tribal) Sovereignty and Illiberalism, this Article undertakes a critical examination of tribal governance in light of changing international norms regarding good governance, which increasingly define the parameters of the obligations governments owe to their citizens. Even in light of the emergence of good governance and a rapidly evolving human rights landscape, this Article posits that Indian nations ought to reject conventional notions of good governance. It proposes, instead, good (Native) governance, which does not require that Indian nations either fully depart from or emulate the West. Rather, this piece contends that good Native governance mandates that tribal nations utilize Native principles of government—drawn from tribal culture and tradition—that allow for the evolution of tribal government in ways that restore and maintain fairness, balance, and inclusion in tribal communities. It concludes that good Native governance is the best way for tribes to facilitate self-governance, protect tribal sovereignty, and ensure their continued cultural and political existence.

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INTRODUCTION

Indian nations encompassed within the borders of the United States are free to be illiberal.¹ That is, they are largely unconstrained by the U.S. Constitution,² and are only bound to follow provisions similar to those contained in the Bill of Rights by statute.³ Even then, the Supreme Court has affirmed that tribes are not required to apply or interpret individual civil rights protections directly in accordance with state and federal

1. I employ the term “illiberal” here as it is used generally in the literature to indicate a government that maintains policies, procedures, and/or rules inconsistent with those of a liberal democracy. For a more complete discussion of illiberalism and the relevant literature, see Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Cal. L. Rev. (forthcoming 2007) (manuscript at 9–15, on file with the *Columbia Law Review*) [hereinafter Riley, Illiberalism].

2. Although tribes are mentioned in the Constitution, the powers of the federal government via the Constitution do not constrain the actions of Indian tribes. See Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 115 (2002) (contending that, because there is no Supremacy Clause allowing federal authority over tribes, “there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty”).

3. See Indian Civil Rights Act of 1968 §§ 201–203, 25 U.S.C. §§ 1301–1303 (2000).

governments.⁴ Accordingly, they may, in a sense, use tribal sovereignty to preserve their differentness—even when tribal laws are seemingly inapposite to American civil rights norms. This is the case even though today Indian tribes employ hundreds of thousands of Americans,⁵ many of them non-Indian,⁶ whose civil rights claims must be brought, if at all, in tribal forums.⁷ News reports coming from Indian country describing, for example, the banishment of tribal members by politically motivated tribal councils or the use of sovereign immunity by tribal governments to shield tribal businesses from employees' civil rights claims, exacerbate negative sentiments regarding Indian nations' sovereignty and call into question tribal governmental legitimacy.⁸

Building on arguments presented in a companion piece, (*Tribal*) *Sovereignty and Illiberalism*,⁹ this Article undertakes a critical examination of tribal governance in light of changing norms regarding the obligations of government to the polity. Having previously asserted that greater expansion of federal civil rights laws into tribal communities could potentially destroy indigeneity and its concomitantly distinct forms of governance,¹⁰ I now address the looming questions that follow from such a position: If

4. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 71–72 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

5. Nat'l Indian Gaming Ass'n, *Indian Gaming: An Analysis of the Economic Impact of Indian Gaming in 2005*, at 6, available at http://www.indiangaming.org/NIGA_econ_impact_2005.pdf (last visited Apr. 15, 2007) (on file with the *Columbia Law Review*) [hereinafter NIGA, *Indian Gaming*] (reporting that Indian gaming created over 600,000 jobs in 2005, with 236,000 of those jobs situated in Indian gaming and ancillary facilities).

6. See Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 *Gonz. L. Rev.* 1, 113 (2004) (“Many gaming tribes employ large numbers of non-Indians from the surrounding community.”).

7. See *Santa Clara Pueblo*, 436 U.S. at 60–72 (holding civil rights actions against tribal governments can only be brought in tribal forums, limiting federal courts to habeas corpus review).

8. See, e.g., Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses*, 25 *Fla. St. U. L. Rev.* 679, 686–702 (1998) (arguing that Congress should use its plenary power to waive sovereign immunity of Indian tribes for purposes of non-Indians' employment discrimination suits); Richard Warren Perry, *Native American Tribal Gaming as Crime Against Nature: Environment, Sovereignty, Globalization*, 29 *PolAR: Pol. & Legal Anthropology Rev.* 110, 110–15, 124–27 (2006) (describing perception among non-Indians that tribal sovereignty is problematic, as manifested by their fear that expansion of tribal casinos will “disrupt[] the managerial spatial order of suburban housing developments”); Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule 3* (John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, Paper No. RWP04-016, 2004), available at <http://ssrn.com/abstract=529084> (on file with the *Columbia Law Review*) (“[T]ribes as collectives are seen by many non-Indians as legitimate if they act like private clubs, but not if they act like sovereigns.”).

9. Riley, *Illiberalism*, *supra* note 1.

10. *Id.* (manuscript at 64–85).

tribes ought not to be remade in the image of the dominant society, how, as a normative matter, should tribal governments act? Or, in other words, to what extent can Native governance stray from that of a liberal democracy and nevertheless constitute good governance?

Good governance, it seems, is on the minds of many these days. In globalization's wake, we are entering a new era of sovereignty and a particular "human rights culture."¹¹ Within this framework, the notion of "good governance"—commonly described as a style of governance that includes, *inter alia*, "democracy, the rule of law, effective bureaucracy, discretion, and decentralization"¹²—is being promulgated internationally and has become a core focal point of discourse in international affairs.¹³ Debates over good governance abound in the international arena and, in some instances, highlight the enormity of a central challenge faced by the developed West: how to exercise influence in illiberal societies without destroying local self-governance and non-Western culture altogether.¹⁴ A global debate concerning the authority—and, indeed, the responsibil-

11. See Helen Stacy, *Relational Sovereignty*, 55 *Stan. L. Rev.* 2029, 2049 (2003) (discussing characteristics of human rights culture).

12. See Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 *Fla. J. Int'l L.* 159, 161–62 & n.13 (2001). Botchway argues that these elements "have sufficient capacity to accommodate" additional principles often associated with good governance, such as "transparency, accountability, anticorruption, civil society, human rights and others." *Id.* at 162.

13. See, e.g., Eva Poluha & Mona Rosendahl, *Introduction: People, Power and Public Spaces*, in *Contesting 'Good' Governance: Crosscultural Perspectives on Representation, Accountability and Public Space* 1, 1–3 (Eva Poluha & Mona Rosendahl eds., 2002) (looking critically at question of whether standards for "good governance" as set forth in international affairs dialogue are, or ought to be, definitive).

14. See, e.g., Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* 248–49 (2004) [hereinafter *Anghie, Imperialism*] (critiquing seemingly neutral global expansion of good governance as "merely replicat[ing] the 'civilizing mission' that has been such a prominent feature of the international relations system at least since the time of Victoria"); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 *Harv. Hum. Rts. J.* 1, 3 (2000) (investigating "how national human rights institutions" associated with democracy "can improve government administration and promote and protect human rights, and thereby build good governance"); Madhavi Sunder, *Enlightened Constitutionalism*, 37 *Conn. L. Rev.* 891, 904 (2005) [hereinafter *Sunder, Enlightened*] (arguing, with respect to Arab countries in particular, that independence in development of constitutional system is desirable, but that complete deference by outsiders may amount to "throwing the weight of the West on the side of traditionalists at the expense of internal reformers seeking greater rights for women and minorities"). Sunder responds to Noah Feldman, who argues for a relatively hands-off approach by the international community with regard to constitution drafting. See Noah Feldman, *Imposed Constitutionalism*, 37 *Conn. L. Rev.* 857, 887–88 (2005) [hereinafter *Feldman, Imposed*] ("[W]here the international community or the occupier lacks the will or capacity for sustained transformation of constitutional norms over time, it would be mistaken to impose norms that are perceived by local political actors as antithetical to their interests.").

ity¹⁵—of liberal nations to remake illiberal ones in their own image has accompanied the rise of good governance theory. The catastrophic events of September 11th accelerated this desire for reform, and the world has witnessed these philosophical and political battles play out in the invasion of Afghanistan,¹⁶ the constitution-drafting process in Iraq,¹⁷ and the American-facilitated democratization of Palestine that ultimately led to the election of Hamas.¹⁸

Curiously, for all the talk of good governance on an international level, there is no scholarship that has directed this inquiry inward. I mean this in two respects. First, the relationship between the U.S. government and Indian nations could benefit from many of the same discussions which circulate around the treatment of foreign sovereigns by the United States. Much of the debate over the extent to which the West ought to allow foreign states to evolve internally, as opposed to imposing Western liberal ideals on them, maps onto the relationship between the federal government and Indian tribes.

But it is not only the relationship between Indian nations and the United States that has been omitted from the good governance dialogue. Tribal nations—themselves governments with constitutions, judiciaries, and governmental infrastructures often as vast and complex as those of many small nations¹⁹—have not been examined in light of good governance standards. That inquiry is the core focus of this Article. I seek to critically examine good governance as it relates to Indian nations. After all, though no one has expressly made this connection in the literature, many of the contemporary criticisms waged against Indian tribes are rooted in old fears that tribal governments are illegitimate, hostile to out-

15. See Thomas M. Franck, *Are Human Rights Universal?*, *Foreign Aff.*, Jan./Feb. 2001, at 191, 203 (arguing that it would be “immoral” for West to wait for illiberal nations to change from within, rather than seeking to change them from without).

16. See Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 *Harv. Int’l L.J.* 427, 431 (2005) (noting that one rationale for invasion of Afghanistan was to oust Taliban, which had committed horrible human rights abuses against women in particular).

17. See Feldman, *Imposed*, *supra* note 14, at 877–79 (describing conflicts over constitution-drafting process in Iraq).

18. See Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* 119–20 (2003). Zakaria notes that Yasser Arafat’s response to President Clinton’s insistence that he sign on to the Camp David peace plan was to the effect that, “‘If I do what you want, Hamas will be in power tomorrow.’” *Id.* Eventually, Hamas was democratically elected to power in Palestine. See *infra* note 352.

19. See generally Suzan Shown Harjo, *The Wall Street Journal’s* Drumbeat: Is This the Way Termination Started?, *Indian Country Today* (Canastota, N.Y.), Sept. 20, 2002, available at <http://www.indiancountry.com/content.cfm?id=1032530449> (on file with the *Columbia Law Review*) (comparing some tribal nations to small state of Monaco, noting that many exceed Monaco in land mass, population, and resources). In terms of geography, a few tribes are substantially larger than some of America’s smaller states. “The Navajo Nation, for example, is approximately equal in size to West Virginia, 24 times larger than Rhode Island, 12 times larger than Delaware, and 4 times larger than Hawaii.” Kalt & Singer, *supra* note 8, at 10 n.18.

siders, and simply too far afield from mainstream Western culture to be tolerated.²⁰ In short, there is an increasingly growing perception that tribal governments are, in fact, not “good.”²¹

Today, tribal nations are ever more prominent in the national arena, as both their independence from federal paternalism and interdependence with non-Indian sovereigns, such as states and local communities, grow. Tribes’ status in our contemporary world further supports the connection between internal notions of good governance and international ones. Other legal scholars have also drawn on the relationship of Indian tribes as “domestic dependent nations”²² vis-à-vis the United States to illustrate the increasing interdependence of all the world’s sovereigns. As Judith Resnik writes: “Today, it is plain that we all live in ‘domestic dependent nations,’ vulnerable to forces also claiming (and sometimes exercising) power in the same space.”²³ Thus, an examination of good governance as related to Indian nations may be both informed by, and hold implications for, global good governance standards.

Even in light of the changing human rights landscape, I contend in this Article that Indian nations ought to reject conventional notions of good governance. I propose, instead, a theory of “good Native governance,” which does not require that Indian nations either fully depart from or emulate the developed West. Rather, a theory of good Native governance draws on indigenous principles of government—based on each tribe’s tradition and contemporary tribal culture—that allow for the

20. A brief survey of American legal history alone reflects such beliefs. See, e.g., Major Crimes Act of 1885, 18 U.S.C. § 1153 (2000); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1302 (2000)); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210–11 (1978) (holding that Indian tribes did not have criminal jurisdiction over non-Indians partly due to concerns over “unwarranted intrusions on [non-Indians]’ personal liberty,” and referring to 1800s-era House Report which said “most Indian tribes were characterized ‘by a want of fixed laws [and] of competent tribunals of fixed justice’” (citing H.R. Rep. No. 23-474, at 18 (1834))); see also *infra* notes 26, 28 (elaborating on historical background and purpose of Major Crimes Act and Indian Civil Rights Act).

21. See Riley, *Illiberalism*, *supra* note 1 (manuscript at 4–5) (discussing recent wave of scrutiny and criticism of tribal governments). This perception is fueling greater encroachment into tribal sovereignty in a myriad of ways. See, e.g., Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 691 (2004) (discussing *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), which held, contrary to decades of established law, that on-reservation, tribally-owned casino was subject to National Labor Relations Board’s jurisdiction under National Labor Relations Act); see also *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (holding that NLRB could apply NLRA to casino, thus denying tribe’s petition for review).

22. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that Indian tribes are “domestic dependent nations,” acknowledging their preexisting aboriginal sovereignty as well as their overarching connection to United States).

23. Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of *Marbury v. Madison* to Tribal Courts’ Criminal Jurisdiction*, 36 *Ariz. St. L.J.* 77, 134 (2004) [hereinafter Resnik, *Tribes*].

evolution of tribal government in ways that restore and maintain fairness, balance, and inclusion in tribal communities.

In Part I of this Article, I provide an introduction to the legal status of Indian nations and then briefly sketch out the connection between tribal governance and the rapidly evolving global standard of good governance. I then move the discussion of governance to the global arena and broadly canvass sovereignty's recent metamorphosis from the strict, Westphalian model to a post-territorial conception of sovereignty, one that is inextricably bound to the rise of our "human rights culture."²⁴ As part of this discussion, I explain the genesis and promulgation of good governance as the standard by which all sovereigns are increasingly judged. I then unpack and critique conventional notions of good governance, drawing on literature that seeks to connect good governance with its colonial and imperialistic roots.

Having laid the groundwork for good governance, in Part II I draw the discussion back within the confines of the United States and propose, in contrast to the burgeoning global standard, an alternative theory of good governance specifically applicable to Indian nations: *good Native governance*. Drawing on political theory and empirical studies, I set forth a taxonomy of good Native governance, which includes: exit, dissent, foundational principles, independent forums for the resolution of disputes, and cultural matching. Expounding on these terms, I also demonstrate that good Native governance is already largely at work within many contemporary Indian nations. Part III then analyzes select examples of practices within Native communities that constitute good Native governance, but that likely would not pass muster under the emerging global standard. In contrast to Part III, Part IV provides specific examples of areas where I believe Native governance could be enhanced within tribal communities. Finally, in arguing against increased encroachment on indigenous nations, Part V lays out two major justifications for tribes to engage in good Native governance on their own accord. Within this discussion, I contend that the growing conception of good governance should be critically examined and that it should not be imposed wholesale on the indigenous peoples of the world. I conclude that if one accepts the theory of good Native governance, such acceptance may have vast implications for defining relationships between other interdependent sovereigns situated beyond U.S. borders.

I. SOVEREIGNTY'S EVOLUTION AND THE RISE OF GOOD GOVERNANCE

The preconstitutional status of Indian nations places them firmly beyond the scope of the U.S. Constitution and the Bill of Rights.²⁵ As a result, tribal governments have long caused concern for the dominant

24. Stacy, *supra* note 11, at 2049.

25. See *infra* Part II.

society,²⁶ and these worries have intensified in recent years.²⁷ Even though Congress extended a portion of the Bill of Rights to Indian tribes by statute through the Indian Civil Rights Act (ICRA) of 1968,²⁸ critics remain skeptical of the scope of civil rights protections afforded to both Indians and non-Indians in tribal communities, particularly because federal court review of tribal court decisions is limited to petitions for habeas corpus.²⁹ This means that civil rights cases brought against tribal governments are solely within the jurisdiction of the tribal courts.³⁰ Given the increasing attention paid to individuals' claims against tribal governments, the unique status of tribes within the federal system raises pressing questions for liberal theorists and policymakers. Specifically, to what extent may Native governments deviate from that of a liberal democracy and, nevertheless, be "good?" Correspondingly, to what extent should such deviations be tolerated by the liberal state?

To answer these questions, it is critical to first examine changing conceptions of sovereignty and the corresponding link to an international human rights agenda that has become the foundation for a flourishing global consensus regarding good governance. Of particular import is an analysis of how human rights have bestowed upon good governance a readily acceptable legitimacy in international affairs discourse, even though the imposition of good governance may, in fact, be ill suited to all sovereigns. This preliminary discussion lays the groundwork for a broader explanation of the relevance of good governance to Indian nations, and sets the stage for contemplation of a new, indigenous governance theory.

26. See, e.g., Major Crimes Act, 18 U.S.C. § 1153 (2000), passed largely in response to *Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883), in which the Supreme Court held that the tribe had exclusive jurisdiction over a crime committed by an Indian in Indian country. *Crow Dog* caused great controversy because the penalty imposed by the Sioux for *Crow Dog's* murder of *Spotted Tail*—\$600, eight horses, and one blanket from *Crow Dog's* relatives to *Spotted Tail's* relatives—was based on traditional Sioux practices. See Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 *Am. Indian L. Rev.* 191, 199 (1989). Reformers were outraged and convinced Congress to extend federal criminal jurisdiction to Indian country. *Id.* at 192.

27. See Riley, *Illiberalism*, *supra* note 1 (manuscript at 4–5).

28. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1302 (2000)). "[A] central purpose of ICRA . . . was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 90-841, at 5–6 (1967)).

29. *Santa Clara Pueblo*, 436 U.S. at 66–67; see also Madhavi Sunder, *Cultural Dissent*, 54 *Stan. L. Rev.* 495, 559–60 (2001) [hereinafter *Sunder, Dissent*] (criticizing Court's decision to protect tribal sovereignty over equality interest of plaintiff).

30. *Santa Clara Pueblo*, 436 U.S. at 61.

A. *The Post-Territorial State and the Rise of the "Human Rights Culture"*

A brief survey of the recent wave of literature regarding sovereignty reveals that global conceptions of sovereignty are changing.³¹ There are now a significant number of legal scholars whose work is devoted to detailing its evolution,³² with one calling sovereignty "the new obsession."³³ Globalization is often credited with fueling these transformations,³⁴ and is said to "provide[] the conditions to constitute a third revolution in sovereignty."³⁵ Globalization, of course, is not new. Information has been moving around the world—in many cases, from East to West, rather than otherwise—for thousands of years.³⁶ But the modern age of globalization has ushered in revolutionary changes that were inconceivable in the past.³⁷

Given the expansiveness of the transformations underway, it appears that sovereignty faces greater challenges in the modern era than it has ever before.³⁸ Globalization of our technological world promises (or threatens) to connect us across time, space, and borders.³⁹ This phenomenon is minimizing the nation-state, and, concomitantly, its relevance.⁴⁰

31. See generally Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (1999); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996).

32. See, e.g., Harold Hongju Koh, *The Globalization of Freedom*, 26 *Yale J. Int'l L.* 305, 306–08 (2001) (reviewing rise of transnational public law concurrent with worldwide integration of "domestic and international processes and events"); Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 *J. Int'l Econ. L.* 841, 843, 878 (2003) [hereinafter Raustiala, *Rethinking*] (examining conceptions of sovereignty and "offering . . . thoughts on the evolution of sovereignty in a globalizing world"); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *Stan. J. Int'l L.* 283, 283 (2004) ("Theorists, pundits, and policymakers all recognize that traditional conceptions of sovereignty are under assault. The result is a seemingly endless debate about the changing nature of sovereignty.").

33. Stacy, *supra* note 11, at 2039.

34. See, e.g., *id.* at 2030.

35. *Id.* (distinguishing this revolution from two other historical conceptions of sovereignty put forward by Hobbes and Locke); cf. Madhavi Sunder, *Piercing the Veil*, 112 *Yale L.J.* 1399, 1407 (2003) (referring to "rise of religion and culture as the New Sovereignty").

36. See Amartya Sen, *How to Judge Globalism*, *Am. Prospect*, Jan. 1, 2002, available at <http://www.prospect.org/print/V13/1/sen-a.html> (on file with the *Columbia Law Review*).

37. See, e.g., Raustiala, *Rethinking*, *supra* note 32, at 874–75 ("Technological, social, and institutional changes have all transformed the world of the twenty-first century in ways that were likely unimaginable in the eighteenth century.").

38. See *id.* (noting widespread belief that changes in modern era have created significant challenges to traditional conceptions of sovereignty).

39. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *Colum. J. Transnat'l L.* 485, 491, 511–18 (2005) (arguing for study of "law and globalization" as means of understanding "people's relationships to concepts such as space, place, borders, distance, and community affiliation").

40. See Stacy, *supra* note 11, at 2043. Some theorists even argue the state as an entity *per se* has outlived its usefulness. See, e.g., Rosa Ehrenreich Brooks, *Failed States*, or the

As such, today there is a move away from a strict, territorial conception of sovereignty, one that “has never been absolute and is increasingly compromised.”⁴¹ The rise in extra-territorial relations, including the expansion of transnational and international administrative and judicial entities, further challenges the notion of absolute territorial borders.⁴² Just as, for example, those accused of crimes against humanity are potentially subject to prosecution in international or foreign courts,⁴³ it is increasingly evident that “the precise contours of both extraterritorial adjudication and nation-state sovereignty are in flux.”⁴⁴

This does not mean that the nation-state has lost its importance within the global political framework,⁴⁵ but it is clear that globalization has diminished its significance.⁴⁶ As nation-states’ territoriality decreases, there is a correlative rise in the focus on citizens’ rights and claims against the government.⁴⁷ This new vision of sovereignty “places a higher obligation on the sovereign state to care for and regulate the behavior of its citizens both inside and outside state borders.”⁴⁸ As Helen Stacy argues, the language of sovereignty has been modified by today’s “human rights culture,”⁴⁹ such that “human rights have become the language with which people, groups, and even nation-states, frame their requests for better treatment from others—whether those others are citizens, governments, international capital, or neighbors.”⁵⁰ As such, sovereignty has to account for “the enlarging role of international human rights norms as

State as Failure?, 72 U. Chi. L. Rev. 1159, 1172–74 (2005) (describing failure of state model).

41. See Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2513 (2005); see also Austen L. Parrish, *Changing Territoriality*, 31 Am. Indian L. Rev. (forthcoming 2007) (manuscript at 13, on file with the *Columbia Law Review*) (“In recent years, the salience of the sovereign state, strictly defined by its territorial borders, has slowly declined.”).

42. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311, 329, 476–86 (2002) [hereinafter Berman, *Globalization*] (describing effects of transnational and supranational entities on territorial conceptions of sovereignty and nationality).

43. *Id.* at 318. While I was writing this Article, for example, a heavily American-influenced Iraqi court sentenced Saddam Hussein to death by hanging after finding him guilty of crimes against humanity. *Iraqi Court Sentences Hussein to Death*, N.Y. Times, Nov. 6, 2006, at A2.

44. Berman, *Globalization*, *supra* note 42, at 329; see also Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 380–402 (2005) (describing erosion of traditional limits on personal jurisdiction and enforcement of foreign judgments in United States and Canada).

45. Stacy, *supra* note 11, at 2044 (“Sovereignty, in fact, is far from receding.”).

46. See Brooks, *supra* note 40, at 1182.

47. See Stacy, *supra* note 11, at 2035, 2048–51 (describing shift from territorial notion of sovereignty to conception based on rights of citizens).

48. *Id.* at 2050–51.

49. *Id.* at 2049.

50. *Id.*

benchmarks of good governance and good sovereignty.”⁵¹ This means that respect for individual human rights is now considered a necessary counterpart to sovereignty.⁵²

B. *The Contours of Good Governance*

As the previous section details, sovereign duties, now in a state of flux, are increasingly connected to human rights and good governance. Although good governance lacks an authoritative definition, leading international law scholars assert that there is a global consensus as to its generally accepted meaning.⁵³ It is, as one author states, a “capacious term”⁵⁴ that characterizes a “government which is, among other things, democratic, open, accountable and transparent, and which respects and fosters human rights and the rule of law.”⁵⁵ Although many facets of international law are associated with good governance,⁵⁶ its inextricable connection to international human rights is particularly significant.⁵⁷ Increasingly, the presence and adoption of human rights norms is considered a necessary component of achieving good governance,⁵⁸ which is believed to have positive consequences for all people.⁵⁹

While good governance has gained wide acceptance in many respects, it has also—like “liberal internationalism”⁶⁰ generally and the international human rights movement more specifically—inspired intense

51. *Id.* at 2044.

52. *Id.* at 2050 (“Sovereignty and human rights thus develop *pari passu*.”).

53. See, e.g., Thomas M. Franck, *Democracy, Legitimacy and the Rule of Law: Linkages* 16 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Working Paper Series, Working Paper No. 2, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=201054 (on file with the *Columbia Law Review*) [hereinafter Franck, *Democracy*] (“Today, almost everyone knows, or could know, the essential elements of good governance.”).

54. Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 *Vill. L. Rev.* 887, 893 (2000) (“‘Good governance’ is, like ‘development’ before it, a capacious term which has a number of meanings.”).

55. Anghie, *Imperialism*, *supra* note 14, at 248; accord Poluha & Rosendahl, *supra* note 13, at 2 (“In international discourse ‘good governance’ comprises aspects such as transparency, accountability, free and fair elections and the rule of law.”).

56. Anghie, *Imperialism*, *supra* note 14, at 248 (“[T]he concept of ‘good governance’ is in some senses a term which combines a number of different areas and principles of international law.”); see also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *Yale L.J.* 1490, 1501 (2006) (“[T]he argument for supranational governance is an extension of the logic of international law.”).

57. Anghie, *Imperialism*, *supra* note 14, at 248 (“[G]ood governance is linked very prominently with international human rights law . . .”).

58. See *id.* (pointing to definitions of “‘good governance’” based in part on “respect [] [for] . . . human rights”).

59. See Stacy, *supra* note 11, at 2059 (“The efficacy of the international system of human rights brings benefits to the citizens of each nation state . . .”).

60. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Va. J. Int’l L.* 1, 2–3, 17–19 (2002) (“Yet the prevailing form of cooperation in the 20th century, known as liberal internationalism, has increasingly come under attack.”).

criticism.⁶¹ Critics charge that good governance serves as another form of Western hegemony,⁶² advances a similar “civilizing mission” to colonization,⁶³ and acts as a ruse for opening up the markets of the world to bring even greater riches to the developed West.⁶⁴

In his extensive work in the area, Antony Anghie has challenged the notion that good governance is wholly neutral and contains benefits for all humankind.⁶⁵ By pointing out its complex colonial roots and its entanglement with Western imperialism, he asserts that good governance was formulated to advance an acceptable governance scheme for the globalized world.⁶⁶ In order to give good governance the credibility necessary for expansion, its proponents connected it to the increasing application of international human rights law.⁶⁷ In this sense, Anghie claims, proponents advance good governance today similarly to how concepts of development were promoted in the past.⁶⁸ That is, all peoples and societies are assumed to long for good governance, much in the same way it

61. Cf. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* 296–323 (2004) (laying out “dark sides” of international humanitarian law). Even within the context of a critique of good governance and the role of the developed West in its promulgation, I agree it would be a disservice not to recognize the positive things America has sought to achieve with regard to human rights. See Harold Hongju Koh, Foreword: On American Exceptionalism, 55 *Stan. L. Rev.* 1479, 1489 (2003) [hereinafter Koh, *Exceptionalism*] (noting critics of American exceptionalism often “overlook” instances of exceptional U.S. leadership in human rights).

62. See Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 *N.Y.U. L. Rev.* 1971, 2015 (2004) [hereinafter Rubenfeld, *Unilateralism*] (“According to a familiar left-wing critique of globalization, multilateral forces such as the International Monetary Fund (IMF) and the WTO are choking off the freedom of developing countries to chart their own, differing economic, cultural, and social paths.”).

63. Anghie, *Imperialism*, *supra* note 14, at 249–50 (internal quotation marks omitted).

64. See *id.* at 263 & n.60. This criticism is due, in part, to the role of international financial and development institutions in advancing the case for good governance. See Botchway, *supra* note 12, at 164–65 (“It is hardly controvertible that the principle or concept of good governance, as understood in the 1990s owes its flourish largely to the international financial and development institutions. It is, however, misleading to say that the idea was conceived or originated from these bodies.”).

65. See Anghie, *Imperialism*, *supra* note 14, at 248–49 (“At the national level, the concept of good governance, particularly because of its reliance on universal international human rights norms, may appear to be a neutral concept that is potentially applicable to all states.”). For a detailed discussion of the critique of good governance, see *id.* at 245–72.

66. See *id.* at 253–54 (“[G]overnance is now designed to provide the political institutions that will enable the furtherance of globalization. Specifically, this is to be achieved through the international human rights norms that are seen as prescribing universally accepted international standards and which are used as a basis to further governance.”).

67. *Id.* at 254 (“‘[G]ood governance’ [has been] . . . conceptually and operationally linked with international human rights law and . . . enjoys a certain legitimacy and coherence as a result.”).

68. See *id.* at 247 (analogizing discourses of “good governance” and “development”).

was assumed that all peoples desired development.⁶⁹ In reality, however, the promotion of good governance is part of a larger agenda in which good governance “merely replicates the ‘civilizing mission’” rooted in the “imperial character of international law.”⁷⁰ Anghie argues that Western states’ “promot[ion] [of] ‘good governance’” holds potentially grave consequences for developing countries because the goal is to “reproduc[e] in the Third World a set of principles and institutions which are seen as having been perfected in the West, and which the non-European world must adopt if it is to make progress and achieve stability.”⁷¹ The effect of this strategy is to further trade and “civilization,” ignoring the consequences for self-rule and local culture so that the developed West can advance its interests.⁷²

II. TOWARD A THEORY OF GOOD NATIVE GOVERNANCE

Though discourse concerning good governance is prominent in the international arena, there has been virtually no effort to turn the good governance framework inward. The literature in this field is largely focused externally, and thus omits any discussion of the parallels between America’s relationship to foreign sovereigns and its connection with internal, indigenous nations. This is particularly curious given that pressing issues, such as the conflict between sovereign autonomy and individual rights, for example, have particular relevance to America’s relations with both external and internal nations.

But, more directly relevant to the project undertaken here, there has been virtually no examination of how principles of good governance play out as applied to the relationship between tribal nations and the polity. Such an inquiry is overdue. After all, the core of contemporary criticisms waged against tribal governments is based on the perception that Indian nations are unfair to outsiders, ignore or suppress their members’ individual liberties, and rule without accountability.⁷³ Quite simply, the sug-

69. See *id.* at 247 (“Like development . . . ‘good governance’ has a very powerful and apparently universal appeal: all peoples and societies would surely seek good governance—in much the same way that all peoples and societies were seen as desiring development.”).

70. *Id.* at 249–50.

71. *Id.* at 249.

72. See *id.* at 252–53 (noting that “expansion of European commerce” was used to “effect[] the entry of the backward peoples into the world of civilization” and that “[h]umanitarian goals were furthered precisely through the expansion of commerce, and appropriate systems of government had to be formulated for this purpose”).

73. See, e.g., Danahy, *supra* note 8, at 702 (“It is contrary to all notions of fairness that plaintiffs [with sexual harassment claims] are denied legitimate legal claims merely because their employers are Native American tribes.”); Paul Porter, *A Tale of Conflicting Sovereignities: The Case Against Tribal Sovereign Immunity and Federal Preemption Doctrines Preventing States’ Enforcement of Campaign Contribution Regulations on Indian Tribes*, 40 U. Mich. J.L. Reform 191, 215 (2006) (“[T]he Agua Caliente tribe’s ability to flout [California’s campaign contribution disclosure law] and make otherwise illegal campaign contributions infringes on California’s sovereignty, substantially affects

gestion is that, in contrast to liberal democracies, tribal governments are illiberal, and, therefore, not “good.”⁷⁴

As an initial matter, I contend that the vast majority of evidence—often ignored by critics—indicates that many Indian nations are already engaged in good governance.⁷⁵ But where tribal governance deviates from that of the dominant culture—as it sometimes does—I assert that the misguided perceptions of outsiders must be countered with an alternate theory of governance to combat the familiar calls for assimilation and homogenization of indigenous nations. Thus, I put forth a theory of good Native governance, which is critical to Indian nations’ efforts to survive as culturally distinct political entities within the confines of the United States. This is because the dominant culture continues to encroach on Native sovereignty in a myriad of ways.⁷⁶ But encroachment through law and the corresponding attack on tribal sovereignty consti-

the fairness of elections for all, and does not protect tribal self-sufficiency.”); see also Tom Kizzia, *Whose Law and Order? Tribal Courts Fill Void Left by State, but Critics Fear Rights May Be Lost*, Anchorage Daily News, July 3, 1997, at A1 (“More strident critics say the tribal court system is reminiscent of racial ‘justice’ in Southern states before Congress stepped in with federal oversight.”); Barb Lindsay, Editorial, *Sovereign Immunity for Tribes is a ‘Get Out of Jail Free’ Card*, Seattle Post-Intelligencer, May 7, 1998, at A15 (“[T]he decisions and actions of tribal governments have a very real and negative impact on our lives, our homes and our rights—impacts that we cannot simply ignore, and because of tribal sovereign immunity, impacts we cannot do anything to mitigate or prevent.”). These depictions of tribal governments have been prevalent for decades. See generally Joseph de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. Rev. 59, 70 (1975) (describing tribal governments, in context of ICRA, as “corrupt little tyrannies, with little accountability either to the individual Indian people . . . or to the culture and traditions of the tribes”).

74. See *supra* notes 19–21 and accompanying text.

75. See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 *Ariz. St. L.J.* 1047, 1074–79 (2005) (showing that decisions of Navajo appellate courts are evenly balanced for and against outsiders whose claims are litigated there); Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 *Ariz. St. L.J.* 889, 896 (2003) [hereinafter Goldberg, *Revitalization*] (“A comprehensive study of reported tribal decisions addressing due process rights has concluded that tribal courts rarely use either custom and tradition or interpretations of tribal constitution and code provisions to depart from the applications of due process found in state or federal law.”); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 *Am. Indian L. Rev.* 285, 352–53 (1998) (analyzing tribal court opinions and contending tribes have been successful in melding tribal and Western law in legal decisionmaking).

76. See, e.g., Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 *Yale Hum. Rts. & Dev. L.J.* 123, 130 (2002) [hereinafter Porter, *Pursuing the Path*] (contending that “extraordinary forces of assimilation” have placed indigenous peoples’ cultural existence at risk); Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 *Wash. L. Rev.* 69, 113, 116 (2005) [hereinafter Riley, *Straight Stealing*] (arguing that Native peoples’ cultural sovereignty is under particular threat in age of burgeoning globalization and massive technological advancements that threaten cultural property and traditional knowledge of indigenous peoples).

tutes a particular threat.⁷⁷ When actions of the courts and Congress diminish tribal sovereignty, tribes are pushed closer and closer to cultural and political annihilation. As prominent Indian law scholars have pointed out: "Tribal sovereignty is not just a legal fact; it is the life-blood of Indian nations. This is obviously true in the political sense: Without self-rule, tribes do not exist as distinct political entities within the U.S. federal system."⁷⁸ I would take this contention a step further and posit that, without self-rule, tribes will not only disappear as political entities within the United States, they may cease to exist altogether.⁷⁹

A theory of Native governance is, nevertheless, somewhat elusive. With over 500 federally recognized Indian tribes in the United States—many of which share few commonalities in terms of language, traditional structure, resources, religious practices, and geography⁸⁰—it would be a disservice to Indian nations and their individual governmental systems to attempt to overlay onto this diverse landscape a rigid framework of good Native governance. In fact, it would imply a requisite level of homogeneity within tribal government that does not now—nor, I argue, ever should—exist. Therefore, in contrast with good governance theory, I resist the urge to produce a definitive laundry list of factors that must be

77. See, e.g., Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 129 (2006) (contending that "[Supreme] Court's federal common law cases often contravene express federal Indian policy" and that this has created negative results for tribes); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 7 (1999) [hereinafter Frickey, *Common Law*] (explaining how Supreme Court decisions, rather than congressional action, have eroded tribal sovereignty); Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 431, 484 (2005) [hereinafter Frickey, *Exceptionalism*] (arguing that Supreme Court's dominant role in setting Indian policy has resulted in confusing and inconsistent body of law that is ultimately harmful to tribal sovereignty); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 267, 282–83 (2001) (contending that Supreme Court has made "radical departures from the established principles of Indian law" in its unrelenting attack on tribal sovereignty); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641, 643 (2003) ("Over the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty."); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. L. 405, 409 (2003) ("Today, the eviscerating potential of the Court's Indian law decisions provokes a real and palpable fear among tribal nations for their future existence.").

78. Kalt & Singer, *supra* note 8, at 4.

79. See Riley, *Illiberalism*, *supra* note 1 (manuscript at 57–58) (contending territorial and political sovereignty are inextricably linked with cultural sovereignty and that cultural devastation is likely consequence if tribes lose ability to live in separate, self-governing communities).

80. See David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 9–27 (5th ed. 2005) (providing overview of vast diversity of Indian nations, their populations, locations, land holdings, and economic and health conditions).

present in order for good Native governance to be present.⁸¹ However, given the importance of encouraging scholars, critics, and policymakers to look at indigenous governance in a new light, I do attempt to establish some guiding principles.

The fact is, tribal nations, like all others, need good governance.⁸² Good governments' demonstrated ability to serve the polity encourages citizens to feel secure in investing in the future of the community.⁸³ At the same time, good governments inspire confidence in outsiders who interact with tribes through social, commercial, and legal dealings.⁸⁴ Ineffective or bad governance, by contrast, produces suspicion and disrespect among citizens and outsiders alike.⁸⁵ Not surprisingly, then, the presence of an effective government is as critical to the success of an Indian nation as it is to any other.⁸⁶

Studies examining the economic development status of various Indian tribes have helped to shed light on those aspects of tribal governance that contribute to the success of Indian tribes. In essence, these findings confirm that tribes with "capable, culturally appropriate, and effective governing institutions" were much better off economically than others.⁸⁷ However, as Joseph Kalt, one of the leading researchers and scholars in this field, has acknowledged, "success" in regard to indigenous nation-building must be "self-defined."⁸⁸ Virtually all Indian nations have in common the desire for "cultural and social well-being and sovereignty," and also want "economic development of the level and type that is consonant with their particular communities' values and that can support individual and collective well-being."⁸⁹ Accordingly, while I do not mean to suggest that economic success is absolutely necessary for good governance, or that its absence implies poor governance, economic success may be indicative of other positive governmental attributes, includ-

81. See Poluha & Rosendahl, *supra* note 13, at 2 (contending that aspects of good governance in international discourse "are endowed with some kind of absolute, 'either you have it or you don't' value").

82. See Stephen Cornell, Catherine Curtis & Miriam Jorgensen, *The Concept of Governance and Its Implications for First Nations* 4-6 (Joint Occasional Papers on Native Affairs, Paper No. 2004-02, 2004), available at http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf (on file with the *Columbia Law Review*) (explaining that some form of governance is present in and necessary for all human societies to function effectively, and noting that "[t]he necessity for capable governance appears to be as true for indigenous nations as it is for others").

83. *Id.* at 6.

84. *Id.* ("Effective governments . . . tend to have the respect of outsiders.").

85. *Id.*

86. *Id.* at 8 ("[S]elf-governance matters for indigenous peoples as much as it does to others. They have to govern themselves, but they also have to do it well.").

87. *Id.*

88. Joseph Kalt, *Constitutional Rule and Effective Governance*, in *American Indian Constitutional Reform and the Rebuilding of Native Nations* 184, 192 (Eric D. Lemont ed., 2006) [hereinafter Kalt, *Constitutional*].

89. *Id.*

ing the ability to provide members with goods and services, the establishment of functional political institutions, and the maintenance of minimum standards of health and education.

In the following discussion, I advance a theory of good Native governance which draws heavily from both liberal political theory and empirical studies that have identified the characteristics most prevalent within the governments of flourishing Indian nations. Good Native governance requires, first and foremost, that citizens are ensured the freedoms of exit (or opt-out rights)⁹⁰ and dissent (or voice).⁹¹ In addition, tribal governments should be based on and guided by their own foundational governing principles⁹² and must also provide both members and outsiders with a fair forum for the resolution of disputes.⁹³ Finally, good Native governance requires that every facet of tribal governance constitute a cultural match⁹⁴ to the structure, religion, and value system of the particular tribe. As I explain my theory, I provide specific examples of tribal governance systems already at work within Indian country that comport with these good Native governance objectives.

A. *Exit (and Entry)*

Good Native governance requires the freedom of exit, which has long been considered “a bedrock liberal value.”⁹⁵ Exit means that a

90. See *infra* notes 95–100 and accompanying text.

91. See *infra* notes 150–161 and accompanying text.

92. See Duane Champagne, *Remaking Tribal Constitutions*, in *American Indian Constitutional Reform and the Rebuilding of Native Nations*, *supra* note 88, at 11, 28–31 (describing the history of constitution-building in Indian country and its contemporary significance in globalized world); Kalt, *Constitutional*, *supra* note 88, at 185–86, 191–93 (noting that Indian nations are “hampered by governing structures that are not of their own making” and arguing for necessity of indigenous constitutional development); Cornell, Curtis & Jorgensen, *supra* note 82, at 10–11 (describing “a constitutional foundation for self-rule” as “essential element[] of governance”); see also *infra* notes 197–215 and accompanying text.

93. See Kalt, *Constitutional*, *supra* note 88, at 207–12 (discussing importance of independent judiciary to nation-building process for Indian governments); Cornell, Curtis & Jorgensen, *supra* note 82, at 13–14 (including “the fair and non-political resolution of disputes” as another “essential element[] of governance”); see also *infra* notes 216–224 and accompanying text.

94. See Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't* 7, 12, 16 (Joint Occasional Papers on Native Affairs, Paper No. 2005-02, 2006), available at http://www.jopna.net/pubs/jopna_2005-02_Approaches.pdf (on file with the *Columbia Law Review*) (describing “nation-building” approach to economic development as consisting of five primary characteristics, including “cultural match,” which requires strong degree of matching between “formal governing institutions and contemporary indigenous ideas”). With regard to establishing constitutional systems of government, Kalt contends: “When the superstructure of governance provided by the constitution is consonant with a community’s norms regarding these dimensions of authority, that constitution is culturally matched to the community.” Kalt, *Constitutional*, *supra* note 88, at 198.

95. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *Yale L.J.* 549, 567 (2001); see also Albert O. Hirschman, *Exit, Voice, and Loyalty* 108–112 (1970) (“With

member can voluntarily leave “the effective jurisdiction of the group”⁹⁶ if she so desires. Exit is valued in liberal theory because it increases individual autonomy insofar as it “enhance[s] [one’s] capacity for a self-directed life, including the capacity to form, revise, and pursue our ends.”⁹⁷ In fact, so long as exit is available, liberal theory allows subcultures wide latitude to maintain illiberal structures and beliefs,⁹⁸ because tolerance of illiberal groups promotes individual autonomy “by providing individuals with a diversity of options among communities.”⁹⁹ Therefore, when exit is wholly prohibited by the group—such as in the case of the Taliban¹⁰⁰—tolerance for the group cannot be justified from the perspective of liberal theory.

With this background, I turn the exit inquiry to Indian tribes. Even without a broad empirical study, there is little doubt that exit is commonly available in tribal communities. First, there is no evidence of existing tribal cultures or practices that rely on Indian tribes detaining members against their will. The only situation in which an Indian tribe can lawfully, physically detain someone is when it acts in its capacity as a sovereign to incarcerate Indians who commit crimes on the reserva-

[America] having been founded on exit and having thrived on it, the belief in exit as a fundamental and beneficial social mechanism has been unquestioning.”); John Rawls, *Justice as Fairness: A Restatement* § 26.5 (Erin Kelly ed., 2001) (noting that “political liberalism does not view political society as an association[,] . . . it insists on the distinction between a political society and an association”); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 *Colum. L. Rev.* 75, 85–86 (2004) (noting that right to exit ensures marriage in liberal societies is legally voluntary); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 *Va. L. Rev.* 1053, 1097–106 (1998) [hereinafter Rosen, *Outer Limits*] (discussing importance of ability to opt out and choose subfederal political structures). But see Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 *N.Y.U. L. Rev.* 144, 161–65 (2003) (arguing that freedom of exit does not necessarily increase individual autonomy, and so does not legitimize group power).

96. Dagan & Heller, *supra* note 95, at 568 (citing Leslie Green, *Rights of Exit*, 4 *Legal Theory* 165, 176 (1998)).

97. Leslie Green, *Rights of Exit*, 4 *Legal Theory* 165, 176 (1998).

98. See, e.g., Hills, *supra* note 95, at 161–65 (arguing that, at least from Rawlsian perspective, consent and exit “cure” potential dangers posed by illiberal groups); Rosen, *Outer Limits*, *supra* note 95, at 1126–27 (discussing opt-out rights within illiberal subsovereigns); Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 *J. Contemp. Legal Issues* 897, 904–07 (2002) (discussing liberal states’ justification for accommodation of illiberal groups where exit rights are present).

99. Sunder, *Dissent*, *supra* note 29, at 536; see also Robert Nozick, *Anarchy, State, and Utopia* 323–24 (1974) (“If a person finds the character of a particular community uncongenial, he needn’t choose to live in it.”).

100. Cf. Feldman, *Imposed*, *supra* note 14, at 870 (calling Taliban “the most extreme instance of the self-conscious, intentional repression of women’s rights anywhere in the modern world”); Mark D. Rosen, “Illiberal” Societal Cultures, Liberalism, and American Constitutionalism, 12 *J. Contemp. Legal Issues* 803, 811 (2002) (calling Taliban “enforcement illiberals” because they “seek[] to enforce rules or norms that prevent people from questioning or revising their societal culture”).

tion.¹⁰¹ And the right of a sovereign to incarcerate does not violate opt-out rights, as long as those incarcerations meet with other liberal requirements.¹⁰² There are also additional layers of federal oversight in place to ensure that tribal prosecutions and incarcerations are justified. ICRA holds tribal governments to many of the same protections found in the Bill of Rights to ensure fair criminal trials.¹⁰³ Additionally, persons incarcerated by an Indian tribe may challenge their detainment in federal district court via the writ of habeas corpus.¹⁰⁴ Thus, there is simply no legal mechanism within tribal government that precludes the option of exit.

Critics of illiberal groups contend that even when actual, physical exit is available, there may be other restrictions on exit that are too great, making the affiliation not genuinely voluntary.¹⁰⁵ For example, some theorists argue that while exit may technically be available, it might represent an impoverished choice if the individual is so steeped in the culture she cannot meaningfully elect exit.¹⁰⁶ Relatedly, this same critique holds that exit is not a real option if the group's members are deprived of an education so that they are either too uninformed to know that there is a different life "beyond" their culture, or if they are left so ill-equipped

101. Tribal criminal jurisdiction has been limited by the Supreme Court, so that only Indians are subject to the criminal jurisdiction of tribal governments, and thus only Indians can potentially be physically detained by a tribe. *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding tribes retain criminal jurisdiction over nonmember Indian defendants); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribal criminal jurisdiction does not extend to non-Indians).

102. See Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 Chi.-Kent L. Rev. 669, 704 (2003) ("The exit right thus demands that no polity have the power to preclude its inhabitants from exiting (with the exception of lawful incarceration, which has this effect)."); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 505 (2000) [hereinafter Rosen, *Multiple Authoritative Interpreters*] ("The exit right would not, however, preclude perfectionist communities from incarcerating people who have violated their penal laws if the community followed fair and consistent adjudicatory procedures.").

103. ICRA's criminal protections include freedom from unlawful search and seizure, double jeopardy, self-incrimination, trial provisions (speedy trial, notice, witnesses, counsel at own expense), trial prohibitions (excessive bail/fines, cruel and unusual punishment, penalty/punishment limits), bill of attainder, ex post facto laws, and trial by jury of at least six. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(1)–(4), (6)–(7), (9)–(10) (2000).

104. 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

105. See Mark E. Warren, *Democracy and Association* 98 (2001) (defining voluntary group membership as when "the associational bond is held together by *chosen* normative allegiance rather than by other kinds of force").

106. See, e.g., Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. Contemp. Legal Issues 625, 627–28 (2002) (arguing with regard to limitation on exit that "[o]ne might need to acquire information about available alternatives to one's current way of life, and what sacrifices one would have to make to choose them").

that they have no viable opportunity to exit.¹⁰⁷ This concern was captured in Justice Douglas's dissent in *Wisconsin v. Yoder*,¹⁰⁸ perhaps one of the most famous cases in American constitutional jurisprudence regarding the rights of illiberal groups to be free from state interference. In *Yoder*, the Court held that Amish parents could not be prosecuted for keeping their children out of formal schooling after eighth grade based on their religious beliefs and efforts to maintain the Amish culture.¹⁰⁹ Justice Douglas argued in dissent that such practices deprive the child of meaningful rights of exit because "the child will be forever barred from entry into the new and amazing world of diversity that we have today."¹¹⁰

But even when this higher bar regarding exit rights is applied to Indian tribes, there are simply no grounds upon which to plausibly contend that Indian tribes put meaningful restraints on exit in terms of educational deprivations or exposure to the world "beyond" the reservation. Research shows that Indian tribes are increasingly devoted to the education of reservation Indians.¹¹¹ In fact, there are currently over thirty-four tribal colleges working to meet the educational and cultural needs of Indian people.¹¹² It is true that one mission of tribal colleges is to bridge the gap between the Indian and Anglo worlds by offering instruction in Indian languages and incorporating a distinctly tribal perspective into the standard curriculum.¹¹³ For example, Bay Mills Community College's tribal literature courses are only offered in the winter term because tribal custom requires that traditional stories be told "when there is snow on

107. See, e.g., *id.* at 627–28; Susan Moller Okin, "Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit, 112 *Ethics* 205, 216–20 (2002) (arguing that gendered socialization within family, which may impose on women sense of inferiority to men or deprive women of educational opportunities or means of independence, functionally denies women meaningful exit options, even if such results are not legally mandated); Mark D. Rosen, Should "Un-American" Foreign Judgments Be Enforced?, 88 *Minn. L. Rev.* 783, 829 (2004) ("[T]he social and cultural costs of living the life of an expatriate may mean that leaving one's home country is not a realistic option for many or most people If so, then it is not meaningful to describe the act of remaining where one was born as a *decision* to remain").

108. 406 U.S. 205 (1972).

109. *Id.* at 234.

110. *Id.* at 245 (Douglas, J., dissenting in part).

111. See, e.g., Lorie M. Graham, An Interdisciplinary Approach to American Indian Economic Development, 80 *N.D. L. Rev.* 597, 624 & n.184 (2004) ("Tribal colleges and universities are taking a leading role in helping tribes meet their human development goals."); Bruce Selcraig, Teeing Off in Indian Country, *N.Y. Times*, Mar. 17, 2006, at F1 (discussing Sandia Pueblo, which makes college education available, free, to any tribal member in high school).

112. Am. Indian Higher Educ. Consortium, at <http://www.aihec.org> (last visited Apr. 2, 2007) (on file with the *Columbia Law Review*).

113. Am. Indian Higher Educ. Consortium, What Makes Tribal Colleges Unique? E-1 to E-2 (1998), available at <http://www.aihec.org/documents/PDFS/TCUSUnique.pdf> (on file with the *Columbia Law Review*) (describing language courses and other incorporations of tribal perspective into tribal college curricula).

the ground.”¹¹⁴ But Indian nations’ efforts to offer a tribal perspective in the context of a broader education does not minimize individual Indians’ opt-out rights. On the contrary, the demonstrated commitment of the vast array of tribal educational institutions, taken in conjunction with other efforts to educate Indians—such as the percentage of tribal revenue that goes towards scholarships and education funds for tribal members¹¹⁵—demonstrates, even if anecdotally, that in no respect are Indian tribes attempting to thwart Indians’ education.¹¹⁶

In addition, though many Indians still reside on reservations and throughout Indian country, there are large Indian populations living beyond reservation borders as well. In a sense, expansive exit rights are part of what is shaping changes in Indian communities and contributing to the “indigenization of modernity.”¹¹⁷ More and more Indians are living off reservations and seeking opportunity and education in the dominant society. These demographic changes are reflected in various American institutions. For example, in keeping with a long history of military service, many Indians leave their tribes and serve in the armed forces. There are currently 20,000 American Indians or Alaskan Natives serving in the U.S. military, and approximately twenty-two percent of all American Indians over eighteen years of age are veterans.¹¹⁸ Educational institutions, particularly those in states with large Indian populations, reflect these demographic shifts as well. The University of Oklahoma, for example, has an undergraduate student body that is eight percent American In-

114. *Id.* at E-1.

115. The National Indian Gaming Association reports that the largest segment of net revenue generated by Indian gaming, twenty percent, is used for education, child and elder care, cultural preservation, charitable donations, and other purposes. NIGA, *Indian Gaming*, *supra* note 5, at 9. Some examples of education spending include \$2.5 million in annual grants for education by the Chickasaw Nation in Oklahoma; a \$3 million donation to California State University, San Bernardino in 2003 by the San Manuel Band of Mission Indians to expand a Cross Cultural Center and develop endowments for scholarships, internships, and diversity training; a tribal scholarship program for higher education funded by the Santa Ynez Chumash; and funding to run the award-winning Ahfachkee School (kindergarten through high school) established on the Big Cypress Reservation by the Seminole Tribe in Florida. *Id.* at 10–11.

116. For example, the Sandia Pueblo, widely regarded as one of the more traditional tribes in Indian country, pays members’ entire educational bills, including graduate school. See Michael Riley, *Duped by Abramoff, Tribe Still Smiling*, *Denver Post*, Feb. 5, 2006, at A1 [hereinafter Riley, Abramoff].

117. Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?*, 17 *Fla. J. Int’l L.* 115, 132–33 (2005) (crediting anthropologist Marshall Sahlins with coining phrase “indigenization of modernity,” meaning indigenous peoples’ attempt to retain traditional ways while using tools of modern world).

118. Holli Chmela, *Bill Would Aid Cemeteries for Indian Veterans*, *N.Y. Times*, Sept. 3, 2006, at A15.

dian.¹¹⁹ And, due to the relocation programs of the 1960s, which urged Indians to leave their reservations and start anew in cities far from their tribes, there are also many Native people living today in urban centers.¹²⁰ According to the 2000 census, approximately sixty-six percent of American Indians live in cities, including Chicago, Los Angeles, and Minneapolis.¹²¹

Accordingly, the evidence suggests that Indians are free to—and indeed, are—moving in and out of Indian country on a regular basis. Now that gaming has produced economic incentives for Indians to return to the reservation, more Indians today are leaving the reservation for education or business experience, but then returning home to help run tribal enterprises.¹²² Indians with MBAs, JDs, MDs, and a host of other degrees are choosing to return to Indian country to help their communities.¹²³ It is precisely this juxtaposition of Anglo education and tribal traditions that allows Indian cultures, like all others, to evolve as they are increasingly influenced by the outside, inspiring change within tribal communities in ways consistent with Indian beliefs and lifeways.

Nevertheless, although education is widely available and encouraged, there might still be constraints on exit that are untenable under a liberal theory. Liberalism allows some “moderate restraints” on the freedom of exit.¹²⁴ Restraints such as an “exit tax” or “departure delay” have been characterized as falling within this category and do not constitute an impermissible impediment to exit under liberal theory.¹²⁵ In fact, some scholars contend that restraints of this magnitude can have

119. Randal C. Archibold, *Off the Beaten Path*, N.Y. Times, July 30, 2006, § 4A (Education Life), at 22.

120. See Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495, 503 n.66 (2004).

121. Press Release, Boxer Press Office, *Boxer Leads Bi-Partisan Group of Senators Seeking to Restore Funding for Urban Indian Health* (Mar. 17, 2006), available at <http://boxer.senate.gov/news/releases/record.cfm?id=252900&&> (on file with the *Columbia Law Review*).

122. See, e.g., Becky Kramer, *The Game Has Changed: LaSarte-Meeks Takes over CdA Indian Casino*, Spokesman-Rev. (Spokane, Wash.), Nov. 8, 2006, at A14 (reporting on career choices of tribal member David LaSarte-Meeks, Stanford-trained attorney and MBA, who returned to Coeur d'Alene Tribe's reservation to become chief executive officer of its casino and resort); Becky Kramer, *Jackpot for Jobs: Success of Region's Casino Industry Has Been a Boon to the Local Job Market*, Spokesman-Rev. (Spokane, Wash.), Mar. 19, 2006, at G1 (describing Coeur d'Alene tribal member Yvette Lozeau, who returned to reservation after obtaining finance and marketing degree to work in management at tribe's casino and resort while tribe also paid for her to get MBA). Anecdotally, I have many friends and colleagues who received their degrees at top educational institutions outside Indian country and have since returned home to work for their tribes.

123. See Kalt, *Constitutional*, supra note 88, at 207 (“[E]ffective tribal governance creates communities where it used to be that everyone wanted to move away, but now they're all coming back.” (internal quotation marks omitted)).

124. See Dagan & Heller, supra note 95, at 568–69.

125. *Id.*

positive effects, as they serve “to ensure that the decision to leave is informed (not hasty and ignorant) and sincere (not opportunistic).”¹²⁶ But harsher, penalizing restraints may run afoul of liberalism’s requirement that individuals enjoy expansive exit rights.¹²⁷ Extraordinarily long delays or the mandatory forfeiture of valuable property or services likely qualify as unreasonable exit restraints.¹²⁸

Here, exit becomes somewhat more complicated for tribes. There are goods and services that might be associated with tribal affiliation that would not otherwise be available to nonmembers.¹²⁹ From this perspective, exit costs could be deemed to be prohibitively high from a liberal theory perspective if members desired to exit the tribal community, but dared not because of the losses they would incur. As a theoretical matter, this might give pause. But the reality is that one need not disenroll or disavow tribal membership in order to “leave” an Indian community. As this Article has demonstrated, many Indians move away from their reservations and live with varying degrees of connection to their tribal communities.¹³⁰ In such cases, those tribal members are often free to continue

126. *Id.* at 568; see also *id.* at 597 (“[E]xit rules . . . can serve . . . as background rules whose mere existence protects [those in a liberal commons] from defection, abuse of trust, and exploitation.”).

127. *Id.* at 567–69.

128. See Alexander, *supra* note 106, at 627–28 (stating that it is not enough that individuals are permitted exit, as departure might still be precluded if individuals must forfeit property, move, or gain information about life outside the group to avail themselves of option); Dagan & Heller, *supra* note 95, at 568–69 (describing rules that “unreasonably delay exit” as “incompatible with the most fundamental liberal tenets”); Gloria Valencia-Weber, Racial Equality: Old and New Strains and American Indians, 80 *Notre Dame L. Rev.* 333, 363–64 (2004) [hereinafter Valencia-Weber, Racial Equality] (explaining that children denied membership in Santa Clara Pueblo tribe “would be denied political rights[,] materials benefits, especially land use rights[,] and other entitlements”).

129. For example, Indian tribes and their members are entitled to certain benefits pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (2000), and the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243. Most tribes also afford numerous goods and services to their own members. See, e.g., *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att’y for W. Dist. of Mich.*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002) (reviewing how revenues from tribal casino fund approximately 270 tribal government positions and governmental programs, “including health care, elder care, child care, youth services, education, housing, economic development and law enforcement”), *aff’d*, 369 F.3d 960 (6th Cir. 2004). These goods and services are no different than those benefits available to U.S. citizens, which would be discontinued upon disavowal of citizenship. Though subject to various exceptions, the general rule is that aliens are not eligible for federal public benefits. See 8 U.S.C. § 1611 (2000) (stating general rule); see also 42 U.S.C. § 402(y) (2000) (barring unlawful aliens from receiving Social Security benefits).

130. See Getches, Wilkinson & Williams, *supra* note 80, at 16 (stating that approximately half of U.S. Indian population lives off of reservations in urban areas); see also D.J. Jackson, A Brief Bad River History/Description, Bad River Lodge, Casino & Convention Center, at <http://www.badriver.com/about.html> (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*) (referring to Bad River Band of Lake Superior Tribe of Chippewa Indians whose total tribal membership is over 6,000 with only 1,500 members living on reservation); Little Earth of United Tribes, Little Earth of United Tribes History,

to access many of the goods and services associated with membership, even when they are no longer living in Indian country.¹³¹

As a practical matter, there is no evidence to suggest that, but for high exit costs, Indians would disavow their tribal citizenship. On the contrary, there is a strange twist on exit occurring within tribal communities. It appears that the vast majority of complaints about exit are coming from members who did not choose to leave (and therefore forfeited goods and services), but who were forced to leave. A cursory look at some of the high-profile conflicts arising in tribal communities around issues of banishment and disenrollment, for example, demonstrates that these conflicts are not about the individual's right to leave the group; rather, they are about the individual's desire to stay in, or enter, the group.¹³² Similar claims may arise in other types of tribal membership disputes as well. For example, a tribe that maintains a matrilineal structure will determine membership according to the mother's clan.¹³³ In such cases, children of an Indian father and non-Indian mother may not be citizens of the tribe.¹³⁴ Or, a tribe may have minimum blood quantum requirements so that those who fall beneath the requisite standard will be denied membership.¹³⁵ In this regard, any deprivation of citizenship by the tribe is more directly related to the right of entry, not exit.¹³⁶

But liberal theory does not equate rights of entry with those of exit.¹³⁷ Even extreme selectivity in membership is generally palatable, even when the liberty interest of the group conflicts with the individual's equality interest in associating with those of her choosing.¹³⁸ Because

at <http://www.littleearth.org/About.htm> (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*) (describing Little Earth community built around Indian culture where off-reservation Indians of different tribes live together in urban environment).

131. See, e.g., Citizen Potawatomi Nation, Services, at <http://www.potawatomi.org/Services/default.aspx> (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*) (discussing benefits available to all Citizen Potawatomi members regardless of residence).

132. See, e.g., Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, Fed. Law., Oct. 2004, at 37, 43 (discussing California case in which tribal government expelled 174 people, fifteen percent of tribe's membership, from tribe); cf. Matthew L.M. Fletcher, *Dibakonigowan: Indian Lawyer as Abductee*, 31 Okla. City U. L. Rev. (forthcoming 2007) (manuscript at 2–3, on file with the *Columbia Law Review*) (contending that some Indian lawyers prefer not to return to reservation to work with Indian tribes, particularly their own, because of potential conflicts of interest or political in-fighting).

133. See *infra* notes 362–372 and accompanying text.

134. See *infra* notes 362–372 and accompanying text.

135. See *infra* note 477.

136. For a thorough discussion of banishment and disenrollment, see *infra* Part IV.B.

137. See Dagan & Heller, *supra* note 95, at 570 (“We believe that liberals should not be concerned with every limitation on entry.”).

138. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (upholding decision of Boy Scouts of America to exclude gay scout leader on free association grounds). But freedom of association is not absolute. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621 (1984) (holding that Jaycees, as quasi-commercial organization, could not exclude women from its ranks).

liberalism values pluralism, groups that maintain “exclusionary practices” may be tolerable.¹³⁹ This is because “a liberal commitment to pluralism requires a multiplicity of groups, which in turn calls for allowing groups autonomously to determine their own, divergent membership requirements.”¹⁴⁰ Thus, the resulting “asymmetry between exit and entry” is deemed an acceptable consequence of liberalism.¹⁴¹

The right to choose one’s members is particularly important to tribes, as the freedom to decide who is in or out of the group is a fundamental attribute of sovereignty.¹⁴² In fact, Justice Marshall’s opinion in *Santa Clara Pueblo* turned, in part, on this critical analysis.¹⁴³ Justice Marshall acknowledged that “[a] tribe’s right to determine its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”¹⁴⁴ Preference for tribes’ authority to determine their membership over individual claims for entrance is also embodied in the dissent accompanying the Second Circuit’s ruling in a recent tribal banishment case.¹⁴⁵ Judge Jacobs argued:

Natural born members of the Tonawanda Band are citizens of the United States. Once they exit the reservation, petitioners will be free to settle and travel where they wish, and to come and go as they please, in the same way and to the same extent as any other person in the United States. Although that freedom does not confer a right to settle or trespass on private lands, or on lands reserved to any Indian nation, the petitioners’ constitutional rights will in no way be diminished after banishment; indeed, they will then enjoy important constitutional rights that are not guaranteed by the ICRA on the Tonawanda reservation.¹⁴⁶

Because the banished plaintiffs in *Poodry* were in no worse position than any other U.S. citizen by virtue of their banishment, the dissent argued that the tribe’s interest in self-determination and autonomy should take precedence over the individual claims of the disenrolled members.¹⁴⁷

Undoubtedly, liberalism struggles to satisfy the appropriate balance between the individual’s equality interest (in entrance), and the group’s

139. Dagan & Heller, *supra* note 95, at 570–71.

140. *Id.* at 570.

141. *Id.* at 571.

142. For a detailed account of some of the struggles Indian tribes have undergone in the process of designating membership, see generally Carole E. Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. Kan. L. Rev. 437 *passim* (2002) [hereinafter Goldberg, *Members Only*].

143. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

144. *Id.* at 72 n.32.

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

146. *Id.* at 902 (Jacobs, J., dissenting) (citation omitted). Judge Jacobs argued that habeas analysis should have focused not on what rights conferred by tribal sovereignty petitioners would lose, but on “whether the petitioners, if banished, will suffer a severe impairment of the liberties that are enjoyed by the American public at large.” *Id.*

147. See *id.*

liberty interest (to exclude). The ensuing debate between liberty and equality is a robust and heated one.¹⁴⁸ Individuals who are illegitimately denied entry (or are subject to forced exit) may suffer great losses in terms of community and cultural identity.¹⁴⁹ This might constitute a particularly poignant loss for Indians, who are unlikely to be able to access a community outside the tribe where they will be able to speak their language, participate in religious ceremonies, commune with sacred sites, or engage with other Indians of the same (or similar) tribal affiliation. This is why, for reasons set forth herein, tribes should be particularly cautious about capriciously imposing exile or denying entry to legitimate or potential tribal members.

Nevertheless, the argument for Indian nations' autonomy to determine tribal membership by internal mechanisms is not a case for exile. Rather, it is an argument for the right of self-determination, which is critical to the continued political and cultural existence of Indian nations. Moreover, as set forth in Parts III and IV, depending on the circumstances, exile of individual Indians from tribal communities may be indicative of the presence—or absence—of good Native governance.

B. *Dissent (Voice)*

The freedom of dissent is widely accepted as a fundamental tenet of a liberal democratic society.¹⁵⁰ As Heather Gerken argues, dissent is valued because “it contributes to the marketplace of ideas, engages electoral minorities in the project of self-governance, and facilitates self expression.”¹⁵¹ I include dissent as an integral part of good Native governance for these and other reasons.¹⁵² Governmental legitimacy often relies on the presence of dissent, or members' opportunities to convey dissatisfac-

148. See, e.g., Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1492–94 (2002) (calling liberty and equality “rival siblings” and arguing that “as equality was to the last century, so should liberty be to the next”); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 Wm. & Mary Bill Rts. J. 595, 595 (2001) (“The tension between freedom of association and antidiscrimination laws is inherently difficult.”); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673, 675–76 (2002) (arguing that Supreme Court jurisprudence now frames Establishment Clause as “guaranteeing the political equality of religious minorities” rather than “protect[ing] the liberty of conscience”); Sunder, *Dissent*, supra note 29, at 523–48 (using *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), as example of how liberty interests of associations are preferred over equality of individuals, particularly those whose speech conflicts with social norms).

149. See Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 Kan. J.L. & Pub. Pol’y 97, 99–101 (2004) (discussing her daughters’ and granddaughters’ levels of “belong[ing]” to Pueblo tribe, depending in part on either enrollment as members or exclusion based on patrilineal membership rule).

150. See Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1746 (2005) (“Everyone, it seems, believes in dissent.”).

151. *Id.* at 1749 (emphasis omitted).

152. See *infra* notes 474–475 (discussing benefits to tribal culture and community where members can speak freely).

tion with the group's leaders.¹⁵³ When members have the ability to participate in the community dialogue, it increases their investment in the society, even if their viewpoint ultimately fails to alter public policy.¹⁵⁴ Relatedly, dissent is good for the group because it instills loyalty in and among community members and enhances members' interpersonal relationships.¹⁵⁵ Theorists have also pointed out that organizations are largely defined by the manner in which the authority to speak (or dissent) is distributed within the group. Evelyn Brody contends: "[H]ow an association distributes voice power within the organization is just as much a part of what it means to be a member—or otherwise affiliated with the organization—as the message it expresses. The medium and the message are both the expression."¹⁵⁶

Moreover, dissent is important because robust rights of voice are thought to minimize exit.¹⁵⁷ Oftentimes, members' decisions regarding exit will be heavily influenced by the avenues available for dissent.¹⁵⁸ That is, when members of the group have the freedom of dissent, they do not have to exit to express their dissatisfaction with the group.¹⁵⁹ In this sense, citizens who enjoy robust protections for speech can use their dissenting voices to inspire internal change. Thus, a government that seeks to keep members engaged and integrated ought to create avenues for voice so that citizens will turn to exit only "as a last resort."¹⁶⁰ In sum, dissent is essential for a good government, though it does not hold the same import as the freedom of exit. As Hanoch Dagan and Michael A. Heller contend: "[S]o long as strong exit is possible—and we insist that it always be possible—exit proves an easy response to dissatisfaction, and it tends to dominate voice."¹⁶¹

The importance of voice suggests that tribal governments—like other sovereigns—ought to provide some avenue for members' speech. The available evidence indicates, in fact, that the right of voice or dissent is commonly available within tribal communities.¹⁶² First, according to

153. See Gerken, *supra* note 150, at 1775.

154. See Esty, *supra* note 56, at 1520 (relying on 1 Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Thomas McCarthy trans., Beacon Press 1984) (1981), in explaining why robust political debate is essential to good governance).

155. See Dagan & Heller, *supra* note 95, at 590–91.

156. Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. Davis L. Rev. 821, 865 (2002) (emphasis omitted).

157. See Dagan & Heller, *supra* note 95, at 590–91.

158. *Id.*

159. *Id.*

160. *Id.* at 591.

161. *Id.*

162. With over 500 federally recognized Indian nations in the United States, it cannot be stated with certainty that the freedom of dissent is available as a general matter. Extensive empirical studies would have to be conducted to definitively draw this conclusion. Cf. Joseph Thomas Flies-Away, *My Grandma, Her People, Our Constitution*, in *American Indian Constitutional Reform and the Rebuilding of Native Nations*, *supra* note

many theorists, democracy itself serves as sufficient voice, because group members have a say in elections and are free to choose leaders to speak for them.¹⁶³ Thus, if a group maintains particular practices or laws that might be deemed illiberal—such as a gay marriage ban among the Cherokees of Oklahoma¹⁶⁴—members' power to vote allows them to elect new leaders with a different vision. In this sense, citizens use their votes to give voice to changing internal tribal dynamics, which can then be reflected in the leaders who are chosen.¹⁶⁵ And many Indian tribes today have democratically elected leadership,¹⁶⁶ due in part, to the "‘boilerplate’ constitutions"¹⁶⁷ adopted after the passage of the Indian Reor-

88, at 144, 153–54 ("Article IX, Bill of Rights of the Hualapai Constitution, guarantees these and other liberties for all people and persons within the Hualapai boundaries."). Flies-Away also notes that "Hualapai culture traditionally allowed for free expression by all members of the Tribe and was practiced prior to the colonization by the Europeans." *Id.*

163. See Ilya Somin, *Revitalizing Consent*, 23 *Harv. J.L. & Pub. Pol'y* 753, 761–62 (2000) ("Most modern voice theories link consent to participation in democratic institutions.").

164. *Cherokees Ban Gay Unions*, *Indian Life*, July 1, 2004, at 2.

165. See, e.g., Hills, *supra* note 95, at 206 n.218 (noting that critics of illiberal groups "ignore . . . the possibility that . . . societies . . . might provide ample opportunities for dissenters to challenge the leadership through voice and exit").

166. See, e.g., *Const. and By-laws of the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation* art. V, § 2 ("All members of the Assiniboiné and Sioux Tribes, . . . who are eighteen (18) years of age or over, are eligible to vote . . ."); *id.* art. IV, § 3 ("The Chairman, the Vice-Chairman, Sergeant-at Arms [sic] and twelve (12) additional members of the Board shall be elected at large."); *Const. and Bylaws of the Bay Mills Indian Community* art. IV, § 7 ("Any member of the Bay Mills Indian Community who is eighteen (18) years of age or over shall be entitled to vote at any election of General Tribal Council meetings at which he presents himself during the official voting."); *id.* art. IV, § 2 ("The General Tribal Council shall elect from its own members who are twenty-one (21) years of age or over, by secret ballot, a President, a Vice-President, a Secretary, a Treasurer, and one Councilman."); *Const. and By-Laws of the Cheyenne River Sioux Tribe* art. V, § 1 ("All enrolled members of the Cheyenne River Sioux Tribe, 18 years of age or over, who have maintained legal residence on the reservation for a period of ninety (90) days immediately prior to any election shall have the right to vote."); *Const. and By-Laws of the Confederated Tribes of the Colville Reservation* art. III, § 5 ("Any enrolled member of the Confederated Tribes of the Colville reservation who is eighteen (18) years of age or over shall be entitled to vote in all tribal elections."); *Const. and By-Laws of the Forest County Potawatomi Community*, Wis. art. III, § 4 ("Any enrolled member of the Community who is at least one-fourth (1/4) degree Potawatomi Indian blood and is eighteen (18) years of age or over shall be qualified to vote at all General Council meetings."); *Const. of the Fort Belknap Indian Community of the Fort Belknap Reservation*, Mont. art. VII, § 1 ("All members of the community of either sex, over the age of 21 years, are entitled to vote in the district in which they reside."); *Const. of the Muscogee (Creek) Nation* art. IV, § 2 ("Every citizen . . . shall be eligible to vote in the tribal elections provided that (a) they are registered voters for elections; (b) they are at least eighteen (18) years of age at the date of election . . . ; and (c) they hold citizenship."); *id.* art. IV, § 7 ("All citizens shall be allowed to vote for the Principal Chief and any such national office that shall be created.").

167. Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 *U. Miami L. Rev.* 63, 78 (2006).

ganization Act (IRA) in 1934.¹⁶⁸ Many of the IRA constitutions, which often required that leaders be democratically elected,¹⁶⁹ are still in place today.¹⁷⁰

Contemporary Indian nations are employing the vote to give voice to significant cultural changes within tribal communities. One example of this phenomenon is reflected in the recent rise of female leaders in tribal governments. In the past two decades, several tribes have, for the first time, elected women to high-ranking tribal leadership positions.¹⁷¹ This includes Herminia Frias, who was the first female to ever be elected to lead the Pascua Yaqui Tribe in Arizona.¹⁷² Frias is one in a growing trend of women leaders. A 1981 Department of Education study found that there were sixty-nine female leaders among the more than 500 federally recognized Indian tribes.¹⁷³ By 2006, the number of women leaders of tribes had nearly doubled, hitting its zenith at 133.¹⁷⁴ Women are also increasingly prominent in tribal judiciaries.¹⁷⁵ One tribe's combined trial and appellate court is comprised entirely of females.¹⁷⁶ The movement toward more women leaders in tribal communities demonstrates that members are using voice to effectuate changes that are reflective of the broader cultural trends occurring within tribal nations and within liberal societies in general.

Beyond voting rights, citizens may also assert voice through the exercise of free speech. As more fully discussed below, many tribal governments are structured around written constitutions that often incorporate

168. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–479 (2000)). Approximately 150 tribal constitutions were adopted pursuant to the IRA. Goldberg, *Members Only*, *supra* note 142, at 437 n.3.

169. See Hope M. Babcock, A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered, 2005 Utah L. Rev. 443, 495–96 (noting that IRA “requir[ed] tribes to conduct tribal elections and to adopt constitutions and governmental institutions modeled after those of the federal government”).

170. Champagne, *supra* note 92, at 12 (“In many other communities, colonial IRA constitutional governments or non-IRA constitutions have operated for more than sixty years and are often taken by many community members as the given government.”).

171. Monica Davey, *As Tribal Leaders, Women Still Fight Old Views*, N.Y. Times, Feb. 4, 2006, at A1.

172. Carmen Duarte, *Pascua Yaqui Female Trailblazer*, Ariz. Daily Star, Dec. 13, 2006, at 5.

173. See Davey, *supra* note 171.

174. *Id.*

175. For example, I am honored to be the first woman elected to the Supreme Court of the Citizen Potawatomi Nation. I join my Indian friends and colleagues—including Christine Zuni Cruz, Wenona Singel, Stacey Leeds, and Pat Sekaquaptewa, among others—who proudly serve as female judges for their respective tribes.

176. See Annette VanDeCar, *A Woman's Place Is in . . . the Courtroom*, Odawa Trails (Little Traverse Bay Bands of Odawa Indians, Harbor Springs, Mich.), Oct. 2006, at 1, 1, available at <http://www.ltbbodawa-nsn.gov/newsletter/newsletterframeset-3.htm> (on file with the *Columbia Law Review*) (celebrating Wenona Singel, Rita Gasco-Shepard, JoAnne Cook, Jenny Kronk, and Donna Budnick, who constitute all-female court of Little Traverse Bay Band of Odawa Indians).

provisions similar or identical to those contained in the U.S. Constitution's Bill of Rights, including the freedom of speech.¹⁷⁷ A brief review of available tribal constitutions confirms that freedom of speech is frequently delineated as an important individual right.¹⁷⁸ At the same time, however, free speech may not be identical in scope and import in tribal communities as it is in the dominant culture. After all, there are vastly different cultural contexts in which the right may be asserted, and these differences ought to be thoughtfully considered. In some indigenous communities, for example, the absence of voice—rather than evidence of an “illiberal” policy—may merely be a reflection of a deeply embedded communitarian culture that depends on unity within the tribal community as a matter of survival. As one Indian author puts it, “[m]ost tribal Indians are raised to think independently and act for others.”¹⁷⁹ In other words, tribal members are taught to put the community before their individual needs,¹⁸⁰ as Indian individualism is situated within a larger “cosmic order of purpose and balanced powers.”¹⁸¹ Because of this communitarian ethic, some scholars have cautioned against an expansive application of free speech rights within tribal nations, suggesting that the closely bound nature of Indian tribes—which are largely comprised of families and clans—could be severely damaged if such robust rights were required.¹⁸²

Given these important cultural differences, voice or the right to speak in any particular Indian community may not be directly analogous to that seen in the dominant culture. At the same time, good Native governance requires that citizens have some meaningful avenue for voice, as it provides the best method for tribal citizens to express dissent and effec-

177. See Goldberg, *Revitalization*, *supra* note 75, at 893–96 (discussing general process by which tribes adopted individual rights provisions); Kalt, *Constitutional*, *supra* note 88, at 208 (“[M]any tribes’ constitutions contain a bill of rights.”); Valencia-Weber, *Racial Equality*, *supra* note 128, at 362 (noting that IRA provided “boiler plate” constitutional model that “many tribes adopted”).

178. See, e.g., *Const. and By-Laws of the Confederated Tribes of Warm Springs Reservation of Or.* art. VII (containing Bill of Rights provision guaranteeing freedom of speech); *Const. of the Fort McDowell Yavapai Nation* art. VIII (same); *Const. and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Mont.* art. VII (same).

179. Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 *Ga. L. Rev.* 1019, 1024 (1990).

180. *Id.*

181. Champagne, *supra* note 92, at 13.

182. See J. Kenneth Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 *Ariz. L. Rev.* 617, 623–24 (2004) (arguing that such imposition into intrafamily tribal life could possibly “lead to a further breakdown of tribal society”); see also Matthew L.M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 *Kan. J.L. & Pub. Pol’y* 525, 535 (2005) (discussing *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968), in which Navajo Nation harshly censored free speech of non-Navajo attorney because his laughing at tribal elders during leadership meeting was considered grave offense against elders).

tuates change from the inside.¹⁸³ This means even if tribal nations—much like the United States and other sovereigns—do not formally proscribe voice, speech rights must be protected in practice, even when, in times of threat, the perceived relative importance of citizens' speech vis-à-vis the government's interest in security shifts.¹⁸⁴

Efforts to achieve this fine balance can be seen in the tribal employment context. Here, free speech rights may be particularly valuable to tribal members, who are often employed by their tribal governments.¹⁸⁵ Like the state and federal governments, Indian nations may lawfully stifle political speech in the employment context to protect the business interests of the government.¹⁸⁶ But, at times, tribal members feel frustrated with such prohibitions, contending that restrictions prevent them from speaking out against tribal corruption for fear of losing their jobs.¹⁸⁷ This becomes particularly problematic in areas of the country where the livelihood of entire communities depends on tribal enterprises.¹⁸⁸ In such cases, a tribal member who is fired from her job for protesting a tribal government's mismanagement may have few options in seeking al-

183. See Dagan & Heller, *supra* note 95, at 590–91 (contrasting voice with exit as effective means of community participation and “community-building”); cf. Esty, *supra* note 56, at 1520 (“[D]ebate and deliberation promote rationality and improve outcomes.”).

184. In times of strife, the U.S. government has unabashedly squashed the free speech interests of Communists, anarchists, and terrorists. See Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 *Cardozo L. Rev.* 233, 239–48, 316–18, 340 (2005) (discussing United States's handling of free speech rights of Communists, anarchists, and terrorists in light of perceived threats).

185. Indian nations employ thousands of people in America, both Indian and non-Indian. See Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 *U. Mich. J.L. Reform* 273, 279 (2005) [hereinafter Fletcher, *Tribal Employment Separation*] (“Tribes are usually close-knit communities that generally employ a significant percentage of Tribal Members.”); Tom Wanamaker, *Let the Games Begin: The Economic Impact of Indian Gaming*, *Indian Country Today* (Canastota, N.Y.), Mar. 9, 2005, available at <http://www.indiancountry.com/content.cfm?id=1096410499> (on file with the *Columbia Law Review*) (noting Oneida Nation Enterprises employs approximately 4200 people, of whom three percent are Indian).

186. See Lauren Donovan, *Hall Says Tribes' Free Speech Intact*, *Bismarck Tribune* (N.D.), Aug. 11, 2004, at 1B (providing example of tribal employer policy forbidding employees from speaking with press). Donovan quotes Tex Hall, a tribal chairman, who defends the speech restrictive policies as “‘standard business practices used to ensure the integrity and accuracy of information regarding the tribe that is released to the public.’” *Id.* She further quotes Professor Matthew Fletcher of the University of North Dakota Law School as saying “‘[t]here's not anything wrong with [Hall's policy],’ since ‘state and federal governments do it all the time.’”

187. See Diana Graettinger, *Tribal Employees' Dismissal Prompts Lawsuit*, *Bangor Daily News* (Me.), Aug. 26, 2006, at C4 (describing tribal court lawsuit alleging First Amendment violations filed by five tribal employees fired for holding demonstration against tribal government).

188. See, e.g., Andrew Ward, *Seminole High Rollers Obscure Tribal Hardship*, *Fin. Times* (London), Dec. 9, 2006, at 21 (noting that Mississippi Band of Choctaw Indians is “second-largest employer” in state).

ternate employment.¹⁸⁹ Of course, similar concerns are likely prevalent for both Indians and non-Indians residing in counties or cities where local, state, or federal governments serve as the primary employers. In contrast to non-Indians, however, tribal members may experience particularly strong connections to their tribal community that simply cannot be replicated elsewhere.

While the available evidence indicates that at least some avenue for voice is available in many tribal communities, without an in-depth study of each particular tribe, it cannot be stated definitively that every Indian nation protects voice.¹⁹⁰ And some protection for voice is critical to good Native governance. In its absence, members may be forced to opt for exit or exile in lieu of speech, which can have a devastating effect on both the individual and the tribe.¹⁹¹

C. Foundational Governing Principles

Indian tribes are at various stages of nation-building due, in part, to dramatic differences in their histories and structures. For example, some tribes have been recognized as nations since their contact with European colonizers, having entered into treaties with the colonial powers that preceded the formation of United States.¹⁹² Contrast this with tribes that were “terminated” by the federal government in the 1950s and later reinstated,¹⁹³ or even those that only recently gained federal recognition for the first time.¹⁹⁴ Combined with other circumstances specific to each tribe—such as being removed from their aboriginal homelands, decimated by disease, placed on a reservation, or funneled into boarding schools—vast differences in tribal governance are inevitable.¹⁹⁵ Similarly

189. See *id.*

190. In fact, given the insular nature of some Indian tribes, such an examination might be wholly inappropriate, if not impossible.

191. See *infra* notes 469–481 and accompanying text. There is a dearth of empirical evidence on this topic. Presently, there are no studies that indicate whether and to what extent individual Indians seek exit from tribal communities due to an absence of voice.

192. See generally Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (1986) (discussing treaties between tribal nations and colonial powers).

193. See Felix Cohen, *Handbook of Federal Indian Law* 89–97 (LexisNexis Matthew Bender 2005) (discussing period of federal Indian policy known as “Termination” during which political relationship between many Indian nations and federal government was destroyed); see also Getches, Wilkinson & Williams, *supra* note 80, at 206–16 (stating that more than 100 tribes suffered “termination” during this era and that some tribes, such as Menominee in 1973 and Klamath in 1986, were only recently reinstated).

194. See, e.g., 25 U.S.C. §§ 1751–1760 (2000) (authorizing federal recognition of Mashantucket Pequot Tribe via Connecticut Indian Lands Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983)).

195. See Champagne, *supra* note 92, at 12 (“There is no single template [of governance] that will work for most tribal governments or communities, since most have unique cultural and institutional arrangements and histories.”). Champagne goes on to point out vast differences between tribes, noting that 330 of the 560 federally recognized tribal communities in the United States are situated in Alaska and California, with little

diverse are the bases upon which tribes rest their governments. While evidence does not indicate that one type of foundational governing principles is preferable to others, studies do reveal that the absence of any foundational governing principles can be extremely detrimental to tribal governance.¹⁹⁶

Foundational principles are important because they embody those sets of beliefs and rules around which government is structured.¹⁹⁷ Practically speaking, foundational principles define the scope of leaders' authority, provide parameters for the exercise of power, and lay out the citizens' basic rights vis-à-vis the state.¹⁹⁸ Critical to allowing the polity to direct change within government, foundational principles also set forth how changes in governmental structure can be effectuated,¹⁹⁹ though, by design, foundational principles should not be easily altered.²⁰⁰ A core characteristic of foundational principles is that they embody a nation's character and values, give life to national identity, and, in some sense, represent the group's common history.²⁰¹

Foundational principles are most obviously evidenced by a written constitution. Constitutional governance is a familiar structure in Indian

land and less than 300 members each. *Id.*; see also Graham, *supra* note 111, at 610–11 (discussing diversity of Indian tribal governance, including that of Santa Ana Pueblo, Mississippi Choctaw, Navajo, Cherokee, Hualapai, and Northern Cheyenne tribes).

196. See Cornell, Curtis & Jorgensen, *supra* note 82, at 10–11 (“Effective self-government requires a foundation of basic rules that spell out *how* the nation will govern itself.”). This work does not directly map onto the analysis of good Native governance, as it draws on studies that focused primarily on the economic success of Indian tribes, which, as I explain, is only one factor to consider in determining whether a tribe is governing well. See *supra* notes 87–89 and accompanying text.

197. Cf. Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 *Fordham L. Rev.* 1469, 1482 (1997) (discussing process of constitution-making, through which polity commits “to writing a set of foundational principles to govern the life of the nation”); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 *J. Contemp. Legal Issues* 69, 84 (1996) (discussing “foundational principles that frame the relation between government and the individual” in context of “‘civil’ deprivations of liberty”); Abner S. Greene, *Uncommon Ground*, 62 *Geo. Wash. L. Rev.* 646, 647 (1994) (reviewing John Rawls, *Political Liberalism* (1993), and Ronald Dworkin, *Life’s Dominion* (1993)) (describing Rawls’s position that “citizens should develop a common set of foundational principles of justice to undergird government”).

198. See Cornell, Curtis & Jorgensen, *supra* note 82, at 10–11.

199. See *id.* at 11.

200. See Simon Chesterman, *Imposed Constitutions, Imposed Constitutionalism, and Ownership*, 37 *Conn. L. Rev.* 947, 949 (2005) (declaring that constitutions “are and should be notoriously difficult to change”).

201. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *Yale L.J.* 1225, 1270–81, 1307 (1999) (contrasting expressivist countries whose constitutions come out of “distinctive history” and reflect “distinctive character,” with other nations whose constitutions “operate at a substantial remove from their nations’ character”). Tushnet believes that the United States is an expressivist country; one where our Constitution “does express our national character.” *Id.* at 1271.

country, as most tribes today operate under a written constitution.²⁰² The Cherokee Nation of Oklahoma, for example, functions based on a governmental structure that was first set out in their constitution almost 200 years ago.²⁰³ In recent years, many tribes—including the Cherokees, the Citizen Potawatomi, Mississippi Choctaw, Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Northern Cheyenne—have undertaken constitutional reform so that their constitutions more adeptly address the challenges tribal governments face in a contemporary world.²⁰⁴ Tribal leaders have recognized such reform as constituting “an essential first step in strengthening government stability, exercising greater political sovereignty, and enhancing prospects for increased political and economic development.”²⁰⁵

Not all foundational governing principles are captured in the form of a written constitution, however.²⁰⁶ For example, the Navajo Nation, the second largest Indian tribe in America, governs pursuant to a written system of tribal codes rather than a constitution.²⁰⁷ These writings codify centuries-old Navajo customary law.²⁰⁸ Similarly, many of the Pueblos of New Mexico, who still govern today in ways largely consistent with their ancient traditions, do not have written constitutions but still maintain a constitutional form of government.²⁰⁹ Joe Kalt explains how, for centuries, “the Cochiti Pueblo has sustained continuity of collective organization for collective decision- and rule-making, although this organization was never written down as a ‘constitution.’”²¹⁰ In such communities, constitutional principles, though unwritten, define the parameters of the indigenous legal system through cultural requirements and sanctions that have been passed down orally from family to family for hundreds or thousands of years.²¹¹

The form in which foundational principles are embodied—if they take a tangible form at all—is not the critical inquiry. Rather, from a governance perspective, what is crucial is that a nation has identified

202. See Cornell, Curtis & Jorgensen, *supra* note 82, at 11.

203. See Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitution Convention*, in *American Indian Constitutional Reform and the Rebuilding of Native Nations*, *supra* note 88, at 287, 290–93 (describing evolution of Cherokee governance from adoption of 1827 constitution to present).

204. See Cornell, Curtis & Jorgensen, *supra* note 82, at 11; see also Kalt, *Constitutional*, *supra* note 88, at 192 (“It is striking how commonly one finds constitutional reform occurring within Indian nations now well-known for their political, social, cultural, and economic success.”).

205. Lemont, *supra* note 203, at 288.

206. See Kalt, *Constitutional*, *supra* note 88, at 188 (noting that Great Britain, Israel, Navajo Nation, and several New Mexico Pueblos all have “constitutional rule” without having written constitutions).

207. Cornell, Curtis & Jorgensen, *supra* note 82, at 11.

208. *Id.*

209. Kalt, *Constitutional*, *supra* note 88, at 188.

210. *Id.*

211. *Id.*

foundational principles upon which it will base its government.²¹² These principles set the parameters for all aspects of the government and empower leaders and the polity alike to contemplate, examine, and, if need be, press the bounds of such foundational principles for change. There is no question that the establishment or clarification of foundational principles is hard work,²¹³ but the development and institutionalization of foundational principles is a process that provides opportunity. Through this process, tribes can develop nationhood and become empowered “to establish the language and grammar of political discourse in a territory for the years and decades to come.”²¹⁴ Evidence shows that the endeavor is critical to the success of indigenous nations.²¹⁵

D. Providing for the Fair and Nonpolitical Resolution of Disputes

Good Native governance requires that governments assure their nations’ citizens that disputes will be dealt with in a fair and nonpolitical manner.²¹⁶ This requirement is borne out by in-depth studies of tribal communities demonstrating that the presence of such dispute resolution forums is integral to tribal nations’ success.²¹⁷ Citizens’ beliefs that the resolution system is politicized and unfair fuel mistrust of government.²¹⁸ Such sentiments drive members away from the community and discourage them from participating in tribal life, thus “draining crucial assets from the nation.”²¹⁹

Fair forums for the resolution of disputes are important with regard to tribes’ dealings with outsiders as well.²²⁰ In some cases, outsiders may

212. See *id.* at 187–91 (arguing that “constitutional rule is . . . human” and thus necessary to existence of “would be polities,” because absent constitutionalism, polities “are consigned to the Hobbesian pre-constitutional struggle”).

213. See Champagne, *supra* note 92, at 12–13 (noting that process of constitutional reform is difficult one, and not every tribal nation is currently equipped to devote resources necessary to project); cf. Feldman, *Imposed*, *supra* note 14, at 859–60, 879–85 (discussing tension between equality and autonomy in context of constitution-building in Iraq and Afghanistan, particularly focusing on tensions between goals of “local elites” versus those of “the international community”).

214. Chesterman, *supra* note 200, at 950.

215. See Cornell, Curtis & Jorgensen, *supra* note 82, at 6–8 (describing studies finding that constitutional factors, including “practical sovereignty, . . . capable governing institutions, . . . and cultural match,” were most important in determining indigenous nations’ economic success).

216. See *id.* at 13–14; Kalt, *Constitutional*, *supra* note 88, at 207–12 (explaining importance of independent judiciary for indigenous nation-building).

217. See, e.g., Kalt, *Constitutional*, *supra* note 88, at 207–12 (“[T]he objective data indicate that an independent court system, not subject to usurpation of its authority and decisions by the legislature or the chief executive, adds substantially to the ability of Indian nations to sustain economic development and create employment on their respective reservations.”).

218. See Cornell, Curtis & Jorgensen, *supra* note 82, at 13.

219. *Id.*

220. *Id.* at 6 (referring to “effective governments” generally, noting that they “tend to have the respect of outsiders”).

be able to bring their claims only in a tribal forum.²²¹ Such is the case, for example, with civil rights complaints by non-Indian employees against tribal employers.²²² In such circumstances, it is important that tribes have mechanisms in place to adjudicate these claims. Where protections are not present, outsiders may opt to reduce interactions with tribes, which, in many cases, would be detrimental to tribal economic viability.²²³ Additionally, perceived unjust treatment of outsiders fuels motivations for increased federal encroachment into intratribal matters.²²⁴

Undoubtedly, Indian nations have made incredible advancements in creating tribal resolution systems²²⁵ since many tribal justice systems were disrupted or dismantled by contact with the colonial powers. But each tribe's dispute resolution system—in style, structure, funding, and resources—depends heavily on that tribe's history and situation. For example, many of the "terminated" California tribes were denied the opportunity to access much of the federal funding earmarked for rebuilding indigenous justice systems.²²⁶ Accordingly, after being reinstated, many are only now in a position to begin the difficult process of creating adjudicatory bodies to resolve tribal disputes.²²⁷ Other tribes, by contrast,

221. Claims brought against tribal governments pursuant to ICRA must be brought in tribal forums. See *supra* note 7 and accompanying text.

222. See *supra* note 7 and accompanying text.

223. See Cornell, Curtis & Jorgensen, *supra* note 82, at 13–14 ("As long as people feel their claims will not be fairly addressed or that court decisions or appeals will be politicized, they will tend to mistrust their government and may take their knowledge and their energy and go somewhere else to live their lives . . .").

224. See, e.g., *San Manuel Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (applying NLRA against tribe for violations of collective bargaining rights).

225. Getches, Wilkinson & Williams, *supra* note 80, at 420 (noting there were seventy-one tribal courts and thirty-two "Code of Federal Regulations" courts in 1978, and approximately 275 tribal courts and twenty-three CFR courts today). Getches, Wilkinson and Williams affirm that "the numbers . . . tell only part of the story of the growth and diversity of these unique and evolving institutions that are in the forefront of modern tribal efforts to define the meanings and scope of tribal sovereignty in United States society." *Id.*

226. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 *UCLA L. Rev.* 1405, 1417–18 (1997) ("Together, termination and Public Law 280 formed a toxic brew, eating away at the funds authorized by federal law for Indian welfare, education, and health care in California.").

227. For example, the Klamath Tribes regained federal recognition in 1986 and produced a Judicial System Development Policy as part of the tribe's Economic Self Sufficiency Plan in 2000. Klamath Tribes, *The Klamath Tribes Economic Self Sufficiency Plan* (Oct. 12, 2000), at <http://www.klamathtribes.org/ESSPWeb03.htm> (on file with the *Columbia Law Review*). The Peoria Tribe of Indians of Oklahoma was reinstated in 1978, but no tribal court has been established. See Peoria Tribe of Indians of Okla., *History*, at <http://www.peoriatribe.com/history.php> (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*); Peoria Tribe of Indians of Okla., *Tribal Government*, at http://www.peoriatribe.com/tribal_government.php (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*). The Confederated Tribes of Siletz was reinstated in 1977 and reestablished self-governance in 1992 with a written tribal legal code and tribal judiciary. See Confederated Tribes of Siletz, *History*, at http://ctsi.nsn.us/History_and_Culture.html (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*); Confederated Tribes of

have had formal dispute resolution processes for almost two centuries,²²⁸ while many tribes exist somewhere between these two extremes.

Tribal courts vary dramatically in structure, style, and jurisdiction.²²⁹ For example, some tribal court systems are based largely on the Anglo model, with trial and appellate courts fulfilling the role of an independent judiciary.²³⁰ Other processes are drawn directly from traditional customs and require claims to be brought before traditional leaders or a group of elders.²³¹ Courts may be designed to address conflicts dealing with specific subject matter, such as drug courts or specialized courts intended to handle only domestic violence or child custody matters.²³² In Indian country today, tribes operate Peacemaker courts, intertribal appellate courts, and talking circles, among others.²³³

The subject matter of the cases being heard in tribal courts requires judges to grapple with sophisticated legal analyses and controversial topics. In fact, some of the most challenging issues facing America today—such as the legalization of gay marriage and questions concerning the intersection of race, identity, and citizenship—have been contemplated by tribal courts. Just within the past few years, for example, the Supreme Court of the Cherokee Nation of Oklahoma heard cases regarding whether two Cherokee women could legally marry under Cherokee

Siletz, Tribal Ordinances, at http://ctsi.nsn.us/Tribal_Ordinances.html (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*).

228. See Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* 53–72 (1975) (discussing evolution of government and justice within Cherokee Nation); Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311, 319–22 (2000) (stating that Cherokee have maintained formal court system off and on since 1830s).

229. See generally Justin B. Richland & Sarah Deer, *Introduction to Tribal Legal Studies* 75–112, 313–58 (2004) (providing both historical and present day overview of tribal justice systems).

230. See, e.g., Citizen Potawatomi Nation, *Judicial*, at <http://www.potawatomi.org/Government/Judicial/default.aspx> (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*).

231. See, e.g., Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577, 596 (2000) (describing Pueblo's contemporary dispute resolution forums, such as tribal elder-led talking circles).

232. See, e.g., *id.* at 592 (noting that Navajo judicial system is made up of seven districts, each with its own children's court and peacemaker court); Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 Idaho L. Rev. 443, 444 (2006) (noting existence of fifty-four Native American tribal drug courts).

233. See, e.g., Atwood, *supra* note 231, at 592–98 (discussing various tribal courts and resolution processes); Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997–2000: Melding Traditional Dispute Resolution with Due Process*, 26 Am. Indian L. Rev. 261, 274–76 (2002) (discussing successful development of drug court on Duckwater Shoshone Indian Reservation); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 252 (1994) [hereinafter Valencia-Weber, *Tribal Courts*] (discussing Navajo Peacemaker Court and Northwest Intertribal Court System).

law,²³⁴ and whether the descendants of freed Black slaves—known as Freedmen—could assert Cherokee citizenship as cultural, if not racial, Indians.²³⁵

As tribes are influenced by outsiders perhaps more than ever before, they are seeking new ways to engage with contemporary Anglo legal systems. As such, tribes across the country have designed inventive dispute resolution mechanisms that creatively fuse the traditional and the modern.²³⁶ Some have been developed to pursue the dual goals of tribal justice and community balance. The Duckwater Shoshone's drug court, which the Shoshone people have called "a successful form of therapeutic jurisprudence," is one such example.²³⁷ The drug court is so effective—and is a compelling example of good Native governance—because it is rooted in the tradition of the people.²³⁸ The tribal members maintain a connection to the methods of instruction, guidance, and punishment of the drug court. These traditions are described by Judge Johnny as being rooted in the Northern Paiute (Numu) and Western Shoshone (Newe) peoples' traditional dispute resolution processes.²³⁹ Judge Johnny describes these processes as historically overseen by Indian doctors who took on the role of "medicine men" and also served as judges in tribal disputes.²⁴⁰ He explains that the Indian doctors "sought to return spirituality, harmony, and wholeness, to those affected by a dispute or disturbance," with rehabilitation, not revenge, serving as the "ultimate goal."²⁴¹ Despite attempts to squelch the traditional resolution processes, the role of Indian doctors among Newe and Numu peoples survived through oral tradition.²⁴²

The Shoshone's drug court has served as a model for other Indian nations, which similarly draw on both ancient and modern practices to establish tribal legal systems that will assist in the development of tribal law.²⁴³ Such hybrid dispute resolution forums have sprung up all across

234. See Lois Romano, *Battle over Gay Marriage Plays Out in Indian Country*, Wash. Post, Aug. 1, 2005, at A2.

235. Press Release, Cherokee Nation, *Cherokee Nation Court Rules on Freedmen Case* (Mar. 7, 2006), available at <http://www.cherokee.org/home.aspx?section=story&id=3ew0mQOIDrg> (on file with the *Columbia Law Review*).

236. See Getches, Wilkinson & Williams, *supra* note 80, at 449–50 (discussing how tribes like Winnebago Tribe of Nebraska, Hopi Tribe, and Colville Confederated Tribes use combination of tribal customary laws and statutory law); Valencia-Weber, *Tribal Courts*, *supra* note 233, at 256–62 (discussing creative use by tribal courts of customs and beliefs in forming justice systems).

237. Johnny, *supra* note 233, at 261.

238. *Id.* at 265–69.

239. *Id.* at 265–66.

240. *Id.* at 265.

241. *Id.* at 265–66 (explaining that "Euro-American concepts of justice of revenge and punishment" were not part of tribal culture, but imposed from without).

242. *Id.*

243. See *id.* at 275–76 (noting that forty-five jurisdictions were implementing or studying drug courts by 1999); Kalt & Singer, *supra* note 8, at 32–33.

Indian country. Some, like the Court of Elders in the Sitka Community Association and the Northwest Intertribal Court System, were designed to resolve, in particular, disputes that turn on questions of tribal cultural beliefs and customary tribal law.²⁴⁴

There has been a renewed and demonstrable commitment on the part of Indian nations in recent years to integrate old and new ways into tribal dispute processes to ensure justice for litigants.²⁴⁵ But the common thread linking these successful endeavors is the creation of judicial (or quasi-judicial) systems that are fair and nonpolitical.²⁴⁶ The fact that many such practices are not already in place is due, in large part, to the fact that when many tribes adopted their constitutions, the vast scope and extent of Indian nations' sovereign powers had simply not been contemplated.²⁴⁷ This is one reason why constitutional reform has been so important to indigenous nation-building: It has created an avenue for tribes to restructure their governing documents in order to adopt "explicit protections for the independence of the judiciary."²⁴⁸ And several tribes, including the Cheyenne River Sioux and the Citizen Potawatomi Nation, have done so.²⁴⁹ Independent and nonpolitical dispute resolution systems provide important assurances to both members and outsiders that their claims will be adjudicated fairly.²⁵⁰ Their presence enhances the loyalty and respect of members and outsiders alike because litigants perceive that they have a genuine opportunity to bring their claims in a forum where resolution of the disputes will not be unduly influenced by political considerations.²⁵¹

E. *Cultural Matching*

The final element of good Native governance is cultural matching.²⁵² As evidenced by the name, "cultural matching" simply means there is a match between the "governing institutions" of the particular tribe and its "indigenous political culture."²⁵³ In other words, a tribal community's ideas regarding the proper use and scope of authority must

244. Valencia-Weber, *Tribal Courts*, supra note 233, at 251–52.

245. See Kalt, *Constitutional*, supra note 88, at 198 ("[T]he challenge of devising legitimate governing structures today is not a matter of 'going back'; it is rather the challenge of finding governing structures that match the reality of the contemporary cultures of Native communities.").

246. See Cornell, Curtis & Jorgensen, supra note 82, at 13–14 ("This message [that disputes will be treated fairly, in nonpolitical manner] is critical to the nation's success.").

247. Kalt, *Constitutional*, supra note 88, at 209.

248. *Id.*

249. *Id.*

250. Cornell, Curtis & Jorgensen, supra note 82, at 13.

251. See *id.*

252. See supra note 94 and accompanying text.

253. See Cornell, Curtis & Jorgensen, supra note 82, at 7 (defining "cultural match"); Cornell & Kalt, supra note 94, at 16 (describing situations where governing institution did not match indigenous culture).

be reflected in the tribe's governing institutions.²⁵⁴ Without this match, members will often see the government as illegitimate, resulting in its inability to garner the trust and loyalty of the polity.²⁵⁵ The requirement of cultural matching spans all areas of tribal governance. Studies indicate that governmental institutions, policies, and economic development projects²⁵⁶ are all vulnerable to failure if they are not a good cultural match.²⁵⁷ Failure among such institutions can be devastating to an Indian nation. If a government fails, it may be unable to, *inter alia*, maintain stability, produce economic gains, provide for basic social services, or safeguard members' human rights.²⁵⁸

One of the most devastating effects of colonialism on indigenous peoples—beyond the obvious historical atrocities of massacre, disease, and removal—has been the imposition of foreign governmental structures, property ownership systems, and religion.²⁵⁹ These encroachments and others like them were devastating to tribal communities largely because they were a poor cultural match. Oftentimes, they undermined existing Indian cultures, lifeways, and religions, breaking down tribal life in ways from which it was difficult, if not impossible, for tribes to recover.²⁶⁰

254. See Cornell & Kalt, *supra* note 94, at 16 ("The crucial issue is the degree of match or mismatch between formal governing institutions and contemporary indigenous ideals . . . about the appropriate form and organization of political power.").

255. See Cornell, Curtis & Jorgensen, *supra* note 82, at 7 (discussing loss of trust and allegiance in absence of cultural match between government and governed); Cornell & Kalt, *supra* note 94, at 16 (arguing that new forms of government still need to "resonate with deeply-held community beliefs").

256. See Cornell & Kalt, *supra* note 94, at 7 (noting that old, or "standard," view of tribal economic development incorporated philosophy that indigenous culture is obstacle to economic development, contrasting this with "new," "nation-building" approach that produces results based on belief that "[i]ndigenous culture may be not an obstacle but an asset").

257. See, e.g., Kalt, *Constitutional*, *supra* note 88, at 202 (discussing implications of poor cultural match between Oglala Sioux Tribe of Pine Ridge Reservation's IRA-style government and its indigenous political institutions, which culminated in "civil strife and violence"); Cornell & Kalt, *supra* note 94, at 10–11 (studying negative implications of poor cultural match in terms of tribal economic development).

258. See Brooks, *supra* note 40, at 1160–62 (describing characteristics of failed states).

259. See, e.g., Dawes Act of 1887, ch. 119, § 1, 24 Stat. 388, 388–89 (repealed 2000) (breaking of communal tribal lands into individual parcels that devastated tribal land base and Indian culture); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *Stan. L. Rev.* 773, 776–805 (1997) (discussing U.S. government's attempts to remove Indians from their land, destroy indigenous culture, and instill Christian and individual property philosophies).

260. Consider, for example, the comments of Wilma Mankiller, the former Principal Chief of the Cherokee Nation of Oklahoma, in reference to the Allotment Act, which broke up communal tribal lands and imposed individual ownership:

What happened to us at the turn of the century with the loss of land, when our land was divided out in individual allotments, had a profound irreversible effect on our people. . . . When we stopped viewing land ownership in common and viewing ourselves in relation to owning the land in common, it profoundly altered

Many governmental structures put in place pursuant to the IRA, for example, constituted a poor cultural match with existing tribal governance systems.²⁶¹ Joseph Thomas Flies-Away, a member of the Hualapai Tribe, describes how the IRA's centralized style of government, including a powerful tribal council, supplanted the tribe's existing complex band and extended family system of governance.²⁶² Flies-Away contends that "the imposed government design was not accordant to Hualapai culture and took the Hualapai away from its customary and traditional means of governance,"²⁶³ causing the tribe to struggle. As with the Hualapai, a poor cultural match between an external, Western-style government and internal indigenous political institutions has had devastating consequences for Indian nations.²⁶⁴ In some cases, this has facilitated the descent of tribes into chaos.²⁶⁵ Many of these governmental systems still remain, sixty years later, unchallenged by current tribal people.²⁶⁶ The lingering effects of colonialism suggest that, until they possess the resources and wherewithal to change, some tribes will continue to struggle with policies, programs, and even religions that are a poor cultural match.²⁶⁷

Many tribes, however, have begun to contemplate the difficult challenges associated with reforming governmental structures to achieve cultural match, as they struggle to advance their cultural and political survival by linking their traditional existence with their sovereignty. Rather than seeking to shield their "timeless" cultures from modernity—as outsiders often assume²⁶⁸—Indian nations strive to maintain their cultural

our sense of community and our social structure. And so that had a tremendous impact on our people and we can never go back.

The Native Americans: The Tribes of the Southeast: Persistent Cultures of Resilient People (Turner Productions, Inc. television broadcast 1994).

261. See Kalt, *Constitutional*, *supra* note 88, at 202 (discussing how IRA system of government sent Oglala Sioux Tribe of Pine Ridge Reservation "down the path of hardship").

262. Flies-Away, *supra* note 162, at 149.

263. *Id.*

264. Cornell & Kalt, *supra* note 94, at 16 (noting that governments organized under IRA followed pattern that was poor cultural match for many tribes).

265. See Lemont, *supra* note 203, at 287 (describing constitutional crises of Cherokee Nation in which two competing governments were formed and tribal council stopped conducting business for a year). Lemont additionally notes that "[t]his government instability has often been attributed to outdated, Western-introduced tribal constitutions—documents that to varying extents lack both legitimacy within tribal communities and the institutional foundations necessary for the effective exercise of government action." *Id.* at 287–88.

266. Champagne, *supra* note 92, at 12 ("In many other communities, colonial IRA constitutional governments or non-IRA constitutions have operated for more than sixty years and are often taken by many community members as the given government.").

267. See *id.* at 20–21.

268. See, e.g., Sunder, *Dissent*, *supra* note 29, at 559–60 (discussing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and implying that position of *Martinez* represented

difference while living in a modern world.²⁶⁹ As they have long done, tribal people in America often seek to live separate and apart from the dominant society and remain free to govern themselves.²⁷⁰ At the same time, indigenous peoples desire to participate in policies being shaped by national and global governing institutions that pertain to their continued cultural and political existence.²⁷¹ The tools of modernity—such as technology and the free market—are being cautiously employed as Indian nations negotiate their own unique place within the modern world.²⁷²

At times, however, the struggle to reconcile modernity with tradition plays out in various aspects of tribal culture, from the creation of tribal dispute resolution systems, to the election of leaders, to defining appropriate avenues for economic development. These concerns are aptly reflected in a statement by Rebecca A. Miles, who, at thirty-three, became the first woman to lead the Nez Perce Tribal Executive Committee in Idaho:

We've become less traditional, and I'm part of that, and that is a tough thing for me to say. . . . I'm a modern leader in a modern government, and that is good and bad. How does somebody like myself ensure that my leadership works to protect the traditions that are so sacred to us—and that may not have included a woman in this role?²⁷³

Miles's statement exemplifies the delicate cultural evolution that sometimes creates tension within tribal communities. A similar phenomenon can be seen at Sandia Pueblo, one of the more traditional tribes in the United States.²⁷⁴ There, thirty-three-year-old Lynn Trujillo left the pueblo to study at Dartmouth College, later returning to work as her tribe's attorney after receiving a law degree.²⁷⁵ Trujillo admits that she has clashed with her father over the role of women and the future of democracy within the pueblo.²⁷⁶ Despite these tensions, she firmly be-

voice of modernity and change, while tribe and Supreme Court held vision of Pueblo culture as unchanging, fixed, and "hermetically sealed").

269. See Coombe, *supra* note 117, at 128, 131 (describing efforts of indigenous people to "promote measures that would ensure local control over resources" while simultaneously using "bicultural education" to "revitalize local cultural differences").

270. See Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 14, 16 (1987) (asserting that core tenet of federal Indian law has always been to create "measured separatism" to allow tribes to live apart from dominant culture).

271. See Coombe, *supra* note 117, at 131 (describing participation of "networks of indigenous peoples" in developing "political strategies 'for the defense of territory, culture and identity linked to particular places'").

272. See *id.* at 133.

273. Davey, *supra* note 171.

274. See Riley, Abramoff, *supra* note 116 (describing how tribe has used revenues from casino for, among other things, programs to protect natural environment around tribe's sacred sites, land purchases to insulate small village community from dominant culture, and buffalo herd used for religious ceremonial purposes).

275. *Id.*

276. *Id.*

lieves that the pueblo will only survive if it is able to hang on to its tribal traditions.²⁷⁷ For Trujillo, this means the tribe will have to find its own “balance between communal rights and individual rights, between traditional ways of life and the development that’s going on.”²⁷⁸

Though indigenous peoples struggle to meld the traditional and the modern²⁷⁹—and, specifically, to incorporate new ways of thinking into tribal life in a way that is a cultural match—their many years of success in doing so has facilitated their continued existence.²⁸⁰ The ability of tribal cultures to survive is remarkable, particularly given the vast assimilative efforts they have confronted for hundreds of years.²⁸¹ Part of this success is due to indigenous peoples’ understanding of their place in a changing world, particularly in relation to other sovereigns. In this regard, tribes have entered into intersovereign relationships which, when they are an appropriate cultural match, can serve as effective means of actually furthering autonomy and self-determination.²⁸² As Judith Resnik has so aptly pointed out, in our globalized world all sovereigns are interdependent to increasing degrees, and, at times, compete to exercise authority “in the same space.”²⁸³ Despite a long-standing desire for “measured separatism” and the freedom to live without encroachment by the dominant society,²⁸⁴ tribal nations have long understood that, in some instances, the best way to serve their communities is to work interdependently with other sovereigns to achieve good Native governance. This willingness to engage as interdependent sovereigns may, in fact, reflect practices that

277. *Id.*

278. *Id.*

279. See Lemont, *supra* note 203, at 288 (noting that tribes “are engaged in a fundamental rethinking of how to balance entrenched Western institutions with often competing traditional, cultural, and political values”).

280. See Coombe, *supra* note 117, at 133 (citing Marshall Sahlins, *What Is Anthropological Enlightenment? Some Lessons of the Twentieth Century*, 28 *Ann. Rev. Anthropology* i, ix (1999)). For example, the Cochiti Pueblo have incorporated golf—a primary source of economic development—into their traditional lives. Selcraig, *supra* note 111. Tribal elders say that golf has “helped nurture a more traditional life by encouraging children to walk in nature for their four-hour rounds, to be honest with themselves and with others and to practice self-discipline.” *Id.* One leader states: “The Cochiti are a very traditional people. . . . Golf is kept in perspective here, the way it should be.” *Id.*

281. See David H. Getches, *A Philosophy of Permanence: The Indians’ Legacy for the West*, *J. West*, July 1990, at 54, 62–63 (“The remarkable part of the history of American tribes is not that they were victims of unrelenting attempts to change them. But it is truly astounding that they did manage to hold onto some land and that the core of their culture remains intact.”).

282. See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 *Conn. L. Rev.* 697, 725–26 (2006) (discussing how retrocession allowed one tribe to create tribal police force that, in conjunction with state authorities, resulted in decline in highway deaths and better understanding of benefits of concurrent jurisdiction).

283. Resnik, *Tribes*, *supra* note 23, at 134.

284. See Wilkinson, *supra* note 270, at 14–16.

are a good cultural match for some tribes. After all, many Indian nations formed confederacies and alliances in pre- and post-contact America to facilitate their survival and continued existence. Some confederacies—such as the Haudenosaunee, which is comprised of the Six Nations of the Iroquois Confederacy—are still allied today, and have become powerful interdependent sovereigns.²⁸⁵

Strategic alliances between tribes and other sovereigns can be seen in a range of areas, but perhaps most often in the area of criminal law. Because of the bizarre criminal jurisdictional scheme that has arisen due to Congress and the Supreme Court acting at odds with one another—and, far too often, against the interests of tribal sovereignty—criminal jurisdiction has long been a problem in Indian country.²⁸⁶ As a result, many tribes now have cross-deputization agreements with state law enforcement to facilitate cooperation in criminal matters.²⁸⁷ The resulting agreements can vary, but they typically authorize tribal police to arrest any violator of state law, whether Indian or non-Indian.²⁸⁸ These agreements can be of great benefit to tribal police who, without such agreements, would be impotent to arrest non-Indians for crimes committed on tribal lands.²⁸⁹ Though imperfect, cross-deputization agreements facilitate the pooling of resources between tribes and states, furthering the shared goal of law enforcement and the tribe's interest in greater self-governance.²⁹⁰

Interdependence among tribes and states is seen in a variety of other areas as well. Pursuant to the Indian Gaming Regulatory Act,²⁹¹ tribes and states are now engaged in intense negotiations regarding the scope and terms of gaming compacts that benefit both sovereigns.²⁹² Other intersovereign relationships are built around issues of environmental protection and natural resource management. For example, the Nez Perce have taken a lead role in a combined tribal, state, and federal governmen-

285. See Ray Halbritter with Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. Int'l L. & Pol. 531, 534–39 (1994) (describing Haudenosaunee people and history of confederacy).

286. See generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709 (2006) [hereinafter Washburn, *American Indians*] (describing challenges associated with criminal jurisdiction in Indian country and suggesting possible reforms).

287. See Goldberg & Champagne, *supra* note 282, at 727–28 (describing cross-deputization process).

288. *Id.*

289. *Id.* at 728. These agreements, however, suffer from the drawback that tribal police may only arrest non-Indians for violation of state, not tribal, law. *Id.*

290. *Id.* at 727–28.

291. 25 U.S.C. §§ 2701–2721 (2000).

292. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 Nev. L.J. 285, 286 (2004) (commenting on tribal dependence on state law for legality and profitability of Indian gaming).

tal effort to protect gray wolf populations in the Rocky Mountains.²⁹³ The Columbia River Inter-Tribal Fish Commission is comprised of many tribes working together to save the salmon of the Pacific Northwest.²⁹⁴ And the Great Lakes Indian Fish and Wildlife Commission, a tribally chartered intertribal organization, has teamed up with the U.S. Forest Service to protect treaty-guaranteed hunting, fishing, and gathering rights.²⁹⁵

These are just a few examples that highlight the importance of incorporating culturally matched facets of modern life into tribal communities to advance tribal governance objectives. In order for tribes to engage in good Native governance, it is essential to devise governmental programs and institutions that reflect each nation's particular history, values, and vision. As studies of tribal governments bear out, a solid cultural match between the tribe's governing institutions and its indigenous political culture is critical to the pursuit of good Native governance.²⁹⁶

III. EXAMINING GOOD NATIVE GOVERNANCE

Many Indian nations are already engaged in good Native governance. Tribes are selectively implementing external policies and laws while still holding onto tribal tradition in ways that facilitate the survival of indigenous culture. In Part II, I have given many examples of how the requisite elements of good Native governance are successfully manifested in the daily activities of Indian nations.²⁹⁷ In the discussion that follows, I will focus on a few examples of practices or traditions within Indian nations that would appear, from an outside perspective, to fall short of good governance. By focusing on these particular examples I seek to show that, in some cases, good governance and Native governance part ways. Nevertheless, I seek to demonstrate that Native governance—even when radically different from the growing global standard—can nevertheless be “good.”

293. Kalt & Singer, *supra* note 8, at 11 (citing Harvard Project on Am. Indian Econ. Dev., Idaho Gray Wolf Recovery Wildlife Program, at http://www.ksg.harvard.edu/hpaied/hn/hn_1999_wolf.htm (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*)).

294. *Id.* (citing Harvard Project on Am. Indian Econ. Dev., Columbia River Inter-Tribal Fish Commission, at http://www.ksg.harvard.edu/hpaied/hn/hn_2002_fish.htm (last visited Apr. 3, 2007) (on file with the *Columbia Law Review*)).

295. *Id.* at 27 (citing Harvard Project on Am. Indian Econ. Dev., Treaty Rights/National Forest Memorandum of Understanding, at http://www.ksg.harvard.edu/hpaied/hn/hn_2000_mou.htm (last visited Mar. 6, 2007) (on file with the *Columbia Law Review*)).

296. See Cornell & Kalt, *supra* note 94, at 16.

297. See *supra* Part II.

A. Traditional Indigenous Dispute Resolution Practices

As with many indigenous people, traditional Navajos believe that all things in the universe are interconnected.²⁹⁸ The divine and the secular are inseparable, and the activities, ceremonies, and rituals of day-to-day life are designed to secure balance in the universe.²⁹⁹ In the Navajo system, extended family networks play a critical role in achieving this sacred balance.³⁰⁰ The traditional Navajo world view, combined with their unique clan structure, supplies the contextual framework within which the Navajo Peacemaking system functions.³⁰¹

Potential litigants in the Navajo Nation have the option of avoiding litigation and the adversary system by taking their case to a Peacemaker Court.³⁰² The *naat'aani*, or peacemakers, are leaders who are selected by the community.³⁰³ Like all things within the traditional Navajo world, the peacemaking process is infused with ceremony, tradition, and religious significance.³⁰⁴ Proceedings are generally commenced with prayer, which is used to ready the *naat'aanii* and the participants for the reconciliation process.³⁰⁵ Navajo culture provides that all members of the community who are affected by the dispute may attend.³⁰⁶ During the proceedings, everyone has an opportunity to be heard.³⁰⁷ Chief Justice Yazzie of the Navajo Supreme Court explains the reason for a community focus that reaches beyond the victim and the perpetrator:

If, for example, someone hurts me, my family is involved in the dispute because I am hurt. If I hurt someone else and I am obliged to pay compensation to make up for the injury, my family is involved because they have a responsibility to help pay the

298. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *Cardozo Arts & Ent. L.J.* 175, 224 (2000).

299. *Id.*

300. See Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 *Wash. L. Rev.* 1003, 1013 (1997) [hereinafter Goldberg, *Overextended*] (describing "the sacred nature of balance or order within the traditional Navajo world-view").

301. See *id.* at 1014. In addition to Peacemaker Courts, the Navajo Nation also has an Anglo-style judicial system. The Navajo Nation court system in its totality hears approximately 100,000 cases a year, thus developing a robust Navajo common law. Getches, Wilkinson & Williams, *supra* note 80, at 421.

302. Robert Yazzie, "Life Comes from It": Navajo Justice Concepts, in *Navajo Nation Peacemaking: Living Traditional Justice* 42, 51–52 (Marianna O. Neilsen & James W. Zion eds., 2005) [hereinafter Yazzie, *Life Comes from It*]. Peacemaking can also be invoked at other periods in the adversary process. See Robert Yazzie, *Healing as Justice: The Navajo Response to Crime*, in *Justice as Healing: Indigenous Ways* 121, 130–31 (Wanda D. McCaslin ed., 2005) [hereinafter Yazzie, *Healing*].

303. Yazzie, *Life Comes from It*, *supra* note 302, at 51.

304. *Id.* at 50 ("Outside the Navajo perspective, a 'ceremony' is seen as a gathering of people to use ritual to promote human activity. To Navajos, a ceremony is a means of involving supernatural assistance in the larger community of reality.").

305. Goldberg, *Overextended*, *supra* note 300, at 1014.

306. Yazzie, *Healing*, *supra* note 302, at 124.

307. *Id.* at 125.

compensation. This is one of the ways the Navajo clan works as a legal system.³⁰⁸

The role of the peacemaker is to “talk out” the problem, but not to judge.³⁰⁹ Rather, after a period of prayer and after the participants have had a chance to speak, the peacemakers guide the participants to a resolution.³¹⁰

Even though the Navajo Nation also maintains a thriving “Anglo-style” court system, the parties or the judges may redirect cases to the Peacemaker Court.³¹¹ Thus, if the parties consent to go through the Peacemaking system, a criminal dispute is converted into a civil one.³¹² Oftentimes, criminal matters are never even referred to the police or law enforcement due to logistical and pragmatic constraints.³¹³ Peacemaking can be used to deal with almost any conflict arising within the tribe, including problems related to alcoholism and addiction, domestic violence, sex-related offenses, and other family disputes.³¹⁴

Peacemaking is effective for the Navajos because the principles upon which Peacemaking is constructed are a “match” with Navajo culture.³¹⁵ Not having been imposed from the outside, Peacemaking in the Navajo Nation is organic and built from traditional Navajo views about the world.³¹⁶ Though the Peacemaker Court was only officially established in 1982 in response to dissatisfaction with the Anglo model of “vertical justice,”³¹⁷ it is, in the words of Chief Justice Yazzie, “[A] modern legal institution that ties traditional community dispute resolution to a court It is a means of reconciling horizontal (or circle) justice to vertical justice by using traditional Navajo legal values”³¹⁸ Peacemaking serves the needs of relatively small, close-knit, clan-based communities like those that comprise the Navajo Nation, where citizens must have positive relationships with one another for there to be social harmony.³¹⁹ Accordingly, the Navajo Peacemaker Court—reflective of the Navajo’s belief sys-

308. *Id.* at 124.

309. *Id.*

310. *Id.* at 125–26.

311. See Yazzie, *Life Comes from It*, *supra* note 302, at 51.

312. Valencia-Weber, *Tribal Courts*, *supra* note 233, at 252.

313. Yazzie, *Healing*, *supra* note 302, at 131 (“There is [another] use of peacemaking The Navajo Nation is 25,000 square miles big. . . . [It does not] have enough police to patrol that large an area.”). Due to these constraints, Chief Justice Yazzie further states, “Rather than call the police, many people call a peacemaker.” *Id.*

314. *Id.* at 132.

315. The existence of “over 250 certified peacemakers in the Navajo Nation” and their “[handling] of hundreds of cases” attest to the effectiveness of the “peacemaker dispute resolution system.” See Getches, *Wilkinson & Williams*, *supra* note 80, at 428.

316. Yazzie, *Life Comes from It*, *supra* note 302, at 51.

317. *Id.*

318. *Id.*

319. *Id.* at 48 (explaining how Navajo clanship establishes justice system that promotes *k’è*, or “deep, learned emotional feelings,” which in turn “create[s] solidarity of the individual with his or her clan”).

tem—is structured around reconciliation and restorative justice, not conflict.³²⁰

Peacemaking constitutes good Native governance for the Navajo for both philosophical and pragmatic reasons. First, it has legitimacy within the community because it is based on the Navajo world view and is inextricably intertwined with the Navajo's beliefs about the universe.³²¹ Thus, Peacemaking arises from within the tribe's traditional systems and operates within Navajo culture as an authentic, unromanticized Navajo way of resolving disputes and keeping the community connected.

Peacemaking also embodies good Native governance because it responds to the pragmatic concerns raised by the jurisdictional nuances that exist within Indian country.³²² Because states lack jurisdiction over crimes committed by Indians against Indians on the reservation,³²³ the burden to prosecute these crimes largely falls on the federal government.³²⁴ But federal prosecutors may be too overburdened (or politically uninterested) to prosecute felonies like domestic violence and child abuse that are funneled into the federal criminal justice system.³²⁵ Moreover, given the extreme isolation of many Indian reservations, Indian victims and defendants must sometimes travel hundreds of miles to the nearest federal courthouse³²⁶ to be tried by a jury of "peers"—a jury that

320. Yazzie, *Healing*, *supra* note 302, at 127 ("Native justice is restorative justice. It restores people to good relationships with each other.").

321. See Goldberg, *Overextended*, *supra* note 300, at 1014–15 (explaining connection between traditional Navajo rituals and belief systems and modern peacemaking courts); Yazzie, *Life Comes from It*, *supra* note 302, at 42 ("Our religious leaders and elders say that human-made law is not true 'law.' . . . [W]hile Anglo-European law is concerned with social control by humans, Navajo law comes from creation. It concerns life and the means to live successfully."); see also Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 *Fordham L. Rev.* 2133, 2155 (2005) (explaining how Anglo law conflicts with traditional dispute mechanisms of Pueblo, which focus on concepts such as healing, kindness, mercy, and discipline that humble perpetrator).

322. Washburn, *American Indians*, *supra* note 286, at 715 (describing federal laws that comprise basis of criminal jurisdiction in Indian country as creating "a complex jurisdictional framework").

323. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (stating that "the laws of Georgia can have no force" within Indian territory due to tribal sovereignty).

324. The federal government has jurisdiction pursuant to the Major Crimes Act over enumerated "major" crimes, such as murder, manslaughter, kidnapping, and assault, committed by Indians against Indians within Indian country. 18 U.S.C. § 1153 (2000). Tribes have concurrent jurisdiction over such crimes, but pursuant to ICRA may only impose penalties of up to a \$5000 fine and one-year imprisonment. 25 U.S.C. § 1302(7) (2000). Accordingly, serious felonies will not be prosecuted to the fullest extent of the law unless the federal prosecutor takes action.

325. See Washburn, *American Indians*, *supra* note 286, at 733 ("Because of the non-reviewability of decisions to decline prosecution or to under-prosecute, the weak or nonexistent political accountability of federal prosecutors to tribal communities, and the lack of media interest in Indian country prosecutions, federal prosecutors feel little external pressure to treat Indian country cases seriously.").

326. *Id.* at 768.

will very likely be entirely non-Indian and will have little if any contact with the way of life on the reservation.³²⁷ This troubling reality has fueled the perception among some reservation Indians that the Anglo system is unjust to both the victim and the defendant.³²⁸ Thus, for many Indians, intratribal resolution of such disputes may be a far more desirable alternative.³²⁹

But the Peacemaker Court and similar bodies are unlikely to satisfy the standards of good governance for a variety of reasons. Liberal democratic theory—from which the notion of good governance is derived—requires a strict separation between the state and religion.³³⁰ Though theories of retributive justice in America, for example, may be deeply embedded in religious views, they must not reflect their religious roots when applied by the state's hand. The liberal state forbids entanglements between religion and law.³³¹ Thus, one potential problem with the Peacemaking Court from a good governance perspective is evident. Peacemaking works for the Navajo precisely because it is an infusion of the religious or sacred with day-to-day life.³³² There is no separation.³³³ Peacemaking is inherently “religious” in that it draws on ceremony, prayer, ritual, and the supernatural to restore balance, harmony, and peace to the world. Thus, Peacemaking violates one of liberalism's most sacred tenets: Religion and the state shall not mix.³³⁴

327. *Id.* at 762.

328. See *id.* at 710–15 (describing difficulties faced by defendants, witnesses, and attorneys involved in Indian country cases, and concluding that “federal justice in Indian country simply may not accord with many of the basic legal principles that guide American courts, prosecutors, and law enforcement officials”).

329. See *supra* notes 311–314 and accompanying text.

330. See Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 *Cardozo L. Rev.* 1243, 1244 (2000) (“In many circles today, religion is seen as an essentially illiberal phenomenon in our public life—a challenge to the rational and tolerant ethos of modern liberalism.”).

331. See Goldberg, *Overextended*, *supra* note 300, at 1016 (“U.S. legal and political culture formally and practically disavows any penetration of religion into law.” (citing Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993))).

332. This is one reason why the “borrowing” of indigenous justice techniques by nonindigenous communities has been criticized. See *id.* (noting that there is “no ready equivalent” to Peacemaking in non-Indian society).

333. See *id.* at 1015 (“[T]raditional tribal law and tribal sacred life are thoroughly intertwined.”).

334. See Yazzie, *Life Comes from It*, *supra* note 302, at 42 (“Our religious leaders and elders say that human-made law is not ‘law.’ Law comes from the Holy People who gave the Navajo people the ceremonies, songs, prayers, and teachings to know it.”). The conflict between liberalism and theocratic government has particular resonance in contemporary times. For example, this debate played out in the relatively recent drafting and adoption of the Iraqi constitution, particularly as the United States simultaneously tried to promote the dual goals of democracy and secularism. But, as scholars who consulted on the drafting of the Iraqi constitution have noted, the more freedom Iraqis had to design their constitution, the more theocratic it became, such that “more democracy meant more Islam.” Noah Feldman & Roman Martínez, *Constitutional Politics*

Peacemaking may violate other principles of good governance as well. First, it is not clear that Peacemaking is sufficiently transparent.³³⁵ As one scholar contends, "Seeing the decisionmaker in action and observing who has influenced the process is essential to a sense of decisionmaking fairness, rationality, and neutrality, as well as to public understanding of the policy results."³³⁶ Part of this aspect of transparency is the availability of written decisions to "provide[] a check against the inappropriate and unaccountable exercise of authority."³³⁷ While Peacemaking may be sufficiently transparent for the Navajo, its transparency may be less evident from an outsider's perspective. In one sense, Peacemaking is an embodiment of the ultimate act of community. It is more inclusive and open to affected parties than, for example, the American system. On the other hand, without court reporters, sworn testimony, or rules of evidence,³³⁸ Peacemaking may be called into question for a lack of openness or insufficient due process.³³⁹ Moreover, when cases are funneled into Peacemaking, criminal acts are dealt with as civil matters.³⁴⁰ This, too, may be objectionable due to reduced federal oversight of civil cases coming from tribal court, as well as the perception that Peacemaking constitutes the "privatization" of criminal matters.³⁴¹ The privatization of criminal law has long been disfavored as out of alignment with the values and mores of the liberal democratic commitment.³⁴²

Some of these criticisms turn on the definitional scope of the attributes encompassed within good governance. Because good governance is still relatively amorphous and its terms may take on different meanings in various contexts, it is difficult to ascertain with precision whether Peacemaking—and other such indigenous justice systems—would be found to run afoul of good governance.³⁴³ Nevertheless, the freedom of Indian tribes to deal internally with criminal matters free from interfer-

and Text in the New Iraq: An Experiment in Islamic Democracy, 75 *Fordham L. Rev.* 883, 884 (2006).

335. Cf. Esty, *supra* note 56, at 1530 ("Transparency is a core good governance attribute . . .").

336. *Id.*

337. *Id.* at 1529.

338. See Yazzie, *Healing*, *supra* note 302, at 125 ("Navajo peacemaking has a place for people to express how they feel without rules of evidence to quiet them.").

339. See Esty, *supra* note 56, at 1530 ("[O]penness and some opportunity for public participation have . . . emerged as nearly universal principles of good governance.").

340. See *supra* note 312 and accompanying text.

341. See *supra* notes 327–330 and accompanying text.

342. Curiously, the Anglo system is now borrowing from indigenous justice systems in the formation of nonadversarial style dispute resolution processes. See generally Goldberg, *Overextended*, *supra* note 300, at 1017–19 (warning of difficulties of uninformed importation of indigenous justice systems into non-Indian legal culture).

343. As Carole Goldberg pointed out to me, many of the perceived infirmities surrounding Peacemaking may be cured simply by the fact that it requires the consent of both parties. E-mail from Carole Goldberg, Professor of Law, UCLA, to author (Mar. 28, 2007) (on file with the *Columbia Law Review*).

ence by the dominant society was curbed long ago. Both the Major Crimes Act of 1883³⁴⁴ and ICRA³⁴⁵ were inspired by deep suspicion of Indian justice on the part of the dominant society.³⁴⁶ Both pieces of legislation extended greater federal control over criminal justice matters within Indian country.³⁴⁷ As good governance standards continue to flourish, and as the West becomes increasingly skeptical of governments that expressly concede connections between religion and law,³⁴⁸ it is not far-flung to suggest that the Peacemaker Courts, as one example, could come under intense scrutiny by outsiders.

B. *Undemocratic Forms of Governance*

In the international context, democracy is almost always included as an essential corollary to or component of good governance.³⁴⁹ Accordingly, as efforts to spread good governance around the world have increased, democracy promotion has become a significant international and U.S. policy objective.³⁵⁰ This remains true even though the exportation of democracy has certainly had its problems, including, *inter alia*, the emergence of illiberal democracies abroad.³⁵¹

344. 18 U.S.C. § 1153 (2000).

345. 25 U.S.C. §§ 1301–1303 (2000).

346. See Riley, *Illiberalism*, *supra* note 1 (manuscript at 4–5) (noting that IRCA enactment was tied to belief that tribal governments were corrupt and unfair); see also *supra* note 26 (describing Major Crimes Act's enactment as response to criticisms of tribal justice).

347. See Riley, *Illiberalism*, *supra* note 1 (manuscript at 52–55).

348. See Feldman, *Imposed*, *supra* note 14, at 861–65 (discussing how constitutional reformers in Iraq wanted to keep Islam out of constitution, though this was inconsistent with views of some Iraqi people).

349. See, e.g., Poluha & Rosendahl, *supra* note 13, at 2 (contending that international discourse has defined “good governance” as requiring free and fair elections); Botchway, *supra* note 12, at 189 (arguing that democracy is essential component of legitimate government); Esty, *supra* note 56, at 1507 (“Democracy is seen in the modern day as fundamental to legitimate governance.”). It should not be forgotten, however, that democracy itself is a nuanced and complicated term. After all, the modern liberal democracy—such as that in America—was designed so that the people would have a limited role in electing officials and effecting policy changes. Marc F. Plattner, *Response, Liberalism and Democracy: Can't Have One Without the Other*, *Foreign Aff.*, Mar.-Apr. 1998, at 171, 172, 174.

350. See Koh, *Exceptionalism*, *supra* note 61, at 1498–99 (arguing dissemination of democracy has become central to American foreign policy, including its role as justification for war); Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 *Stan. J. Int'l L.* 347, 369 (2004) (“The values shaping and inspiring the contemporary commitments of the international community include ending ethnic violence, stopping human rights atrocities, promoting democracy, and encouraging the rule of law.”).

351. See, e.g., Chesterman, *supra* note 200, at 949 (arguing, in regards to Bosnia, that “flawed democracy may sometimes be worse than no democracy at all”). See generally Zakaria, *supra* note 18, at 101–02, 105 (arguing that democracy may actually entrench power of illiberal states).

The election of Hamas to power in Palestine serves as one cautionary tale.³⁵²

Good Native governance challenges the assumption that democracy is required for good governance. As Carole Goldberg asserts, "At the root of the argument that protecting individual rights in Indian country promotes respect and growth for tribes is a normative claim about the superiority of the Anglo-American system of democratic majority rule and individual rights over tribal governing systems."³⁵³ In reality, there are tribes with functioning governments and stable economies that do not maintain democracies. Both anecdotal and empirical evidence suggests that good Native governance can and does exist in the absence of democracy. One recent study of Indian nations revealed that tribes' success depended much more on the quality of the leadership than the type of governmental system the tribe had in place.³⁵⁴ In other words, "[t]hose societies that govern well do better—economically, socially and politically—than those that don't."³⁵⁵

A number of tribes in the United States do not select their leaders through direct democracy, but nevertheless maintain functioning, capable governments. In some cases, these tribes operate based on clan systems or employ complex (and sometimes secretive) methods for the selection of leaders that are rooted in hundreds of years of tribal culture and religion.³⁵⁶ The Sandia Pueblo, for example, has retained its traditional structure for choosing its leaders.³⁵⁷ As a theocratic nation, religion is prominent in all facets of Pueblo life, with no separation between the private (religious) and public (secular) spheres.³⁵⁸ Both the procedure and substance of leadership selection is rooted in the tribe's tradition as a religious and patriarchal society. To date, religious leaders still sequester themselves from the rest of the tribe and, through a period of

352. See Noah Feldman, *Ballots and Bullets*, N.Y. Times, July 30, 2006, § 6 (Magazine), at 9 (arguing United States's Iraq War and democracy promotion policy "encouraged elections in Lebanon and Palestine, opening the door to entities like Hezbollah and Hamas"). As Jed Rubenfeld argues in regard to democracy promotion in the Islamic world, promoters of democracy must "be prepared to respect its outcomes," including the "right of Islamic societies to diverge from us on matters of sex equality, the proper relationship between church and state, and so on." Rubenfeld, *Unilateralism*, *supra* note 62, at 2016. Rubenfeld further notes, "There is such a thing as illiberal democracy." *Id.* Promoting democracy means it is possible more illiberal democracies will be created.

353. Goldberg, *Revitalization*, *supra* note 75, at 921–22.

354. See Cornell, Curtis & Jorgensen, *supra* note 82, at 6.

355. *Id.* ("To govern well is to increase the society's chances of effectively meeting the needs of its people."). Of course, whether any particular country is ever governing "well" can be debated, and the quality of governance is more appropriately viewed as situated on a spectrum, rather than as an all or nothing proposition.

356. See, e.g., Valencia-Weber, *Racial Equality*, *supra* note 128, at 368–69 (discussing example of Onondaga governance through clan system).

357. Riley, Abramoff, *supra* note 116.

358. *Id.*

prayer, discussion, and debate, emerge with the names of the men who will lead the tribe.³⁵⁹ Tribal members often decline to inquire into the details of the process.³⁶⁰ Despite maintaining an extremely private, traditional, and undemocratic governing structure, the Sandia Pueblo are culturally cohesive, well functioning, and economically stable. They have managed to successfully incorporate modern tools to effectuate their continued cultural survival.³⁶¹

The various nations of the Haudenosaunee, which is comprised of the Six Nations of the Iroquois Confederacy, similarly employ undemocratic practices.³⁶² Eight clans span these nations, and all are “organized culturally, socially and politically” by the matrilineal system.³⁶³ Under this system, children—regardless of their gender—become members of their mother’s clan upon birth.³⁶⁴ Thus, historically “the transmission of all titles, rights, and property descended through the female clan line to the exclusion of the male” under Iroquois law.³⁶⁵ All facets of Iroquois life, including the selection of leaders, are structured around the clan system. Pursuant to traditional tribal law, each of the clans selects a Clan Mother with authority to appoint a male Chief after receiving input from the other women in the clan.³⁶⁶ The Clan Mothers are empowered to direct certain actions of the Chiefs, and if they determine that a Chief has failed to fulfill his duties, they can remove him.³⁶⁷ Because the clan system is critical to the appointment of leaders, women wield great power within the community.³⁶⁸ Adherence to the clan system is strict: The leader of the Oneida Nation, for example, concedes that his own children are not Oneida because they have Onondaga citizenship via their mother’s clan.³⁶⁹

The Onondaga, one of the Haudenosaunee nations, provide a good example of how this matrilineal clan system shapes governance. Clan Mothers decide which men will become Faith Keepers and govern the

359. *Id.*

360. *Cf. id.* (quoting former tribal governor who, “[o]ut of respect [for his] culture,” did not inquire into why religious leaders replaced him).

361. For example, the Sandia Pueblo have used their significant gaming revenues to aid in the reclamation of their traditional lands and to advance traditional culture. *Id.*

362. Originally there were only five nations in the Confederacy: the Onondaga, Oneida, Seneca, Cayuga, and Mohawks. Williams, *supra* note 179, at 1038. The Tuscarora joined in 1724, making it the sixth. Michael Cousins, *Aboriginal Justice: A Haudenosaunee Approach*, in *Justice as Healing: Indigenous Ways*, *supra* note 302, at 141, 156 n.4.

363. Williams, *supra* note 179, at 1038–39.

364. *Id.*

365. *Id.*

366. *Id.* at 1040.

367. *Id.*

368. See *id.* (“The Iroquois constitutional system of gendered checks and balances sought to insure, at least in theory, that women’s voices could always be heard and respected on all issues of tribal policy.”).

369. Halbritter & McSloy, *supra* note 285, at 554 n.79.

nation via their positions on the council.³⁷⁰ The Clan Mothers also hold the power to remove the Faith Keepers if they do not act for the benefit of the tribe.³⁷¹ Western-style democracy is not seen in the nation, because “[n]o one votes for the Clan Mothers nor for the Faith Keepers who serve on the governing council that enacts the laws.”³⁷²

Whether indigenous systems of selecting leaders run afoul of good governance depends on the particular definition of democracy one adopts. Though democracy promotion has become a core function of the developed West’s international policies, liberal theory has long accepted limits on the people’s power to directly elect their leaders.³⁷³ Such limits still appear to fall within the realm of good governance.³⁷⁴ Thus, selection processes seen within the Haudenosaunee, for example, that are based on consensus and require tribal participation and accountability on the part of those in power,³⁷⁵ may still meet the standard. Because the Clan Mothers are always accountable to their respective clans, even in picking the Chief, the people have a voice, if indirect, in the selection and removal of their leadership. Other tribes’ processes—like those of the traditional New Mexico Pueblo, who vest the power to select leaders in only a small number of religious figures³⁷⁶—might be more problematic from an outsider’s view of democratic governance. Nevertheless, as scholars of tribal governance have pointed out, where these systems are embedded in the political structure and culture of the tribe, the “authority exercised under procedures and standards . . . are every bit as compelling and recognized by the people as the dominant society’s pieces of paper on display at the National Archives.”³⁷⁷

The forms of government discussed here work for these particular tribes because they are both consistent with foundational governing principles and are a cultural match. Even absent the elements demanded by liberal democracy, these nations—and, undoubtedly, others like them—are governing “well.” That is, they appear to be sufficiently “meeting the needs of [their] people,” one of the aspects of good governance,³⁷⁸ by combining tribal traditions and the tools of modernity to facilitate their self-governance and continued existence. But because they do not employ direct democratic methods identical to those promoted by the devel-

370. See Valencia-Weber, *Racial Equality*, *supra* note 128, at 368–70.

371. *Id.*

372. *Id.*

373. See Plattner, *supra* note 349, at 172, 174.

374. See *id.*

375. Depending on exactly how power is distributed within the clans in selecting the Clan Mothers, it is not clear that the traditional Haudenosaunee government falls short of the definition of a “representative democracy.”

376. See Kalt, *Constitutional*, *supra* note 88, at 195 (noting that Pueblo government officials are appointed by “senior theocrat”).

377. *Id.* at 188.

378. Cornell, Curtis & Jorgensen, *supra* note 82, at 6.

oped West, such systems of governance may, indeed, fall short of good governance standards.

C. *Banishment*

Given that this Article addresses banishment as an area where tribal nations could enhance good Native governance,³⁷⁹ it may seem counter-intuitive that I also include it here as an example of how tribes are governing well. But, if combined with the other previously discussed requisite elements—namely, freedom of dissent, foundational principles, independent bodies for the resolution of disputes, and cultural matching—banishment may, in fact, exemplify good Native governance.

Banishment was traditionally imposed as a legitimate form of punishment in indigenous communities.³⁸⁰ As communal societies, tribes had to function together to survive. Those who threatened the existence of the group and refused to live in harmony with others could be exiled.³⁸¹ In contrast to the U.S. system, for example, which authorizes the execution of murderers, many tribal communities opted, instead, for banishment as a punishment for taking another's life.³⁸² Today, there has been a resurgence in banishment as a way of dealing with wrongdoers in tribal communities.³⁸³ In some cases, banishment is employed in its traditional sense, as a means of healing and conciliation; in others, it is a reaction to the modern realities of tribal jurisdiction and reservation life.

In a handful of recent cases, tribal communities have employed banishment as it was traditionally used—to serve in the healing process and to assist in reconnecting the perpetrator spiritually to the tribe.³⁸⁴ In such cases, banishment is usually temporary and designed to facilitate the

379. See *infra* Part IV.B.

380. See Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. Rev. 253, 255 (2004) ("Banishment perhaps is most deeply rooted in certain tribal cultures in the Americas, which have used the punishment for centuries."). I was reminded of the banishment issue by Joseph H. Martin, a former Chief Judge of the Saginaw Chippewa Tribal Court, who contends that banishment was always used among his people as a method of dealing with wrongdoers and those who refused to live peacefully with other members. Joseph H. Martin, Question & Answer Session at the Michigan State Univ. Coll. of Law Conference: Indigenous Justice Systems (Mar. 17–18, 2006).

381. See Cousins, *supra* note 362, at 154 (noting that, under the Great Law of Peace of the Haudenosaunee, banishment may be imposed on those who "engage in antisocial acts or hurtful behavior").

382. See, e.g., K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* 167 (1941) (discussing Cheyenne Law of Killing, which authorized banishment as appropriate punishment for murderers); Cousins, *supra* note 362, at 153 (noting that, pursuant to Great Law of Peace, "execution is a defined sanction within Haudenosaunee society" but "it has seldom been used").

383. See, e.g., Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. Times, Jan. 18, 2004, at 1; Renee Ruble, *Banishment Laws Revived Among Indians*, Wash. Post, Jan. 25, 2004, at A9.

384. See Miller, *supra* note 380, at 255–61 (discussing "rehabilitative, restorative, and re-integrative goals" of banishment).

perpetrator's self-examination and eventual return to the community.³⁸⁵ In a recent case, two Tlingit teenage boys were banished from their tribal community for armed robbery and assault with a deadly weapon of a pizza delivery man.³⁸⁶ They were sentenced to a period of exile on separate remote islands for one year, where they were expected to survive on their own.³⁸⁷ A Tlingit elder stated that the banishment was designed to make the boys "reflect on their crime, purify their spirits, and make restitution to the victim."³⁸⁸ Used in this manner, banishment is employed as a method of healing, where the tribal member can sit in isolation and contemplate the consequences of his crimes before returning to the tribal community.³⁸⁹ As one author writes of banishment: "When people have to survive alone or are forced to live with other communities in shame, they can go through intense personal reflection that often leads to spiritual awakening."³⁹⁰

The resurgence of banishment in indigenous communities is also attributable to the practical limitations that tribes face in controlling (often drug-related) crime on isolated, sometimes poverty-stricken reservations. Federal laws and Supreme Court decisions greatly limit tribes' ability to police reservations,³⁹¹ and under ICRA tribes may only impose criminal punishments on Indians of up to \$5000 in fines and one year of imprisonment.³⁹² Although the federal government has jurisdiction to try major crimes, such crimes regularly escape the attention of federal prosecutors, who are often located hundreds of miles away from the reservation.³⁹³ And tribes have no criminal jurisdiction over the crimes of non-Indians,

385. See Cousins, *supra* note 362, at 154 (explaining that banishment "rarely occurs for life" and serves to facilitate offender's "return to a spiritual state where he or she can be socially inter-connected").

386. Miller, *supra* note 380, at 257 & n.19.

387. *Id.* at 259.

388. *Id.* at 257 (internal brackets omitted).

389. See, e.g., John Balzar, *Two Alaska Indian Youths Banished to Islands for Robbery*, L.A. Times, July 15, 1994, at A3 (discussing case of two Tlingit boys who were banished to remote island for crime of assault and robbery). See generally Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in Indian Tribal Courts* (Part II of II), 46 Am. J. Comp. L. 509, 554-55 (1998) (discussing various banishment cases).

390. Cousins, *supra* note 362, at 154.

391. See Assimilative Crimes Act, 18 U.S.C. § 13 (2000) (permitting federal prosecution of state law crimes); Indian Country Crimes Act, 18 U.S.C. § 1152 (extending federal jurisdiction to "Indian country"); Major Crimes Act, 18 U.S.C. § 1153 (mandating federal jurisdiction over enumerated crimes); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (ruling that tribal courts do not have criminal jurisdiction over non-Indians unless specifically authorized by Congress).

392. 25 U.S.C. § 1302(7) (2000).

393. See Washburn, *American Indians*, *supra* note 286, at 710-15, 733 ("[T]he sheer distance between United States Attorney's Offices and many of the federal Indian reservations they serve present tremendous obstacles . . . Perhaps as a result, United States Attorneys have been widely criticized for decades for failing to give proper attention to Indian country cases.").

even when such crimes occur on the reservation.³⁹⁴ So when federal prosecutors fail to respond to repeated requests to remove a non-Indian drug dealer from a reservation, for example, some tribal communities use their authority to ban the drug dealer from the reservation for a period of time.³⁹⁵ Many tribes have taken such actions, including the Turtle Mountain Band of Chippewa, which recently enacted an "Exclusion Code" for this purpose.³⁹⁶ Because tribes lack criminal jurisdiction over non-Indians, they are increasingly employing banishment to protect members from non-Indian criminals who hide out on Indian reservations, all too aware of the jurisdictional nuances that keep law enforcement officials clambering.

Due particularly to the massive increase in drug-related crimes on reservations, some tribes are using banishment to police the actions of members as well.³⁹⁷ Unlike non-Indians, Indians are processed through the tribe's criminal justice system prior to banishment. Sometimes such banishments are temporary, but tribes have demonstrated a willingness to permanently exile those who repeatedly put the community at risk by engaging in criminal drug-related activity.³⁹⁸

When banishment is properly employed in either of these categories of cases, it comports with the requirements of good Native governance. Applied contextually as a traditional remedy for healing and restitution, banishment is an effective restorative justice technique because it can potentially return harmony to Native communities. Where banishment is implemented as a pragmatic tool to police reservations, it provides Indian tribes with a mechanism to keep tribal members safe from the ills of criminal behavior that too often go unaddressed by the criminal justice system.

394. *Oliphant*, 435 U.S. at 212.

395. See Ruble, *supra* note 383; cf. Kershaw & Davey, *supra* note 383.

396. Susanne Nadeau, Non-Indian Ousted from Reservation, *Grand Forks Herald* (N.D.), May 19, 2006, available at <http://www.topix.net/content/kri/2595087491124577698640681928150982520803> (on file with the *Columbia Law Review*).

397. See, e.g., The Problem of Methamphetamine in Indian Country: Hearing Before the S. Comm. on Indian Affairs, 109th Cong. 20 (2006) (statement of Jefferson Keel, First Vice President, National Congress of American Indians, and Lieutenant Governor of the Chickasaw Nation) (discussing efforts of Lummi to ban drug dealers, both Indian and non-Indian, from reservation). This approach is controversial, however, as some tribal members argue that the banishment process is too easily subverted by corrupt officials. See, e.g., Cheley Hokanson-Gonzales, Letter to the Editor, Tribal Banishment Proposal Creates Possibility of Corruption, *Lahontan Valley News & Fallon Eagle Standard* (Nev.), Dec. 15, 2006, available at <http://www.lahontanvalleynews.com/article/20061215/opinion/112150033/0/archives> (on file with the *Columbia Law Review*) (contending that "abuse of this kind of ultimate power is very dangerous" and arguing that tribes should instead expand drug treatment programs).

398. See Nadeau, *supra* note 396.

Although banishment is still used in some circumstances within the United States,³⁹⁹ it is widely considered to fall outside the parameters of good governance. From a U.S. perspective, banishment—particularly of the type suffered by the Tlingit boys⁴⁰⁰—is likely to run afoul of the Eighth Amendment's ban on cruel and unusual punishment.⁴⁰¹ When the Supreme Court considered the question of whether a military deserter could suffer loss of citizenship for his crime, the Court argued that banishment is "a fate universally decried by civilized people," while maintaining that the punishment of death is "widely accepted" and does not "violate the constitutional concept of cruelty."⁴⁰²

This does not mean that banishment would necessarily violate global good governance standards or that such a violation would necessarily mean a failure of Native governance. After all, the United States uses its own—at times draconian—policies of immigration, deportation, and naturalization to determine its membership.⁴⁰³ Such practices certainly parallel banishment: They can be temporary at times, but may also be ac-

399. Banishment is still used as a form of punishment within the United States. Doron Teichmann, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdiction Competition*, 103 Mich. L. Rev. 1831, 1851 (2005) (discussing "158-county banishment" rule in 159-county Georgia, whereby certain criminals are given option of being banished to remote county or leaving state altogether, and recently enacted Cicero, Illinois ordinance allowing for banishment of gang members from city).

400. See *supra* text accompanying notes 386–389.

401. See Clare E. Lyon, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 Ave Maria L. Rev. 211, 232 (2006) (noting that although Eighth Amendment might prohibit banishment generally, tribal sovereignty makes amendment less relevant to tribal practices).

402. *Trop v. Dulles*, 356 U.S. 86, 99, 102 (1958). The Court noted that exile of the soldier in this case would essentially make him "stateless." *Id.* at 102. This situation contrasts with exile or disenrollment of an Indian within the United States who would presumably maintain his or her American citizenship despite the loss of tribal enrollment.

403. According to Kevin R. Johnson, "U.S. immigration laws . . . have barred racial minorities, political dissidents, the poor, actual and alleged criminals, and homosexuals from our shores and—often pursuant to procedures that are difficult . . . to square with the notion of due process of law—have caused them to be deported from the country." Kevin R. Johnson, *The "Huddled Masses" Myth: Immigration and Civil Rights* 2 (2004). For examples of such conduct, see, e.g., Nina Bernstein, *Immigrants Go from Farms to Jails, and a Climate of Fear Settles in*, N.Y. Times, Dec. 24, 2006, at A21 ("Some longtime [farmworkers] with American children were deported too quickly for goodbyes, or remain out of reach in the federal detention center in Batavia, N.Y., where immigrants are tracked by alien registration number, not by name."); Julia Preston, *Immigrants' Families Figuring Out What to Do After Federal Raids*, N.Y. Times, Dec. 16, 2006, at A13 (describing raids by Immigration and Customs Enforcement agents of meat-packing plants, resulting in detention of both illegal immigrants and residents not carrying papers with them, and tough decisions they faced as to whether to leave citizen family members in United States alone or bring them back to home country); see also Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1890, 1890–91 (2000) ("We live in a time of unusual vigor, efficiency, and strictness in the deportation of long-term permanent resident aliens convicted of crimes. . . . Deportation is now often a virtually automatic consequence of criminal conviction.").

accompanied by permanent disenrollment and exile.⁴⁰⁴ Despite the use of banishment-style practices by the dominant society, though, banishment may make tribes vulnerable to encroachment. The fact remains that inferences in both law and culture persist about the types of governments that apply the penalty of banishment, which mirror many outsiders' deeply embedded beliefs about Indians—that they are primitive, uncivilized, and intolerable.

I contend, nevertheless, that banishment satisfies good Native governance standards so long as it is employed in the presence of the other requisite factors. But, as argued more fully below, there have been legitimate concerns raised with regard to banishment that go to its implementation and application. If banishment is not applied fairly and in a nonpolitical way, forbidden by or inconsistent with the foundational governing principles of the tribe, or implemented absent a cultural match, it lacks legitimacy. Perhaps most importantly, banishment cannot be used in response to the exercise of voice. If banishment is imposed contrary to these principles, it may run afoul of good Native governance and be undermined as a legitimate form of punishment.

Having focused in Part III on Native governmental institutions and practices that likely fail under a global good governance standard, but nonetheless comport with good Native governance, I will now examine tribal governance practices that both deviate from the global standard of good governance and possibly run afoul of good Native governance as well.

IV. ENHANCING GOOD NATIVE GOVERNANCE

Many perceived shortcomings of tribal governments can be directly traced to a failure of the federal government to live up to its obligations to Indian nations. There is a vast body of literature detailing this volatile relationship, including genocide through starvation, disease, and massacres; treaty abrogation; mismanagement of Indian monies; and breaches of the trust responsibility.⁴⁰⁵ Though many Americans conceive of these as historical wrongs—and some are—the U.S. government continues, in a variety of ways, to undermine or altogether sabotage the survival of indigenous nations in America.⁴⁰⁶

While I fully acknowledge this reality and understand the climate within which many tribal nations emerged from the colonial period, I nevertheless posit that Indian tribes in a contemporary world are in a position to more fully consider their obligations to their citizens. With

404. See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”).

405. Much of this history is recounted in Matthew L.M. Fletcher, *Sawnawgezowog: “The Indian Problem” and the Lost Art of Survival*, 28 *Am. Indian L. Rev.* 35 (2003).

406. Supreme Court jurisprudence of the last two decades, for example, has been extremely detrimental to tribal sovereignty. See Frickey, *Exceptionalism*, *supra* note 77, at 452–61.

this in mind, this section focuses on two specific areas where Native governance could be enhanced within tribal communities. First, where they are absent, tribes should provide meaningful forums for the adjudication of civil rights claims by both members and nonmembers, which includes at least partial waivers of sovereign immunity for the purpose of such claims. Second, tribes should ensure that banishment or disenrollment is carried out only when accompanied by the other requisite good Native governance factors.

A. Waivers of Sovereign Immunity in Tribal Courts for ICRA Claims

In the United States, the federal, state, and tribal governments all enjoy sovereign immunity—the right to be free from lawsuits for damages filed against it without its consent.⁴⁰⁷ The primary purpose of the doctrine is to ensure that the sovereign is not subjected to lawsuits for its actions unless it waives its immunity.⁴⁰⁸ Various rationales have been offered to explain the sovereign immunity doctrine, including the related theories that the “King can do no wrong”⁴⁰⁹ and that the sovereign cannot be subject to the rights it has established.⁴¹⁰ A robust vision of sovereign immunity is also thought to address separation of powers concerns,⁴¹¹ in that it assists in “maintain[ing] a proper balance among the branches of the federal government.”⁴¹² Finally, it has also been noted that the doctrine is useful to limit costly lawsuits that “would interfere with the government’s ability to carry out its official duties and enforce-

407. Sovereign immunity is an English common law doctrine that dates back to the thirteenth century, and is the foundation of the idea that the King could not be sued without his consent. Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 5, 7 (1972). State sovereign immunity is rooted in the Eleventh Amendment: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Tribal sovereign immunity is rooted in federal common law. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” (citations omitted)). Suits by state governments and private actors are prohibited absent tribal waiver or congressional consent. See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” (citations omitted)).

408. In the case of Indian tribes, however, Congress has the authority via its plenary power to waive the sovereign immunity of Indian tribes without their consent. See *Santa Clara Pueblo*, 436 U.S. at 58 (noting that sovereign immunity, “like all other[] [aspects of tribal sovereignty], is subject to the superior and plenary control of Congress”).

409. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1530 (1992).

410. Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 Denv. U. L. Rev. 359, 371 (1993).

411. *Id.*

412. Krent, *supra* note 409, at 1530.

ment of judgments that would cause economic losses that could impair or destroy government functions.”⁴¹³

Sovereign immunity is widely employed by all sovereigns within the United States, but it has particular import for tribal governments. Historically, tribes have struggled with financial solvency and have long existed on tiny budgets, operating on poverty-stricken reservations. As such, Indian nations have relied heavily on the sovereign immunity defense to protect tribal communities.⁴¹⁴ Despite the impression that tribes are now wealthy, the reality is that the vast majority of tribes are struggling. American Indians are still among the poorest people in the country.⁴¹⁵ Thus, tribal governments must always be mindful of the need to govern so as to keep tribes intact. From the tribe’s perspective, this may require the assertion of sovereign immunity to foreclose the funneling of resources out of tribal coffers, and instead direct scarce resources to areas where they may best serve the needs of the tribal community. For example, an Indian tribe that takes the economic viability of the government into account when determining the balance between an individual’s civil rights claim and the tribe’s liability may decide that the cost to tribal government would be devastating if it paid out to individual tribal members the amount of money sought, even if warranted. This view is reflected in one tribal judge’s view of the defense:

[C]ritically important community interests are being protected by this immunity: Suits against the tribe seeking damages attack the community treasury. This money belongs to all the people of the Sauk-Suiattle nation. It must be guarded against the attacks of individuals so that it can be used for the good of all in the tribal community. Secondly, any suit against the tribe forces the tribe to expend community monies in legal fees. The possible amounts that can be expended on this effort would be great if suits of this nature are not limited. Finally, the entire community stands to suffer irreparable harm if their leaders, foreseeing possible liabilities at every action, are unable to fulfill the responsibility of their offices.⁴¹⁶

However, given that tribal forums are the sole locus in which non-habeas ICRA claims may be brought, many tribes have nonetheless

413. Limas, *supra* note 410, at 371.

414. See Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 *Ariz. St. L.J.* 137, 168 & n.179 (2004) (citing Amelia A. Fogelman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 *Va. L. Rev.* 1345, 1349 (1993) (“Courts and commentators have justified the continued existence of tribal sovereign immunity primarily as a means to protect scarce tribal resources.”)).

415. See Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 *Cornell L. Rev.* 1203, 1243 (2006) (“Indians are today among the poorest people in the United States, with reservations that ‘continue to rank among the most economically depressed sectors of the nation.’” (citation omitted)).

416. Limas, *supra* note 410, at 371 (quoting *Moses v. Joseph*, 2 *Tribal Ct. Rep.* A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980)).

elected to waive their sovereign immunity for purposes of civil rights claims.⁴¹⁷ Some waivers are effectuated through tribal law, in the form of constitutional provisions,⁴¹⁸ legislative acts,⁴¹⁹ or by virtue of the development of a tribal common law.⁴²⁰ Tribal courts sometimes waive tribal sovereign immunity on the grounds that such waivers are consistent with, or even mandated by, ICRA or *Santa Clara Pueblo*.⁴²¹

417. Many tribal courts have interpreted ICRA—per *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)—as creating an implied waiver of tribal sovereign immunity in tribal courts for purposes of ICRA claims. See, e.g., Alexander Tallchief Skibine, Brief for Respondents, *Martinez v. Santa Clara Pueblo*, 14 Kan. J.L. & Pub. Pol’y 79, 86 (2004) (“[M]ost tribal courts interpret ICRA as an implied waiver of the tribes’ sovereign immunity in their own tribal courts and have taken seriously their role in implementing the Act’s protections.” (citations omitted)). Others expressly waive their immunity for civil rights suits in tribal courts through their tribal constitutions. See, e.g., Menominee Indian Tribe of Wis. Const. art. XVIII, §§ 1–2 (waiving tribal immunity in tribal court for Indian Civil Rights Act cases); see also Goldberg, *Revitalization*, supra note 75, at 900 (“Most tribal courts or councils waive sovereign immunity so as to enable litigants to challenge actions of tribal officers for violating the Act.”); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 480–83 (1998) (discussing tribal courts that have found tribal sovereign immunity waived for purposes of ICRA claims). Other scholars have claimed, however, that sovereign immunity is preventing civil rights claims against tribal governments. See, e.g., Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 Ga. L. Rev. 895, 959 (2002) (“[Many] tribal courts have held that ICRA does not abrogate a tribe’s sovereign immunity in tribal court and have declined to entertain suits brought against tribes under ICRA. . . . [E]ven for violations of ICRA, injured parties find themselves without a forum in which to adjudicate their claims against these tribes.” (footnote omitted)); Rosen, *Multiple Authoritative Interpreters*, supra note 102, at 509 (“The doctrine of tribal sovereign immunity, however, is a potential doctrinal obstacle to the tribal courts’ functioning as fora to vindicate ICRA rights.”).

418. See, e.g., Menominee Indian Tribe of Wis. Const. art. XVIII, § 2.

419. See, e.g., Colville Tribe Law & Order Code § 1-5-5 (2005) (waiving Colville Tribes’ sovereign immunity in tribal courts for suits brought under Colville Tribes’ Civil Rights Act); Fort McDermitt Paiute-Shoshone Tribe of Or. & Nev. Law & Order Code, ch. 1, §§ 1, 3 (2003) (stipulating that Tribal Council may waive immunity to enforce equal protection and procedural due process rights).

420. See, e.g., *Murphy v. Standing Rock Sioux Election Comm’n*, 17 Indian L. Rep. 6069, 6070 (Standing Rock Sioux Tribal Ct. 1990) (rejecting Election Commission’s argument that they enjoyed sovereign immunity via their status as instrumentality of tribe); *O’Brien v. Fort Mojave Tribal Court*, 11 Indian L. Rep. 6001, 6002 (Fort Mojave Tribal Ct. 1983) (rejecting defense of sovereign immunity as “a dinosaur of injustice”); Limas, supra note 410, at 379–80 (noting that “a tribal court may look to its tribe’s common law to determine the existence or extent of immunity,” and discussing *O’Brien* as example of case waiving immunity under tribal common law).

421. See Limas, supra note 410, at 380–81 (noting that Cheyenne River Sioux Tribal Court of Appeals rejected tribe’s defense of sovereign immunity, finding that under *Santa Clara Pueblo*, “tribal courts must entertain causes of action based on ICRA” (quoting *DuFree v. Cheyenne River Hous. Auth.*, 1 Indian L. Rep. 6106, 6108 (Cheyenne River Sioux Tribal Ct. App. 1988))). Limas additionally notes that the Turtle Mountain Tribal Court relied on *Santa Clara Pueblo* to find that ICRA amounted to an “‘express, unequivocal expression of congressional intent to provide jurisdiction to the tribal court based upon alleged violations of an individual’s civil rights protected by ICRA.’” Id. at 380 (quoting *Davis v. Keplin*, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. 1991)). I do not mean to suggest that tribal courts should find a waiver of immunity within ICRA

Despite the large number of tribes that do waive the defense of sovereign immunity for the purpose of ICRA claims, there remain a sizeable number of tribes that do not.⁴²² This means that the assertion of the sovereign immunity defense keeps many ICRA suits from ever being litigated in tribal court.⁴²³ Thus, despite all the good reasons for assertion of the defense, principles of good Native governance strongly suggest that tribes ought to take it upon themselves to waive their immunity via their own constitutions, statutes, or common law, in order to address the civil rights claims being raised by tribal members and non-Indian claimants. And even while acknowledging the persuasive, pragmatic reasons for waiving the defense,⁴²⁴ it is not upon this rationale that I make my claim.

Good Native governance requires the waiver of the defense so that ICRA claims may be heard in a tribal forum.⁴²⁵ As Marshall stated in *Santa Clara Pueblo*, "Tribal forums are available to vindicate rights created by ICRA."⁴²⁶ He emphasized: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."⁴²⁷ The Court made no exception for tribes in which judicial authority is vested in a nonjudicial entity, such as (in the case of the *Santa Clara Pueblo*) a tribal council, calling such fora "competent law-applying bodies."⁴²⁸ As Marshall's opinion emphasizes, civil rights violations will only be addressed if the tribal forums—uniquely qualified to hear these matters—are available. And such forums are critical for good

where one has not been expressly stated. In fact, federal Indian law supports the theory that—absent an express waiver of immunity by Congress—such limitations on tribal sovereignty will not be inferred.

422. See, e.g., Fletcher, *Tribal Employment Separation*, supra note 185, at 322 ("Most Tribal Courts do not find that ICRA waives a Tribe's immunity.").

423. See Limas, supra note 410, at 360 ("With the exception of habeas corpus actions, which can be heard in federal courts, tribal courts are generally the only forums available for ICRA claims. In response to ICRA suits against them in tribal courts, some tribes assert the defense of sovereign immunity."); Rosen, *Multiple Authoritative Interpreters*, supra note 102, at 509 ("Many tribal courts have held that ICRA does not waive tribal sovereign immunity, but have allowed prospective injunctive relief or damages where tribal officials act beyond the scope of their duty.").

424. The fact that tribal governments are protected from suit by sovereign immunity has caused Congress to attempt to pass legislation abrogating that immunity for ICRA claims. Limas, supra note 410, at 361; see also John W. Borchert, Comment, *Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification?*, 13 *Emory Int'l L. Rev.* 247, 250–51 (1999) (noting that defense of sovereign immunity feeds political backlash against tribes, leading Congress to try to pass laws that would condition tribal funding on waivers of immunity).

425. Though there may be compelling reasons why tribes ought to waive immunity for a variety of disputes other than civil rights claims—such as contract disputes, commercial disputes, etc.—I do not address those here.

426. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

427. *Id.* (citing *Fisher v. Dist. Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959); *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

428. *Id.* at 66 (citing *United States v. Mazurie*, 419 U.S. 544 (1975)).

Native governance. When tribal members seek redress for wrongs that they feel have been perpetrated against them, they will lose faith in the legitimacy of the government if they are given no opportunity to be heard. In order for tribal members to have faith in the tribe and to be incentivized to continue to invest in the community, they must have access to a nonpolitical forum for resolution of their disputes. Waiver of the defense of sovereign immunity is part of this calculus. Even where a tribal forum is available, if the tribe is shielded by the sovereign immunity defense, the litigant may, nevertheless, be wholly precluded from pursuing his or her claim. And as other scholars have noted, even "marginal" or "aspiring state[s]" "ought not to be able to be fully excused from any and all forms of accountability."⁴²⁹

I do not mean to suggest that tribes should grant wholesale waivers of immunity. In fact, not only would I argue against waivers for unlimited monetary damages in most cases, for example, I think it prudent that some tribes preclude monetary relief altogether. But it is up to each tribe to weigh for itself the parameters of its immunity and the scope of the claims it will allow within the tribal forum. Wealthier tribes may, for example, conclude that monetary judgments are appropriate, while tribes with far fewer resources may offer injunctive or declaratory relief only.⁴³⁰ Some tribes have enacted limited waivers, allowing suits for monetary damages to the extent the losses will be covered by insurance.⁴³¹ This is not to say that litigants will always be satisfied by the limits imposed by tribal governments. In many cases, they most certainly will not.⁴³² But there is a catharsis for those who feel they have been wronged in having their claims heard. Providing a venue for individuals to tell their stories will be good for the tribal community in several respects. Adequate tribal fora and limited waivers of immunity will inspire the confidence and loyalty of citizens who feel they have been harmed by tribal governments. And outsiders, too, many of whom now work for Indian nations, ought to

429. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 *Stan. L. Rev.* 1921, 1955 (2003) (identifying Santa Clara Pueblo as example of sovereign in need of accountability).

430. A study of tribal courts revealed that this tact has, indeed, already been undertaken by some tribal courts. See Newton, *supra* note 75, at 339 ("Some tribes . . . specifically waive sovereign immunity for Indian Civil Rights Act cases, but limit that waiver to injunctive or declaratory relief.").

431. See, e.g., *Johnson ex rel. Gould v. Navajo Nation*, 5 *Navajo Rptr.* 192, 200 n.4 (1987) (discussing Navajo Nation Sovereign Immunity Act, Navajo Nation Code tit. 1, §§ 551–555 (1995), which includes provision permitting lawsuits against tribe for money damages that are covered by insurance).

432. For example, former non-Indian female employees of the Thunder Valley Casino have sued for sexual harassment. They are attempting to take their claims to state court, despite the offer by the tribe to send the claims to an independent arbitrator. The women refused to use the tribe's resolution alternative because they would not be allowed to recover punitive or exemplary damages. See Dorothy Korber, *Ex-Casino Workers' Harassment Case Faces Key Hearing: Judge to Rule on Tribal Sovereignty Issue in Seven Women's Lawsuit Against Thunder Valley*, *Sacramento Bee*, June 4, 2006, at B1.

be afforded a fair opportunity to bring their claims. For all those—Indian and non-Indian—who enter the tribe's domain and jurisdiction, the resolution of very important civil rights claims is an integral component of good Native governance.

B. *Banishment*

Banishment has received a great deal of attention in recent years.⁴³³ Though I have discussed it previously in the context of good Native governance,⁴³⁴ it must also be addressed as a source of serious contention within tribes. As I have argued, banishment can serve a legitimate function as a bona fide punishment within Native communities as long as it is implemented in conjunction with other aspects of good Native governance—voice, the presence of a fair and nonpolitical forum for the resolution of disputes, and cultural matching, in particular.

But recent stories of banishment in the news raise the inference that, at least in some instances, tribal members are being permanently exiled from their tribal communities in the absence of the other requisite governance factors. Allegations that tribal members have been banished for voicing dissent against tribal leadership are particularly troubling. In the case of one California rancheria, for example, the *Los Angeles Times* reported that 174 members—fifteen percent of the tribe's total enrollment—were banished because their common relative vocally opposed a proposed casino development deal.⁴³⁵ Another California tribe purportedly disenrolled seventy tribal members, including the vice chair of the tribal council, for signing a petition to recall other elected officials.⁴³⁶ Subsequently, two tribal members who expressed vocal opposition to the previous banishments were also disenrolled.⁴³⁷ In that instance, the tribal chairwoman, Glenda Nelson, reportedly said that the tribal members were disenrolled for the sake of tribal unity, because the dissidents' actions were destroying the tribe.⁴³⁸ Just recently, five tribal members were

433. See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879 (2d Cir. 1996) (holding that Native Americans banished from tribe can challenge legality of their "conviction" under ICRA habeas provision); *Quair v. Sisco*, 359 F. Supp. 2d 948, 971 (E.D. Cal. 2004) (relying on *Poodry*, 85 F.3d at 895–98, in holding that "banishment from the reservation constitutes detention in the sense of a severe restriction on petitioners' liberty not shared by other members of the Tribe"); Michael Hiltzik, *Fairness Is the Loser in Tribal Identity Crisis*, L.A. Times, Apr. 5, 2004, at C1 (discussing unfairness and limited judicial review of tribal "disenrollment" disputes); Calif. Tribe Threatens to Disenroll Dissidents, *Indianz.com*, Sept. 29, 2003, at <http://www.indianz.com/news/archives/001695.asp> (on file with the *Columbia Law Review*) (discussing attempted disenrollment of tribal members who signed voting recall petition).

434. See *supra* Part III.C.

435. Hiltzik, *supra* note 433.

436. Mary Weston, *Appellants Disenrolled for Speaking Out*, *Oroville Mercury Reg.* (Cal.), Dec. 12, 2006, available at <http://www.rlnn.com/ArtDec06/AppellantsDisenrolledForSpeakingOut.html> (on file with the *Columbia Law Review*).

437. *Id.*

438. *Id.*

allegedly “shunned” by their tribe for several years for filing a lawsuit to demand review of tribal finances.⁴³⁹ They were not informed of their banishment—which will preclude them from accessing their tribal membership benefits for seven years—until almost a month after the tribal council’s decision.⁴⁴⁰ And there are other cases that raise questions about the rights of minority factions who claim they are being punished for speaking out against powerful elites.⁴⁴¹ Such stories are troubling from an indigenous perspective, not only because injustice may be perpetrated on individual Indians, but because such stories raise the ire of the non-Indian community and further instigate misconceptions and animosity toward tribes, even when such incidences are extremely isolated.

As set forth above, good Native governance requires that members have the freedom of voice or dissent. But even in tribes that hold elections or protect voice through freedom of speech, such rights are illusory if the exercise of voice results in one’s exile from the community. After all, “the fairness and decency of any state should be assessed not alone through a study of whether its majorities examine it and find it good, but through a study of whether its minorities find it good.”⁴⁴² That is, how a community treats acts of dissidents is part of how group identity is defined.⁴⁴³ When dissenters are permanently exiled from a tribal community⁴⁴⁴ for speaking out against governing elites—particularly when such ejections occur in the absence of a nonpolitical dispute resolution process—we must look critically at the governments allowing or facilitating these results.

I do not mean to suggest there are no cases in which even permanent banishment might be justified. In fact, I have already detailed two broad categories of cases where I contend banishment falls within the parameters of good Native governance, and there are most certainly others.⁴⁴⁵ But tribal banishment is an extremely harsh penalty. Though it does not invoke the Supreme Court’s concerns that exile necessarily creates “statelessness,”⁴⁴⁶ it does raise serious questions. After all, tribal members who are exiled from their tribe will still have American citizenship, but unless they can satisfy eligibility for enrollment in another tribe

439. Sean Gonsalves, *State ‘Reviews’ Complaints of Tribe Dissidents*, Cape Cod Times, Feb. 8, 2007, available at <http://www.rlnn.com/ArtFeb07/StateReviewsComplaintsTribeDissidents.html> (on file with the *Columbia Law Review*).

440. *Id.*

441. See, e.g., *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004) (alleging that “official representative” of Oneida Indian Nation used power “to suppress, harass, and intimidate . . . dissidents” by “enact[ing] an illegal housing ordinance permitting the seizure and destruction of [dissidents’] homes without providing just compensation”).

442. Stephen L. Carter, *The Dissent of the Governed* 97 (1998).

443. See *id.*

444. Evidence suggests that, under traditional Iroquois law, banishment is rarely permanent and sparingly used. Cousins, *supra* note 362, at 154–55.

445. See *supra* Part III.C.

446. *Trop v. Dulles*, 356 U.S. 86, 99, 102 (1958); see also *supra* note 402 and accompanying text.

or are adopted by another Indian nation, they will be permanently devoid of tribal citizenship. This may not only deprive them of valuable goods and services, but can also leave them without any avenue in which to access and practice their tribal culture, causing a devastating loss of cultural identity.

The gravity of banishment has not been lost on the courts, which have found ways to manipulate well-settled law to review internal tribal membership decisions.⁴⁴⁷ In *Poodry v. Tonawanda Band of Seneca Indians*, for example, the Second Circuit employed wildly circuitous reasoning to find grounds upon which to hear the plaintiffs' case.⁴⁴⁸ There, the Senecas claimed that the actions of the dissidents—in their efforts to form a competing government within the tribe to combat alleged corruption and mismanagement by tribal government—had committed treason.⁴⁴⁹ The individual members were told of their banishment and disenrollment via a notice that read, in part: "It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca nation. You are to leave now and never return."⁴⁵⁰

In its opinion, the court noted that "detention" for purposes of ICRA could be met only by either physical imprisonment or "sever[e] . . . actual or potential restraint[s] on liberty," and then characterized plaintiffs' banishment as falling within this definition so as to justify federal court review of their claim.⁴⁵¹ The court's reaction to the facts of *Poodry* may indicate that they were as troubled by the perceived absence of the other good Native governance factors as they were by the banishment itself. In fact, the court focused on various elements of the case that were not critical to its finding that plaintiffs had been "detained" by the tribe. For example, the opinion reflects the court's acknowledgment that, if it could not review the case, the plaintiffs had no other avenue of review within the tribe.⁴⁵² The court also highlighted the cursory manner in which the plaintiffs were simultaneously informed of their crime and their punishment.⁴⁵³

Of course, treason is a serious offense, and a sovereign government has an obligation to protect itself against individuals advocating its demise.⁴⁵⁴ In fact, the United States recently caused a media frenzy when it

447. See Riley, *Illiberalism*, supra note 1 (manuscript at 26–30) (discussing recent encroachments by federal judiciary into tribal membership disputes).

448. 85 F.3d 874, 893–95 (2d Cir. 1996).

449. *Id.* at 878.

450. *Id.*

451. *Id.* at 893–95.

452. The court stated that "[i]f the reasoning of *Santa Clara Pueblo* forecloses federal habeas jurisdiction, the petitioners have no remedy whatsoever." *Id.* at 885.

453. See *id.* at 877–78.

454. See *Dennis v. United States*, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring) ("The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty.").

brought the first treason charge in fifty years against U.S. citizen Adam Gadahn for promoting the agenda of the terrorist organization Al Qaeda.⁴⁵⁵ Thus, tribal nations are obviously not alone in seeking to protect themselves against overthrow or mutiny. However, when applying such a harsh penalty to tribal members, the Senecas may have been able to avoid federal interference had they more clearly demonstrated—for the good of their individual members and their Nation as a whole—that the plaintiffs' punishment was imposed in conjunction with the other good Native governance factors.

History and contemporary circumstances tell us that that, unless limited, powerful elites may misuse their authority.⁴⁵⁶ This is not to say that tribes should avoid employing banishment as a punishment altogether. But because banishment has the potential for such grave abuse—to silence dissenting voices or to increase remaining members' shares of goods and services—it is critical that it is used in conjunction with other important protections. The absence of any of the requisite factors may raise concerns about the legitimacy of banishment and, correspondingly, Native governance.

V. WHY TRIBES SHOULD STRIVE FOR GOOD NATIVE GOVERNANCE

Even though ICRA extended certain civil rights provisions to tribal governments, the fact remains that, in many respects, tribes are free to act illiberally.⁴⁵⁷ In my work, I have argued for maintenance of the status quo: That is, that self-determination requires that each individual tribe be afforded the freedom to self-govern, and that there ought not to be greater federal (or international) encroachment on the internal governance of tribal nations.⁴⁵⁸ Given this position, it is perhaps unwise for an outsider⁴⁵⁹ to even attempt to map out the parameters of good Native governance.

At the same time, there are real concerns about Native governance, arising from both within and without tribal communities.⁴⁶⁰ As tribal na-

455. Eugene Volokh, *The Case for Treason*, L.A. Times, Oct. 14, 2006, at B17.

456. See Cornell, Curtis & Jorgensen, *supra* note 82, at 10 (explaining that abuse of power is seen in governments around world, and thus, central challenge of self-government is finding effective leadership that "gets things done" while protecting citizens from abuses of power).

457. Or at least, they are free to engage in governance that deviates from that required of the state and federal governments pursuant to the Bill of Rights. See Riley, *Illiberalism*, *supra* note 1 (manuscript at 17–18).

458. *Id.* (manuscript at 81–83).

459. Though I am a tribal member and a Justice on my Nation's Supreme Court, I believe that each individual tribal government is a separate, independent sovereign. Thus, to the extent I am advocating for a standard to govern all tribes, I am, in some sense, a quasi-outsider.

460. See Champagne, *supra* note 92, at 11 ("For many [tribal] communities, there is a growing sense of crisis and a movement to remake tribal constitutions."); Kalt, *Constitutional*, *supra* note 88, at 184 ("Indian nations are sitting ducks for those who

tions continue to assert sovereignty—attempting in some cases to recapture the fleeting attributes of external sovereignty⁴⁶¹—global governance standards for all sovereigns are being shaped. Indian nations are faced with the unique opportunity to enter this dialogue by supplying evidence that Native governments, too, are taking their sovereign responsibilities seriously and responding to the tribal polity, even if they do so in ways that deviate from the practices of the dominant regime. As scholars have noted, governmental accountability is part of, not an affront to, sovereignty.⁴⁶² So the question remains: as long as Indian nations are not (yet) required to engage in this examination of sovereignty, why would they? More importantly, why should they?

There are many reasons why today's tribal nations ought to critically contemplate the changing nature of sovereignty and the responsibilities that are concomitant to the exercise of sovereign rights. After briefly discussing and then disregarding what might appear to be the most compelling justification for adhering to good Native governance—that is, to minimize or altogether avoid further federal encroachment on tribal governments—I focus on two compelling reasons for the implementation of good Native governance by contemporary tribal governments.

I will deal, first, with pragmatic considerations. Much of the recent literature on Indian nations—particularly that which is critical of tribal governance—focuses on pragmatic reasons for tribes to more closely emulate the dominant society.⁴⁶³ There is a sound rationale for this position. The U.S. government has tried for many years to effect the full and total assimilation of Indian peoples. In fact, there were entire eras of

would wish to limit tribal sovereignty by pointing to examples of political disarray, unenforced law, and irrationally enforced law.”).

461. See, e.g., Michelle Chen, *Navajos, Cuba Strike Unprecedented Trade Deal*, *New Standard*, Sept. 4, 2006, at <http://newstandardnews.net/content/index.cfm/items/3629> (on file with the *Columbia Law Review*).

462. E.g., Resnik & Suk, *supra* note 429, at 1928 (citing Chayes & Chayes, *supra* note 31, at 27).

463. See, e.g., Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 *Va. L. Rev.* 1345, 1347 (1993) (arguing that waiver of tribal sovereign immunity for tribal businesses provides “powerful bargaining tool, increases the likelihood that tribes will attract non-Indian business, and defuses the impetus for potentially adverse congressional or judicial action”); Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes’ Sovereign Power over Membership*, 92 *Va. L. Rev.* 793, 800 (2006) (arguing for “effective federal remedy for the victims of wrongful disenrollment, disenfranchisement, or banishment, and for putative members to whom membership has been wrongfully denied”); see also Champagne, *supra* note 92, at 11 (noting that increased globalization has led Native peoples to realize their goals for “greater control over their economic, political, and cultural lives,” and corresponding necessity for “more effective forms of government” to achieve those goals); Kalt & Singer, *supra* note 8, at 21 (“Tribes know that the Supreme Court has granted Congress plenary power to [diminish or abolish tribal government]. . . . Tribes have, in other words, extremely strong incentives to act fairly to non-Indians in their dealings.”).

Indian policy directly devoted to achieving this goal.⁴⁶⁴ Even though we are now in an age of Self-Determination,⁴⁶⁵ the Supreme Court has upheld Congress's plenary authority over Indian affairs,⁴⁶⁶ which has been used in the past and could be used in the future to effectuate policies that are wholly detrimental to Indian sovereignty. There is little doubt in the context of ICRA decisions, for example, that Congress could authorize federal court review of tribal court decisions if it so chose.⁴⁶⁷ But Congress's power likely goes even further. In fact, some scholars have noted that "Congress has the power to take away [tribes'] sovereign powers entirely."⁴⁶⁸

These pragmatic concerns are powerful and real. But I do not focus on them here as a justification for adhering to principles of good Native governance. Instead, I assert that, as sovereign nations, tribes ought to contemplate their duties to their citizens independent of what the dominant regime threatens to, or in fact, may do. The concerns that are raised by this Article are bigger than the relationship between the Indian tribes and the federal government; rather, they go to the heart of the legitimacy, stability, and survival of indigenous governments. I contend that the concept of good Native governance has broader and more persuasive application than that contemplated in the context of its usefulness in staving off the forces of an encroaching regime. Thus, I briefly sketch out here two alternate justifications for adhering to good Native governance: First, I focus on the prohibitively high cost of exit to the tribal community. Second, I explore the responsibilities that Indian nations have implicitly taken on by virtue of their appeal to international human rights principles.

Most scholarship dealing with exit costs focuses on the price paid by the individual. Turning that examination on its head, I focus here on the enormous costs associated with exit, not to the individual, but to the group that remains. If it is true that "the absence of good governance causes economies to atrophy and societies to splinter,"⁴⁶⁹ one plausible reason for this is that those who lose faith in the government exit the

464. See Cohen, *supra* note 193, at 75–84, 89–97 (discussing periods of federal Indian policy known as "Allotment and Assimilation" and "Termination").

465. *Id.* at 97–113.

466. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

467. Kalt & Singer, *supra* note 8, at 20.

468. *Id.* at 21; see also Frickey, *Common Law*, *supra* note 77, at 11 (noting that Congress has authority to dismantle tribal rights); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 *Ariz. L. Rev.* 439, 449 (1988) ("Congress can unilaterally and whimsically destroy the ability of tribes to exercise self-governing powers.").

469. See Franck, *Democracy*, *supra* note 53, at 14.

community.⁴⁷⁰ As a result, the community is weaker, more insulated, and more vulnerable to fractionization.

Exit of individual Indians from tribal communities is extremely harmful to tribes in unique ways. Always vulnerable to an encroaching dominant culture, indigenous peoples are particularly so in this age of globalization.⁴⁷¹ Given that indigeneity as a way of life is currently under threat, preserving group identity and Indian lifeways⁴⁷² is more critical to indigenous peoples' cultural survival than ever.⁴⁷³ Thus, keeping individual Indians engaged in tribal life—and, accordingly, minimizing incidences of exit by members—is essential for tribes' continued existence. Simply put, when individual members are forced to leave their tribal cultures—either by law, coercion, or ostracism—the group may experience serious cultural loss.

Exit should also be minimized because keeping members engaged in tribal life facilitates change from within rather than imposition from without.⁴⁷⁴ Expansive avenues for dissent will provide an opportunity for tribal members, even those who are in the minority, to participate in tribal government⁴⁷⁵ and to contribute to the cultural evolution of the tribe.

470. Dagan & Heller, *supra* note 95, at 590–91 (arguing that exit is likely in absence of “democratic self-government”).

471. See Porter, *Pursuing the Path*, *supra* note 76, at 130 (stating that “forces of assimilation” could result in “complete absorption of Indigenous peoples into American society”); Riley, *Straight Stealing*, *supra* note 76, at 113 (stating that threats to indigenous peoples are exacerbated by globalization).

472. Tribes are struggling to maintain their cultural distinctiveness, including preserving Native languages, customary law, and access to sacred places. See generally Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians and Nonowners*, 52 *UCLA L. Rev.* 1061 (2005) (arguing property law should protect Indian interests on federally owned land).

473. See Porter, *Pursuing the Path*, *supra* note 76, at 130 (“[T]he survival of Indigenous peoples is predicated upon embracing Indigenization and pursuing a distinct development path at some level.” (emphasis omitted)).

474. I recognize that advocating that tribes be left to change from within is a controversial proposition. This battle—between autonomy and equality—rages on within the tribal context, and also throughout the globe. For example, Noah Feldman argues in relation to a western-style constitution in Iraq:

[C]onstitutional practices emerge and ripen into custom when the relevant elites see it as consistent with their interests for these practices to be adopted. By this I mean that political elites tend to guarantee and enforce rights to the equality and liberty of persons other than themselves only when they come to see those rights as beneficial to their own interests in preserving the constitutional order. So long as egalitarian or liberal principles are imposed on political elites against what they perceive as their own interests, they will resist them with all means at their disposal.

Feldman, *Imposed*, *supra* note 14, at 883 (emphasis omitted). But see Sunder, *Enlightened*, *supra* note 14, at 893 (“Transnational influence is inescapable; political and cultural autarky is hard to imagine. Power and ideas hardly pause at passport controls. And diverse peoples, even governing elites . . . look across borders for validation.”).

475. See, e.g., Gerken, *supra* note 150, at 1775 (describing how dissent “encourages electoral minorities to take part in the project of governance”).

Making an effort to keep tribal members engaged in tribal life enriches the community and makes it more likely that the polity will shape the future of the tribe consistent with changing values. By contrast, where voice is squelched, individual tribal members may feel they have no choice but eventual exit (or exile).⁴⁷⁶ Such options are sure to come at the expense of the group's existence. When this happens, both individual tribal citizens and indigenous nations suffer.

The great lengths to which many tribal governments go to keep Indians engaged in tribal life evidence that they share these concerns. Some tribes are reconsidering membership ordinances and modernizing their constitutions to reflect a growing emphasis on inclusiveness.⁴⁷⁷ Other tribes have extended financial assistance to tribal descendants who do not qualify for official enrollment.⁴⁷⁸ Even the Santa Clara Pueblo—which, in some respects may be credited with spurring much of today's critical dialogue surrounding Indian governments⁴⁷⁹—is making attempts to keep those raised in the community engaged in tribal life. They have established a committee, which includes children of Santa Clara women who were denied membership due to the decision in *Martinez* as well as one of the original defendants in the case, to study the impact of the patriarchal membership ordinance on the pueblo.⁴⁸⁰ Though the work toward inclusion is laudable, it is indisputably not universal. And, as

476. See Dagan & Heller, *supra* note 95, at 590–91 (“[T]he decision whether to exit will often be taken in light of the prospects for the effective use of voice.” (citation and emphasis omitted)).

477. See, e.g., Chippewa Leader Seeks Broader Enrollment Criteria, *Indianz.com*, Mar. 21, 2006, at <http://indianz.com/News/2006/013071.asp> (on file with the *Columbia Law Review*) (noting that Chippewa tribal leaders fear their one-fourth blood quantum requirement is resulting in “self-terminat[ion]” of tribe, and, accordingly, seek to allow blood from combination of all Chippewa tribes to comprise requisite quantum).

478. See Molly Davis, *Tribe Extends Help to Kin Lacking Casino Ties*, *Press-Enterprise* (Riverside, Cal.), May 5, 2006, at B1 (describing Morongo tribe program granting aid to tribal descendants who don't receive funds from tribe's casinos and are in need).

479. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 71–72 (1978). Some critics claim that *Santa Clara Pueblo's* deference to tribal sovereignty has resulted in the oppression of individual rights. See, e.g., Amy Gutmann, *Identity in Democracy* 47 (2003) (arguing with regard to *Santa Clara Pueblo* that “group sovereignty often amounts to a license for the dominant members of a group to impose injustice on others”); Sunder, *Dissent*, *supra* note 29, at 559–60 (arguing that Court's decision entrenched tribal elites and violated individual liberty of *Martinez*). Mainstream feminists have also been highly critical of the Court's decision. See, e.g., Catharine A. MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in *Feminism Unmodified* 63, 65–69 (1987) (arguing that Pueblo tribal governance is rooted in male supremacy); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 702 (1989) (arguing that *Santa Clara Pueblo* Court prioritized sovereignty interests over subordination of women).

480. See Valencia-Weber, *Racial Equality*, *supra* note 128, at 373.

many tribes continue to lose members,⁴⁸¹ the long-term survival of indigenous groups grows correspondingly uncertain.

Beyond the high costs of exit to the community, there is another reason that Indian nations ought to strive for good Native governance. Indigenous groups in the past few decades have begun to use human rights instruments to assert their own claims for fair treatment from the governments to which they are subject.⁴⁸² Because indigenous peoples are using international human rights systems to advance their own claims, I suggest that they also must contemplate the concomitant obligations they have, as sovereigns, to the Native polity. Thus, any critical examination of sovereignty—tribal or otherwise—must be situated within the larger framework of these rapidly changing global conceptions of the duties of the state.

Despite presenting many drawbacks, globalization and technological advances have made possible a global network of indigenous peoples.⁴⁸³ As a result, indigenous groups have aligned themselves internationally.⁴⁸⁴ They now have a real voice on the international plane, as they coordinate with NGOs and engage in political discourse on the national and international levels to advance their rights under international law.⁴⁸⁵ Indigenous peoples are increasingly employing the language of rights to advocate for their cultural and political survival, and are often doing so as part of a global indigenous peoples' movement.⁴⁸⁶ In a recent work, Thomas Franck recounts how Native groups are supporting other indige-

481. The shrinking of Indian nations through blood-quantum requirements is a subject of particular concern. See, e.g., *Flies-Away*, *supra* note 162, at 157 (noting that Hualapai have blood quantum requirement of one-fourth, which, according to author, means that "[d]ue to the diminishing degree of Hualapai blood over a very long period of time, under the current constitution, the Hualapai Tribe is destined to disintegrate").

482. See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *Ariz. J. Int'l & Comp. L.* 13, 14–16 (2004) (discussing international human rights regime and its connection to indigenous peoples); see also *United States v. Dann*, 470 U.S. 39, 45 (1985); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 140 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (on file with the *Columbia Law Review*) (holding in favor of human rights and aboriginal property claims of Awas Tingni people of Mosquito Coast in Nicaragua); Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 *Colum. Hum. Rts. L. Rev.* 49, 79–83 (2002) (discussing case).

483. Angela R. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 *Kan. J.L. & Pub. Pol'y* 155, 157 (2004) [hereinafter Riley, *Globalization*] (noting how indigenous peoples are using technology to facilitate their cultural survival and to engage in global indigenous peoples' rights movement).

484. See Anaya, *supra* note 482, at 14 ("Numerous processes within the international system have focused on the common set of ongoing problems that are central to the demands of indigenous groups These international processes now reveal a contemporary body of international human rights law on the subject.").

485. See Coombe, *supra* note 117, at 128.

486. See *id.* at 125 (discussing increased politicization of indigenous peoples in world and their quest for rights and recognition).

nous peoples in the world, particularly as they seek to hold dominant governments accountable for atrocities committed against them.⁴⁸⁷ Franck tells the story of Letty Scott, an Australian Aboriginal woman whose husband committed suicide in a Darwin prison.⁴⁸⁸ After his death, Scott became vocal about the treatment her husband and other aboriginals had suffered at the hands of the Australian government.⁴⁸⁹ With help from the Mashantucket Pequot Nation, an Indian tribe located in the state of Connecticut, Scott made her case public. She eventually received the attention of the U.S. Congress, British nongovernmental groups, and the United Nations Human Rights Subcommittee.⁴⁹⁰ As Franck points out: "These [actions] made Letty Scott's case a global issue of good governance."⁴⁹¹

The Letty Scott case illustrates how indigenous peoples are tapping into norms of good governance to hold states accountable for their historical and continued mistreatment of indigenous peoples.⁴⁹² Scott and the Pequots relied on relatively informal means to effectuate change, but the same goals are manifested in indigenous groups' efforts to use the law and formal legal systems to reach similar results. One case in particular has garnered much attention. In the fall of 2001, the Inter-American Court on Human Rights decided *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.⁴⁹³ The Awas Tingni, an indigenous group, sought legal recognition of their rights to their traditional territories from the Nicaraguan government.⁴⁹⁴ The Awas Tingni alleged in their petition to the Inter-American Commission that Nicaragua had not protected the traditional lands of the Awas Tingni, due, in part, to the state's decision to authorize logging by a Korean company in the Awas Tingni's territory.⁴⁹⁵ Consistent with the findings of the Commission, the Inter-American Court agreed that Nicaragua had violated the Mayagna (Sumo) community of Awas Tingni's land and resources rights under Article 21 of the American Convention on Human Rights.⁴⁹⁶ As a remedy, Nicaragua was

487. Franck, *Democracy*, supra note 53, at 16.

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.* at 17 ("How a government governs is no longer a matter to be determined exclusively by each governing elite.").

493. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 159 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (on file with the *Columbia Law Review*).

494. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 *Harv. Hum. Rts. J.* 33, 37–38 (2001).

495. *Id.* at 37.

496. *Awas Tingni*, 79 Inter-Am. Ct. H.R. ¶ 153; see also James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 *Ariz. J. Int'l & Comp. L.* 7, 13–14 (2005) (discussing *Awas Tingni*).

ordered to enact the necessary measures for the “delimitation, demarcation, and titling of [the indigenous community’s] lands, . . . with full participation by the Community and taking into account its customary laws, values, customs, and mores.”⁴⁹⁷

In another case, Mary and Carrie Dann, two Indian sisters and members of the Western Shoshone tribe, battled the federal government for years to keep their land.⁴⁹⁸ The U.S. government had long maintained that a monetary judgment in favor of the Western Shoshone Nation for taking the tribe’s land had compensated the Danns, even though no distribution plan had been devised to convey the money to the tribe.⁴⁹⁹ The Danns argued that “the land ha[d] been in the possession of their family from time immemorial”⁵⁰⁰ and that they had never received compensation for the taking.⁵⁰¹ But the Supreme Court disagreed, ruling against the Danns.⁵⁰² Eventually, the Danns filed their case with the Inter-American Commission of Human Rights.⁵⁰³ Here, as in *Awas Tingni*, the Inter-American Commission sided with the indigenous group, holding that the United States had unlawfully deprived the sisters of their rights, and that its actions “were not sufficient to comply with contemporary international human rights norms, principles, and standards that govern the determination of indigenous property interests.”⁵⁰⁴

As these cases demonstrate, indigenous peoples are taking advantage of the “human rights culture”⁵⁰⁵ to secure their own place in the global community. A theory of good Native governance assumes that corresponding duties come along with indigenous peoples’ exercise of their rights.⁵⁰⁶ However, I make this claim with one critical caveat. That is, the

497. *Awas Tingni*, 2003 Inter-Am. Ct. H.R. ¶ 164.

498. See *United States v. Dann*, 470 U.S. 39, 41, 42 (1985) (calling conflict “longstanding”). The Court noted that the taking of Shoshone land occurred in the latter part of the nineteenth century. *Id.* The Dann sisters filed their action in 1974; it was not argued before the Supreme Court until 1984, with a decision rendered in 1985. *Id.* at 39, 43–44.

499. *Id.* at 44 (“[T]he United States maintained that the requirement of ‘payment’ under [the relevant statute] was satisfied by the congressional appropriation of the \$26 million award into the Treasury account.”).

500. *Id.* at 43.

501. *Id.* at 43–44.

502. *Id.* at 50. The Court did leave open the question of whether the Danns possessed “individual aboriginal rights” to the land because the lower courts had not addressed it. *Id.*

503. *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 5 rev. ¶ 1 (2002).

504. *Id.* ¶¶ 139, 144. Despite the ruling in their favor, however, the Department of the Interior confiscated and sold the 225 head of cattle on the Danns’s land. Getches, Wilkinson & Williams, *supra* note 80, at 294.

505. See Stacy, *supra* note 11, at 2049 (“We live now in a human rights culture. . . . [H]uman rights have become the language in which people, groups, and even nation states, frame their requests for better treatment from others . . .”).

506. See Riley, *Globalization*, *supra* note 483, at 164 (“[W]hile we can and should hold the powerful governments of the West and profit-seeking, multi-national corporations

status of Indian tribes as “domestic dependent nations”⁵⁰⁷—whose territory is encompassed within a larger, dominant government—significantly complicates issues of sovereign obligation. Virtually all indigenous peoples exist within the borders of larger nation-states who owe them duties.⁵⁰⁸ All too often, the relationship between indigenous groups and the nations in which they reside is marked by a denial or complete abrogation of the responsibilities owed to indigenous peoples. Thus, today’s human rights culture must not only contemplate the claims of individual Indians vis-à-vis tribal governments. It must also encompass indigenous peoples’ claims of self-determination and sovereignty vis-à-vis the dominant state.⁵⁰⁹

In sum, it is clear that contemporary governments—tribal or otherwise—cannot ignore the human rights of their members. Sovereignty should not be used as a shield to justify the denial of basic rights and liberties.⁵¹⁰ All sovereigns should thus, in some sense, strive to be “good.” At the same time, however, the obligations of tribal governments to their members must be contemplated in the context of the concomitant duties owed to tribes by the larger, dominant regime in conjunction with the goal—deeply embedded in international human rights law⁵¹¹—of preserving the continuation and existence of minority cultures.⁵¹²

CONCLUSION

More work is to be done to fully construct a theory of good Native governance. While I have drawn on actual examples from indigenous communities to support my arguments, this piece is largely a theoretical and normative work. I have not undertaken the kind of empirical study that would be required to determine, for example, exactly what the opportunities are for exit within each of the over 500 tribes within the

accountable for their responsibilities, we should not turn our focus away from our own responsibilities to work for and advocate for our own people.”).

507. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

508. See Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 *Wis. Int'l L.J.* 553, 553 (2005) (defining “indigenous peoples” as “racially distinct populations whose long-term histories connect them with identified areas of land situated within the borders of globally recognized nations”).

509. Resnik & Suk, *supra* note 429, at 1943–44 (addressing claims of indigenous peoples for “recognition through collective rights to sovereignty” and discussing international documents that protect rights of indigenous groups).

510. See *id.* at 1925–26 (“Whatever prerogatives governments once had, they cannot . . . treat human beings with utter disregard and assert sovereignty as an absolute defense to their actions.”).

511. See generally S. James Anaya, *Indigenous Peoples in International Law* (2d ed. 2004) (detailing status of indigenous peoples within international human rights framework).

512. A future work provides a framework to explain how these competing rights ought to be reconciled. Angela R. Riley, *The Human Rights Hierarchy* (2007) (unpublished manuscript, on file with author).

United States that are engaging in Native governance. And other important questions similarly remain unanswered. How, for example, should conflicts between the right to dissent and cultural match be reconciled in any particular case? What is the standard for determining whether a specific tribal forum is fair and nonpolitical? I have not fully addressed these and other pressing issues in this piece, and they are certainly worthy of a separate, deeper examination.

Nevertheless, this Article represents an initial step toward conceiving of a new theory of governance unique to indigenous nations. This piece reveals that there are compelling reasons to resist the temptation to mechanically impose the growing global conception of good governance on the indigenous peoples of the world. Significantly, this Article demonstrates that governance exists in our contemporary world that may deviate from that seen in the developed West, but that is, nevertheless, "good." Thus, if one accepts the theory of good Native governance, such acceptance may have broader implications for defining relationships between other interdependent sovereigns situated far beyond the borders of the United States.