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# Indian Tribes and Human Rights Accountability

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# Indian Tribes and Human Rights Accountability

WENONA T. SINGEL\*

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## I. INTRODUCTION

In Indian country, the expansion of self-governance, the growth of the gaming industry, and the increasing interdependence of Indian and non-Indian communities have intensified concern about the possible abuse of power by tribal governments.<sup>1</sup> As tribes gain greater political and economic clout on the world stage, expectations have risen regarding the need for greater government accountability in Indian country.<sup>2</sup>

Despite these expectations, Indian tribes are largely immune from external accountability with respect to human rights. In fact, tribes have effectively slipped into a gap in the global system of human rights responsibility. The gap exists in the sense that tribal governments are not externally accountable in any broad sense for abuses of human rights that they commit.

This gap in the human rights system exists because tribes do not have direct obligations under public international law, they are largely immune from external accountability under the domestic law of the United States, and they are frequently immune from judicial review within their own

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1. DUANE CHAMPAGNE, *SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS* 80 (2007); Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 59–61 (2010) (arguing that meaningful tribal sovereignty requires constraints against the potential abuse of power).

2. Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 598, 621 (2010). See generally Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007) (arguing and theorizing as to greater tribal government accountability).

systems of tribal law.<sup>3</sup> Furthermore, there is no system apart from the limited federal court review process that allows for external accountability for Indian tribes.

The failure of the legal system to provide for tribal accountability for human rights produces serious harms for Indian tribes and their polities. For example, victims of human rights abuses are often unable to obtain a remedy in any forum; their cases are frequently dismissed because of sovereign immunity or lack of subject matter jurisdiction.<sup>4</sup> In addition, the inability of victims to vindicate their rights prevents tribal governments from being held accountable for their actions and engaging in the reform and development that accountability would foster. A third effect is that dismissals create a growing unease with tribal sovereignty in the public, increasing the risk that Congress or the courts will take steps to change the law in a way that diminishes tribal prerogatives of self-government.<sup>5</sup>

Scholars have engaged in a great deal of debate over the appropriate response to these dilemmas. Many have defended the current state of affairs as a necessary form of collateral damage that respect for tribal sovereignty must entail.<sup>6</sup> Others have proposed providing individuals greater access to the federal courts to litigate their claims.<sup>7</sup> Commentators have also argued that the United States bears responsibility under international law for the human rights abuses inflicted by tribal governments.<sup>8</sup> One scholar has proposed the creation of an intertribal appellate court system with limited

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3. See Clint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 9 (2006); Riley, *supra* note 2, at 1111.

4. See *id.* at 11–13.

5. Florey, *supra* note 2, at 621; see also Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 829 & n.216 (2007).

6. See, e.g., Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 276 (2004) (concluding after finding that the practice of banishment violates international human rights norms that banishment should be allowed by indigenous groups).

7. Austin Badger, Comment, *Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples*, 26 AM. U. INT'L L. REV. 485, 510–12 (2011); Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 VA. L. REV. 793, 858–63 (2006).

8. Cowan, *supra* note 3, at 31–37; Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT'L L. 1, 32–36 (2009).

jurisdiction over tribal membership determinations.<sup>9</sup> I think that the time is ripe for the creation of an intertribal human rights regime that includes the formation of an intertribal treaty recognizing tribal human rights obligations and establishing an intertribal institution with the capacity to address human rights violations.

An intertribal human rights regime offers the best possible method of providing external accountability for tribal abuses of human rights. This approach has several advantages. It allows tribes to collectively respond to the need for greater external accountability on their own terms, and it allows human rights violations to be addressed without resorting to the diminishment of tribes' sovereign powers by the federal government. The development and application of substantive human rights norms by tribes also offer several benefits. They allow tribes to articulate and interpret universal human rights in light of their cultural, philosophical, spiritual, political, and social perspectives. Such a regime would also provide an institutional forum to allow tribes to discuss and respond to the actions of tribal governments that are accused of human rights violations. Furthermore, such a regime would also act as a central resource that could assist individual tribal governments with the task of adapting their domestic legal systems to ensure that human rights norms are internalized, promoted, and protected.

Part II of this Article describes tribal powers of self-government in order to explain how tribes are capable of being human rights offenders. Part III explains the reason for the existence of the human rights gap in Indian country. It explains why tribes are shielded from federal court review of most human rights abuses, why tribal legal systems do not provide effective enforcement of human rights, and why tribes are not directly subject to international human rights instruments. Part IV argues that the tribal sovereignty doctrine should be modified from its present understanding to one that accommodates external accountability for human rights violations. Finally, Part V moves from theory to action by calling for the development of an intertribal human rights treaty that will recognize human rights norms and establish an institutional mechanism for enforcement.

## II. TRIBES AS GOVERNMENTS WITH HUMAN RIGHTS IMPACTS

To understand why human rights are worthy of concern in Indian country, it first helps to understand the fundamental aspects of tribal sovereignty, sovereign immunity, and tribal powers of self-government.

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9. Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311 (2010).

Ultimately, this discussion will underscore the point that Indian tribes have significant powers over the lives of individuals, and these powers have the potential to be used, as well as abused, just as in any other governmental context.<sup>10</sup>

### *A. A Primer on Tribal Sovereignty*

Together with the federal government and the states, Indian tribes constitute one of three kinds of sovereigns in the United States.<sup>11</sup> Tribes, however, are unique in that their existence predates the arrival of European colonial governments. Therefore, they possess original and inherent rights of self-government that are not derived from the federal government and that have never been extinguished.<sup>12</sup> Although the Constitution refers to Indians twice, the Constitution does not define the rights of tribes.<sup>13</sup> For this reason, other sources of law, such as treaties, statutes, and federal common law, must be considered together with history to understand the status of tribes in the United States and the contours of their sovereignty.

From the earliest contact with Europeans until 1871, the Indian tribes of North America entered into hundreds of treaties with colonial governments, including treaties with the Dutch, British, French, and Spanish colonists, as well as with the young government of the United States.<sup>14</sup> These treaties recognized that tribes were distinct political communities capable of exercising the powers of self-government and

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10. Stephen Cornell et al., *The Concept of Governance and Its Implications for First Nations* 10 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev. Joint Occasional Papers on Native Affairs, Paper No. 2004-02, 2004), available at [http://www.jopna.net/pubs/jopna\\_2004-02\\_Governance.pdf](http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf) (claiming that all government power is subject to abuse and that societies need effective and culturally appropriate rules to protect society from the misuse of power).

11. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

12. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 324 (1978) (criminal jurisdiction over members).

13. DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 9 (2001).

14. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)) (stating, in a rider inserted into the Act, that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe" (emphasis omitted)).

capable of entering into relations with the United States.<sup>15</sup> The treaties entered into between tribes and the United States were binding obligations of the federal government ratified by the Senate.<sup>16</sup>

This treaty-making history forms the backdrop to the foundational cases of federal Indian law that are now called the “Marshall trilogy.”<sup>17</sup> Although criticized on numerous grounds,<sup>18</sup> many of the principles of federal Indian law articulated by Chief Justice Marshall continue to have vitality in the law today. These include the principle that Indian tribes are “domestic dependent nations”<sup>19</sup> that constitute “distinct, independent, political communities”<sup>20</sup> capable of exercising the powers of self-government. However, the opinions also recognized that tribes no longer possess full independence. Rather, the powers of the tribes were “necessarily diminished” because of their dependence on the superior power of the United States.<sup>21</sup> As an incident to their dependence, tribes were deemed to have lost the power to engage in foreign relations, and they lost the power to alienate their property to anyone other than the United States.<sup>22</sup> Furthermore, Congress is deemed to have the power to further diminish tribal powers, although this authority is tempered by the duty of the federal government to protect tribal interests pursuant to what is now termed the “trust relationship.”<sup>23</sup> Although tribes were deemed to have lost important powers of external sovereignty, they were also deemed to retain possession of internal rights of self-government.<sup>24</sup>

Since the Marshall trilogy, tribal sovereignty has been deemed to be diminished in additional ways. The Supreme Court has held that Congress possesses plenary power in Indian affairs,<sup>25</sup> meaning that it has full

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15. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556–57, 559 (1832).

16. *See id.* at 556. *But see* *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (affirming Congress’s power to unilaterally abrogate Indian treaties by congressional enactment).

17. Those cases are *Worcester*, 31 U.S. (6 Pet.) 515, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

18. Vine Deloria, Jr., *Indian Law and the Reach of History*, 4 J. CONTEMP. L. 1 (1978); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989).

19. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

20. *Worcester*, 31 U.S. (6 Pet.) at 559.

21. *Johnson*, 21 U.S. (8 Wheat.) at 574.

22. *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (citing *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 667–68 (1974); *Worcester*, 31 U.S. (6 Pet.) at 559; *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18; *Johnson*, 21 U.S. at 574; and *Fletcher v. Peck*, 10 U.S. 87, 147 (1810) (Johnson, J., concurring)).

23. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

24. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71–72 (1978) (tribal membership); *United States v. Quiver*, 241 U.S. 602, 603–04 (1916) (domestic relations); *Jones v. Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules).

25. *E.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

authority to legislate with respect to Indian tribes, even to the point of terminating federal recognition of tribes.<sup>26</sup> In more recent decades, the Supreme Court has adopted the common law doctrine of implicit divestiture.<sup>27</sup> Under this doctrine, the Court may hold that tribal governments no longer possess certain powers because they are inconsistent with their dependent status.<sup>28</sup> The implicit divestiture doctrine has been used to hold that tribes no longer possess criminal jurisdiction over non-Indians in Indian country or civil jurisdiction over non-Indians on non-Indian land unless they enter into consensual relations with Indian tribes or people or threaten the political integrity, economic security, health, or welfare of tribal communities.<sup>29</sup>

### B. Introduction to Tribal Sovereign Immunity

An essential aspect of tribal sovereignty is sovereign immunity. Just as in other non-Indian law contexts, sovereign immunity shields a tribe from suit unless it provides its consent.<sup>30</sup> In the case of Indian tribes, however, Congress is also deemed to have the power to waive or abrogate tribal immunity from suit.<sup>31</sup>

The powerful significance of the federal common law doctrine of tribal sovereign immunity is illustrated in *Santa Clara Pueblo v. Martinez*.<sup>32</sup> In that case, a female member of the Santa Clara Pueblo attempted to challenge a pueblo law that prohibited children whose fathers were not enrolled in the pueblo from becoming members themselves.<sup>33</sup> The pueblo law allowed the children of male members of the pueblo whose mothers were not members to enroll in the tribe.<sup>34</sup> The plaintiff, Julia Martinez, filed a lawsuit in federal court claiming that the pueblo's law discriminated against her on the basis of her sex and ancestry in violation of

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26. *Cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 408, 416 (1968) (assuming congressional authority to terminate the federal-tribal trust relationship).

27. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

28. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

29. *Montana v. United States*, 450 U.S. 544, 565–66 (1981); *Oliphant*, 435 U.S. at 212.

30. *E.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63–64 (1978).

31. *Kiowa Tribe of Okla.*, 523 U.S. at 759.

32. 436 U.S. 49.

33. *Id.* at 49.

34. *Id.*



the equal protection provision of the Indian Civil Rights Act (ICRA), passed by Congress in 1968.<sup>35</sup> The ICRA imposes Bill of Rights-like protections on Indian country, prohibiting tribal governments from violating certain civil and political rights, such as the right to freedom of speech, the right to due process, the right to equal protection of the law, and the right not to be deprived of one's property without compensation.<sup>36</sup> After the district court entertained the suit and held that the pueblo violated Martinez's civil rights and the court of appeals upheld that determination, the Supreme Court reversed.<sup>37</sup> In its analysis, the Court held that the pueblo had sovereign immunity, and Congress, in passing the ICRA, did not broadly waive tribal immunity for enforcement in the federal courts.<sup>38</sup> The Supreme Court held that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers,"<sup>39</sup> and "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"<sup>40</sup>

Since *Santa Clara Pueblo*, the tribal sovereign immunity doctrine has continued to be upheld by the federal courts. Although the Supreme Court stated that the doctrine "developed almost by accident,"<sup>41</sup> that the earliest precedents form "but a slender reed"<sup>42</sup> for supporting the doctrine, and that "[t]here are reasons to doubt the wisdom" of the rule,<sup>43</sup> the doctrine of tribal sovereign immunity is nevertheless entrenched in the federal common law, and the Supreme Court has declared that it will defer to Congress rather than repudiate or limit the doctrine itself.<sup>44</sup> With these reservations, the Court nevertheless held that sovereign immunity shielded the Kiowa Tribe from suit in a commercial suit brought pursuant to the tribe's default on a note that was signed on off-reservation lands.<sup>45</sup>

Today, Indian tribes view sovereign immunity as serving a critical function in promoting their exercise of self-government and their pursuit of economic development activities. Without sovereign immunity, lawsuits against tribal governments and their economic enterprises could place tribal assets at risk, including those that fund public safety, public infrastructure, health facilities, and services for the poor, elderly, and

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35. *Id.*; see Pub. L. No. 90-284, tit. II, §§ 201–203, 82 Stat. 77, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

36. 25 U.S.C. § 1302.

37. *Santa Clara Pueblo*, 436 U.S. at 53–55.

38. *Id.* at 58–59.

39. *Id.* at 58.

40. *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

41. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

42. *Id.* at 757.

43. *Id.* at 758.

44. *Id.* at 758–59.

45. *Id.* at 760.

children. In a form of compromise, many tribes agree to limited waivers of immunity in particular contexts.<sup>46</sup> Such waivers are common in specific contractual agreements.<sup>47</sup> Although rarer, some tribes have also enacted statutes that provide for limited waivers of immunity for certain classes of tort claims.<sup>48</sup> In other cases, tribal courts have issued opinions that hold that sovereign immunity is waived for the vindication of constitutional rights.<sup>49</sup> Tribal courts have also held that suits against government officials can proceed on *Ex Parte Young*-type theories.<sup>50</sup>

### C. Tribal Powers of Self-Government

Despite the fact that the federal common law holds that tribes are no longer “possessed of the full attributes of sovereignty,”<sup>51</sup> they continue to possess important aspects of self-government. In *United States v. Wheeler*, the Supreme Court held that Indian tribes “are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than private, voluntary

46. See Riley, *supra* note 2, at 1112; Edward Rubacha, *Construction Contracts with Indian Tribes or on Tribal Lands*, 26 CONSTRUCTION LAW., Winter 2006, at 12, 12-14.

47. See Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1370 (1993).

48. E.g., TULALIP TRIBES OF WASHINGTON CODES & REGULATIONS, ORDINANCE 122.1 (2004), available at <http://narf.org/nill/Codes/tulalipcode/tulalip122torts.htm> (establishing a limited waiver of sovereign immunity to provide a remedy for persons injured by negligent or wrongful acts or omissions of the tribe or its agents); 6 GRAND TRAVERSE BAND CODE § 104 (2009) (providing for a limited waiver of sovereign immunity for certain classes of injuries caused by the negligent acts or omissions of certain tribal officers or caused by the condition of Gaming Commission property); Tribal Torts Claims Act, Law and Order Code of the Fort McDowell Yavapai Community §§ 22-401 to -406 (2000).

49. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 480-83 (1998) (reviewing cases where tribal courts concluded that sovereign immunity was waived for ICRA claims); cf. Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 959 (2002) (“A number of 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. Accordingly, even for violations of ICRA, injured parties find themselves without a forum in which to adjudicate their claims against these tribes.” (footnote omitted)).

50. E.g., Puyallup Tribe, Inc. v. Dep’t of Game, 433 U.S. 165, 173 (1977) (“[T]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction.”).

51. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

organizations.”<sup>52</sup> The general rule of the common law is that tribes continue to possess their original powers of self-government, except for those “withdrawn by treaty or statute” or “by implication as a necessary result of their dependent status.”<sup>53</sup>

Tribal self-government powers that had been affirmed in earlier precedents were also enumerated in the original publication of Felix S. Cohen’s *Handbook of Federal Indian Law* in 1941. That text states that Indian self-government includes:

[T]he power of an Indian tribe to adopt and operate under a form of government of the Indians’ choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.<sup>54</sup>

In the decades since Cohen’s handbook was originally published, the Supreme Court has continued to affirm tribal powers of self-government over internal matters.<sup>55</sup>

#### *D. The Parameters of Tribal Jurisdiction*

A major issue that frequently surrounds the exercise of tribal powers of self-government is the extent and scope of tribal jurisdiction. Jurisdiction is at the core of tribal sovereignty because it is a precondition to the ability of a tribe to execute, apply, or enforce its laws. Tribes often struggle to defend their adjudicatory and regulatory jurisdiction against assertions of competing or concurrent jurisdiction by the states and by the federal government. The scope and boundaries of tribal jurisdiction are defined by statutes and federal common law, although the resulting body of law has a patchwork character that leaves many ambiguities and that creates fertile ground for frequent litigation.

The scope of tribal criminal jurisdiction has a modicum of legal certainty, so it serves as a useful starting point for discussing tribal jurisdiction. In general, Indian tribes do not possess criminal jurisdiction over crimes committed by non-Indians.<sup>56</sup> They do, however, possess

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52. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)) (internal quotation marks omitted).

53. *Id.*

54. FELIX S. COHEN, U.S. DEP’T OF THE INTERIOR, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1945).

55. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *Wheeler*, 435 U.S. at 322–23.

56. *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

jurisdiction over all crimes<sup>57</sup> committed by Indians if the crime occurs in Indian country.<sup>58</sup> Their jurisdiction is exclusive if the crime involved both an Indian perpetrator and Indian victim, and the crime is not one included in the Major Crimes Act.<sup>59</sup> If the crime involves an Indian perpetrator and a non-Indian victim, the tribe shares concurrent jurisdiction with the federal government.<sup>60</sup> Also, tribal criminal jurisdiction extends to nonmember Indians as well as members.<sup>61</sup> In cases where a non-Indian commits a crime in Indian country, exclusive federal jurisdiction exists if the victim is Indian.<sup>62</sup> If the perpetrator and the victim are both non-Indian, then the state and possibly the federal government have jurisdiction over the case.<sup>63</sup> This last scenario is the only instance where the state can exercise criminal jurisdiction in Indian country. In 2010, Congress enhanced tribal criminal jurisdiction by passing the Tribal Law

57. Although some have maintained that the federal government has exclusive jurisdiction over Major Crimes Act crimes committed by an Indian, the Ninth Circuit has held that tribes do share concurrent jurisdiction over such crimes. *See Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995).

58. *Wheeler*, 435 U.S. at 324. Jurisdictional questions in Indian law often turn on whether land satisfies the legal definition of “Indian country.” Indian country is defined in 18 U.S.C. § 1151. The statute defines Indian country as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

59. 18 U.S.C. § 1153 (2006). The Major Crimes Act vests the federal government with criminal jurisdiction over any Indian who commits any of the following major crimes:

[M]urder, manslaughter, kidnapping, maiming, a felony under chapter 109A [rape and related offenses], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . . , an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of [Title 18 of the U.S. Code] within the Indian country . . .

*Id.*

60. Concurrent federal criminal jurisdiction in such cases is established by the Major Crimes Act, 18 U.S.C. § 1153, the Indian Country Crimes Act, 18 U.S.C. § 1152 (2006), and the Assimilative Crimes Act, 18 U.S.C. § 13 (2006).

61. *United States v. Lara*, 541 U.S. 193, 210 (2004).

62. Indian Country Crimes Act, 18 U.S.C. § 1152; Assimilative Crimes Act, 18 U.S.C. § 13.

63. *United States v. McBratney*, 104 U.S. 621, 624 (1881).

and Order Act.<sup>64</sup> The Act increases tribal court sentencing authority from one to three years and elevates the ability to impose fines from \$5,000 to \$15,000 where certain constitutional protections are met, such as providing licensed, law-trained judges and providing appointment of counsel for indigent defendants.<sup>65</sup>

The scope of tribal civil jurisdiction is more ambiguous. In general, tribes possess civil jurisdiction over their members, but where nonmembers are concerned, the Supreme Court has adopted a general presumption against tribal jurisdiction unless certain exceptions apply.<sup>66</sup> Under the exceptions, tribes may regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.”<sup>67</sup> Tribes may also exercise civil jurisdiction over non-Indians when their conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>68</sup>

Adjudicatory authority is important for tribes because it defines the scope of tribal authority to resolve disputes affecting their lands and people. Tribal courts have jurisdiction over civil cases arising in Indian country involving a tribal member defendant, regardless of whether the plaintiff is Indian or non-Indian.<sup>69</sup> If the defendant is a nonmember, the tribal court generally lacks jurisdiction unless one of the *Montana* exceptions applies.<sup>70</sup> If a nonmember challenges the exercise of tribal adjudicatory jurisdiction, the challenge can create federal question jurisdiction to decide whether the tribal court is acting within the scope of its jurisdiction.<sup>71</sup> Such challenges, however, must first exhaust all available remedies in the tribal court to provide the tribal court with the first opportunity to evaluate the basis for the jurisdictional challenge.<sup>72</sup> In addition, the Supreme Court has extended the tribal court exhaustion

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64. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 123 Stat. 2261.

65. *Id.* § 234(a)(3) (codified at 25 U.S.C. § 1302(b) (Supp. IV 2011)).

66. *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

67. *Id.* at 565.

68. *Id.* at 566.

69. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

70. The Court found that the *Montana* exceptions were not satisfied in a series of cases, resulting in the determination that the tribal court in each case did not have adjudicatory jurisdiction. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (holding *Montana* exceptions inapplicable because the tribe lacked civil authority to regulate land sales); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (holding *Montana* exceptions inapplicable to civil rights suit arising out of a search executed in connection with an off-reservation crime); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (holding *Montana* exceptions inapplicable because authority over state highway accidents is not needed to preserve inherent tribal power).

71. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

72. *Id.* at 856–57.

requirement to cases where diversity jurisdiction creates concurrent federal and tribal court jurisdiction.<sup>73</sup> In such cases, the federal courts must stay their hand to give a tribal court a “full opportunity to determine its own jurisdiction.”<sup>74</sup>

### *E. Tribal Self-Governance in Practice*

In the Part above, I have described the legal meaning of tribal sovereignty and sovereign immunity, the powers of self-government that have been affirmed by court precedent, and the common law rules that define the scope of tribal jurisdiction. This discussion has so far described the de jure forms of tribal self-governance. What is missing, however, is a de facto description of self-governance; that is, what tribes actually do in the real world. The description that follows will provide a more grounded basis for my claim that tribal governments bear responsibility for human rights obligations.

For the 566 federally recognized Indian tribes in the United States,<sup>75</sup> tribal sovereignty is more than an abstract legal concept documented in the legal opinions of the Supreme Court. It is a force that brings power and legitimacy to tribal governments in their everyday dealings in the world.

Tribal governments today exist in a wide diversity of forms, and they govern vastly different communities within different territories. In some cases, government structures are similar to the United States’ three-branch system, while in others they are dramatically different. Some of the more unique examples include pueblos that use a theocratic form of government<sup>76</sup> or tribes who legislate and decide disputes using a vote of all of the adult members of the tribe in a general council format. The land mass and populations of tribes also vary dramatically. The Navajo Nation’s reservation is comparable in size to West Virginia or the

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73. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

74. *Id.* (quoting *Nat’l Farmers Union*, 471 U.S. at 857) (internal quotation marks omitted).

75. See Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 77 Fed. Reg. 47,868 (Aug. 10, 2012) (listing 566 tribes).

76. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 844–45 (2007) (describing the theocratic governments of the Hopi, Pueblos, Onondaga, and Meskwaki).

Republic of Ireland, and its population exceeds 175,000.<sup>77</sup> In contrast, the Redding Rancheria in California has a land base of thirty acres and a population of eighty-three people.<sup>78</sup> Overall, there are just over one million people living on reservations and trust lands in the United States, and approximately 544,000 of these residents identify as American Indian or Alaska Native alone or in combination with another race.<sup>79</sup> This also means that approximately 456,000 non-Indians live within the potential reach of the civil jurisdiction of Indian tribes.<sup>80</sup> The average population of these areas is approximately 6,000, and the median population is approximately 400; twenty-two reservations have a population greater than 10,000 people.<sup>81</sup>

### 1. Law Enforcement

Indian tribes are the frontline defenders of peace and safety for reservation communities. There are more than 200 police departments operated by tribal governments in Indian country.<sup>82</sup> Some police departments employ a small number of officers, while the Navajo Nation employs approximately 200 officers.<sup>83</sup> A 2002 census prepared by the Bureau of Justice Statistics reported that 84% of tribal justice systems in the United States identified themselves as handling misdemeanor cases, and seventy-one tribes reported that they operated their own detention facilities.<sup>84</sup> Approximately 207 tribes reported that they had agreements

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77. HARVARD PROJECT ON AM. INDIAN ECON. DEV., *THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 6 (2008) [hereinafter HARVARD PROJECT].

78. *See* Redding Rancheria v. Salazar, No. 11-1493 SC, 2012 WL 525484, at \*2 (N.D. Cal. Feb. 16, 2012); U.S. CENSUS BUREAU, AMERICAN INDIAN AND ALASKA NATIVE TRIBES FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES: 2000, at 6 tbl.1 (2002), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t18/index.html>.

79. U.S. CENSUS BUREAU, *supra* note 78. This figure includes the populations reported by the 2000 U.S. Census for all reservations, off-reservation trust lands, and rancherias. It does not include Alaska Native Village Statistical Areas, Tribal Designated Statistical Areas, or Oklahoma Tribal Statistical Areas, nor does it include other areas designated American Indian areas, such as Hawaii Homeland Areas, State Designated Tribal Statistical Areas, or state reservations.

80. *See id.*

81. *See The 2006–2010 ACS 5-Year American Indian & Alaskan Native Tables Summary File Technical Documentation*, U.S. CENSUS BUREAU (2012), [http://www2.census.gov/acs2010\\_SPT\\_AIAN/AmericanIndianAlaskaNative/ACS\\_AIAN\\_SF\\_Tech\\_Doc.pdf](http://www2.census.gov/acs2010_SPT_AIAN/AmericanIndianAlaskaNative/ACS_AIAN_SF_Tech_Doc.pdf) (used to generate population averages and medians in Excel document on file with author).

82. HARVARD PROJECT, *supra* note 77, at 264.

83. *Id.* at 265.

84. BUREAU OF JUSTICE STATISTICS, *CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY*, 2002, at iii, 43 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

to use local or county detention facilities for criminal defendants sentenced to jail.<sup>85</sup> These figures are likely increasing because the Bureau of Justice Assistance has provided twenty-six grants to tribes in recent years to build or renovate correctional facilities on their lands.<sup>86</sup>

## 2. Tribal Courts

Tribal courts handle a wide variety of civil as well as criminal matters. Since 2002, when the Bureau of Justice Statistics identified 188 tribes that operated a judicial system in the lower forty-eight states,<sup>87</sup> the number of tribal courts has grown substantially. Through federal financial assistance programs such as the Tribal Court Assistance Program,<sup>88</sup> Indian tribes have received approximately \$45 million to plan, create, or enhance their tribal courts.<sup>89</sup> More than 282 tribes have received these funds, indicating that the number of tribal courts in the United States may have grown by close to one-third within the last decade.<sup>90</sup>

Most tribal courts are courts of general jurisdiction, and as such, their dockets include a wide variety of cases. Aside from criminal matters, a typical tribal court is likely to hear cases on issues involving constitutional law, civil rights, election law, and voting law.<sup>91</sup> Tribal courts also review cases involving domestic relations, including family law and child welfare.<sup>92</sup> Because tribes are often large employers, tribal

85. *Id.* at iii (“About two-thirds [of the 344 tribes responding] relied on local or county agencies to provide a jail or detention facility.”).

86. *BJA Programs: Correctional Facilities on Tribal Lands Program*, BUREAU OF JUST. ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=55](https://www.bja.gov/ProgramDetails.aspx?Program_ID=55) (last visited Sept. 27, 2012). The grant program is authorized under the Violent Crime Control and Law Enforcement Act of 1994, Title II, Subtitle A, as amended at 42 U.S.C. § 13701 et seq. *Id.*

87. BUREAU OF JUSTICE STATISTICS, *supra* note 84, at iii; cf. Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 353 (2011) (“Two hundred and forty-eight American Indian tribes have formal tribal court systems or court systems based on the American form of courts.” (citing *Frequently Asked Questions*, U.S. DEP’T INTERIOR, BUREAU INDIAN AFF., <http://www.bia.gov/FAQs/index.htm> (last updated Sept. 27, 2012, 3:57 PM))).

88. 25 U.S.C. § 3681 (2006).

89. B.J. Jones, *Tribal Courts Assistance Program (TCAP)*, U.S. DEP’T JUST., [http://www.justice.gov/tribal/docs/fv\\_tjs/session\\_1/session1\\_presentations/Tribal\\_Courts.pdf](http://www.justice.gov/tribal/docs/fv_tjs/session_1/session1_presentations/Tribal_Courts.pdf) (last visited Sept. 27, 2012).

90. *Id.*

91. MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 143–382 (2011).

92. *Id.* at 437–73.



courts frequently adjudicate employment disputes.<sup>93</sup> Property law issues are also common in tribal court, including enforcement of probate law, housing law, and law governing leasing and allotments.<sup>94</sup> Furthermore, tribal courts also adjudicate a number of commercial disputes, leading them to apply contract and commercial law in many cases.<sup>95</sup>

The law applied in tribal courts comes from multiple sources. A tribal court may need to apply and interpret provisions of a tribal constitution, statute, or regulation. It may also apply the common law that has developed from prior court decisions. In many instances, tribal courts also decide cases by drawing upon the tribe's traditional customary law.<sup>96</sup> Although exact numbers are not available, a large number of tribal courts also apply rules of procedure and evidence that resemble procedural and evidentiary rules used in non-Indian jurisdictions in the United States.<sup>97</sup>

Tribes often struggle with competing pressures to develop their justice systems in ways that comport with their traditional practices versus Western adversarial models. For some, the solution has been to develop traditional courts or peacemaking systems in addition to adversarial

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93. *Id.* at 692–710.

94. *Id.* at 475–530.

95. *Id.* at 531–71.

96. *See, e.g.*, 4 BAY MILLS TRIBAL CODE § 401 (2004), available at <http://www.narf.org/nill/Codes/baymillscode/chapter04civilcases.htm> (stating that the tribal customs form part of the laws applied by the tribal court in civil actions); 2 BLACKFEET TRIBAL LAW & ORDER CODE § 1 (1999), available at [http://www.narf.org/nill/Codes/blackfeetcode/blkftcode2\\_civil.htm](http://www.narf.org/nill/Codes/blackfeetcode/blkftcode2_civil.htm) (same); 9 COUSHATTA TRIBE OF LOUISIANA JUDICIAL CODES § 1 (2004), available at <http://www.narf.org/nill/Codes/couscode/coutitle9.htm> (same); 1 SAN ILDEFONSO PUEBLO CODE § 1.3 (1996), available at <http://www.narf.org/nill/Codes/sicode/sanildcodetlgeneral.htm> (stating that the Code “shall be interpreted pursuant to the traditions and customs of the San Ildefonso Tribe”); *see also* Austin, *supra* note 87, at 353 (describing Navajo Nation courts’ preference for Navajo customary law); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 126, 130 (1995) (explaining the concept of customary law); Ezra Rosser, *Customary Law: The Way Things Were, Codified*, 8 TRIBAL L.J. 18, 18–19 (2008) (discussing tribal courts’ reliance on customary law). *See generally* RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009).

97. B.J. JONES, *ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM* 1 (2000), available at <http://www.icctc.org/Tribal%20Courts-final.pdf> (“[M]any Indian tribal courts mirror the justice systems that exist in states and the federal system and use very similar procedures and rules.”). But see Jones’s further discussion:

Tribal courts are operated by Indian tribes under laws and procedures that the Tribe has enacted or made one of their laws, which often differ from the laws and procedures in federal and state courts. . . .

. . . [Some] Indian tribal courts have attempted to bring back traditional dispute resolution techniques by adding these methods into their court systems. As a result, these courts and their procedures may differ dramatically from the procedures of a state or federal court.

*Id.*

courts.<sup>98</sup> This structure creates alternatives for the resolution of disputes that often improve the efficiency and effectiveness of dispute resolution. Although rare, some tribes elect not to adopt formal courts in favor of the exclusive use of traditional decisionmaking bodies.<sup>99</sup> In these cases, the forum for resolution of disputes may consist of a tribal council or a general council. A tribal council typically consists of the elected members of the tribe's lawmaking body, and a general council is usually made up of all of the adult members of the tribe.<sup>100</sup>

### 3. *Tribal Executive Functions*

Just as any sovereign, Indian tribes are engaged in the process of protecting and improving the welfare of their citizens as fully as possible. Tribal governments pursue these aims through the creation and support of a variety of institutions and through the execution of a wide variety of tribal laws and policies. Aside from the tribal justice systems discussed above, some of the most common institutions and agencies include those that deal with cultural preservation, child welfare, tax revenues, economic development, natural resources management, environmental protection, land use, education, housing, and health.

### 4. *Tribes as Owners of Commercial Enterprises and Employers*

The economies of Indian tribes have grown at a rapid rate in recent decades. Between 1990 and 2000, the real median household income

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98. See, e.g., 1 CHITIMACHA COMPREHENSIVE CODES OF JUSTICE § 102 (1990), available at [http://www.narf.org/nill/Codes/chitimachacode/CCCJ\\_Title\\_IA\\_Chitimacha\\_Peacemaker\\_Court.pdf](http://www.narf.org/nill/Codes/chitimachacode/CCCJ_Title_IA_Chitimacha_Peacemaker_Court.pdf) (establishing a peacemaker court); ONEIDA INDIAN NATION CODES & RULES, PEACEMAKING RULE 2 (2004), available at <http://www.narf.org/nill/Codes/oneidacode/peacemaking.htm> (establishing a peacemaker court); 8 PIT RIVER TRIBE OF CALIFORNIA CODE § 101 (2005), available at <http://www.narf.org/nill/Codes/pitrivercode/pitriverfamilych15youthreclam.htm> (establishing a peacemaker program); 4 STOCKBRIDGE-MUNSEE TRIBAL LAW PEACEMAKER ORDINANCE § 4.11, available at <http://www.narf.org/nill/Codes/stockmcode/4peacemaker.pdf> (establishing a peacemaker system for tribal community); see also JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 353 (2d ed. 2010) (providing an overview of peacemaking approaches developed by various tribes).

99. See, e.g., *Emmonak Juveniles and the Elders' Group*, ALASKA JUST. F., Summer 2001, at 1, available at [http://justice.uaa.alaska.edu/forum/18/2summer2001/a\\_emmonak.html](http://justice.uaa.alaska.edu/forum/18/2summer2001/a_emmonak.html) (describing a tribal program that allows juvenile nonfelony cases to be adjudicated through a body of elders).

100. See Reitman, *supra* note 7, at 813.

within Indian areas in the United States grew between 24% and 33%.<sup>101</sup> Despite these gains, however, American Indians continue to have the highest rates of poverty relative to other racial groups in the United States.<sup>102</sup> The growth of economic indicators in Indian country is likely connected to two important factors: economic diversification and tribal self-government supported by the federal government's policy of promoting self-determination. Tribes today pursue economic development in a variety of industries, including natural resources management, manufacturing, hotels and resorts, tourism, financial services, media outlets, and retail management and operation. The gaming industry has also exploded in Indian country. In 1995, overall revenues from Indian gaming were estimated to be \$5.4 billion.<sup>103</sup> By 2010, that figure had increased to \$26.5 billion.<sup>104</sup> The benefits of Indian gaming revenue are enjoyed only by a small percentage of tribes, however. More than two-thirds of gaming revenues in 2010 were earned by the top 17.6% of all Indian gaming facilities.<sup>105</sup> In that same year, 146 gaming operations, or more than one-third of the total, took in just 2% of all Indian gaming revenue.<sup>106</sup>

As Indian economies have grown, so have the size of tribal payrolls. Today, Indian tribes employ hundreds of thousands of Indians and non-Indians,<sup>107</sup> and many tribes are the largest employers in their regions.<sup>108</sup>

In summary, tribal governments possess broad powers of self-government over their internal affairs, and they engage in a variety of

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101. HARVARD PROJECT, *supra* note 77, at 115.

102. *Id.*

103. *Growth in Indian Gaming 1995–2004*, NAT'L INDIAN GAMING COMMISSION, <http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/growthinindiangaminggraph1995to2004.pdf> (last visited Sept. 27, 2012).

104. *Growth in Gaming Revenues 2000–2010*, NAT'L INDIAN GAMING COMMISSION, <http://www.nigc.gov/LinkClick.aspx?fileticket=ta0m2dzcB3k%3d&tabid=67> (last visited Sept. 27, 2012).

105. *NIGC Tribal Gaming Revenues 2006–2010*, NAT'L INDIAN GAMING COMMISSION, <http://www.nigc.gov/LinkClick.aspx?fileticket=1P8h79gnJOU%3d&tabid=67> (last visited Sept. 27, 2012).

106. *Id.*

107. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW: CASES AND MATERIALS* 503 (2008).

108. For example, the Confederated Tribes of the Colville Reservation employ more individuals than nearly any other employer in north-central Washington State. *The President's Fiscal Year 2012 Budget for Tribal Programs: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 110 (2011) (statement of Hon. Michael O. Finley, Chairman, Confederated Tribes of the Colville Reservation). The Saginaw Chippewa Tribe is also the largest employer in mid-Michigan. See Mark Ranzenberger, *Tribe Is Major Employer; More than 3,000 Workers Are Employed by Tribe in Isabella County*, MORNING SUN (Mar. 9, 2011, 12:15 PM), <http://www.themorningsun.com/article/20110309/FINANCE01/303099976/tribe-is-major-employer-more-than-3-000-workers-are-employed-by-tribe-in-isabella-county>. With 4,777 employees, the Oneida Indian Nation is also the largest employer in its two-county area in New York. ONEIDA INDIAN NATION, 2010 ANNUAL REPORT: INVESTING IN THE SEVENTH GENERATION 18 (2010).

activities that impact many aspects of peoples' lives. Through the decisions and actions of their courts, government agencies, officers, and enterprises, they exert powers over people that if abused have the potential to severely impact the physical, economic, social, and cultural conditions of peoples' lives. This potential is no different from the potential for abuse that lies in other governments. The difference, however, is that Indian tribes are not externally accountable in any broad sense for their human rights violations.

### *F. Tribes as Human Rights Violators*

As the above discussion illustrates, Indian tribes have the power to do tremendous good for their communities. However, just as with any other government, tribes are also capable of abusing their powers and inflicting harm on individuals. The harms alleged in Indian country are a breed apart from the extreme depredations that are often associated with human rights, such as torture, political executions, or forced disappearances. However, the human rights claims in Indian country nevertheless implicate a variety of civil, political, economic, social, and cultural rights that are protected in existing international human rights instruments. In recent years, several tribes have been publicly criticized for allegedly violating human rights. The actions complained of have included race and sex discrimination, failure to provide a fair and public hearing before an independent and impartial tribunal, infringement of freedom of expression and freedom of association, arbitrarily depriving individuals of their property rights, and creating barriers to the right of individuals to freely exercise their culture.<sup>109</sup>

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109. See, e.g., *Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Fla.*, 836 F. Supp. 2d 1296, 1300, 1308–09 (S.D. Fla. 2011) (dismissing on immunity grounds allegations that tribe wrongfully canceled nonmember lease); *Contour Spa at the Hard Rock, Inc., v. Seminole Tribe of Fla.*, No. 10 60483 CIV, 2011 WL 1303163 (S.D. Fla. Mar. 31, 2011) (similar facts), *aff'd*, No. 11-11997, 2012 WL 3740402 (11th Cir. Aug. 30, 2012); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1458 (10th Cir. 1989) (upholding summary judgment for tribe and tribal officials against plaintiffs denied participation in tribal elections based on race); Cowan, *supra* note 3, at 40–43 (discussing various human rights violations by Indian tribes); Jessica Jones, *Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State*, 22 NAT'L BLACK L.J. 1, 50 (2009) (discussing the Cherokee Nation's alleged race discrimination against the Cherokee Freedmen); Rebecca J. Tallent & Rubell S. Dingman, *Cherokee Independent Press Act of 2000*, 35 J. COMM. INQUIRY 252 (2011), available at <http://jci.sagepub.com/content/35/3/252.full.pdf+html> (discussing censorship of tribal newspapers); Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM.

In response to these charges of human rights abuses, criticism has mounted against tribes from several sources. In some cases, federal judges have openly expressed concern that tribal immunity from federal court review leaves tribes free to engage in acts that are “deeply troubling on the level of fundamental substantive justice.”<sup>110</sup> In other cases, legislators have responded to complaints of human rights abuses by introducing legislation that would waive sovereign immunity, restrict tribal powers of self-government, strip tribes of federal financial support, or even terminate tribes.<sup>111</sup> In still other cases, individuals have also formed organizations that seek to publicize tribal abuse of power through public education, rallies, and protests.<sup>112</sup>

The allegations of tribal abuse of individual rights and public criticism against tribes have received increasing attention from media outlets, public commentators, and academics alike. Many have criticized the harm inflicted on individuals by tribes and have questioned whether tribal sovereignty’s legal affirmation was achieved on the backs of women and other oppressed individuals within tribal communities.<sup>113</sup> At the same time, however, perhaps an even larger contingent of commentators has remained firm in its commitment to upholding tribal sovereignty against any infringement, even if it means shielding tribal governments from external review when they are accused of human rights violations.<sup>114</sup>

Also notable within this mix is the silence of Indian country’s tribal government leaders that surrounds the accusations of human rights abuses launched against their peers. In Indian country, the right to exercise self-government without outside interference in connection with internal domestic affairs is held sacrosanct. The flip side of this core legal principle, however, is that tribal leaders within Indian country are loath to criticize the actions of other tribes with respect to their own internal

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MITCHELL L. REV. 392 (2010) (surveying tribal court sex discrimination cases); cf. Raphael Cohen-Almagor, *Liberalism and the Limits of Multiculturalism*, 36 J. CANADIAN STUD. 80 (2001) (alleging cultural discrimination by American pueblos in the Southwest).

110. Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005) (membership case).

111. See Edward D. Gehres III, Note, *Visions of the Ghost Dance: Native American Empowerment and the Neo-Colonial Impulse*, 17 J.L. & POL. 135, 150 (2001).

112. Samantha Tipler, *Protesters Invade Tribal Government*, OR. PUB. BROADCASTING (Oct. 26, 2011, 3:29 PM), [http://www.opb.org/news/article/protesters\\_invalidate\\_tribal\\_government/](http://www.opb.org/news/article/protesters_invalidate_tribal_government/) (protesting education cuts and tribal council member severance packages); see also ORIGINAL PECHANGA’S BLOG, <http://www.originalpechanga.com/> (last visited Sept. 27, 2012) (blog of disenrolled Pechanga members protesting alleged abuses of Pechanga tribe).

113. E.g., CATHARINE A. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987).

114. See, e.g., Riley, *supra* note 76 (opposing federal intervention into internal tribal affairs).

affairs. Such criticism is considered an affront to another tribe's sovereignty and disrespectful of its right to maintain its distinctive cultural traditions.

### III. THE HUMAN RIGHTS ENFORCEMENT GAP IN INDIAN COUNTRY

In the Part above, I have described the doctrines of tribal sovereignty and sovereign immunity, tribal powers of self-government, and the ways in which tribes execute that power in the real world. I then described how tribal government actions have become the object of a growing number of human rights complaints. In this Part, I turn to describing how federal Indian law, tribal law, and international law have created a deadlock in which victims alleging human rights complaints are largely turned away from tribal courts and left without any form of effective recourse under tribal, federal, or international law for their injuries. In essence, this widespread lack of access to any forum for review of these complaints constitutes a significant gap in human rights enforcement in Indian country.

#### *A. Federal Law*

Federal law contributes to the human rights deadlock by denying access to federal court review for most human rights complaints that arise in Indian country. In a Ninth Circuit case called *Lewis v. Norton*, the presiding federal judge summed it up succinctly.<sup>115</sup> He called it the "double jurisdictional whammy" of sovereign immunity and exclusive tribal jurisdiction over internal matters, including membership disputes.<sup>116</sup> Essentially, individuals who allege human rights violations by tribal governments and who present claims that establish federal question jurisdiction are usually dismissed from federal court once the defendant tribe raises the shield of sovereign immunity and exclusive rights to determine internal matters.

Sovereign immunity, as I discussed in Part II, shields a tribe from suit unless Congress or the tribe waives the immunity. For a tribal waiver to be effective, it must be clear and unequivocal.<sup>117</sup> Congress has only rarely waived tribal sovereign immunity to allow anyone other than the federal government to sue a tribe. The ICRA, which restricts tribes from

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115. 424 F.3d at 960.

116. *Id.*

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

violating many of the individual rights represented in the Bill of Rights and which constitutes Congress's principal foray into recognizing the human rights obligations of Indian tribes, does not waive tribal sovereign immunity to allow individuals to sue in federal court to enforce the Act.<sup>118</sup>

The second part of the jurisdictional double whammy is the tribal right to exclusive jurisdiction over internal matters of self-government. This principle stems from *Williams v. Lee*, in which the Supreme Court held that the Navajo Nation had exclusive jurisdiction over an action to recover on a debt brought by a non-Indian storeowner against a tribal member.<sup>119</sup> The Court held that the tribal court had exclusive jurisdiction, reasoning that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."<sup>120</sup>

Of course, there are important exceptions to the jurisdictional double whammy. Under the ICRA, habeas petitions may be reviewed by the federal courts.<sup>121</sup> In some cases, a plaintiff can obtain access to federal court review for allegations that involve human rights if the individual sues a tribal official for declaratory relief under an *Ex Parte Young*-type approach.<sup>122</sup> Significantly, however, this strategy is not available where individuals sue to enforce the ICRA's civil and political rights because of the statute's explicit limitation of federal court review to habeas relief. In still other cases, individuals can obtain access to federal court review for the vindication of their rights if the violation is somehow enforced by or otherwise involves federal action. Under these circumstances, a claimant can use the Administrative Procedure Act (APA) or other applicable statute to sue the federal government.<sup>123</sup> Many litigants may view this avenue as a weak proxy for suing the tribe directly as a defendant, but it can nevertheless provide a sense of vindication and even trigger federal action whose repercussions may motivate the tribe to modify its actions. However, these exceptions are available in a limited minority of cases. Overall, the jurisdictional double whammy remains a significant bar to federal court review for human rights abuses committed by tribes.

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118. *Id.* at 58–59.

119. *Williams v. Lee*, 358 U.S. 217, 217–18, 222–23 (1959).

120. *Id.* at 223.

121. 25 U.S.C. § 1303 (2006).

122. *See supra* note 50 and accompanying text.

123. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 928–29 (9th Cir. 2008); *Vann v. Salazar*, No. 03-1711 (HHK), 2011 WL 4953030, at \*7 (D.D.C. Sept. 30, 2011).

*B. Tribal Law*

In *Santa Clara Pueblo v. Martinez*, the seminal case interpreting the ICRA's individual rights protections, the Supreme Court explained that civil rights vindication must occur within tribal courts.<sup>124</sup> As noted above, federal common law also recognizes that tribes have exclusive jurisdiction over their internal affairs including, for example, disputes over membership, probate law, and domestic relations.

There are many powerful reasons why tribal courts should be the frontline and principal forums for the enforcement of civil—and human—rights violations in Indian country. Chief among them are the need to respect the exercise of tribal sovereignty and the ability of tribes to apply and enforce their own law and customs. Related to these is the pragmatic recognition that tribal courts are the most effective forums for the resolution of disputes because they are situated in proximity to the parties and the place where the dispute is likely to have arisen. This proximity puts the tribal court in the best position for understanding the facts of the dispute and for ensuring accessibility for the parties and their witnesses. Finally, tribal court resolution of disputes also avoids several costs associated with review in federal courts. Federal courts are more likely to bungle their resolution of tribal law questions and are less accessible to the parties, and their decisions would constitute a significant broadening of the reach of colonialism into Indian affairs.

Despite these factors, however, individuals with complaints involving human rights issues are frequently denied access to tribal courts. Tribal governments cannot be sued in tribal court unless they waive their sovereign immunity or their immunity is waived by Congress.<sup>125</sup> Some tribes have implemented limited waivers under tribal law for certain categories of claims,<sup>126</sup> but such waivers continue to be the exception rather than the rule. In most cases, tribes have declined to waive their immunity for these

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

125. See *supra* Part II.B.

126. See, e.g., CHOCTAW TORTS CLAIM ACT § 25-1-3 (2011), available at [http://www.choctaw.org/government/tribal\\_code/Title%2025%20-%20Choctaw%20Torts%20Claim%20Act.pdf](http://www.choctaw.org/government/tribal_code/Title%2025%20-%20Choctaw%20Torts%20Claim%20Act.pdf); PUYALLUP TRIBAL TORT CLAIMS ACT § 4.12.010 (2002), available at <http://www.codepublishing.com/WA/puyalluptribe/html/PuyallupTribe04/PuyallupTribe0412.html>; cf. MODEL TRIBAL TORT CLAIMS ACT FOR NON-GAMING RELATED TORTS § 4 (2008), available at <http://thorpe.ou.edu/TribalUCC/MODEL%20TRIBAL%20TORT%20CLAIMS%20ACT%20FOR%20NONGAMING%20RELATED.pdf>; see also Fogleman, *supra* note 47, at 1365–74.



suits, and Congress has not exercised its prerogative.<sup>127</sup> This failure of tribes to open themselves to lawsuits involving fundamental individual rights sits in stark contrast to waivers that allow suits to proceed against the federal and state governments. Although the waivers are limited and there continue to be important rights that lack any available remedy, there are significantly greater opportunities to obtain judicial redress for federal and state violations of individual rights than there are in the tribal context.

### C. *International Law*

Individuals who find that their cases are dismissed from tribal and federal courts also lack access to international forums for human rights enforcement. Although tribes, like all organs of society, are charged with striving to secure the universal and effective recognition and observance of human rights for all individuals, they do not shoulder enforceable obligations under the major human rights treaties. Tribes, which do not possess the requisite elements of statehood under international law, are not eligible for membership in the United Nations or the Organization of American States.<sup>128</sup> As public entities that perform many of the same functions as states but that nevertheless lack a claim to statehood under international law, they are also excluded from treatment as subjects of international treaties, including the major human rights treaties and the protocols that implement them.<sup>129</sup> As a result, claims against tribal governments cannot be brought before the international bodies that are charged with monitoring and implementing human rights treaties.

Perhaps tribal violations of human rights should be attributed to the United States and the United States should be held accountable under the state responsibility doctrine of international law. Or perhaps the United States should be held accountable in international forums for being complicit in tribal human rights abuses. Yet another approach that might pave the way for international accountability for tribal human rights violations is the developing theory that nonstate entities are accountable

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127. See Fogleman, *supra* note 47, at 1355.

128. See, e.g., Jeff Cornstassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse*, 33 *ALTERNATIVES: GLOBAL, LOC., POL.* 105, 109 (2008) (discussing failed application by Six Nations of Haudenosaunee/Iroquois to United Nations).

129. See Cowan, *supra* note 3, at 27; see also Kristoffer P. Kiefer, *Exercising Their Rights: Native American Nations of the United States Enhancing Political Sovereignty Through Ratification of the Rome Statute*, 32 *SYRACUSE J. INT'L L. & COM.* 345, 357 (2005).

for human rights obligations.<sup>130</sup> These topics merit further exploration, but they are beyond the scope of this Article because they either focus on state liability rather than tribal or they involve theories that have little proven application to Indian tribes and little hope for practical enforcement.

#### IV. REFORMING TRIBAL SOVEREIGNTY

In Part II, I discussed the potential for tribal abuse of human rights. In Part III, I described how federal law, tribal law, and international law have created a deadlock that stymies the enforcement of human rights claims in Indian country. In this Part, I shift from describing the human rights enforcement problem in Indian country to arguing that tribal sovereignty is a judicially created construct whose development has been contingent on the history of tribal-federal relations and that our contemporary understanding of it should include the recognition that tribes are externally accountable for the treatment of individuals.

Within Indian country, tribal sovereignty is a publicly revered concept that plays many roles in Indian communities. It is a bedrock principle that marks the federal government's recognition of native peoples' right to continue to govern themselves and provide for the well-being of their communities.<sup>131</sup> It is both a wellspring of authority and control and a shield against external interference. It connects tribal communities to their history and their ancestors because it represents an inherent self-governing authority that has been passed from generation to generation, from time immemorial to present-day tribal governments. It also connects native people to their futures because the exercise of tribal sovereignty allows tribes to implement their vision for the generations that follow them.

Tribal sovereignty has a social and cultural meaning for native people that transcends its political and legal definitions. It has been described as carrying "an aura of dignity as well as complexity,"<sup>132</sup> with the ability to stir powerful emotions for native people. For many, tribal sovereignty is linked to the very lifeblood of survival for native peoples and their

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130. E.g., Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56 (1999).

131. *Williams v. Lee*, 358 U.S. 217, 220–22 (1959).

132. CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 248 (2005).

cultures. For others, tribal sovereignty has a spiritual dimension that is characterized by a “sacred trust” of the federal government.<sup>133</sup>

Like freedom or equality, tribal sovereignty is a concept that is invoked widely by native people and that is subject to multiple and contested meanings. In academia and in popular culture, tribal sovereignty has been used to refer to control over resources, cultural integrity, and the indomitable ability of native peoples to resist centuries of colonial actions aimed at their extermination, removal, and forced assimilation.<sup>134</sup> Tribal sovereignty is also viewed as the basis for claims to nationhood.<sup>135</sup> The term has gained ascendancy in the rhetoric of tribal rights on par with sovereignty’s cousin, self-determination. With regard to self-determination, Vine Deloria Jr. once lamented that “[t]oday the term is used by everyone to indicate almost every idea they want to promote, and really has no meaning.”<sup>136</sup> Of tribal sovereignty, Deloria similarly commented that “the definition of *sovereignty* covers a multitude of sins, having lost its political moorings, and now is adrift on the currents of individual fancy.”<sup>137</sup> For Deloria, native intellectuals should recall that contemporary claims to tribal sovereignty experienced their resurgence from the simple act of tribal members who exercised their treaty fishing rights using the slogan, “if you act like you’re a sovereign, eventually you will be treated as one.”<sup>138</sup> For these individuals, tribal sovereignty is linked to the political act of enforcing the promises made by the United States in Indian treaties.

In this discussion, I explore the complexity of tribal sovereignty’s meaning. I start by focusing on the pronouncements of the Supreme Court. I then shift to recognize the indigenous perspectives on sovereignty as well, and I recognize that the federal common law’s distillation of the doctrine is situated within a particular historical and political context.

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133. Wilma Mankiller, “*Tribal Sovereignty Is a Sacred Trust*”: An Open Letter to the Conference, 23 AM. INDIAN L. REV. 479, 479 (1998–1999).

134. E.g., 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; Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75 (2003); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191 (2001); Pommersheim, *supra* note 1.

135. See Mike McBride III, *Oklahoma’s Civil-Adjudicatory Jurisdiction over Indian Activities in Indian Country: A Critical Commentary on Lewis v. Sac & Fox Tribe Housing Authority*, 19 OKLA. CITY U. L. REV. 81, 95 (1994); Steven Paul McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139 (1988–1989).

136. Vine Deloria, Jr., *Intellectual Self-Determination and Sovereignty: Looking at the Windmills in Our Minds*, 13 WICAZO SA REV. 25, 26 (1998).

137. *Id.* at 26–27.

138. *Id.* at 26 (internal quotation marks omitted).

Furthermore, I acknowledge that the seeds of federal law's tribal sovereignty doctrine were sowed in European philosophical writings dating back to the era of feudalism. In this discussion, I intend to come to grips with each of these critiques of tribal sovereignty. My ultimate aim is to deconstruct the doctrine of tribal sovereignty to reveal the political and historical forces at work and to reveal how the contemporary understanding of tribal sovereignty can and should evolve to accommodate modern concerns about government accountability and the enforcement of fundamental human rights.

#### *A. The Supreme Court's Tribal Sovereignty Doctrine*

I begin with tribal sovereignty's contemporary meaning in the context of federal law. Within federal law, tribal sovereignty is a multilayered concept that emerges from the amalgamation of treaties, brief references to Indians in the U.S. Constitution, the federal common law, and acts of Congress. No single source of law provides a definitive statement on the meaning of tribal sovereignty. Furthermore, federal law's interpretation of tribal sovereignty is ultimately based on the subjective perspective of the United States as the colonizing nation.

The constitutive documents that give shape to federal law's treatment of Indians are the hundreds of treaties that tribes entered into with the earliest colonial governments and, eventually, the federal government.<sup>139</sup> These treaties, originally serving as agreements for peace and commerce and ultimately serving as legal tools for the cession of Indian lands, recognized native peoples as having their own separate, distinct polities with their own rights of self-governance over their people and territories, capable of engaging in nation-to-nation dealings with the United States.<sup>140</sup> In *Worcester v. Georgia*, Chief Justice Marshall stated:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular

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139. Overall, between 1778 and 1871 the Senate ratified 372 treaties entered into between the federal government and Indian tribes. ARLENE HIRSCHFELDER & MARTHA KREIPE DE MONTANO, *THE NATIVE AMERICAN ALMANAC: A PORTRAIT OF NATIVE AMERICA TODAY* 53 (1993).

140. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *HARV. HUM. RTS. J.* 57, 60–63 (1999).

region claimed. . . . The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.<sup>141</sup>

In *Cherokee Nation v. Georgia*, the Cherokee Nation sought to invoke the Supreme Court’s Article III, Section 2 original jurisdiction over controversies between a state and a foreign state.<sup>142</sup> The Cherokee Nation argued that it constituted a foreign state.<sup>143</sup> The Supreme Court ultimately held that the Constitution’s reference to Indian tribes as distinct from foreign nations within the Commerce Clause indicated that the Cherokees were not a foreign state.<sup>144</sup> In contrast, the Court held that the Cherokee Nation formed a “domestic dependent nation[.]”<sup>145</sup> The Court therefore created a sui generis category to define the political status of Indians as retaining rights of inherent self-government yet still dependent upon and subordinate to the ultimate power of the federal government. The language of the opinion recognizes the Cherokee Nation as “a distinct political society, separated from others, capable of managing its own affairs and governing itself,”<sup>146</sup> yet also “under the sovereignty and dominion of the United States,”<sup>147</sup> and in a “state of pupilage” with a relationship to the United States resembling that of a “ward to his guardian.”<sup>148</sup> The Court’s use of the term “domestic dependent nation” ultimately became an entrenched part of the federal common law’s view of Indian tribes, extending this interpretation of tribal powers to all other native peoples within the boundaries of the United States, even those that had never made any concessions to the federal government through treaty negotiation or otherwise.<sup>149</sup>

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141. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832).

142. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

143. *Id.*

144. *Id.* at 19 (discussing U.S. CONST. art. I, § 8, cl. 3, which empowers Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

145. *Id.* at 17.

146. *Id.* at 16.

147. *Id.* at 17.

148. *Id.*

149. *E.g.*, *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *see also* Joseph William Singer, *Double Bind: Indian Nations v. the Supreme Court*, 119 HARV. L. REV. F. 1, 4–7 (2005) (explaining how Alaska Natives lost their property rights despite never executing treaties divesting themselves of property).

Other decisions of the Court continued to affirm a limited view of tribal sovereignty that was subject to the ultimate authority of the United States. In *Johnson v. M'Intosh*, Chief Justice Marshall held that upon discovery, the indigenous people of North America lost their full property rights and were reduced to holding a mere possessory right with the additional limitation that they could only alienate their interests in the land directly to the discovering nation.<sup>150</sup> In later opinions, the Supreme Court also cemented federal authority over Indian people by holding that the Indians' "very weakness and helplessness" gave rise to a congressional "duty of protection" and a concomitant congressional power to take actions to satisfy that duty.<sup>151</sup> This congressional power, coined congressional "plenary power" in *Lone Wolf v. Hitchcock*, was interpreted broadly to include "authority over the tribal relations of the Indians" and "full administrative power . . . over Indian tribal property."<sup>152</sup> Although theoretically constrained by the trust responsibility, this plenary power can be used to unilaterally abrogate Indian treaties<sup>153</sup> and even terminate the federal recognition of Indian tribes.<sup>154</sup>

Since these earliest cases on the nature of tribal sovereignty, the Supreme Court has continued to recognize that Indian tribes possess a unique form of sovereignty over their polities. In *United States v. Wheeler*, the Supreme Court in 1978 stated its commitment to the core principles articulated in *Worcester v. Georgia*.<sup>155</sup> It stated:

The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

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150. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587–89 (1823).

151. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

152. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 568 (1903).

153. *Id.* at 566.

154. *Menominee Tribe of Indians v. United States*, 607 F.2d 1335, 1341–43 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980).

155. *United States v. Wheeler*, 435 U.S. 313 (1978). In *Worcester v. Georgia*, the Court's holding included that the laws of Georgia could have no force within the Cherokee Nation. 31 U.S. (6 Pet.) 515, 561 (1832). This portion of the opinion is not incorporated within the federal common law because the states do exercise some forms of limited jurisdiction within Indian country today. See, e.g., 18 U.S.C. § 1162 (2006 & Supp. 2010); *United States v. McBratney*, 104 U.S. 621, 624 (1881).

Indian tribes are, of course, no longer “possessed of the full attributes of sovereignty.” Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than ‘private, voluntary organizations.’” The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.<sup>156</sup>

In today’s legal environment, the ground is slowly shifting toward increased implicit diminishment of tribal sovereignty where tribes assert jurisdiction over nonmembers. Several Supreme Court cases in the last thirty years have used the doctrine of implicit divestiture to find that Indian tribes have lost aspects of their sovereignty that have never been explicitly conceded in treaties or by acts of Congress. These decisions have primarily limited tribal sovereignty where tribes have sought to exercise jurisdiction over non-Indians. For example, the Supreme Court has held that tribes have no criminal jurisdiction over non-Indians<sup>157</sup> and that significant limitations apply to the assertion of civil adjudicatory jurisdiction over nonmembers.<sup>158</sup>

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156. *Wheeler*, 435 U.S. at 322–23 (citations omitted) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945); *Kagama*, 118 U.S. at 381; and *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

157. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

158. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008) (holding that a tribal court lacked civil jurisdiction over a discrimination claim involving the sale of fee land on the reservation brought by a tribal couple against a non-Indian bank); *Nevada v. Hicks*, 533 U.S. 353, 364–65 (2001) (holding that a tribal court lacked civil jurisdiction over a claim brought by a tribal member against state officers who were enforcing a search warrant on Indian land); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (holding that a tribal court lacked civil jurisdiction over a personal injury action brought by non-Indians who were injured in a car accident involving a truck operated by a non-Indian company on a right-of-way across the reservation); *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding that tribes generally do not have civil jurisdiction over nonmembers unless they have entered into a consensual relationship with the nonmember or the nonmember’s conduct threatens the political integrity, economic security, health, or welfare of the tribe).

*B. Contextualizing the Tribal Sovereignty Doctrine  
in History and Politics*

As the discussion above illustrates, federal law provides an incomplete statement of the scope and substance of tribal sovereignty. Our doctrinal understanding of tribal sovereignty arises from a piecemeal process of amalgamating diverse sources of legal authority. The end result is that significant gaps remain, leaving lawyers and tribes with persistent ambiguity over such fundamental issues as the limits of Congress's plenary power over Indian affairs, the extent of tribal jurisdiction over non-Indians, and the degree to which states can exercise jurisdiction within Indian country.<sup>159</sup> A major reason for this incomplete iteration of tribal sovereignty is the ad hoc approach to Indian affairs that characterizes many of the relevant sources of law. Unlike areas of law that are defined by statutes that attempt to provide a comprehensive treatment of a subject area,<sup>160</sup> the treaties, statutes, and judicial opinions that touch upon tribal sovereignty's substance and scope were often developed in a piecemeal fashion, implicating the rights of individual tribes or small groups of tribes at a time. In the case of judicial decisionmaking, the interpretation of the content and scope of tribal sovereignty and freedom from external control takes place within particular historic, political, and legal contexts involving matters pertaining to individual tribes or Indians. A single case may require the interpretation of a specific treaty and a series of congressional enactments that apply only to that particular tribe. It may also involve questions of tribal authority that involve a tribe with a unique legal system or governmental institutions, or a tribe whose landholdings, population demographics, or resources present unique factors. This deeply contextualized process of forming Indian law challenges our ability to draw logical conclusions about the precedential value of Indian law decisions for other tribes and contexts. As Charles Wilkinson observed,

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159. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 11 (1987).

160. *See, e.g.*, National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)); U.C.C. (2005).



Federal Indian law presents uniquely formidable obstacles to the development of consistent and unitary legal doctrine. There are a number of scattering forces that push Indian law away from any center. Taken together, these splintering influences have the potential of creating a body of law almost without precedent, of reducing each dispute to the particular complex of circumstances at issue—the tribe, its treaty or enabling statute, the races of the parties, the tract-book location of the land where the case arose, the narrow tribal or state power involved, and other factors.<sup>161</sup>

The ad hoc and deeply contextualized process of forming Indian law constrains our modern understanding of tribal sovereignty. The piecemeal approach to developing doctrine elevates the importance of the Supreme Court as the branch of government most involved in finding and articulating persistent norms. However, the Supreme Court's decisionmaking is fundamentally backward looking, looking to specific moments in history and interpreting the law based on a narrow historical context. Our modern understanding of tribal sovereignty, due to the fact that it is largely the product of judicial interpretations of the law, is therefore fundamentally retrospective and chained to the history of federal-tribal and state-tribal relations from which Indian law cases arose.

In *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, Wilkinson masterfully synthesizes the Supreme Court's jurisprudence in Indian law from the earliest years of the nation's history to the establishment of the self-determination era and concludes that a major task of Indian law jurisprudence is reconciling two historical trends within the history of federal Indian policy.<sup>162</sup> These two trends, one promoting a measured separatism for Indian tribes and one promoting the opening up of Indian lands for non-Indian settlement, provide the historical backdrop for Indian law decisionmaking. As the historical and political context of Indian law cases, they also constrain the horizon of federal Indian law to meanings that relate back to the implications that flow from these two competing motives of Congress.

From the beginning of U.S. history until the mid- to late-nineteenth century, Congress's policy toward Indians was aimed at providing a "measured separatism" for Indian tribes.<sup>163</sup> The treaties and acts of Congress relating to Indians during this time focused on setting aside reservations for Indians where they could live without external interference, free to continue their inherent practice of governing themselves and free from the threat of encroachment from non-Indians and their state and local governments.<sup>164</sup> The "measured" nature of this separatism reflects

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161. WILKINSON, *supra* note 159, at 3–4.

162. *See generally id.*

163. *Id.* at 14–19.

164. *Id.* at 16.

the fact that the promise of separatism was not absolute; rather, it came with federal supervision and the provision of goods and services.<sup>165</sup> This aid was provided to the Indians based on Congress's assertion of itself as a guardian to Indian peoples perceived as dependent and needing the protection of the federal government.<sup>166</sup>

This measured separatism referred to by Wilkinson is reflected in treaty language that commonly promised Indians the "absolute and undisturbed use and occupation" of reservation lands and that frequently promised Indians that "no persons except those herein so authorized . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."<sup>167</sup> The federal supervision and aid that treaties afforded Indians is exemplified by the 1852 Treaty of Santa Fe, which promised "donations, presents, and implements" in addition to other "liberal and humane measures" deemed proper by the government.<sup>168</sup>

The measured separatism policy of the United States has influenced the development of a line of cases within Indian law that views tribal sovereignty in positive terms that recognize tribal self-governance capacities and that protect tribes from external interference. The cases that interpret tribal sovereignty in light of the era of Congress's measured separatism have held that tribes are "distinct, independent political communities" with inherent rights of self-government that were not lost because of their dependent status and who have the right to exist apart from non-Indians and beyond the reach of state and local laws.<sup>169</sup> This line of cases has also affirmed that tribes are not subject to the restrictions imposed by the Bill of Rights because they exercise a sovereignty that is independent and not derived from the federal government.<sup>170</sup> Furthermore, this line of cases recognizes that tribes are capable of resolving their own disputes in accordance with their traditional ways and that they are not subject to federal criminal jurisdiction absent a clear statement of Congress's intent.<sup>171</sup>

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165. *Id.* at 14–15.

166. *Id.*

167. *Id.* at 16 (quoting Treaty with the Kiowas and Comanches, Oct. 21, 1867, 15 Stat. 581, 582; Treaty of Fort Sumner with the Navajo Indians, June 1, 1868, 15 Stat. 667, 668; and Treaty of Fort Laramie with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 636) (internal quotation marks omitted).

168. *Id.* at 15 (quoting Treaty with the Apaches, July 1, 1852, 10 Stat. 979, 980).

169. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–62 (1832).

170. *Talton v. Mayes*, 163 U.S. 376, 384–85 (1896).

171. *Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883).

In contrast to the measured separatism era of Indian policy, Wilkinson describes the late nineteenth century as a period when Congress opened up Indian reservations, imposing allotment on communally held Indian lands, easing up statutory restrictions on alienation over time, conferring citizenship on “competent,” civilized Indians, and selling off surplus lands to non-Indian settlers.<sup>172</sup> During this era of federal Indian policy, Indian tribes were economically and culturally debilitated, leading to a period of dormancy in their exercise of tribal sovereign powers.<sup>173</sup> Concurrent with this silencing of Indian self-rule, Congress facilitated the non-Indian settlement of Indian lands, creating an implied expectation among settler society that it was subject to the uniform application of state jurisdiction rather than any form of tribal rule or federal preemption of state law.<sup>174</sup>

The history of opening up Indian lands to non-Indian settlement and the implementation of policies designed to assimilate and acculturate Indian tribes gave rise to a line of Indian law cases that failed to acknowledge the ability of tribes to effectively govern themselves.<sup>175</sup> This line of cases also emphasized Congress’s overriding plenary power in Indian affairs,<sup>176</sup> and it found space to accommodate the incursion of limited state jurisdiction within Indian country.<sup>177</sup>

The two lines of cases described above—that interpreting the effect of Congress’s policy of establishing a measured separatism and that interpreting the effect of Congress’s opening up of Indian lands for non-Indian settlement—express principles of tribal sovereignty that the Supreme Court continues to try to reconcile today. The line of cases that deemphasizes tribal self-governance in favor of Congress’s plenary power and accommodation of non-Indian expectations within opened reservation areas has not fully displaced those parts of the tribal sovereignty doctrine that affirm tribal powers and their continued right to be free of non-Indian interference. The history of Congress’s opening of Indian reservations was not uniform, and it produced varying results.

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172. WILKINSON, *supra* note 159, at 19–23.

173. *See id.* at 19–21 (documenting federal policies that promoted assimilation and acculturation and that generated extreme poverty within Indian communities, such as the opening of Bureau of Indian Affairs (BIA) boarding schools, the breaking up of Indian lands and traditional kinship networks caused by the allotment policy, the attempt to shift Indians from traditional forms of subsistence to reliance on an unfeasible agrarian lifestyle, the loss of more than a third of Indian lands due to surplus land sales and the removal of restrictions on alienation, the displacement of traditional indigenous forms of self-rule with local BIA control, and the influx of Christian missionaries within Indian communities).

174. *Id.* at 22–23.

175. *E.g.*, *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

176. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903).

177. *E.g.*, *United States v. McBratney*, 104 U.S. 621, 623–24 (1881).

Thus, the salience of the second line of cases is often contingent and context specific.

The analysis above shows that the doctrine of tribal sovereignty is inseparably bound up with interpreting the relationship between tribes and the federal government and the relationship between tribes and non-Indian settlers and their state and local laws. Thus, the doctrine of tribal sovereignty is a very narrow lens for assessing the nature and scope of tribal powers.

The discussion above also illustrates how the doctrine of tribal sovereignty is a product of a unique set of historical forces that were present during the era of measured separatism and the era of the opening up of reservation lands. In a sense, the doctrine established principles in the nineteenth century that have become frozen, or reified, through time. As contemporary decisions in federal Indian law attempt to reconcile divergent aspects of the tribal sovereignty doctrine, they apply concepts that reflect nineteenth century views of tribal sovereignty. This narrow jurisprudential approach has resulted in an impoverished and stagnant understanding of tribal sovereignty. Two of its most glaring inadequacies are that it fails to investigate or reflect indigenous understandings of tribal self-rule and that it also insulates the doctrine from the influence of changing notions of sovereignty in twentieth century international law.<sup>178</sup>

### *C. The Influence of International Law on the Tribal Sovereignty Doctrine*

For purposes of this Article, I am most interested in the disconnect between the federal law doctrine of tribal sovereignty and changes that the doctrine of sovereignty underwent in international law in the latter half of the twentieth century.

First, I explore the reasons for the disconnect. In the discussion above, I explained how the doctrine of tribal sovereignty is frozen in principles that were first articulated in Supreme Court decisions issued in the nineteenth century. This doctrine narrowly arises from disputes that involved either the effect of the federal government's measured separatism policy or the effect of the policy of opening reservations to non-Indian settlement. In the discussion below, I focus on a second factor that

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178. See Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 76 (2002).

shields tribal sovereignty's doctrine from international law. This factor is the impulse observed within federal Indian policy and within federal Indian law decisions to segregate Indian law from international law considerations.

In the Marshall trilogy, the Supreme Court wavers on the extent to which international law can be used to explicate the doctrine of tribal sovereignty. In *Johnson v. M'Intosh*, Chief Justice Marshall stated that the Court was bound to apply the international law doctrine of discovery to a dispute over title to lands conveyed by an Indian tribe.<sup>179</sup> In *Johnson*, the discovery doctrine was borrowed from international law and incorporated into the fabric of the U.S. legal system, resulting in federal law's legitimation of the stripping of full property rights from the native peoples of North America.<sup>180</sup> Although scholars have claimed that Chief Justice Marshall mischaracterized the doctrine in his opinion, the case nevertheless represents an explicit attempt to turn to international law to interpret the rights of Indian people.<sup>181</sup>

Following *Johnson*, the Supreme Court shifted from using international law paradigms to interpret the rights of Indian peoples to using a unique approach that was grounded in the interpretation of Indian treaties, acts of Congress, and the Constitution. This shift is observed in *Cherokee Nation v. Georgia*, where the Supreme Court held that the Cherokee Nation did not constitute a foreign nation capable of invoking the Supreme Court's original jurisdiction to hear a lawsuit against the State of Georgia.<sup>182</sup> Instead, Chief Justice Marshall famously described Indians as "domestic dependent nations," a term that was unique to the Indian tribes of the United States because "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."<sup>183</sup>

One year later, in *Worcester v. Georgia*, the Supreme Court returned to using international law concepts to interpret tribal sovereignty.<sup>184</sup> In that case, Chief Justice Marshall considered whether the Cherokee Nation's acceptance of the protection of the United States effectively nullified its claim to sovereignty. The Court considered the writings of Emerich de Vattel, widely acknowledged as a founding father of modern international law, who had theorized that a state could maintain its own sovereignty even if it joined in an alliance with a more powerful nation, as long as it

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179. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 316–17, 325–26 (1990).

180. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572–74 (1823).

181. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 54 (2001).

182. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

183. *Id.* at 16–17.

184. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

reserved to itself the right of governing its own body.<sup>185</sup> The Court ultimately adopted Vattel's approach to understanding tribal sovereignty:

To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. . . .

. . . .  
 . . . The very fact of repeated treaties with [Indian tribes] recognizes [the Indians' right to self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.<sup>186</sup>

Felix S. Cohen, famed author of the *Handbook of Federal Indian Law*, also argued that international law guided the early relations between the federal government and Indian tribes. Cohen goes so far as to assert that the language of the Northwest Ordinance of 1787, which protected Indian property rights from conveyances without their consent, was a near-verbatim reiteration of Francisco de Vitoria's writings on indigenous property rights, as incorporated into the 1537 papal bull, *Sublimis Deus*.<sup>187</sup> Cohen makes the general observation that

our Indian law originated, and can still be most clearly grasped, as a branch of international law, and that in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the sixteenth and seventeenth centuries, most notably by the author of the lectures *De Indis*, Francisco de Vitoria.<sup>188</sup>

Despite its original reliance, the Supreme Court ultimately stopped turning to international law to interpret the scope and content of tribal sovereignty.<sup>189</sup> Instead, it treated tribal sovereignty as a *sui generis* concept,

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185. *Id.* at 561 (discussing Emmerich de Vattel's theory of sovereignty); *see also* EMMERICH DE VATTEL, *THE LAW OF NATIONS* bk. 1, § 5 (Joseph Chitty trans., T. & J.W. Johnson 1852) (1758).

186. *Worcester*, 31 U.S. (6 Pet.) at 553–54, 560–61.

187. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 12 (1942).

188. *Id.* at 17.

189. In a few cases, the Supreme Court has cited to Felix Cohen's writings on the Spanish legal theologian influence on aboriginal title, but references to international law concepts have not extended beyond the issue of Indian land rights. *See, e.g.*, *United States v. Dann*, 470 U.S. 39, 41 n.3 (1985); *see also* *United States v. Candelaria*, 271

implying that international law concepts of sovereignty were inapplicable. For example, in *United States v. Wheeler*, the Court emphasized the unique character of tribal sovereignty, stating that “[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.”<sup>190</sup>

The divorce of international law from Indian law’s tribal sovereignty doctrine has falsely insulated the doctrine from the evolution that the sovereignty doctrine underwent with the advent of modern international human rights law in the twentieth century. In the discussion that follows, I trace international law’s development from an absolute immunity view of sovereignty to one that accommodates external accountability for human rights violations.

#### *D. Human Rights, International Law, and the Evolution of Sovereignty*

Until the middle of the twentieth century, international law was largely understood as concerned only with the law between states. It was largely accepted that international law simply did not address or relate to individual persons.<sup>191</sup> Louis Henkin describes international law’s perspective on relations between a state and its subjects before the shift toward recognizing human rights in this way: “What a State did inside its borders in relation to its nationals remained its own affair, an element of its autonomy, a matter of its ‘domestic jurisdiction.’”<sup>192</sup>

During this period, international law was also premised on the notion that it pertained only to the external actions of sovereigns. Some internal actions of sovereigns, such as the sovereign’s treatment of its citizens, were outside the scope of international law’s concern.<sup>193</sup> A corollary of that presumption was that sovereigns could engage in abusive practices against the people within their territorial limits, and those practices could go on without any external accountability to the international community of nation-states.

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U.S. 432, 442 (1926) (referring to Spanish and Mexican legal theory to determine Indian land rights).

190. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

191. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1989), as reprinted in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 127, 127 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) [hereinafter *HUMAN RIGHTS*].

192. *Id.*

193. *Id.* An exception to this general rule is international law’s recognition of rights for foreign diplomats and foreign nationals. *Id.*

The gravity of the Holocaust and the unprecedented loss of life and damage inflicted during World War II gave rise to a new interest in using international legal institutions to protect human rights. In the months immediately following the end of World War II in May of 1945, the world saw two major milestones in international human rights. The first was the signing of the United Nations (U.N.) Charter on June 26, 1945, by fifty of the fifty-one countries forming the original membership of the U.N.<sup>194</sup> The second major development was the signing of the London Agreement in August of 1945.<sup>195</sup> The discussion below begins with a description of the London Agreement and the Nuremberg Trial that it yielded before turning to the U.N. Charter.

The London Agreement (the Agreement) was significant because it established an institutional mechanism for recognizing and enforcing the human rights of the millions of victims of the Holocaust. The U.N. Charter annexed to the Agreement identified and defined the concept of war crimes, crimes against peace, and crimes against humanity.<sup>196</sup> It also established the protocol for the International Military Tribunal, which then conducted the Nuremberg Trial.<sup>197</sup> The prosecution of war criminals who acted in accordance with the laws of their own states represented a tremendous achievement in the evolution of international law. The act of allowing for international judgment behind the shield of state sovereignty is described as “pierc[ing] the State veil” of sovereignty and as a “radical penetration of the State monolith.”<sup>198</sup>

Meanwhile, the adoption of the U.N. Charter (the Charter), the constitutive document of the United Nations, marked another massive stride in international human rights. The Charter itself makes several brief references to individual rights.<sup>199</sup> Even though the Charter makes

194. *History of the United Nations*, UNITED NATIONS, <http://www.un.org/aboutun/history.htm> (last visited Sept. 27, 2012).

195. *Judgment at Nuremberg*, in HUMAN RIGHTS, *supra* note 191, at 112, 113.

196. *Id.*

197. *Id.*

198. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 19, 215 n.\*\*, 216 (1989).

199. U.N. Charter provisions that briefly refer to human rights or that relate to them include the second paragraph of the Preamble and Articles 1(3), 13(1)(b), 55–56, 62(2), and 68. U.N. Charter art. 1, para. 3, art. 13, para. 1(b), arts. 55–56, art. 62, para. 2, art. 68, available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>; see also PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 189 (2d ed. 2003) (“[The U.N. Charter] explicitly drew a connection between human



no reference to the states having any obligations correlating to those rights, the Charter's language is a significant milestone.<sup>200</sup> Article 68 of the Charter empowers the U.N. to create commissions,<sup>201</sup> and in 1946, pursuant to this article, it created the U.N. Human Rights Commission (the Commission).<sup>202</sup> The Commission was charged with submitting reports and proposals on an international bill of rights.<sup>203</sup>

The Commission worked quickly to complete its assigned task. It formed three successive committees that debated the content of the draft catalog of rights.<sup>204</sup> With each successive committee, the process became increasingly inclusive, and a wide variety of political, cultural, philosophical, and religious perspectives were ultimately represented.<sup>205</sup> In December of 1948, the Commission's draft was adopted by the U.N. General Assembly as the Universal Declaration on Human Rights (the Declaration).<sup>206</sup> The Declaration recognizes the core principle that all humans have equal human dignity, and that they share a set of basic human rights no government is free to violate. The Declaration contains thirty articles, and together they identify a broad spectrum of human rights, including those relating to civil and political concerns, and those pertaining to economic, social, and cultural concerns.<sup>207</sup>

Later, in the International Covenant on Civil and Political Rights (the Covenant), adopted by the U.N. General Assembly on December 16, 1966, the member states of the U.N. created a body responsible for enforcing the civil and political human rights it upheld.<sup>208</sup> That body is

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well-being and international peace, reiterated support for the principle of equal rights and self-determination, and committed the organization to promote universal respect for, and observance of, human rights and fundamental freedoms without discrimination—"for all."").

200. *From the United Nations Charter to the International Covenant on Civil and Political Rights*, in HUMAN RIGHTS, *supra* note 191, at 137, 141–42 (citing Henkin, *supra* note 198, at 215–16).

201. U.N. Charter art. 68, available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

202. Margaret Huang, "Going Global": Appeals to International and Regional Human Rights Bodies, in 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 105, 107 (Cynthia Soohoo et al. eds., 2008).

203. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS, FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1996), available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

204. *Universal Declaration of Human Rights*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008), [http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr\\_ph\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_ph_e.pdf).

205. *See id.*

206. *Universal Declaration of Human Rights*, G.A. Res. 217(III) A, U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

207. *See id.*

208. *See International Covenant on Civil and Political Rights art. 28*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

the Human Rights Committee (the Committee).<sup>209</sup> It is composed of eighteen members elected as representatives of the state parties to the Covenant.<sup>210</sup> The Committee has two principal functions. It receives and reviews reports from the state parties to the Covenant, and it responds to claims by state parties that other state parties are failing to fulfill their obligations under the Covenant.<sup>211</sup> The reports detail the measures that state parties have adopted to give effect to the Covenant's recognized rights.<sup>212</sup> The Committee also comments on the reports and disseminates them to the other state parties and to the Economic and Social Council of the U.N.<sup>213</sup>

The Committee also responds to claims by one state party that another state party is not fulfilling its obligations under the Covenant.<sup>214</sup> The Committee must receive notices from a minimum of ten state parties about the claim before it can proceed.<sup>215</sup> If this threshold is met, the Committee gives the state party that is the subject of the claim an opportunity to submit a response.<sup>216</sup> If, after the passage of a set period of time, either state remains unsatisfied, either state can initiate further Committee action.<sup>217</sup> The Committee can then, after ascertaining that all domestic remedies have been exhausted, meet with the state parties to attempt to find a solution, or if no solution is found, submit a further report detailing the facts of the matter.<sup>218</sup> At this point, the Committee can form an ad hoc Conciliation Commission that can perform additional investigation into the facts of the matter and attempt to find a solution to the claim.<sup>219</sup> The Conciliation Commission must then submit its own report on any solution that was found, with further information about the facts of the matter.<sup>220</sup>

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available at <http://treaties.un.org/doc/publication/UNTS/volume999/v999.pdf> [hereinafter ICCPR].

209. *Id.*

210. *Id.*

211. *Id.* arts. 40–41.

212. *Id.* art. 40.

213. *Id.*

214. *Id.* art. 41.

215. *Id.* art. 41(2).

216. *Id.* art. 41(1)(a).

217. *Id.* art. 41(1)(b).

218. *Id.* art. 41(1)(h).

219. *Id.* art. 42.

220. *Id.* art. 42(7).

The enforcement mechanism of the Covenant is also supplemented by its Optional Protocol. The Optional Protocol allows the Human Rights Committee to receive complaints filed by individuals as well.<sup>221</sup>

In summary, the Declaration and the Covenant represent watershed moments in the development of human rights law and international law more broadly. They signify the movement away from the notion that sovereignty is an inviolable shield and toward an understanding that state governments are externally accountable for the domestic treatment of their own subjects.

Because of Indian law's isolation from international law in the twentieth century, the dramatic changes that sovereignty underwent were never translated to the Indian law context. As a result, tribal sovereignty has remained caught in a time warp, frozen in the form it took when the Supreme Court began to articulate the tribal sovereignty doctrine in the nineteenth century. The piecemeal, nonexhaustive case law that has given tribal sovereignty its current shape has primarily functioned to interpret the relationship between the Indian tribes and the federal government or between tribes and non-Indians. As a result, it has never had occasion to engage with the impact of human rights on tribal sovereignty's meaning. Given this omission, might Indian tribes maintain that their sovereignty is immune from human rights accountability and therefore unlike any other in the world? Such a position is untenable under international human rights law. Given the external accountability that tribes must acknowledge for human rights enforcement, and given the widespread unavailability of tribal, federal, and international forums for human rights complaints arising in Indian country, the time is ripe for a plan of action that will establish an intertribal human rights regime in Indian country.

#### *E. The Harms Produced by Lack of Human Rights Accountability*

The need for an intertribal regime is also underscored when one considers the harms that lack of accountability creates for Indian tribes and their polities. Perhaps the most grievous harm is the impact that lack of accountability has on victims. Without access to a forum for their claims, victims are unable to obtain a remedy for the harms that they suffer, and they never receive vindication of their rights. This lack of access to relief is a denial of their basic claim to dignity and compassion, and it runs counter to the goals of healing, reconciliation, restoration of harmony, and repair of relationships that are often

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221. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www.unhcr.org/refworld/docid/3ae6b3bf0.html>.

described as central aspects of tribal justice.<sup>222</sup> Lack of human rights enforcement also deprives victims of other remedies that are generally considered appropriate and helpful for victims, including financial compensation, restitution, rehabilitation, satisfaction in verifying the truth or receiving an apology, revelation of the truth, and an assurance that the harm will not be repeated.<sup>223</sup> Furthermore, when governments are not accountable for human rights violations, victims have a heightened vulnerability to retaliation once they speak openly about their experience.<sup>224</sup> It is often the victims of abuse who are most at risk of suffering new forms of abusive treatment because they pose the greatest threat of revealing the abuser's oppressive practices. Legal regimes that allow government actors to avoid responsibility for human rights abuses pose grave dangers for victims.

Lack of accountability for human rights abuses is also damaging because it eliminates a powerful incentive for government reform. If tribal governments are forced to come to terms with abusive practices, they may be more likely to remove individual perpetrators from office and reform government institutions, policies, and laws to reduce the chance of repetition.<sup>225</sup> Without an effective check on human rights abuses, tribal governments will suffer because the conditions that created the opportunity for abuse will persist. Even worse, freedom from accountability can lead to a culture of impunity that may breed more human rights violations in the community.<sup>226</sup>

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222. See Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 77 (2008); Emily Mansfield, *Balance and Harmony: Peacemaking in the Coast Salish Tribes of the Pacific Northwest*, 10 MEDIATION Q. 339, 344 (1993); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 127-28 (1995); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 184-85 (1994).

223. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 360-64 (2008) (describing the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the U.N. General Assembly in 2005).

224. Report on the Situation of Human Rights Defenders in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.124, doc. 5 rev. 1 ¶¶ 137-207 (Mar. 7, 2006) [hereinafter *Situation of Human Rights Defenders Report*].

225. Matthew Draper, *Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia*, 40 COLUM. J. TRANSNAT'L L. 391, 402 (2002).

226. *Situation of Human Rights Defenders Report*, *supra* note 224, at 31.

Finally, lack of accountability for human rights abuses harms tribes because it increases the risk of a backlash against tribal sovereignty. Disenrollments in California have spawned the creation of several grassroots organizations that disseminate information to the public about their human rights complaints.<sup>227</sup> In California, an activist opposing tribal disenrollments drafted legislation called the California Indian Legacy Act that purported to force all California tribes to accept as members anyone certified by the BIA to be a descendant of the band.<sup>228</sup> Under this proposal, the remedy for noncompliance is loss of federal recognition.<sup>229</sup> In 2009, in the case of the Cherokee Freedmen, a bill was introduced into Congress that purported to terminate the Cherokee Nation until it restored full tribal citizenship to them.<sup>230</sup> Judges have also publicly denounced the ability of tribes to avoid judicial review in cases involving individual rights. In a case involving a challenge to the Table Mountain Rancheria's refusal to grant several lineal descendants membership in the tribe, U.S. District Judge Lawrence K. Karlton exclaimed that "somebody ought to warn the tribe that this is the kind of facts where some court is going to say 'we're outraged' and put it to them."<sup>231</sup> When the Ninth Circuit also dismissed the suit for lack of federal jurisdiction over membership issues and the tribe's sovereign immunity, the court agreed with the district court that the case was "deeply troubling on the level of fundamental substantive justice."<sup>232</sup> These instances demonstrate that the stakes are high. Even when tribes appear to be fully protected by long-standing principles of federal Indian law, the risk remains that in cases where tribes appear to abuse their

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227. See, e.g., Emily Bazar, *Native American? The Tribe Says No*, USA TODAY, Nov. 29, 2006, at 1A, available at 2006 WLNR 20606163 (discussing disenrollment advocacy work of the Many Lightnings American Indian Legacy Center); Stephen Magagnini, *Indians Barred from Tribes Seek Help*, SACRAMENTO BEE, July 15, 2004, at A3, available at 2004 WLNR 20787196 (describing grassroots efforts of California Indians For Justice); *About AIRRO*, AM. INDIAN RTS. & RESOURCES ORG. (2008), <http://www.airro.org/about.html>.

228. Elizabeth Larson, *Efforts Increase To Draw Attention to Indian Disenrollment Problem*, LAKE COUNTY NEWS (May 9, 2010, 6:25 PM), [http://www.lakeconews.com/index.php?option=com\\_content&view=article&id=13862:efforts-increase-to-draw-attention-to-indian-disenrollment-problem-&catid=1:latest&Itemid=197](http://www.lakeconews.com/index.php?option=com_content&view=article&id=13862:efforts-increase-to-draw-attention-to-indian-disenrollment-problem-&catid=1:latest&Itemid=197).

229. See *California Indian Legacy Act*, PETITION SITE, <http://www.thepetitionsite.com/takeaction/691/320/030/> (last visited Sept. 27, 2012).

230. See H.R. 2824, 110th Cong. (1st Sess. 2007) ("A bill [t]o sever United States' government relations with the Cherokee Nation of Oklahoma until such time as the Cherokee Nation of Oklahoma restores full tribal citizenship to the Cherokee Freedmen disenfranchised in the March 3, 2007, Cherokee Nation vote and fulfills all its treaty obligations with the Government of the United States, and for other purposes.").

231. Jerry Bier, *Nowhere To Turn*, FRESNO BEE, Aug. 22, 2004, at A1, available at 2004 WLNR 17586108.

232. *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005).

power, Congress or the Supreme Court may respond by expanding federal court review of ICRA actions or by limiting sovereign immunity.

Public outcry over human rights abuses also threatens to diminish relationships between tribes and their surrounding communities. Interdependence between tribes and the non-Indian world is a critical facet of everyday life within Indian country. Tribal intergovernmental relationships with local units of government and state and federal agencies are essential for a wide array of government services, from effective law enforcement to the provision of human services to the management of natural resources in Indian country. Furthermore, tribal economic interests depend upon maintaining healthy relationships in commercial dealings. Each of these relationships has the potential to suffer if a tribe gains notoriety for human rights abuses.

## V. A PROPOSAL FOR AN INTERTRIBAL HUMAN RIGHTS REGIME

### *A. The Proposal*

An intertribal human rights regime offers the best possible method of providing external accountability for tribal abuses of human rights. This approach has several advantages. It allows tribes to collectively respond to the need for greater external accountability on their own terms, and it allows human rights violations to be addressed without resorting to the diminishment of tribes' sovereign powers by the federal government.

The development and application of substantive human rights norms by tribes also offers several benefits. It allows tribes to articulate and interpret universal human rights in light of their cultural, philosophical, spiritual, political, and social perspectives. Such a regime would also provide an institutional forum to allow tribes to discuss and respond to the actions of tribal governments who are accused of human rights violations. Furthermore, such a regime would also act as a central resource that could assist individual tribal governments with the task of adapting their domestic legal systems to ensure that human rights norms are internalized, promoted, and protected.

The treaty-making process will require three initial planning phases. The first step will be gaining broad support within Indian country for the task of forming the treaty. The support must include a broad array of individuals representing tribal elected leadership, individuals who work in tribal government, persons with independent organizations in Indian country, and those with grassroots connections within Indian communities.

These individuals are needed to spread information about human rights enforcement in Indian country and mobilize Indian communities.

The second major step will be reaching an agreement on universal norms to be included in the treaty. The debate between universality and cultural pluralism is sure to be ignited as the normative content of the treaty is considered. At the same time, however, tribes will benefit from drawing upon the strategies that have been used in other international contexts for reconciling recognition of universal human rights with respect for cultural diversity, self-determination, custom, and tradition.

The third major step will be agreeing upon an institutional framework for enforcement. The framework will need to not only respect tribal sovereignty and self-determination but also ensure that human rights abuses are reviewed and addressed in a meaningful way. Here, tribes will also benefit from the examples set by the human rights instruments and institutions established by the United Nations and other regional systems.

Tribal participation in this effort has the potential to transform traditional notions of tribal sovereignty and self-governance. The making of an intertribal treaty on human rights will revitalize the latent power of tribes to govern for their collective welfare. If successful, a human rights treaty may open the door to additional treaties on other subjects where collective action is needed. Furthermore, the practice of intertribal diplomacy will also connect to a rich indigenous tradition that, if revitalized, may provide lessons on nation building and effective governance for all sovereigns.

### *B. Areas of Special Concern*

The project to develop an intertribal human rights regime requires broad-based support within Indian country. In other contexts, such as the small islands in the Pacific, the effort to develop a regional human rights convention faltered because the project lacked widespread buy-in and was viewed as an effort imposed by outsiders. Within Indian country, this danger is especially acute because there is widespread disdain for the top-down imposition of policies on native communities. Past efforts to do so, such as the passage of the ICRA, represented misguided colonial efforts to regulate tribal governments. In the case of human rights, it is essential that native people take ownership over the entire process of developing an intertribal regime, from the initial planning stages, to the selection of norms to be recognized, to the drafting and design of the system of implementation for the agreement. The task of amassing such inclusive support will be difficult and will require direct and initial engagement with the concerns of skeptics. In the discussion that follows, I describe, grapple with, and respond to three concerns that must be

addressed at the outset to ensure that the human rights project earns public support.

### *1. Colonialism*

First, many skeptics will question whether a human rights regime within Indian country would serve to assimilate native communities and weaken their cultural and political diversity. The argument is that the human rights articulated in international instruments, such as the Universal Declaration of Human Rights, reflect European, Western values and norms, and that a human rights treaty between Indian tribes will incorporate these Western norms and be used as a standard against which Indian tribes will be judged, penalizing them for their cultural distinctiveness and awarding them for moving toward greater homogeneity and a closer resemblance to Western liberal democracies.

I have two primary responses to these arguments. The first rebuts the contention that human rights, as represented by international instruments within international law, are fundamentally Western, and the second responds to the claim that recognizing human rights will be harmful for tribal rights to cultural distinctiveness and pluralism.

First, historical studies of the development of human rights norms in international law reveal that the process of drafting the Declaration in 1948 was broadly inclusive. As discussed previously, when the U.N. Human Rights Commission was established pursuant to the U.N. Charter in 1946, the Commission formed three successive committees that debated the content of the draft catalog of rights. With each successive committee, the process became increasingly open, and a wide variety of political, cultural, philosophical, and religious perspectives from around the world were ultimately represented, with significant contributions from non-Western states.<sup>233</sup> The human rights norms that made the final version of the Declaration were the product of an intense period of negotiation and compromise, and they each reflect a commitment to a single common purpose that resonates across cultural boundaries, namely, that all humans are entitled to equal human dignity.

In addition, human rights are capable of articulation, recognition, and enforcement in unique regional conventions that respond to the specific

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233. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 133 (Henry J. Steiner et al. eds., 3d ed. 2008); GRACE Y. KAO, GROUNDING HUMAN RIGHTS IN A PLURALIST WORLD 22–24 (2011).



needs of sovereigns with proximity to each other. The claim to universality of some instruments and conventions does not obviate the need for more local communities to reflect on the best means of articulating and enforcing human rights within specific cultural and geographic contexts. Regional human rights conventions have been successfully developed and enforced in Africa, the Americas, and Europe, and many other regional groups around the world are working to develop similar approaches to human rights recognition and enforcement.

Regional human rights conventions have been used to protect cultural diversity, promote traditional practices and values, and empower groups that are working to dismantle the effects of colonialism. The African Charter on Human and Peoples' Rights (the African Charter) is a powerful example of how a regional human rights convention can protect human rights by responding to the unique concerns of culturally distinctive sovereigns who refuse to blindly adhere to norms associated with European institutions. When the drafting of the African Charter began, the President of Senegal exhorted the drafters to recall that

Europe and America have constructed their system of rights and liberties with reference to a common civilization, to respective peoples and to some specific aspirations. It is not for us Africans either to copy them or to seek originality for originality's sake. It is for us to manifest both imagination and skill. Those of our traditions that are beautiful and positive may inspire us. You should therefore constantly keep in mind our values and the real needs of Africa.<sup>234</sup>

The African Charter responds to this call for deliberate distinctiveness in a variety of ways. For example, paragraph 5 of the preamble of the African Charter states that "their reflection on the concept of human and peoples' rights" is deeply connected to "consideration [of] the virtues of their historical tradition and values of African civilization."<sup>235</sup>

The African Charter also reflects the unique cultural standpoint of its signatories by the inclusion of unique provisions that focus on the value of family. Article 17(3) of the African Charter states, "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."<sup>236</sup> The African Charter also balances its enumeration of rights with an emphasis on responsibility, recognizes the relationship between the well-being of individuals and the

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234. President Leopold Sedar Senghor of Senegal, Remarks at the Conference on Drafting the African Charter on Human and Peoples' Rights, *as quoted in* Olusola Ojo, *Understanding Human Rights in Africa*, in *HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES* 115, 116 (Jan Berting et al. eds., 1990).

235. U. OJI UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* app. at 145 (1997).

236. *Id.* app. at 149.

well-being of their communities, and replaces the terminology of “individual rights” in favor of “peoples’ rights.” In addition, the African Charter recognizes the influence of colonization and the need to support a shift away from economic dependence.<sup>237</sup>

The governments of the Pacific Islands have also struggled to develop a regional human rights regime, and their work provides lessons for the tribal context in the United States. One commentator has described the benefits of a Pacific Islands human rights regime as including the opportunity to expand upon the universal rights established by international human rights instruments to include recognition of unique rights and duties that are relevant to the Pacific Island countries and territories.<sup>238</sup> These unique rights include traditional fishing rights, the “right to a safe or quality environment or land to live on,” and environmental rights that are uniquely responsive to the impacts of climate change.<sup>239</sup>

The African and Pacific Island examples indicate that a tribal human rights project need not signify cultural imperialism within Indian country. By taking ownership of the process of developing the convention, native people can create a regime that respects human rights from a uniquely indigenous perspective. For example, a tribal human rights convention could reflect on the impact of colonization on tribal peoples and governments, and it could recognize unique human rights that reflect shared values across native cultures. Human rights in Indian country could, for example, be expanded to reflect rights to land, environmental quality, freedom of religion and rights to sacred sites, treaty rights, and cultural rights that are specific to the concerns and values of native peoples within the United States. To the extent tribes articulate their distinctive interpretation of human rights, they could also become a valuable source of inspiration and enlightenment that contributes to global human rights discourses.

Some persons may question whether the interweaving of an indigenous perspective into a tribal human rights convention might still threaten native cultural distinctiveness because it would adopt a constructed pan-Indian worldview rather than respect the diversity of Indian country. However, there are two factors that suggest that this need not be the case.

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237. *Id.* app. at 151 (committing African states to eliminating “all forms of foreign [economic] exploitation particularly that practised by international monopolies”).

238. P. Imrana Jalal, *Why Do We Need a Pacific Regional Human Rights Commission?*, 40 VICTORIA U. WELLINGTON L. REV. 177, 183–84 (2009).

239. *Id.* at 184.

First, we must recognize that Indian country is fundamentally diverse, as reflected by the vast number of Indian tribes in the United States, the multiple and varying landscapes that make up their homelands, and the unique languages and cultural teachings that they possess. However, in addition to this diversity, many also recognize that there are values and experiences that are shared among many native peoples within North America. In a recent column, two scholars responded to what they consider an alarming fragmentation and growth of debilitating controversies within Indian country by calling for native people to build stronger governments using fundamental shared values:

Each Native nation, of course, acts under its own set of “core” values, but we are convinced that indigenous peoples throughout the Americas and across the world share certain intellectual and emotional understandings that once held them in good stead and that might again serve as the basis on which to construct stronger Native societies and governments.<sup>240</sup>

The authors suggested that the four values of personal sovereignty or autonomy, interdependency, sacred character, and maturity could serve as a starting point for calling upon native people across the country to share in a concerted effort to strengthen their governments.<sup>241</sup> The project to develop a human rights regime in Indian country could also begin by identifying shared core values that also respect and acknowledge diversity.

In response to the concern that a pan-Indian approach to human rights might stifle diversity, a second factor to consider is that human rights conventions are capable of being interpreted locally. One scholar has coined the term *legal vernacularization* to describe how local, indigenous cultures can assign meaning to universal norms with reference to their unique histories and perspectives.<sup>242</sup> She writes:

[I]n the post-colonial world, [human rights are] no longer owned by the West. As indigenous groups seek to define a space for themselves in the modern world, they seize and redefine law as the basis for their claims to justice. The law they mobilize is not simply the law of the state or the United Nations but an appropriated notion of law that joins indigenous concepts with state and global law. Thus, although they talk [about] rights, reparations, and claims—the language of law—they construct a new law out of the pieces of the old. . . . [The colonial law] is becoming a vernacular law rather than transnational imperial law.<sup>243</sup>

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240. David E. Wilkins & Heidi Kiiwetinepinesiik Stark, *Refocusing Our Values*, INDIAN COUNTRY TODAY (July 10, 2011), [http://indiancountrytodaymedianetwork.com/ict\\_sbc/refocusing-our-values](http://indiancountrytodaymedianetwork.com/ict_sbc/refocusing-our-values).

241. *Id.*

242. Sally Engle Merry, *Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, the People's International Tribunal, Hawai'i 1993*, 19 POL. & LEGAL ANTHROPOLOGY REV. 67, 67–68 (1996).

243. *Id.* at 68.

In this case, the Ka Ho'okolokolonui Kanaka Maoli (the People's International Tribunal) staged a trial of the United States for the takeover of the sovereign nation of Hawaii. During the trial and in its written opinion, the tribunal appropriated federal and international law and vernacularized it with local meanings and indigenous interpretations. Similarly, the application and interpretation of a tribal human rights convention can also be mediated by this process of local vernacularization, where "the global becomes localized, no longer simply a global imposition but something which is infused with the meanings, signs, and practices of local places."<sup>244</sup>

In the case of a tribal human rights convention, the process of local interpretation of the human rights norms could be enriched by drawing upon the cultural values, creation stories, and wisdom of individual tribes. For example, interpretation of human rights norms in Anishnaabe culture could draw upon the concept of *bimaadiziwin* (living the Anishnaabe life; the good life) and the Seven Grandfather Teachings, which identify *nbwaakaawin* (wisdom), *zaagidewin* (love), *mnaadendiwin* (respect), *aakde 'win* (bravery), *gwekwaadsiwin* (honesty), *ddadendizwin* (humility), and *debwewin* (truth) as principles that should guide all of our interactions with one another.<sup>245</sup> By interpreting human rights norms in light of traditional teachings, the human rights convention protects and gives life to cherished cultural values and also engages traditional values in a cross-cultural educational process that may be generative for other native communities as they develop their own interpretative strategies.

## 2. Sovereignty

A second argument that I anticipate being made against a tribal human rights project is that the regime would encroach on tribal sovereignty. I have several responses to this claim.

First, as I discussed earlier, the conventional understanding of tribal sovereignty improperly fails to recognize that tribes, like all sovereigns, are externally accountable for violations of human rights. As I demonstrated earlier, the tribal sovereignty doctrine evolved from a particular historical and political context in which the primary focus of

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244. *Id.* at 80.

245. Vanessa A. Watts, *Towards Anishnaabe Governance and Accountability: Reawakening Our Relationships and Sacred Bimaadiziwin* 3, 17–18 (2006) (unpublished M.A. thesis, University of Victoria) (on file with the University of Victoria).

the Supreme Court was in determining the legal boundaries of tribal, federal, and state authority over tribes and their territories in light of the aims of creating a measured separatism or of opening up reservations for non-Indian settlement. The principles of tribal sovereignty articulated in federal law date back to an era when sovereigns were still understood as having absolute dominion over their territories and subjects. Federal Indian law is unique in that it adds the overlay of congressional plenary power over the doctrine of sovereignty in Indian law, but the notion that tribes would have absolute authority over their internal affairs is nevertheless evident in treaties and the opinions of the Supreme Court.

Today, this understanding of sovereignty is anachronistic and an affront to human rights. Consider, for example, the fact that Chief Justice Marshall was inspired by Vattel in his articulation of tribal sovereign powers when he drafted the Marshall trilogy.<sup>246</sup> Vattel's recognition of the absolute internal dominion of sovereigns was relied upon in the opinion for *Dred Scott v. Sandford*, one of the worst deprivations of human rights ever countenanced by the Supreme Court.<sup>247</sup> The time is certainly

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246. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 568–69 (1823). In *Worcester*, the Court stated the following: "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority, are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

*Worcester*, 31 U.S. (6 Pet.) at 560.

247. *Dred Scott v. Sandford* quoted Vattel for the following statement on the absolute freedom of a sovereign from external judgment:

So, in section 20: "A nation, then, is mistress of her own actions, so long as they do not affect the proper and perfect rights of any other nation—so long as she is only internally bound, and does not lie under any external and perfect obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are free, independent, and equal, and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue, in order to fulfill her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, a perfect equality of rights between nations, in the administration of their affairs, and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment."

60 U.S. (19 How.) 393, 484 (1857) (Daniel, J., concurring) (emphasis omitted) (quoting VATTEL, *supra* note 185, at bk. 1, § 20), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

ripe for Indian tribes to relinquish their flawed claims to absolute internal sovereignty with the sole exceptions of congressional plenary power and judicial implicit diminishment and to recognize that all sovereigns must be externally accountable for human rights.

Some skeptics may counter that if tribes recognize external accountability for human rights, they will open the door to increased federal interference with tribal affairs. However, I believe that this fear would be misplaced. Tribal sovereignty's accommodation of external accountability for human rights would not necessarily open tribes to increased federal control. Tribes would still be able to use their sovereign immunity to avoid being sued in tribal or federal courts, and the federal courts would still be required to dismiss suits where a tribe has exclusive jurisdiction. Furthermore, Congress already claims to have plenary power to encroach on tribal sovereignty, so the recognition that tribes are externally accountable for human rights would not result in an expansion of Congress's authority in Indian affairs.

I also argue that the creation of an intertribal human rights regime would expand sovereignty for Indian tribes. The treaty would extend tribal sovereignty beyond traditional territorial and membership limits into the realm of intertribal lawmaking. Intertribal treaty making also expands the universe of tribal lawmaking's traditional subject matters because it allows tribes to address matters that affect their collective welfare.

Others may question whether tribes should refrain from judging the actions of others because such scrutiny is disrespectful of another tribe's sovereignty and right to cultural and political distinctiveness. Some leaders within Indian country may also wonder whether finger-pointing will produce more harm than good for the causes of native peoples. A human rights regime is likely to increase Indian and non-Indian attention on the wrongful actions of some tribal governments, and this may cause tribes to lose influence in Congress or damage relationships with allies in economic, political, and social dealings.

My response to these concerns is that tribal isolationism is harmful for many practical reasons, and it also conflicts with some of the core shared values that are commonly attributed to tribes. By tribal isolationism, I refer to the reluctance of tribal leadership to criticize or openly discuss reports of abuses of power that emanate from other tribal communities. In two high-profile matters that involve allegations of human rights abuses—the disenrollment of large numbers of tribal members in California and elsewhere, and the expulsion of the Cherokee Freedmen from the

Cherokee Nation—the silence of tribal leadership from other native nations is uniform and remarkable.<sup>248</sup> One scholar has commented that isolationism is rampant in Indian country and that its primary cause is 500 years of abuse through colonization.<sup>249</sup> According to this view, the cumulative effect of colonialism’s impact across multiple generations of native peoples is the creation of “a politics of resignation, reactivity, and continuing dependence on outsiders for leadership.”<sup>250</sup> In contrast, global action “is an act of faith and self-confidence” that affirms that Indians “have a substantive contribution to make to the liberation and development of other indigenous peoples.”<sup>251</sup>

Political isolationism among Indian tribes is harmful because it deprives tribal governments engaged in abusive practices from benefiting from the wisdom, experience, and successes of other tribes. The silence surrounding the abusive actions of some tribal governments, even if they are outliers marginalized from other native nations in the United States, can be interpreted by others as implied consent. Finally, isolationism prevents human rights abusers from accessing the concrete resources they need to reform their laws, institutions, and practices. These resources, implemented through sheer innovation and commitment by some tribes, should be shared, discussed, and distributed as best practices, allowing all tribes to benefit from their development.<sup>252</sup>

Isolationism in Indian country also runs contrary to tribal tradition and historic practices. Many would agree that one of the core shared values of indigenous peoples in the United States is a relational understanding of rights and obligations founded on universal kinship. This relational understanding transcends familial relationships, extending to political and social relationships and relationships with the natural world. In diplomatic relations between traditional native nations in North America, each nation within a confederation assumed a kinship relation to others.<sup>253</sup> Thus, nations would be thought of as brothers, with rights and responsibilities for mutual welfare that one would associate with a brother-

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248. *But see* George Wickliffe, *UKB Chief: Cherokee Nation Can't Break Treaty*, INDIANZ.COM (June 20, 2007), <http://64.38.12.138/News/2007/003511.asp> (providing opinion of the Chief of the Keetoowah Band of Cherokee Indians in Oklahoma regarding the Cherokee Nation’s expulsion of the Cherokee Freedmen).

249. Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 285 (1993).

250. *Id.*

251. *Id.* at 286, 292.

252. *See, e.g., Navajo Nation Human Rights Commission Plan of Operation*, NAVAJO NATION, <http://www.nnhrc.navajo-nsn.gov/pdfs/PlanofOperation.pdf> (last visited Sept. 27, 2012).

253. ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 62–66, 71 (1997).

brother relationship.<sup>254</sup> In such a relationship, coercion would be publicly disdained and considered a sign of weakness, but public opinion, ridicule, and censure were vital forces that motivated people toward honorable conduct.<sup>255</sup> Rather than turn a blind eye toward the transgressions of other tribes, a tribal human rights regime would allow tribes to revitalize their traditional diplomatic relationships with each other to promote the collective welfare of all human rights victims.

### 3. *Consensus Building*

A third concern that I anticipate is that the human rights treaty process will fail to launch because there will be little incentive for widespread agreement and participation. Tribes are independent sovereigns, each with its own vision of self-determination and each with its own constituencies demanding commitment to local priorities. Furthermore, some would argue that tribal governments are self-interested, and the human rights treaty-making process will offer little incentive for participation.

Although it is true that collective action in Indian country is extremely difficult to achieve, it is not impossible. Organizations that facilitate collective action, such as the National Congress of American Indians, exist, and their resources and expertise could be recruited to the cause of human rights in Indian country. Furthermore, the project of developing an intertribal human rights treaty will not necessarily fail for lack of widespread participation. The human rights treaty could begin with a core group of signatories, and additional participants could sign on to it once they recognize its benefits. Other conventions in international law have had similar histories, where the number of signatories expanded as additional states acceded over time.<sup>256</sup>

Furthermore, international law scholars have developed theories that attempt to explain why states behave in accordance with international law. This scholarship identifies several factors that are applicable to the

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254. Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM. INDIAN Q. 181, 194 (1986).

255. *Id.* at 184 (citing G. COPWAY, *THE TRADITIONAL HISTORY AND CHARACTERISTIC SKETCHES OF THE OJIBWAY NATION* 141 (1850); RALPH LINTON, *THE STUDY OF MAN: AN INTRODUCTION* 224 (1936); ROBERT H. LOWIE, *PRIMITIVE SOCIETY* 385 (1920); and PAUL RADIN, *PRIMITIVE MAN AS PHILOSOPHER* 51 (1927)).

256. For example, the signatories to the Nuclear Non-Proliferation Treaty grew from sixty-eight in July 1968 to 189 by July 2011. *Status of the Treaty on the Non-Proliferation of Nuclear Weapons*, UNITED NATIONS OFF. FOR DISARMAMENT AFF., <http://disarmament.un.org/treaties/t/npt> (last visited Sept. 27, 2012).



collective action problem in this case as well. Harold Koh's scholarship examines the field of contributions in this area and offers a typology that names and describes each approach.<sup>257</sup> He explains that there is a spectrum of theories with varying degrees of explanatory power of why states obey international law, ranging from sheer force of coercion to the complete legal internalization of international law norms.<sup>258</sup>

The first incentive, sheer power, is evident when nations obey international law because someone else made them do it.<sup>259</sup> A second reason why nations obey international law is because they are acting within their self-interest.<sup>260</sup> Under this theory, nations agree to consent to international law regimes because they make a calculated determination that participation and its associated costs will be outweighed by the benefits to be garnered by becoming a signatory.<sup>261</sup>

A third approach to understanding why nations obey international law is described by Koh as the "liberal theory" approach.<sup>262</sup> Koh sees two strands here: the first explaining international law compliance as a function of state perception that a rule is legitimate, and the second explaining compliance as a function of a state's perception of its identity as a liberal democracy.<sup>263</sup>

A fourth approach, a communitarian theory, supposes that nations obey international law because they are drawn to the values of the community of which they are a part.<sup>264</sup> The fifth theory, termed "transnational legal process," explains that nations obey international law through a process in which nations collectively form international law regimes through horizontal action, and then the rules gradually work their way toward becoming internalized within a nation's domestic legal system.<sup>265</sup>

Koh's typology has some use for explaining how we can encourage Indian tribes to participate in the human rights project, and it also advances our understanding of how a human rights regime may eventually filter down into domestic tribal legal systems and result in greater compliance with human rights norms. The most salient theories that apply to the human rights project at this stage are the self-interest paradigm, the communitarian theory, and the transnational legal process theory.

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257. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397 (1999).

258. *Id.* at 1401-03, 1405-06, 1411.

259. *Id.* at 1401-02.

260. *Id.* at 1402.

261. *Id.*

262. *Id.* at 1403-04.

263. *Id.*

264. *Id.* at 1405.

265. *Id.* at 1401, 1406.

First, the tribes may be motivated to incur the costs of participating in the deliberation, drafting, and enforcement of an intertribal regime if they can identify long-term rewards that outweigh their costs. Thus, it is critical that information about the long-term rewards of participation be disseminated throughout Indian country. Such rewards include knowing that the tribe's actions will aid victims, knowing that the tribe will be able to assist with government reform to eradicate human rights abuses, earning a reputation as a promoter of human rights and social justice, and earning a reputation as a sovereign committed to the rule of law. Each of these reputational rewards is likely to produce other indirect rewards, such as improved relations with tribal members and non-Indian residents and employees, improved relations with neighboring non-Indian communities, improved relations with partners in commercial dealings, and improved relations with federal, state, and local governments.

The communitarian theory also has salience for tribes and the human rights project. Tribes are likely to be drawn to participate in the human rights project if they identify with other participants and want to publicly reflect that they share the same values. In Indian country, shared group identity is a powerful bond between native nations. To maximize the impact of this dynamic, information about the tribes that choose to join in the human rights project should be widely disseminated, with the hope that other tribes will identify with them and choose to join to reflect their allegiance and shared values.

Finally, the transnational legal process theory is illuminating and can certainly be used to inform strategies for the intertribal human rights project. Professor Koh, in describing this process, identifies several sets of actors and processes that contribute to state compliance with international law.<sup>266</sup> The success of the intertribal human rights project will be enhanced if these actors and processes are intentionally harnessed to promote participation in the treaty and enforcement of its terms, both domestically and in the intertribal institutional context. Koh identifies essential agents in the process that he terms "transnational norm entrepreneurs."<sup>267</sup> These are individuals and organizations who generate interest and support for their cause both within their nation and internationally.<sup>268</sup> They create networks of information sharing about

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266. *Id.* at 1409–10.

267. *Id.* at 1409.

268. *Id.*

their cause, termed “transnational issue networks” by Koh.<sup>269</sup> These networks include forums where the norm entrepreneurs confer, deliberate, and publicly discuss and identify solutions for their cause, all with the participation of contacts in domestic and international governments, nongovernmental organizations (NGOs), foundations, and any other interested groups that can be drawn into the fray.<sup>270</sup> The norm entrepreneurs then identify “government norm sponsors” who use their office to promote specific policies and solutions.<sup>271</sup> Lastly, the norm entrepreneurs also identify opportunities for “specific interpretation” of the norms, with success enhanced if multiple forums can be employed using international institutions, courts at all levels of government, legislatures, NGOs, and any other entity, organization, or office that can be used to further the successful interpretation of the norm.<sup>272</sup> Finally, Koh predicts that if each of these agents and processes work, then the norms that originated at the international level can successfully be internalized domestically.<sup>273</sup> To ensure that this last step occurs, government leadership and in-house attorneys play a critical role in mandating government reform and in drafting the laws, regulations, or policies that will implement the reform.

The intertribal human rights regime will have a greater chance at success if each of the agents and processes can be used to maximum benefit. First, the project will need intertribal norm entrepreneurs who will be willing to take up the human rights cause and mobilize support both within specific tribal communities and on a national level. These entrepreneurs could come from diverse corners of Indian country, but they will be most effective if they already have existing networks from their membership in existing institutions or organizations in Indian country. Second, the norm entrepreneurs will need to create “intertribal issue networks” to create forums for the exchange of information, ideas, and solutions. This process could be facilitated through the planning of conferences, working groups, special action committees, and organizations dedicated to finding new avenues for educational exchange. The activists on this issue will also need to locate “government norm sponsors,” or elected tribal leaders and government employees who will use their positions to promote the drafting of the treaty and participation of other tribes. Finally, the treaty will need to be applied and interpreted, both

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269. *Id.*  
270. *Id.* at 1410.  
271. *Id.*  
272. *Id.*  
273. *Id.* at 1410–11.

using the institutional enforcement mechanism established by the treaty and using domestic legal processes within each tribe's legal system.

Ultimately, Koh's transnational legal process theory illustrates how tribal participation in the intertribal human rights project may ultimately result in internalization of the norms and domestic compliance. This lesson is powerful because it recognizes that domestic legal systems are on the frontlines of human rights enforcement and an intertribal regime must always focus on how its actions will influence compliance at this most basic, localized level.

## VI. CONCLUSION

Indian tribes have been subject to heightened scrutiny by Congress, the courts, and the media over their treatment of individuals. Many are concerned that as tribes experience economic and political growth, they will assert their jurisdiction over individuals in novel ways that may implicate the fundamental rights of individuals. For the most part, the prescriptions for tribes are unattractive. They either involve submitting to further federal encroachments and greater dependency as Congress intrudes on tribal self-government to protect individual rights, or they involve fierce attachment to outmoded notions of the inviolable nature of tribal sovereignty, coupled with an isolationist reluctance to comment on government abuses committed by other tribes. Neither of these approaches actively engages the sovereignty of tribes to allow native nations to forge their own collective solution to the need for human rights accountability. My hope is that the proposal described here will receive serious consideration as a possible alternative. If successfully implemented, tribes will be able to take a significant stride toward greater social justice for their communities.

