

(Tribal) Sovereignty and Illiberalism

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Liberalism struggles with an ancient paradox. That is, it must navigate the sometimes treacherous course between individual autonomy and pluralism's accommodation. In this Article, I argue that this philosophical tension has manifested in very concrete intrusions on American Indians' tribal sovereignty. On the one hand, tribal sovereignty guards Indian nations' inherent right to live and govern beyond the reach of the dominant society. This "measured separatism" embodies liberalism's commitment to the accommodation of pluralism. On the other hand, critics charge that imposing liberalism onto Indian nations is necessary to prevent infractions of individual rights by tribal governments. For these scholars, individual autonomy must always be preferenced above Indian nations' sovereignty.

Scholars concerned with illiberal practices perpetrated by tribal governments are increasingly calling for an expansion of federal civil rights laws into tribal communities. But these urgings are rarely accompanied by a thorough and thoughtful analysis of American Indian tribal sovereignty. In fact, most scholars writing in this area fail to acknowledge that expansion of such laws into tribal communities would potentially eviscerate tribal sovereignty and wipe out Indian differentness altogether. Accordingly, based on a detailed

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examination of tribal sovereignty—both as embodied in American law and as actually experienced by Indian nations—I conclude that the United States’ own theory of Indian sovereignty supports the perpetuation of Indian nations’ autonomous existence. Further, it mandates that internal tribal decisions regarding Indian culture and tradition be left to Indian tribes, even when those decisions are inapposite to Western liberal ideals.

INTRODUCTION

Liberalism has a problem.¹ Individual autonomy is its critical core, but pluralism remains a prominent tenet.² This means that liberalism must navigate the sometimes treacherous course between upholding individual rights and accommodating a diverse array of cultures and organizations. Liberalism is challenged by this endeavor, particularly when individual rights are exercised in communities that espouse illiberal³ conceptions of the good.⁴

This philosophical tension has manifested in very concrete intrusions on American Indians’ tribal sovereignty. On the one hand, tribal sovereignty guards Indian nations’ inherent right to live and govern beyond the reach of the dominant society. This “measured separatism”⁵ embodies liberalism’s commitment to accommodating pluralism. On the other hand, critics charge that imposing liberalism onto Indian nations is necessary to prevent intrusions on individual rights by tribal governments.⁶ For these scholars, individual liberty must always take precedence over Indian nations’ sovereignty and autonomy.

American Indian tribes have long been a subject of concern for the dominant society,⁷ particularly because Indian tribes are the only governmental

1. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 974 (1978) (discussing the conflict between freedom and equality).

2. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1887 (1987); see also John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4-5 (1987).

3. For a definition of “illiberal” see *infra* Part I.

4. JOHN RAWLS, *POLITICAL LIBERALISM* 6-7 (1993).

5. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14, 16 (1987) (asserting that a central thrust of federal Indian law is to create a “measured separatism”).

6. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 166-67 (1995). My analysis is limited to tribal governments’ authority over their own members. Tribal authority over nonmembers implicates other issues beyond the scope of this paper.

7. See, e.g., *The Major Crimes Act*, 18 U.S.C.A. § 1153 (2006), passed in response to *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883), in which the Supreme Court held that tribes have exclusive jurisdiction over crimes committed by an Indian in Indian Country. *Crow Dog* caused much controversy, because the Sioux imposed a traditional penalty on Crow Dog for murdering Spotted Tail: Crow Dog’s people agreed to pay Spotted Tail’s people \$600, eight horses, and one blanket. Reformers were outraged and succeeded in convincing Congress to extend federal criminal jurisdiction over Indian Country.

bodies within the United States not bound by the U.S. Bill of Rights.⁸ Unease over tribes' extra-constitutional status motivated Congress to enact the Indian Civil Rights Act (ICRA) in 1968, which extends provisions similar to those contained in the U.S. Bill of Rights to Indian tribes. But ICRA has not alleviated concerns over potential violations of civil liberties by tribal governments. In fact, these concerns intensified after the Supreme Court's ruling in *Santa Clara Pueblo v. Martinez*,⁹ which limited federal court review of ICRA claims to habeas corpus petitions and left the interpretation and enforcement of the other ICRA protections to tribal courts. As a result, the Court upheld the Pueblo's authority to maintain its own membership rules, even though those rules discriminated against the children of women—but not of men—who married outside the Pueblo.¹⁰

Today, scholars who critique the (sometimes merely perceived¹¹) illiberal actions of tribal governments point to *Santa Clara Pueblo* as evidence of the need for increased federal control over tribes and diminished tribal autonomy. And now it appears that the judiciary may be taking heed. Though *Santa Clara Pueblo* has never been overruled, there is evidence that federal courts are growing increasingly concerned over alleged civil rights violations by tribal governments and are seeking ways to intervene under ICRA¹² even though the issue of federal court review of non-habeas corpus ICRA claims has long been settled.¹³

Scholars have extensively debated to what extent liberal societies ought to accommodate illiberal groups, if at all.¹⁴ But in this Article I seek to address

8. See *infra* Part I.

9. 436 U.S. 49, 61 (1978).

10. *Id.* (holding, *inter alia*, that there is no jurisdictional basis upon which a federal court can review an Indian Civil Rights Act claim, unless it involves a habeas corpus action).

11. I supply this caveat because many of the tribal practices and customs labeled “illiberal” are in fact much more nuanced and complicated than critics realize. For example, a tribe’s de-emphasis on individual rights may reflect communitarian values rather than opposition to liberal values. Nevertheless, it is not my goal here to argue that tribes are not “illiberal.” Instead, I seek to show how imposing liberal norms onto Indian tribes will result in homogenization, assimilation, and cultural destruction.

12. See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901 (2d Cir. 1996) (holding that permanent banishment ordered by the tribal council is a punitive sanction, and as such is a “sufficiently severe potential or actual restraint on liberty” to justify federal habeas review under ICRA); *Quair v. Sisco*, 359 F. Supp. 2d 948, 971 (E.D. Cal. 2004) (following *Poodry*, holding that disenrollment and banishment are equivalent to “detention” such that federal habeas review under ICRA is authorized).

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

14. See, e.g., KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 6, at 169-70 (arguing that liberalism need not impose its values on illiberal minority groups and can tolerate illiberal values to the extent they are not inconsistent with respect for individual autonomy); Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 939 (2002) (examining how liberalism does not treat all illiberal groups consistently, leading in some cases to destructive effect, but in others to supportive effect); Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka*, Taylor, and Nussbaum, 12 J. CONTEMP. LEGAL ISSUES 661, 692 (2002) (concluding that true liberalism

and fully examine another question concerning illiberalism, one related specifically to American Indian tribes: that is, to what extent are Indian tribes free to govern illiberally? As a descriptive matter, what is U.S. law and policy concerning illiberal actions undertaken by the “domestic dependent nations”?¹⁵ And normatively, how should Indian tribal sovereignty inform U.S. judicial and political reactions to the illiberal practices of these extra-constitutional governments?¹⁶ Answers to the questions raised here are critical, not only to Indian nations’ sovereignty, but also to American democracy. And they must be confronted. With over 500 federally recognized Indian tribes in the United States, conflicts between individual tribal members and their tribal governments will continue to arise. Accordingly, it is imperative to examine—both descriptively and normatively—the scope and extent of federal power to intervene in purely intra-tribal disputes.

In this Article I suggest that well-settled principles of federal Indian law and the history of Indian tribal sovereignty situate Indian tribes beyond the bounds of a standard liberalism analysis. American Indian tribes do not neatly fit into existing legal paradigms because they inhabit a strange sovereign space in the U.S. legal system, one which they alone occupy. A wealth of federal law embodied in treaties, the U.S. Constitution, and Supreme Court jurisprudence affirms Indian nations’ inherent, retained sovereignty with respect to purely intra-tribal disputes. Moreover, specific examples from tribal communities demonstrate—just as Congress recognized when it passed ICRA in 1968—that increased federal control over intra-tribal matters will likely mean the end of core aspects of tribal differentness. Thus, an accurate analysis of tribes as illiberal actors must address Indian nations’ sovereign status, which may impact their capacity to live and govern illiberally.

In the next Part, I provide a brief introduction to the definitions and discourse of illiberalism and set forth U.S. law governing illiberal groups. I then highlight evidence of a trend by the federal judiciary towards greater encroachment into intra-tribal disputes, and discuss the illiberalism literature¹⁷ to demonstrate how scholars writing in this area often bundle Indian tribes with other illiberal actors without acknowledging the unique aspects of Indian

requires honoring liberal values at all levels and in all categories, whether individual/group, majority/minority, or cultural/political); Mark D. Rosen, *“Illiberal” Societal Cultures, Liberalism, and American Constitutionalism*, 12 J. CONTEMP. LEGAL ISSUES 803, 806 (2002) [hereinafter Rosen, *“Illiberal”*] (arguing that a true liberal state should not only tolerate illiberal groups, with some limitations, but even allow them to prosper and grow).

15. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Chief Justice Marshall ruled that Indian tribes were “domestic dependent nations,” acknowledging their preexisting aboriginal sovereignty as well as their overarching connection to the United States).

16. See, e.g., *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring) (referring to Indian tribes as “extraconstitutional sovereign[s]”).

17. I use the term “illiberalism literature” to refer to a subset of academic literature promulgated by liberal theorists, which focuses, specifically, on the philosophical and theoretical challenges illiberal groups pose to the liberal state and to liberal theory.

sovereignty that differentiate tribes from other entities. In Part II, I focus on the legal and historical roots of tribal sovereignty and explore how tribes' complicated legal status translates into the practical realities of tribal sovereignty in contemporary tribal communities. Finally, in Part III, I demonstrate the high costs of increasing federal control over intra-tribal affairs through ICRA. I argue, specifically, that if all ICRA claims arising from tribal courts are subject to federal review, indigenous justice systems, gender-based systems of governance, and tribal theocracies—to name a few—would be at the mercy of novice federal courts. I conclude that adjudication of intra-tribal matters ought to be left to Indian tribes, even if the resulting decisions are seemingly inapposite to liberal ideals. Though I do not always agree with the decisions of tribal courts and tribal councils in these matters,¹⁸ I nevertheless advocate against further expansions of federal control over tribal decision-making that would impede tribal self-governance and risk the destruction of tribal culture.¹⁹

I

ILLIBERALISM AND U.S. LAW

A. Defining "Illiberalism"

Despite volumes of scholarship on the topic, there is a dearth of literature discussing or debating exactly what illiberalism *is*. Organizing cultures into the dichotomous structure of *liberal versus illiberal* is itself potentially problematic. As political theorist Will Kymlicka notes: "[I]t is quite misleading to talk of 'liberal' and 'illiberal' cultures, as if the world was divided into completely liberal societies on the one hand, and completely illiberal ones on the other."²⁰ In fact, most societies condone both liberal and illiberal practices,

18. Like all governments, Indian nations owe duties to their polities. It is imperative that tribal governments take their dual responsibilities—to their tribal ways and to their people—very seriously as they move into the 21st century. For a full examination of tribal governance, see Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. (forthcoming 2007) [hereinafter Riley, *Governance*]. All page number references to this piece refer to the author's manuscript, which is on file with the author.

19. Though there have been legislative attempts to expand federal court review of ICRA claims (see generally S.517, 101st Cong., 1st Sess. (1989), discussed in ROBERT N. CLINTON, NELL JESSUP NEWTON, & MONROE E. PRICE, *AMERICAN INDIAN LAW* 424-27 (3d ed. 1991)), this Article focuses on the federal judiciary's recent treatment of ICRA cases.

20. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 94. This Article assumes that the United States is a "liberal" society. However, that designation may be contested: gay marriage bans, which could easily be considered "illiberal," are a popular trend among the states. Additionally, the continued use of the death penalty could also be considered illiberal. See, e.g., William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417, 422 (2004) (stating that "[a]bolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice, and repression"); FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 39 (2003) (discussing the diverging

and “the liberality of a culture is a matter of degree.”²¹

Though definitional concerns persist, illiberalism has taken on a generally accepted meaning. Illiberal groups are those that “simply assign particular roles and duties to people, and prevent people from questioning or revising them.”²² Such immutable status is often placed on certain sub-groups—such as women, low-ranking social castes, and racial and ethnic minorities²³—where individuals are treated as “members of more and less respect-worthy natural kinds.”²⁴ As a result, many illiberal groups “are structured along patriarchal, theological, racist, classist or homophobic lines.”²⁵ For example, because of its gender-based rule excluding women from the priesthood, the Roman Catholic Church constitutes an example of an illiberal organization.²⁶

The illiberalism literature reflects robust debates over the question of tolerance; that is, whether liberal societies can and should accommodate illiberal groups. Some scholars promote philosophies of “live and let live”—meaning that illiberal groups ought to be left alone to live as they like, so long as they receive no help from the state in continuing their illiberal practices.²⁷ Others contend that liberal societies’ tolerance of illiberal groups only perpetuates the existence of regimes that oppress individual autonomy.²⁸ And there are many others writing between these extremes, basing their arguments on finer distinctions between different types of illiberal groups.²⁹

histories of the death penalty in Europe and the U.S. and arguing that “with the United States as a spectacular exception, the contrast between abolitionist and executing nations is clear on questions of human rights, political freedom, and respect for democratic institutions”).

21. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 94.

22. *Id.* Kymlicka argues that indigenous groups should enjoy rights of self-government, but only on the condition they exercise rights in accordance with liberal democratic conventions. WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 196-98 (1989) [hereinafter KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE*]. See also Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 181 (2003) (noting that “[o]ur autonomy is importantly constituted by our capacity to play different roles with craft and zeal in different contexts. It is this art of separation that defines what it means to live in a liberal society.”).

23. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 94.

24. Doppelt, *supra* note 14, at 679.

25. Rosen, “*Illiberal*,” *supra* note 14, at 804.

26. Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 717-18 (2003) (explaining that the Catholic church, operating within the private sphere of religion, excludes women from the priesthood).

27. Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992).

28. See, e.g., Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 505 (2001) [hereinafter Sunder, *Cultural Dissent*] (noting that “[e]ven when the case for group rights to culture has been cast in distinctively ‘liberal’ terms, most theorists have not been convinced that group rights are possible without severely suppressing individual autonomy”); Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1407 (2003) [hereinafter Sunder, *Piercing the Veil*] (arguing that “law should intervene [in illiberal cultures], even when deference is otherwise the rule, when grave injustice is at hand”).

29. See, e.g., KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 152 (drawing a distinction between groups that impose internal restrictions—those that restrict basic civil or political liberties of its own members—and those seeking external protections which are designed

Even where a particular culture is characterized as illiberal—remembering that all cultures contain both liberal and illiberal strains—many scholars contend it may nevertheless be tolerated as long as the members enjoy the freedoms of exit (opt-out rights)³⁰ and dissent (voice).³¹ If these rights are available, even groups advocating values at odds with liberal societies³² should retain wide latitude to maintain illiberal structures and practices.³³ This is because allowing illiberal groups to exist within the liberal state advances liberalism's commitment to pluralism and personal liberty by providing individuals "with a diversity of options among communities."³⁴ Thus, if a member is displeased with a particular group, she may simply opt out if she so chooses.³⁵ Within this theoretical structure, a group such as the Boy Scouts of America, which discriminates against gays, but allows members to voice dissent and exit at will, is tolerable.³⁶ But those that silence dissenting voices, or prevent members from opting out entirely, are beyond the bounds of liberalism's accommodation.³⁷ The Taliban, which has been called "the most extreme instance of the self-conscious, intentional repression of women's rights anywhere in the modern world,"³⁸ serves as one such example.³⁹

to guard it from the dominant society); Rosen, "*Illiberal*," *supra* note 14, at 811 (drawing distinctions between "enforcement illiberals," which seek to enforce rules that prevent people from questioning their societal culture, and "cultural illiberals," which deprive members of their autonomy through their societal culture alone rather than through force).

30. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 320, 323-24 (1974) ("If a person finds the character of a particular community uncongenial, he needn't choose to live in it.").

31. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970); Stolzenberg, *supra* note 14, at 904.

32. Rosen, "*Illiberal*," *supra* note 14, at 811 (contending that groups lacking formal limitations may still restrain members' freedom to choose other lifestyles "not by force, but simply by virtue of their being a societal culture").

33. See, e.g., HIRSCHMAN, *supra* note 31; Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 86 (2004) ("Exit is a bedrock liberal value."); Hills, *supra* note 22, at 161-65 (arguing that from the Rawlsian perspective consent and exit "cure" the potential dangers posed by illiberal groups); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1126-27 (1998) [hereinafter Rosen, *The Outer Limits*] (discussing opt-out rights within illiberal sub-sovereigns); Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 627 (2002) (explaining that under one view of liberalism, "so long as everyone freely consents to such regimentation and can opt out of total communities at any time, then total [illiberal] communities and liberalism can co-exist").

34. Sunder, *Cultural Dissent*, *supra* note 28, at 536.

35. NOZICK, *supra* note 30, at 323-24 ("If a person finds the character of a particular community uncongenial, he needn't choose to live in it.").

36. See generally William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 507 (2001) (discussing how the First Amendment historically allowed the state to suppress illiberal groups, but an increasingly neutral interpretation now protects such groups, including the Ku Klux Klan and the Boy Scouts).

37. Rosen, "*Illiberal*," *supra* note 14, at 811.

38. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 870 (2005).

39. Rosen, "*Illiberal*," *supra* note 14, at 811.

Despite the widely-accepted views of classical liberalism, recent world events like the global rise in religious fundamentalism⁴⁰ and an increased focus on the plight of women living under oppressive, patriarchal regimes⁴¹ have fueled arguments against accommodating illiberal groups, even those that freely allow members to voice dissent and exit at will.⁴² This is due, in part, to liberal scholars' skepticism regarding opt-out rights. They often contend that even where exit is not legally proscribed, its costs may be prohibitively high,⁴³ or the right to opt-out may be altogether illusory.⁴⁴ Fearing that cultural

40. See generally ALISTER E. MCGRATH, *THE TWILIGHT OF ATHEISM: THE RISE AND FALL OF DISBELIEF IN THE MODERN WORLD* (2004); KAREN ARMSTRONG, *THE BATTLE FOR GOD* xi (2001) ("One of the most startling developments of the late twentieth century has been the emergence within every major religious tradition of a militant piety popularly known as 'fundamentalism.'"); CHETAN BHATT, *LIBERATION AND PURITY: RACE, NEW RELIGIOUS MOVEMENTS, AND THE ETHICS OF POSTMODERNITY* (1997); GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* (1980).

41. See, e.g., Declan Walsh, *In Pakistan, 'Rescues' from Marriages; Unwilling Brides Aided by British Diplomats*, BOSTON GLOBE, Dec. 31, 2005, at A1 (British diplomats aid women lured to Pakistan for forced marriages); Larry Derfner, *Family Honor Killing*, THE JERUSALEM POST, Dec. 16, 2005, at 12 (father and two uncles charged with murder of woman in Israel; annually, hundreds of Israeli Arab women are said to be at risk of being killed to restore "family honor"); Christine Spolar, *For Family Honor, She Had to Die*, CHICAGO TRIBUNE, Nov. 17, 2005, at 1 (reviewing "honor killing" of women in Europe and elsewhere); *Person of the Week: Mukhtar Mai*, ABC News Person of the Week, Oct. 21, 2005, <http://abcnews.go.com/WNT/PersonOfWeek/story?id=1237950&page=1> (Pakistani high court ultimately convicts men of rape after woman who was gang-raped as punishment for her brother's transgression pressed charges); Sharon LaFraniere, *Women's Rights Laws and African Custom Clash*, N.Y. TIMES, Dec. 30, 2005, at A1 (discussing how African women's lives are only very slowly, if at all, being improved). See also Shannon A. Middleton, *Women's Rights Unveiled: Taliban's Treatment of Women in Afghanistan*, 11 IND. INT'L & COMP. L. REV. 421 (2001) (examining the Taliban's oppressive treatment of women in the context of Afghani history and Islamic principles); Benazzer Roshan, *The More Things Change, the More They Stay the Same: The Plight of Afghan Women Two Years After the Overthrow of the Taliban*, 19 BERKELEY WOMEN'S L.J. 270 (2004) (two years after the ouster of the Taliban, conditions for women in Afghanistan remain much the same as before).

42. See Rosen, "*Illiberal*," *supra* note 14, at 804-05 (discussing the work of Gerald Doppelt and Will Kymlicka, concluding that "[v]irtually all who have addressed this question [of liberal cultures tolerating illiberal ones] conclude that liberalism should provide little if any quarter for such groups."). Cf. Abner S. Green, "*Kiryas Joel*" and Two Mistakes About Equality, 96 COLUM. L. REV. 1 (1996) (arguing that a majority liberal entity should grant public power to a minority illiberal one when the latter seeks to exit only partially and not completely, and as long as Constitutional norms are not otherwise violated).

43. See, e.g., Sunder, *Piercing the Veil*, *supra* note 28, at 1409 (2003) (arguing that "traditional liberalism takes too lightly the ease of exit from one's community and the desirability of culture"); Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661, 676 (1998) (contending that the safety valve of "exit" is not adequate because it is available after harm to a woman's prospects has already occurred, or is precluded by the fact that a woman in a restrictive culture may not see its availability).

44. Susan Moller Okin, "*Mistresses of Their Own Destiny*": *Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205, 212-13 (2002) (arguing that gendered socialization within the family, which may impose on women a sense of inferiority or deprive women of educational opportunities or means of independence, functionally denies women meaningful exit options).

tolerance may create “a cloak for oppression and injustice,”⁴⁵ these theorists increasingly call for action against illiberal entities. In some instances, they even advocate for a breakdown of the public/private distinction, which historically has partially shielded private associations from constitutional scrutiny.⁴⁶

As they advance their claims, critics oftentimes neglect to acknowledge the important legal differences that distinguish the vast array of illiberal groups situated within the United States. Thus, the following section provides a brief overview of U.S. law regarding illiberal groups, and then explains in greater detail how federal law relates, specifically, to the inner workings of sovereign Indian nations.

B. Indian Tribes and U.S. Law

The U.S. Bill of Rights applies directly against the federal government and indirectly against the states via the Due Process Clause of the Fourteenth Amendment.⁴⁷ Thus, federal, state, and local governments are all constitutionally prohibited from acting illiberally.⁴⁸ In contrast, the freedom of (illiberal) association is constitutionally protected as a fundamental right under the First Amendment.⁴⁹ As a result, most examples of illiberal practices within the United States—such as the Boy Scouts’ decision to exclude gays—occur within the private sector, where organizations retain some leeway to act in

45. See Chandran Kukathas, *Cultural Toleration*, in ETHNICITY AND GROUP RIGHTS 69 (Ian Shapiro & Will Kymlicka eds., 1997) (explaining that some liberal theorists view cultural tolerance as a “cloak for oppression and injustice”) (citing Sebastian Poulter, *Ethnic Minority Customs, English Law and Human Rights*, 36 INT’L & COMP. L.Q. 593 (1987)).

46. See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interests of Associations*, 9 WM. & MARY BILL RTS. J. 595, 596 (2001) (noting that a core tenet of group rights is the freedom to determine “who is in and who is out”). See, e.g., Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 WM. & MARY J. WOMEN & L. 459, 467 (2004) (“[T]he exemption from equality norms in the context of both religious and nonreligious associations should be strictly restricted to situations of intimate association”); Martha C. Nussbaum, *In Defense of Universal Values*, 36 IDAHO L. REV. 379, 380 (2000) (arguing that a set of “universal norms of human capability” which cross public-private, political, cultural, international, and religious boundaries can be determined and should be adopted in all national constitutions); Tracy E. Higgins, *Why Feminists Can’t (Or Shouldn’t Be) Liberals*, 72 FORDHAM L. REV. 1629, 1629 (2004) (“I would argue that certain core characteristics of liberalism—the centrality of the public/private divide and an overriding emphasis on pluralism within the private sphere—taken together, limit the usefulness of liberalism to a feminist agenda.”).

47. Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1515 (2005).

48. See *id.* at 1515-16 (explaining that federal, state, and local governments are bound by the U.S. Bill of Rights and the U.S. Constitution). Cf. discussion of gay marriage in the dominant society, *infra* Part III.

49. See Chemerinsky & Fisk, *supra* note 46, at 597-98 (noting that, though unenumerated, association is a “fundamental right” that is “integral” to all other First Amendment rights). See generally Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 (1995).

ways that contradict principles of formal equality. In regard to illiberalism within the private sphere, the Supreme Court has delineated a “gradient of protectable expression with two diametrically opposed poles represented by political or intimate associations on the one hand (high levels of protection) and economic associations on the other (little or no protection).”⁵⁰ Organizations situated somewhere between these two extremes—such as the Jaycees, a private social club with a quasi-commercial purpose⁵¹—receive an intermediate level of protection.⁵²

Indian tribes are anomalous within this system. Unlike states,⁵³ tribes are not bound by the U.S. Bill of Rights.⁵⁴ At the same time, tribes possess rights and responsibilities unique to their sovereign status, which also means they cannot be directly analogized to private clubs. Because the U.S. Bill of Rights neither applies to nor limits domestic tribal nations,⁵⁵ tribes cannot be encompassed in the “usual constitutional dialogue” of individual rights.⁵⁶ Tribal sovereignty necessarily situates Indian nations beyond the federal-state paradigm that dominates individual civil liberties discourse within the U.S. In fact, the constitutional position of tribes—and their corresponding freedom to act beyond the scope of the U.S. Bill of Rights in matters pertaining to individual civil liberties—prompted Congress to pass ICRA in 1968.

50. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 530 (2002).

51. *Roberts v. United States Jaycees*, 468 U.S. 609, 638-40 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (noting with approval that the lower courts unanimously determined the Jaycees was “first and foremost, an organization that . . . promotes and practices the art of solicitation and management,” that “[r]ecruitment and selling are commercial activities, even when conducted for training rather than for profit,” and that the Court’s traditional expressive-commercial dichotomy analysis was appropriately applied).

52. McGinnis, *supra* note 50, at 530-31.

53. As discussed fully in Part II, *infra*, tribes’ position vis-à-vis the U.S. government is one of sovereign to sovereign, although tribal sovereignty remains subject to congressional abrogation. See, e.g., Porter, *infra* note 148, at 1601. Treaty-making as a means of governing relations between Indian nations and the subsequently-formed United States continued for over one hundred years before it ended. See 25 U.S.C. § 71 (2000) (originally enacted as Act of March 3, 1871, Ch. 120, § 1, Stat. 544, 566) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . . with whom the United States may contract by treaty.”).

54. See, e.g., *United States v. Lara*, 124 S. Ct. 1628 (2004) (Kennedy, J., concurring) (referring to Indian tribes as “extraconstitutional sovereign[s]”). See also Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 336 (2004) [hereinafter Valencia-Weber, *Racial Equality*] (explaining that indigenous nations are “the original sovereigns” within the United States; as such, they are “preconstitutional” and “extraconstitutional” governments); but see Carol Tebben, *infra* note 150, at 324 (arguing that while tribes are pre-constitutional “in the sense that [they] existed as sovereigns before the creation of the United States Constitution” and extra-constitutional in that they maintain “sovereign authority that has not been delegated to the national government,” tribes nevertheless have “constitutional status”).

55. Tebben, *infra* note 150, at 324.

56. Valencia-Weber, *Racial Equality*, *supra* note 54, at 373.

1. *The Indian Civil Rights Act*

The American civil rights movement of the 1960s⁵⁷ inspired reformers to transform tribal governments.⁵⁸ Senator Sam Ervin of North Carolina led this endeavor, introducing bills in Congress designed to extend constitutional protections to individual Indians via an Indian Bill of Rights.⁵⁹ Ervin's aide, a Lumbee Indian, was partially responsible for inspiring Ervin's work on the bill. Ervin viewed the Lumbee tribe—an Indian nation that lacked a communal land base and had significantly assimilated into mainstream society—as a positive model for other tribes.⁶⁰ When Ervin learned that the U.S. Bill of Rights did not apply to individual Indians subject to the control of tribal governments, he commented that such a notion was “alien to popular concepts of American jurisprudence.”⁶¹ Ervin thus sought to ensure that tribal governments offered protections to individual Indians similar to those enjoyed by citizens living under federal, state, and local governments.⁶²

Though much debate surrounded the initial bills, Congress succeeded in enacting ICRA as a rider to the Civil Rights Act of 1964.⁶³ In language closely tracking the U.S. Bill of Rights, the Act⁶⁴ sets forth rights guaranteed to individual Indians vis-à-vis tribal governments, including the free exercise of religion⁶⁵ and many of the protections guaranteed in the criminal process.⁶⁶

57. See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, 922 (1989) (“Kennedy’s murder marked the arrival of the freedom surge.”); Julian Bond, *Introduction to JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965*, xi, xv (1988) (“The social movements of the sixties—the antiwar movement, the women’s movement, and others—all followed in the wake of the [1954-1965] civil rights movement.”).

58. See generally Donald L. Burnett, Jr., *An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act*, 9 HARV. J. ON LEGIS. 557 (1972).

59. John R. Wunder, *The Indian Bill of Rights*, in *THE INDIAN BILL OF RIGHTS*, 1968, 2, 4 (John R. Wunder ed., 1996).

60. *Id.* at 5.

61. *Id.* at 4-5. Ervin, of course, failed to realize that Indians did not necessarily want to be like other citizens. They were different, and they wanted the freedom to stay that way. *Id.*

62. S. Rep. No. 90-841, at 5-6 (1967) (noting that a central purpose of ICRA was to “secur[e] for the American Indian the broad constitutional rights afforded to other Americans,” and thereby to “protect individual Indians from arbitrary and unjust actions of tribal governments”); 113 Cong. Rec. 13473 (1967) (statement of Sen. Ervin) (noting that the Subcommittee concluded denials of Indian civil liberties did not occur from malice or ill will or from a desire to do injustice, but due to under-funded legal systems where tribal judges were placed into the position of acting like American jurists without training in the traditions and forms of the American legal system).

63. Burnett, *supra* note 58, at 557.

64. Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1302 (1986)).

65. *Id.* § 1302(1).

66. Including freedom from unlawful search & seizure, double jeopardy, self-incrimination, takings, criminal trial provisions (speedy trial, notice, witnesses, counsel at own expense, excessive bail/fines, cruel & unusual punishment, penalty/punishment limits), bill of attainder, ex post facto laws, and trial by jury of at least six. *Id.* §§ 1302(1)–(4); (6)–(7); (9)–(10).

Notably, ICRA also extends to individual Indians the right to equal protection and due process,⁶⁷ as well as the writ of habeas corpus.⁶⁸ Even though the Act closely mimics the U.S. Bill of Rights in many respects, Congress nevertheless declined to apply the full complement of constitutional restraints to Indian tribes to further its two "distinct and competing purposes" in enacting ICRA: 1) to strengthen the position of individual tribal members within tribal governments; and 2) to promote the well-established federal policy of furthering Indian self-government.⁶⁹ Accordingly, Congress declined to extend to tribes the requirement of grand jury indictment, jury trials in civil cases, and the right to counsel for indigent defendants.⁷⁰ Perhaps most importantly, Congress acceded to the desires of tribal elders and removed restrictions regarding tribal establishment of religion.⁷¹

Whether Congress intended to authorize federal court review of ICRA claims was critical to questions surrounding the Act's enforcement. More than ten years after ICRA's passage, the Supreme Court resolved this issue in *Santa Clara Pueblo v. Martinez*, ruling that Congress intended to limit federal court review of ICRA claims to habeas corpus petitions, leaving all other ICRA claims within the jurisdictional purview of tribal forums.⁷²

2. Santa Clara Pueblo v. Martinez

Though Indian tribes have long been culturally and legally distinct from mainstream Americans,⁷³ their status as (potentially) illiberal groups gained

67. *Id.* § 1302(8).

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

69. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 n.11 (1978) (noting that President Johnson supported ICRA on the ground that it furthered "self-determination," "self-help," and "self-development" within Indian nations). See 114 Cong. Rec. 5518, 5520 (1968)).

70. 25 U.S.C. § 1302 (1968). Nor were these features incorporated via the Fourteenth Amendment. *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896) (establishing that the U.S. Bill of Rights was not extended to tribes through the Fourteenth Amendment as it was to states). Some tribes have gone further than ICRA's mandates and ensure the right to counsel for indigent defendants in criminal cases. See, e.g., 1 Navajo Nation Code § 7 (1995) (stating that "nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation").

71. Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657, 664-65 (1992). For a full discussion of the importance of maintaining tribal theocracies, see *infra* at Part III.

72. 113 Cong. Rec. 13471 (1967).

73. See, e.g., *Ex parte Crow Dog*, 109 U.S. 556 (1883) (defendant Crow Dog murdered another Indian on the Brule Sioux reservation and paid the tribal penalty of restitution to the victim's family: cash, horses and blankets. The tribe's adherence to restitution rather than retribution—specifically, its decision not to sentence Crow Dog to death—led to the passage of the Major Crimes Act, granting federal authority over certain enumerated crimes, including murder).

popular attention about thirty years ago, when the U.S. Supreme Court decided the now infamous case of *Santa Clara Pueblo v. Martinez*.⁷⁴ *Santa Clara Pueblo* involved a dispute over the membership status of the children of Julia Martinez, a member of the Pueblo, and her husband, Myles Martinez, a Navajo Nation citizen.⁷⁵ A 1939 Santa Clara Pueblo membership ordinance states that children of men who marry outside the Pueblo are eligible for tribal membership, but children of women who marry outside the Pueblo are not.⁷⁶ Martinez attempted to persuade the tribe to change its membership rule in hopes of enrolling her children in the Pueblo. When unsuccessful, Martinez and her daughter filed an ICRA lawsuit against the tribe and its governor in federal district court. In her suit, Martinez sought to invalidate the 1939 membership ordinance and require the Pueblo to include her children as members.⁷⁷

Justice Thurgood Marshall wrote for the majority, ultimately concluding that federal courts lack authority to hear any ICRA claims other than habeas corpus petitions.⁷⁸ Focusing on the purposes behind ICRA and the Pueblo's right to self-determination and continued traditional existence, the Court noted that ICRA's provisions were "similar, but not identical, to those contained in the Bill of Rights."⁷⁹ It reasoned that, as compared with federal courts, the tribal courts were better situated to give effect to ICRA provisions consistent with traditional tribal norms and governance structures.⁸⁰ In regards to membership decisions, the Court acknowledged that such determinations lay at the core of tribal self-government and that the Pueblo people are in the best position to determine what it means to be Santa Clara.⁸¹ Additionally, as Marshall pointed out, ICRA claims should be heard in tribal forums which "have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."⁸² The Court made no exception for tribes vesting judicial authority in a nonjudicial entity—such as a tribal council like in the Santa Clara Pueblo—calling such fora "competent law-applying bodies."⁸³

74. 436 U.S. 49 (1978).

75. *Id.* at 52. See also Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 672 (1989) [hereinafter Resnik, *Dependent Sovereigns*].

76. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 n.2 (1978). See Resnik, *Dependent Sovereigns*, *supra* note 75, at 672.

77. *Santa Clara Pueblo*, 436 U.S. at 53. See Resnik, *Dependent Sovereigns*, *supra* note 75, at 672.

78. *Santa Clara Pueblo*, 436 U.S. at 62. See also Philip P. Frickey, *(Native) American Exceptionalism*, *infra* note 81, at 445-46.

79. *Santa Clara Pueblo*, 436 U.S. at 57.

80. *Id.* at 72.

81. *Id.* at 72 n.32. See also Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 445-46 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*].

82. *Santa Clara Pueblo*, 436 U.S. at 65.

83. *Id.* at 66. Many tribal courts have interpreted ICRA as creating an implied waiver of tribal sovereign immunity in tribal courts for purposes of ICRA claims. See Alex Tallchief

As such, the Supreme Court affirmed what Congress recognized in passing ICRA: intra-tribal disputes are best left within the purview of the tribal courts.

Much of the Court's rationale rested on its faith in tribal dispute forums and its corresponding concern over the competency of the federal courts to decide issues critical to tribal governance. Marshall revealed great unease at the prospect of authorizing the federal courts to adjudicate disputes within Indian tribes, maintaining that to do so would threaten the survival of the tribal community as a distinct group.⁸⁴ The Court stated: "[R]esolution of statutory issues under [ICRA] . . . will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." Furthermore, "efforts by the federal judiciary to apply [ICRA] . . . may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."⁸⁵ Accordingly, the Court construed ICRA narrowly. It held federal court review appropriate for habeas corpus violations alone as expressly provided for in the statute, reasoning that a contrary holding would undermine Congress's purpose of protecting tribal sovereignty and tribal self-government.⁸⁶

Santa Clara Pueblo caused a furor. By deferring to tribal sovereignty and denying federal court review, the Supreme Court allowed the Santa Clara Pueblo to continue determining membership pursuant to sexually discriminatory rules. Mainstream feminists strongly criticized the result,⁸⁷

Skibine, *Respondent's Brief: Reargument of Santa Clara Pueblo v. Martinez*, 14 KAN. J. L. & PUB. POL'Y 79 (2004) (stating that "most tribal courts interpret ICRA as an implied waiver of the tribes' sovereign immunity in their own tribal courts and have taken seriously their role in implementing the Act's protections") (citations omitted). Others expressly waive their immunity for civil rights suits in tribal courts through their tribal constitutions. *See, e.g.*, Constitution and Bylaws of the Menominee Indian Tribe Of Wisconsin, Art. XVIII, §§ 1-2 (1977) (waiving tribal immunity in tribal court for Indian Civil Rights Act cases); *see also* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 900 (2003) [hereinafter Goldberg, *Individual Rights*] ("Most tribal courts or councils waive sovereign immunity so as to enable litigants to challenge actions of tribal officers for violating the Act."); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 480-83 (1998) (discussing those tribal courts that have found tribal sovereign immunity waived for purposes of 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."); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 509 (2000) [hereinafter Rosen, *Multiple Authoritative Interpreters*] ("The doctrine of tribal sovereign immunity, however, is a potential doctrinal obstacle to the tribal courts' functioning as fora to vindicate ICRA rights."). Despite its controversial nature, tribal sovereign immunity is essential to tribal self-government. *See* Riley, *Governance*, *supra* note 18, at *57-59.

84. *Santa Clara Pueblo*, 436 U.S. at 71-72.

85. *Id.* at 72.

86. *Id.* at 71-72.

87. *See, e.g.*, Catherine A. Mackinnon, *Whose Culture? A Case Note on Martinez v. Santa*

while Indian scholars retorted with passionate pro-sovereignty arguments.⁸⁸ With few compromises put forth,⁸⁹ reconciliation between the camps has never been fully realized. *Santa Clara Pueblo* was certainly not the beginning of the schism between liberal theorists advocating for the primacy of individual rights and Indian scholars arguing for adherence to tribal sovereignty's "measured separatism."⁹⁰ But in many instances this case drew liberal theorists' attention to Indian country for the first time, prompting a critique of tribal governments based on—oftentimes largely and singularly—one very public case.⁹¹

Clara Pueblo, in *FEMINISM UNMODIFIED* 63 (1987) (arguing that Pueblo tribal governance is rooted in male supremacy); Resnik, *Dependent Sovereigns*, *supra* note 75, at 702 (finding that the *Santa Clara Pueblo* Court prioritized sovereignty interests over the challenging of rules that "subordinate women"); Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 *YALE L. J.* 169, 177-78, 185 (1991) (finding that the result of the Court's "great respect" for tribal sovereignty was a second victimization of Native American Indian women, who suffer discrimination both within and without the tribe). See also AMY GUTMANN, *IDENTITY IN DEMOCRACY* (2003); Marie Anna Jamie Guerrero, *Civil Rights Versus Sovereignty: Native American Women in Life and Land Struggles*, in *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* 101, 101-02, 107 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).

88. See, e.g., Gloria Valeneia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 *ST. JOHN'S L. REV.* 69, 88-93 (1995) ("Indian feminists have rejected the Western feminist approach to gender equality by retaining the cultural framework and a commitment to the tribal nations' autonomy"); Valencia-Weber, *Racial Equality*, *supra* note 54, at 365-75 (arguing that the conflict between Native and constitutional visions of the relationship between individual and group rights is exacerbated by non-tribal outsiders' lack of knowledge); Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 *WIS. WOMEN'S L.J.* 347, 367-70 (2002) (arguing that "cultural sovereignty" is the foundation on which both autonomy and internally-directed changes to tribal structure and culture rest); Rayna Green, *Native American Women*, 6 *SIGNS* 248, 264 (1980) ("For Indian feminists, every women's issue is framed in the larger context of Native American people."). See also Kate Shanley, *Thoughts on Indian Feminism*, in *A GATHERING OF SPIRIT: A COLLECTION BY NORTH AMERICAN INDIAN WOMEN* 213, 215 (Beth Brant ed., 1988); C.L. Stetson, *Tribal Sovereignty: Santa Clara Pueblo v. Martinez: Tribal Sovereignty 146 Years Later*, 8 *AM. IND. L. REV.* 139, 152 (1980) (arguing that "Anglo-American reluctance" to accept the Santa Clara Pueblo ordinance regarding the children of women who married outsiders arises from "a distrust of alien norms and from a belief that United States law is the only applicable law.").

89. Cf., Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 *YALE J.L. & HUMAN.* 17, 50 (2005) [hereinafter Resnik, *Paideic Communities*] (arguing that her own solution would have been to require the provision of many federal benefits to Ms. Martinez's children while remitting the question of tribal recognition to the Pueblo, but also recognizing that this proposal "would have been understood by the Court as a serious counterweight to tribal governance"); Laurence, *supra* note 71, at 657 (positing that ICRA ought to be expanded to allow federal court review, but this action must be accompanied by a reversal of cases that deny Indian tribes jurisdiction over non-Indians).

90. WILKINSON, *supra* note 5.

91. See generally Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 *CONN. L. REV.* 813, 830 (2006) (calling *Santa Clara Pueblo* the case "most condemned by liberal critics of federal Indian law").

*C. Dissatisfaction with ICRA and Santa Clara Pueblo**1. Judicial Response: Poodry and its Progeny*

In 1996, nearly two decades after *Santa Clara Pueblo*, the Second Circuit Court of Appeals opened the door to broader federal court review of ICRA claims in *Poodry v. Tonawanda Band of Seneca Indians*.⁹² Plaintiffs were members of the Council of Chiefs for the Tonawanda Band of Seneca Indians who broke away from the tribe's legislative body in protest over alleged tribal law violations by other Council members.⁹³ After Plaintiffs formed a competing government, the Council stripped them of their tribal citizenship and banished them from the tribe's territory.⁹⁴ Plaintiffs brought suit in federal district court and made the unique argument that exclusion from the reservation provided a basis for a writ of habeas corpus under ICRA.⁹⁵

Though the district court dismissed the claim on the grounds that banishment did not trigger ICRA's habeas corpus provision, on appeal the Second Circuit considered whether the banishment constituted a "detention by order of an Indian tribe."⁹⁶ The court emphasized that the plaintiffs had no access to review within the tribal community,⁹⁷ so that "[i]f the reasoning of *Santa Clara Pueblo* foreclose[d] federal habeas jurisdiction, the petitioners ha[d] no remedy whatsoever."⁹⁸ Viewing the case through this lens, the Second Circuit decided the banishment constituted a criminal rather than civil sanction, meeting the first requirement for habeas review.⁹⁹ Then, turning to the statute, the court acknowledged that "detention" for purposes of ICRA could be met by either physical imprisonment or "sever[e] . . . actual or potential 'restraint[s] on liberty.'"¹⁰⁰ Concluding that the banishment constituted a severe restraint on liberty, the Second Circuit held that federal court jurisdiction of Plaintiffs' ICRA claim was proper.¹⁰¹

Poodry was monumental.¹⁰² It marked a change in the landscape of

92. 85 F.3d 874 (2d Cir. 1996).

93. *Id.* at 877.

94. *Id.* at 878.

95. *Id.* at 879.

96. *Id.* at 890-91.

97. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 885 (2d Cir. 1996).

98. *Id.*

99. *Id.* at 890.

100. *Id.* at 894.

101. *Id.* at 895.

102. I believe it was improper for the *Poodry* court to circumvent *Santa Clara Pueblo*'s limitation on federal court review of tribal court decisions through its crafty analysis of "detention." In my opinion, whether the tribal government acted properly in *Poodry* turns on the question of whether adequate protections for exit and dissent were present. For a full analysis of the *Poodry* decision, see Riley, *Governance*, *supra* note 18 at *64-65.

For the argument that *Poodry* was decided correctly, but for the wrong reasons, see Rosen, *The Outer Limits*, *supra* note 32, at 1136-40 (arguing that the federal court properly exercised

external review over intra-tribal matters, and its effects have been felt all across Indian country.¹⁰³ Post-*Poodry*, federal courts are again grappling with the once-settled question of federal judicial review of ICRA claims. In *Quair v. Sisco*,¹⁰⁴ for example, a federal district court in California relied on *Poodry* to allow federal court jurisdiction over plaintiffs' banishment and disenrollment claims against the Santa Rosa Rancheria Tachi Indian Tribe.¹⁰⁵ Calling *Poodry* "authoritative" on the issue,¹⁰⁶ the court held that the disenrollment and banishment of tribal members constituted "detention" under ICRA's habeas provision, authorizing federal court review of their claims.¹⁰⁷

Since *Poodry*, some federal courts have swiftly dismissed detention-based ICRA claims, even after applying its broad reasoning.¹⁰⁸ But in another class of ICRA cases, decisions to decline federal court review of ICRA claims appear more complicated and potentially problematic. In these cases, courts have declined to authorize federal court review of tribal courts' ICRA decisions, but nevertheless express serious concern about tribal courts' exclusive jurisdiction over civil rights claims.¹⁰⁹ In some instances these opinions convey judges'

jurisdiction, but ought to have only been concerned "whether the tribal council had faithfully followed its own customary banishment procedures, as the tribal council in fact had claimed in their banishment letter").

103. See, e.g., *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004).

104. *Id.*

105. *Id.* at 971.

106. *Id.*

107. Judge Levy heard oral arguments on the parties' motions for summary judgment on September 27, 2006. At the time this piece was published, no decision had been issued.

108. See, e.g., *Sbenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004) (holding that petitioners' claims did not amount to a sufficiently "severe restraint on liberty" under *Poodry* to invoke federal habeas review); *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708 (2d Cir. 1998) (citing *Poodry* and holding that members of the Oneida Indian Nation did not suffer severe restraint on their liberty, nor did they exhaust administrative remedies, as required for habeas corpus relief under ICRA); *Alire v. Jackson*, 65 F. Supp. 2d 1124 (D. Or. 1999) (citing *Poodry* and granting defendant's motion for summary judgment on the grounds that exclusion of nonresident nonmember was civil proceeding, for which habeas corpus relief is not available).

109. See, e.g., *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) (holding that the court did not have jurisdiction to intervene in intratribal membership dispute which raised ICRA claims. The court opined: "We agree with the district court's conclusion that this case is deeply troubling on the level of fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of tribal sovereign immunity. This is a matter in the hands of a higher authority than our court."); *Halbritter*, 366 F.3d at 92 (holding that the federal court did not have jurisdiction to hear ICRA claims, noting that "[e]ven though the actions of the ruling members of the Nation may be partly inexcusable herein, we can only remedy those wrongs which invoke the jurisdiction of this Court. Unfortunately for Petitioners, Constitutional provisions limiting federal or state authority do not, *per se*, control the actions of the tribal governments complained of herein."); *LaMcree v. Superior Court of the County of Riverside*, 131 Cal. App. 4th 1059, 1063 n. 2 (Cal. Ct. App. 2005) (holding that the state court did not have jurisdiction under Public Law 280 to intervene in case brought under the Indian Civil Rights Act. In a footnote the court expounded on its opinion, stating that "our ruling means that plaintiffs have no formal judicial remedy for the alleged injustice . . . [T]ribes have been given broad power to order their own affairs without regard for Eurocentric mores. To the extent that Congress has not chosen to provide an effective *external* means of enforcement for the rights of tribal members, the omission is for Congress to

angst over evidence of potential abuses by tribal governments and urge Congress or the Supreme Court to intervene.¹¹⁰

Poodry and its progeny manifest the concerns raised by the Supreme Court's pro-sovereignty decision in *Santa Clara Pueblo*; that is, that rogue tribal governments are engaging in unchecked violations of individual civil liberties. In this sense, these cases embody fears brewing since first contact between Europeans and Natives; namely, that Indian tribal governance is simply too far afield from Western liberalism to be tolerated. While the *Poodry* line of cases represents the real-world application of that belief, the illiberalism literature,¹¹¹ discussed below, embodies its theoretical component.

2. Academic Response: The Illiberalism Literature

A growing body of legal scholarship, the illiberalism literature, contemplates the political and philosophical tensions raised by the presence of illiberal groups in liberal societies. Scholars in the field approach this academic project from a wide variety of perspectives. For example, some adhere to liberalism's commitment to pluralism and tolerance, while others advance more aggressive, interventionist policies. Thus, while the scholars discussed here are not singularly devoted to any one particular theory or outcome, they nevertheless share an important link. When advancing their respective theories, they commonly include Indian tribal governments as one in a series of examples of illiberal actors. Though a handful of these scholars reference relatively obscure tribal laws or practices in discussing Indian tribes,¹¹² the vast majority label tribes illiberal based solely on the facts revealed in *Santa Clara Pueblo v. Martinez*.¹¹³ Oftentimes, they employ this case alone to contend that Indian tribes operate inconsistently with Western liberal ideals and largely without oversight by the dominant society.¹¹⁴ This assumption allows scholars

reconsider if and when it chooses.").

110. See, e.g., *LaMere*, 131 Cal. App. 4th at 1063 n. 2; *Lewis*, 424 F.3d at 963.

111. See *supra* note 17 (explaining "illiberalism literature").

112. See, e.g., KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 6, at 164-65 (referencing a case where the Pueblo's theocratic government did not respect the religious liberty of tribal members who had converted to Protestantism); Rosen, "Illiberal," *supra* note 14, at 829 (noting a Winnebago gender-specific tribal law and custom); Rosen, *The Outer Limits*, *supra* note 32, at 1078 n. 102 (1998) (noting the congruence of political, religious and personal identity among the Hopi).

113. See, e.g., KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 6, at 165 (classifying the Santa Clara Pueblo as illiberal because they use "sexually discriminatory membership rules"); Rosen, "Illiberal," *supra* note 14, at 804 (referring to Kymlicka's classification of the Santa Clara Pueblo as illiberal due to the tribes' sexually discriminatory membership policy); Sunder, *Piercing the Veil*, *supra* note 28, at 1429 (employing the Santa Clara Pueblo as an example of a non-liberal culture based on the Supreme Court's decision in *Santa Clara Pueblo*); GUTMANN, *supra* note 87, at 44-56 ("The call for group sovereignty often amounts to a license for a dominant member of the group to impose injustice on others, even (as in the Martinez case) on a majority of others.").

114. See, e.g., KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 6, at 38-39 (arguing that limiting the application of the U.S. Constitution's Bills of Rights to Indian tribes "create[s]

to ignore the real-world ramifications of a full-scale imposition of dominant legal norms onto tribal nations.¹¹⁵

My critique of the illiberalism literature can be applied most readily to two recent works of Madhavi Sunder, who relies on *Santa Clara Pueblo* to bolster her arguments against tolerance of illiberal groups. In the first of these articles, *Cultural Dissent*,¹¹⁶ Sunder argues that law should not be used to protect culture, because such protection entrenches cultural elites in power and subverts individual rights. To concretize her argument, Sunder applies the “cultural dissent” theory to a variety of scenarios that she claims would be positively affected by her approach.¹¹⁷ Here, Sunder references *Santa Clara Pueblo*,¹¹⁸ arguing that the Court’s recognition of the Pueblo as a “distinct” community and a “separate people” reframed the case as one about “the external threat of the state” to tribal sovereignty, rather than about an individual’s civil rights claim.¹¹⁹ She contends that the Court should have adopted a cultural dissent approach, which recognizes that “cultural distinctiveness and sovereignty are often attained only by actively suppressing claims for greater autonomy and equality within a culture.”¹²⁰ In the end, Sunder argues that the Court should have intervened in the case and forced the Pueblo to change their membership rule to reflect the values of the dominant society.¹²¹ All the while she concedes that successful application of her theory in this instance requires that one put “complicated issues of tribal sovereignty aside.”¹²²

In a subsequent work, *Piercing the Veil*,¹²³ Sunder argues that law’s deference to religion and culture suppresses individual rights.¹²⁴ She again

the possibility that individuals or subgroups within Indian communities could be oppressed in the name of group solidarity or cultural purity”); Sunder, *Piercing the Veil*, *supra* note 28, at 1429 (referring to *Santa Clara Pueblo* and arguing that “tribal sovereignty for Native Americans is yet another area in which U.S. law defers to traditionalists within a culture over the claims of reformers”); GUTMANN, *supra* note 87, at 49-51.

115. Cf. Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 647 (2004) (“In short, ‘[t]he failure . . . to appreciate the difference between Indigenous people as a race and Indians as citizens of separate sovereign nations . . . confuse[s] the message sent to American society about Indigenous political status and thereby compromise[s] the existence of Indigenous sovereignty.’”) (citations omitted).

116. Sunder, *Cultural Dissent*, *supra* note 28.

117. *Id.* at 558.

118. *Id.* at 559.

119. *Id.*

120. *Id.* at 559-60.

121. *Id.* (“To the extent women and others within the tribe are no longer willing to accept the tribe’s norms, the state should recognize that by choosing to stay out of the conflict in the name of cultural autonomy, the state is in fact choosing a side in an internal debate [N]ormatively, the state should weigh in on the side of greater autonomy and equality, rather than on the side of repression.”) (emphasis in original).

122. Sunder, *Cultural Dissent*, *supra* note 28 at 560.

123. Sunder, *Piercing the Veil*, *supra* note 28.

124. *Id.* at 1425.

references *Santa Clara Pueblo*,¹²⁵ but this time her criticism of the case reaches beyond the Court's holding and goes to the legal foundations of tribal autonomy. She asserts that "tribal sovereignty for Native Americans is yet another area in which U.S. law defers to traditionalists within a culture over the claims of reformers."¹²⁶ Sunder contends that the Court erred in *Santa Clara Pueblo* because, in her view, it bowed to the interests of tribal leaders at the expense of Martinez's quest for equal justice.¹²⁷ Other scholars have similarly claimed that tribal sovereignty—particularly as employed in *Santa Clara Pueblo*—improperly shields illiberal cultures from external change. Reflecting on *Santa Clara Pueblo*, one theorist asserts: "[G]roup sovereignty often amounts to a license for the dominant members of a group to impose injustice on others"¹²⁸

Sunder's works are misleading in that they intimate that the recognition of tribal sovereignty constitutes *per se* deference to traditionalists and threatens modernity.¹²⁹ By suggesting that the Supreme Court should have imposed the dominant culture on the Santa Clara Pueblo, Sunder hastily makes the leap to federal intervention. In doing so, she fails to recognize the possibility that the Pueblo—certainly well aware of members' dissenting views—will work to change its own laws, consistent with tribal cultural values. In fact, evidence indicates that change is occurring at Santa Clara Pueblo in regards to the membership ordinance.¹³⁰ Moreover, many contemporary liberal theorists agree that it is counterproductive to impose foreign cultures onto minority groups,¹³¹ contending that true change only happens when driven by members of the self-governing society.¹³² In contrast, Sunder's approach erroneously assumes that Indian culture will only "evolve" if change is imposed from outside.¹³³

Sunder's work also ignores the fact that the Santa Clara Pueblo's membership rule is only one of hundreds of membership rules maintained by

125. *Id.* at 1429.

126. *Id.*

127. *Id.* at 1430.

128. GUTMANN, *supra* note 87, at 47.

129. Sunder, *Cultural Dissent*, *supra* note 28 at 560.

130. At Santa Clara Pueblo, a committee has been established to examine the membership ordinance and assess its impact on the tribe. Members of the committee include one of the original defendants in the case, as well as some children of Santa Clara women who are not members of the Pueblo due to the Court's decision in *Martinez*. Gloria Valencia-Weber, *Racial Equality*, *supra* note 54, at 373.

131. See GUTMANN, *supra* note 87, at 50 (discussing Kymlicka and arguing against his position regarding internal change).

132. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 167. Evidence shows that tribes are changing, from the inside out. See Riley, *Governance*, *supra* note 18 at *20-21, *26-28.

133. In fact, for a variety of reasons, tribal cultures are in a state of flux, with many moving towards greater emphasis on individual rights. See Goldberg, *Individual Rights*, *supra* note 83, at 909 (noting that her work with Indian communities "suggests growing demand for the recognition and protection of such [individual] rights").

Indian tribes, many of which comport with liberal notions. Some tribes, such as the Navajo Nation, have gone even further than the federal government by adopting an Equal Rights Provision, explicitly requiring legal equality between the sexes.¹³⁴ By relying solely on *Santa Clara Pueblo* to contend that Indian tribes are illiberal, Sunder's scholarship neglects to acknowledge the broad diversity between Indian nations.

Finally, Sunder's critique also omits any discussion of the complex legal status of Indian tribes in the federal system. After all, though tribal sovereignty ensures that tribes may govern independently, there are some critical federal limits on tribal autonomy. For example, the federal government still maintains a degree of control over tribal constitutions, which often set forth tribal membership requirements. Today, changes within some tribal constitutions are subject to approval by the tribal membership and the Secretary of the Interior, which affords the federal government a large oversight role in tribal affairs.¹³⁵ Sunder's failure to address the complicated legal issues raised by the political and historical status of the "domestic dependent nations" weakens her analysis. Although Sunder does concede this infirmity to some extent in *Cultural Dissent*, as she acknowledges that to accept her theory complicated issues of tribal sovereignty must be put aside.¹³⁶

Sunder's work plainly illustrates the problems with the illiberalism literature. And it does not stand alone. Even scholars advocating for the increased autonomy of purportedly illiberal groups often rely heavily on *Santa Clara Pueblo* in labeling Indian tribes illiberal. Prominent political theorist Will Kymlicka also references the case, arguing that "the Pueblo tribal council violates the rights of its members by . . . employing sexually discriminatory membership rules."¹³⁷ He further describes the absence of federal court review over tribal court decisions as "creat[ing] the possibility that individuals or subgroups within Indian communities could be oppressed in the name of group solidarity or cultural purity."¹³⁸ Though he is an ardent advocate of indigenous peoples' collective rights, Kymlicka's assertions can be misleading, as he does not delve deeply into the historical circumstances that gave rise to Indian tribes' anomalous status.

Along with Kymlicka, other group-rights theorists also discuss Indian tribes without specific reference to tribal sovereignty, sometimes conflating tribal governments with non-sovereigns. Mark Rosen, for example, advocates for the right of groups to self-govern, but has discussed Mormons, Mennonites,

134. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1138 (2004).

135. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 476 (2000). Many of these constitutions have built-in provisions that require changes to be approved by the Secretary of the Interior. Resnik, *Dependant Sovereign*, *supra* note 75, at 712-14.

136. Sunder, *Cultural Dissent*, *supra* note 28, at 560.

137. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 165.

138. *Id.* at 39.

the Oneida, Scientologists, and Theosophists along with Indian nations, potentially causing confusion about tribes' unique status.¹³⁹ And even while arguing that liberal societies are obligated to accommodate distinctive communities, Glen Robinson contends that "[t]here is no apparent basis for distinguishing between Indians and . . . [the] Amish, or Orthodox Jews."¹⁴⁰

These examples provide a snapshot of the illiberalism literature that draws primarily on *Santa Clara Pueblo* to support the claim that tribes are illiberal, but simultaneously omits the complete legal and historical analysis necessary to explain tribal sovereignty and Indian differentness.¹⁴¹ Undoubtedly, this literature endeavors to address broad, philosophical questions raised by illiberalism rather than to undertake a detailed examination of tribal sovereignty. Yet, designating Indian tribes as illiberal while failing to consider their anomalous legal status creates an unjustifiable lacuna between theoretical conceptions of Indian tribes and the real-world functions of sovereign Indian governments. As a result, calls for greater federal control over tribal governments¹⁴² do not take into account the full panoply of potential consequences such actions hold for Indian nations.¹⁴³ Understanding the legal, historical, and contemporary cultural components of tribal sovereignty is critical in comprehending how law has shaped in the past, and ought to continue to guide in the future, the complex interactions between the federal and tribal governments. That is the subject of the following Part II.

II

UNDERSTANDING TRIBAL SOVEREIGNTY¹⁴⁴

As the illiberalism literature reflects, *Santa Clara Pueblo*—and the corresponding perception of tribes as illiberal—retains a great deal of influence and continue to stir controversy. With stakes in tribal membership increasing due to a few tribes' rapidly changing economic circumstances,¹⁴⁵ tribal

139. Rosen, *The Outer Limits*, *supra* note 32, at 1055-59, 1061, 1081.

140. Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 342-43 (1997).

141. Such explanations are critical for a full understanding of the legal situation of Indian tribes, as many Americans are unaware of the existence of the "third sovereign." For a discussion of Indian nations as the "third sovereign," *see, e.g.*, Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 TULSA L. J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes.").

142. Sunder, *Cultural Dissent*, *supra* note 28, at 559-60; Sunder, *Piercing the Veil*, *supra* note 28, at 1407. *Cf.* KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 164-70 (proposing that liberals do not force illiberal societies to change, but instead create incentives for them to become liberal).

143. Sunder, *Cultural Dissent*, *supra* note 28, at 559-60.

144. In this section I focus on the law of the United States in relation to Indian tribes to explain the current state of tribal sovereignty. This approach has been thoughtfully criticized by Indian law scholars who contend that it "concede[s] far too much authority to the United States at the expense of the Indian nations and their inherent sovereignty." Porter, *infra* note 148, at 1598.

145. *See, e.g.*, Eric S. Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 451 (2003) ("By

governments are subject to greater scrutiny now than they have been for decades.¹⁴⁶ Thus, it is critical for Indian nations' continued sovereign existence that outsiders understand both the historical foundations and contemporary expressions of tribal sovereignty. Accordingly, this Part proceeds in two sections. First, I sketch out the legal and historical foundations of tribal sovereignty. Second, I examine a few manifestations of tribal sovereignty in practice, briefly addressing the cultural, commercial, and governmental functions served by and performed through the exercise of tribal sovereign authority.

A. Historical and Legal Foundations of Tribal Sovereignty

As presently constituted under federal law, tribal sovereignty ensures that Indian tribes enjoy the same inherent rights of self-government over their members and retained territories as any other nation, except as limited by the doctrine of discovery, treaty-based cessions of authority, or explicit congressional abrogation under the plenary power doctrine.¹⁴⁷ Tribal

the year 2000, gross revenues from Indian gaming exceeded \$10.6 billion . . . an increase of more than two thousand percent over twelve years The extraordinary expansion of the Indian gaming industry—most notably its mushrooming revenues—has caused various disputes among tribal members, tribes, states, and the federal government.”) (citations omitted); *History of the Committee on Indian Affairs*, U.S. Senate Committee on Indian Affairs, <http://indian.senate.gov/cominfo.htm> (last visited Feb. 10, 2006) (detailing the growth, expansion, and establishment of the U.S. Senate Committee on Indian Affairs over the last twenty-five years); ExpectMore.gov, the Office of Management and Budget and Federal Agencies, available at <http://www.whitehouse.gov/omb/expectmore/summary.10001091.2005.html> and <http://www.whitehouse.gov/omb/expectmore/summary.10001082.2005.html> (detailing the current Executive's critique of tribal courts and tribal law enforcement) (last visited Feb. 12, 2006).

146. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 127 (2006) [hereinafter Fletcher, *The Supreme Court*] (noting that Indian gaming has inspired greater federal encroachment in tribal matters, touching everything from membership disputes to federal recognition petitions, and contending that “the backlash against Indian gaming feared since its early days is now here and flourishing”).

147. See, 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, 455 (2005) (“Tribes resemble foreign countries because they have dominion over their lands and members. But, unlike foreign nations, with which the federal government deals at arm's length, they are subject to the paramount sovereignty of the federal government.”); Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 75 (2003) (discussing how current economic activities may create additional disputes regarding tribal sovereign authority); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 815 (1996) (“The essential claim of tribal Indians that distinguishes them from other groups is their claim of sovereignty—the inherent right to promulgate and be governed by their own laws.”); Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 438 (“By authorizing Congress to regulate commerce ‘with foreign Nations, and among the several States, and with the Indian Tribes,’ the Constitution places tribes in the same category as acknowledged sovereigns and recognizes that tribes are sovereigns distinct from the United States but nonetheless suggests that they are not foreign nations.”); Sarah Krakoff, *supra* note 134, at 1189-90 (“The framework of federal law is inescapable, yet federal law renders tribal sovereignty a fragile concept, resting vulnerably in the hands of potentially unconstrained federal courts that articulate a nebulous common law and legislators who exercise an insufficiently

sovereignty is embodied in hundreds of treaties between Indian nations and the colonial powers, referenced in the U.S. Constitution, recognized by a vast body of Supreme Court jurisprudence, and affirmed by numerous congressional acts. These will be addressed in turn.

1. Recognizing Tribal Sovereignty

Before the United States was even formed, and for many years since, treaties have governed the relationship between the Indian nations and colonial powers.¹⁴⁸ And the authority to make treaties lies exclusively with nation-states. Thus, treatment of Indian nations as sovereigns, both in a historical and legal sense, is virtually indisputable, "given the long track record of diplomatic interaction between the European colonial governments and the Indian nations."¹⁴⁹ Through treaty formation, tribal nations became participants in a sovereign-to-sovereign relationship with the colonial powers, which took on the role of protector of Indian tribes.¹⁵⁰ Treaties with Indian nations spanned a wide variety of topics, including resolving boundary disputes, delineating hunting and fishing rights, and establishing peace between sovereigns.¹⁵¹ In the peace treaties in particular, tribes often ceded land and certain political rights to the dominant government, but reserved all rights not expressly ceded.¹⁵² The "reserved rights" rule of Indian treaty interpretation makes clear that the colonial powers did not grant rights to the Indians via treaty, but accepted cessions of rights from the Indians, who retained those rights not granted.¹⁵³ This doctrine reveals much about Indian sovereignty: "Because tribal

constrained plenary power. The commentary on this unsatisfactory state of doctrinal affairs is extensive.").

148. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1600 (2004).

149. *Id.* at 1601. I do not mean to imply that Indian nations' sovereignty is dependant on the views of the dominant society; rather, that treatment acts as further evidence of inherent tribal sovereignty.

150. Carol Tebben, *An American Trifederalism Based on the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 327 (2003).

151. See, e.g., Treaty Between the United States and the Wyandot, Delaware, Clippewa, and Ottawa Nations, Jan. 21, 1785, Art. III, 7 Stat. 16, 17 (setting forth the boundary line between the United States and the Wyandot and Delaware nations); Treaty Between the United States and the Delaware Nation, Sept. 17, 1778, Art. II, 7 Stat. 13, 13 (wherein the Delaware Nation and United States agreed that "a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations"); *United States v. Winans*, 198 U.S. 371 (1905) (adjudicating the Yakima Nation's right to fish upon the Columbia river as set forth in the treaty between the United States and the tribe). See also Porter, *supra* note 148, at 1600-02.

152. Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 439 (explaining the reserved rights doctrine and pointing to it as the source for the term "Indian reservation").

153. *Winans*, 198 U.S. at 381; see also Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1103 (2005) (explaining that the reserved rights doctrine also gave rise to the Indian canons of treaty interpretation).

sovereignty is understood as being retained from a tribe's inherent, preconstitutional sovereignty rather than consisting of delegated power, the exercise of this sovereignty does not entail any federal or state action that would trigger the Constitution."¹⁵⁴ Even though Congress ended treaty-making in the late 1800s,¹⁵⁵ the reserved rights rule of treaty interpretation was substantiated by an early Supreme Court case and is still employed today.¹⁵⁶

In addition to treaty-making, the U.S. Constitution also confirms the sovereign status of Indian tribes. At the time of the Constitution's creation, Indian nations were already established in the U.S. and exercised inherent sovereignty over their people and territories.¹⁵⁷ Thus, the U.S. Constitution, which has never been amended to formally incorporate tribal governments into the federal-state system, does not regulate the conduct of Indian tribal governments.¹⁵⁸ Even so, the Constitution expressly mentions Indian tribes three times.¹⁵⁹ Specifically, it empowers Congress to regulate commerce with the Indian nations and authorizes both the President and the Senate to make treaties with them.¹⁶⁰

Supreme Court jurisprudence, reaching back to the 19th century, also laid the groundwork for an understanding of the unique sovereign rights of Indian nations. In *Cherokee Nation v. Georgia*,¹⁶¹ the Supreme Court engaged in a detailed discussion of the anomalous legal relationship between the U.S. government and the Indian tribes.¹⁶² In determining whether it had jurisdiction under the Constitution to hear a case by an Indian tribe against a state, the Court defined the tribe as "a distinct political society, separated from others,

154. Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 440.

155. *Id.* at 441.

156. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). For a complete discussion of *Worcester*, see *infra* at 46.

157. See Porter, *supra* note 148, at 1599.

158. *Id.* at 1596 n.1 (citing *United States v. Lara*, 124 S. Ct. 1628, 1636 (2004), which states that "the Constitution does not dictate the metes and bounds of tribal autonomy"). See also *United States v. Wheeler*, 435 U.S. 313, 330 (1978) (concluding that because Indian nations have inherent sovereignty, separate tribal and federal prosecutions are not barred by Double Jeopardy Clause of the U.S. Constitution); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (concluding that the grand jury provisions of the Fifth Amendment of the U.S. Constitution were meant to apply to the federal government only and not to Indian tribal governments).

159. Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 436.

160. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."); U.S. CONST. art. II, § 2, cl. 2 ("The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."). See also Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 438 (noting that the Constitution also contains an exclusion of "Indians not taxed" from state population rolls for purposes of representation in the House of Representatives. The phrase "Indians not taxed" refers to unassimilated tribal Indians, a term that "applies to no one today.").

161. 30 U.S. (5 Pet.) 1 (1831).

162. *Id.* at 16 (stating that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence"); see also Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 437.

capable of managing its own affairs and governing itself.”¹⁶³ At the same time, the Court determined that the language of the Indian Commerce Clause—which textually distinguishes foreign nations from tribes¹⁶⁴—was inconsistent with a designation of tribes as foreign nations.¹⁶⁵ This paradoxical view was further supported by tribes’ practical situation and status.¹⁶⁶ Tribes existed within the boundaries of the United States, were not considered independent sovereigns by foreign powers, and had entered into treaties in which they acknowledged being under the protection of the United States.¹⁶⁷ In light of this peculiar status, Chief Justice Marshall labeled tribes “domestic dependent nations.”¹⁶⁸

Subsequent Supreme Court jurisprudence affirms the view of tribes as sovereigns. One year after *Cherokee Nation*, the Supreme Court heard *Worcester v. Georgia*.¹⁶⁹ *Worcester* arose from a power struggle between the federal government and the state of Georgia, which sought to interfere with the Cherokee Nation’s treaty-based right to be free from state criminal jurisdiction within its borders.¹⁷⁰ In interpreting a Cherokee treaty, the Court invoked the reserved rights doctrine, finding that treaty language offering the Cherokee peace and the protection of the United States did not constitute a complete cession of sovereignty.¹⁷¹ Instead, Chief Justice Marshall held that tribal nations were “independent, political communities, retaining their original natural rights.”¹⁷² He concluded that the status of tribal nations vis-à-vis the federal government left the states no role in Indian affairs,¹⁷³ making Georgia’s attempt to exert jurisdiction in the Cherokees’ territory unlawful.¹⁷⁴

Since these early Indian law cases, the Supreme Court has repeatedly

163. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). See also Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 437.

164. U.S. CONST. art. I, § 8, cl. 3.

165. *Cherokee Nation*, 30 U.S. at 18 (noting that in the Indian Commerce Clause, Indians are “clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union.”).

166. *Id.* at 16 (“[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else . . .”).

167. *Id.* at 17; see also Tebben, *supra* note 150, at 322 (arguing that the Constitution not only failed to extinguish tribal sovereignty, but actually recognized and bolstered it via the Commerce Clause), and 331 (recognizing that Commerce Clause language makes it clear that Indian tribes are not treated like foreign nations); Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 438.

168. *Cherokee Nation*, 30 U.S. at 17.

169. 31 U.S. (6 Pet.) 515 (1832).

170. *Id.* See also Tebben, *supra* note 150, at 331.

171. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552-54 (1832). See also Frickey, *supra* note 81, at 439 (“The treaties involved in *Worcester* contained several clauses that could have been read as representing a complete cession of Cherokee sovereignty.”).

172. *Worcester*, 31 U.S. at 559.

173. *Id.* at 515; see also Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 438.

174. *Worcester*, 31 U.S. at 561 (“[T]he acts of Georgia are repugnant to the constitution, laws, and treaties of the United States . . .”).

recognized the sovereignty of Indian nations.¹⁷⁵ In a long line of decisions, the Court has emphasized that Indian nations' sovereignty "long predates that of our own Government"¹⁷⁶ and that tribes maintain the power to "make their own laws and be ruled by them."¹⁷⁷ Holding to *Worcester's* exclusion of state law from Indian country, the Court has since acknowledged that Indian nations enjoy a panoply of sovereign rights essential to self-government. For example, contemporary Indian tribes govern commerce on their reservations via complex systems of taxation applicable to both Indians and non-Indians,¹⁷⁸ while reservation Indians remain free from the imposition of state income tax on monies earned on the reservation.¹⁷⁹

Perhaps most importantly, the Court has acknowledged that the creation, implementation, and enforcement of legal rules are central to self-governance. Accordingly, the Court has upheld a vast array of lawmaking functions by Indian tribes. In the criminal context, tribal governments possess jurisdiction to prosecute¹⁸⁰ and punish Indians who commit crimes on the reservation.¹⁸¹ As sovereigns distinct from the federal and state governments,¹⁸² double jeopardy does not attach to such prosecutions, even where another sovereign has concurrent jurisdiction.¹⁸³ And Indian tribes retain significant civil jurisdiction as well. Tribal courts develop tribal common law as they resolve intra-tribal matters¹⁸⁴—including controversial membership disputes¹⁸⁵—as well as

175. In fact, the Supreme Court's docket has been peppered with Indian law cases, even though only one to two percent of the United States' population is Native. See Tebben, *supra* note 150, at 333 ("Cases involving issues of tribal sovereignty are now commonplace in the caseload of the Supreme Court."). One reason put forth for this phenomenon is that the Supreme Court itself is grappling with the complicated conflicts that arise due to Indian nations' unique sovereign status.

176. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

177. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

178. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding a tribe's imposed sales tax on non-members' on-reservation purchases); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that the tribe maintains inherent authority to tax parties extracting oil and gas from reservation land); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (upholding tribes' discretionary power to impose severance taxes on non-Indians operating on tribal lands). See also Tebben, *supra* note 150, at 333.

179. *McClanahan*, 411 U.S. at 165.

180. *United States v. Lara*, 124 S. Ct. 1628 (2004) (upholding Congressional power to authorize tribal criminal jurisdiction over both member and non-member Indians who commit crimes on tribal lands).

181. This authority is subject to the limitations set forth within ICRA, which provides that tribes can impose only penalties or punishments up to a term of one year, a fine of \$5,000, or both. ICRA, 25 U.S.C. § 1302(7).

182. *Talton v. Mayes*, 163 U.S. 376 (1896) (upholding a conviction arising out of tribal court against a Fifth Amendment challenge).

183. *United States v. Wheeler*, 435 U.S. 313, 330 (1978).

184. DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 11, 421 (5th ed. 2005) (discussing the courts of the Navajo Nation, the types of intra-tribal conflicts they hear, and how they are creating "a line of precedents large enough to constitute a common law of the tribe.").

185. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (denying federal court review of a tribe's membership rules).

conflicts involving non-members.¹⁸⁶ The Supreme Court has affirmed all these acts as within the scope of tribal sovereign authority.

Finally, Congress also has reinforced and reinvigorated conceptions of Indian self-government.¹⁸⁷ The 1934 Indian Reorganization Act¹⁸⁸ is particularly significant, as it renewed congressional support for tribal self-governance and ended a policy period specifically geared towards assimilation of tribal peoples into U.S. culture and government.¹⁸⁹ Congress has passed other important legislation on behalf of Indian tribes as well. For example, the Indian Child Welfare Act of 1978¹⁹⁰ gave tribal communities control over the adoption of Indian children,¹⁹¹ and the Native American Graves Protection and Repatriation Act¹⁹² safeguards the human remains, sacred objects, and cultural patrimony of indigenous peoples. These laws, and others,¹⁹³ reaffirm the federal government's commitment to act in furtherance of tribal rights¹⁹⁴ and reinforce federal policy supporting Indian self-determination and self-government.¹⁹⁵

186. *Williams v. Lee*, 358 U.S. 217, 223 (1959) (denying state jurisdiction over a suit brought by a non-Indian against tribal members concerning transactions which occurred on tribal lands).

187. Congress can restore tribal rights. *See, e.g.*, 25 U.S.C.A. §1301(2) (overruling *Duro v. Reina*, 495 U.S. 695 (1990) and defining tribal powers of self-government to include "the inherent power of Indian tribes, hereby recognized and affirmed to exercise criminal jurisdiction over all Indians.").

188. Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified as amended 25 U.S.C. §§ 461-479 West 2001 and Supp. 2005)).

189. Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 444 n. 63 ("The [Indian Reorganization] Act curtailed allotment and restricted other forms of alienation of tribal land, provided for new acquisitions of tribal land, established opportunities for tribal incorporation and self-governance, and extended financial credit to tribes for these purposes" (referencing FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 147-51 (Rennard Strickland ed., 1982))).

190. 25 U.S.C. §§ 1901-1963 (1983).

191. 25 U.S.C. § 1915 (a)-(b) (1978).

192. 25 U.S.C. §§ 3001-3013 (1991).

193. *See, e.g.*, Indian Self-Determination and Education Act, Pub. L. No. 93- 638, 88 Stat. 2203 (1975) (reinforcing Indian self-determination by giving Indian nations a direct role in administering tribal programs).

194. *See* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 214 (2000) ("The ICWA and NAGPRA are merely two examples of a growing recognition in the legislature that even in an era of self-determination, the federal government and Indian nations must honor their mutual, ongoing trust relationship.").

195. Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 444 (explaining that although the ICRA of 1968 certainly has "assimilative features," it did amend a previously passed congressional law to require tribal consent before allowing statutes to assume jurisdiction over Indian Country). *Cf.* Babcock, *supra* note 147, at 496 (noting that tribes found the imposition of ICRA to be antithetical to tribal sovereignty and destructive to tribal ways of life). ICRA changed the social structure of some tribes, shifting it from a focus on the whole—achieved by each tribal member recognizing his or her responsibilities to the group—to the individual—who could feasibly be pitted against the tribal government.

2. Limiting Tribal Sovereignty

Although the treaty relationship, the federal Constitution, Supreme Court precedent, and congressional action have worked together to repeatedly reaffirm the inherent sovereignty of Indian nations, in many important respects, they have also limited it.

a. Historical and Plenary Limits

While tribes considered treaties quasi-Constitutional documents,¹⁹⁶ to the colonial powers they too often represented attempts to advance the immediate goals of an encroaching white society.¹⁹⁷ As a consequence, many treaties were breached by the federal government, some within days of their enactment.¹⁹⁸ When Congress ended treaty-making with tribes in 1871,¹⁹⁹ the abandonment of the process “cut against the notion of tribes as sovereigns.”²⁰⁰

In addition to the end of treaty-making, much of the chipping away of tribal sovereignty has come in the form of the dubious doctrine of congressional plenary power over Indian affairs.²⁰¹ Pursuant to the Indian Commerce Clause, Congress and the Supreme Court have worked in tandem to expand Congress’s authority over tribes.²⁰² This extraordinary control was clarified by the Supreme Court in the case of *Lone Wolf v. Hitchcock*,²⁰³ where the Supreme Court declined to limit Congress’s unilateral abrogation of treaties with tribes. The Court held that Congress’s plenary authority over Indian tribes

196. See generally ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, 98-123 (1997) (discussing treaties as constitutions).

197. Babcock, *supra* note 147, at 459-61.

198. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 611 (1975) (“Breach by the United States was common; in one case a treaty was respected for only 12 days before it was violated by the government negotiator.”). Of course, Congress’s power to abrogate treaties is not limited to Indian tribes. Congress also has the authority to abrogate treaties with foreign nations, and it has readily done so. See, e.g., *United States v. Chae Chan Ping*, 130 U.S. 581 (1889).

199. Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 441.

200. *Id.*

201. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984) (arguing that “[t]he judiciary’s frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs”). See also Tebben, *supra* note 150, at 337 (“The constitutional basis for congressional plenary power over tribal governments *outside the realm of commerce* is vulnerable to challenge.”); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1141 (1990) [hereinafter Frickey, *Congressional Intent*] (“The plenary power doctrine rests on tenuous foundations.”).

202. See Tebben, *supra* note 150 at 337 (explaining that while the Commerce Clause does authorize Congress to regulate commerce with Indian Tribes, the Constitution does not necessarily authorize plenary power over tribal governments beyond the realm of commerce).

203. 187 U.S. 553 (1903).

was a political power,²⁰⁴ and treaty abrogation pursuant to that power raised a nonjusticiable political question not reviewable by the Court.²⁰⁵

Since *Lone Wolf*, the Supreme Court has assumed that Congress's management of Indian affairs is proper pursuant to its plenary power,²⁰⁶ and Congress has freely exercised that authority, both in favor of and against tribal interests. At times past Congress has relied on its plenary power to legislate against tribal property interests and Indians' cultural and political rights. For example, Congress has passed legislation that stripped tribes of their aboriginal territory,²⁰⁷ forced their removal to remote locations,²⁰⁸ and broke up communal land holdings, resulting in the vast divestiture of tribal property.²⁰⁹ In further attacks on tribes' cultural rights, Congress has passed laws criminalizing Indian religious ceremonies²¹⁰ and vesting ownership of Indian human remains in the federal government.²¹¹ Congress has similarly diminished tribes' political rights, enacting legislation that extended federal criminal jurisdiction over Indian country,²¹² unilaterally terminating tribal status,²¹³ and requiring tribes to negotiate with states over the scope of their

204. *Id.* at 565.

205. *Id.*

206. *See, e.g.,* *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs."); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."); *Winton v. Amos*, 255 U.S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations.").

207. *See, e.g.,* Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975) (codified at 16 U.S.C. §§ 228a-228j (1994)).

208. Indian Removal Act of May 28, 1830, ch. 148, Stat. 411 (forcing tribes to leave ancestral homelands in the east for Indian Territory west of the Mississippi River). *See also* Tebben, *supra* note 150, at 336.

209. Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-334, et. seq.) (repealed by Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 2007 (codified as amended at 25 U.S.C. §§ 2201-2219 (2004))). *See also* Tebben, *supra* note 150, at 336.

210. Federal Agencies Task Force, American Indian Religious Freedom Act Report (Department of the Interior, 1979) at 5-6. *See also* *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (1999) ("In 1892, Congress outlawed the practice of traditional Indian religious rituals on reservation land. Engaging in the Sun Dance, one of the ceremonies at issue in this case, was punishable by withholding 10 days' rations or 10 days' imprisonment.") (citing H. Exec. Doc. No. 1 part 5, vol. II, 53 Cong., 2d Sess., at 28-31, reprinted in FRANCIS PAUL PRUCHA, S.J., AMERICANIZATION OF THE AMERICAN INDIAN: WRITINGS FROM THE FRIENDS OF THE INDIANS 1880-1900, 300-05 (1973)).

211. *See* Antiquities Act of 1906, Act of June 8, 1906, c. 3060, 34 Stat. 225 (codified at 16 U.S.C. § 432 (1994)) (treating Native American remains found on federal lands as "objects of antiquity"); Archaeological Resources Protection Act of 1979, Pub. L. 96-95 (codified at 16 U.S.C.A. §§ 470aa-470ll) (treating Native American remains found on federal lands as "archaeological resources" and property of the United States).

212. Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)).

213. *See, e.g.,* Menominee Indians Act of 1954, Pub. L. No. 83-399, 68 Stat. 250 (codified at 25 U.S.C. §§ 891-902) (repealed by Menominee Restoration Act of 1973, Pub. L. No. 93-197,

gaming rights.²¹⁴ All these actions were taken under the guise of Congress's plenary power over Indian affairs via the Indian Commerce Clause.²¹⁵

b. Judicial Limits

Despite an early history of affirming tribal sovereignty, the Supreme Court has also had a hand in its diminishment. Several scholars now contend that "it is the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty."²¹⁶ In the past few decades, the Court has significantly deviated from the early principles of federal Indian law to erode tribal rights.²¹⁷ For example, despite ICRA's robust protections for defendants subject to tribal criminal prosecutions,²¹⁸ the Court has held that tribes do not have the ability to prosecute non-Indians who commit crimes on tribal lands,²¹⁹ resulting in serious challenges for law enforcement on reservations.²²⁰ Recent cases by the Court also reflect a trend towards diminishing tribes' civil jurisdiction over nonmembers as well.²²¹ For example, the Court has held that a tribal court lacked civil jurisdiction over both a tribal

87 Stat. 770). See also Tebben, *supra* note 150, at 336.

214. Indian Gaming Regulatory Act of 1988, Pub. L. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721 (1996)).

215. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."). See Tebben, *supra* note 150, at 336.

216. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) [hereinafter Frickey, *A Common Law for Our Age of Colonialism*] (explaining how recent Supreme Court decisions rather than congressional action have eroded tribal sovereignty). Over the past twenty years, U.S. Indian law scholars have been vocal critics of the Supreme Court's assault on tribal sovereignty. See, e.g., Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 490 ("[F]or the past three decades, the highest Court of the United States has been on a decisional path that undercuts tribal prerogatives, and recently several Justices openly challenged the notion that tribes should be recognized as self-governing in the first place."); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001) (contending the Supreme Court has made "radical departures from the established principles of Indian law" in its unrelenting attack on tribal sovereignty); Joseph William Singer, *Canons of Conquest: The Supreme Court Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003) ("Over the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty."); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 409 (2003) ("Today, the eviscerating potential of the Court's Indian law decisions provokes a real and palpable fear among tribal nations for their future existence.").

217. See Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 452-72.

218. See ICRA § 1302(7) (limiting punishment under ICRA to a term of one year imprisonment, a maximum \$5,000 fine, or both).

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

220. For a full discussion of the complex jurisdictional issues that have arisen in regards to criminal enforcement in Indian country, see Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

221. See Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 457.

member's wrongful search and seizure claim against state officials acting on tribal land,²²² and a tort action arising from nonmembers' automobile accident on a state highway running through the reservation.²²³ These decisions reflect the growing gap between the Court's current Indian law jurisprudence and the realities of tribal life.²²⁴

Congress's ambitious use of its plenary power—upheld by the Court—served as an early assimilative force and threat to tribal sovereignty.²²⁵ Today, the Supreme Court's role in shrinking the boundaries of tribal sovereign authority has resulted in a renewed assault on Indian nations.²²⁶ As the pendulum swings to and fro in regards to Indian policy, the current vulnerability of tribal sovereignty is evident.²²⁷ But limitations on tribal sovereignty, however damaging, have not destroyed the living sovereignty of Indian nations.²²⁸

B. Tribal Sovereignty in Practice

Tribal sovereignty touches virtually every component of tribal life within Indian country. Each day, hundreds of Indian tribes affirm the existence of tribal sovereignty through real and tangible everyday actions²²⁹ that span every facet of life, from the most basic and fundamental—birth, death, marriage, divorce, and prayer—to the most sophisticated and specialized—policing

222. *Nevada v. Hicks*, 533 U.S. 353 (2001).

223. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

224. See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 659 (2006) [hereinafter Frickey, *Transcending Transcendental Nonsense*] (drawing on *Oliphant* to illustrate how the Court adopts broad rules limiting tribal sovereign authority and extends them to all Indian nations, in this case resulting in a decision that “earns the epithet of transcendental nonsense” because of its disconnect with the real-world circumstances of tribes).

225. See Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 443 (discussing the assimilative policies pursued by Congress, such as Allotment).

226. *Id.* at 452 (noting that “[b]eginning in the early 1970’s, the Court began undercutting the plenary power/canonical interpretation model of federal Indian law that had remained largely intact since the nineteenth century”). See also Fletcher, *The Supreme Court*, *supra* note 146, at 124-25 (arguing that the diminished role of Congress and the Executive in setting Indian policy has resulted in a situation where the Supreme Court has “additional latitude in deciding Indian cases according to its own preferences”).

227. WILKINSON, *supra* note 5, at 13 (noting that Indian policy has been cyclical due to “the tension between two conflicting forces—separatism and assimilation Thus, the laws are not only numerous; they are also conflicting, born of the explicit regimen and implicit tone of the eras in which they were enacted.”).

228. See generally Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 118-22 (2005) [hereinafter Riley, “Straight Stealing”] (discussing the “living sovereignty” of American Indian nations).

229. Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 345-46 (1969) (“For Indians, tribal sovereignty is not an abstract concept, a cultural relic, or even a vanishing institution. On their reservations, the tribe represents to its members not only the local government, but also a dominant force in their economic and social lives.”).

members, resolving disputes, and incarcerating law-breakers. While it is not my intention to lay out every facet of tribal governance or undertake a comprehensive empirical analysis, I do seek to show how tribal sovereignty manifests in three core components of Indian tribes' sovereign existence: tribal cultural, commercial, and governmental functions.

I. Cultural Functions

Indian tribes embody the most basic cultural unit in the human experience: they are, in many respects, families.²³⁰ Tribes are bound by bloodlines, clan affiliations, and kinship,²³¹ with ancestry or descent often constituting the dominant factor in determining tribal membership.²³² Family structure is a defining characteristic of tribal life.²³³ Even the political loyalties of individual Indians are often shaped around these identifiers.²³⁴

Within tribal nations, the family structure also facilitates the formation of intricate social networks. Since many families trace their tribal roots back dozens of generations, tribal nations tend to be composed of groups of people—usually organized by family or clan—that have interacted with each other consistently for centuries.²³⁵ This long-standing social structure is deeply embedded within tribal nations and serves as the framework within which tribal people socialize, marry, worship, and feud. Given the closely knit nature of tribal communities, some scholars suggest that tribal cultures and Indian governance systems would suffer severely if civil rights protections are interpreted to apply to tribal governments just as they apply to the federal and state governments.²³⁶ In fact, one scholar has gone so far as to argue that such an imposition into intra-family tribal life could lead to the breakdown of tribal society.²³⁷

Indian tribes also serve as repositories for unique, ancient, and valuable indigenous knowledge that is kept alive by the continued existence of these threatened cultures.²³⁸ With vast differences between them, indigenous peoples

230. See, e.g., G. Kenneth Reiblich, *Indian Rights under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 623-24 (1968) ("Indian tribes [are] more like families than governmental units.").

231. See Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373, 1390 (2002) [hereinafter Goldberg, *Descent*] (describing Indian nations as being "commonly based on kinship and clan relations, with ancestry or descent forming the dominant—though not exclusive—component of belonging.").

232. *Id.*

233. See, e.g., Reiblich, *supra* note 230, at 623-24.

234. See Babcock, *supra* note 147, at 540 (arguing that tribal political loyalties are often tied to a member's clan or familial status).

235. Goldberg, *Descent*, *supra* note 231, at 1391-92 ("At gatherings of Navajo, for example, individuals asked to introduce themselves typically identify not only the clan of which they are born, but also the connected clans to which they owe sacred obligations.").

236. See Skibine, *supra* note 83, at 87.

237. Reiblich, *supra* note 230, at 623-34.

238. See Riley, "Straight Stealing," *supra* note 228, at 76-82 (explaining how the

possess working knowledge of tribally-specific pre-contact religions, medicinal remedies, burial traditions, and sacred practices.²³⁹ Hundreds of ancient languages and ceremonies are kept alive in flourishing, functioning tribal communities.²⁴⁰ These aspects of cultural identity are inextricably linked with tribal sovereignty. For example, in tribes that have consistently maintained separateness and sovereign authority within their aboriginal homelands—thus avoiding some of the losses that occurred through programs of assimilation and removal—tribal members are more likely to speak their native language and practice pre-contact religion. These tribal governments are also in a better position to develop and expand governance systems that are dependant on tribal custom and tradition.²⁴¹ Thus, for tribes, political, territorial, and cultural sovereignty²⁴² are intimately linked and mutually reinforcing.²⁴³

2. Commercial Functions

For decades, Indian tribes have owned and operated tribal businesses as sovereigns.²⁴⁴ Though the popular perception of Indian commerce centers on the casino, in reality tribes have long engaged in a plethora of commercial enterprises.²⁴⁵ Tribes own auto-parts plants, timber management services, printing businesses, mills, grocery stores, golf courses, banks, and ski resorts, to name a few.²⁴⁶ Tribes are also actively engaged in media outreach to their

protection of indigenous peoples' cultural property is tied to the survival of their unique cultures).

239. See generally *id.* at 109-15 (discussing cultural resource programs and cultural preservation codes in indigenous communities which set out to protect and revitalize indigenous languages, sacred sites, burial practices, natural resources, traditional medicines, and ceremonies).

240. *Id.* at 109-11.

241. *Id.* at 98 (arguing that tribes maintaining political autonomy and geographical consistency have had fewer disruptions in relationship to the natural world, tribal history, and traditional life, including their native language).

242. Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357, 357 (2006) (explaining that "cultural sovereignty refers to tribes' efforts to represent their histories and existence using their own terms, and it acknowledges that each Indian nation has its own vision of self-determination as shaped by each tribe's culture, history, territory, traditions, and practices").

243. See ANGELA R. RILEY, *INDIGENOUS PEOPLES AND EMERGING PROTECTIONS FOR TRADITIONAL KNOWLEDGE INTELLECTUAL PROPERTY AND INFORMATION WEALTH* (Peter Yu ed., Praeger Press) (forthcoming 2007) (discussing the relationship between territorial, political, and cultural sovereignty and survival for indigenous peoples).

244. *The Next Generation*, FORTUNE, Mar. 7, 2005, available at http://www.timeinc.net/fortune/services/sections/fortune/corp/2005_03TribalGaming.html (describing various business ventures of Native American tribes, including the Chickasaw Nation's AM/FM radio station; the Shakopee Mdewakanton Dakota Sioux tribe's Dakotah Sport and Fitness Club; the Mille Lacs Band of Ojibwe Woodlands National Banks; the Santa Ana Pueblo's store specializing in Native American foods; the Sandia Pueblo's market center specializing in Native American art; the Oneida Indian Nation's newspaper; the Winnebago Tribe's gas stations; and the Mississippi Band of Choctaw's printing press) (last visited May 9, 2007).

245. *Id.*

246. See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973) ("The Mescalero Apache Tribe operates a ski resort in the State of New Mexico, on land located outside

members and surrounding communities, investing in newspapers, radio stations,²⁴⁷ and commercial telecommunications ventures.²⁴⁸

Undoubtedly, the gaming industry has helped to further expand tribal holdings.²⁴⁹ Today, tribes cater to their visiting guests—both Indian and non-Indian—by developing hotels, resorts, restaurants, and other tourist attractions.²⁵⁰ In fact, gaming tribes alone contributed \$32 billion in revenue, \$12.4 billion in wages, and 490,000 jobs to the U.S. economy in 2001.²⁵¹ And those numbers are clearly growing.²⁵² Some tribes have expanded commercial enterprises to the point that they are now among the largest employers in the regions or states in which they're situated.²⁵³

Tribal sovereignty and tribal economic development are intertwined in a myriad of ways. The power to tax and regulate commerce on the reservation—powers reserved to sovereigns—generates income necessary for tribes to fulfill basic governmental functions, thus keeping tribal members engaged in tribal life. Such development also has allowed tribes to recover aboriginal territory lost after contact with Europeans.²⁵⁴ These lands are used to rebuild tribal communities, some of which included only a handful of members and a tiny or

the boundaries of the Tribe's reservation.”); U.S. Dep't. of Labor v. Occupational Safety & Health Review Comm'n, 935 F. 2d 182 (9th Cir. 1991) (describing the timber industry of the Warm Springs tribes). See also R. Spencer Clift, III., *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 179 (2003) (describing commercial ventures of Indian tribes, including “smokeshops, fuel stations, convenience stores, casinos, hotels, golf courses, agribusiness, and banks on more than 300 Indian reservations located throughout the United States”); STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 103 (2005).

247. Citizen Potawatomi Nation, Public Information, <http://www.potawatomi.org/services/Public+Information/default.aspx> (last visited May 9, 2007).

248. Gabriel S. Galanda, *Insuring Indian Country*, INS. J., May 22, 2006, at 138, available at <http://www.wkg.com/uploadedFiles/Resources/Articles/GalandaInsuringICMay06.pdf> (last visited May 9, 2007).

249. See LIGHT & RAND, *supra* note 246, at 103 (stating that tribes have used casino revenues to open restaurants, hotels, printing businesses, and invest in commercial real estate).

250. See *id.*

251. Galanda, *supra* note 248, at 138. See also LIGHT & RAND, *supra* note 246, at 103 (noting that Indian tribes employ thousands of people, both Indian and non-Indian).

252. See Tom Wanamaker, *Let the Games Begin: The Economic Impact of Indian Gaming*, INDIAN COUNTRY TODAY, Mar. 09, 2005, available at <http://www.indiancountry.com/content/cfm?id=1096410499> (discussing the ancillary spending, tax revenue, and expansion projects boosted by the Indian gaming industry).

253. See *id.* at 103; Matthew L. M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY. L. REV. 1, 45 (2004) [hereinafter Fletcher, *The Power to Tax*] (noting that Michigan Indian tribes with gaming operations are often the largest employer in their regions).

254. See, e.g., Glenn Coin, *Second Land Trust Hearing Scheduled*, THE POST-STANDARD, Jan. 10, 2007, available at 2007 WLNR 561591 (announcing the Bureau of Indian Affairs public hearing to discuss the Oneida Indian Nation proposal to put up to 35,000 acres of re-purchased aboriginal lands into federal trust).

non-existent land base in the post-contact period.²⁵⁵ Finally, economic development has also enabled tribes to revitalize their traditional cultures,²⁵⁶ as generated income has been used to build tribal museums,²⁵⁷ restore indigenous languages,²⁵⁸ and repurchase once lost sacred lands.²⁵⁹

3. Governmental Functions

Like all sovereigns, Indian tribes are governments. As such, tribes provide members a panoply of goods and services. Although these benefits vary by tribe, an Indian living with her tribe may have available to her housing and housing assistance (both on and off the reservation), health care benefits, education (from pre-school to the graduate level), and day care facilities owned and operated by the tribal government.²⁶⁰ With tribally owned gas stations, banks, grocery stores, fitness centers, gift shops, printing presses, newspapers and radio stations, tribal members oftentimes access all their daily necessities through tribal government or tribal enterprises.²⁶¹ For an Indian who lives, works, socializes, exercises, and worships on a reservation, there is no other government that has a larger role in her day to day life than her tribe.

Tribal sovereignty and self-governance translates into tribes' legal authority. Most tribes enact, enforce, and live by their own tribal laws (either oral or codified), which apply to all tribal members.²⁶² Criminal laws are usually enforced by tribal police, who may be cross-deputized with state or local law enforcement officials.²⁶³ Some tribes employ prosecutors who try

255. See, e.g., Anthony Lonetree, *Tribal Land Issue Heating Up in Scott County*, STAR TRIBUNE, Feb. 11, 2006, at 1B, available at 2006 WLNR 2553170 (chronicling the change in fortunes of the Shakopee Mdewakanton Sioux Community: in 1969 it had thirteen members and 258 acres of land; today it runs a casino, three hotels, and a golf course, and contributes to local infrastructure development).

256. Riley, "Straight Stealing," *supra* note 228, at 112-13.

257. *Id.*

258. *Id.*

259. Michael Riley, *Duped by Abramoff, Tribe Still Smiling*, DENVER POST, Feb. 5, 2006, <http://blogs.denverpost.com/washington/2006/02/05/duped-by-abramoff-tribe-still-smiling> (noting how the Sandia Pueblo have used profits from their gaming resort to recover sacred land on Sandia Mountain).

260. Gover, Stetson, and Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277, 294 (1991) (describing the Puyallup Tribe's use of trust fund income for "housing, elderly needs, burial and cemetery maintenance, education and cultural preservation, supplemental healthcare, day care, and other social services").

261. *Id.*

262. See Riley, "Straight Stealing," *supra* note 228, at 92 ("American Indians govern themselves by tribal law through various institutional forms, including, among others, tribal councils, tribal courts, and tribal peacemaking systems.").

263. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1440 (1997) (describing how tribal police members may be cross-deputized with state officials to facilitate cooperation among law enforcement).

crimes committed by Indians on the reservation.²⁶⁴ Disputes are resolved through indigenous justice systems that, in some cases, deviate significantly from Anglo-style courts. In some, tribal councils fill this role, while others rely on elders or clan leaders to settle disputes.²⁶⁵ There are a growing number of tribal courts in place to hear disputes—between both members and non-members—that arise on the reservation.²⁶⁶ Tribal courts vary widely in their structure: trial courts, appellate courts, Peacemaker courts, talking circles, drug courts, and specialized courts for domestic violence or child custody matters can all be found in Indian country.²⁶⁷ Among the tribal nations' many lawmaking functions are those reserved specifically for sovereigns: namely, the power to arrest, prosecute, and incarcerate those who break their laws.²⁶⁸ Along with the authority to exile and exclude, these are perhaps the most important powers of the tribal nations as sovereign entities.²⁶⁹

III

ASSESSING THE COSTS OF ICRA'S EXPANSION

Tribes are not only anomalous as compared to the federal and state governments; there is a vast range of governance systems within tribal communities as well.²⁷⁰ There are over 500 federally recognized Indian tribes in the United States, including Alaska, which contains over 200 tribal villages.²⁷¹ Indian nations create, maintain, and are bound by their own tribal

264. Porter, *supra* note 148, at 1613 (explaining that more attorneys are becoming involved in Indian nations, serving as tribal general counsels, tribal prosecutors, tribal judges, defense counsel and general private practitioners).

265. Nell Jessup Newton, *Tribal Courts Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 309 (1998) (describing the Winnebago traditions of "family, clan or council deliberations" to resolve disputes) (quoting Rave v. Reynolds, 23 INDIAN L. REP. 6150, 6158 (Winnebago Sup. Ct. 1996)).

266. *Id.* at 294 (describing the courts of gaming tribes, which frequently hear cases brought by non-Indians).

267. See, e.g., Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 592-653 (2000) (discussing various tribal courts and resolution processes, including tribal and appellate courts, family gatherings and talking circles, and restorative justice methods for dealing with domestic violence and child custody matters); Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997-2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2002) (discussing the successful development of a drug court on the Duckwater Shoshone Indian Reservation); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 252 (1994) ("The Navajo Peacemaker court is part of the judicial system; when parties consent to or seek its resolution process, the dispute is converted from a criminal matter into a civil case.").

268. See Frickey, (*Native*) *American Exceptionalism*, *supra* note 81, at 479.

269. See generally *id.* (arguing that it is nonsensical to analogize Indian tribes—who have unique sovereign powers—to private associations).

270. See Riley, "*Straight Stealing*," *supra* note 228, at 74 ("Tribal cultures are not all alike; tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot.").

271. See Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,327-33 (July 12, 2002); Federally

laws,²⁷² which vary greatly from one community to another.²⁷³ Like the states and the federal government, many tribes follow a written constitution that serves as the paramount governing document and source for many tribal rights.²⁷⁴ Others govern without a written constitution, sometimes relying on codified law or legal custom passed down orally.²⁷⁵ Tribal leadership may be concentrated in a lone individual, or distributed among clans, families, or tribal councils.²⁷⁶ Some have laws and structures intentionally kept secret from the dominant society as required by tradition and religion²⁷⁷ or as part of a concerted effort to insulate some facets of tribal life from outside interference.²⁷⁸

Critics of tribal sovereignty tend to overlook the vast spectrum of legal systems and practices found within Indian communities, and consequently fail to consider the consequences of homogenizing tribal governance. Some theorists endorse third-party intervention in tribal communities²⁷⁹ without acknowledging that such proposals will essentially require tribal cultures to become mirror images of the dominant society.²⁸⁰ Short of the wholesale application of federal law, federal courts have no clear rubric to decide which tribal rules constitute “illiberal” violations that “buttress the hegemony of cultural elites” and which ones are palatable.²⁸¹ One example is illustrative.

Consider the “culture war” over gay rights²⁸² playing out across the U.S., a battle that has not stopped at reservation borders. In the wake of a backlash in

Recognized Indian Tribes, available at <http://www.artnatam.com/tribes.html> (last visited June 11, 2004); GETCHES, ET AL., *supra* note 184.

272. Riley, “Straight Stealing,” *supra* note 228, at 96.

273. *Id.*

274. McCarthy, *supra* note 83, at 484 (asserting that “[b]y 1947, 161 tribes had adopted constitutions under the IRA provisions”).

275. See Goldberg, *Individual Rights*, *supra* note 83, at 892 n. 14 (citing to the tribal codes of the Navajo Nation and the Colville Nation who do not have written constitutions).

276. Porter, *supra* note 148, at 1605-06 (“In many cases [the establishment of judicial systems] is completely novel, as traditionally the method for resolving disputes or adjudicating offenses was reserved to chiefs in council or other traditional governing institutions.”).

277. See Carpenter, *supra* note 153, at 1113-14 (“Moreover, tribal custom may dictate that religious and cultural traditions be kept confidential among members, clans, societies, or practitioners within the tribal community.”).

278. *Id.*

279. Sunder, *Piercing the Veil*, *supra* note 28, at 1407; Sunder, *Cultural Dissent*, *supra* note 28, at 559-60.

280. For some scholars, this may be the desired result. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 423-24 (1986) (arguing that most indigenous cultures are inherently illiberal and incapable of liberalization.) Raz also argues that the break-up of illiberal indigenous communities is the “inevitable by-product” of attempts to liberalize their institutions. *Id.*

281. Sunder, *Cultural Dissent*, *supra* note 28, at 504. See generally Resnik, *Paideic Communities*, *supra* note 89, at 49 (posing her own compromise solution to the *Santa Clara Pueblo* case).

282. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (noting that “[i]t is clear . . . that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”).

the dominant culture against equal rights for gays,²⁸³ the Cherokee Nation of Oklahoma and the Navajo Nation—the two largest Indian tribes in the country—recently passed anti-gay marriage laws.²⁸⁴ The Cherokee Nation Tribal Council unanimously passed a law banning same-sex marriage after two lesbian Cherokee women successfully obtained a marriage license from the Nation.²⁸⁵ The Tribal Council challenged the marriage license in tribal court, and the Judicial Appeal Tribunal (JAT) (the Cherokee's highest court of appeals) ultimately ruled that it lacked standing to challenge the order.²⁸⁶ As a result, the Cherokee Nation is the first Indian tribe in the country to recognize (one) gay marriage.²⁸⁷ Ironically, given that the American government denies the right of marriage to gays—and, in fact, President George W. Bush supports

283. In 2004, voters in thirteen states were presented ballot measures seeking approval of constitutional amendments that would limit the institution of "marriage" to solely between a man and woman. The measures passed in all thirteen states, in most cases by overwhelming majorities: eleven during the November 2nd general election (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah), and two in earlier primary elections (Louisiana and Missouri). In 2005, Kansas and Texas became the eighteenth and nineteenth states to amend their constitutions to limit marriage to same-sex couples. Initiative & Referendum Institute, University of Southern California Law School, *Ballotwatch*, available at <http://www.iandrinstitute.org/ballotwatch.htm> (last visited Feb. 19, 2006).

284. In 2004, the Cherokee Nation Tribal Council unanimously passed a law banning same-sex marriages. *Cherokees Ban Gay Unions*, INDIAN LIFE, July 1, 2004, at 2, available at 2004 WLNR 5884017. On April 22, 2005, the Navajo Nation Council overwhelmingly passed the Diné Marriage Act of 2005, prohibiting same-sex marriages. Ryan Hall, *Same-Sex Marriages Not Recognized by Navajo Nation*, FARMINGTON DAILY TIMES, Apr. 23, 2005, at A1, available at 2005 WLNR 6499471. Anna Macias Aguayo, *Navajos Vote to Veto Gay-Marriage Ban*, ASSOCIATED PRESS, June 4, 2005, available at <http://www.outinsarasota.com/home/news.asp?articleid=8848&star=1>). On May 1, 2005, Navajo Nation President Joseph Shirley, Jr., vetoed the bill. Jason Begay, *Delegate Calls for Override of Gay-Ban Veto*, NAVAJO TIMES, May 5, 2005. On June 3, 2005, the Navajo Nation Council overrode the President's veto. Aguayo, *supra*.

285. Dawn L. McKinley and Kathy E. Reynolds, a lesbian couple, applied for and received a Cherokee tribal marriage certificate in Tahlequah, Oklahoma, on May 13, 2004. *Tribal Court Refuses Same-Sex Marriage Certificate*, CHEROKEE PHOENIX AND INDIAN ADVOC., June 30, 2004, at 4, available at 2004 WLNR 15184957. In order for the marriage to be formalized, the certificate had to be signed by the officiating officer and registered at the tribal courthouse. *Id.* However, on May 14, the Chief Justice of the Judicial Appeals Tribunal, the Cherokee tribe's highest court, declared a thirty-day moratorium on the registering or issuing of Cherokee marriage licenses. Donna Hales, *Cherokee Attorney Objects to Same-Sex Marriage License*, MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, June 12, 2004, available at 2004 WLNR 16042428. A month later, on June 14, the Cherokee Nation Tribal Council made a last minute addition to its meeting agenda and, despite complaints about procedural irregularity, unanimously passed a law banning same-sex marriages. *Council Bans Same-Sex Marriages*, CHEROKEE PHOENIX AND INDIAN ADVOC., July 1, 2004, at 6, available at 2004 WLNR 15124954; *Cherokees Ban Gay Unions*, *supra* note 284, at 2.

286. Donna Hales, *Cherokee High Court Dismisses Latest Attempt to Block Lesbian Marriage*, MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, Jan. 5, 2006.

287. Adam Tanner, *Top US Indian Court Upholds First Gay Marriage*, ASSOCIATED PRESS (January 5, 2006), available at <http://www.localnewsleader.com/brocktown/stories/news-00120412.html> (last visited Feb. 19, 2006).

a constitutional amendment to ban such marriages²⁸⁸—it is unclear whether a tribe that allows (or disallows) gay marriage is acting illiberally.²⁸⁹ Even setting aside this example, which really serves to highlight the definitional problems of illiberalism alluded to earlier in this Article, the reality is that increased federal control over allegedly illiberal intra-tribal matters—many of which go to the core of Indianness—will subject tribal cultural practices to the discretion of the federal courts, placing both tribal sovereignty and indigenous cultural survival at risk.

Illiberalism within tribal communities is complicated and nuanced.²⁹⁰ Some nations are structured along matrilineal lines²⁹¹ while others are patrilineal.²⁹² Some tribes historically accepted transvestite, or *berdache*, members,²⁹³ while others have adopted the majority society's viewpoint and are now banning gay marriage.²⁹⁴ Some tribes retain traditional, pre-Columbian, theocratic structures,²⁹⁵ while others allow the entanglement of religion and government in the interest of furthering fundamentalist Christianity.²⁹⁶

The continued recognition of tribal sovereignty and tribes' right of self-determination currently protects tribal laws and structures against a full-scale attack by the dominant society. There are two safeguards at work, functioning together to guard against ICRA becoming an entirely assimilative force. First,

288. George W. Bush, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), at <http://www.whitehouse.gov/news/releases/2004/02/print/20040224-2.html> (last visited Feb. 19, 2006) ("If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America."); Adam Nagourney & David D. Kirkpatrick, *Urged by Right, Bush Takes on Gay Marriages*, N.Y. TIMES, July 12, 2004, at A1 (noting that President Bush escalated his support for a constitutional amendment banning gay marriage by moving the issue to the front of his presidential campaign).

289. See *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 499 (Cal. 2004) (holding that same-sex marriages performed after local officials refused to enforce statutes limiting marriage only to heterosexual couples void and of no legal effect).

290. As stated previously, I use the terminology of "illiberalism" only to address the critics of tribal cultures. I strongly feel that many non-Western practices within tribal cultures are not, in fact, "illiberal" at all, but represent a communitarian ethic absent from many European cultures.

291. See *supra* Part I.B.

292. *Id.*

293. WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* (1986) (showing how anthropological fieldwork and historical research reveal some American Indian cultures venerated androgynous individuals classified as neither male nor female).

294. Title 44 of the Cherokee Nation Marriage and Family Act was amended in 2004 to include a definition of marriage as "a civil contract between one man and one woman." *Cherokees Ban Gay Unions*, INDIAN LIFE, *supra* note 284. The Navajo Nation Code now includes language stating that "[m]arriage between persons of the same sex is void and prohibited." 20th Navajo Nation Council, Resolution of the Navajo Nation Council, CAP-29-05, (copy on file with author).

295. See *supra* PART I.B.I and *infra* PART III.C.

296. Becky Johnson, *Cherokee Ten Commandments Move Above Federal Law*, SMOKY MOUNTAIN NEWS, Sept. 21, 2005, available at http://www.smokymountainnews.com/issues/09_05/09_21_05/fr_cherokee_commandments.html.

not all provisions of the U.S. Bill of Rights were included in ICRA. Thus, certain provisions—like the Establishment Clause—do not apply to tribal governments. Expanding ICRA to include all the U.S. Bill of Rights provisions would eliminate the existing structure of selective application, ultimately subverting core tribal values. Second, tribal courts retain interpretive authority over ICRA provisions and need not interpret them “jot for jot” with federal courts.²⁹⁷ In other words, Indian tribes are authorized and encouraged to apply ICRA’s provisions consistent with tribal values and traditions.²⁹⁸ In the absence of these safeguards, core facets of indigenous peoples’ cultural and political existence—such as indigenous justice systems, gender-based systems of governance, and tribal theocracies—are at risk.

A. Indigenous Justice Systems

Indigenous justice systems constitute the facet of tribal governance most vulnerable to destruction from an expansion of ICRA. In fact, even at the time that the initial civil rights bill was first introduced, testimony and debate surrounding the proposed Act revealed tribal leaders’ fear that further federal encroachment into intra-tribal matters would wipe out Indian justice systems.²⁹⁹ During discussions on the proposed bill, tribal leaders’ testimony focused on the importance of protecting traditional tribal dispute resolution methods.³⁰⁰ They emphasized the inconsistencies between the Anglo and Indian world views in regards to law and justice. For example, the Ute and Hopi Tribes noted:

The defendants’ standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the United States. When requested to enter a plea to a charge the Indian defendant, standing before respected tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of ‘white man’s justice’, guilty persons entering pleas of not guilty merely to throw the burden of proof upon the prosecution.

297. Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109, 120 (1992) (stating that Congress chose a balanced approach in enacting ICRA, extending portions of the U.S. Bill of Rights, but not requiring that they be interpreted “jot for jot” in tribal courts); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978).

298. *Santa Clara Pueblo*, 436 U.S. at 57.

299. UNITED STATES COMMISSION ON CIVIL RIGHTS, *THE INDIAN CIVIL RIGHTS ACT 8-9* (1991) (citing *Rights of Members of Indian Tribes: Hearing Before the Subcomm. On Indian Affairs of the House Comm. On Interior and Insular Affairs*, 90th Cong. 2d Sess. 127 (1968) (statement of John S. Boyden) [hereinafter *Commission Report*]).

300. *Id.*

From their viewpoint it is not an elevating experience. We are indeed fearful that the decisions of Federal and State Courts, in the light of non-Indian experience, interpreting 'testifying against oneself' would stultify an honorable Indian practice³⁰¹

This testimony conveys concerns still relevant today. That is, if federal courts are authorized to review the practices and procedures of traditional tribal justice systems, they will have to reconcile these systems with mainstream constitutional principles. Such determinations are necessarily made within the context of the "non-Indian experience,"³⁰² compelling the courts to dismantle indigenous justice systems or practices inconsistent with mainstream constitutional law.

Other aspects of ICRA also raised concerns. Tribal leaders opposed the imposition of jury trials onto tribes,³⁰³ explaining that jury trials were seldom invoked by Indian defendants, and tribal governments often viewed the jury process as inconsistent with tribal mores.³⁰⁴ The Pueblos explained:

It [is] no more logical to use a jury system for the settlement of internal matters within the extended 'family' that makes up a pueblo than it would be to use a similar system within the framework of an Anglo-American family as a means for enforcing internal rules or resolving internal disputes.³⁰⁵

Other tribes, such as the Hopi and Ute felt similarly, and testified that "[m]any accused Indian people feel they do not need a jury of peers to determine the facts already within the knowledge of the accused. The defendant enlightens a credulous court."³⁰⁶

Statements by tribal leaders also emphasized the differences between the Anglo adversarial system and conceptions of justice within tribal nations.³⁰⁷ One Navajo leader explained that "[i]t was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case, and where who can speak and what they can say are closely regulated."³⁰⁸ This is because Navajo conceptions of fairness and social harmony require full community involvement in each dispute and, in particular, the participation of elders and those knowledgeable about the matter.³⁰⁹ In the Navajo system,

301. *Id.*

302. *Id.*

303. 25 U.S.C.A. §1303.

304. *Id.*

305. *Commission Report*, *supra* note 299, at 9 (testimony of Domingo Montoyo, Chairman of the All Indian Pueblo Council of New Mexico).

306. *Id.* (statement of John S. Boyden).

307. *Id.* at 10 (citing *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Comm. on Civil Rights*, Washington, D.C., Jan. 23, 1988, Exh. 11 at 266, 269-70 (written statement of Robert N. Clinton, Professor, University of Iowa College of Law)).

308. *Id.*

309. *Id.*

everyone is allowed to speak, and if private discussions with elders or decision-makers helps bring peace to the community, this is acceptable.³¹⁰

Perceptions of justice systems during the ICRA debates and now share a central theme: that the Anglo justice system is superior to indigenous ones.³¹¹ Indian leaders questioned this assumption at the time of the ICRA hearings, inquiring as to Congress's motivations in passing the Act. One tribal leader pressed this point, asking why tribes are not afforded "inalienable rights to be protected as our customs and traditions require" and why Congress saw fit to force Indians to "relin[q]uish our right to self-government and submit to an alien code of reasoning that someone else knows better than we the safeguards of our sacred rights?"³¹² Another leader spoke about the majority society's failure to recognize the sophisticated and well-functioning Navajo legal system, emphasizing that Indian justice has long been viewed as "having nothing to contribute."³¹³ He pointed out the ironic reality, that the Anglo judicial system had recently begun to emulate the indigenous methods of dispute resolution it had historically treated as inferior.³¹⁴

This testimony reflects Indian leaders' frustration with a majority legal system that historically devalued, misunderstood and trivialized indigenous justice systems. Furthermore, it highlights the inherent inconsistencies underlying further expansion of federal control over Indian tribes through ICRA; that is, the perception that some tribal practices deserve special protection, while others do not, and the framework pursuant to which such determinations are to be made is shifting. Tribal leaders feared broader federal power over tribal justice systems then, just as they do now. As Professor Alexander Tallchief Skibine argues, expanding ICRA to allow federal court review of tribal court decisions on purely intra-tribal matters will place every aspect of tribal governance—including membership decisions, election disputes, and freedoms of speech and religion—under the outside scrutiny of judges unfamiliar with tribal ways.³¹⁵ Such a result will thwart the intentionally limited review authorized by ICRA, and will, as some scholars have warned, make tribal courts mere instrumentalities of the federal government.³¹⁶

This expansion may also jeopardize the existence of other indigenous justice systems that deviate from Anglo norms, such as talking circles,³¹⁷ restorative justice processes,³¹⁸ and consensus-building practices.³¹⁹ Depending

310. *Id.*

311. *Commission Report, supra* note 299, at 11 n. 35 (quoting Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227 (1989)).

312. *Id.* at 127 (statement of John S. Boyden).

313. *Id.* at 11 n. 35 (quoting Tso, *supra* note 311 at 227).

314. *Id.*

315. Skibine, *supra* note 83, at 87.

316. *Id.*

317. JUSTICE AS HEALING: INDIGENOUS WAYS 111 (Wanda D. McCaslin ed., 2005).

318. *Id.* at 124.

on the tribal court's utilization of particular procedures and/or interpretation of substantive law, these fora might impermissibly depart from federal constitutional law in a variety of ways. Informal resolution systems in which "everyone [is] allowed to speak," for example, may run afoul of procedural due process requirements. Similar problems may be raised by a system in which the decision-maker has prior knowledge of the dispute or is authorized to hold private conversations with the parties.³²⁰ Consider, for example, the Navajo Nation's Peacemaker court, which deviates in some significant respects from Anglo norms. The Peacemaker courts incorporate Navajo religion and ceremony in the dispute resolution process. Selected Peacemakers commence and conclude the proceedings with prayer, and participants call upon the supernatural to direct them in the reconciliation process.³²¹ Peacemaking is effective for the Navajo precisely because it incorporates the Navajo world view about the interconnectedness of the extraordinary (the sacred) and the ordinary (the secular) within its processes.³²² However, despite its success—and its popularity³²³—Peacemaking may be unable to withstand constitutional scrutiny. Even though Peacemaking is a "time-honoured procedure ensuring consensual decision-making"³²⁴ that promotes harmony, balance, and cultural continuity for the Navajo, it potentially could likely constitute an impermissible entanglement of religion and law by constitutional standards.³²⁵

B. Traditional Gender-Based Systems of Governance

Gender-based systems of governance—which may appear at first glance wholly incompatible with liberal conceptions of equality³²⁶—are also

319. *Id.* at 128.

320. See Riley, *Governance*, *supra* note 18, at *47-48. See generally Frickey, *Congressional Intent*, *supra* note 201, at 1185 (arguing that if tribes are required to apply ICRA's guarantees in tribal court under the same standards applied by state and federal courts, "the strain on tribal resources would be enormous, and the tribal courts would be required to abandon traditional methods of resolving disputes").

321. See generally Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1014 (1997) [hereinafter Goldberg, *Overextended Borrowing*].

322. *Id.* at 1014-15 (explaining the relationship between traditional Navajo views of harmony and balance and the contemporary Peacemaker Courts). Because the Peacemaker courts entangle religion and law, the "borrowing" of such practices by non-indigenous communities has been criticized. See *id.*

323. Because of its success, it has been suggested that Navajo Peacemaking ought to be imported into Anglo dispute resolution processes as well. See generally *id.*

324. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 39.

325. For a more thorough discussion of the relationship between religion and law in the Peacemaker Courts, see Riley, *Governance*, *supra* note 18, at *43-49.

326. See generally Robert A. Williams, *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019, 1022-23 (1990) [hereinafter Williams, *Gendered*] (arguing that when non-Indians seek evidence of sexism and prejudice in traditional Indian communities, "[l]ooking . . . in the usual places one finds them in a system based on the values of white patriarchy can lead to fundamental

vulnerable to destruction via ICRA's expansion. This is because some tribes maintain roles for men and women that are complementary and equal, but nevertheless fixed and immutable.³²⁷ For example, the Tonawanda Band of Seneca Indians—one of the six tribes comprising the Iroquois Confederacy³²⁸—structures its government around eight clans.³²⁹ The clan system is matrilineally based and defines the cultural, social, and political aspects of tribal life, including how the tribe selects leaders.³³⁰ In this system, each clan selects a female Clan Mother by consensus. Together, the eight Clan Mothers appoint a man to serve as the tribe's chief.³³¹ The Clan Mothers are vested with the authority to guide some of the Chief's actions, and may remove him if he fails to fulfill his duties. Because the clan system is fundamental to the selection of the Chief, women are held in high regard and wield significant political power within the tribe. One scholar notes this "system of gendered checks and balances sought to ensure, at least in theory, that women's voices could always be heard and respected on all issues of tribal policy."³³² This gender-based model of governance is common to all of the Haudenosaunee Nations.³³³ At Onondaga, for example, Clan Mothers select men as Faith Keepers to serve on the tribe's governing council,³³⁴ and the Faith Keepers can be removed by the Clan Mothers for failing to act in the tribe's best interest.³³⁵

The Navajo Nation and several of the Hopi tribes also define many legal rights through a matrilineal clan structure.³³⁶ At Hopi Pueblo, each Hopi village maintains its own lands, which are assigned to each village's matrilineal clans.³³⁷ Women are in charge of the lands, which are passed down according to matrilineal inheritance laws.³³⁸ The clans at Hopi-Tewa also hold the land, but women are the actual owners of the land and houses.³³⁹ Here too, ownership rights descend through the mother's line.³⁴⁰

misunderstandings about Indian cultures").

327. Valencia-Weber, *Racial Equality*, *supra* note 54, at 372.

328. See Michael Cousins, *A Haudenosaunee Approach to Justice*, at 156, n. 4, in JUSTICE AS HEALING: INDIGENOUS WAYS 111 (Wanda D. McCaslin ed., 2005).

329. Williams, *Gendered*, *supra* note 326, at 1039 (including the Snipe, the Heron, the Hawk, the Deer, the Wolf, the Beaver, the Bear, and the Turtle).

330. *Id.*

331. *Id.* at 1040.

332. *Id.*

333. *Id.* at 1039.

334. Valencia-Weber, *Racial Equality*, *supra* note 54, at 368-70.

335. *Id.* at 369.

336. Krakoff, *supra* note 134, at 1138 (citing to Res. of Navajo Tribal Council CF-9-80 (1980)). In fact, the Navajo Nation has actually gone further than the United States in affording formal equality to women, adopting an equal rights provision. *Id.*

337. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1588-89 (2001) (discussing the ownership schemes of the Hopi and other tribes).

338. *Id.*

339. *Id.*

340. *Id.*

Not all gender-based practices or systems of governance are matrilineal, however. Some, like the Santa Clara Pueblo membership ordinance, preference the rights of men over those of women. But critics of gendered tribal systems often ignore evidence of matrilineal systems that reflect Indian women's authority in tribal communities. Historically, many Indian women possessed significant property interests, managed and controlled agricultural endeavors, and had the authority to initiate and end battles between nations³⁴¹ long before similar rights were extended to Anglo women. And today, Indian women wield significant power in tribal communities. In fact, Indian women are more highly represented in prestigious tribal leadership positions than are non-Indian women in comparable American political institutions.³⁴² As tribal cultures have evolved, some tribes have abandoned gendered systems of governance. But for other tribes such governmental structures have survived, as they are seen as providing an appropriate framework to distribute power and ensure cultural balance within the community.

From an American constitutional perspective, however, these gender-based systems are fundamentally flawed. Because federal law requires formal equality between the sexes, gender-specific laws in tribal communities could not withstand equal protection scrutiny. Thus, authorization for federal courts to review tribal court decisions on gender-based matters would mean the end of such systems, destroying the cultural foundation upon which tribal members seek to achieve balance in the community and in the world.

C. Theocratic Tribal Governments

Finally, theocratic tribal governments are also vulnerable to destruction if ICRA is expanded. Liberal theory requires a strict separation between the state and religion³⁴³ and expressly disavows religion's infiltration into law.³⁴⁴ While many tribal governments maintain the church-state distinction, such is not always the case, particularly among tribes that adhere to pre-contact religions. Nations such as the Pueblos, the Hopi, the Onondaga and the Meskwaki, for example, organize tribal government theologically.³⁴⁵ In these tribes, religion plays a dominant role in the selection of leaders. Often, religious figures select

341. Williams, *Gendered*, *supra* note 326, at 1034.

342. See Riley, *Governance*, *supra* note 18, at *28.

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

344. See generally Goldberg, *Overextended Borrowing*, *supra* note 321, 1016 (referring to the U.S. in particular regarding the strict separation of church and state).

345. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 273-74 (1997).

the tribe's leadership,³⁴⁶ or become leaders themselves due to their esteemed position within the tribe's religious hierarchy.³⁴⁷ As a result, the political and religious leadership is often one in the same.³⁴⁸ In such societies all aspects of tribal life—including governance, social structures, justice systems, and culture—are infused with religious meaning. Accordingly, if these tribes were prohibited from mixing religion and government, virtually every aspect of tribal society would be at risk of destruction.³⁴⁹

The ICRA debates prominently reflected tribal leaders' fears regarding the extension of the Establishment Clause to Indian tribes. Tribal leaders insisted at the time that applying the Clause to tribes would likely destroy tribal theocracies in existence much longer than the Constitution itself.³⁵⁰ Frank Barry, Solicitor of the Department of Interior, agreed. In explaining why the Department recommended no prohibition on the establishment of religion, he stated: "[b]ecause religion is so deeply rooted in their system . . . it might be destructive of their government."³⁵¹ Ultimately, Congress acknowledged that imposing the Establishment Clause onto all tribes could destroy their social and political foundations and imperil their governance systems.³⁵² Congress avoided these disastrous consequences by declining to extend the Establishment Clause to Indian tribes,³⁵³ while maintaining protection of individual Indian's rights of free exercise.³⁵⁴ The result is that Indian tribes are the only constitutionally permitted theocracies within the United States.³⁵⁵ This exceptional status allows tribes to continue to self-govern according to their tribal customs and traditional religions, rather than suffer the alternative: destruction of tribal theocracies that could possibly undermine every aspect of

346. See Michael Riley, *supra* note 259 (discussing the Sandia Pueblo: the tribe's governors and lieutenant governors—male by tribal law—are picked by religious leaders after a period of seclusion). See also Riley, *Governance*, *supra* note 18, at *50.

347. See Burnett, *supra* note 58, at 578 (stating that "[t]he Pueblo communities have been termed theocratic, because seats on the governing council were filled by the leaders of the many religious societies").

348. Michael Riley, *supra* note 259.

349. See *id.* (explaining that some pueblo members believe that "the pueblo's survival is intrinsically linked to the survival of its traditions").

350. Laurence, *supra* note 71, at 664-65.

351. Reiblich, *supra* note 230, at 623.

352. Burnett, *supra* note 58, at 591-92.

353. Everett Saucedo, *Curse of the New Buffalo: A Critique of Tribal Sovereignty in the Post-IGRA World*, 3 SCHOLAR 71, 98 (2000) ("Paragraph 1 of Title II [of ICRA] is essentially a carbon copy of the first amendment; however, it excludes the prohibition against the establishment of a religion. This exclusion is an acknowledgement of the fact that many Indian tribes are theocratic in nature.") (citing *Hearings on S. 961-68 and J.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 9 (1966)).

354. Laurence, *supra* note 71, at 665.

355. Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez: *Twenty-Five years of Disparate Cultural Visions*, 14 KAN. J.L. & PUB. POL'Y 49, 52 (2004). See Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1380 n. 82 (2002) (noting that in structuring ICRA as it did "Congress explicitly recogniz[ed] as legitimate a form of government that the Constitution expressly prohibits").

traditional tribal cultures, resulting in absolute assimilation of theocratic tribal governments.

I have given here only a few examples of how Congress's imposition of all the provisions of the U.S. Bill of Rights onto Indian tribes and corresponding federal court review of intra-tribal matters would threaten, if not altogether destroy, many aspects of traditional indigenous life. But there are many other facets of indigenous culture also at risk of destruction.³⁵⁶ If federal courts interpreting ICRA held that indigenous lifeways violated the U.S. Constitution—which, presumably, they would—it would devastate indigenous cultures. Accordingly, expansion of ICRA and federal review in tandem would force Indian tribes and tribal governments to become mini-models of state and local governments.³⁵⁷

I do not mean to ignore the possibility that the critics of purportedly illiberal Indian tribes do, in fact, seek to culturally and legally assimilate Indian peoples in accordance with Western liberal ideals. The destruction of Indian culture has long been a goal of activists situated across the theoretical and political spectrum. Consider the now-infamous Dawes Act of 1887,³⁵⁸ which broke up communally held tribal lands into lots for individual ownership, decimating the tribal land base. This Act was, in significant part, the result of advocacy on the part of so-called "Friends of the Indian."³⁵⁹ Convinced that the civilizing forces of individual, private property ownership and Christianity would improve the Indians' situation, these "friends" pushed the allotment policy into law, culturally devastating many Indian tribes.³⁶⁰ Still today,

356. For a full discussion of the wide array of tribal governmental systems that could be destroyed by either full-scale imposition of the U.S. Bill of Rights, federal court review of tribal court decisions, or expansion of Western liberal ideals regarding theories of governance, see Riley, *Governance*, *supra* note 18.

357. Frank Pommersheim & Sherman Marshall, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 420 (1992). See Porter, *supra* note 148, at 1623 ("Promoting the illegal application of American law within the Indian nations furthers the colonization and incorporation of Indigenous peoples into American society and thus jeopardizes their future as distinct societies.").

358. Act of Feb. 8, 1887, ch. 119, 24 Stat. 288 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348, 49, 354, 381).

359. Henry L. Dawes, *Solving the Indian Problem* (1883), reprinted in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900*, at 27 (Frances Paul Prucha, ed., 1973). See Bobroff, *supra* note 337, at 1565 (noting that the "Friends of the Indian" who advocated for and pushed for passage of the Dawes Act were "[s]ure in their Christian righteousness" and "had a messianic faith in the civilizing force of private property").

360. Former Principal Chief of the Cherokee Nation of Oklahoma, Wilma Mankiller, says of allotment:

What happened to us at the turn of the century with the loss of land, when our land was divided out in individual allotments, had a profound irreversible effect on our people . . . When we stopped viewing land ownership in common and viewing ourselves in relation to owning the land in common, it profoundly altered our sense of community and our social structure. And that had a tremendous impact on our people and we can never go back.

Wilma Mankiller, *The Native Americans* (TBS television broadcast 1992).

allotment is recognized as one of the most destructive pieces of legislation ever enacted in regards to tribal peoples.³⁶¹ And it does not stand alone.³⁶² Outsiders' desire to save Indians by way of destroying them is not new to indigenous peoples.³⁶³

CONCLUSION

Political theorists have recently noted an increased desire on the part of contemporary liberals to impose liberalism on indigenous groups.³⁶⁴ This is a mistake. Despite heavy criticism fueled largely by *Santa Clara Pueblo*, evidence indicates that violations of civil liberties by tribal governments are, in fact, rare.³⁶⁵ And because Indian tribes vary dramatically in their governmental structures, cultures, and contemporary lives, Congress and the Supreme Court have recognized that the federal courts are ill-equipped to differentiate between them. Thus, forcing a one-size-fits-all approach to civil liberties onto Indian tribes is not only unjustified, it would seriously endanger Indian differentness.³⁶⁶

361. President Theodore Roosevelt stated: "The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual." WILKINSON, *supra* note 5, at 19 ("Allotment . . . devastated the Indian land base, weakened Indian culture, [and] sapped the vitality of tribal legislative and judicial processes."). See also Frickey, *Congressional Intent*, *supra* note 201, at 1180 ("Allotment, arguably the most disastrous federal policy ever adopted for peaceful tribal Indians, destroyed most of the Indian land base."); Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 449 (2003) ("Allotment's impact on community held land and important sacred and cultural sites opened the door for the eventual destruction of tribal life-ways."); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1656 (2000) ("The Allotment Policy was part of an intensive federal policy of assimilation designed to break down tribal structures and institutions and supplant these with Anglo American forms of governance.").

362. Other federal laws, like the Major Crimes Act, were purportedly enacted to "save" Indians, but very often with devastating consequences. See, e.g., Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 808-09 (2006) (arguing that the Major Crimes Act, which extended federal jurisdiction over certain enumerated crimes within Indian Country, arose out of the United State's "duty of protection" to Indians, but was, at heart "an extension of authority over a subjugated people at the time of their greatest weakness and political dependence on the United States. In other words, it was a simple and straightforward act of colonization.").

363. See, e.g., Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 10-18 (1998) (describing the federal government's and missionaries' attempts to Christianize Indian children by removing them from their homes and installing them in federal boarding schools where they had religious and other instruction designed to "Kill the Indian and Save the Man."); GETCHES ET AL., *supra* note 184, at 95 (explaining that the removal policy "eventually gained political support from both the coveters of tribal lands and from non-Indians who were concerned for the Indians' well-being").

364. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 6, at 167.

365. See Skibine, *supra* note 83, at 86 (stating that "all available evidence indicates that tribes have not violated the edicts of the ICRA").

366. See Frickey, *(Native) American Exceptionalism*, *supra* note 81, at 484 (noting that the Supreme Court's recent Indian law jurisprudence is evidence of the Court "either not recognizing

Undoubtedly, Indian tribal governments owe duties to the tribal polity. And these duties should not be taken lightly.³⁶⁷ But these issues are better addressed by tribes themselves, who are in the best position to shape change in ways consistent with tribal values and traditions. This enables Indian nations to continue their own internal processes of cultural evolution and growth. Thus, as indigeneity as a way of life is increasingly threatened by an encroaching dominant culture, it is critical that the federal government take no further steps to force the assimilation and potential destruction of America's indigenous peoples.³⁶⁸

or not caring that a one-size-fits-all solution should not be imposed on communities as radically varied as those composing America's Indian country").

367. The future of Indian peoples depends on tribal governments maintaining functional, workable relationships with tribal members. See Riley, *Governance*, *supra* note 18.

368. See Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 130, 141 (2002) (contending that "[g]iven the extraordinary forces of assimilation that have been unleashed against our societies," if indigenous peoples do not choose a "distinct developmental path," they will eventually cease to exist).