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The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction

ABSTRACT. For too long, tribal judiciaries have been an afterthought in the story of tribal self-determination. Until the last half-century, many tribal nations relied on federally administered courts or had no court systems at all. As tribal nations continue to develop their law-enforcement and police powers, tribal justice systems now play a critical role in tribal self-determination. But because tribal codes and constitutions tend to borrow extensively from federal and state law, tribal judges find themselves forced to apply and enforce laws that are poor cultural fits for Indian communities – an unfortunate reality that hampers tribal judges' ability to regulate and improve tribal governance.

Even where tribal legislatures leave room for tribal judges to apply tribal customary law, the results are haphazard at best. This Article surveys a sample of tribal-court decisions that have used customary law to regulate tribal governance. Tribal judges have interpreted customary law when it is expressly incorporated into tribal positive law, they have looked to customary law to provide substantive rules of decision, and they have relied on customary law as an interpretive tool. Reliance on customary law is ascendant, but still rare, in tribal courts.

Recognizing that Indian country will continue to rely on borrowed laws, and aiming to empower tribal courts to advance tribal governance, this Article proposes that tribal judges adopt an Indigenous canon of construction of tribal laws. Elevating a thirty-year-old taxonomy first articulated by Chief Justice Irvin in *Stepetin v. Nisqually Indian Community*, this Article recommends that tribal judges seek out and apply tribal customary law in cases where (1) the relevant doctrine arose in federal or state statutes or common law; (2) the tribal nation has not explicitly adopted federal or state law on a given issue in writing; (3) written tribal law was adopted or shifted as a result of the colonizer's pressure and interests; and (4) tribal custom is inconsistent with the written tribal law, most especially if the law violates the relational philosophies of that tribal nation. Tribal judiciaries experienced at applying tribal customary law will be better positioned to do justice in Indian country.

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INTRODUCTION

Simon Otto,[1] a prominent Anishinaabe storyteller and artist, once told the aadizookaan, or sacred story, of a tiny worm who went through three phases of life.[2] In the first phase, they were a tiny, bald worm who lived underground. They were sad they could not see the world above ground. Nanaboozhoo, the Anishinaabe trickster god, advised the little worm to eat as much as they could and settle in for a long nap. The worm did so and awoke, all fuzzy, covered in brown and black fur. The fuzzy worm climbed to the surface to see the sun. Nanaboozhoo was there and called the worm Mosay, or caterpillar. Eventually, Mosay became sad because they could not climb the trees. Nanaboozhoo again advised Mosay to eat as much as they could, but this time a sticky string would come from Mosay's mouth. Nanaboozhoo told Mosay to find a safe place and wind the string around their body. Mosay did this and fell asleep. When Mosay awoke, they were surprised to find more changes, most notably two thin filaments on their back. The wind blew on Mosay, who dramatically flew into the air, lifted by the new wings. Nanaboozhoo was there and named them Mamengwaa, butterfly.

Growth and development are difficult. Changes come slowly and in stages. American Indian tribal nations are working through those stages. Even though

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1. This Article is dedicated to Simon Otto. Simon was a citizen of the Saginaw Chippewa Indian Tribe, though he grew up in Waganakising, the home of the Little Traverse Bay Bands of Odawa Indians. ANISHINAABEK ARTISTS OF LITTLE TRAVERSE BAY 55 (Marsha MacDowell ed., 1996); SAGINAW CHIPPEWA INDIAN TRIBE OF MICH. & ZIIBIWING CULTURAL CTR., E'AAWIYAANG (WHO WE ARE) 27 (Charmaine M. Benz & Marsha MacDowell eds., 1997).

   Along with hundreds of other tribal citizens, Simon was disenrolled by the Saginaw Chippewa tribal nation. *Saginaw Chippewa Tribe Removes Members Amid Per Cap Issues*, INDIANZ (Oct. 20, 2016), https://www.indianz.com/News/2016/10/20/saginaw-chippewa-tribe-removes-members-a.asp [https://perma.cc/VR7T-289L]. Those disenrollments generated numerous tribal-court decisions. For some examples of these cases, see generally *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*, 32 ILR 6047 (No. 04-CA-1017) (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Jan. 7, 2005); *Gardner v. Cantu*, No. 08-CA-1027 (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Sept. 12, 2008) (on file with author); *Graveratte v. Saginaw Chippewa Tribe of Michigan*, Nos. 09-CA-1040, 09-CA-1041 (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Aug. 16, 2010), https://turtletalk.files.wordpress.com/2010/09/ayling-v-tribal-certifiers.pdf [https://perma.cc/H9X5-YTHX]; *Kequom v. Atwell*, No. 12-CA-1051 (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Aug. 27, 2013) (on file with author); and *Alberts v. Saginaw Chippewa Indian Tribe of Michigan*, No. 13-CA-1058 (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Aug. 12, 2015) (on file with author).

   Disenrolled members of the tribe have brought suit against the federal government in a collateral action designed to force the tribe to reverse its decision. *See* Cavazos v. Haaland, 579 F. Supp. 3d 141, 145 (D.D.C. 2022).

   Sadly, Simon walked on in 2016.

2. SIMON OTTO, *The Three Lives*, *in* GRANDMOTHER MOON SPEAKS 33, 33-36 (1995).

tribal nations predate the arrival of the United States and all the other European colonizing nations, modern-day tribal nations are growing and developing anew. This Article describes a part of that story.

* * *

In the long history of tribal governance inside the borders of the United States, tribal courts are very much an afterthought. Since the Framing, Congress and the U.S. Supreme Court set the broad parameters of tribal powers and the role of state and federal governments. While federal policies eroded traditional tribal government until the late twentieth century, the Federal Bureau of Indian Affairs managed the daily lives of reservation residents. As Indian reservations shrank, and as non-Indians moved in greater numbers into Indian country beginning in the late nineteenth century, state and local governments assumed greater control as well. In the last half-century or so, federal policies have favored tribal self-determination. With all this government, to say that Indian-country governance is complicated and confusing is to say nothing new. But until recent years, tribal judiciaries have left little more than an imperceptible imprint on this history.

The reasons for the limited impact of tribal judiciaries are varied, but they are likely rooted in path dependence. Path dependence is simply reliance on the easiest, most convenient practice.[3] Tribal law usually does not arise in a vacuum; it is often borrowed or adapted from state and federal law.[4] Tribal court systems are professionalized, with most judges and practitioners trained in understanding and applying state and federal law.[5] Tribal elected officials also have the

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3. *See, e.g.*, Lawrence Friedman, *Path Dependence and the External Restraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 797-98 (2011) (noting that "independent state constitutionalism did not exist before the 1970s" due in part to path dependence); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 607 (2001) ("Path dependence occurs because once a court makes an initial decision, it is less costly to continue down that same path than it is to change to a different path."); *cf.* Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 491 ("Path dependence means more than just 'history matters,' however. The theory of path dependence also explains how early events or decisions can establish paths that are 'locked-in' or resistant to change.").

4. *See, e.g.*, Singel, *supra* note 3, at 494-95 (describing path dependence in the context of tribal labor relations).

5. *See* Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y, no. 2, 1998-1999, at 74, 74 ("When Indian tribal governments were eagerly assuming control of reservation police departments, courts and jails in the 1970s, funded by the Law Enforcement Assistance Administration and other federal agencies, the guiding philosophy was *professionalization*."). In the tribal courts in which I enjoy an appointment, all but two of the approximately sixty judges appointed to serve are lawyers. Exact total numbers are difficult to determine because, according to my understanding, several tribes draw from a pool of judges, all of whom are lawyers.

ability to restrict the power of tribal judges, whether by limiting tribal-court jurisdiction or by strengthening the sovereign immunity of tribal governments. Some tribal codes require tribal judges to follow federal law, which can limit tribal powers.[6] In these conditions, the simplest path is to follow established law—law that is, unfortunately, the law of the United States. And so, path dependence buries tribal customary law.[7]

Moreover, legal scholarship on tribal sovereignty and tribal justice systems (including my own[8]) usually focuses on limitations or restrictions on tribal nations, notably on tribal powers over nonmembers.[9] Contemporary tribal governance is the practical manifestation of an Indigenous resurgence that was never supposed to happen in the wake of the "[v]anishing Indian."[10] As Leanne Betasamosake Simpson and Edna Manitowabi have theorized in other contexts, the narratives of tribe-versus-nonmember disputes are part of the "language" that legal scholars, judges, and practitioners "can understand."[11] These subjects are therefore privileged in the scholarship and in the courts. To borrow Aimée Craft's phrasing, privileging scholarship about tribal/colonizer conflicts unintentionally but effectively freezes tribal nations in the colonizer's shadow.[12] To be sure, these conflicts are important to Indian country, but these matters often are mere

6. *E.g.*, CONST. OF THE LITTLE RIVER BAND OF OTTAWA INDIANS art. I, § 2, https://lrboi-nsn.gov/sites/default/files/pages/Constitution-2016-Amendments.pdf [https://perma.cc/FY6N-MRCA] ("The Tribe's jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and *federal law*." (emphasis added)).

7. "Tribal customary law" is merely the common law of a tribal nation. *See* Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y, no. 1, 1997-1998, at 17, 17, 22.

8. *E.g.*, Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 781, 792 (2014) (critiquing the Supreme Court's jurisprudence limiting tribal inherent powers).

9. *See, e.g.*, Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1503 (2013) (describing the "dismantling of tribal civil jurisdiction over nonmembers" by the Supreme Court); 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, 3 (1999) (discussing the "incoherent Supreme Court precedents and incandescent controversies" that define federal Indian law).

10. John W. Ragsgale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393, 429 (1997).

11. Leanne Betasamosake Simpson & Edna Manitowabi, *Theorizing Resurgence from Within Nishnaabeg Thought*, *in* CENTERING ANISHINAABEG STUDIES: UNDERSTANDING THE WORLD THROUGH STORIES 279, 279 (Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiik Stark eds., 2013).

12. Aimée Craft, *Thawing the Frozen Rights Theory: On Rejecting Interpretations of Reconciliation and Resurgence that Define Indigenous Peoples as Frozen in a Pre-Colonial Past*, *in* INDIGENOUS RESURGENCE IN AN AGE OF RECONCILIATION 96 (Heidi Kiiwetinepinesiik Stark, Aimée Craft & Hōkūlani K. Aikau eds., 2023).

sideshows to the real action—how tribal courts act in tribal-governance cases outside the gaze of most observers. What goes on inside Indian country is often a black box, with tribal laws and court decisions often going unpublished or excluded from mainstream legal-research avenues.[13] In important respects, tribal justice systems are venues where true justice matters more than it does in many state and federal courts.[14] Because tribal governments care about matters such as income inequality, over- and under-criminalization, and individual human rights, and because they might struggle to advance those principles through legal doctrines imported from state and federal law, tribal self-government rooted in Indigenous philosophies will, someday soon, directly compete with colonizing nations' governance models, where "justice" is too often irrelevant.

This Article brings to light the nascent resurgence of Indigenous philosophies in tribal justice systems.[15] First, this Article introduces the concept of judicial regulation into the literature about tribal justice systems and the governance of Indian country.[16] By "judicial regulation" of governance, I mean court rulings that enhance or restrict the powers and jurisdiction of governments, much like how scholars have used the phrase to assess the U.S. Supreme Court as a regulator of voting rights and gerrymandering,[17] federal agency powers,[18] or access to the courts in commercial-law disputes.[19] I do not mean court procedure and

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13. *Cf.* Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5 Am. Indian L.J. 101, 127-38 (2017) (summarizing sources of tribal laws).

14. *See* Matthew L.M. Fletcher, *The Sovereignty Problem in Federal Indian Law*, 75 UCLA L. Rev. (forthcoming 2025) (manuscript at 2), https://ssrn.com/abstract=4700232 [https://perma.cc/4MZE-SXET] (citing Wright v. Nottawaseppi Huron Band of the Potawatomi, No. 21-154-APP, slip op. at 11 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. June 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/06/2022-6-3-Filed-NHBP-Supreme-Court-Opinion-Order-in-Wright-et-al-v-NHBP-et-al-21-154-APP.pdf [https://perma.cc/KT69-UGRC]).

15. For a summary of Indigenous resurgence, see Heidi Kiiwetinepinesiik Stark, *Introduction: Generating a Critical Resurgence Together*, *in* Indigenous Resurgence in an Age of Reconciliation, *supra* note 12, at 3, 4-8, 12-14.

16. "Indian country" is a term of art defined in 18 U.S.C. § 1151 (2018) and related judicial opinions, in which tribal governments possess considerable governing powers. Restatement of the L. of Am. Indians § 3 (Am. L. Inst. 2022).

17. *See, e.g.*, Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1330 (1987) (discussing judicial regulation in the context of voting rights and gerrymandering).

18. *See generally* Bradford C. Mank, *Does the Evolving Concept of Due Process in* Obergefell *Justify Judicial Regulation of Greenhouse Gases and Climate Change?:* Juliana v. United States, 52 U.C. Davis L. Rev. 855 (2018) (discussing judicial regulation in the context of agency decision-making).

19. *See, e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 89-90.

lawyer discipline, areas in which judicial regulation plainly is authorized.[20] I do not mean the regulation of tribal powers by the U.S. Supreme Court, which the late and dearly missed Alex Tallchief Skibine labeled "judicial supremacy."[21] Rather, I mean tribal judicial decisions impacting tribal governance through the regulation of tribal government itself. Tribal-court decisions applying enhanced equitable or procedural defenses to persons targeted for disenrollment,[22] for example, can impose greater substantive and procedural obligations on tribal nations before they act to deny persons citizenship, an individual right that many consider fundamental.[23]

Second, this Article describes and justifies the application of Indigenous philosophies when tribal courts do engage in judicial regulation of government. Well-worn limits on state and federal courts' powers to regulate government derive from the common-law principles of colonizing nations.[24] None of these traditions need apply in Indian country. For example, in finding that the Indian Civil Rights Act[25] bars federal courts from hearing civil suits, the Supreme Court in *Santa Clara Pueblo v. Martinez*[26] gave tribal lawmakers and judiciaries room to incorporate tribal customs and traditions into civil-rights claims arising from the

20. *E.g.*, HANNAHVILLE INDIAN COMMUNITY TRIBAL COURT RULE 2.000, https://hannahville.net/wp-content/uploads/2024/05/Non-Indian-Civil-Contempt-Rule-2.pdf [https://perma.cc/G4R4-JX3V].

21. *See, e.g.*, Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 392 (2007); Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy*, 8 COLUM. J. RACE & L. 277, 305 (2018).

22. *See, e.g.*, Alexander v. Confederated Tribes of Grand Ronde, 13 Am. Tribal. L. 353, 358-63 (No. A-15-008) (Confederated Tribes of the Grand Ronde Community of Oregon Ct. App. Aug. 5, 2016) (applying the equitable defense of laches to reject a tribal disenrollment petition); Wright v. Nottawaseppi Huron Band of the Potawatomi, No. 21-154-APP, slip op. at 2-3 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. June 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/06/2022-6-3-Filed-NHBP-Supreme-Court-Opinion-Order-in-Wright-et-al-v-NHBP-et-al-21-154-APP.pdf [https://perma.cc/KT69-UGRC] (reversing the dismissal of a suit seeking the enrollment of petitioners on equitable grounds).

23. Judith M. Stinson, *When Tribal Disenrollment Becomes Cruel and Unusual*, 97 NEB. L. REV. 820, 849 (2019).

24. *See generally* Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (examining the origins of federal Indian law in the laws of various European nations).

25. 25 U.S.C. § 1302(a) (2018).

26. 436 U.S. 49, 72 (1978).

Due Process Clause or Equal Protection Clause. To date, relatively few tribal political bodies have done so,[27] but that is changing.

This Article initially will survey the history of tribal courts, explaining the reasons behind their relatively minimal impact on Indian-country governance and drawing on the work of legal scholar and practitioner Robert Odawi Porter. It will then turn to the monumental changes in tribal judiciaries and in tribal legal practice during the last few decades, discussing several recent tribal-court decisions that could signal a future where tribal courts play a far greater role in regulating governance through the application of customary law. This discussion will build on the work of legal scholar Wenona T. Singel. Finally, the Article offers preliminary views on whether introducing robust tribal judicial regulation to the already-crowded field of Indian-country governance is normatively desirable. The short answer? Yes. Many of the intractable political disputes that plague tribal governance can be traced to tribal governments' reliance on state and federal legal principles that are deeply flawed and have limited value in Indigenous contexts. Tribal judges and scholars should acknowledge and embrace an Indigenous canon of construction of tribal laws by tribal judiciaries that limits the impact of the ongoing project of colonization on tribal nations.

I. A BRIEF HISTORY OF TRIBAL COURTS AS AN AFTERTHOUGHT

The history of federal Indian law and policy is usually described in chronological eras. Not every tribal nation went through every era, but every tribal nation went through some of them. The story of tribal justice systems is no different. Federal policies and goals buried tribal justice systems (along with all tribal governance). This Part surveys the impacts of federal Indian law and policy on tribal justice systems.

A. *Before the Indian Reorganization Act (Pre-1934)*

Vine Deloria, Jr., the father of American Indian studies, referred to precolonial tribal councils—and presumably other forms of traditional Indigenous governance—as judicial in character.[28] The role of Lakota law in addressing the killing of Spotted Tail by Crow Dog exemplifies this judicial character and led to

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27. *See generally* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595 (2004) (criticizing the incorporation of non-Indian law into tribal communities).

28. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 89 (1983).

United States v. Kagama, one of the most important federal Indian law cases.[29] In *Ex parte Crow Dog*, tribal councils met to determine the fate of the murderer, and the U.S. Supreme Court ultimately confirmed the councils' decision to employ restorative rather than punitive justice practices, denying the federal government jurisdiction.[30] For another example, we can look to the Navajo dispute-resolution mechanism, hózhooji naat'áanii, which former Navajo Nation Justice Raymond Austin has described as a "dispute resolution ceremony that has, as its chief goals, the healing of relationships and restoration to harmony of individuals with their communities."[31] Notwithstanding their judicial character, tribal justice systems usually did not look like anything we expect to see in a modern court system. Leo K. Killsback's monumental survey of Cheyenne governance,[32] for example, delves deep into the history, philosophy, and sacred teachings with nary a reference to the kind of formal judicial process we expect in court systems today.

The first formal tribal court of note was the Cherokee Nation's judiciary, established in the 1820s.[33] The United States forcibly removed the Cherokee Nation, along with other southeastern tribes, to Indian Territory, now present-day Oklahoma, but the tribal nation quickly reestablished its judiciary.[34] Other tribal nations that were removed to Oklahoma did so as well.[35] Those Oklahoma tribal nations had large populations and vast territories to govern.[36] Some of their decisions even became fodder for U.S. Supreme Court conflicts, most notably *Talton v. Mayes*, where the Court impliedly affirmed the power of the Cherokee

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29. 118 U.S. 375 (1886); SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 103-05 (1994).

30. *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883); HARRING, *supra* note 29, at 103-05.

31. Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 354 (2011).

32. For an expansive overview of the many facets of Cheyenne governance, see generally LEO K. KILLSBACK, A SACRED PEOPLE: INDIGENOUS GOVERNANCE, TRADITIONAL LEADERSHIP, AND THE WARRIORS OF THE CHEYENNE NATION (2020); and LEO K. KILLSBACK, A SOVEREIGN PEOPLE: INDIGENOUS NATIONHOOD, TRADITIONAL LAW, AND THE COVENANTS OF THE CHEYENNE NATION (2020) [hereinafter KILLSBACK, A SOVEREIGN PEOPLE].

33. For a more detailed description of the Cherokee judiciary, see generally J. MATTHEW MARTIN, THE CHEROKEE SUPREME COURT: 1823-1835 (2021).

34. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 120-57 (1975).

35. *See, e.g.*, DEVON ABBOTT MIHESUAH, CHOCTAW CRIME AND PUNISHMENT, 1884-1907, at 15-17 (2009) (describing the origins of the Choctaw courts); 5 MVSKOKE LAW REPORTER, at vii (2005) (describing the origins of the Creek Nation judiciary after removal).

36. Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 307 (2021).

Nation to sentence a murderer to death.[37] Oklahoma tribal courts were the exception, however, as few tribal nations beyond the prominent Five Tribes – the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, the Seminole Nation, and the Muscogee (Creek) Nation – established tribal courts on their own. Unfortunately, Congress terminated the Five Tribes' courts in 1898.[38]

In 1883, the Secretary of the Interior ordered the Office of Indian Affairs to establish Courts of Indian Offenses in Indian country.[39] These court systems were curious arrangements, neither fully federal nor fully tribal. Congress never enacted a statute authorizing the Secretary to order the creation of these courts, but it later appropriated funds for their establishment and administration by paying judges' salaries.[40] By 1900, about two-thirds of the then-recognized Indian reservations had one of these courts.[41] Some of these courts, federal entities with at least some tribal control, still exist, and are often referred to as "C.F.R. courts."[42]

B. Reorganization to the Indian Bill of Rights (1934-1968)

In 1934, Congress enacted the Indian Reorganization Act (IRA).[43] Under the IRA, tribal nations could opt into reorganizing their governments into more democratic structures with written constitutions approved by the Interior Department.[44] The written constitutions that came out of this process often did not include a provision for a tribal court, in large part due to federal influences.[45] The presence of the Courts of Indian Offenses on many reservations presumably meant that federal officials advising (or coercing) tribes would object to the addition of tribal court systems to the new constitutions.[46] Tribal constitutions

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37. 163 U.S. 376, 383-85 (1896).
38. Curtis Act of 1898, ch. 517, § 28, 30 Stat. 495, 504-05.
39. WILLIAM T. HAGEN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 104 (1966).
40. *Id.* at 111.
41. *Id.* at 109.
42. *See, e.g.*, Denezpi v. United States, 596 U.S. 591, 595 (2022).
43. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101-5129).
44. 25 U.S.C. § 5123 (2018).
45. *See, e.g.*, CONST. AND BY-LAWS OF THE ONEIDA NATION art. IV, § 1, https://oneida-nsn.gov/wp-content/uploads/2018/05/2015-06-16-Tribal-Constitution.pdf [https://perma.cc/FZ6W-UWCD] (listing the enumerated powers of the tribal council without mention of a tribal court).
46. Under 25 U.S.C. § 5123(a)(2), (d) (2018), tribal constitutions are not valid unless the Secretary of the Interior approves them.

from this era that did provide for tribal courts made them impliedly subject to the control of the tribal legislatures, which possessed the power to create the courts and, presumably, the power to dissolve them as well.[47]

The IRA was not fully implemented because of World War II, when Congress severely reduced the federal Indian affairs budget.[48] After the war, Congress turned against tribes, initiating the Termination Era and eliminating the federal-tribal relationship with hundreds of tribal nations.[49] Where Congress did not terminate tribes, it authorized many states to assume civil and criminal jurisdiction over Indian country.[50] These factors prevented many tribes from establishing and developing court systems.

During this era, the Courts of Indian Offenses continued their operations.[51] Tribal courts became highly informal.[52] For example, federal regulations banned lawyers from working in Courts of Indian Offenses until 1961.[53] Since many tribal leaders distrusted lawyers anyway, many tribal courts banned attorneys.[54] Few, if any, tribal judges were lawyers. In the 1960s, Senator Sam Ervin of North Carolina, the Chair of the Senate Committee on Constitutional Rights, held a series of hearings on civil rights in Indian country.[55] Most people testifying in these hearings complained about federal and state civil-rights abuses against Indian people, but a few people complained about tribal courts, which had the power to jail people without legal counsel, written laws, or the protections of the Federal Bill of Rights.[56] Federal officials actually worked to deny the rights of

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47. *See*, *e.g.*, CONST. AND BY-LAWS OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION art. VI, § 3(b), https://static1.squarespace.com/static/5a5fab0832601e33d9f68fde/t/5ad8ef90aa4a99672f22df16/1524166546435/TAT+Constitution+v.2010.pdf [https://perma.cc/ERU8-SVWC] (granting power to the tribal council to establish tribal courts).

48. *Cf.* Thomas E. Glass, *Federal Policy in Native American Education, 1925-1985*, 3 J. EDUC. POL'Y 105, 115 (1988) (noting that federal Indian schools closed during World War II).

49. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 12-13 (2016).

50. *Id.* at 329-30.

51. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 560 (1971).

52. *Id.*

53. *Id.* at 579 (citing 26 Fed. Reg. 4360, 4361 (May 19, 1961)).

54. *Cf. Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary, Part 3*, 87th Cong. 578-79 (1962) (statement of D'Arcy McNickle, Director, American Indian Development, Inc.) ("[I]f trained attorneys entered the tribal court, [tribal leaders believed that] it would no longer be an Indian court, but it would get beyond the experience and ability of the Indians to deal with it.").

55. *See* Bethany R. Burger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 642-44 (2009).

56. Burnett, *supra* note 51, at 579-82.

Indian people in tribal courts; one Bureau of Indian Affairs official supposedly stated, "We didn't have any trouble with the Indians until they found out they had constitutional rights."[57]

In the wake of these hearings, Congress passed the Indian Civil Rights Act of 1968.[58] Section 202 of the Act would become known as the Indian Bill of Rights.[59] This ten-section list of enumerated rights applied to persons under tribal jurisdiction, Indian and non-Indian, tribal members and nonmembers.[60] The Indian Bill of Rights did not exactly track the Federal Bill of Rights. It included key features like freedom of speech,[61] freedom of the press,[62] religious freedom,[63] equal protection,[64] due process,[65] and just compensation for takings.[66] But it excluded others, such as the separation of church and state (some tribal governments have theocratic elements),[67] the right to a jury trial in civil

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57. *Id.* at 583 (quoting *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary, Part 4*, 88th Cong. 819 (1963) (statement of R. Max Whittier, General Counsel, Shoshone-Bannock Tribes, Fort Hall, Idaho)).

58. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201-203, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1301, 1302(a), 1303).

59. *Id.* § 202, 82 Stat. at 77-78 (codified as amended at 25 U.S.C. § 1302(a)).

60. *Id.*

61. *Id.* § 202(1), 82 Stat. at 77 (codified as amended at 25 U.S.C. § 1302(a)(1)).

62. *Id.*

63. *Id.*

64. *Id.* § 202(8), 82 Stat. at 77 (codified as amended at 25 U.S.C. § 1302(a)(8)).

65. *Id.*

66. *Id.* § 202(5), 82 Stat. at 77 (codified as amended at 25 U.S.C. § 1302(a)(5)).

67. *See id.* § 202(1), 82 Stat. at 77 (codified as amended at 25 U.S.C. § 1302(a)(1)) (listing analogous rights to the First Amendment but not containing an equivalent of the Establishment Clause); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1100-01 (2007).

cases,[68] and (infamously) the right to counsel for indigent criminal defendants.[69] Though it is plausible to argue that the Act is paternalistic and assimilative—it most certainly was intended to be exactly that by its congressional champions[70]—it also provided a pathway for tribal governments that wanted to establish court systems akin to state and federal courts. The development of tribal justice systems began in earnest in the 1970s and has followed this path ever since.

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68. *See* Indian Civil Rights Act § 202(10), 82 Stat. at 78 (codified as amended at 25 U.S.C. § 1302(a)(10)) (providing for a right to a jury trial for "offense[s] punishable by imprisonment"); Grant Christensen, *Civil Rights Notes: American Indians and Banishment, Jury Trials, and the Doctrine of Lenity*, 27 WM. & MARY BILL RTS. J. 363, 384 (2018) ("[The Indian Civil Rights Act's] right to a jury trial has regularly been litigated before tribal courts . . . . These courts have held that the right does not apply to civil proceedings, because the plain language of ICRA extends the right to a jury only when the defendant is accused of an offense punishable by imprisonment."). Jury trials in criminal cases are still required. *See, e.g.*, Sam v. Southern Ute Indian Tribe, 17 SWITCA Rep. 11, 13 (SWITCA No. 05-004-SUTC) (Southwest Intertribal Ct. App. for the Southern Ute Tribal Ct. Nov. 27, 2006), https://www.ailc-inc.org/wp-content/uploads/Volume-17-2006.pdf [https://perma.cc/ML5Y-238K] (reversing the conviction of a nonmember Indian due to the lack of nonmember-Indian representation in the jury).

69. *See* Indian Civil Rights Act § 202(6), 82 Stat. at 77 (codified as amended at 25 U.S.C. § 1302(a)(6)) (providing a right to "counsel for his defense" but specifically "at his own expense"); Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 319 (2013); Hualapai Nation v. D.N., 9 SWITCA Rep. 2, 3 (SWITCA No. 97-005-HTC) (Southwest Intertribal Ct. App. for the Hualapai Nation Mar. 4, 1998), https://www.ailc-inc.org/wp-content/uploads/Volume-9-1998.pdf [https://perma.cc/K8J7-89CG] ("Congress clearly exempted Indian tribes from the requirement of appointing counsel, attorney or lay counsel, for criminal defendants."); Yates v. Nambé Pueblo Tribal Council, 17 SWITCA Rep. 1, 1 (SWITCA No. 05-008-NTC) (Southwest Intertribal Ct. App. for the Nambé Pueblo Tribal Ct. Mar. 31, 2006), https://www.ailc-inc.org/wp-content/uploads/Volume-17-2006.pdf [https://perma.cc/ML5Y-238K] ("Counsel is not a matter of right, but is available at the expense of the defendant."); Harrington v. Pueblo of Santa Clara, 12 SWITCA Rep. 25, 26 (SWITCA No. 00-016-SCPC) (Southwest Intertribal Ct. App. for the Santa Clara Tribal Ct. Aug. 16, 2001), https://www.ailc-inc.org/wp-content/uploads/Volume-12-2001.pdf [https://perma.cc/9FPC-S5V7] ("Appellant has no right to court-appointed counsel either pursuant to Santa Clara law or pursuant to the U.S. Constitution.").

However, despite no federal mandate to do so, many tribes do provide indigent criminal defendants with paid counsel. *E.g.*, Hualapai Tribe v. Powskey, No. 2020-AP-03, slip op. at 8 (Hualapai Ct. App. Dec. 30, 2021), https://libguides.law.ucla.edu/ld.php?content_id=64990648 [https://perma.cc/28CX-J628] (noting that the defendant was entitled to counsel under tribal law if he was facing jail time); Rangel v. People, No. 13-002-AP, slip op. at 5 (Pokagon Band of Potawatomi Indians Ct. App. Oct. 14, 2014), https://www.pokagonband-nsn.gov/wp-content/uploads/2022/09/13-002-ap-decision-1653.pdf [https://perma.cc/5AC7-74X7] (same).

70. Burnett, *supra* note 51, at 576.

C. Self-Determination (1968-Present)

The next major piece of legislation was the Indian Self-Determination and Education Assistance Act, or Public Law 93-638, which was enacted in 1975 to extend greater governance powers to tribal nations.[71] Under the law, tribal nations are authorized to make an offer to contract with the federal government to provide federally funded services directly to their tribal citizens and other eligible Indians.[72] Imagine every federal governmental service provided to Indian country as an itemized budget. The tribe could pick and choose from the list of line items and decide which programs it would administer, stepping into the shoes of the relevant federal agency. The federal agency is obligated to accept that offer and extend a contract to the tribe.[73] This is typically called 638 contracting or self-determination contracting.[74] Prior to 1975, with limited exceptions, only the Bureau of Indian Affairs and similar agencies were authorized by Congress to provide governmental services.[75] Later, Congress expanded 638-type contracting to housing.[76] It also allowed tribal nations that met certain criteria to contract to provide other services and gave them greater flexibility in implementing federal programs.[77]

Self-determination contracting started slowly for most tribes. Federal bureaucrats occasionally ran roughshod over tribal prerogatives.[78] Few tribes had sufficient experience or infrastructure to become federal contractors, but over time, many hundreds of tribal nations have become effective federal-government contractors. The innovations, efficiencies, and capabilities of tribal nations far

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71. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301-5423).

72. 25 U.S.C. § 5321(a) (2018).

73. *Id.*

74. U.S. GEN. ACCT. OFF., GAO/RCED-89-185FS, INTERNAL CONTROLS: BUREAU OF INDIAN AFFAIRS SECTION 638 CONTRACTS WITH TRIBAL ORGANIZATIONS 1 (1989).

75. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 14, 18 (2014).

76. Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (codified as amended at 25 U.S.C. §§ 4101-4243).

77. Strommer & Osborne, *supra* note 75, at 29-31.

78. *See, e.g.*, Earl Old Person, Russell Jim, Gerald One Feather & Joe De La Cruz, *Contracting Under the Self-Determination Act*, *in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 251, 253 (Kenneth R. Philp ed., 1986) (describing how the federal government stopped funding the Blackfeet tribal child-welfare program); *id.* at 254 (describing how the federal government took back five million dollars in timber money from the Yakima Nation "because [it] would not accept [Public Law] 638 in its entirety").

exceed that of the federal government, at least in the provision of governmental services to Indian country. That said, federal contracting authorities have little patience to this day for truly innovative tribal initiatives.[79]

Tribal nations have embraced the opportunity to develop tribal justice systems under their own control. Almost every tribal nation subjected to a Court of Indian Offenses, or C.F.R. court, has taken control of those courts through 638 contracting or replaced those courts altogether.[80] Self-determination contracting allows tribes great leeway in developing court systems from the ground up.[81] Tribes can adopt their own laws and rules of procedure, retain their own judges based on criteria the tribes establish, and otherwise make the courts their own. Much like congressional power under Article I of the Federal Constitution, tribal legislatures possess significant power to expand or contract tribal-court jurisdiction and authority.[82]

In the early years of the self-determination era, the U.S. Supreme Court issued a series of dramatic decisions both protecting and undercutting tribal-court powers. The first key decision stripped all tribal nations of the power to prosecute non-Indians absent congressional authorization.[83] The second recognized the exclusive power of tribal forums (including courts) to interpret and enforce the Indian Bill of Rights in civil suits.[84] The third established a general rule that tribes could not regulate activities on nonmember-owned land unless Congress authorized it, the nonmember consented, or the nonmember's conduct impacted the political integrity, economic security, or health and welfare of the tribe or its citizens.[85] The final key decision established a prudential rule requiring persons challenging tribal jurisdiction first to exhaust their remedies in tribal court.[86] These decisions established vague and indeterminate borders of tribal judicial authority from the perspective of the colonizer's highest court.

There are several notable trends affecting the administration of tribal justice during the self-determination era. Tribal courts are more formal now than they were before the Indian Civil Rights Act, although they are almost always less

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79. *Cf.* Danielle Delaney, *The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting*, 5 AM. INDIAN L.J. 308, 344 (2017) (noting that tribes continue to fight the "paternalism" of federal bureaucrats).

80. Austin, *supra* note 31, at 359.

81. Melody L. McCoy, *When Cultures Clash: The Future of Tribal Courts*, 20 HUM. RTS., no. 3, 1993, at 22, 23.

82. *Id.* at 23-24; *see* U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have power to . . . constitute Tribunals inferior to the supreme Court.").

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

84. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71-72 (1978).

85. Montana v. United States, 450 U.S. 544, 562, 565-66 (1981).

86. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

formal than state and federal courts. Tribal judges and counsel are increasingly likely to be attorneys licensed through a state bar. Tribal courts issue more written opinions. And, importantly for the purposes of this Article, tribal courts increasingly enjoy independence from the political branches of tribal governments. Even so, tribal-court jurisdiction and power are often sharply limited by tribal legislatures.

II. THEORIZING THE PATH-DEPENDENT TRADITION OF LIMITED TRIBAL JUDICIAL REGULATION

The law represents the settled path: a set of rules adopted as a result of longstanding custom and tradition, enforceable by judges. Judges are supposed to interpret and enforce the law; they are not supposed to legislate or regulate, except regarding courthouse matters.[87] Legislation is best left to political branches of government. Agencies and bureaucracies, authorized by legislatures and high-level executive-branch officials, regulate. Or so the story goes. In reality, though, judges regulate: they reach beyond settled law and occasionally beyond their institutional capacities. That is the nature of common-law rulemaking.[88]

The tradition of tribal common-law rulemaking is new and foreign to tribal nations. Tribal courts' history differs vastly from that of state and federal courts in the United States. Until recently, many tribes had little positive law—ordinances, codes, regulations, court opinions, and so on—to apply. Many tribal nations did not establish a tribal justice system at all until the last few decades. But tribal courts are improving in their capacity, competence, and legitimacy. The opportunities are growing for tribal courts to take up the mantle of judicial regulation and break away from the path-dependent tradition of following the colonizer's law.

87. *See, e.g.*, *In re* Wescogame, No. 2020-AP-01, slip op. at 3-4 (Hualapai Ct. App. Nov. 30, 2020), https://libguides.law.ucla.edu/ld.php?content_id=58878210 [https://perma.cc/V9AA-JE42] (affirming a civil-contempt sanction); Cooeyate v. Chapela, 23 SWITCA Rep. 6, 12 (SWITCA No. 12-001-ZTC) (Southwest Intertribal Ct. App. for the Zuni Pueblo Tribal Ct. Jan. 11, 2012), https://www.ailc-inc.org/wp-content/uploads/Volume-23-2012.pdf [https://perma.cc/XLU7-TJF6] (disqualifying a trial judge for bias).

88. *See* A.W.B. Simpson, *The Common Law and Legal Theory*, *in* 1 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* 119, 120 (Alison Dundes Renteln & Alan Dundes eds., 1994) (describing the common law as "judge-made law" or "customary law").

A. *The Colonizer's Judicial Traditions*

In the conventional story of federal and state courts, judges are cast as umpires that call balls and strikes.[89] Supposedly, these judges do not do anything except interpret the law. They do not make policy. They do not make law that subverts the text of legislation. Federal judges (and some state judges) are, after all, unelected and undemocratic actors.[90] Unlike legislatures or agencies, court systems are passive entities that have no institutional capacity to research, investigate, and debate policy questions.

And yet we know state and federal judges routinely regulate government, make policy choices, and undermine legislative and executive will. State and federal judges can do all this merely by identifying and applying a particular judicial philosophy: textualism, originalism, law and economics, legal realism, or any number of other theories. Judicial disagreement about the rules and methodologies for interpretation leaves enormous opportunity for the exercise of judicial discretion.[91] Federal and state judges are political actors with personal biases, as all people are.[92] Many state judges are elected by a constituency that presumably expects them to rule in a manner consistent with voters' preferences.[93] Even unelected federal and state judges are not selected randomly; they are appointed by

89. Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1709 (2007) ("In his testimony before the Senate Judiciary . . . Committee, Chief Justice Roberts ushered a new metaphor into the legal lexicon when he proclaimed: 'Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . .'" (second alteration in original) (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States)).

90. *See generally* DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT IN THE AGE OF TRUMP (2019) (criticizing the unelected Justices of the U.S. Supreme Court).

91. McKee, *supra* note 89, at 1710 ("In the first place, judges may not be able to systematically decide cases based upon objective application of a set of rules because judges may not agree on what the rules are.").

92. *Id.* at 1710-11 ("Each of us, be we student, teacher, lawyer, judge or just thoughtful participant in the democratic process, is a product of social, cultural and economic forces that shape us in many different ways and pull us in many different directions.").

93. *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), https://www.brennancenter.org/judicial-selection-map [https://perma.cc/A49F-M5U6]; Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 315 (2001).

authorized political actors through a deeply politicized process.[94] And these judges often are deeply invested in outcomes, leading to intense criticism of the perceived politicization of the U.S. Supreme Court.[95] State courts are courts of general jurisdiction, meaning their workhorse judges must hear just about any case arising within their territories. Federal-court jurisdiction is limited, but still broad enough to allow determined judges to hear any question of federal constitutional significance. Importantly, as Judge Theodore A. McKee has written, the narrative that judges are umpires is counterproductive, "assum[ing] a reality that is based upon an abstract principle rather than our every day reality."[96] The intense politicization of federal and state judicial selection reflects the importance of the role of judges in modern government.

The U.S. Supreme Court's regulation of government is the most pronounced, to be sure. The Justices are not elected, serve a life term, and cannot be overruled if the Court declares itself to be interpreting the Federal Constitution. In the last few decades, the Court has adopted dramatic limitations on federal governmental power, such as the state sovereign-immunity doctrine,[97] the anti-commandeering principle,[98] the congruence-and-proportionality principle,[99] and the major-questions doctrine.[100] The Court has even assumed control over aspects of state governance, such as election practices and gerrymandering.[101]

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94. Jon C. Rogarski & Andrew R. Stone, *How Political Contestation over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court*, 51 BRIT. J. POL. SCI. 1251, 1251 (2021) ("Contemporary nominations to the Supreme Court of the United States are unavoidably, and perhaps inevitably, political."); Vincent J. Samar, *Politicizing the Supreme Court*, 41 S. ILL. U. L.J. 1, 1 (2016) ("Within days of Justice Scalia's death, the Senate leadership, in efforts to prevent a shift to a more liberal Court, announced the Senate would not consider any replacement nominated by President Barack Obama.").

95. *E.g.*, Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 195 (2015) ("A troubling and unmistakable trend has developed over several decades, and accelerated in recent years, of extreme judicial activism within the conservative bloc of Justices on the Supreme Court—reaching a new pinnacle under Chief Justice John Roberts.").

96. McKee, *supra* note 89, at 1711.

97. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 733 (1999) (acknowledging state sovereign immunity in state courts); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996) (acknowledging the limited Article I powers of Congress to abrogate state sovereign immunity).

98. *See, e.g.*, Printz v. United States, 521 U.S. 898, 925 (1997) (holding that Congress may not "conscript[]" state officers).

99. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (limiting congressional power to enforce the Fourteenth Amendment).

100. *See* West Virginia v. EPA, 597 U.S. 697, 719-22 (2022).

101. *See* Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1239-43 (describing the rise of the

Some state supreme courts have similarly asserted dramatic control over state governance, notably in election law[102] and abortion,[103] although state elections can change those outcomes fairly quickly.[104]

Federal and state justice systems are manifestations of a governmental structure rooted in a Western political tradition that insists on hierarchy to guarantee security and law.[105] That is the whole nature of sovereignty. According to the Western philosophical model, there can be no civilization without sovereignty.[106] People must give up aspects of their individual freedoms to a Leviathan who will then use its monopoly on violence to preserve order and the rights of the people.[107] It is no wonder that state and federal judges interpret the law in accordance with these philosophies of hierarchy and power. For tribal communities, the application of federal and state law can be especially dangerous. As Christine Zuni Cruz once warned, "The greatest danger in using non-Indian law is that since it is not law that has evolved from native peoples themselves, it advances non-Indian approaches which do not necessarily provide the best way to resolve disputes [and] handle crimes and violations for a native community."[108]

B. Tribal Nations' Judicial Traditions Impacted by Path Dependence

Tribal judiciaries differ from their federal and state counterparts. Most tribal judges are appointed by the political branches of government.[109] They almost

independent-state-legislature theory in the context of U.S. Supreme Court decisions regulating elections).

102. *See, e.g.*, Johnson v. Wis. Elections Comm'n, 972 N.W.2d 559, 586 (Wis. 2022) (selecting a Republican Party-generated electoral map by a 4-3 party-line vote), *overruled by* Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370 (Wis. 2023).

103. *See, e.g.*, Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 130 (S.C. 2023) (finding a right to bodily autonomy in state law).

104. *See, e.g.*, A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), https://www.nytimes.com/2010/11/04/us/politics/04judges.html [https://perma.cc/JF8P-QFNR] (noting that several Iowa judges were recalled by voters after ruling in favor of the constitutional right to same-sex marriage).

105. Terry L. Anderson & Dominic P. Parker, *Culture, Sovereignty, and the Rule of Law: Lessons from Indian Country*, 51 PUB. CHOICE 405, 406-07 (2022).

106. Fletcher, *supra* note 14 (manuscript at 4-6).

107. *Id.* (manuscript at 4).

108. *See* Zuni, *supra* note 7, at 24.

109. Gregory D. Smith, *Native American Tribal Appellate Courts: Underestimated and Overlooked*, 19 J. APP. PRAC. & PROCESS 25, 30 (2018).

always serve for short terms, though they can be reappointed.[110] Until recent decades, most tribal judges were not lawyers (many hundreds of state judges are not lawyers, either[111]). Tribal judges often have little or no professional support staff; certainly, it is rare for tribal judges to be able to call upon a full-time, law-trained clerk who can research complicated questions of law and assist in drafting opinions.[112] Many trial-level tribal judges also carry an enormous administrative burden, serving as the chief administrator of the entire tribal court system.[113]

In my experience, trial-level tribal judges often do not have enough time to research and write in-depth opinions. Though tribal governments themselves are represented well in tribal court, many private tribal-court litigants are inexperienced.[114] Their briefing and oral advocacy, therefore, likely will not help tribal judges analyze complex cases.[115] The easiest path for many judges, then, is to use state and federal precedents to resolve tribal legal disputes.[116] In

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110. *E.g.*, CONST. OF THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI art. XI, § 6(a)-(b), https://ecode360.com/output/word_html/29874258 [https://perma.cc/47MW-CB4G] (providing for appointments of trial and appellate judges for terms of four and six years, respectively, with no limit on the number of reappointments); 1 LAS VEGAS PAIUTE TRIBAL CODE § 1.40.040(b) (2019), https://lvpaiute.tribal.codes/LVPTC/1.40.040 [https://perma.cc/8WGG-PGRV] ("All judges shall be eligible for reappointment.").

111. Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1291 (2022) (noting that thirty-two states allow nonlawyers to serve as judges in some low-level courts).

112. *Cf.* Smith, *supra* note 109, at 33-34 (describing the lack of resources in many tribal justice systems).

113. *See, e.g.*, *In re* Kern, No. 2014-2331-CV-CV, slip op. at 9-11 (Grand Traverse Band of Ottawa and Chippewa Indians Jud. Comm'n June 27, 2014), https://turtletalk.files.wordpress.com/2013/05/kern-final-opinion.pdf [https://perma.cc/3JUR-G84K] (describing the administrative roles of the chief trial judge).

114. Smith, *supra* note 109, at 36-37.

115. *E.g.*, *In re* JHW, 21 SWITCA Rep. 10, 10 (SWITCA No. 08-013-ZTC) (Southwest Intertribal Ct. App. for the Zuni Pueblo Child.'s Ct. Aug. 10, 2010), https://www.ailc-inc.org/wp-content/uploads/Volume-21-2010.pdf [https://perma.cc/9S3N-5TVX] (noting that both parties were pro se and had "little understanding of court procedures").

116. *E.g.*, Yarberry v. Ak-Chin Indian Community, 24 SWITCA Rep. 1, 3 (SWITCA No. 11-009-ACICC) (Southwest Intertribal Ct. App. for the Ak-Chin Indian Community Ct. Jan. 2, 2013) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950); Mathews v. Eldridge, 424 U.S. 319, 334 (1976)), https://www.ailc-inc.org/wp-content/uploads/Volume-24-2013.pdf [https://perma.cc/QL7F-GE73] (stating the law of unlawful detainer and due process); L.J.Y. v. T.T., 8 SWITCA Rep. 4, 8 (SWITCA No. 97-002-FMTC) (Southwest Intertribal Ct. App. for the Fort Mojave Tribe 1997) (citing Parham v. J.R., 442 U.S. 584, 602-04 (1979); *In re* Nina P., 31 Cal. Rptr. 2d 687, 692 (Ct. App. 1994)), https://www.ailc-inc.org/wp-content/uploads/Volume-8-1997.pdf [https://perma.cc/8LXH-Z8G8] (stating

contrast, many tribal judges do not feel competent to apply tribal customary law. They simply might not understand how. Former Justice Austin pointed out that if there is no tribal code explicitly authorizing a tribal judge to apply customary law, "they might conclude that they do not have authority to do so."[117] Given the dearth of legal education and scholarship on customary law,[118] this is not surprising. Finally, tribal-court dockets are usually minuscule compared to state and federal dockets, so there is relatively little opportunity to develop a truly Indigenous common law.

Tribal governments usually structure tribal courts to mirror many aspects of federal and state courts, at least when it comes to adjudicating matters involving nonmembers, commercial matters, and self-determination contract matters.[119] As Robert Odawi Porter noted, tribal councils, tribal judges, tribal litigants, and even Indian-law professors follow the easy path of adopting non-Indian law as tribal law.[120] But that law is not Indigenous—it is the colonizer's law, derived from longstanding traditions and philosophies of the colonizer, and then borrowed or adapted by tribal nations.[121] Consider *Teeman v. Burns Paiute Indian Tribe*, where the tribal court applied federal constitutional precedents to reverse a tribal-court criminal conviction where the law placed the burden of proving self-defense on the defendant.[122] The court did point to "customary and

the law of due process regarding parental rights under the Indian Civil Rights Act); Havatone v. Hualapai Election Bd., 10 SWITCA Rep. 3, 6 (SWITCA No. 99-002-HTC) (Southwest Intertribal Ct. App. for the Hualapai Tribal Ct. Aug. 23, 1999) (citing *Mathews*, 424 U.S. at 335), https://www.ailc-inc.org/wp-content/uploads/Volume-10-1999.pdf [https://perma.cc/K4LQ-PKJE] (stating the law of due process regarding an election-board proceeding); K.R v. Thompson, 19 SWITCA Rep. 6, 8 (SWITCA No. 07-005-SUTC) (Southwest Intertribal Ct. App. for the Southern Ute Tribal Ct. Sept. 2, 2008) (citing *Mathews*, 424 U.S. at 333-35), https://www.ailc-inc.org/wp-content/uploads/Volume-19-2008.pdf [https://perma.cc/L4JG-RFW7] (stating the law of due process in a banishment proceeding).

117. Austin, *supra* note 31, at 361.

118. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 624-26 (2021).

119. *See generally* Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701 (2006) (arguing that tribal courts apply customary law only where tribal members are the sole parties or where nonmembers have consented to the application of customary law).

120. Porter, *supra* note 27, at 1617-19.

121. *See id.* at 1598 (criticizing the incorporation of non-Indian law into tribal communities); Zuni, *supra* note 7, at 23 ("The fact remains, however, that the Anglo-American approach to law is pervasive in most tribal court systems.").

122. 4 NICS App. 185, 190 (No. CR-061-96) (Burns Paiute Tribal Ct. App. Apr. 24, 1997), https://www.codepublishing.com/WA/NICS/html/4NICSApp/4NICSApp185.html [https://perma.cc/ENZ3-6HGH].("[N]owhere in Anglo-American law is there authority to support a conclusion which places upon the defendant the burden of proving that self-defense is a legitimate claim. Except in this case.").

traditional law of Indian country," but only to note that both sources of law led to the same conclusion.[123] Some tribes go further, requiring tribal courts to grant supremacy to federal law.[124]

Tribal judges often apply federal law that is restrictive of tribal-court jurisdiction or decide difficult cases involving nonmembers with an eye to how a federal court might review that jurisdiction.[125] In Robert Odawi Porter's words, "The concern about review by American courts has invariably led tribal court judges and advocates to more consciously impose upon themselves the restrictions on tribal court authority contained within American federal law."[126] Porter notes that tribal courts are likely to adopt nontribal law under the assumption that federal law controls over tribal law: "American law is simply incorporated within a case and becomes part of the tribal common law. As a practical matter, the supremacy of American federal law in tribal court is usually, although not always, presumed."[127] After all, tribal lawyers are trained in American law schools, where they likely will not learn much about tribal law and tribal courts and where they are often taught that American law is normatively superior.[128]

Tribal law also makes it more difficult for tribal judges to regulate government. Robert Odawi Porter focuses the blame on tribal lawyers,[129] but tribal elected officials influenced by those lawyers are also responsible. Tribal governments zealously guard their immunity from suit.[130] Tribal legislatures can draft

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123. *Id.*

124. *See, e.g.*, 1 LEECH LAKE BAND OF OJIBWE JUD. CODE pt. I, § 4(B), https://www.llojibwe.org/court/tcCodes/tc_coTitle1-Judicial.pdf [https://perma.cc/D8GZ-M98C] ("Where a conflict may appear between this code and any statute, regulation, or agreement of the United States, the federal law shall govern if it has specific applicability and if it is clearly in conflict with the provisions of this code.").

125. *See, e.g.*, Casias Mounts v. Box, 12 SWITCA Rep. 18, 20-21 (SWITCA No. 00-013-SUTC) (Southwest Intertribal Ct. App. for the Southern Ute Tribal Ct. Dec. 27, 2001), https://www.ailc-inc.org/wp-content/uploads/Volume-12-2001.pdf [https://perma.cc/9FPC-S5V7] (analyzing tribal-court jurisdiction and citing Montana v. United States, 450 U.S. 544 (1981), and related federal precedents).

126. Porter, *supra* note 27, at 1611.

127. *Id.* at 1611-12 (footnotes omitted).

128. *See id.* at 1613-16.

129. *See id.*

130. *See, e.g.*, 1 LAW & ORDER CODE OF THE FORT MCDERMITT TRIBE OF OREGON & NEVADA § 1 (2015), https://www.narf.org/nill/codes/fort_mcdermitt/ch1.pdf [https://perma.cc/E9C7-4GWT] ("The Fort McDermitt Paiute-Shoshone Tribe of Oregon and Nevada, also known as the Fort McDermitt Tribe or the Fort McDermitt Tribal Council, hereby declares that it is immune from suit within or without Fort McDermitt Indian Country, within Tribal Court, another Indian Court, or any state court or federal court under the doctrine of

significant restrictions on tribal-court subject-matter jurisdiction as well.[131] Consider *Paul v. Southern Ute Indian Tribe*.[132] The plaintiffs had petitioned the tribal council for adoption into the tribe as members several times dating back to 1962.[133] In each instance, either the tribal council had refused to adopt the plaintiffs or the plaintiffs did not appear before the council.[134] Applying *Santa Clara Pueblo v. Martinez*—where the U.S. Supreme Court confirmed the immunity of tribal nations from suits in federal courts and also confirmed the plenary power of tribal nations to determine their own tribal membership[135]—the tribal court held that the Southern Ute Indian Tribe was immune from suit.[136] The court also applied the Anglo-American legal tradition of laches, an equitable defense that allows for legal claims to be disregarded when the party making the claim has sat on their rights.[137] In particular, the court noted that the plaintiffs had not appeared at a scheduled hearing before the council in 1974.[138] The

Sovereign Immunity except as it may set forth in this Law & Order Code for the purposes of granting limited waiver of the doctrine of sovereign immunity to empower the court to utilize its inherent civil contempt powers for the purposes of guaranteeing certain stated equal protection and procedural due process rights."); Hualapai Indian Nation v. Mukeche, 9 SWITCA Rep. 21, 24-25 (SWITCA No. 97-019) (Southwest Intertribal Ct. App. for the Hualapai Indian Nation Aug. 10, 1998), https://www.ailc-inc.org/wp-content/uploads/Volume-9-1998.pdf [https://perma.cc/K8J7-89CG] (dismissing an employment suit against the tribe but impliedly criticizing the doctrine of tribal sovereign immunity); Navajo Hous. Auth. v. Johns, 11 Am. Tribal L. 31, 34-35 (No. SC-CV-18-10) (Navajo Nation Sup. Ct. Sept. 10, 2012) ("Sovereign immunity is a jurisdictional defense. Therefore it is not merely a defense to an action but a jurisdictional bar. We have stated numerous times that before a court can hear a matter, it must have personal and subject matter jurisdiction. It is self-evident that lacking jurisdiction as a court for any reason, the court may not proceed to the merits. Jurisdiction is a question of law." (citations omitted)).

131. *See, e.g.*, Bourdon v. Sisneros, 19 SWITCA Rep. 1, 2 (SWITCA No. 08-006-SCPC) (Southwest Intertribal Ct. App. for the Santa Clara Tribal Ct. Aug. 4, 2008), https://www.ailc-inc.org/wp-content/uploads/Volume-19-2008.pdf [https://perma.cc/L4JG-RFW7] (noting in dicta that the Santa Clara Pueblo Tribal Council denied the intertribal appellate court the jurisdiction to hear membership or real-estate questions); *cf.* Porter, *supra* note 27, at 1607 ("[A]s Indian nations have developed formal Western-style judicial systems, they have enacted laws through their own legislative processes that define what law is to apply in their own courts.").

132. 8 SWITCA Rep. 1 (SWITCA No. 95-002) (Southwest Intertribal Ct. App. for the Southern Ute Indian Tribe 1995), https://www.ailc-inc.org/wp-content/uploads/Volume-8-1997.pdf [https://perma.cc/8LXH-Z8G8].

133. *Id.* at 2.

134. *Id.*

135. 436 U.S. 49, 60 (1978).

136. *Paul*, 8 SWITCA Rep. at 3.

137. *Id.* at 3.

138. *Id.* at 2-3.

plaintiffs had alleged serious violations of civil and human rights because of the council's longstanding refusal to grant them citizenship, but since tribal law situated the tribal-citizenship power with the tribal council, the tribal court determined that no judicial review was possible.[139] Perhaps the plaintiffs' claims were meritless, but since the tribal council and the tribal court agreed that the court had no competence to address membership questions, there was no vehicle to appeal the council's decision. No one, not even the plaintiffs, will ever know whether their claims had merit.

Some tribal courts refuse to articulate common-law rules, pointing to tribal statutes purporting to grant the tribal council complete authority to determine the jurisdiction of the court. Consider *Kimsey v. Reibach*, a decision dismissing a defamation action involving private parties in the Grand Ronde Community tribal court.[140] The court refused to accept jurisdiction, finding that the Grand Ronde legislature did not explicitly authorize the court to hear defamation cases between private parties.[141] The Grand Ronde judiciary is not alone in this reluctance; other tribal courts have similarly refused.[142] Consider also *Chavez v. Torres*, a decision dismissing a sexual-harassment claim in the Southern Ute tribal court.[143] There, the plaintiff brought a sexual-harassment claim, alleging that tribal common law recognized a cause of action.[144] The court disagreed, noting

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139. *Id.* at 3.

140. 6 Am. Tribal L. 119, 120-21, 125-26 (No. C-05-02-002) (Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ct. June 30, 2005.

141. *Id.* at 124 ("I therefore determine that in order to have jurisdiction over a defamation action arising in tort between two private individuals, there must be an Ordinance or other statutory enactment of the Tribal Council granting the Court specific jurisdiction to hear such matters and setting out the standards by which such matters should be adjudicated. A review of the Tribal Code indicates that there is no such Ordinance or statutory enactment. In the absence of such an enactment, I determine that this Court lacks the subject matter jurisdiction necessary to hear this case.").

142. *E.g.*, J.I. v. Muckleshoot Pentecostal Church, 13 NICS App. 43, 46 (No. MUC-CIV-03/14-032) (Muckleshoot Tribal Ct. App. July 23, 2015), https://www.codepublishing.com/WA/NICS/?13NICSApp/13NICSApp043.html [https://perma.cc/7EL6-TA3M] (declining to assert jurisdiction over a matter brought under common law); Burnett v. Pioneer Chevrolet, Inc., 2 Am. Tribal L. 66, 73-74 (No. 98-167-CV) (Confederated Salish & Kootenai Tribes Ct. App. Feb. 12, 2000) (same).

143. 12 SWITCA Rep. 11, 11 (SWITCA No. 00-009-SUTC) (Southwest Intertribal Ct. App. for the Southern Ute Tribal Ct. June 22, 2001), https://www.ailc-inc.org/wp-content/uploads/Volume-12-2001.pdf [https://perma.cc/9FPC-S5V7].

144. *Id.* at 12-13.

that state and federal common law did not recognize a common-law cause of action for sexual harassment, and therefore neither could tribal law.[145]

In short, tribal judiciaries often do not have much capacity, authority, or willingness to engage in judicial common-law rulemaking or judicial regulation of government. Even so, tribal judicial regulation is happening more and more outside of adversarial court cases. Tribal courts have established an impressive and well-earned reputation for theorizing and implementing creative and progressive court programs, most notably peacemaking,[146] healing-to-wellness courts,[147] drug courts,[148] and other nonadversarial dispute-resolution mechanisms. Those new mechanisms usually arise from principles grounded in Indigenous cultures and philosophies.

Peacemaking, which originated in the Navajo Nation,[149] has spread all over Indian country. It is a manifestation of the fundamental laws of the Navajo Nation, and two of its aspects are important to highlight. First, Navajo law is nonhierarchical, or, in former Navajo Nation Chief Justice Robert Yazzie's description, horizontal.[150] All persons are equal, even those who choose to govern. Second, Navajo law is rooted in part in a clan system.[151] Both of these aspects are exportable to tribal nations around the United States, and even the world. Tribal courts and governments all over Indian country, with vastly different cultures and histories, have adopted peacemaking as their own.[152] Most modern-

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145. *Id.* at 14 ("Since sexual harassment is not a common law tort incorporated into tribal law, and tribal law itself does not contain such a cause of action, the trial court was correct to dismiss plaintiffs' claims for sexual harassment.").

146. *E.g.*, 4 KICKAPOO TRADITIONAL TRIBE OF TEXAS TRIBAL CODES §§ 4.1-.3 (2005), https://kickapootexas.org/wp-content/uploads/2017/05/KTTT-Ch-1-17-Tribal-Codes.pdf [https://perma.cc/E26G-EHAN] (establishing the peacemaker system).

147. *E.g.*, 15 CITIZEN POTAWATOMI NATION CODE § 15-1-102 (2023), https://www.potawatomi.org/wp-content/uploads/2023-CPN-Codes.pdf [https://perma.cc/NRP2-45Q4] (establishing the Healing to Wellness Court).

148. *E.g.*, *About the Waabshki-Miigwan Drug Court Program*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, https://ltbbodawa-nsn.gov/judicial-branch/waabshki-miigwan/drug-court-program [https://perma.cc/NY6N-ZTUV].

149. *See* Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 186 (1994) (noting the creation of the Navajo peacemaking program in 1982).

150. *Id.* at 180.

151. *Id.* at 182.

152. *Cf.* Nic Rossio, Tim Connors, Margaret Kruse Connors, Cheryl Demmert Fairbanks, William Hall & Brett Lee Shelton, *Restructuring American Law Schools: Peacemaking in the First Year Curriculum*, 69 WAYNE L. REV. 635, 640-43 (2024) (summarizing the tradition of peacemaking in tribal communities generally).

day tribal nations once rejected hierarchy and relied upon a clan system or similar social organization.[153]

Tribal judiciaries at the forefront of developing programs like peacemaking are expert interpreters of traditional and customary law. Tribal judge Michael D. Petoskey conducted peacemaking projects for both the Grand Traverse Band of Ottawa and Chippewa Indians and the Pokagon Band of Potawatomi Indians.[154] Judge Petoskey was a law-school classmate of Chief Justice Yazzie and Justice Austin, who introduced Petoskey to peacemaking.[155] When the Pokagon Band decided to build a modern court building, Petoskey helped to design the building in a circular pattern to replicate the nonhierarchical structure of Anishinaabe culture—and to enhance peacemaking activities, which require talking circles.[156] Tribal judiciaries all over the country are doing work like this.[157]

After introducing tribal culture into the nonadversarial work of a tribal court, the next logical step is introducing tribal culture into its adversarial work. The Navajo Nation Supreme Court has been doing this for decades.[158] Little by little, tribal judges elsewhere are writing opinions that interpret tribal constitutions and tribal laws with a judicial methodology informed by Indigenous cultures. Tribal judiciaries have only recently become able to do so. They now usually enjoy adequate independence from the political branches of tribal government.[159] They are also becoming professionalized, meaning that more tribal judges are

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153. *See, e.g.*, Daniel B. Snyder, *Ho-Chunk Nation Tribal Law Profile*, 12 TRIBAL L.J. art. no 3, at 2 (2012) ("The Ho-Chunk people were comprised of twelve clans and further distinguished in two groups as clans belonging to 'those who are above' and 'those who are on earth.'").

154. *See* Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 876 n.9 (1999); Tony Tekaroniake Evans, *Native Negotiations Are a Winning Alternative to Courts*, AM. INDIAN (Fall 2023), https://www.americanindianmagazine.org/story/Native-negotiation-methods [https://perma.cc/62YK-8JF8].

155. Costello, *supra* note 154, at 876 n.9, 878 n.26.

156. *See Pokagon Band Unveils New Justice Center in Dowagiac*, S. BEND TRIB. (Dec. 11, 2019, 5:00 PM ET), https://www.southbendtribune.com/story/news/local/2019/12/11/pokagon-band-unveils-new-justice-center-in-dowagiac/117179440 [https://perma.cc/L7M6-HPJK].

157. *E.g.*, Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Justice*, 112 CALIF. L. REV. 103, 146-56 (2024) (surveying the development of three tribal healing-to-wellness courts).

158. *See generally* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009) (surveying the long history of the Navajo judiciary's common-law rulemaking).

159. Fred W. Gabourie, *Judicial Independence of Tribal Courts*, 44 ADVOCATE, no. 10, 2001, at 24, 24 ("The majority of tribes recognize the fact that for a strong judiciary, judges must be free from political pressures, and therefore have enacted sections in their Constitution and Law and Order Code clearly defining judicial independence, therefore, separating the judicial branch from the executive and legislative branches of tribal government." (footnote omitted)).

lawyers or are served by professional staff.[160] And more tribal members are becoming lawyers, including tribal-court professionals,[161] hopefully bringing to bear their expertise in Indigenous cultures.[162] Even non-Indian judges and nonmember Indian judges can perform this work, with the caveat that they are often strangers to tribal cultures and must tread carefully. The judicial work of Frank Pommersheim, a non-Native tribal judge, is exemplary.[163] It is likely that the assessment of tribal cultures and traditions by tribal judges, visiting or not, must be guided by the pleadings and submissions of tribal-court litigants and amici with cultural expertise. Finally, tribal legislatures are incorporating culture into tribal codes concerning child welfare,[164] membership,[165] cultural property,[166] and other areas of law.[167]

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160. Smith, *supra* note 109, at 31 ("Most tribes require at least some of the judges on the tribal appellate bench to be law trained.").

161. *See* Mary Smith, *For Native American Attorneys, NNABA Groundbreaking Study Reveals Devastating Lack of Inclusion in the Legal Profession at Large*, 62 FED. LAW., no. 3, 2015, at 72, 73 (noting that there were 2,640 American Indian lawyers in 2015); Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285, 285 (1994) (noting that there were about 1,500 American Indian lawyers in 1993); Jordan Oglesby, *Pipeline to Tribal Sovereignty: Celebrating the Pre-Law Summer Institute's 50th Class*, 66 FED. LAW., no. 2, 2015, at 59, 59 (noting that there were only about twenty-five American Indian lawyers in 1966).

162. I say "hopefully" because tribal-member lawyers are educated in American law schools and could easily ignore their own cultural heritage in their work, though there is some evidence that they do not. *See, e.g.*, Carey N. Vicenti, *The Social Structure of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y 513, 526 (2000).

163. *E.g.*, Est. of Tasunke Witko v. G. Heileman Brewing Co., 23 ILR 6104, 6106 (No. Civ. 93-204) (Rosebud Sioux Sup. Ct. May 1, 1996) (assessing tribal common law related to remedies for the customary right of privacy).

164. *E.g.*, 4 WHITE EARTH BAND OF OJIBWE CHILD/FAM. PROT. CODE § 1.02(2)(c) (2017), https://whiteearth.com/media/pages/divisions/judicial-services/codes-ordinances/7b0115b786-1727297549/child.family.protection.code.pdf [https://perma.cc/WZ4M-2SGM] (declaring that several policies "shall guide decisions pursuant to this Code," including "[p]reservation of the culture, religion, language, values, clan system, and relationship of the Tribe").

165. *E.g.*, 2 WAGANAKISING ODAWA [LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS] TRIBAL CODE OF LAW § 2.301 (2024), https://ltbbodawa-nsn.gov/wp-content/uploads/2023/03/Vol.-2-TITLE-II.-CITIZENSHIP-TRIBAL-ENROLLMENT.pdf [https://perma.cc/4XYN-EKMF] (recognizing that there are "cultural, spiritual, traditional, and personal reasons for name changes" in the membership code "to enable Tribal Citizens the opportunity to have multiple names and change their name").

166. *See* Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 106-35 (2022) (surveying tribal cultural-property laws).

167. *E.g.*, 1 KICKAPOO TRADITIONAL TRIBE OF TEXAS TRIBAL CODES § 1.3(B)(1) (2005), https://kickapootexas.org/wp-content/uploads/2017/05/KTTT-Ch-1-17-Tribal-Codes.pdf [https://perma.cc/E26G-EHAN] ("Whenever there is uncertainty or a question as to the

III. BREAKING AWAY FROM THE COLONIZER'S PATH

This Part surveys tribal-court decisions where Indigenous cultures, traditions, and customs play a critical role in the disposition of a case, with an emphasis on cases where the judiciary applies customary law to regulate the tribal government. This Part divides the cases into three categories: (1) cases where customary law is incorporated into the written tribal constitutional, statutory, or regulatory law, thus requiring tribal-court interpretation; (2) cases where the tribal judiciary introduces customary law as a substantive rule of decision; and (3) cases where the tribal judiciary introduces customary law as an interpretive tool. There will naturally be some overlap between the categories. This Part is hardly a comprehensive survey of all the tribal-court decisions that have utilized customary law but is instead exemplary of how tribal courts do so.

A. Codification of Indigenous Culture

Positive enactments by the tribal legislature, the tribal bureaucracy, and the tribal constitution serve as invitations to the tribal judiciary to interpret customary law. Tribal judiciaries are more confident in applying customary law to tribal-government actions when the tribal legislature has incorporated customary law into tribal codes.

This Section discusses several cases where tribal legislatures articulated or authorized the use of tribal customary law, leading the tribal court to apply that law. The task is not always easy. Often, where a tribal legislative enactment or constitutional provision references customary law, that law is not described in the text, leaving tribal judiciaries to ascertain the nature of the relevant customary law and how it applies. Tribal courts have taken a variety of approaches to do so. In *In re Saunooke*, for example, an Eastern Band of Cherokee Indians statute allowed the tribal court to apply "custom" but did not articulate any particular custom.[168] In that case, the court held that a tribal lawyer had authorization to practice before the tribe's courts where the tribal council had hired the lawyer in accordance with tribal custom.[169] In another case, a Navajo Nation court looked to intertribal common law to define the term "customary adoption" as used in a

interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be based on the written or oral testimony of a qualified tribal elder, historian or other representative.").

168. 15 Am. Tribal L. 176, 180-82 (No. CSC-18-01) (Eastern Band of Cherokee Indians Sup. Ct. Dec. 19, 2018).

169. *Id.* at 182-83.

Navajo statute.[170] An Eastern Band of Cherokee Indians court relied upon tribal common law—pointing to a dispute decided by the National Committee of the Cherokee Nation in 1825—to decide a case challenging the court's cost-assessment authority, which was granted by the tribal code.[171] The Grand Ronde tribal court has likewise looked to Navajo common law for guidance.[172] But in some cases, even where customs exist, a tribal court might decline to apply customary law, presuming it to be displaced by positive law. For example, in *In re E.S.*, where a tribal ordinance conflicted with a custom, the Hopi court applied the ordinance.[173] The remainder of this Section canvasses several tribal-court cases in which the court successfully interpreted and applied customary law that was incorporated by reference into positive law.

1. Raphael v. Election Board *(Grand Traverse Band of Ottawa and Chippewa Indians): Due Process and the Seven Sacred Teachings*[174]

The Grand Traverse Band of Ottawa and Chippewa Indians has incorporated aspects of Anishinaabe customary law into its written codes, allowing the

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170. James v. Window Rock Fam. Ct., 11 Am. Tribal L. 41, 49-50 (No. SC-CV-06-12) (Navajo Nation Sup. Ct. Oct. 8, 2012).

171. Eastern Band of Cherokee Indians v. Cucumber, Nos. TR 01-775, TR 01–776, TR 01–777, TR 01–778, TR 01–77-779, 2003 WL 25902443, at *1-2 (Eastern Band of Cherokee Indians Sup. Ct. July 16, 2003).

172. Alexander v. Confederated Tribes of Grand Ronde, 13 Am. Tribal L. 353, 358 (No. A–15–008) (Confederated Tribes of the Grand Ronde Community of Oregon Ct. App. Aug. 5, 2016).

173. 3 Am. Tribal L. 446, 447 (Nos. 01AC000010, 00JC000014) (Hopi Tribe App. Ct. Nov. 13, 2001) ("Preference should be given to an interpretation of the statute that does not render these two provisions in conflict. Therefore, this Court must assume that the drafters of this Code were aware of the above-noted custom and chose to pre-empt it in certain situations. Hopi precedential order of authority places Hopi ordinances over Hopi custom."); *see also In re* Guardianship of E.D., 8 NICS App. 74, 79 (No. TUL-CV-GU-2006-010, 011) (Tulalip Tribal Ct. App. Sept. 23, 2008), https://www.codepublishing.com/WA/NICS/html/8NICSApp/8NICSApp074.html [https://perma.cc/XF6T-X32X] ("Customary practices are on an equal plane with the other laws and ordinances of the Tribes. However, the custom relied upon by Appellant goes only so far . . . . Traditional relationships between a child and his or her biological or marriage relatives that existed before non-Indian contact could have been, but were not, incorporated into Ordinance 81, except to the extent that they also meet the definition of 'significant familial-type relationship' in the Ordinance. Neither does Ordinance 81 include customs relating to adoption by a family as part of the preferences for placement." (citations omitted)).

174. A note on terminology of what I refer to here as the Seven Sacred Teachings. Most Anishinaabe people refer to these teachings as the Seven Grandfather Teachings (or the Seven Grandfathers) or the Seven Grandmother Teachings. I use Seven Sacred Teachings to avoid gendering these teachings (though I am sure others will disagree with me on that point). Regardless of terminology, they are the same for the purposes of this Article.

judiciary to interpret codified customary law. Consider *Raphael v. Election Board*, a case I adjudicated.[175] *Raphael* involved an election dispute.[176] The tribal election board, an independent body charged with administering elections, publishes election regulations every election cycle.[177] The court invoked Niizhwaaswi Mishomis Kinoomaagewinawaan, the Seven Sacred Teachings of the Anishinaabeg.[178] The Grand Traverse Band Constitution does not mention whether tribal customary law constitutes valid tribal law, instead listing the "Constitution, ordinances, resolutions, regulations, and judicial decisions of the Band" as the governing law.[179] In dicta, the tribal judiciary, sitting en banc, expressed concern about the election board's actions in relation to the election challenger, who had tried to initiate a recall of a sitting council member.[180] The board applied a tribal election statute naming the board the final arbiter of recall elections; in contrast, the tribal constitution allows for tribal-court review of "improprieties" of the election board.[181] Without jurisdiction to hear the merits of the appeal, the tribal judiciary in dicta expressed an interpretation of the tribal constitution's due process clause in light of the Seven Sacred Teachings.[182] According to the *Raphael* court, the Seven Sacred Teachings are:

Nbwaakaawin – Wisdom
Zaagidwin – Love
Mnaadendimowin – Respect
Aakwade'ewin – Bravery
Gwekwaadiziwin – Honesty
Dbaadendizwin – Humility

175. Raphael v. Grand Traverse Band of Ottawa and Chippewa Indians Election Bd., No. 13-2189-CV-CV (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary May 21, 2014), https://turtletalk.files.wordpress.com/2013/05/raphael-final-opinion.pdf [https://perma.cc/L7ZF-V5ZR].

176. *Id.* at 2.

177. *See* CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. VII, § 1(h), https://www.narf.org/nill/codes/grand_traverse/constitution.pdf [https://perma.cc/H8UD-7G4K].

178. *Raphael*, slip op. at 6-7.

179. CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. VI, https://www.narf.org/nill/codes/grand_traverse/constitution.pdf [https://perma.cc/H8UD-7G4K].

180. *Raphael*, slip op. at 9.

181. *Compare* CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. VII, § 5(c), https://www.narf.org/nill/codes/grand_traverse/constitution.pdf [https://perma.cc/H8UD-7G4K] (allowing tribal-court review of "improprieties" in regular elections), *with id.* art. VIII, § 1 (excluding parallel language for recall elections).

182. *See Raphael*, slip op. at 5-9.

Debwewin — Truth[183]

The *Raphael* court also invoked the broader, and perhaps higher, principle of Mino-Bimaadiziwin.[184] That phrase, translated literally, means something like the act of living life in a good way—but for Anishinaabe people, it has far greater meaning. The court quoted Eva Petoskey, a tribal member and former tribal judge, who gave a description of Mino-Bimaadiziwin as follows:

> There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.[185]

Noting these principles, the judiciary criticized the election board for summarily dismissing the petitioner's recall petition without notice and without giving her the opportunity to be heard on the merits.[186] In short, while the board's decision might or might not comport with the due-process precedents of federal and state courts, it did not comport with the tribal judiciary's understanding of "due process" under the Seven Sacred Teachings. The court concluded that Anishinaabe customary law requires more of the government than mere due process: "Due process works both ways—it protects the individual and provides

183. *Id.* at 6.

184. *Id.*

185. *Id.* at 6-7 (alteration in original) (quoting Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 39, 47-48 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012)).

186. *Id.* at 8.

opportunities for the government (or Election Board in this instance) to improve."[187]

2. *Wright v. Nottawaseppi Huron Band of the Potawatomi: Due Process, Sovereign Immunity, and the Seven Sacred Teachings*

Even more so than the Grand Traverse Band, the Nottawaseppi Huron Band of the Potawatomi has peppered its statutes with references to the Seven Sacred Teachings, known in the Potawatomi language as Noeg Meshomsenanek Kenomagewenen and Mno Bmadzewen (the same principle noted in *Raphael*).[188] In *Wright v. Nottawaseppi Huron Band of the Potawatomi*, another decision in which I participated, the Nottawaseppi Huron Band of the Potawatomi Supreme Court interpreted the due process and equal protection clauses of the tribal constitution in light of tribal customary law in a membership dispute.[189] The preamble to the tribal constitution promises that the tribal government would act "consistent with our Bode'wadmi traditions and cultural values."[190] The court first addressed a due-process claim through the lens of Mno Bmadzewen.[191] The court noted that previously it had held (in a case discussed below[192]) as a matter of tribal common law that the government owes a duty of "fundamental fairness" to persons under its jurisdiction.[193] The court expanded on the understanding of fundamental fairness by explaining that the duty requires the court to "do justice."[194] The court understood, in contrast, that due process as applied by state

187. *Id.* at 9.

188. *See, e.g.*, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI CODE §§ 5.2-3, 5.3-4, 7.3-6, 7.4-6 (2023), https://ecode360.com/NO3539 [https://perma.cc/SQY6-BKSN] (referencing Noeg Meshomsenanek Kenomagewenen in, respectively, the tribal-employment, labor-relations, juvenile-justice, and domestic-violence codes); *id.* § 7.5-1 (referencing Mno Bmadzewen in the child-protection code).

189. No. 21-154-APP, slip op. at 10-12, 27-30 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. June 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/06/2022-6-3-Filed-NHBP-Supreme-Court-Opinion-Order-in-Wright-et-al-v-NHBP-et-al-21-154-APP.pdf [https://perma.cc/6MEA-9Q8N].

190. CONST. OF THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI pmbl., https://ecode360.com/29874258#29874258 [https://perma.cc/GQ5L-RKWM].

191. *Wright*, slip op. at 10.

192. *See infra* Section III.B.5.

193. *Wright*, slip op. at 10 (citing Spurr v. Tribal Council, No. 12-005APP, slip op. at 6 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Feb. 21, 2012), https://nhbp-nsn.gov/wp-content/uploads/2018/07/12-005APP-Opinion-of-SC-in-Spurr-v-TC-et-al1.pdf [https://perma.cc/7755-JDPX]).

194. *Id.* at 11.

and federal courts "too often means nothing more than the bare minimum."[195] The court added that when the tribal government is adverse to individual persons, the government's duty is heightened: "It is especially important for people in positions of power or authority over others to strictly ensure that fundamental fairness occurs in all [of the Tribe's] interactions with the Tribal public."[196]

In light of its pronouncements on the government's duty to individuals under the tribal due process clause, the *Wright* court rejected the tribe's sovereign-immunity defense, applying customary law.[197] The Nottawaseppi tribal constitution waived sovereign immunity for suits seeking prospective injunctive relief for alleged violations of tribal law, but without limitation as to which persons could bring suit.[198] The tribe's defense was that the limited waiver benefited only tribal members, despite the broad language of the waiver.[199] The court applied Debwewin, or truth, one of the Seven Sacred Teachings, in interpreting the tribe's limited waiver of sovereign immunity.[200] Standing alone, the limited waiver allowed for this suit, but the court added that Debwewin supported the decision to allow the plaintiffs to sue.[201] The court first noted that a root word for Debwewin is heart, or demin, which is also the word for strawberry: "*Debwewin* asks us to seek the truth of the matter, which can be 'detected through the beat of the heart and through the voice of the person and how the person speaks.'"[202] The court reasoned that since the tribe's sovereign-immunity defense would prevent the petitioners from expressing their views on the merits of the case, the truth of the claim could never be determined: "The Tribal Council's invocation of sovereign immunity is a demand to silence the Wright petitioners before they can speak on the merits of their claims."[203] The court rejected the immunity defense because "[s]ilencing the petitioners prevents us from

195. *Id.*

196. *Id.* at 11 (quoting Rios v. Nottawaseppi Huron Band of the Potawatomi Election Bd., No. 21-181-APP, slip op. at 14 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Mar. 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/03/Dorie-Rios-Nancy-Smit-v.-NHBP-Election-Board-Supreme-Court-Opinion-3-3-2022.pdf [https://perma.cc/L6AX-QKXA]).

197. *Id.* at 12-14.

198. CONST. OF THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI art. X, § 2(a), https://ecode360.com/29874258#29874258 [https://perma.cc/GQ5L-RKWM].

199. *See Wright*, slip op. at 13.

200. *Id.* at 14.

201. *Id.*

202. *Id.* (quoting Mark F. Ruml, *The Indigenous Knowledge Documentation Project—Morrison Sessions: Gagige Innakonige, The Eternal Natural Laws*, 30 RELIGIOUS STUD. & THEOLOGY 155, 163 (2011)).

203. *Id.*

knowing who they are and, ultimately, prevents us from discovering the truth of this matter."[204]

Next, the *Wright* court addressed the meaning of the tribal constitution's guarantee of equal protection of law to persons under tribal jurisdiction. The court once again invoked customary law, focusing on Debanawen, or love, one of the Seven Sacred Teachings.[205] Debanawen, like Debwewin, has as a root word demin, meaning heart or strawberry. Debanawen is a remedial principle at its core: it "is the capacity for caring and desire for harmony and well-being in interpersonal relationships and with the environment."[206] Debanawen "transcends time and space; it links us inexplicably to our ancestors and future generations."[207] "In times of great difficulty and even violence, *Bodéwadmi* people reacted with *Debanawen*, a great healing tool."[208] The court applied the "corrective and reparative principle" of Debanawen in interpreting the tribe's equal-protection guarantee.[209]

The court contrasted these Anishinaabe principles with the American understanding of the Equal Protection Clause, which the court noted was born of "the state of horrendous and unequal protection rooted in a racial caste system."[210] The way the U.S. Supreme Court has interpreted the federal equal-protection mandate is that the law generally may *not* be used to remedy past discrimination.[211] In contrast, the equal-protection mandate of the Nottawaseppi Huron Band need not be shackled to that history. The tribal equal-protection mandate *can and should* be used to remedy discrimination, past and present. Ultimately, the *Wright* court remanded the matter to the trial court to reconsider the legal questions in light of customary law.[212]

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204. *Id.*

205. *Id.* at 29.

206. *Id.* (quoting Deborah McGregor, *Indigenous Women, Water Justice and* Zaagidowin *(Love)*, 30 CANADIAN WOMEN'S STUD. 71, 75 (2015)).

207. *Id.* (quoting Deborah McGregor, *Indigenous Women, Water Justice and* Zaagidowin *(Love)*, 30 CANADIAN WOMEN'S STUD. 71, 75 (2015)).

208. *Id.*

209. *Id.* at 29-30.

210. *Id.* at 28.

211. *See, e.g.*, Adarand Contractors v. Peña, 515 U.S. 200, 224, 227, 235-37 (1995) (applying a heightened standard of review presuming the unconstitutionality of affirmative-action laws designed to remedy past discrimination). *But see, e.g.*, Associated Gen. Contractors of Am. v. Cal. Dep't of Transp., 713 F.3d 1187, 1195 (9th Cir. 2013) (holding that a program aimed at remedying historical discrimination survived strict scrutiny).

212. *Wright*, slip op. at 38-39.

3. Minnesota Department of Natural Resources v. Manoomin *(White Earth Nation): Rights of Nature and Anishinaabe Teachings on Wild Rice*

In 2018, the White Earth Reservation Business Committee adopted a "Rights of Manoomin" statute.[213] Manoomin is wild rice, a culturally critical food staple of the Anishinaabe and other tribal nations: "[M]anoomin, or wild rice, is considered by the Anishinaabe people to be a gift from the Creator and continues to be an important staple in the diets of native people for generations, is a central element of the culture, heritage, and history of the Anishinaabe people . . . ."[214] The statute begins: "Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation."[215]

In 2021, the White Earth Nation and numerous tribal members sued to enforce the rights of Manoomin in the context of the State of Minnesota's approval of a pipeline on lands that likely will affect Manoomin habitat.[216] The White Earth Nation's appellate court dismissed the complaint by relying on federal precedents limiting tribal powers over nonmembers.[217]

Though the tribal court dismissed the suit before the merits could be heard, the complaint showcases the dispute. At bottom, the State of Minnesota was asserting ownership of Manoomin on state public lands under state law,[218] while the White Earth Nation was asserting the "inherent rights" of Manoomin in lands ceded by the Anishinaabe nations in various nineteenth-century treaties.[219]

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213. Rights of Manoomin, Res. No. 001-19-009 (2018) (White Earth Reservation Business Committee, White Earth Band of Chippewa Indians), https://www.centerforenvironmentalrights.org/s/2018-White-Earth-Rights-of-Manoomin-Resolution-and-Ordinance.pdf [https://perma.cc/MG6Z-U9PK].

214. *Id.* at 5.

215. *Id.* § 1(a).

216. Complaint at 39-45, Manoomin v. Minn. Dep't of Nat. Res., No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. Aug. 18, 2021) [hereinafter *Manoomin* Complaint], https://turtletalk.files.wordpress.com/2021/08/manoomin-et-al-v-dnr-complaint-w-exhibits-8-4-21.pdf [https://perma.cc/S9WS-YBB5].

217. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516, slip op. at 16-17 (White Earth Band of Ojibwe Ct. App. Mar. 10, 2022), https://turtletalk.files.wordpress.com/2022/03/manoomin-opinion-ap21-0516.pdf [https://perma.cc/W3ZF-2WM4].

218. *Manoomin* Complaint, *supra* note 216, at 39. The complaint cited a Minnesota statutory provision, which provides: "The state is the owner of wild rice and other aquatic vegetation growing in public waters." MINN. STAT. § 84.091(1) (2024).

219. Rights of Manoomin, Res. No. 001-19-009, § 1(a) ("Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation.").

This dispute, should it ever be litigated, is a conflict between different legal and political philosophies. In one philosophy, internalized by almost all federal, state, and even tribal judges and policymakers trained in American law, humans are placed on earth to exercise dominion over the world; in the other, internalized by traditional Anishinaabek, human dominion over plants, animals, lands, waters, air, and other natural entities is exactly wrong.

* * *

These cases involve tribal judicial interpretation of positive tribal laws enacted by tribal lawmakers such as tribal councils or election boards. These tribal courts engaged – or, in the *Manoomin* litigation, would have to engage – at some length in the interpretation of codified customary law.

B. Tribal Judicial Substantive Common-Law Rulemaking

Tribal judiciaries have engaged in common-law rulemaking and adopted substantive decision rules rooted in tribal customary law. The existence and development of tribal common law is still nascent and often controversial, both in tribal and nontribal spheres. Tribal leaders (and their attorneys), who are accustomed to tribal governmental structures in which a legislative branch takes the lead on establishing statutory law, are often skeptical of the power of tribal courts to establish common law. While still rare, tribal-court common-law rulemaking appears to be proceeding analogously to how state courts and state legislatures interact. Tribal legislatures can override tribal-court common-law decisions with simple legislation, while tribal-court constitutional interpretation is likely not subject to legislative override, much like how Congress can overrule statutory-interpretation decisions of the U.S. Supreme Court but not the Court's constitutional interpretations (absent a constitutional amendment).

Tribal courts fairly routinely invoke tribal custom as common law in certain kinds of cases, especially those involving family law[220] or property law.[221] Tribal courts are also warming up to incorporating customary law in the commercial context, though that development comes in fits and starts.[222] Even the Courts of

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220. *E.g.*, *In re* C.D.S., 17 ILR 6083, 6084 (No. PG-87-A50) (Ct. of Indian Offenses for the Delaware Tribe of Western Oklahoma Oct. 13, 1988) ("[T]he Court does not hesitate in taking judicial notice of the unique relationship that exists between Indian grandparents and grandchildren, and the need for maintenance of these contacts, despite the fact there is no written tribal law on the subject."); Garfield v. Aleck, 24 ILR 6100, 6101 (No. FM-J96-08) (Inter-Tribal Ct. App. of Nevada Feb. 25, 1997) (reversing a tribal child placement disfavoring the child's grandmother, invoking "tribal custom which permits a parent to place a child in the temporary care of a close relative, especially a grandmother"); Mike v. Mike, 7 Am. Tribal L. 186, 187 (No. CV 99-42) (Ho-Chunk Nation Trial Ct. June 14, 2007) ("The Ho-Chunk Nation lacks an elder abuse statute. Therefore, the Court took testimony from elder Dennis Funmaker of the Bear Clan on the custom of 'respect for elders.' According to Mr. Funmaker, respect for elders is considered a type of law. It is one of the more important customs of the Tribe. This is due to several factors. The elders have fostered us, our knowledge of customs come from their knowledge of the past and what has been passed down. The elders have taken care of us from before. They are to be respected for this and held in a place of honor. It is the duty of the younger generation to take care of the elders. Elders are always served first at tribal events and are served by their younger relatives. They are given special care in seating and their disabilities are accommodated whenever possible."); Sanchez v. Garcia, 2 Am. Tribal L. 334, 339 (Nos. 95CV000110, 98AP000014) (Hopi Tribe App. Ct. Nov. 16, 1999) ("[T]his Court hereby takes judicial notice that there is a 'generally known and accepted' custom at Hopi recognizing the appropriate clan relatives as traditional legal authorities with the power to resolve inheritance disputes." (quoting Hopi Indian Credit Ass'n v. Thomas, 25 ILR 6168, 6169 (No. AP–001–8) (Hopi Tribe App. Ct. Mar. 29, 1996))); Gray v. Metoxen, No. 19-AC-004, slip op. at 7 (Oneida Judiciary Ct. App. May 18, 2020) (Wigg-Hinham, J., dissenting), https://oneida-nsn.gov/wp-content/uploads/2020/06/19-AC-004-Deitric-Gray-v-Mercy-Metoxen-Final-Decision.pdf [https://perma.cc/XD3S-5VGG] ("Default Judgment goes against the Oneida Nation's Haudenosaunee traditions, heritage and cultural values involving family because it can be punitive in nature by taking away established visitation, thus creating undue anxiety for the child and continues the inter-generational trauma imposed upon Indian People when the children were taken from their parents during the Boarding School Era."); Leyva v. Hyeoma, No. ITCN/AC-CV-04-004, 2004 WL 5748397, at *2 (Inter-Tribal Ct. App. of Nevada Aug. 24, 2004) ("We note that the traditions and customs of the Paiute and Shoshone people provide that both parents have a responsibility to contribute to the maintenance and support of the children. This custom is common among Native Americans."); Toya v. Ramone, 23 SWITCA Rep. 3, 4 (SWITCA No. 10-015-ZTC) (Southwest Intertribal Ct. App. for the Zuni Pueblo Tribal Ct. Mar. 31, 2012), https://www.ailc-inc.org/wp-content/uploads/Volume-23-2012.pdf [https://perma.cc/AX2D-ZFHU] ("The Pueblo of Zuni, like many Pueblos, is a strong matriarchal society.").

221. *E.g.*, *In re* Est. of Komaquaptewa, 4 Am. Tribal L. 432, 442-44 (Nos. 01AP000013, 00CV000137) (Hopi Tribe App. Ct. Aug. 16, 2002) (asserting jurisdiction over the property-rights issue but remanding to the trial court for a determination on customary law).

222. *Compare* Ho-Chunk Nation v. Money Ctrs. of Am., Inc., 9 Am. Tribal L. 308, 315 (No. CV 10-54) (Ho-Chunk Nation Trial Ct. Dec. 28, 2010) ("While the Traditional Court acknowledged

Indian Affairs, the federal instrumentalities that provide judicial services to several tribal nations, are authorized to apply customary law.[223]

There are relatively few cases in which tribal courts apply judge-made common law to tribal-government action in the absence of a tribal code to interpret. In some cases, courts refuse to find and apply tribal common-law rules, asserting that the tribal legislature, not the court, is the body mandated to create tribal law.[224] One court, in the criminal-law context, alleged that tribal criminal prosecutions are far removed from traditional governance and refused to find tribal customary law that would apply in a criminal context.[225] Often, litigants raise tribal custom as an attempt to override or deflect controlling tribal constitutional and statutory law, but it is rare to find a tribal-court decision overriding statutory

contract claims as a cause of action under tradition and custom, it has not extended this pronouncement to include implied and quasi-contract causes of action."), *and* Ho-Chunk Nation v. B&K Builders, Inc., 3 Am. Tribal L. 381, 392 (No. CV 00-91) (Ho-Chunk Nation Trial Ct. June 20, 2001) (refusing to apply customary law to interpret an agreement where the governmental party was not authorized to enter into the contract), *with* Ho-Chunk Nation v. Olsen, 2 Am. Tribal L. 299, 308 (No. CV 99-81) (Ho-Chunk Nation Trial Ct. Sept. 18, 2000) ("Under the traditions and customs of the Ho-Chunk Nation, the defendant has violated a binding agreement by retaining the benefit of the down payment without providing the agreed upon compensation.").

223. 25 C.F.R. § 11.500(a)(3) (2024); *see also* Dale v. Benally, 14 SWITCA Rep. 3, 4 (SWITCA No. 02-002-UMUTC) (Southwest Intertribal Ct. App. for the Ute Mountain Ute C.F.R. Ct. July 23, 2003), https://www.ailc-inc.org/wp-content/uploads/Volume-14-2003.pdf [https://perma.cc/YTR6-YMSR] (remanding the matter to address customary law in accordance with 25 C.F.R. § 11.500). *But see* Soto v. Lancaster, 14 SWITCA Rep. 8, 11 (SWITCA No. 03-00-UMUTC) (Southwest Intertribal Ct. App. for the Ute Mountain Ute C.F.R. Ct. Dec. 30, 2003), https://www.ailc-inc.org/wp-content/uploads/Volume-14-2003.pdf [https://perma.cc/YTR6-YMSR] (reversing a lower court's customary-law analysis where the tribal common law "was totally inconsistent" with the relevant federal regulations).

224. *E.g.*, Ho-Chunk Nation Treas. Dep't v. Corvettes on the Isthmus, 7 Am. Tribal L. 78, 80 (No. SU 07-03) (Ho-Chunk Nation Sup. Ct. Nov. 19, 2007) ("It is not for the Court's [sic] to make positive law. It can recognize custom and tradition as a basis of law, but given the fact that Ho-Chunk people did not develop an advanced commercial system which gave clear rules on what to do in case of a breach leaves this Court with little recourse. The HCN Constitution is explicit in giving the authority to make laws to the HCN Legislature. The Courts cannot exceed the authority which created them.").

225. Marchand v. Colville Confederated Tribes, 8 CCAR 43, 47-48 (No. AP05-016) (Colville Tribal Ct. App. Apr. 26, 2006), https://www.colvilletribes.com/s/8-CCAR.pdf [https://perma.cc/S4N8-UCEH] ("Our criminal court system is based largely on the westernized system (*e.g.* Arraignments, pleas entered, presumption of innocence, jury trials). It is far from a customary decision-making role as found in our history. Marchand has not met his burden in showing that a tradition or custom should be considered in this arena."); *see also* Swinomish Tribal Community v. Fornsby, No. CRCO-2009-0124, 2009 WL 9125779, at *3 (Swinomish Tribal Ct. Oct. 6, 2009) (rejecting a customary-law argument on the scope of the insanity defense, writing that "[i]t is not the province of the court to blaze the trail on a theory that appears so contrary to custom and tradition and the clearly stated policies and goals of the community").

or constitutional text.[226] Tribal courts impose a very high burden on litigants to demonstrate evidence of a tribal custom capable of overriding tribal constitutional or statutory text, or even Anglo-American common-law principles.[227] At other times, the tribal court might prudentially refuse jurisdiction over a claim it might otherwise adjudicate because the issue was inappropriate for judicial

226. *E.g.*, Swan v. Colville Bus. Council, 11 CCAR 83, 96-98 (No. AP13-027) (Colville Tribal Ct. App. Dec. 2, 2014), https://www.colvilletribes.com/s/11-CCAR.pdf [https://perma.cc/72AK-NUXP] (refusing to override tribal sovereign immunity); Blanchard v. Grant, 5 Am. Tribal L. 490, 492 (No. SC-00-02) (Sac and Fox Nation Dist. Ct. Mar. 30, 2004) ("The mother cites certain reference materials as well as oral testimonies in support of her proposition that, by virtue of tribal custom and tradition, she is a preferred custodian based upon her gender. Father correctly replies that such a purported gender-biased preference is not incorporated at any place in the Sac and Fox Code of Laws. This court declines to address said issue.").

227. *E.g.*, Hoffman v. Cheyenne-Arapaho Election Bd., No. CNA-SC-97-04, , 2000 WL 33976522, at *3-4 (Cheyenne-Arapaho Tribes Sup. Ct. Oct. 27, 2000) (refusing to apply customary law to an election dispute due to lack of evidence); Cheyenne River Sioux Tribe v. White Eyes, 37 ILR 6027, 6027 (No. 08-A-003) (Cheyenne River Sioux Tribal Ct. App. Aug. 8, 2009) ("While it is a core maxim of Cheyenne River Sioux Tribal law that Lakota tradition and custom is a vital source of law, it goes without saying that relevant evidence must come from traditional elders, academic experts, and other legitimate sources. It cannot be merely asserted by counsel without proof."); Wilson v. Bus. Comm., No. CNA-SC-02-02, 2003 WL 24313610, at *9-10 (Cheyenne-Arapaho Tribes Sup. Ct. Mar. 18, 2003) (rejecting a customary-law argument for failure to document the custom); Walker v. Laducer, 12 CCAR 69, 74 (No. AP15-008) (Colville Tribal Ct. App. Feb. 4, 2016) (citing Smith v. Colville Confederated Tribes, 4 CCAR 58 (No. AP97-008) (Colville Tribal Ct. App. May 7, 1998), https://www.colvilletribes.com/s/4-CCAR-20.pdf [https://perma.cc/Z7XG-GQ5J]), https://www.colvilletribes.com/s/12-CCAR.pdf [https://perma.cc/86YB-NFKV] (reversing a trial-court decision creating customary law with inadequate testimony supporting the custom); Hoffman v. Colville Confederated Tribes, 4 CCAR 4, 15 (No. AP95-023) (Colville Tribal Ct. App. May 5, 1997), https://www.colvilletribes.com/s/4-CCAR-20.pdf [https://perma.cc/Z7XG-GQ5J] ("Since the appellant has the burden of proof, he must affirmatively plead that a custom of the Tribes controls the law on an issue pertinent to his blood degree correction action in order for the Trial Court to request a customs hearing. This has not been done in this action. In the appellant's petition and subsequent pleadings, no specific allegations have been made regarding the applicability of custom law pertaining to adoption or blood corrections."); Smith v. James, 2 Am. Tribal L. 319, 324-25 (Nos. 94CV000019, 98AP000011) (Hopi Tribe App. Ct. Nov. 16, 1999) (ordering remand to conduct an additional hearing on customary law); Hopi Indian Credit Ass'n v. Thomas, 1 Am. Tribal L. 353, 357 (Nos. Civ-020-84, 98AC000005) (Hopi Tribe App. Ct. Nov. 23, 1998) (describing the burden to establish customary law, requiring that "its existence and substance must be proved with clear evidence and decided by the court as a matter of law"); Mirabal v. Vigil, 23 SWITCA Rep. 24, 30 (SWITCA No. 11-004-NTC) (Southwest Intertribal Ct. App. for the Nambé Pueblo Tribal Ct. July 5, 2012), https://www.ailc-inc.org/wp-content/uploads/Volume-23-2012.pdf [https://perma.cc/4D6H-GE97] (rejecting an argument based on customary law where the claimant failed to put forth evidence); Jensen v. Giant Indus., Ariz., Inc., 8 Navajo Rep. 203, 209-10 (No. SC-CV-51-99) (Navajo Nation Sup. Ct. Jan. 22, 2002), https://static.case.law/navajo-rptr/8/case-pdfs/0203-01.pdf [https://perma.cc/R4L9-QWFE] (rejecting an affidavit from a customary-law expert for failure to be fact-specific to the legal question).

interpretation.[228] Sometimes, sovereign immunity makes irrelevant the question whether to apply customary law to tribal governments.[229]

The Navajo Nation Supreme Court is known for its invocation of Diné Bi Beenahaz'áanii, or Diné Fundamental Law,[230] as a source of common law. Consider the cases of *Lee v. Begay*,[231] *Charley v. Benally*,[232] and *Howard v. Blackman*.[233] These cases involved the Navajo common-law rule governing the acknowledgment of oral wills and the subsequent modifications of the original rule through

228. *E.g.*, *In re* Sacred Arrows, 3 Okla. Trib. 332, 337-38 (No. CNA-CRM-90-28) (Cheyenne-Arapaho Tribes Dist. Ct. July 11, 1990) (dismissing a claim to sacred arrows in favor of leaving the question to customary process).

229. *E.g.*, Campos v. Parker, 16 Am. Tribal L. 334, 342 (No. CV 21-107) (Cherokee Ct. of the Eastern Band of Cherokee Indians Feb. 22, 2022) (dismissing an employment claim against tribal officials rooted in customary law); Marino v. Mashantucket Pequot Gaming Enter., 3 Mash. Rep. 161, 166, (No. CV-PI-1996-0117) (Mashantucket Pequot Tribal Ct. Jan. 6, 2000) ("This Court finds that the Tribal Council's articulation of its belief in the principle of sovereign immunity, coupled with the deliberate adoption of Connecticut tort law principles, in the Ordinance evidences an intent to supersede the application of any conflicting tribal customary law to tort claims brought against the Gaming Enterprise.").

230. 1 N.N.C. §§ 201-206 [1 NAVAJO NATION CODE §§ 201-206 (2010)], https://www.nnols.org/wp-content/uploads/2022/05/1-5.pdf [https://perma.cc/V8WB-RFZX].

231. 1 Navajo Rep. 27 (Navajo Nation Sup. Ct. Dec. 7, 1971), https://static.case.law/navajo-rptr/1/case-pdfs/0027-01.pdf [https://perma.cc/NMY8-CTZB].

232. 1 Navajo Rep. 219 (Navajo Nation Sup. Ct. July 7, 1978), https://static.case.law/navajo-rptr/1/case-pdfs/0219-01.pdf [https://perma.cc/VT66-DWUU].

233. 7 Navajo Rep. 262 (No. SC-CV-53-95) (Navajo Nation Sup. Ct. May 28, 1997), https://static.case.law/navajo-rptr/7/case-pdfs/0262-01.pdf [https://perma.cc/S3BK-V9JY].

common-law rulemaking.[234] The Hopi Tribe[235] and the Ho-Chunk Nation[236] judiciaries are also well known for applying customary law as common law. These tribal justice systems have also generated a significant body of written court opinions published in established tribal court reporters. This Section leads with decisions from those tribal nations. Given the apparent reluctance of tribal judiciaries to apply the common law to tribal governments, few of the decisions surveyed below involve tribal governments as parties.

1. In re Estate of Benally *(Navajo Nation): Laches and Navajo Fundamental Law*

The Navajo Nation has a long track record of invoking customary law. In *In re Estate of Benally*, for example, the Navajo Nation Supreme Court adopted a substantive rule rooted in the customs and traditions of respect for the deceased and resistance to compensating for lost opportunities.[237] The court rejected a challenge to a probate decision where the petitioner waited six months to bring the challenge.[238] The court noted that under federal law, lengthy delays are often excused, but matters involving the deceased in Navajo culture are very

234. *See Lee*, 1 Navajo Rep. at 31-32; *Charley*, 1 Navajo Rep. at 221-25; *Howard*, 7 Navajo Rep. at 263-68.

235. *E.g.*, Hopi Tribe v. Timms, 3 Am. Tribal L. 419, 421-22 (No. 00AC000011) (Hopi Tribe App. Ct. Mar. 23, 2001) (applying ookwalni, forgiveness and mercy, to set aside the criminal conviction of the defendant who had been punished and rehabilitated a decade earlier); Vill. of Mishongnovi v. Humeyestewa, 1 Am. Tribal L. 295, 302 (Nos. CIV-008-94, 96AP000008) (Hopi Tribe App. Ct. Nov. 23, 1998) ("This court must now articulate a tribal common law rule that will be consistent with Hopi customs of open dispute resolution and will serve certain important functions of standing doctrine. A Hopi common law standing rule should ensure that litigants in Hopi Tribal Court are truly adverse, that those parties most directly concerned are able to litigate the questions at issue, and that issues are raised in concrete cases that inform judges of the consequences of their decisions."); Polingyouma v. Laban, 1 Am. Tribal L. 274, 277 (Nos. D-013-94, AP-006-95) (Hopi Tribe App. Ct. Mar. 31, 1997) ("This Court is prepared to take judicial notice of three aspects of Hopi custom concerning children. Under traditional Hopi practice, a child is born into her mother's clan, lives with the mother's household and receives ceremonial training from the mother's household.").

236. *E.g.*, Hernandez v. Hernandez, 14 Am. Tribal L. 84, 84 (No. CV 11-16) (Ho-Chunk Nation Trial Ct. Aug. 18, 2011) ("[T]he plaintiff and the Court met with the Traditional Court to determine whether stealing was a cause of action under tradition and custom. The Traditional Court confirmed that stealing did exist under tradition and custom and is something that was frowned upon and dealt with.").

237. 8 Am. Tribal L. 246, 250-51 (No. SC-CV-49-08) (Navajo Nation Sup. Ct. June 25, 2009).

238. *Id.* at 250.

delicate.[239] Promptness is mandatory because of the respect that Navajo people afford death:

> It is not proper to talk about death or dying. Moreover, burials and property distribution are to be accomplished without undue delay out of respect for the deceased and without dispute in order to protect surviving family members. "Out of respect for the deceased," *kwá'ásiní báhozhdísin*, means that prompt attention should be given to the disposition of property so as to allow the deceased to complete Life's journey and so that the survivors can complete the transitional (cleansing) process to resume Life.[240]

The court also applied a custom akin to the equitable defense of laches, a custom of "lost opportunities," in denying the tardy petition:

> We further recognize the Navajo principle of *bit ch'í níyá* or missed opportunity. The Appellant had the opportunity to present her own expert at the second evidentiary hearing, a fifteen-day window after entry of judgment to file a motion for a new trial, as well as a thirty-day window after the time of entry to file an appeal to this Court. However, she failed to take action in all three instances.[241]

Needless to say, the petitioner did not prevail.

2. Means v. District Court of the Chinle Judicial District *(Navajo Nation): Criminal Jurisdiction Under Navajo Fundamental Law*

In the criminal-jurisdiction context, the Navajo Nation has also adopted substantive jurisdictional rules rooted in kinship. In *Means v. District Court of the Chinle Judicial District*, the Navajo Nation Supreme Court affirmed the Nation's jurisdiction over a nonmember Indian criminal offender.[242] The Nation prosecuted Russell Means, a citizen of the Oglala Sioux Tribe who had voluntarily entered into a relationship with a Navajo citizen, resided on Navajo lands, and engaged in political activities, for violent crimes against his father-in-law, a

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239. *Id.* at 250-51.

240. *Id.* at 251 (citing *In re* Est. of Tsosie, 4 Navajo Rep. 198, 200 (No. WR-CV-300-82) (Window Rock Dist. Ct. Dec. 9, 1983), https://static.case.law/navajo-rptr/4/case-pdfs/0198-01.pdf [https://perma.cc/8N6E-WWML]; Hall v. Watson, 8 Am. Tribal L. 135, 140 (No. SC-CV-52-07) (Navajo Nation Sup. Ct. Feb. 24, 2009)).

241. *Id.* (footnotes omitted).

242. 7 Navajo Rep. 383, 393 (No. SC-CV-61-98) (Navajo Nation Sup. Ct. May 11, 1999), https://static.case.law/navajo-rptr/7/case-pdfs/0383-01.pdf [https://perma.cc/22NK-CJ8W].

citizen of the Omaha Nation, and another man from the Navajo Nation.[243] The court ruled that several separate legal theories supported the Nation's jurisdiction; I will focus on the theory rooted in Navajo common law. Means argued that as a nonmember of the Nation, he was effectively immune from criminal prosecution.[244] The court disagreed, holding that Means did possess certain tribal-membership rights—and obligations—under Navajo common law adequate to justify the prosecution.[245]

The court began by describing how Means's intimate domestic relationship with a Navajo citizen is that of a hadane, or an in-law, under Navajo common law:

> While there is a formal process to obtain membership as a Navajo, that is not the only kind of "membership" under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the "foreign nation" clans include the "Flat Foot-Pima clan," the "Ute people clan," the "Zuni clan," the "Mexican clan," and the "Mescalero Apache clan." The list of clans based upon other peoples is not exhaustive. A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. Among those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person).[246]

Indigenous kinship is often rooted in a clan system. As a general matter, clans tend to denote kin relations as well as social relationships. Navajo clanship, as the court noted, also comes with social, political, and legal obligations.

Because Means voluntarily entered into this relationship with a Navajo citizen and resided on the Nation's lands (as well as engaged in the political activities that he was well known for), the court had no trouble concluding that he owed these duties to the Nation and could be prosecuted for violating those duties.[247] In short, Means consented to tribal jurisdiction "by assuming tribal relations and

243. *See id.* at 387.

244. *Id.* at 383-84.

245. *Id.* at 392-95.

246. *Id.* at 392-93 (footnote and citations omitted).

247. *Id.*

establishing familial and community relationships under Navajo common law."[248]

After the court affirmed the conviction, Means sought federal-court review, but he did not prevail.[249]

3. *Mahkewa v. Mahkewa (Hopi Tribe): Equitable Remedies Under Hopi Customary Law*

The Hopi Tribe judiciary has also adopted substantive law rooted in custom, on one occasion doing so to enforce an equitable remedy fashioned by a trial court. In *Mahkewa v. Mahkewa*, the Appellate Court of the Hopi Tribe applied Hopi customary law to a divorce proceeding where one party's failure to make court-ordered mortgage payments had caused the postdivorce repossession of the other party's home.[250] The trial court had ordered one party to build a replacement home for the other in accordance with customary law.[251] The appellate court agreed that the trial court correctly applied the customary law regarding "'Nukpunti' or an 'act of evil intended to deprive a former spouse of property that is rightfully hers.'"[252] The court held that the appellant "never intended to honor the original Divorce Decree and his duty to provide a home for his former spouse," leaving his former spouse "homeless."[253] The appellate court also approved of the trial court's order to require one of the parties to build a home for the other, an obligation rooted in the foundational custom of Hopi matrilineal society:

> It is obvious that the Trial Court attempted to fashion a remedy consistent with and supported by Hopi Customary Law. That law provides that the Hopi home is a sacred place where children are instilled with Hopi traditions and values and where the wife fulfills her obligations to her clan. Unlike the Anglo-American culture, the Hopi home is not merely a piece of real estate shared in common by the husband and wife. Hopi is a matrilineal society. The husband has the duty to provide support and maintenance for the wife in the form of a home and other resources to enable her to fulfill her obligations to her clan. Traditionally,

248. *Id.* at 393.

249. Means v. Navajo Nation, 432 F.3d 924, 937 (9th Cir. 2005).

250. 5 Am. Tribal L. 207, 209-10 (Nos. 03AP000009, 01CV000223) (Hopi Tribe App. Ct. Apr. 12, 2004).

251. *Id.* at 211.

252. *Id.*

253. *Id.*

> upon the completion of the wedding ceremony at the groom's household, the bride returns to her family home where the groom joins her to begin the marital relationship. After the groom accumulates sufficient resources to build a home for his wife, the new couple moves to the new home to become nawipti, or independent. This new home becomes the womb of the new family where Hopi traditions and values are perpetuated. By virtue of her matrilineal duties, the wife's interest in the home is paramount to that of the husband. The husband's obligation to his clan, on other hand, takes place in the homes of his clanswomen, not his wife's home.[254]

The appellate court concluded that

> Appellant's failure to honor his duty to provide his former spouse with a home is 'Nukpunti.' It is also contrary to the meaning of the home in Hopi Culture. As Hopi is a matrilineal society, the home is not merely a piece of property shared in common by husband and wife, it is a sacred place essential to the wife in fulfilling her obligations to her clan.[255]

However, because the appellant filed for bankruptcy in federal court, rendering the build-a-home order impossible to enforce under federal law, the appellate court remanded the matter to the trial court to consider an alternative remedy.[256] In this instance, federal bankruptcy law precluded the customary remedy available under tribal law,[257] perhaps an instance of the colonizer's law interfering with tribal law.

Creative judicial remedies are the norm in Indian country. They require enormous trial-court discretion to craft bespoke remedies for special parties. Tribal courts likely will continue to develop substantive tribal common law in this area.

4. Gardner v. Littlejohn *(Ho-Chunk Nation): Defamation and Warrior's Privilege Under Woigixate*

On occasion, tribal courts attempt to build on prior common-law decisions. In *Gardner v. Littlejohn*, the Ho-Chunk Nation trial court recognized a tribal common-law defense to defamation available to veterans: a warrior's

254. *Id.* at 211-12.

255. *Id.* at 213.

256. *Id.* at 213-14.

257. *Cf.* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 385 (2023) (holding that the Bankruptcy Code abrogates tribal sovereign immunity).

privilege.[258] Previously, the court had invoked the customary-law principle of woigixate in an employment case.[259] The *Gardner* trial court noted that the Nation's Traditional Court, an ad hoc body formed by the tribal judge for purposes of generating opinions on tribal customary law, determined that the defamation principle was consistent with Ho-Chunk traditional law:

> The Traditional Court indicated that in the tradition and custom of the Ho-Chunk Nation defamation existed, meaning on occasion, individuals did publicly question the honor of another individual. Nevertheless, *hocąk* people generally spoke the truth. If someone said something that was a lie or a false statement about another person, then that person typically ignored the lie that was said about them, knowing that it will come full circle back to the lying party. In other instances, the person who uttered the lie or false statement would repeat it to that person face-to-face with tobacco, and the truth would reveal itself.[260]

Since the matter involved a defamation claim against a tribal-member veteran, the court asked the Traditional Court to opine on whether defamation applied to speakers who were warriors:

> The presiding judge also questioned the role of a warrior and any privileges imposed upon warriors when publicly speaking. The Traditional Court indicated that a warrior maintained a privilege to speak his mind. Ho-Chunk people have distinctive cultural values, and one such value is their proud warrior tradition. Warriors embody strength, honor, pride, and wisdom, and a warrior's success depends on the aforementioned embodiments. Warriors return to their respective community with experiences that make them valued members of their society. Therefore, the Court relies on the above-referenced tradition and custom as the applicable law in this jurisdiction.[261]

The court ultimately dismissed the defamation action against certain defendants, citing the warrior's privilege.[262]

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258. 9 Am. Tribal L. 431, 439 (No. CV 10-47) (Ho-Chunk Nation Trial Ct. Feb. 2, 2011), *rev'd*, 11 Am. Tribal L. 400 (No. SU 11-02) (Ho-Chunk Nation Sup. Ct. Sept. 28, 2011).

259. *Id.* (citing Topping v. Ho-Chunk Nation Grievance Rev. Bd., 11 Am. Tribal L. 388, 393 (No. SU 09-08) (Ho-Chunk Nation Sup. Ct. July 1, 2010)).

260. *Id.*

261. *Id.*

262. *Id.* at 441 ("In order to foster, encourage, and perpetuate the Ho-Chunk Nation traditions and customs, the Court must look to the cultural, engrained and embodied warrior society.

Though the trial court had complied with the court rule for certifying a question to the Traditional Court, the tribal appellate court reversed the decision in part on the ground that the trial court's procedure for communicating with the Traditional Court was not transparent enough.[263] This goes to show that the invocation of tribal customary law as a source of substantive doctrines remains fraught.

5. Spurr v. Tribal Council *(Nottawaseppi Huron Band of the Potawatomi): Due Process and Mno Bmadzewen*

The Nottawaseppi Huron Band of the Potawatomi Supreme Court drew from Anishinaabe customary law to establish the principle of fundamental fairness, an analogue to due process. In *Spurr v. Tribal Council*, a decision in which I wrote the opinion, a tribal member sued the tribe over a referendum to amend the tribal constitution, alleging a host of due-process violations.[264] The tribal constitution did not expressly provide a guarantee of due process to persons under tribal jurisdiction at that time (as it does now), leading the *Spurr* court to draw from the Anishinaabe principle of Mno Bmadzewen. The court first invoked Eva Petoskey's statement describing Mno Bmadzewen, which was quoted in earlier cases.[265] Then the court added more detail from Anishinaabe elders opining that Mno Bmadzewen is akin to an unwritten constitution, the supreme Anishinaabe law:

> The four concentric circles in the sky—*Pagonekiishig*—show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four

Warriors embody strength, honor, pride, and wisdom, and a warrior's success depends on the aforementioned embodiments. Warriors return to their respective community with experiences that make them valued members of their society, and maintain a duty to protect the Ho-Chunk people. Veteran privilege exists in this instance . . . .").

263. *See* Gardner v. Littlejohn, 11 Am. Tribal L. 400, 404 (No. SU 11-02) (Ho-Chunk Nation Sup. Ct. Sept. 28, 2011) ("The Trial Court seeking the wisdom and assistance of the Traditional Court certified a question to the Traditional Court in accordance with [a rule of civil procedure] that allows the HCN courts to request the assistance from the Traditional Court on matters relating to custom and tradition of the Nation. . . . The record below is void as to how the Trial Court interacted with the Traditional Court or whether counsel or the parties were present.").

264. Spurr v. Tribal Council, No. 12-005APP, slip op. at 2-3, 11-12 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Feb. 21, 2012), https://nhbp-nsn.gov/wp-content/uploads/2018/07/12-005APP-Opinion-of-SC-in-Spurr-v-TC-et-al1.pdf [https://perma.cc/7755-JDPX].

265. *Id.* at 5 (quoting Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 39, 47-48 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012)).

> sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* [*mno bmadzewen*] that is the heart of the supreme law of the Anishinaabe. And simply put that is the meaning of a constitution.[266]

The court concluded that "Mno Bmadzewen guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct."[267] From that principle, the court inferred a duty of fundamental fairness owed by the government to all individuals under its jurisdiction.[268] Though no written tribal statute guaranteed due process or fundamental fairness (at the time of the litigation), the court inferred one through the application of customary law.[269]

The court used Mno Bmadzewen as a form of natural law or an unwritten constitutional principle, akin to customary law. The court could have relied on other authorities reflective of the requirement that the tribal government must guarantee fundamental fairness. It could, for example, have drawn upon the Indian Civil Rights Act (ICRA), which enumerates a right to due process.[270] But ICRA has two normative flaws. First, ICRA is merely a minimum of what tribal governments owe persons under their jurisdiction. Second, ICRA is congressionally mandated, an imposition on tribal nations by the colonizer. *Spurr* was the first appellate decision by this court. The court did not wish to begin the tribal judiciary's jurisprudential journey by following the wretched path of the colonizer.

6. Thlopthlocco Tribal Town v. Anderson *(Muscogee (Creek) Nation): Tribal Constitutional Structure*

Tribal judicial understandings of custom and tradition can also impact fundamental tribal constitutional structure. In *Thlopthlocco Tribal Town v. Anderson*, the Muscogee (Creek) Nation Supreme Court pointed in dicta to a provision of

266. *Id.* at 6 (citing Vanessa A. Watts, Towards Anishnaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadiziwin 77 (2006) (M.A. thesis, University of Victoria), https://dspace.library.uvic.ca/bitstreams/80e8d75d-0a6c-4b87-8598-08e0ab778bef/download [https://perma.cc/9G5M-CYRL]).

267. *Id.*

268. *Id.* at 6-8.

269. *See id.* at 6. The election at issue in *Spurr* led to the inclusion of a due-process guarantee in the tribal constitution. CONST. OF THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI art. VII, § 1(a)(8), https://ecode360.com/29874258#29874258 [https://perma.cc/GQ5L-RKWM].

270. 25 U.S.C. § 1302(a) (2018).

the tribal constitution that was ambiguous in light of tribal customary law.[271] There, the court had to decide whether the Nation's courts possessed jurisdiction over a suit brought by the Town. The Thlopthlocco Tribal Town is both a federally recognized Indian tribe and a municipality of sorts in the larger Nation.[272] According to the court, the Creek Tribal Towns predated the establishment of the Nation.[273] The towns, known in the Mvkoke language as Italwa or Talwa, were the governing entities of the Creek people before colonization.[274] The court held that since the Town had waived its immunity in the Nation's courts, the individual parties were also citizens of the Nation, and the Town did not have a court of its own (at the time of the initiation of the suit), the Nation's courts possessed jurisdiction.[275]

However, the court noted that the Thlopthlocco Tribal Town's ceremonial fire had been extinguished in 1962.[276] Article II, section 5 of the Muscogee (Creek) Nation Constitution allows the Nation to establish tribal towns, but the court left open whether the towns created were Italwa, an entity that "maintains a ceremonial fire and passes down the traditions of ceremonial dances, music, and medicine; whose matrilineal clan-based organizational structure determines positions of leadership within the tribal town," or whether they were mere municipalities.[277] The court therefore left for another day the decision on whether a tribal town created under the tribal constitution enjoyed the same benefits of a traditionally established Italwa.

Thlopthlocco Tribal Town has a potentially explosive impact, akin to the impact that Diné Fundamental Law has had on Navajo tribal governmental structure. The obvious difference between Creek and Navajo is that Navajo has no written constitution,[278] allowing the Navajo judiciary more room to announce common law. The Muscogee (Creek) Nation Supreme Court showed its intent to consider tribal customary and traditional legal doctrines – not by announcing common law, but through interpretation of the tribe's written constitution. Such a method could be employed aggressively to redefine terms in the tribal

271. No. SC-2021-03, slip op. at 15 n.43 (Muscogee (Creek) Nation Sup. Ct. Feb. 28, 2022), https://www.creeksupremecourt.com/wp-content/uploads/Doc.-19-Order-and-Opinion-02282022.pdf [https://perma.cc/ZH52-PRKJ].

272. *See id.* at 7.

273. *See id.* at 4.

274. *See id.* at 4-5.

275. *Id.* at 15 n.43.

276. *Id.*

277. *Id.*

278. Off. of the Navajo Nation President & Vice-President v. Navajo Nation Council, 9 Am. Tribal L. 46, 60-61 (No. SC-CV-02-10) (Navajo Nation Sup. Ct. June 2, 2010).

constitution or could be used more passively as an interpretive tool, as the tribal courts discussed in the next Section decided to do.

* * *

This Section surveyed several cases where tribal customary law served as a significant source of the substantive decision rule. While this practice has been a feature of tribal-court decisions for decades, it is still relatively rare. The impact of customary law as a source of substantive decision rules remains fairly minimal in most tribal jurisdictions today.

C. Tribal Judicial Interpretive Methodologies

Many tribal nations recognize broad principles that can either serve as sources of substantive law or contribute to interpretive methods. Standing alone, these tribal principles are often too broad to be legally determinative, but tribal courts do employ them as a kind of interpretive methodology. More and more frequently, tribal judiciaries invoke customary law as a set of interpretive tools akin to canons of construction or equitable principles. These courts use tribal common law to establish procedural and jurisdictional doctrines.

Tribal constitutional and statutory texts often recite respect for customary law, perhaps in a preamble or a legislative policy statement, as an invitation of sorts for courts to rely on customary law to interpret other enactments of the tribe. For example, in *In re Village Authority to Remove Tribal Council Representatives*, the Appellate Court of the Hopi Tribe acknowledged that tribal villages had the power to withdraw their elected representatives from the tribal council as a function of the "Hopi Way."[279] Even absent a policy statement favoring tribal customary law, many tribal judiciaries either expressly or impliedly apply cultural norms and traditions when interpreting and applying ambiguous text.[280] Tribal judiciaries are somewhat more likely to apply customary law to tribal government action when using it as an interpretive tool rather than as a source of substantive law.

279. 11 Am. Tribal L. 80, 90 (No. 2008-AP-0001) (Hopi Tribe App. Ct. Feb. 11, 2010).

280. *See, e.g.*, Taypayosatum v. Fort Peck Tribes, 16 Am. Tribal L. 224, 226-27 (No. AP 804) (Fort Peck Ct. App. Dec. 3, 2020) (noting that a nonmember Indian criminal defendant who had married into the tribal community and resided there was Indian as a matter of customary law).

1. Standing Bear v. Whitehorn *(Osage Nation): Tribal Constitutional Interpretation and 𐓷𐓘.𐓻𐓤𐓘𐓘*

The Osage Nation's court has begun utilizing broad philosophical principles in complex governmental disputes. In *Standing Bear v. Whitehorn*, the Osage Supreme Court addressed a difficult conflict between the Osage Nation's political branches of government.[281] The court began its analysis by invoking an Osage principle, 𐓷𐓘.𐓻𐓤𐓘𐓘, which the court translated as "to do one's best."[282] The court had previously described that principle as a guide to the court to "balance the roles and responsibilities of each branch of government in a manner that respects the efforts of those who prepared this Constitution as well as the interests of Osage constituency to whom we are all accountable."[283]

In light of that principle, the court interpreted the tribal constitution's references to inherent or implied governmental powers narrowly and eschewed plenary power altogether.[284] The court acknowledged massive changes to Osage society, which "maintain[s] the core principles of our unique worldview, which includes transforming our environs into something that ensures our future survival."[285] The court found that "[t]he Constitution reflects our continuing values of respect, compassion, preservation, cultural stewardship, resource management, home, land, and family."[286] In the separation-of-powers context, the court noted that "[a]though 'basic knowledge was shared by the twenty-four clan priesthoods, each clan also had exclusive control over parts of this knowledge.'"[287] With these principles in mind, the court then addressed a panoply of statutes enacted by the Osage Congress attempting to regulate and restrict significantly the powers of the executive branch, striking many of them down as unconstitutional.[288]

281. No. SCO-2015-01, slip op. at 1-2 (Osage Nation Sup. Ct. Mar. 8, 2016), https://turtletalk.files.wordpress.com/2016/03/sco-2015-01-slip-opinion-3-8-16.pdf [https://perma.cc/8VZD-RNLH].

282. *Id.* at 3.

283. *Id.* (quoting Red Corn v. Red Eagle, No. SPC-2013-01, slip op. at 4 (Osage Nation Sup. Ct. May 10, 2013), https://web.archive.org/web/20210119083102/https://dl.dropboxusercontent.com/s/p66dvor3w11762f/SPC-2013-01,%20Red%20Corn%20v.%20Red%20Eagle,%205-10-13%20Opinion.pdf?dl=0 [https://perma.cc/RGP3-979X]).

284. *Id.* at 3-4.

285. *Id.* at 4-5.

286. *Id.* at 5.

287. *Id.* (quoting THE OSAGE AND THE INVISIBLE WORLD: FROM THE WORKS OF FRANCIS LA FLESCHE 74 (Garrick A. Bailey ed., 1995)).

288. *Id.* at 8-35.

The Osage Supreme Court's employment of Osage philosophical principles sharply distinguishes that tribal nation from the U.S. and state governments. Osage culture demands direct governmental accountability to the Osage people, elevating the citizenry's interests over that of the tribal government. This notion recurs in other tribal justice systems.[289]

2. Payment v. Election Committee *(Sault Ste. Marie Tribe of Chippewa Indians): Election Disputes, Due Process, and Mino-Bimaadiziwin*

Tribal courts interpret legally indeterminate principles borrowed from (or imposed by) the colonizer's law—due process, for example—in light of core tribal philosophies. The Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals invoked Mino-Bimaadiziwin in interpreting the government's obligation to guarantee due process in *Payment v. Election Committee*.[290] In a formal determination, the election committee had deemed political speech by a noncandidate during a tribal-council election cycle to be improper.[291] When the speaker did not respond or appeal the determination, the committee issued a $1,500 civil penalty against the speaker.[292] The speaker appealed to the court, citing due-process violations under tribal constitutional law.[293]

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289. *E.g.*, Off. of the Navajo Nation President & Vice-President v. Navajo Nation Council, 9 Am. Tribal L. 46, 77 (No. SC-CV-02-10) (Navajo Nation Sup. Ct. June 2, 2010) ("[An elected tribal official] has a direct relationship with all the People, his/her mandate comes from all the People, and he/she has the stature of representing the whole reservation. We emphasize the relationship between *shi nat'ahí* and the People, as *shi nat'ahí* are the ones that were voted in by the whole of the People in order to serve the People as a whole. That does not mean he/she is superior in the governmental scheme. It means that this is the individual who, when it is necessary to deal with other sovereigns, he or she is the one who is the face of the Nation, the embodiment of the Nation. The individual must always be mindful that he or she holds office solely for the public interest."); Shananaquet v. Gasco-Bentley, No. C-257-0822, slip op. at 4 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Nov. 16, 2022), https://ltbbodawa-nsn.gov/wp-content/uploads/2022/12/C-257-0822-Gregory-Shananaquet-vs.-Regina-Gasco-Bentley-LTBB-Chairperson-Courts-Opinion-on-the-Motion-to-Dismiss.pdf [https://perma.cc/RR49-Q3VM] ("The fact that the people made access to Tribal government records part of the LTBB Constitution speaks to the importance of governmental transparency and accountability to the people.").

290. No. APP-22-2022, slip op. at 4 (Sault Ste. Marie Tribe of Chippewa Indians Ct. App. Dec. 6, 2022), https://www.saulttribe.com/government/tribal-court/download-files/download-file?path=Court%2Bof%2BAppeals%2BOpinions%2BOrders%252FAPP-22-02%2BPayment%2Bv.%2BElection%2BCommittee.pdf [https://perma.cc/2X3Q-4CXS].

291. *Id.* at 1-2.

292. *Id.*

293. *Id.*

The court invoked Ojibway teachings, noting that "the notion of due process emanates from the concept of achieving harmony in life, to live in balance with all of creation, otherwise known to the Anishinaabe as mino-bimaadiziwin."[294] The court then invoked more specific teachings: "Our Anishinaabe teachings of *nibwaakaawin* (wisdom[—]use of good sense), *zaagi'idiwin* (practice absolute kindness), *minadendmowin*, (respect—act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) must guide this Court's decision-making."[295] The court asserted that the Elders used teachings akin to "ordinances of creation,"[296] perhaps a kind of tribal common law, in developing a law similar to the due-process guarantee of the tribal constitution:

> This Court is further informed by our Elders that the Anishinaabe achieve wisdom through their understanding of the "ordinances of creation." The tenets represented in the rhythm of the earth and all of creation, are utilized in our established systems of governance and can be used to identify the principles of due process. For example, the Anishinaabe are no stranger to respectful listening to the position of all interested persons on any important issue. To be sure, one only need to look to the Seven Grandfather Teachings of the Anishinaabe to understand that Indian nations did not learn "due process" and "fairness" from Anglo-American cultures.[297]

The court concluded that the tribal constitution's due-process requirement should be interpreted in light of the tradition of the Ojibway talking circles, where all individuals have the twin duties of "respectful discussion" and "respectful listening":

> Indeed, this Court is called upon to consider the last time its members participated in a talking circle—we think of the order of the circle as it exists in our traditional ways, the importance of the talking stick or eagle feather as the object that enables respectful discussion as well as demands respectful listening. We also think of expected outcomes and finality of the decisions made that result from the open, honest and respectful

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294. *Id.* at 4 (citing Cholewka v. Grand Traverse Band of Ottawa and Chippewa Tribal Council, No. 2013-16-AP, slip op. at 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal App. Ct. Oct. 14, 2014), https://turtletalk.blog/wp-content/uploads/2013/05/cholewka-v-gtb-tribal-council.pdf [https://perma.cc/7H32-JY62]).

295. *Id.*

296. *Id.*

297. *Id.* at 4-5 (citing Begay v. Navajo Nation, 6 Navajo Rep. 20, 24-25 (No. A-CR-04-87) (Navajo Nation Sup. Ct. July 25, 1988), https://static.case.law/navajo-rptr/6/case-pdfs/0020-01.pdf [https://perma.cc/L5WJ-FTEH]).

> discussion. It could be said that the application of the Ojibway talking circle principles speak to the essence of due process[—]a governmental respect for all individuals subject to its authority. Like other Indian communities, this respect can be pragmatically translated in legal proceedings to mean notice and the opportunity to be heard when the deprivation of property or liberty is at stake.[298]

With these principles in mind, the court vacated the civil penalty for violating the speaker's right to due process.[299]

Had the court followed federal and state precedents interpreting due process, the outcome might or might not have been the same. Anishinaabe courts interpret due process by insisting on governmental accountability to individuals and to traditional political processes. Federal and state courts typically interpret due-process claims as limited to purely procedural issues, rarely reading substantive rights into the constitutional text.[300]

3. Rios v. Election Board *(Nottawaseppi Huron Band of the Potawatomi): Political Disputes and Mno Bmadzewen*

Tribal courts can interpret difficult tribal political matters in light of fundamental tribal common law. In *Rios v. Nottawaseppi Huron Band Election Board*, the Nottawaseppi Huron Band of the Potawatomi Supreme Court addressed a challenge to the validity of a close tribal election where the tribal chairperson allegedly made statements in an open meeting that affected the outcome of the election.[301] The court, per Justice Bird, began its analysis by invoking Anishinaabe law, Gaagige-Inaakonigewin, and Mno Bmadzewen, hoping to "achieve justice under the law as rooted in Anishinaabe ways of thinking and being."[302] The court held that the election board had violated these principles by

298. *Id.* at 5 (citing Zephier v. Walters, No. 15A06, slip op. at 4, 5-7 (Cheyenne River Sioux Tribal Ct. App. Apr. 17, 2017), https://www.narf.org/nill/bulletins/tribal/documents/zephier_v_walters.pdf [https://perma.cc/D5M7-WBXN]).

299. *Id.* at 6.

300. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993).

301. No. 21-181-APP, slip op. at 3 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Mar. 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/03/Dorie-Rios-Nancy-Smit-v.-NHBP-Election-Board-Supreme-Court-Opinion-3-3-2022.pdf [https://perma.cc/Y3MU-MGTF].

302. *Id.* at 2.

considering out-of-court statements from social media and not providing adequate notice to the affected parties of its adjudication.[303]

Tribal political discourse has long been known as a "closed circle."[304] The kind of political speech employed in tribal communities tends to be, in my experience, deeply personal and specific; after all, tribal communities are close knit, akin to families. The political speech in state and national elections tends to be impersonal and broad. Nasty political discourse has a much larger potential to be politically destabilizing in tribal communities. Aware of this reality, the *Rios* court concluded its opinion with a statement about the values of Anishinaabe communities and especially about Mno Bmadzewen:

> The world around us is in a state of stress and unrest. We live in a time when our *penojen* (children) are growing up with the fear of uncertainty that comes with a pandemic, climate change, political unrest, and war. These times have come and gone for our Indigenous people throughout our time here on *Segmekwé*, our Mother Earth. Through it all we have been resilient and adaptive. We also carry trauma and huge scars that sometimes feed our fears and reactions. It is more important than ever that we provide a structure and way of life for our *penojen* that reflect who we are and who we want to be as Indigenous people. The values of *mno-bmadzwen* are more than just words that we post on our websites or on paper. Or that we speak about when calling out another person. "For the Anishinaabe, the concept of achieving harmony in life, to live in balance with all of creation is expressed by the term mino-bimaadiziwin." *Mno-bmadzwen* reflects a way of living and how we treat one another so that we may all live in harmony together. It is a uniquely tribal concept that considers the individual as no different from the whole, and the whole as no different from the Universe. How each individual community chooses to create lifeways based on *mno-bmadzwen* is important to their future as Indigenous people and to all that feel its effect.[305]

The court added that hotly contested political disputes like tribal elections can do great damage to tribal communities:

> Tribal elections are a messy process, made more complicated by personal emotion, motive, and lack of reason. The people of NHBP are all relatives

303. *Id.* at 11-15.

304. Burnett, *supra* note 51, at 577.

305. *Rios*, slip op. at 16 (citing Cholewka v. Grand Traverse Band of Ottawa and Chippewa Tribal Council, No. 2013-16-AP, slip op. at 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal App. Ct. Oct. 14, 2014), https://turtletalk.blog/wp-content/uploads/2013/05/cholewka-v-gtb-tribal-council.pdf [https://perma.cc/7H32-JY62]).

> so the ramifications of conflict can be far-reaching and damaging to the entire Tribe. We have all seen how our Tribal elections have largely followed the processes mandated by the larger U.S. society that surrounds us. There are some good things about the process, and also some things that don't work for our Indigenous nations and ways of being. As we figure out what processes work best for our people in our adaptation to modern Tribal governance, it is important that our leaders and potential leaders provide an example of how to treat one another so that *mno-bmadzwen* is present for all. "The principles of mino-bimaadiziwin should be utilized to interpret and develop Anishinaabe-inaakonigewin." "The principles of mino-bimaadiziwin as a fundamental law of the Anishinaabe are achieved through the application of the seven sacred laws of creation—the Seven Grandfather Teachings."[306]

The court then invoked one of the Seven Sacred Teachings, respect:

> The principle of *kejitwawenindowen*, or respect, should form the basis for the way that Tribal relatives treat one another in nearly all matters, but particularly where one is leading or governing. Words, tones, context, body language, timing, action and intent all play a part in how one gives or perceives respect. Different people may have different understandings of what this means. However, it is usually clear to most when *kejitwawenindowen* isn't being given. Harsh words, gossip, and fighting over election processes that are non-Bode'wadmi inspired means that the individuals, groups, and/or process are stressed by something that is not being carried out with *kejitwawenindowen* as well as other Grandfather Teachings, thereby not allowing *mno-bmadzewen* to flourish. It is up to the individuals to look at themselves and their conduct first, then the group together, and finally, the process itself.[307]

Though much of the court's assessment of customary law was dicta, the court hoped to articulate useful law to guide future elections and any disputes that might arise during them. Other tribal constitutional provisions, especially those related to free speech and election regulation, can also be interpreted using these principles. Anishinaabe philosophy reminds political partisans that they are related and that there are devastating consequences to vicious political speech for insular tribal communities. The near-absolute freedom of speech favored in state and federal election matters is often a poor fit for tribal nations.

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306. *Id.* at 16-17 (footnotes omitted) (quoting Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for Inter-Generational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293, 305 (2021)).

307. *Id.* at 18.

4. Spurr v. Spurr *(Nottawaseppi Huron Band of the Potawatomi): Tribal Jurisdiction over Nonmembers and Aadizookaan (Sacred Stories)*

Other tribal courts invoke sacred-teaching stories to inform interpretive methodologies. In *Spurr v. Spurr*, the Nottawaseppi Huron Band of the Potawatomi Supreme Court applied the special civil-jurisdiction provisions of the Violence Against Women Reauthorization Act of 2013.[308] In that Act, Congress recognized the inherent tribal power to enforce personal protection orders against nonmembers in accordance with tribal statutes.[309] The tribal nation adopted a law that conferred tribal-court jurisdiction to issue a protective order against any person, member or nonmember, who had engaged in certain kinds of conduct.[310] The specific case involved a tribal member who resided on the reservation; their non-Indian stepmother harassed the tribal member mostly from her home many miles from the reservation, but on occasion had entered the reservation to engage in the conduct.[311]

The tribal legislature's authorization statute explicitly named and listed the Noeg Meshomsenanek Kenomagewenen (the Seven Sacred Teachings) as its guiding principle.[312] As the sacred teachings tend to be indeterminate standing alone, the court invoked an aadizookaan, or sacred story, called the Blue Garter, to flesh out the importance of the teachings to the intrafamily dispute in *Spurr*:

> A young Anishinaabe man travels from his home village to an isolated lodge where he meets Blue Garter, a young woman. They fall in love, but Blue Garter's parents oppose the marriage. Blue Garter's father imposes a series of virtually impossible tasks for the young man to complete before he will approve of the marriage, believing the tasks could not be completed and hoping the young man would eventually go away. However, Blue Garter secretly helps the young man complete the tasks, one after the other. One day, Blue Garter's parents grudgingly approve of the marriage. Once married, however, Blue Garter and her young husband flee her parents. Her parents give chase day after day. Ultimately, in order to escape her parents, Blue Garter transforms herself and her partner into

308. No. 17-287-APP, slip op. at 8-9 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Jan. 25, 2018), https://nhbp-nsn.gov/wp-content/uploads/2018/07/Spurr-v.-Spurr-17-287-APP_Opinion-of-the-Supreme-Court-for-the-NHBP.pdf [https://perma.cc/R69H-D27R].

309. 18 U.S.C. § 2265(a) (2018).

310. 7 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI CODE § 7.4 (2023), https://ecode360.com/31765715#31805805 [https://perma.cc/Z5MQ-FDLY].

311. *Spurr*, slip op. at 2-6.

312. 7 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI CODE § 7.4-.6 (2023), https://ecode360.com/31765715#31805805 [https://perma.cc/Z5MQ-FDLY].

> ducks and [they] escape across the water. For all of Blue Garter's [parents'] good intentions, their negative actions drive away their daughter and her husband. Instead of gaining a new family member, Blue Garter's parents lose their daughter.[313]

From this story the court drew a lesson: elder relatives should guide, not torment or punish, younger relatives.[314] The court therefore affirmed the protective order issued by the trial court against the tribal member's stepmother.[315]

5. Champagne v. People *(Little River Band of Ottawa Indians): Criminal Jurisdiction and Aadizookaan (Sacred Stories)*

Parties in litigation may invoke tribal customary law, leading tribal judiciaries to assess and apply that law. In *Champagne v. People*, an appeal of a criminal conviction where the petitioner demanded a trial before "traditional judges,"[316] the court invoked the aadizookaan of Nanaboozhoo and the Duck Dinner:

> There are many trickster tales told by the Anishinaabek involving the godlike character Nanabozho. One story relevant to the present matter is a story that is sometimes referred to as "The Duck Dinner." There are many, many versions of this story, but in most versions, Nanabozho is hungry, as usual. After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several ducks and kills them by decapitating them. He eats his fill, saves the rest for later, and takes a nap. He orders his buttocks to wake him if anyone comes along threatening to steal the rest of his duck dinner. During the night, men approach. Nanabozho's buttocks warn him twice: "Wake up, Nanabozho. Men are coming." Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he is angry. But he does not blame himself. Instead, he builds up his fire and burns his buttocks as punishment for their failure to warn him. To some extent, the trick has come back to

313. *Spurr*, slip op. at 28-29.

314. *Id.* at 29.

315. *Id.*

316. 35 ILR 6004, 6007 (No. 06-178-AP) (Little River Band of Ottawa Indians Tribal Ct. App. June 6, 2007).

> haunt Nanabozho—and in the end, with his short-sightedness, he burns his own body.[317]

The underlying crime involved an attempt by the defendant, an employee of the tribal government, to procure money from the tribe by making a false statement about a car accident.[318] The court took the lesson from the Duck Dinner story that Nanaboozhoo had caused his own suffering, much like the defendant:

> Like Nanabozho, Justice Champagne perpetrated a trick upon the Little River Ottawa community—a trick that has come back to haunt him. It would seem to be a small thing involving a relatively small sum of money, but because the Little River Ottawa people have designated this particular "trick" a criminal act, Justice Champagne has burned himself.[319]

The court affirmed the conviction.[320]

6. In re Sacred Arrows *(Cheyenne-Arapaho Tribes): Cultural Property and Tribal-Court Subject-Matter Jurisdiction*

Occasionally, tribal courts announce a common-law doctrine that actually strips the court of jurisdiction over a matter, such as the ownership of cultural property. In *In re Sacred Arrows*, the District Court of the Cheyenne and Arapaho Tribes declined jurisdiction over a case brought to decide the rightful possessor of certain sacred items.[321] The case arose during a dangerous dispute over resistance to tribal police officers' efforts to enforce the transfer of possession of sacred arrows, a cedar chest and its contents, a bison hide, and a tipi cover.[322] The court ultimately dismissed the case, following the recommendations of community members and ceremonial leaders that the court did not have the competence to decide possession of these items:

317. *Id.* at 6004 (citing JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 47-49 (2002); Charles Kawbawgam, *Nanabozho in a Time of Famine*, *in* OJIBWA NARRATIVES OF CHARLES AND CHARLOTTE KAWBAWGAM AND JAQUES LEPIQUE, 1893-1895, at 33, 35 (Arthur P. Bourgeios ed., 1994); Beatrice Blackwood, *Tales of the Chippewa Indians*, 40 FOLKLORE 315, 337-38 (1929)).

318. *Id.* at 6005.

319. *Id.*

320. *Id.* at 6007.

321. 3 Okla. Trib. 332, 337-38 (No. CNA-CRM-90-28) (Cheyenne-Arapaho Tribes Dist. Ct. July 11, 1990).

322. *Id.* at 335-36.

> The Tribal Court will not and cannot decide who the Arrow Keeper is. The Tribal Court's involvement in this matter has been limited to honoring the requests of various tribal citizens for assistance, which all tribal citizens have a right to do so. However, tribal courts cannot merely simulate the state and federal courts in interpreting and applying tribal laws. The Tribal Court has the duty of incorporating centuries of customs and traditions within the framework of the new Constitution. As in this case, it is not an easy task. Applying the Tribal Code of Laws to a traditional and religious conflict results in tension and conflict between the Tribal Code of Laws and traditional customs and traditions. Because of these dilemmas, Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to Indian communities. These concepts can be applied only in conjunction with the unique cultural, social, and political attributes of the Indian heritage.[323]

Several years later, the court followed its own precedent in a different dispute over a religious and cultural ceremony, refusing jurisdiction to settle the matter but retaining jurisdiction to enforce any order arising from a traditional ceremony.[324]

In *Sacred Arrows*, the court held that the tools and practices of state and federal courts, from which this tribal nation has largely borrowed and followed, were a poor fit for resolving these disputes.[325] In some regards, the *Sacred Arrows* court stated a practical limitation on tribal judiciaries' capacity to determine matters of cultural property. More importantly, the court recognized the primacy of traditional customs and traditions over cultural property, leaving only the role of enforcing the judgment of others in tribal court. It is very possible that the proper forum to address the control over these cultural items is the Arrow Lodge, described by Cheyenne people as a kind of medicine society.[326] One can imagine that the careful ceremonies conducted by traditional leaders designed to "restore balance"[327] would be upset by the introduction of legal procedures conducted by a law-trained judge.

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323. *Id.* at 337-38.

324. Redman v. Birdshead, No. CAN-CIV-03-87, 2003 WL 25783118, at *4 (Cheyenne-Arapaho Tribes Dist. Ct. Sept. 22, 2003).

325. *In re Sacred Arrows*, 3 Okla. Trib. at 337.

326. *See* KILLSBACK, A SOVEREIGN PEOPLE, *supra* note 32, at 47-48.

327. *Id.* at 48.

7. Shack v. Lewis *(Zuni Pueblo): Political Disputes and Tribal-Court Subject-Matter Jurisdiction*

Tribal courts have recognized substantive common law that limits tribal-court jurisdiction over certain political matters. In *Shack v. Lewis*, the Zuni Pueblo appellate court remanded a political dispute for reconsideration in light of tribal custom.[328] In that case, during an "emotional and raucous public meeting," the appellant orally resigned from his position as lieutenant governor.[329] Later, claiming that he and his family were "verbally attacked and humiliated" during the meeting, he withdrew his oral resignation.[330] Litigation ensued in which the appellant raised questions of customary law regarding his oral resignation.[331] The trial court dismissed the claims.[332]

On appeal, the court noted that the parties disagreed on the governing law, justifying remand.[333] The court first noted that in the case of customary law, the law is not easily determined by the court: "[T]he law is not so easily discoverable here; there are no written statutes and certainly no written case law setting out the traditional law. It must be told to us by the traditional people and the religious leaders."[334] The appellate court noted that the trial court did not turn to customary law, but instead turned to Black's Law Dictionary for a definition of "resignation."[335] The court noted that, as an intertribal court of appeals, an "outside agency," the court had no special capacity to determine customary law, necessitating a remand:

> Zuni Pueblo is famous and well-respected for its tradition and culture. It is critical that the courts of the Pueblo, whether they be internal or, as here, appointed from an outside agency, respect that tradition and culture. If there is any such customary law, it should be heard by the trial court and given due respect and consideration.[336]

328. 9 SWITCA Rep. 28, 28-29 (SWITCA No. 98-004) (Southwest Intertribal Ct. App. for the Pueblo of Zuni July 22, 1998), https://www.ailc-inc.org/wp-content/uploads/Volume-9-1998.pdf [https://perma.cc/G25K-T9ZU].

329. *Id.* at 29.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 30.

334. *Id.*

335. *Id.*

336. *Id.*

It is common for state and federal appellate courts to remand matters to trial courts to determine the appropriate decision rule or to order the trial court to apply a known decision rule. One presumes it is far less common, however, for appellate courts to order trial courts to make common law. As tribal courts develop tribal common law, it may become common for tribal appellate courts to remand to trial courts to ascertain common-law rules in the first instance.

8. Stepetin v. Nisqually Indian Community *(Nisqually Indian Community): Substantive Criminal Law and Tribal Culture*

One tribal-court opinion strongly influenced this Article's drive for an Indigenous canon of construction. In *Stepetin v. Nisqually Indian Community*, the tribal appellate court reversed the defendant's conviction for reckless driving on the ground that the tribal statute was impermissibly vague.[337] Chief Justice Irvin disagreed in dissent, asserting that "Nisqually custom and tradition combined with the tribal history of enforcement of the state statute at issue provided adequate warning to the appellant that his conduct could be sanctioned in the manner it was."[338] Irvin insisted that the vagueness doctrine should be assessed not in light of federal or state communities, but in the context of the Nisqually tribal community:

> The doctrine of vagueness of a statute originated in the non-Indian community. Federal cases, state cases, and even those from other Indian reservations have little, if any, applicability to the facts of the present case. One must interpret the disputed statute in the context of the Nisqually Indian Community, a physically small and close-knit community of tribal people whose lineage and customs have intertwined for hundreds of years. . . .
>
> Tribal jurisprudence does not spring from European roots, but stems from tribal traditions, practices, and teachings that predate the introduction of Anglo-American law in this country. These traditions and customs constitute the original body of tribal law, the role of which is in many ways analogous to that of common law crimes in the Anglo-American tradition.[339]

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337. 2 NICS App. 224, 229-30 (No. NIS-Cr-1/91-060) (Nisqually Tribal Ct. App. Apr. 16, 1993), https://www.codepublishing.com/WA/NICS/html/2NICSApp/2NICSApp224.html [https://perma.cc/8KZG-HT77].

338. *Id.* at 230 (Irvin, C.J., concurring in part and dissenting in part).

339. *Id.* (citations omitted).

After surveying the history of Nisqually-colonizer relations, Chief Justice Irvin offered a powerful suggestion. Tribal laws enacted in derogation of tribal customs, she wrote, should be interpreted narrowly:

> Tribal statutes which have been adopted in derogation to tribal tradition should be regarded with caution. Just because tribal communities have sometimes given paper recognition to non-Indian practices and Anglo-American law principles in their laws does not necessarily mean that such apparent adoption of non-Indian legal concepts and practices should be taken at face value. Tribal practices and traditions have always been oral, and it is very rare that any tribe intends to supplant these with a formal writing.
>
> Tribal courts as they presently exist are not a traditional forum for tribal people. For the Western Washington tribes, the need to assert treaty hunting and fishing rights, territorial jurisdiction over the reservations, and the tribal interest in their children given legal protection in the Indian Child Welfare Act, has caused tribal courts to become more complex and to take on aspects of non-Indian jurisprudence to gain respect in the non-Indian community. The courts have also taken over some of the functions originally performed by the tribal elders in providing a forum to resolve disputes in the community and in sanctioning members for conduct the community will not tolerate. In performing any of these functions the court must be fundamentally fair and evenly address the needs of the tribal community in order to maintain legitimacy and respect.[340]

Chief Justice Irvin implored the court to do the work of tribal justice in light of the "relational aspect" of tribal communities:

> The relational aspect of tribal courts, in which the tribal court serves as a dispute resolution forum for a tribal community which consists of related families, is an important way in which the function of tribal courts differs from that of non-Indian jurisprudence. Rigid rules, fashioned as precedent for adjudications but ignoring the internal dynamics of the tribal community, may not serve justice at all. In contrast, equitable considerations and procedures allowing flexibility in dispute resolutions may often be more responsive to the relational needs of the tribal community.[341]

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340. *Id.* at 232-33 (citation omitted).

341. *Id.* at 233.

Chief Justice Irvin added that the conduct at issue in that matter was the kind of conduct that the tribal community traditionally knew how to manage:

> Mr. Stepetin drove recklessly on the Nisqually Reservation in a manner that not only endangered property but also human life, and ended up killing one family's pet dog. Traditionally, when conduct such as this occurred within the tribal community, it was customary for someone who represented the victim to go to the family of the person who had caused the loss and demand satisfaction or payment. If the person refused to make some offering of regret or payment, the event would upset relationships between families and risk starting a feud. If no offering was made, the leader of the community or some respected elder or a person of standing in the community would frequently step in and try to settle the dispute.[342]

Chief Justice Irvin's dissent attempted to reorient the court's analysis toward important Nisqually traditions. Much like the traditions of other Indigenous nations, those traditions focus on kinship relations in insular communities and nonadversarial dispute-resolution mechanisms.

The *Stepetin* dissent is an early and rare proposal for tribal judicial regulation of tribal governance. The dissent argued that courts can and should employ tribal customs and traditions to smooth out the rough edges of colonizer justice, both preserving and employing tribal cultures in this contemporary era. Chief Justice Irvin's compelling views on the tribal legislature's adoption of non-Indigenous legal concepts should guide other tribal judges and lawmakers toward a more thoughtful merging of Indigenous and colonizer legal thought.

* * *

These decisions indicate that tribal judiciaries are already applying what I would call an Indigenous canon of construction of tribal laws. Modern tribal governments have incorporated colonizer laws and policies in order to survive and thrive within the United States. Following the colonizer's laws and policies is often convenient and occasionally mandatory. But adopting these laws may also mean adopting political philosophies that are antithetical to Indigenous peoples and customary law. These courts have recognized that tribal customs and traditions continue to play an important role in tribal justice and lawmaking, helping to revive and restore Indigenous philosophies. Even so, these decisions are currently a tiny fraction of the broad corpus of tribal-court decisions.

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342. *Id.* at 234 (citation and footnote omitted).

IV. IMPLICATIONS FOR TRIBAL GOVERNANCE

Federal and state governments are gaining legal and political respect for tribal governance in the third decade of the twenty-first century. Federal policies of self-determination have finally provided space and a modicum of resources that allow tribal nations to govern.[343] However, tribal governments are now tantamount to federal-government contractors, economic actors governing in the model of state and local governments.[344] If tribal nations choose to mirror state and local governments, it would be easy to do so, but the suppression of tribal culture and philosophy would continue. Sadly, if tribal nations wish to reintroduce tribal culture and philosophies into modern tribal governance, tribal actors have to push against prevailing forces.

Despite these challenges, tribal justice systems and tribal common law are ascendant. Tribal judges are more likely to be professionals and tribal citizens than decades ago. Tribal courts are more likely to be independent from the political branches of tribal governments than decades ago. Tribal-court decisions are becoming more visible and public. Tribal constitutions and statutes might look a lot like state and federal laws, but tribal common law often does not.

Forces external to tribal nations have often dominated tribal governance. In the twenty-first century, if that situation persists, only self-governing tribal nations are to blame. Tribal governments modeled on state and federal governmental structures are inherently conservative. Their slow pace and dependence on the colonizer's structure allow the U.S. Supreme Court to regulate tribal governance by filling gaps in federal and tribal statutory law—regulating, for example, the scope of tribal police powers.[345]

Tribal judicial regulation can and should be an important tool to advance tribal governance and to push out the colonizer's influence. As the cases examined in the previous Part show, tribal courts have the opportunity to enforce

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343. *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works* 12 (Harvard Kennedy Sch. Fac. Rsch. Working Paper Series, Paper No. RWP10-043, 2010), https://research.hks.harvard.edu/publications/getFile.aspx?Id=610 [https://perma.cc/6D2P-M3ZY] ("[Tribal self-determination] is being manifested by wholesale changes in tribal institutions and policies as the Indian nations themselves rewrite their constitutions, generate increasing shares of their revenues through their own taxes and business enterprises, establish their own courts and law enforcement systems, remake school curricula, and so on, across the panoply of functions commonly associated in the United States with state governments.").

344. *See* Delaney, *supra* note 79, at 343 ("The fact that 638 contracting/compacting language revolves around self-determination and self-governance rather than sovereignty is not an oversight nor a mistake, but a deliberate choice [by the federal government].").

345. *E.g.*, United States v. Cooley, 593 U.S. 345, 347-48 (2021) (holding that tribal police may detain a non-Indian criminal suspect but only until state or federal police arrive).

traditional philosophies that emphasize the accountability of tribal leadership, the responsibility of tribal citizens to others, and the larger role of humans in this world. Tribal judicial regulation of tribal governance has the potential to cut through the havoc that the colonizer has wreaked on Indian country. For example, intractable tribal political disputes arising from elections and enrollment politics, which can engulf tribal nations at any time and too often lead to terrible harm,[346] derive directly from the colonizer's law of sovereign immunity, which insulates tribal leaders from accountability.[347] Tribal courts (re)introducing traditional culture and philosophies into modern tribal governance should help resolve those disputes.

In a limited number of decisions, tribal judiciaries are attempting to restore tribal culture and tradition to a meaningful place in tribal jurisprudence. There is much more room for expansion and development. I recommend the establishment and acknowledgement of an Indigenous canon of construction of tribal laws, inspired by Chief Justice Irvin's dissent. In short, tribal laws should be interpreted by tribal judiciaries in light of tribal philosophies rather than those of the colonizer. I emphatically do not propose a canon that would allow tribal judiciaries to impose their own views in contravention of the plain text of tribal statutes. But where tribal statutes are ambiguous, an Indigenous canon could spur tribal judges, litigants, and lawmakers to break free from their path dependence on federal and state law.

A. *Toward an Indigenous Canon of Construction of Tribal Laws*

Modern federally recognized tribal nations are intensely hybridized entities. They are the result of centuries of colonization and paternalism, more recent self-determination policies, and tribal cultures and traditions. On their face, the large majority of tribal nations are constitutional democracies acting as federal-government contractors with considerable leeway in the expenditure of federal and tribal funds. They are in control of diverse commercial enterprises operated as a means of generating additional governmental revenue. The tribal governments "reorganized" after the Indian Reorganization Act of 1934, alongside the federally chartered corporate entities, buried and replaced traditional tribal governance.[348] Elected tribal officials manage these entities hierarchically, with a top-

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346. *See* David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., Matthew L.M. Fletcher & Kristen A. Carpenter, Cases and Materials on Federal Indian Law 496-99 (7th ed. 2017) (providing examples of intractable political disputes).

347. *Id.* at 497-98.

348. *See* Vine Deloria, Jr., The Indian Reorganization Act: Congresses and Bills, at ix (2002) (referring to the decades prior to the enactment of the Indian Reorganization Act as "the time of the traditional governments").

down corporate structure.[349] This is not necessarily a terrible thing. The United States made a decision in the exercise of its duties to tribal nations to allow and encourage greater self-determination, and the federal government believed these structures would best advance federal prerogatives. Tribal nations have taken these structures and policies and thrived, at least relative to where tribal nations were before the 1960s and 1970s. But there are consequences to adopting the ways of the colonizers. We see them in holdover councils, election disputes, mass firings of tribal-government employees, and vast amounts of litigation. Tribal traditions often remained buried under layers of governmental and bureaucratic hierarchies.

Tribal judiciaries are a part of that governmental structure. Tribal courts are not really Indigenous. Some, like the Cherokee courts, originated in response to actions of the colonizers. Others, like the Courts of Indian Offenses, were imposed on tribal nations by the colonizer. Still others were adopted by tribal nations as an acceptable (to the federal government) means of self-determination. For the most part, tribal justice systems are no different than federal or state courts. The Indian Civil Rights Act,[350] 638 contracting,[351] the Indian Child Welfare Act,[352] and other self-determination-era laws and policies[353] all but ensure that tribal courts follow the well-worn path of state and federal courts. They are adversarial, professionalized, and generally follow the precedents of state and federal courts.

But tribal nations are slowly evolving and restoring a greater emphasis on their traditions. Tribal nations should enable and encourage tribal judiciaries to change. Drawing from economics literature on path dependence, Wenona T. Singel has explained how tribal nations can wrest themselves away from many of the laws of the colonizer through three reforms:

> [Douglass C.] North also identifies several remedies for institutional reform that defeat path dependence. They include the creation and support of organizations that have an interest in succeeding under new

349. *See, e.g.*, Matthew L.M. Fletcher, The Rise and Fall of the Ogemaakaan 25 (Feb. 10, 2020) (unpublished manuscript), https://ssrn.com/abstract=3535656 [https://perma.cc/C8XX-2R3D] ("Ogemaag are now elected by tribal elections in elections for terms of years. Ogemaag under modern tribal constitutions are generalists. They can only be replaced or removed through a constitutionally-mandated process (equivalent to impeachment). Ogemaag meet in council. They act, if at all, by motion, ordinance, or resolution. They are corporate board members.").

350. 25 U.S.C. §§ 1301-1304 (2018).

351. *Id.* §§ 5301-5423.

352. *Id.* §§ 1901-1963.

353. *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 62-65 (3d ed. 2024) (surveying the tribal self-determination era).

> institutional regimes; the education of individuals to encourage the adaptation of their knowledge, skills, and belief systems to the new institutional regime; and the encouragement of informal constraints (the second key ingredient of institutions)—such as norms of behavior, conventions, and codes of conduct—that support the new institutional regime.[354]

The first reform Singel identifies—the creation and support of entities with an interest in change—is plausibly fulfilled by tribal judiciaries. They are in a unique and potentially powerful position to influence the development of tribal governance. The second reform she identifies—educating people in the knowledge and skills needed for development—is possibly fulfilled by tribal judiciaries as well. Tribal judges with robust child-welfare and criminal dockets see the ravages of colonialism every single day. The historical and childhood trauma, poverty, and structural racism that dominates the lives of many tribal citizens is on full display in these cases. Tribal judges are intensely motivated to address these issues in any way that they can, using tribal philosophies and cultural tools. Tribal judges also know that solutions are not found elsewhere: they are found through the exercise of tribal sovereignty, not reliance on federal, state, or private actors.

The continuing rise of tribal judicial experimentation in the use of customary and traditional law and practices, like peacemaking, is evidence that tribal judiciaries are dedicated to progressive change within the tribal-sovereignty space. Tribal judiciaries are working with tribal historical, cultural, and linguistic experts to expand their knowledge bases. This expansion of knowledge and expertise leads to additional and improved initiatives. The community is more involved. In my experience as a tribal judge and academic, I have seen how cross-education between tribal citizens, tribal cultural specialists, and tribal judges is exploding.

Norms of tribal governance need to change as well. I argue that Singel's final reform—the encouragement of informal constraints, like behavioral norms—will be fulfilled, at least in part, by the expansion of tribal customary law in tribal-court jurisprudence. The opportunity—what Kristen A. Carpenter and Angela R. Riley termed the "jurisgenerative moment"[355]—is here. Chief Justice

354. Singel, *supra* note 3, at 493-94 (citing Douglass C. North, *Institutions and Economic Theory*, 36 AM. ECONOMIST, no. 1, 1992, at 3, 4-5).

355. *See generally* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014) (arguing that we are witnessing a "jurisgenerative moment" in Indigenous peoples' rights and human rights).

Irvin's powerful and scholarly dissent in *Stepetin v. Nisqually Indian Community*[356] is a good place to start in the fulfillment of Singel's third point. This dissent is the inspiration for the Indigenous canon.

Chief Justice Irvin's opinion allows us to distill several factors that, if fulfilled in a given case, would counsel tribal courts against following federal and state law and encourage them to look instead to tribal common law: (1) the relevant doctrine arose in federal or state statutes or common law; (2) the tribal nation has not explicitly adopted federal or state law on a given issue in writing; (3) written tribal law was adopted or shifted as a result of the colonizer's pressure and interests; and (4) tribal custom is inconsistent with the written tribal law, most especially if the law violates the relational philosophies of tribal nations such as Mino Bimaadiziwin, or otherwise has the potential to undermine close relationships of tribal members and other tribal community members. A logically concomitant principle to these factors—call it an Indigenous canon of construction—is that written tribal law enacted by tribal legislatures should be interpreted in a manner consistent with tribal philosophies. As former Justice Austin argued over a decade ago:

> Indian nations are not traditional native institutions. Indian nation courts, at least those that rely on customs and traditions, can use their customary laws to interpret foreign laws. It is therefore important for each Indian nation to develop a test to screen a foreign law's compatibility with the tribe's culture and ways of doing things.[357]

Tribal laws enacted to fulfill the goals of the colonizer or other outsiders, if not consistent with tribal philosophies, should be strictly construed to fulfill Indigenous goals whenever possible.

B. Application of the Indigenous Canon of Construction

In the case of a tribal constitutional provision, statute, or regulation that expressly invokes tribal customary law, the tribal court is directly invited to interpret the law in light of the Indigenous canon. Tribal law typically originates with the colonizer, meaning that many tribes borrow heavily from federal and state statutes and constitutions, as well as the tribal constitutions and codes that federal bureaucrats have imposed on tribal nations. In interpreting those tribal laws,

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356. 2 NICS App. 224, 230-41 (No. NIS-Cr-1/91-060) (Nisqually Tribal Ct. App. Apr. 16, 1993) (Irvin, C.J., concurring in part and dissenting in part), https://www.codepublishing.com/WA/NICS/html/2NICSApp/2NICSApp224.html [https://perma.cc/8KZG-HT77]; *see supra* Section III.C.8.

357. Austin, *supra* note 31, at 371.

tribal courts should follow Chief Justice Irvin's entreaty and consider the Indigenous canon.

1. *Common-Law Doctrines Originating in State or Federal Law*

Federal and state law contain a multitude of common-law doctrines that reflect principles antithetical to tribal customary law; this Section discusses two. Their impact is insidious.

First, consider procedural default. In federal and state law, procedural default punishes criminal defendants who intentionally fail to raise objections to major errors in order to subvert the trial.[358] The doctrine presumes that litigants will engage in gamesmanship and "sandbagging" at every turn.[359] But litigants may be simply unaware of the law or otherwise not to blame for their defaults. Tribal courts have reason to reject assumptions that litigants are sandbagging, such as where tribal law is difficult to discover and analyze. In *Wright v. Nottawaseppi Huron Band of the Potawatomi*, the court rejected the Tribal Council's argument that the court could refuse to hear the petitioners' membership claim and related constitutional arguments on the grounds that the petitioners failed to cite to any authority in support of the claims.[360] The court first noted that procedural default is common in federal and state courts, where parties are penalized for failure to develop arguments in the lower courts, losing the arguments forever if they are not raised.[361] The court chose to apply Edbesondowen (humility) and Bwakawen (wisdom), which are two of the Noeg Meshomsenanek Kenomagewenen, or Seven Sacred Teachings, to the principle of procedural default.[362] These teachings counseled "generosity" and "kindness," as well as the "gift of vision" in others.[363]

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358. *See* Paul T. Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DEPAUL L. REV. 753, 753-54 (1980).

359. *Id.* at 753 ("Three general types of situations exist in which criminal defense counsel fail to make timely procedural motions or contemporaneous objections to errors during trials. These three situations involve ignorance, strategy decisions, and 'sandbagging.'").

360. No. 21-154-APP, slip op. at 26-27 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. June 3, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/06/2022-6-3-Filed-NHBP-Supreme-Court-Opinion-Order-in-Wright-et-al-v-NHBP-et-al-21-154-APP.pdf [https://perma.cc/6MEA-9Q8N].

361. *Id.* at 23.

362. *Id.* at 22.

363. *Id.* (first quoting Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Inter-Generational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293, 317 (2021); and then quoting James Dumont, *Justice and Aboriginal People*, *in* ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 42, 57 (Royal Comm'n on Aboriginal Peoples 1993)).

In the context of procedural default, they "require[d] the judiciary to provide the *Wright* petitioners with significant leeway in presenting legal arguments and fact development in this difficult case."[364] The court pointed out that the issues before it "involve[d] a case of first impression," lacking much precedent to follow, even from similar tribes.[365] In contrast, for cases in state and federal courts, there are "millions" of state and federal decisions addressing many of the complex matters being litigated.[366] As to the merits of the claim, the tribal court held that the burden of the party claiming procedural default is very high, requiring "prejudice or surprise."[367] Even that rule, the court noted, was tempered by Edbesondowen and Bwakawen, which are "holistic and inclusive principles, not formalistic and exclusive principles."[368]

Second, consider the federal common-law rule governing tribal civil jurisdiction over nonmembers. One of the most famous tribal-court opinions, *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, involved tort claims rooted in federal and state law against nonmembers.[369] Under federal law, the leading case on tribal civil jurisdiction over nonmembers is *Montana v. United States*.[370] *Montana* established a general rule under federal common law that tribal nations do not possess civil jurisdiction over nonmembers, subject to exceptions.[371] In *Tasunke Witko*, the Rosebud Sioux Supreme Court categorically stated that *Montana* is inapplicable to cases arising in tribal courts.[372] But the court analyzed the matter under *Montana* anyway, holding that *Montana* only applies on nonmember lands owned in fee within Indian reservations.[373] Ultimately, the Eighth Circuit held that the tribal court could not exercise jurisdiction under *Montana*,[374] but the Rosebud Sioux court seems to have correctly predicted where the federal courts would go on the scope of the *Montana* test. It generally does not apply on tribally

364. *Id.* (emphasis added).

365. *Id.* at 23-24.

366. *Id.* at 23.

367. *Id.* at 25.

368. *Id.* at 27.

369. 23 ILR 6104, 6106 (No. Civ. 93-204) (Rosebud Sioux Sup. Ct. May 1, 1996).

370. 450 U.S. 544, 547 (1981).

371. *Id.* at 565-66.

372. *Tasunke Witko*, 23 ILR at 6111.

373. *Id.*

374. Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1093 (8th Cir. 1998).

owned or controlled lands.[375] The Rosebud Sioux court refused to extend the scope of a federal precedent in a manner that would undercut tribal prerogatives.

2. *Legal Terms of Art Originating in State and Federal Law*

Written tribal constitutions, codes, and regulations incorporate many terms of art originating in federal and state law. Tribal courts should take care in using federal and state precedents to interpret this "foreign law."

The Indian Civil Rights Act, for example, guarantees the right against self-incrimination to all persons under tribal jurisdiction.[376] Under the Fifth Amendment, the Supreme Court refers to this right as a "privilege" that can be easily waived, even unintentionally.[377] But tribal nations need not possess such a cramped view of the right against self-incrimination.

Consider *Navajo Nation v. Rodriguez*.[378] The Navajo Nation Supreme Court refused to follow federal precedents in lockstep, instead incorporating tribal customary law to interpret the right against self-incrimination.[379] There, the government conceded that it had coerced a criminal suspect into making a damaging admission, though the government argued the coercion was not so severe as to require reversal.[380] The court disagreed, holding that *any* degree of coercion was unacceptable: "Though the Navajo Nation referred to a 'degree of coercion' without defining 'degree,' we do not see how coercion can be measured by degrees. Either the police coerced Rodriguez or it did not. . . . [W]e find that any degree of coercion is in violation of the Navajo Bill of Rights."[381] The court invoked tribal customary law instead of federal precedents to interpret the right: "In interpreting the Navajo Bill of Rights and the Indian Civil Rights Act, as with other

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375. *See*, *e.g.*, FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 920 (9th Cir. 2019) (affirming tribal civil jurisdiction over a nonmember polluter for activities arising on tribally controlled lands); Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 808 (9th Cir. 2011) (similar).

376. 25 U.S.C. § 1302(a)(4) (2018).

377. *See* Eve Brensike Primus, *The State[s] of Confession Law in a Post-*Miranda *World*, 115 J. CRIM. L. & CRIMINOLOGY (forthcoming 2025) (manuscript at 11), https://ssrn.com/abstract=4742148 [https://perma.cc/4J7R-KZT5] ("[T]he state's 'heavy burden' for demonstrating a waiver of *Miranda* rights turns out to be pretty light . . . ." (quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966))).

378. 8 Navajo Rep. 604 (No. SC-CR-03-04) (Navajo Nation Sup. Ct. Dec. 16, 2004), https://static.case.law/navajo-rptr/8/case-pdfs/0604-01.pdf [https://perma.cc/F9U3-WZ3L].

379. *Id.* at 612-15.

380. *Id.* at 613.

381. *Id.*

statutes that contain ambiguous language, we first and foremost make sure that such interpretation is consistent with the Fundamental Laws of the *Diné*."[382]

The court continued by referring to *Miranda v. Arizona*, the leading U.S. Supreme Court decision on the right (or "privilege," as it is called under federal law) against self-incrimination.[383] Rejecting that court's analysis of the "legacy of internal oppression" of people by state and federal governments,[384] the Navajo court invoked hazhó'ógo:

> *Hazhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it's not uncommon for an elderly person to stand and say "*hazhó'ógo, hazhó'ógo sha'áłchíní*." The intent is to remind those involved that they are *Nohookáá Diné'é*, dealing with another *Nohookáá Diné'é*, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na'níle'dii éí dooda*. This is *hazhó'ógo*, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our other adopted ways are all intended to be conducted with *hazhó'ógo* in mind.[385]

Applying hazhó'ógo, the court imposed heightened obligations on the Navajo police department and vacated the conviction.[386]

Peppered throughout tribal constitutions and statutes are legal terms of art and doctrines originating with the colonizer. There is no obligation on tribal governments to import state and federal precedents—and their attendant philosophical and historical baggage—into tribal jurisprudence. Indigenous principles and philosophies can and should be used to interpret those terms and doctrines.

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382. *Id.*

383. *Id.* at 614-15 (citing Miranda v. Arizona, 384 U.S. 436, 442-43 (1966)).

384. *Id.* at 615.

385. *Id.* (footnotes omitted).

386. *Id.* at 615-17.

3. *Tribal Law Imposed or Influenced by the Colonizer*

Tribal nations frequently adopt or borrow state and federal statutes to fill gaps in tribal law, but often tribal nations adopt these laws in response to the insistent demands of the colonizer. For example, tribal nations managing federally funded housing programs follow the federal government's "zero tolerance" rules on drug use and possession, forcing the eviction of all persons from tribal housing, even those that are innocent and unaware of drug violations.[387]

Consider property, most especially the complex matter of tribal land assignments. In *Riggs v. Estate of Attakai*, the Navajo Nation Supreme Court analyzed competing claims to a grazing permit held by a woman who had walked on.[388] The son of the deceased prevailed in the lower court on a theory that since he was the same clan as the deceased, he grazed the land with his mother's permission; as the deceased would have wanted the permit to stay in the same clan, the son was entitled to the permit.[389] Presumably, under state law, the heir to an intestate estate would have been the son. However, the tribal supreme court reversed in favor of the deceased person's sister, focusing on the role of women in Navajo society:

> Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes. The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as *Yoołgaii Asdzáán Bi Beehazáanii*. These principles include *Iiná Yésdáhí* (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising, and teaching), *Yódí Yésdáhí* (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs), *Nitł'iz Yésdáhí* (a position encompassing and being a provider of and a caretaker of mineral goodness for protection), *Tsodizin Yésdáhí* (a position encompassing spirituality and prayer). This is why the women are attached to both the land base and the grazing permits. For the most part, Navajos maintain and

387. *E.g.*, People v. Lee, No. APP-06-01, slip. op at 5 (Sault Ste. Marie Chippewa Tribal Ct. App. Div. Nov. 30, 2006), https://www.saulttribe.com/government/tribal-court/download-files/download-file?path=Court%2Bof%2BAppeals%2BOpinions%2BOrders%252FAPP%2B06-01%2BLORI%2BLEE%2Bvs.%2BSSMTCI.pdf [https://perma.cc/SLQ4-RUFX] (describing the eviction of a tribal-citizen mother from tribal housing due to her son's drug violations).

388. 7 Am. Tribal L. 534, 535 (No. SC-CV-39-04) (Navajo Nation Sup. Ct. June 13, 2007).

389. *Id.* at 535-36.

> carry on the custom that the maternal clan maintains traditional grazing and farming areas.
>
> Because they are keepers of the clan line and land base, Navajo women are often the most logical persons to receive land use rights to hold in trust for the family.[390]

After elevating the interests and roles of women in land-use management, the court added that the matriarchal roles were also consistent with Navajo public policy disfavoring "progressive fragmentation of the land."[391]

Riggs was a rare case where a tribal court was asked to choose between competing customary legal claims. Even so, the case shows how tribal courts can apply tribal customary law to fulfill tribal traditions, not those of the colonizer. The case also shows how tribal customary law can meld and work with other tribal public policies.

4. *Violations of Tribal Relational Philosophies*

Relational philosophies are the core of every tribal nation's culture with which I am familiar. In Pat Sekaquaptewa's words, "As tribal members, our relationships involve significant reciprocal obligations depending on how we are related to each other. This may also extend to non-biological or ceremonial relationships."[392] Anishinaabe courts most often refer to Mino-Bimaadiziwin. Navajo courts refer to Ke'e. Osage courts refer to ϟΛ.ঌϦΛʌ. Each of these courts is taking a dramatic step in an adversarial justice system. They hope to infuse balance and harmony into a justice system that spits out winners and losers. Tribal judges are already quietly doing this work. As Sekaquaptewa noted, "A number of legal scholars assert that in tribal dispute resolution, tribal judges, influenced by their knowledge and sense of fairness based on their experience with tribal ways, focus less on rules and more on relationships."[393]

This Section will focus on one of the most difficult circumstances tribal nations can face: the intractable political dispute. In this space, tribal courts are taking courageous action, appealing to culture to respond to intense political conflicts. It's working.

What is an intractable political dispute? At any given moment, as many as two dozen tribes are immersed in such disputes. These disputes usually arise out

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390. *Id.* at 536.

391. *Id.* at 536-37.

392. Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 355-56 (2007).

393. *Id.* at 323.

of the factionalization of tribal leadership, often involving election disputes and membership matters. They are intractable because there usually is no definitive legal body that can resolve the matter. Federal and state governments have no jurisdiction to resolve intractable political disputes on the merits. Tribal judiciaries might not possess the authority—on paper or in realpolitik—to resolve the matter. On occasion, these disputes turn violent.[394]

The origins of Indian-country political strife are almost always tied to the coercive influence of the colonizer going back decades or centuries.[395] The law of the colonizer has insidious impacts on tribal nations.[396] Those laws privilege conflict and competition, strength over weakness, and domination of the natural world. These philosophies are extraordinarily harmful to tribal nations.

Courts applying an Indigenous canon of construction can act to build and protect relationships, even in these difficult contexts. The Article opened with an aadizookaan told by Simon Otto, an Anishinaabe storyteller, artist, and author who was disenrolled by his tribal nation, the Saginaw Chippewa Indian Tribe, in the 2010s, shortly before he walked on. The story and legacy of mass disenrollment at Saginaw Chippewa is not particularly well known outside of Michigan, but the herculean efforts of the tribal judiciary to enforce the rule of law in the face of overwhelming political power by the tribal government is an aadizookaan in and of itself.

The story begins with the decision of the Saginaw Chippewa Tribal Council to vacate the results of two tribal elections in 1997 and 1998 that would have resulted in the turnover of most of the sitting council.[397] Litigation arising from those decisions culminated in *Chamberlain v. Peters*, a decision of the Saginaw Chippewa Appellate Court.[398] The holdover council, known as the Chamberlain Council, refused to leave office because it believed that its election in 1996 granted it a mandate to commence reform of the membership rolls.[399] The tribe's IRA-era constitution was the key source of law in the matter. Focusing on the

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394. *E.g.*, John Kifner, *Tribal Shootout: Rival Factions Behind Conflict*, N.Y. TIMES, Apr. 3, 1995, at B1, B1 ("A shootout last weekend between two rival factions, each claiming to hold the tribal presidency, killed three men and wounded a fourth.").

395. *E.g.*, Snowden v. Saginaw Chippewa Indian Tribe of Michigan, 32 ILR 6047, 6048 (No. 04-CA-1017) (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Jan. 7, 2005) (describing the Bureau of Indian Affairs as a "meddlesome" and "destabilizing federal force" that was a partial cause to the tribe's internal political disputes).

396. *See* Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL'Y 273, 283-88 (2005).

397. Chamberlain v. Peters, 27 ILR 6085, 6086-87 (No. 99-CI-771) (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Jan. 5, 2000).

398. *Id.* at 6086-88.

399. *Id.*

text of the tribal constitution, the court held that the holdover council did not possess authority to remain in office after the expiration of its term.[400] Members of the competing parties, known as the Peters Council, formed what they called an "interim" government.[401] The court also held that this "interim" council was invalid, given that there was no authority in the tribal constitution for interim councils.[402]

After the *Chamberlain* court reached its decision, it pointed out that where no party takes tribal law and tribal justice systems seriously, the potential for these political disputes to happen is dangerously high.[403] As a case of first impression at both Saginaw Chippewa and, as far as the court could determine, nationally, the court was forced to engage in a process of "jurisgenesis," a term coined by Robert M. Cover to mean the creation of new law.[404] The court asked the parties to engage in mutually respectful behavior, which seemed to calm the proceedings.[405]

The next generation of Saginaw Chippewa tribal leaders moved toward the membership reform that the Chamberlain Council promised, resulting in another decision of the Saginaw Chippewa Appellate Court, *Snowden v. Saginaw Chippewa Indian Tribe*.[406] *Snowden* involved the disenrollment of deceased members of the tribe, leading to the summary disenrollment of their descendants as an attendant consequence.[407] While the tribal leadership officially claims these disenrollments responded to fraudulent or mistaken enrollments,[408] tribal leaders also have expressed concern about falling per capita gaming payments.[409]

The *Snowden* court opened with a short history of the tribe's formal acknowledgment under the IRA in 1934 and the ratification of the tribal constitution in 1937.[410] The tribal council proposed a constitution that stated in its preamble,

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400. *Id.* at 6090.

401. *Id.* at 6095.

402. *Id.* at 6097.

403. *Id.*

404. *Id.* at 6096 (quoting Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11 (1983)).

405. *Id.* at 6096-97.

406. 32 ILR 6047 (No. 04-CA-1017) (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Jan. 7, 2005).

407. *Id.* at 6048.

408. Press Release, Saginaw Chippewa Indian Tribe, Tribe Can Reopen Previously Dismissed Disenrollment Cases (Sept. 11, 2015), https://www.sagchip.org/news.aspx?newsid=552 [https://perma.cc/534U-QHTG].

409. *Saginaw Chippewa Tribe Removes Members Amid Per Cap Issues*, *supra* note 1.

410. *Snowden*, 32 ILR at 6048-49.

"We, the members of the Saginaw, Swan Creek, and Black River Bands of Chippewa Indians . . . ."[411] This geographic description included all the tribal members living on the Isabella Reservation as well as three other major regions off the reservation.[412] That group of tribal citizens voted to adopt the IRA.[413] But when the tribe proposed its constitution to the Department of the Interior, the federal government struck the references in the preamble to the off-reservation locations and insisted that all tribal members move to the Isabella Reservation.[414] If they did not, the tribal council could "adopt" the off-reservation members.[415] The court referred to the federal actions as "meddlesome," "destabilizing," and "dubious."[416]

On the merits of the disenrollment decisions, the crux of the issue was the implied power of the tribal council to disenroll members under the tribal constitution.[417] The court rejected the tribe's insistence that the court was wrong to assume that all persons then enrolled were tribal members pending the council's ongoing disenrollment proceedings:

> This Court's "assumption" is indeed warranted and required by both legal and cultural norms of integrity. If someone has achieved a legal status (even if erroneously), they are entitled to that status until the government *proves* adequately to the contrary. The Tribe would have us *assume* the "guilt" rather than the "innocence" of Appellants. Such an approach would necessarily taint and even erode this Court's bedrock commitment to due process and cultural respect.[418]

The court concluded that the tribal constitution did not include the implied power to disenroll tribal members except in the case of fraud or mistake.[419] Once again, the court concluded with a request that the parties focus on healing, balance, and harmony:

> Tribal membership involves not only constitutional status, but also serves as the ultimate indication of cultural belonging. With this in mind,

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411. *Id.* at 6048 (alteration in original) (quoting DIBA JIMOOYUNG: TELLING OUR STORY 92 (Charmaine M. Benz ed., 2003)).

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 6050.

418. *Id.*

419. *Id.* at 6050-51.

> we urge the parties, as we did in the *Chamberlain* case, to place themselves in the heart of Native American jurisprudence by "healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again."[420]

The tribal council restarted the disenrollment engine a few years later. Their efforts led to two critical decisions, *Gardner v. Cantu*[421] and *Kequom v. Atwell*,[422] where the Saginaw Chippewa Appellate Court largely accepted the tribal council's broad interpretation of the language in *Snowden* about "mistake" in the enrollment of tribal members.[423] The *Gardner* court accepted the need for "clarity" in tribal-membership decision-making, with a focus on the "four corners of the Constitution itself."[424] And with the *Kequom* precedent in hand, the council reopened hundreds of enrollment files to search for "mistake," a process again validated by the appellate court in *Alberts v. Saginaw Chippewa Indian Tribe of Michigan*.[425]

From an outsider's perspective, the Saginaw Chippewa mass-disenrollment story does not end with balance and harmony. The tribal court attempted to dissuade the political leaders from following a path of great disruption and greed, but the government proceeded anyway. Ultimately, in approving mass disenrollment, the tribal appellate court in later opinions seemingly abandoned its commitment to seeking healing, balance, harmony, and reconciliation. But for years, when the tribal court articulated and then applied that commitment, the tribal government complied with those court orders. This is a powerful example of tribal judicial regulation of tribal governance.

Elsewhere in Indian country, outside of a small number of particularly troublesome cases, tribal nations that have attempted to proceed with mass disenrollment subject to tribal judicial review have been less likely to succeed.[426] For

420. *Id.* at 6051 (quoting Chamberlain v. Peters, 27 ILR 6085, 6097 (No. 99-CI-771) (Saginaw Chippewa Indian Tribe of Michigan App. Ct. Jan. 5, 2000)).

421. Gardner v. Cantu, No. 08-CA-1027 (Saginaw Chippewa Indian Tribe of Michigan Ct. App. Sept. 12, 2008) (on file with author).

422. Kequom v. Atwell, No. 12-CA-1051 (Saginaw Chippewa Indian Tribe of Michigan Ct. App. Aug. 27, 2013) (on file with author).

423. *See, e.g.*, *id.* at 7-8.

424. *Gardner*, slip op. at 5, 6.

425. Alberts v. Saginaw Chippewa Indian Tribe of Michigan, No. 13-CA-1058 (Saginaw Chippewa Indian Tribe of Michigan Ct. App. Aug. 12, 2015) (on file with author).

426. *Compare* Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 414-21 (2015) (discussing the history of Osage and Creek Nation disenrollments, which occurred without tribal judicial review), *and id.* at 430

example, the Grand Ronde Community mass disenrollments in Oregon were stopped in their tracks by a tribal appellate-court decision, *Alexander v. Confederated Tribes of Grand Ronde*.[427] That decision invoked Navajo customary law to elevate the tribal philosophies of balance and harmony that mass disenrollment disregards.[428]

CONCLUSION

Tribal judiciaries with a pattern and practice of articulating and applying tribal customary law are in a better position to do justice in Indian country. By establishing an adversarial winners-and-losers election system, for example, tribal nations are vulnerable to political machinations that subvert that system. The only solution to a tribal problem is tribal; in Gloria Valencia-Weber's words, "[T]he development of tribal-specific law presents the strongest case for a judicial system tailored to serve the evolving indigenous sovereigns."[429] Tribal nations are "laboratories of the future," to quote Vine Deloria, Jr.[430] Tribal customary law is a part of that future. So is tribal judicial regulation of tribal governance.

Seriously reconsidering and deconstructing the law that tribal nations borrow from their colonizer is an important step toward justice in tribal governance. An Indigenous canon provides a tool for tribal judges to assess the application of borrowed law that allows for the respect due to tribal cultures.

* * *

Simon Otto's mamengwaa aadizookaan (butterfly story) was a story about the stages of growth and development. In that story, mamengwaa was a learner. In other stories, mamengwaa is a teacher. Consider the aadizookaan about the twin children of the manidokwe (spirit woman).[431] Those benojhen (children)

(discussing the history of Northern Ute disenrollments, which occurred without tribal judicial review), *with id.* at 422-27 (discussing the history of Nooksack disenrollments, which occurred with tribal judicial review after the removal of several tribal judges), *and id.* at 431-39 (discussing the history of Paskenta disenrollments, which occurred with judicial review by competing and parallel tribal courts).

427. 13 Am. Tribal L. 353, 355 (No. A-15-008) (Confederated Tribes of the Grand Ronde Community of Oregon Ct. App. Aug. 5, 2016).

428. *Id.* at 358-59.

429. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 240 (1994).

430. *Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 89th Cong. 195 (1965) (statement of Vine Deloria, Jr., Executive Director, National Congress of American Indians).

431. Anna C. Gibbs, *The First Butterflies*, 7 OSHKAABEWIS NATIVE J., no. 2, 2010, at 91, 91.

had trouble learning to walk. Nanaboozhoo offered to help teach them. He tossed rainbow-colored stones into the air, where they turned into mamengwaawaag (butterflies). The benojhen stood and danced around, hands in the air, hoping to catch the mamengwaawaag. In this way, they learned to walk.[432]

Recently, Justice Bird of the Nottawaseppi Huron Band of the Potawatomi Supreme Court wrote an opinion in a contested-election case, invoking one of the Anishinaabeg's Noeg Meshomsenanek Kenomagewenen: "The principle of *kejitwawenindowin*, or respect, should form the basis for the way that Tribal relatives treat one another in nearly all matters, but particularly when one is leading or governing."[433] Tribal judiciaries are not and should not be the only regulators of tribal governance. But a tribal judiciary armed with an understanding of customary law is well prepared to deal persuasively with complex political questions in Indian country.

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432. *Id.* at 93.

433. Rios v. Nottawaseppi Huron Band of the Potawatomi Election Bd., No. 21-181-APP, slip op. at 18 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Jan. 27, 2022), https://nhbp-nsn.gov/wp-content/uploads/2022/03/Dorie-Rios-Nancy-Smit-v.-NHBP-Election-Board-Supreme-Court-Opinion-3-3-2022.pdf [https://perma.cc/L6AX-QKXA].