# Indigenous Culture in Contemporary Indigenous Government: Some Examples from Native Nations in the United States

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# INDIGENOUS CULTURE IN CONTEMPORARY INDIGENOUS GOVERNMENT: SOME EXAMPLES FROM NATIVE NATIONS IN THE UNITED STATES

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## I. INTRODUCTION

While their legal and political circumstances vary, the self-determination campaigns by Indigenous peoples in the four so-called CANZUS states[2] have long had much in common. Among the commonalities are at least two objectives.

The first has been to regain the right to *govern* their lands, communities, and affairs themselves, displacing the settler-colonial decision-makers who have long exercised control over these populations and their lands. The closely related second objective has been to regain the right to make their own choices about *how* to govern. Even where the first objective has been met through an at least partial return of substantive decision-making power, there has been a settler-colonial tendency to impose—or at least strongly encourage—its own organizational and procedural preferences on the resulting Indigenous governments. Where the first objective—the right to govern—has been partially met, the message from settler-colonial governments about the second—how to govern—often has been: "You can exercise governmental power, but you need to do it *our* way."

While the success of either objective varies across and even within these countries, and circumstances can quickly change, both objectives appear to be most advanced, at least for now, in the United States.[3] But in all four countries, Indigenous peoples are engaging the *how's* of governing, pushing against the jurisdictional and organizational envelopes within which they have long been confined.[4] In the process, Native nations are developing a broad repertoire of governing tools, sometimes drawing on their own traditions, sometimes borrowing from each other and from non-Native sources, and sometimes inventing new tools for new times.

Our concern in this paper is less with the right to govern than with the how of governing, and our focus is on the Indigenous experience in the United States: How are Native nations in the

[2] Canada, Australia, Aotearoa New Zealand, and the United States.

[3] Concerning Native nations in the U.S., Vine Deloria, Jr. and Clifford Lytle wrote in 1984 that "Indian tribal governments, as presently constituted, have many of the powers of nations and, more important, have the expectation that they will continue to enhance the political status they enjoy. With some exceptions, such as jurisdiction over major crimes… a standing army, coinage and postage, and other attributes of the truly independent nations, Indian tribes exercise in some respects more governing powers than local non-Indian municipalities and in other respects more important powers than the states themselves" (Deloria and Lytle 1984, p. 14; see also Kalt and Cornell 1994). While the intervening forty years, thanks to both positive and negative court decisions, have seen changes in the rights exercised by tribes, this remains essentially the case.

[4] For some explorations of Indigenous governmental initiatives in the CANZUS states, see, for example, Jorgensen et al. (2023) and the papers in Jorgensen (2007), Maddison and Brigg (2011), Nikolakis, Cornell, and Nelson (2019), Benton and Joseph (2021), and Smith, Wighton, Cornell, and Delaney (2021).

U.S. incorporating aspects of culture—including their own governmental traditions—in building effective governments today? We have organized our response around six topics or tools of governing: constitutions, citizenship, dispute resolution and the provision of justice, law-making, the selection of leaders, and child welfare. Within each section we offer examples of Indigenous nations considering—and usually drawing on—their own cultural resources to address contemporary governmental tasks.

Neither our choice of topics nor our choice of examples is meant to be exhaustive. Our purpose instead is to be illustrative, capturing at least some of the diversity of Indigenous nations' efforts to draw on their own rich governmental principles and traditions in addressing the challenge of governing effectively on behalf of their own purposes.[5]

## II. CONSTITUTIONS

In our usage a constitution is a set of principles, rules, or agreements among a people about how they intend to govern.[6] It need not be written down; it might exist in the teachings of elders, the insights of medicine people, the gifts of spirit beings, an accumulation of experience, or the products of community discussion about the proper ways of getting things done. The keys to a successful constitution lie both in its content and in the willingness of a people to adhere to it—to give it legitimacy and power in their lives.

This sense of a constitution is not foreign to Indigenous peoples. The word "constitution" may be foreign (although numerous Indigenous languages have equivalent terms[7]), but the concept of an agreed-upon and shared set of principles, protocols, distributions of authority and responsibility, and ways of getting things done is not foreign at all. On the contrary, such shared knowledge, embodied in relationships and daily activity, is part of what has allowed Indigenous peoples to survive over generations (Cornell 2015). One can even think of it as culture: the deep

[5] At the same time, as non-Indigenous researchers, we are aware that what we see, in a sense, is what we're allowed to see. Government is not only a set of formal positions, policies, and procedures. It often is embedded in complex community relationships and shared, nuanced understandings and involves carefully protected knowledge, all of which may be invisible to the outsider. While we are grateful for the access we have been given in those cases of which we have some first-hand knowledge, what follows is, in any particular case, an inevitably partial account.

[6] Some complementary views: Anishinaabe legal scholar John Borrows argues that "Constitutions communicate a society's central organizing principles" (2010, p. 181). Del Laverdure, former Chief Legal Counsel to the Crow Nation and former chair of that nation's Judicial Ethics Board, says that "I view a constitution as a social contract among the citizenry… [the citizens] come together [to] form a government and set the rules for that." In their book on the constitutions of Native nations, Melissa Tatum, Miriam Jorgensen, Mary Guss, and Sarah Deer describe a constitution as "one form of the expression of the relationship between a government and its people and of the fundamental principles that define that relationship" (2014, p. 3). Economist Joseph Kalt argues that "A constitution is a fundamental framework that empowers the people to state who they are, define how they will make community decisions, choose their direction, solve their disputes, and stay a *people*" (2007, p. 79).

[7] The cover design of Tatum et al. (2014) highlights phrases that language speakers from nine Native nations identified as equivalents in their languages of the English word "constitution."

understandings that a people share that ideally guide action and sustain a good life. Of course culture itself is something that changes over time as circumstances, experience, and knowledge change. Constitutions, written or not, also may change as nations encounter new, unexpected challenges or have other reasons to revisit the ways they govern.

Native nations in the United States today have substantial freedom to organize their governments in ways of their own choosing. Most would argue that they have always had that right, although in the early part of the 20th century it was not always clear that the U.S. government recognized either that right or existing Native governments. In 1934, however, responding to dire socio-economic conditions in Indigenous communities and the efforts of some government officials to reverse individualizing and assimilationist policies, the U.S. Congress passed the Indian Reorganization Act (IRA). This legislation offered, among other things, the opportunity for a Native nation that wished to do so "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws...."[8]

The legislation required that a nation decide, by vote, whether to adopt this provision of the IRA, and the U.S. government set up an Organization Committee to assist those tribes that chose to do so in the development of constitutions. While approximately two-thirds of Native nations in the lower forty-eight states voted to adopt the IRA, by 1980 only about half of Native nations had actually organized constitutions under it. Draft constitutions were subject to review by U.S. government attorneys and approval by the U.S. Secretary of the Interior.[9]

As Rusco (2000) and Wilkins and Wilkins (2017a, ch. 3) show, the U.S. government did not impose a model constitution on tribes and in some cases made efforts to incorporate Indigenous practices and allocations of responsibility into IRA-based governments. Nonetheless, a great many Native nations, either directly under the IRA or indirectly under its influence, ended up with similar, rather simple constitutions.[10] These commonly provided for the election of tribal leaders, usually to two-year terms of office; placed most decisions in the hands of an elected, representative council; and required U.S. government approval of constitutional amendments, Indigenously produced laws, and certain major decisions.

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[8] The Indian Reorganization Act (Wheeler-Howard Act) 48 Stat. 984 (1934), Section 16. Indigenous peoples in Oklahoma and Alaska originally were excluded from the IRA, but further legislation extended its provisions to them in 1936.

[9] Nations that elected to take advantage of the constitutional provisions of the IRA were involved in the drafting process. The review by government attorneys was to identify any legal issues involved; nations could then respond to those reviews. Draft constitutions (and subsequent amendments to them) had to receive final approval from the Secretary of the Interior before taking effect. Rusco (2000) offers a comprehensive treatment of the IRA; for a more concise account, see Rusco (2006).

[10] In some cases where the IRA was rejected, the federal government pressured nations to adopt governmental practices that better fit federal conceptions (see, for example, Fowler 1982, ch. 4). Other nations either maintained already existing governmental organizations or initiated change outside IRA provisions.

Duane Champagne has argued that for the most part, these governments "ignored tribal sociopolitical organization by bypassing the social and cultural organization of the tribes… Consequently, the checks and balances that could be expressed through the autonomies of actual social and political power groupings within traditional tribal communities do not play significant roles in most contemporary tribal constitutions and governments" (2007, p. 75). In short, the resulting governments were more likely to reflect colonial than Indigenous principles and practices.

By the 1970s Indigenous political activism and other factors had led to a new federal policy of Indigenous self-determination, offering enlarged opportunities for nations wanting to expand and reorganize self-governing power. Subsequent decades have seen a burst of Indigenously initiated constitutional change. One result is increased diversity of governmental forms as some Native nations rethink their governing systems, reject the U.S. government approval provision, exercise their right to govern as they wish, and consider what role, if any, Indigenous structures, principles, and practices should play in revised or entirely new governing systems.

In doing so, these nations are exercising not a delegated power but an assumed right that has never been explicitly extinguished or withdrawn. The "reserved rights" principle of federal Indian law in the U.S. holds that tribes retain all powers that have not been expressly given up by treaty or explicitly extinguished by federal statute. For example, a 1905 fishing-rights decision in the U.S. Supreme Court held that a treaty is "not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted."[11]

Below we look at three Indigenous governments in the U.S.: Cochiti Pueblo, which governs without a written constitution; the Osage Nation, which in the early 2000s wrote and adopted a new constitution; and the Hopi Tribe, whose distinctive constitution recognizes the continuing inherent sovereignty of the twelve Hopi villages that constitute the Tribe. We also look at a few examples of the ways some Native nations have incorporated their own sense of purpose and place in the introductory sections of their constitutions.

**Cochiti Pueblo.**[12] A number of nations in the U.S. operate without written constitutions. Examples include the Navajo Nation and some of the Pueblos in the American Southwest. Does this mean they have no constitutions at all? When asked about this, one leader of a Pueblo nation in what is now New Mexico responded regarding his own community: "Oh,

[11] *United States v. Winans,* 198 U.S. 371 (1905), quoted in Getches, Wilkinson, and Williams, Jr. (2005, p. 137). See also the discussions in Wilkinson (1987, ch. 3) and in Wilkins and Lomawaima (2001, ch. 4). In a 1978 ruling the Supreme Court acknowledged tribes as "self-governing sovereign political communities" with "inherent powers of a limited sovereignty that has never been extinguished." *United States v. Wheeler,* 435 U.S. 313, 322-23 (1978), quoted in Duthu (2008, p. xxvi).

[12] This account draws on Cornell and Kalt (1997) which draws in turn on Lange (1959) and Goldfrank (1927), among others. We draw as well here on conversations over the years with several Cochiti citizens, including two former governors of the Pueblo. While this discussion focuses on Cochiti Pueblo, significant elements of the system outlined here can be found, with some variation, in the governing systems of several other Pueblo nations as well, among them Kewa (Santo Domingo), San Felipe, and Jemez.

yes, we have a constitution. It's written here," and pointed to his head and his heart. "You learn it from your parents, your grandparents, the elders. You grow up learning what it is."[13]

While some Pueblo peoples adopted the mainstream governmental models promoted by federal policy, and while all show impacts of first Spanish, then Mexican, then U.S. colonial controls and impositions, some never ended many of their traditional practices and govern themselves today through comprehensive institutions with demonstrably ancient roots. Cochiti Pueblo is one.

The Pueblo of Cochiti is located west of the Rio Grande River, 35 miles southwest of Santa Fe, New Mexico, on a land base of nearly 55,000 acres. Cochiti has suffered many of the same historical impacts of colonialism that other Indigenous nations in North America have suffered, from major losses of land to the suppression of cultural practices to other interference in their ways of life.

Cochiti also exhibits a historical pattern found in a number of the Pueblo nations: "an adaptive strategy that was a complicated mixture of taking certain matters (such as religious ceremonies)"—and, we might add, some kinds of decision-making—"underground while absorbing and adopting other dimensions of Spanish (and eventually American) culture and economic systems" (Cornell and Kalt 1997, p. 279). In the contemporary era, and particularly under U.S. policies of Indigenous self-determination,[14] much of what historically was taken underground has re-emerged in robust self-governmental form.

Cochiti has no written constitution. It has no elections. Each year the cacique, the senior spiritual leader of the Pueblo, appoints six individuals to the six senior positions for one-year terms: governor and lieutenant governor (responsible for secular affairs), war captain and lieutenant war captain (responsible for sacred and ceremonial affairs), fiscale and lieutenant fiscale. There are two primary kivas (moieties or societies) at Cochiti: Pumpkin and Turquoise. If this year the cacique selects as officers members of the Pumpkin kiva, next

[13] In conversation.

[14] In the Indian Self-Determination and Education Assistance Act of 1975, the U.S. Congress committed itself to the "maximum Indian participation in the Government and education of the Indian people" and to "an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services" (U.S. Congress 1975, pp. 2203, 2204). Despite this stated intent, implementation of the legislation often turned out to involve little more than self-administration: Native nations taking over the management of programs developed and funded by the federal government. However, a growing number of tribal leaders took the legislation at its word, believing that the U.S. government's stated commitment to tribal "self-determination" constituted recognition of their right not only to administer but to *govern* their lands and affairs in their own ways. Over the next two decades they and others responded accordingly. Without waiting for U.S. governmental affirmation, they seized this perceived opportunity (expanded by subsequent legislation such as the 1994 Tribal Self-Governance Act) and its attendant funds to push jurisdictional boundaries, organize their own forms of political authority, make their own law, and gather to themselves increased governmental powers. The eventual effect was that Native nations increasingly displaced the federal government as primary decision-maker over much of what happens on Native lands.

year it will be members of the Turquoise: a way of managing power within community relationships.

Those who have ever served in any one of these six positions become members of the nation's council for life, yielding a council that may change in size year to year but—regardless of size—becomes a remarkable repository of experience, knowledge, and institutional memory. It also is less a legislature—a law-making body—than what Goldfrank in 1927 described as "a body of consultants" to whom senior leaders can bring issues of various kinds. But, she adds, "their sanction is of great importance, since they are honored members of the community, and it is doubtful whether the governor or war captain would act in direct opposition to their expressed will" (1927, p. 27). By recent accounts, this remains essentially the case.

Writes Charles Lange, "In governing, Cochiti officers are guided by no written laws…. Instead, problems are met by the officers and council by means of innumerable 'regulations,' comprising a body of common law. This body of unwritten, yet efficacious, law is both rigid and flexible, as the situation demands…." (1959, p. 191).

The system also includes a separation of powers, described by Lange (and still apparent in only slightly modified form today) as "a dichotomy of responsibility divided between the governors—secular—and the war captains—ecclesiastical, or ceremonial. The council actively participates in the secular phases, less openly in the ceremonial, their places being taken by the medicine men, headed by the cacique…" (1959, p. 220). According to one recent governor, a key part of the governor's job is to serve as a buffer between, on one hand the war captain, who is responsible for the cultural core of Cochiti life, "for all the things we cherish," and, on the other, the secular world: the federal government, the state of New Mexico, possible business partners, the school system, inquisitive researchers like us, and more.[15]

This governmental organization, aspects of which, despite waves of colonialism, appear to have changed little over a very long time, oversees a sustainable economy based on tourism, recreation, employment in off-reservation activity (including at the nearby Los Alamos National Laboratory), and small-scale farming that serves both subsistence and ceremonial purposes. Culturally, politically, economically, it works.

**Osage Nation.**[16] In some cases within the movement for constitutional change among Indigenous nations in the U.S., change has been modest—a matter of amendments. In others it has involved wholesale revamping. The Osage Nation is a prominent member of

[15] In numerous conversations.

[16] The following discussion draws heavily on Dennison's (2012) thorough account of the Osage Nation's constitution-making process, on several presentations by and conversations with Jim Gray, Chief of the Osage Nation during that process, and on conversations with the late Leonard Maker, an Osage citizen who played a central role in the early stages of the reform.

the latter group. The background to their constitutional reform is both complicated and historically unique, but for our purposes, the point is that in the 2000s they had both the opportunity and the desire to freely rethink how they would govern.

In 2004 the Osage Tribal Council initiated a constitutional reform process and appointed a ten-person Osage Government Reform Commission to lead it. From 2004 to 2006 the Commission held more than 40 community meetings, circulated questionnaires to citizens of the Nation, held a referendum vote on some of the organizational options, and sought outside advice, including legal advice, as part of the process, leading eventually to a draft constitution. In 2006, the new Osage constitution was adopted by a two-thirds "yes" vote of more than 2,000 Osage citizens. With later amendments, it provides the architecture of Osage governance today.[17]

One of the major issues in the constitutional reform process was the role that culture and tradition should play in the Nation's revised governing system. "From the beginning of the reform process," writes Osage anthropologist Jean Dennison, "Osage culture and its various referents of tradition, values, and ancient ways lurked as one of the elephants in the room that the commissioners knew they had to contend with in some fashion during the writing of the constitution" (2012, p. 82). There were those who saw the new constitution as an opportunity to bring traditional practices back into governance, including suggestions of a return to clan-based structures and decision-making, while others looked for ways to express "Osage values" in the new governmental organization.

It was clear from a survey that a significant number of Osage citizens wanted government to be supportive of Osage language and cultural practices—the nation already had a vigorous program of language revitalization and popular cultural activities of various kinds—but it was not at all clear that they expected the form of government to be a return to the past, nor that they expected government to be responsible for cultural restoration or preservation.

In the course of these meetings and discussions, at least three concerns emerged. One was a fear that embedding cultural practices or structures in the organization of government would hinder the natural evolution of culture as something not fixed but alive, capturing it in a particular form that might limit the already existing variation in cultural practices across the Osage Nation. A second concern was that giving responsibility for cultural matters or continuity to the new government would interfere with already existing and effective, if less formal, cultural institutions. There was a clear preference for keeping cultural activities separate from and independent of the Nation's government.[18] A third concern was simply with the passage of time and knowledge, the realization that many of the ways of governing

[17] This process is outlined in detail by Dennison (2012, pp. 29-46).

[18] As one citizen said, "Osage culture should be maintained and transferred by the people themselves. If you need a governing document to tell you how to be Osage, you've waited too late to take care of your culture" (quoted in Dennison 2012, p. 93).

from before the United States took control of Osage lives were no longer either known or meaningful to many—perhaps a majority—of Osage people. To many Osages, it was time to move on (see Dennison 2012, chapter 3).

Such concerns prevailed. This meant that the Osage constitution would resemble, in important ways, mainstream structures of government. But as Dennison writes, citizens viewed these political tools as useful.

> The act of taking on the shape of the colonizer could… be described as a contradiction. For most of the participants within the reform process, however, the act of adopting any new tool or technology makes sense once it is proven to be effective. Embracing these new practices was generally not understood in any way as endangering the Osage as a people. Instead, such changes were fundamental to reforming an Osage Nation in the twenty-first century *and ensuring that the Osage continue to exist as a people* (2012, p. 97, emphasis added).

The new constitution makes little effort to capture older Osage ways of governing, and it leaves the practical preservation of Osage traditional values and practices largely in the hands of existing, non-governmental Osage institutions, limiting the authority of government to manage that effort. But it does assign the Osage Nation, through its government, at least some responsibility. Article XVI states that "The Osage People have the inherent right to preserve and foster their historic linguistic and cultural lifeways. The Osage Nation shall protect and promote the language, culture, and traditional ways of the Osage people."[19] Protect and promote, not oversee and manage.

What are we to make of these two cases? Researchers from the Harvard Project on American Indian Economic Development showed that one of the keys to successful community and economic success among Indigenous nations in the United States was something they called "cultural match"—a congruence between the forms and practices of contemporary governing institutions on one hand and the contemporary political cultures of the nations being governed on the other (Cornell and Kalt 1997, 2007). "Contemporary" is a critical term here; the message was not that Indigenous nations should necessarily return to the ways they governed before settler colonialism forever altered their worlds. It was instead that the legitimacy of any governing institutions would depend to a significant extent on whether the people being governed saw those institutions as appropriate for them—as in some sense, *theirs*. The critical questions were not "'are they traditional?' but instead, do those institutions, traditional or not,

[19] Quoted in Dennison (2012, pp. 98-99); also at https://s3.amazonaws.com/osagenation-nsn.gov/files/departments/congress/ON+Constitution+5th+Edition_rev2.pdf, Article XVI, Section 1, p. 24. The full text of the 2006 Constitution of the Osage Nation also can be found in Dennison (2012, pp. 197-220).

fit the contemporary, broad-based, political culture of the nation; do they therefore have the support of the people; and have they been freely chosen by the nation?[20]

Cochiti and Osage govern very differently, and their links to past governmental practice are by no means the same. But both nations meet that cultural match criterion. That may seem obvious in the Cochiti case, where current governing practice, with its ancient roots, has enormous legitimacy and support in the Cochiti community. But it is also the case at Osage, where the people likewise have made a choice, this time through a constitutional process. As Dennison points out, "Ultimately, the need to have a cultural match… meant that the Osage Nation refused to centralize authority" over culture (2012, p. 100).

There's a further point to be made here. A number of nations have adopted governing systems that, like the Osage Nation's, bear a more than passing resemblance to western systems. But that resemblance can be misleading.

For example, in a decision having to do with the distribution of authority among the various governmental entities of the **Citizen Potawatomi Nation**, that Nation's Supreme Court stated that "This Court has no doubt that the Potawatomi Constitution creates a 'separation of powers' within the government of the Citizen Potawatomi Nation in the sense that the governmental powers of the Citizen Potawatomi Nation are divided between the different entities of the government which are created by the Constitution…." However, it went on to say, "In the first case decided by this Court, we noted that '... the separation of powers expressed in the Constitution *is not the same as that in Anglo-American law*.... In varying degrees, the power to legislate, the power to execute laws which have been enacted, and other functions of the Nation are disbursed among the various constitutional entities of the Nation'" (emphasis added), of which it noted six.[21]

**The Hopi Tribe.**[22] The Hopi Tribe is located on a series of mesas and adjacent lands in what in now northeastern Arizona, surrounded by lands of the Navajo Nation. The tribe is a composite of twelve self-governing villages that, prior to the 1930s, had no unifying political structure. In a practical, political sense, there was no Hopi Tribe. In 1936, following the 1934 passage of the Indian Reorganization Act, the federal government urged the Hopis to create a tribal government under the IRA and sent someone to assist them in doing so. Most Hopis were reluctant to take this step, and when the new constitution, created with federal

[20] Diane E. Smith argues that the key to community legitimacy in Indigenous governmental design is not its link to tradition, as important as that may be to many Native nations, but the freedom to decide for themselves on a design, traditional or not, that works: in short, "a process of Indigenous choice" (2004, p. 27).

[21] The quotations are from Citizen Potawatomi Business Committee v. Barrett (7 Okla. Trib. 310, 2001 WL 34090537 (Cit. B. Potawatomi)), pp. 4-5. See also the discussion of the distinction between the structure of the Navajo Nation's court system on one hand and the law it utilizes in its decisions on the other (pp. 20-21 below).

[22] This account draws on the Hopi Tribe's constitution, available at https://www.narf.org/nill/constitutions/hopi/hopi_const_1993.pdf, on case materials from the Hopi Tribe Appellate Court included in Fletcher (2020, pp. 142- 45), and on Richland (2008).

assistance, was put to a vote, a majority of eligible Hopis abstained from voting. But a majority of those actually voting approved, resulting in a constitution that linked these twelve villages under a single tribal government.

The constitution, however, is unusual in that, while voted on by the people (as required by the U.S. government), it explicitly draws its power not from the people but from the Hopi and Tewa villages. Its Preamble states that "This constitution, to be known as the Constitution and By-Laws of the Hopi Tribe, is adopted by the self-governing Hopi and Tewa Villages of Arizona to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems, with the United States Government and with the outside world generally." It is the decision of the villages, not the people, that is the source of whatever power the constitution has. In the words of the Hopi Tribe Appellate Court in a 2010 case,

> "…the entire structure of the Hopi Constitution indicates that the authority of the central government of the Hopi Tribe rests on the bedrock of the aboriginal sovereignty of the Hopi and Tewa Villages… Thus, unlike most tribal governments adopted under section 16 of the Indian Reorganization Act of 1934, which, according to the express language of their constitutions, owe their authority to powers delegated by their people, the authority of the central government of the Hopi Tribe, according to the express provisions in the Preamble of the Constitution, derives exclusively from power delegated to it by the Hopi and Tewa Villages" (quoted in Fletcher 2020, p. 143).

Not all the villages, however, supported that delegation of power. From the beginning some villages objected to the arrangement; relations between some of the more traditional villages and the Hopi Tribe have often been conflicted; and a few villages have withheld recognition of the powers of the Tribal Council.[23] In short, in the background—and occasionally the foreground—of contemporary Hopi government are issues having to do with the legitimacy of the tribal government and the extent of village autonomy within the system.

Nonetheless, what has emerged today is in effect a federal system with some powers reserved to the villages and others delegated by the villages to the Hopi Tribe. It is an arrangement that appears to do several things: build a governing structure that joins together a dozen communities that substantially share culture, language, history, and a sense of Hopi identity; in doing so, give to those communities an organizational scale with potentially greater impact in their relationships with other governments and in their ability to meet their needs; but at the same time respect—to some degree at least—the long-standing culture of autonomy that those communities value.

[23] For a brief overview of the history and the issues, see Richland (2008, ch. 2).

These three cases illustrate some of the variety of Indigenous governments in the United States as well as the variety of culture's impact on those governments. On one hand we have Cochiti's system in which ancient ideas about how to appropriately organize internal and external affairs, the sacred and the secular, do not dictate but clearly shape contemporary organization and action. While modified by multiple colonialisms over the years, Cochiti's ways of governing remain profoundly different from mainstream governmental models but, critically, enjoy great legitimacy with the nation's citizens and—partly for that reason—appear to effectively support the nation's own vision of its future.

On the other hand there's the Osage Nation's new constitution through which most citizens not only embraced externally derived structures and processes but chose to locate support for cultural continuity outside the formal structures of government. Theirs was not a decision against their own traditions but instead a decision for those traditions, which they believe should be organized outside the administrative control of government, and for a form of government that, while substantially replicating external models, they believe can best serve their purposes.

In between there's Hopi, the only one of the three constitutions organized under the IRA, where outside pressure for an encompassing governing system ran into a culture of village autonomy, had to accommodate it somehow and did so, but still has to deal with the tensions that result. Culture's effects in this case are less apparent in the structure of government than in its continued need to take that autonomy into account.

We referred above to the Preamble of the Hopi Tribe's constitution, which makes clear the Tribe's constitutional purpose. Some Native nations have used the Preamble to a written constitution (its opening section) to articulate their view of the source of their governmental authority and law, state who they are, and indicate what matters to them: a kind of foundation-setting for what follows in the rest of the document. As Greg Gilham, chair of the Constitutional Reform Committee of the **Blackfeet Nation** in what is now the state of Montana, said in 2010, "We don't need the federal government or the state of Montana telling us who we are. Let's define ourselves, and let them know who we are."[24]

Here are three examples of Preambles that, in various ways, use traditional self-concepts to frame their constitutions as very much their own. They also make clear, at least implicitly, that the sources of both their law and their right to self-government lie not in any decisions made by the United States but long pre-date the European presence in North America.

> **From the Preamble to the constitution of the Osage Nation.** "We the Wah-zha-zhe, known as the Osage People, having formed as Clans in the far distant past, have been a People and as a People have walked this earth and enjoyed the blessings of Wah-kon-tah for more centuries than we truly know. Having resolved to live in harmony, we now come together so

[24] Video interview, March 25, 2010, available at http://nnidatabase.org/db/video/rebuilding-native-nations-course-series-constitutions-reflecting-and-enacting-culture-and-iden.

that we may once more unite as a Nation and as a People, calling upon the fundamental values that we hold sacred: Justice, Fairness, Compassion, Respect for and Protection of Child, Elder, All Fellow Beings, and Self. Paying homage to generations of Osage leaders of the past and present, we give thanks for their wisdom and courage. Acknowledging our ancient tribal order as the foundation of our present government, first reformed in the 1881 Constitution of the Osage Nation, we continue our legacy by again reorganizing our government…. We, the Osage People, based on centuries of being a People, now strengthen our government in order to preserve and perpetuate a full and abundant Osage way of life that benefits all Osages, living and yet unborn" (Dennison 2012, p. 197).

**From the Preamble to the constitution of the Coquille Tribe of Oregon.** "Our ancestors since the beginning of time have lived and died on the Coquille aboriginal lands and waters. The Coquille Indian Tribe is and has always been a sovereign self-governing power…." (quoted in Tatum et al. 2014, p. 32).

**From the Preamble to the constitution of the White Earth Nation.** "The Anishinaabeg of the White Earth Nation are the successors of a great tradition of continental liberty, a native constitution of families, totemic associations. The Anishinaabeg create stories of natural reason, of courage, loyalty, humor, spiritual inspiration, survivance, reciprocal altruism, and native cultural sovereignty. We the Anishinaabeg of the White Earth Nation in order to secure an inherent and essential sovereignty, to promote traditions of liberty, justice, and peace, and reserve common resources, and to ensure the inalienable rights of native governance for our posterity, do constitute, ordain and establish this Constitution of the White Earth Nation" (Vizenor and Doerfler 2012, p. 63).

One powerful statement that captures a distinctive sense of identity, value, purpose, and place comes not from a nation in the U.S. but from the Haida people of Haida Gwaii off the western coast of what is now Canada, who open their written constitution with the following Proclamation:

**Haida Proclamation.** "The Haida Nation is the rightful heir to Haida Gwaii. Our culture is born of respect; and intimacy with the land and sea and the air around us. Like the forests, the roots of our people are intertwined such that the greatest troubles cannot overcome us. We owe our existence to Haida Gwaii. The living generation accepts the responsibility to insure that our heritage is passed on to following generations. On these islands our ancestors lived and died and here too, we will make our homes until called away to join them in the great beyond."[25]

While the content of a constitution—what it says—is critical, so is the process of deciding what that content will be. As Tatum et al. (2014) conclude in their review of constitutional development and change among Native nations, "creating a constitution is a time-consuming

[25] Given at https://www.haidanation.ca/haida-constitution/.

and demanding task, and no one 'correct' set of procedures exists to ensure successful completion…" (p. 178). That said (and as Tatum et al. point out; see their Chapter 12), there are a number of factors that appear to increase the odds of success in either creating a constitution or reforming an existing one.[26] Among them:

- A dedicated working group or committee, ideally not closely identified with current elected leadership, to lead and oversee the constitutional process and draft the proposed document or changes;
- A plan for substantial and repeated input from a broad spectrum of the nation's citizens;
- A plan for making clear to the community what the steps in the constitutional process are and for keeping the community regularly informed of progress;
- Sufficient dedicated funding to support working group meetings, broad community input and updates, and appropriately timed legal advice;[27]
- Care that the language used in the constitution is understandable and familiar enough to the community that the result is felt to be "our" constitution.

## III. CITIZENSHIP

One of the most destructive effects of settler colonialism in the U.S. was the loss, by Indigenous peoples, of the right to determine for themselves who they are. That right was taken by the federal government which imposed its own rules for identifying who was tribal and who was not. The key in the federal view was the quantum of tribal or Indian blood that an individual had or was perceived to have, a criterion that was introduced by the U.S. as a means of identifying and, as some of its supporters readily admitted, eventually eliminating Indians (see Ellinghaus 2017; Kiel 2017; Wilkins and Wilkins 2017b). For most U.S. government purposes, the required blood quantum eventually settled on was one-quarter, which became a common requirement for U.S. recognition of an individual as a tribal citizen eligible for federal services.

This changed in 1978 when the U.S. Supreme Court, in *Santa Clara v. Martinez,* recognized the right of Indigenous nations to determine for themselves who is or is not a part of their nation. By then, however, the blood quantum criterion had taken hold, and many nations, even with the freedom to make their own rules, continued to count various degrees of blood quanta as

[26] Two of the best accounts we've seen of contemporary Indigenous constitutional processes are Vizenor and Doerfler (2012) on the White Earth Nation's constitution and Dennison (2012) on the Osage Nation's constitution.

[27] A relevant anecdote: one of the authors of this paper was present at an early, grassroots, community meeting in an ultimately failed constitutional process in a large Native nation in the U.S. The nation's elected government had put the change process in the hands of the nation's attorneys, asking them to review the nation's current Indian Reorganization Act constitution and report what needed to be changed. Two of the attorneys, both of them citizens of the nations, were at the meeting. They presented the results of their analysis and then asked for reactions. After a long silence a woman at the back of the room stood up and took the attorneys to task. In paraphrase: "Your job isn't to tell us what needs to change in our constitution. Your job is to ask us, 'what would you like to see in the nation's constitution?' and then help us make that happen."

the indicator of eligibility for citizenship or what some nations call membership.[28] But as more and more nations revisit their constitutions or current ways of governing, determining requirements for citizenship has emerged as a recurrent topic of often intense debate.[29]

In 2007 the **White Earth Nation of Anishinaabeg** initiated a major reform of its constitution. Six years of intensive community discussion and a series of constitutional conventions ended in November of 2013 when nearly 80 percent of White Earth voters approved a new constitution for the White Earth Nation (Vizenor and Doerfler 2012; Doerfler 2015). Despite this, the new White Earth Nation Constitution was never implemented. The reasons why are complex (see Krausova 2019), but what interests us here is not the fate of the constitution but the Nation's lengthy consideration of citizenship.

What would be required for White Earth citizenship? This was among the most difficult issues addressed during the reform process. The nation had long relied on the U.S. imposition of blood quantum, but many citizens objected to it, partly because of its history—the colonizer claiming the right to determine who is Indian (or tribal) and who is not—and partly because of its potential long-term demographic effects. After months of debate, White Earth delegates to the nation's constitutional conventions rejected any use of a specified blood quantum to determine citizenship and instead elected to rely on lineal descent as the only measure of eligibility, making kinship the core of White Earth identity and "organizing the nation around family and relationships" (Doerfler 2015, p. 81).

Citizenship was also an issue for the **Osage Nation** in its own constitutional reform process. In 2004 the U.S. Congress formally recognized "the inherent sovereignty of the Osage Nation to determine its own citizenship" (Dennison 2012, p. 66). In making that determination the Osage people likewise rejected any specific blood quantum. Dennison again: "Of the 1,650 people who voted in the November 2005 referendum, only 236 desired some sort of minimum blood quantum" (2012, p. 65). Article 3, Section 2 of the new Osage constitution adopted in 2006

[28] The terminology for those who are part of a Native nation varies and is sometimes contentious. A growing number of nations have been moving away from the term "members." In conversation a few years ago, Oren Lyons, traditional Faithkeeper of the Onondaga Nation, asked one of the authors of this paper, "Are you a *member* of the United States? At Onondaga, we're not a club. We don't have members. We're a nation. We have citizens." Debra Harry comments that "I would say that I am a citizen of my nation which acknowledges its nationhood, and my nation recognizes me as a contributing citizen of the nation… Membership sounds like a club. It is easy to forget that we are the original, free, and independent nations of this land when we adopt such demeaning terminology" (Harry and Pihama 2017, p. 108; see also Dennison 2012, p. 13). However, some others find "citizen" a fraught term as well, worrying about its western origins and implications, and prefer terms such as "relatives," "those who belong," or something else. We use the terms "citizen" and "citizenship" in this paper because those are the terms that, in our experience, are most often being used in recent Indigenous constitutional and other debates that have as a key referent the standing of Native nations *as political entities* in some ways comparable to other nations of the world and engaged in government-to-government, nation-to-nation relationships with settler power. But we would of course defer to Indigenous preferences in any given case. See also the brief discussion of the difference between citizenship and ethnicity in Tatum et al. (2014, pp. 41-42).

[29] Goldberg (2002) remains a useful exploration of some of the options, and see Fletcher (2012) for a discussion of the issues surrounding descent-related criteria.

states that “All lineal descendants of those Osages listed on the 1906 Roll are eligible for membership in the Osage Nation, and those enrolled members shall constitute the citizenry subject to the provisions of this Constitution and to the laws enacted and regulations approved pursuant to this Constitution” (Dennison 2012, p. 198).

The efforts of Native nations to escape external racial classifications—“how much Indian (or tribe-specific) blood do you have?”—and find Indigenous ways of thinking about relationships, community, nationhood, and belonging are amply apparent in both these cases (and in others), and especially in the accounts of the difficult discussions of citizenship reported by Dennison (2012) and by Vizenor and Doerfler (2012) and Doerfler (2015). That said, lineal descent has issues of its own; among other things, as Kiel points out, it sustains a biological notion of identity; lineal descent means that citizenship remains attached to the blood line (2017, p. 90). Further, it opens the gates to a much larger population and to those who may have little connection to the tribe—this last a problem it shares with blood quantum (see the discussion in Fletcher 2012). At White Earth, says Doerfler, despite such shortcomings, which were recognized in the course of debate, “delegates decided that it was the best option they had” (2015, p. 174, note 55).

Citizenship issues also have prompted extended discussions at **Ysleta del Sur Pueblo**. Ysleta del Sur is a Tigua community and the southernmost of the Rio Grande Pueblos, located today within the bounds of the city of El Paso, Texas. The Pueblo’s political history defies brief summary, but in 1987 the U.S. Congress placed certain conditions on tribal citizenship in the Pueblo, limiting it to individuals listed on a Tribal Membership Roll established in 1984 and to those of their descendants with at least one-eighth degree Ysleta del Sur blood.

Increasingly concerned about the divisive and potentially devastating long-term effects of this legislation and about the inability of the nation to determine its own citizenship, in 2012 the Pueblo persuaded Congress to change its requirement. The new legislation allowed citizenship for “any person of Tigua Ysleta del Sur Indian blood enrolled by the tribe.”[30]

With this change—the power to enroll any descendant—in hand, the tribe then moved to determine its own requirements for enrollment. It did so through a two-year process of citizen education and discussion called Project Tiwahu, a word that means “Tewa Person” in the Pueblo’s own language. Meetings, focus groups, and surveys explored both the effects of past requirements and the possible options—and their consequences—for the future. Through this process the community expressed overwhelming support for replacing any specific blood quantum requirement with what amounts to a family relationship requirement that embraces all descendants, including those who had been excluded from citizenship under previous requirements. The process also helped the community think together about what they wanted citizenship to mean and involve.

[30] Quoted in Harvard Project on American Indian Economic Development (2016, p. 35).

> "Through Project Tiwahu, the Tribal Council was able to frame the issue as a reclamation of tribal sovereignty—and as a challenge to the colonial mindset, which equated the terms 'member' and 'beneficiary' (of payments, programs, and services). Project Tiwahu emphasized that Tigua citizenship should define a distinct community whose members had responsibilities to each other. As a result, conversations about enrollment criteria centered on the ways the new citizenship rules could support the preservation of the Pueblo's identity and could contribute to the economic and cultural growth of the tribal nation."[31]

As these examples suggest, recent discussions of citizenship in Native nations in the U.S., while variable in their details, have tended to reject blood quantum requirements while favoring lineal descent and, less conclusively, to express a desire for cultural continuity as a critical element of citizenship. Frank Ettawageshik, former chairman of the Little Traverse Bay Bands of Odawa, frames the issue this way:

> Somewhere along the line people started looking at us and thinking in terms of blood quantum. And they started to use it as a way of measuring us. And they sold it to us; they sold it to us so well that we think it's our own idea now…. This whole concept of tying citizenship to blood quantum is something that we're going to really have to think about…. Some people talk about when the blood quantum gets diluted we lose a lot. Well it isn't just the blood quantum. When the knowledge of our culture and our language and our tie to the land gets diluted, have we not also lost just as much? And so somehow we have to be thinking about what it means to be a citizen…. Citizenship is really what's going to perpetuate us in the long run…. We really need to think about what is it that we need to be a citizen. And I think about it as… cultural literacy…. What does it take to be a culturally literate Odawa? What does it mean to be an informed citizen so that you can live up to your responsibilities and not just demand your rights?[32]

Different nations may answer these questions differently, and intriguing solutions, particularly regarding cultural literacy or engagement and the nature of connectedness within the nation, may yet emerge from their efforts. But the critical starting point is the freedom of the nation to choose its own solutions. In all three of the cases reviewed here, the end result reflected not a requirement set by the colonizer but an assertion of self-governing power by an Indigenous nation: the right of its people to decide for themselves who they are.

## IV. DISPUTE RESOLUTION AND THE PROVISION OF JUSTICE

As the United States gradually asserted and expanded its control over Native nations, it set out to dismantle most Indigenous governing systems, including Indigenous methods of resolving

[31] Ibid., pp. 36-38.

[32] Frank Ettawageshik, "Constitutional Reform: A Wrap-Up Discussion (Q&A)," video at Tribal Constitutions seminar, Native Nations Institute, University of Arizona, May 2, 2012, available at http://nnidatabase.org/db/video/constitutional-reform-wrap-discussion-qa

disputes, enforcing law, and maintaining order. “As part of this effort,” writes Stephen Pevar (2002), “the federal government sought to impose ‘white man’s law’ on Indian reservations” (p. 103).

It did so in part through the creation, in 1883, of Courts of Indian Offenses on most reservations, displacing traditional law and order systems. With only limited jurisdiction, “these courts were often administered by the tribes but were always under the control of federal agents. The rules and procedures governing the courts were issued by the Secretary of the Interior and were published in the Code of Federal Regulations (CFR)” (Pevar 2002, p. 103). Known as CFR courts, their primary function “was to provide Indians with a way to prosecute crimes and resolve disputes in a manner acceptable to federal officials” (ibid.). The crimes at issue, dictated by the Bureau of Indian Affairs in the Department of the Interior, tended to reflect the assimilationist thrust of federal policy, and included such things as traditional dances, polygamy, intoxication, and idleness.

Since passage of the Indian Reorganization Act in 1934, Native nations have had the recognized right to organize their own courts and create their own law and order codes, and beginning in the 1960s and 1970s “an availability of funds and the advent of self-determination gave tribes both the opportunity and the means to reestablish their own legal systems” (O’Brien 1989, p. 203). While some nations have continued to use the CFR courts, most Native nations in the U.S. today have formally constituted dispute resolution mechanisms of their own, usually (but not always) consisting of a tribal (nation) court. These courts can exercise substantial civil jurisdiction across an array of issues, and some exercise significant criminal jurisdiction as well.

They also have substantial freedom in court design and process. Paul Spruhan, assistant attorney general for the Litigation and Employment Unit at the Navajo Nation Department of Justice, points out that “all three branches of the federal government recognize and affirm that tribes are independent governments with authority separate from the states and the United States. With this comes… the right of tribal legislatures and courts to apply unique legal principles that reflect the values and public policy of that society” (2017, p. 32).

For example, in a 1988 decision of the Court of Indian Appeals of the **Ponca Tribe**, the court stated that “neither the Ponca Tribe nor its Election Board are [*sic*] restricted by the due process provisions of the U.S. constitution.”[33] It went on to argue that

> When analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law countries, upon which the United States' notions of due process are founded…. When entering the arena of due process in the context of an Indian tribe, courts should not

[33] *Election Board v. Snake,* 1 Okla. Tribal Ct. Rptr. 209 (Ponca Ct. Indian App. 1988), p. 226, quoted in Freitag (1997, p. 856).

> simply rely upon ideas of due process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government. That is not to say that the general concepts of due process analysis with regard to state and federal governments are wholly inapplicable to Indian governments, but these precedents are certainly not dispositive nor controlling in the tribal context. One should tread lightly when analyzing the scope and nature of tribal sovereignty and not make assumptions based upon a history and legal tradition that might be entirely foreign to an Indian nation.... Accordingly, we must look to the tribal law of the Poncas, not vague notions of federal and state due process, to determine not only the source of a right to sue but ultimately what process is due to the plaintiffs in this matter.[34]

One result of this freedom of design and process, according to legal scholar Justin Richland, is that tribal courts today "exhibit a breathtaking diversity in their structure, process, scope of jurisdiction, and the kinds of norms they enact and maintain" (Richland 2008, p. 12). But this raises issues of its own. Richland's comment from almost fifteen years ago remains relevant: "…for today's tribal jurists, the question concerning the relationship between norms of Anglo-American legal procedure and their unique tribal legal heritage is their fundamental jurisprudential concern" (2008, p. 16).

The issues involved vary but range from loss of knowledge of traditional legal principles and values or lack of agreement on just what they are, to pressure on Indigenous dispute resolution processes to adopt the dominant system's formality of rules and procedures, to learned comfort, over decades, with mainstream legal practices, despite their departure from older Indigenous traditions.[35] As a result, many Indigenous courts replicate mainstream judicial models not only in structure and process but even norms.[36] Many use classic western adversarial methods—who's right, who's wrong?—that result in winners and losers, often leaving conflicts or issues formally resolved but informally sustained.

This can be a source of tension in some Indigenous communities. As Vine Deloria, Jr. and Clifford Lytle pointed out forty years ago, "The greatest challenge faced by the modern tribal court system is in the harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence…. [In many past traditions] the desired resolution of an intratribal

[34] From the same decision, pp. 230-32, quoted in Freitag (1997, p. 857).

[35] Deloria and Lytle (1983) argue that "Under Anglo-American notions of criminal jurisprudence, the objectives are to establish fault or guilt and then to punish. The sentencing goals of retribution, revenge, and deterrence and isolation of the offender are extremely important…. Under the traditional Indian system the major objective was more to ensure restitution and compensation than retribution…. In most instances the system attempted to compensate the victim and his or her family and to solve the problem in such a manner than all could forgive and forget and continue to live within the tribal society in harmony with one another" (pp. 111-12).

[36] Fletcher (2020, ch. 2) provides a richly informative overview of tribal justice systems in the United States. For examples of how some tribes have specified judicial systems in their constitutions, see Tatum et al. (2014, ch.11).

dispute is one that benefits the whole Indian community (family) and not one designed to chastise an individual offender" (1983, p. 120).

In recent decades some Indigenous communities may have become more accustomed to the latter, more punitive approach, but anthropologist Larry Nesper has pointed to a related difficulty: "Tribes are fundamentally organized by kinship, and so they traditionally and typically resolve internal disputes in largely egalitarian councils using mediation. Courts, by contrast, are characteristic of more hierarchical sociopolitical formations… and typically empower impartial third party decision makers who authoritatively adjudicate" (2018, p. 88). Indigenous justice systems can find themselves under external (and sometimes internal) pressure to conform to mainstream models of jurisprudence while also being dependent, directly or indirectly, on some degree of mainstream funding for operations.

As Nesper suggests, for nations wishing to maintain control over dispute resolution and the provision of justice—and many view these as critically important governmental functions—these sorts of issues pose the question of how to maintain at once *both* external *and* internal legitimacy, presenting a face to the outside world that will discourage interference in what many nations view as essential aspects of self-government while at the same time performing in ways that their own people will trust and view as appropriate for them.[37] The danger is that without an external/internal balance, a tribal justice system might be viewed by the nation's own citizens as less an expression of endogenous governance than a vehicle of exogenous control, while being viewed from the outside as simply illegitimate.

While these challenges are substantial, they also have been productive of experimentation and creativity. For example, Raymond Austin, a former justice in the Navajo Nation Supreme Court, has written that when the Navajo Nation designed its court system, it assumed that a system "that looked and acted like an Anglo-American court system would be more palatable to non-Indian policymakers. The states would then leave the Navajo Nation alone to develop its law and justice institutions on its own terms" (2009, pp. 28-29).[38] Adopting mainstream models was a strategic decision. According to Tom Tso, former Chief Justice of that same court, "The

[37] Frank Pommersheim points out an aspect of this challenge facing tribal court jurisprudence: "In order to be credible to the law community both on and off the reservation and the larger society in general, tribal court decision making must be convincingly rendered in the craft and analytical practices of legal reasoning. This does not mean that this requirement is preemptive or exclusive of other concerns but only that it is necessary in a fundamental way." He goes on to remark that "Tribal culture provides a context for legal craft to be persuasive because it takes into account tribal history and tradition in the process of legal decision making… Sensitivity and awareness of (tribal) culture helps to insure that tribal court decision making will not only be analytically sound, but also culturally informed. In many ways, craft and culture are the cornerstones for building a sturdy and enduring tribal court jurisprudence" (quoted in Fletcher 2020, pp. 106-07).

[38] Some other nations have acted similarly. Jennifer Hendry and Melissa Tatum (2018) argue that "tribal legal orders have adapted the *form* of [mainstream] legal features or practices for the particular end of an increased understanding of this feature or practice *by* the federal legal order," and identify it as the "pragmatic action of translating normative cultural practices into identifiable legal forms…" (p. 176).

structure of our courts is based upon the Anglo court system, but generally the law we apply is our own" (2005, p. 33).[39]

Tso's comment refers specifically to the Navajo Nation court system but has wider applicability. Indigenous cultures are less likely to be apparent in the structure of court systems than in how cases are dealt with—court processes—and in reliance on what is often termed customary law or Indigenous common law.[40] Such law is often less concerned with punitive judicial outcomes than with reparative or restorative ones, leading to such practices as "talking circles, clan mothers' meetings, elders' panels, circle sentencing, and peacemaking… traditional mechanisms of mediation, consensus building, and reconciliation" (Flies-Away, Garrow, and Jorgensen 2007, p. 124; see also Austin 2011). This is part of what Russell Barsh has referred to as the "Indigenization" of tribal legal systems (1999, p. 74).

Some nations have taken this a step further, practicing what might be called preventive justice, a parallel to preventive health care. Instead of waiting for an offence to occur, they are intervening with individuals and families that are at risk and employing traditional cultural principles and other techniques in an effort to mend relationships and divert potential offenders toward more positive and beneficial paths. In mainstream society, such efforts are usually handled by social service agencies, perhaps under a court order. But it is common to find Native nations in the U.S. that view such matters as court business, leading to the development of such things as wellness courts and youth courts and to court-run programs that address critical social issues in the community.

For example, the **Yurok Tribe**, located along the Klamath River in what is now coastal northern California, established its own tribal court system in 1996. A mission statement says that the court's role is "to protect the values of the people, to support the development of those values with each member of the community, and to ensure that our responsibilities to protect our traditions and traditional lands are carried out" (quoted in Steinberger 2014, p. 2). But the court does this not only through its judicial approaches to offenses or disputes but also, according to its website, through court-overseen programs ranging from an adult wellness program to a program called *Skuy-ech-son'* ("to heal one's self") that works with individuals involved in physical or emotional abuse, from a reentry program for tribal citizens released from state and federal correctional institutions to support services for military veterans. The goal is to reduce the need for judicial services by intervening before offenses occur. Each of these programs uses and builds, to one degree or another, on Yurok cultural traditions.

There also are nations that run effective dispute resolution systems without recourse to anything that looks like a western court. Some of the more traditional Pueblo nations in what is now New Mexico, for example, rely on traditionally selected officials to settle disputes,

[39] Raymond Austin points out that "In the absence of statutory law, the Navajo Nation courts use Navajo common law as primary and substantive law to resolve legal issues. Navajo common law is also used to interpret Navajo statutes and non-Navajo laws…" (2011, p. 353).

[40] On Indigenous common law, see the following section on Making Law.

"operating under strict centuries-old cultural guidelines and the powerful expectations of the community that the officials will act selflessly and do the right thing" (Flies-Away, Garrow, and Jorgensen 2007, p. 143, and see Cornell and Kalt 1997).

Incorporating Indigenous traditions or principles into contemporary Indigenous jurisprudence clearly presents a challenge. Nonetheless, many Native nations see it as a crucial self-governance objective, one of the ways they can sustain the vitality of their cultures in the face of assimilationist policies and effects. Below, we look at four Indigenous nations that, in one way or another, are incorporating traditional principles or practices into their dispute resolution or justice systems.[41]

**Navajo Nation Judicial Branch.**[42] In 1958, in the aftermath of two major court decisions that upheld the adjudicatory and regulatory powers of the Navajo Nation, the Navajo Tribal Council—its legislative body—established a "Judicial Branch of the Navajo Nation Government," including trial and appellate courts. In doing so the Council also defined the courts' jurisdiction, provided for jury trials, and made a number of other determinations about how the system would operate. "On April 1, 1959, the Navajo Nation courts assumed the caseload of the decommissioned Navajo Court of Indian Offenses and the sitting judges of the former Navajo Court of Indian Offenses started their tenure as the founding group of Navajo Nation judges" (Austin 2009, p. 29).[43] However, the new court system was modeled on western courts and adopted much of the legal code provided by the Bureau of Indian Affairs as Navajo statutory law.

By the 1980s it had become clear to Navajo judges that there were aspects of the mainstream system that were incompatible with Navajo ways of life and counterproductive in the provision of justice. Acting on this perception, in 1982 the Judicial Branch of the Navajo Nation created the Navajo Peacemaker Court, later called the Navajo Peacemaker Division. The peacemaker system brings back into use traditional, community- and consensus-based dispute resolution methods. Robert Yazzie, former Chief Justice of the Navajo Supreme Court, says that peacemaking relies on "the talents of a *naat'aanii* (peacemaker)… chosen based on demonstrated abilities, wisdom, integrity, good character, and respect of the community," and on his or her knowledge. The naat'aanii has no coercive power but is, in essence, a mediator, working with both victim and perpetrator, their families, friends, and other community members to address the harm done, the reasons for

[41] Fletcher (2020) offers some examples and analysis of diverse tribal provisions for the use of customary law in tribal courts. See pp. 83-98.

[42] The following discussion draws largely on Austin (2009, 2011), Harvard Project on American Indian Economic Development (1999a), Yazzie (2005, 2008), Zion (1983), and materials in Fletcher (2020). Austin (2009) provides a comprehensive overview of the Navajo court system and its use of Navajo common law while Zion (1983) provides a detailed history of the early development of the Peacemaker approach within that system.

[43] Some traditional Navajo processes of law and justice had survived into the 1960s in parts of the Navajo Nation where Navajos resisted the punitive practices of western justice, continuing to rely as much as possible on Navajo common law and the restoration of "right relations (*hózhó*)." See Austin (2009, pp. 22-23).

it, and the steps that need to be taken to restore harmony and peace. “A naat’aanii acts as a guide,” says Yazzie, leading the process of talking things out and repairing broken relationships (2005, pp. 51-52; see also Zion 1983).[44]

Peacemaking does not replace the adversarial, Western approach to dispute resolution but instead provides an alternative to it, to be used in certain kinds of cases or when those involved request it. Decisions reached through peacemaking are recorded like other court decisions and are awarded the same status as those reached through the Western adversarial system, which also continues to function as an option for dispute resolution within the Navajo Judicial Branch.

Not only the Peacemaking Division but the entire system relies in part on Navajo common law. The Navajo Nation Code, Section 204, specifies choice of law in the workings of the Navajo courts:

> In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz’áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory law and regulations. The courts also shall use Diné bi beenahaz’áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts (quoted in Fletcher 2020, p. 84).

Traditional Navajos, writes Austin, understand this body of law as “values, norms, customs, and traditions that are transmitted orally across generations and which produce and maintain right relations, right relationships, and desirable outcomes in Navajo society” (p. 40). Says Yazzie, “The laws we use are not federal or state laws but our own" (2008, p. 49). More generally, writes Austin,

> The Navajo Nation judges enjoy a solid reputation for utilizing extant Navajo customs and traditions as law (Navajo common law) and blending the old with the new, that is, a process that meshes Navajo customs and traditions with relevant and beneficial parts of not only Anglo-American legal traditions, but also legal traditions from other parts of the world. The process of blending the old with the new uses a framework that gives primacy to Navajo philosophy and Navajo ways of doing things. Use of Navajo common law by Navajo judges and the Navajo Nation government, which has been described as a

[44] Flies-Away, Garrow, and Jorgensen (2007) provide a brief summary of peacemaking as it has been adopted not only by the Navajo court system but by a number of other Native nations in the United States and in Canada: “A community-inclusive approach, peacemaking brings together the affected parties… in a shared forum where they seek mutual agreement about how best to repair the harm caused by the offense, to prevent the offender from returning to harmful ways, and to restore and nourish personal and community relationships…. Native nations and their citizens report that peacemaking has proven a dynamic, culturally fortifying mechanism for mending the damage done between victim and offender and promoting the physical, emotional, social, and cultural health of their communities” (p. 124).

> Navajo legal revolution, is really the Navajo people defining Navajo Nation sovereignty the Navajo way—by relying on their own philosophy, customs, traditions, language, spirituality, and sense of place (2009, p. 18).

This orientation is also apparent in court procedure. In 2014, then Navajo Chief Justice Herb Yazzie offered one example of ways the system defers to Navajo custom and values. As summarized in an external report quoted by Matthew Fletcher (2020, p. 80), "…when a grandmother accompanies a young person to a hearing and would like an opportunity to speak, many court rules would dictate that unless she is on the witness list, the judge should not allow her to speak. But not allowing elders and community members to speak creates a feeling that nothing was resolved." Navajo court procedure is sufficiently flexible to take such principles into account.

**Organized Village of Kake.**[45] The legal and political position of Native peoples in Alaska is unusual in the U.S. context, thanks to, among other things, a distinctive history of U.S.-tribal relations there and a 1998 decision by the U.S. Supreme Court that, in effect, limited tribal jurisdiction.[46] One result, is that "Tribal self-determination in judicial matters has been a struggle in rural Alaska" (Jarrett and Hyslop 2014, p. 248).

Kake is a small community on Kupreanof Island in southeastern Alaska. About two thirds of Kake's population are Tlingit, the Indigenous people of the region. Despite its size, the community is organizationally complex. Kake is a municipality under the Alaska state constitution. The Organized Village of Kake is a tribal government organized under the U.S. Indian Reorganization Act of 1934. A village corporation holds tribal assets and is organized under the Alaska Native Claims Settlement Act of 1971. For years, the only local court process available to community members was the magistrate's court, a state institution.

In the 1990s Kake, like many isolated Indigenous communities, was dealing with high incidences of underage drinking, youth suicides, crime, domestic abuse of various kinds, and related problems. In 1998 Mike Jackson—a Tlingit community member and the local magistrate—learned of the peacemaking circles used to good effect by the Carcross Tlingits in the Yukon Territory of Canada. Those circles reminded him of techniques his grandfather and father had used, practices "that had fallen into relative disuse with the advent of Western law" (Jarrett and Hyslop 2014, p. 255). For Tlingits in Kake, this form of community justice was "reminiscent of the Deer People, an almost forgotten group of traditional Tlingit peacemakers who practiced healing, the restoration of relationships, and the prevention of further harms by consulting with all those affected by the actions of an offender" (Harvard Project on American Indian Economic Development 2003, p. 28).

[45] The following account is based largely on Jarrett and Hyslop (2014), Rieger (2001), Harvard Project on American Indian Economic Development (2003), and Ka.oosh (2014).

[46] *Alaska v. Native Village of Venetie Tribal Government* 522 US 520 (1998).

In 1999, with help from Carcross peacemakers, Kake community members formed the Healing Heart Council, made up of Tlingit community members, and initiated their own Circle Peacemaking, a reconciliation and sentencing process with a focus at first on youth offenders. But they did not simply import the Carcross model; they modified it "to more closely reflect local priorities of the Raven and Eagle moieties and their responsibilities… In so doing, the Kake version of the circle reincorporated clan identification and authority" (Rieger 2001, p. 7).

The Kake process begins when a juvenile enters a guilty plea in state court, at which point the court may turn the case over to the Healing Heart Council for sentencing.[47] The Council initiates Circle Peacemaking by bringing together the offender, victims, families, friends, church representatives, police, substance abuse counselors, and concerned community members. These participants sit in a circle while a Keeper of the Circle facilitates a discussion that typically lasts for hours, ending only when healing and forgiveness are apparent and consensus is reached about the offender's sentence. Circle participants then carry responsibility for assuring that the offender completes the sentence, which might include curfew, community service, a formal apology, meetings with elders, or other tasks. If necessary the circle can be repeated. Non-compliant offenders are returned to state court. In the program's first four years, only two offenders out of eighty rejected a circle's outcome and returned to state court for sentencing, and recidivism rates have been low.

This success led quickly led to the expansion of the process beyond juveniles to adult offenders and others in need who request Peacemaking. Circle Peacemaking "is now codified in the Tlingit Tribal Court rules, as acceptable alternative practices to the standard legal process" (Jarrett and Hyslop 2014, p. 256).

Mike Jackson points to some critical differences between that standard legal process and Circle Peacemaking. The standard process is adversarial (state vs. offender) where Peacemaking is based on consensus (community vs. problem). The issue in the standard process is broken laws; in Peacemaking it is broken relationships. The standard process employs punishment and control; the Peacemaking process uses healing and support.[48]

In the complex and conflicted jurisdictional setting of Alaska, the Organized Village of Kake, inspired by Tlingit innovations in the Yukon, has found a way not only to reinvigorate old cultural practices critical to community well-being but also to increase its control over a central governmental function: the resolution of disputes and the provision of justice.

[47] This paragraph is a modified version of the account of the peacemaking process in Harvard Project on American Indian Economic Development (2003, pp. 25-26).

[48] Ka.oosh (2014, slide 8).

**Hopi Tribal Court.**[49] As noted in the Constitutions section above, the Hopi Tribe is a composite of twelve autonomous villages that in 1936 adopted a constitution that for the first time linked the twelve villages under a single government and created a Hopi Tribal Council. For many years the Tribe, like many Indigenous nations in the United States, employed a Court of Indian Offenses, created by the federal Bureau of Indian Affairs, to resolve internal disputes, although Richland comments that this Court of Indian Offenses (like most such courts) "seemed designed more to meet the administrative concerns and assimilative goals of the [Bureau of Indian Affairs] superintendent than to address the needs of the Hopi people" (2008, p. 38).

In 1972 the tribe replaced this Court with a Hopi Tribal Court, with substantial civil and criminal jurisdiction, including both a trial court and an appellate court. While established not by the federal government but by an ordinance of the Hopi tribal government, that court also reflects, in both structure and operation, Anglo-American jurisprudential lines, favoring the adversarial processes typical of U.S. courts. However, in 1976 a resolution of the Hopi Tribal Council directed that in its decisions and procedures the court should give more "weight as precedent to the… customs, traditions and culture of the Hopi Tribe" than to U.S. federal and state law (quoted in Richland 2008, p. 50).[50]

Putting the resolution to work within the structure of the Hopi Tribal Court and within the complex relationships among the villages and between villages and Tribe is a challenging task, as accounts by both Richland (2008) and Sekaquaptewa (2000) make clear and as the Hopi Tribe Appellate Court itself has indicated. In a 1996 ruling, that court noted that

> Although Hopi customs, traditions and culture are to be considered by a trial court before it considers foreign [i.e., state or federal] laws, it is not enough just to say that they are 'mandatory' to use as if they could be quickly or easily applied. Hopi customs, traditions and culture are often unwritten, and this fact can make them more difficult to apply. While they can and should be used in a court of law, it is much easier to use codified foreign laws. That ease of use may convince a trial court to forego the difficulty and time needed to properly apply our own unwritten customs, traditions and culture.

[49] The following account draws largely on Richland (2008) and Sekaquaptewa (2000).

[50] Title 1 of the Hopi Code adopted in 2012 is emphatic on tribal autonomy, providing that "The Courts, in deciding matters of both substance and procedure, shall look to, and give weight as precedent to, the following: (a) The Hopi Constitution and Bylaws; (b) Codes, ordinances and laws enacted by the Tribe; (c) Resolutions passed by the Tribal Council; (d) customs, traditions, culture and common law of the Hopi Tribe; (e) Laws, rules and regulations and cases of the Federal Government, which the Judge or Justice may use as guidance. This provision shall not, however, be deemed to be an adoption of such laws or rules as the law of the Hopi Tribe nor as a grant or cession of any right, power or authority by the Hopi Tribe to the Federal Government; (f) The laws and rules, and cases interpreting such laws and rules, of the State of Arizona. This provision shall not be deemed to be an adoption of such laws or rules as the law of the Hopi Tribe nor as a grant or cession of any right, power or authority by the Hopi Tribe to the State of Arizona" (Hopi Tribe 2012, pp. 8-9).

> However, the trial court must apply this important source of law when it is relevant (quoted in Fletcher 2020, p. 93).

In a 1998 decision, the Appellate Court criticized a trial court decision in the following words: "Although the trial court's opinion… is a thoughtful application of federal standing principles to a Hopi village dispute, it inappropriately applies foreign law without analyzing that law to determine whether it is consistent with Hopi custom and tradition" (Quoted in Fletcher 2020, p. 697).

The "difficulty and time needed" to determine relevance and application means that serious discussions of custom, tradition, clan relations, village autonomy, Hopi identity, and related topics commonly appear in proceedings of the Hopi Tribal Court. Here's Richland again:

> Qualitatively, the instances of talk about cultural identity and tradition that emerge in Hopi courtroom interactions reveal a wide diversity of form, content, and distribution of speaking rights (who can say what, and how, about tradition). These notions are expressed by Hopis and non-Hopis, and by laypersons, advocates, and judges, in both English and Hopi. They also appear throughout the various genres of Hopi courtroom discourse, including opening arguments, direct and cross-examinations of witnesses, witness testimony, objections, and even in the rulings by judges" (2008, p. 56).

Sekaquaptewa writes:

> Hopi judges decide cases applying first Hopi constitutional and tribal law, then by applying Hopi custom, and finally, where relevant, importing selected or modified foreign law through the judicial opinion drafting process. Because Hopi constitutional and statutory law recognizes traditional legal authorities and jurisdiction, an exploration of "custom" at Hopi goes beyond identification and application of Hopi values in the tribal courts. First and foremost at Hopi, the tribal custom law area is about identifying legal authorities, determining their subject matter jurisdiction, and determining whether the tribal courts have concurrent jurisdiction to hear a particular type of dispute before them (2000, p. 773-74).

To the outside observer, the Hopi Tribal Court looks, and generally appears to operate, like a mainstream court in the United States. However, within a largely Anglo-American derivative structure, Hopi culture is a recurrent, even ever-present factor. Hopi traditions, values, and evolving norms are topics of extensive courtroom exploration, discussion, and debate and often shape judicial outcomes.

**Seminole Nation of Oklahoma.**[51] In 1969 the Seminole Nation adopted, for the first time, a written constitution of its own design. The constitution specified executive and legislative branches of government, but for a number of reasons, including a federal government view that the tribe lacked significant jurisdiction, the constitution did not include a judicial branch. That later changed as a series of external court decisions opened the door to the creation of a tribal judiciary, and in 2008 the Nation added a Judicial Branch to its government.

Attorney John Haney writes that "the importance of Seminole custom and tradition has been codified in the Seminole Code of Laws." He quotes the code, which specifies that "in matters not covered by Statute, the Court shall apply traditional tribal customs and usages, which shall be called the Common Law." He adds that the Nation "has been making a special effort to develop laws that look back to old written clan laws from the 19th century," laws developed following an 1856 treaty with the United States.

But the nation is looking forward, too, fully expecting that Seminole-made law—a form of common law—will emerge over time through the resolution of future disputes (2014, p. 25). Haney quotes the former Assistant Chief of the Nation, Ella Colman, who "described the future role of the tribal court system as keeping Seminole 'culture, traditions, beliefs, values and ceremonial songs, church hymns, and language alive, and protect[ing] and respect[ing] tribal sovereignty…'" (2014, pp. 25-26).

Introducing another relevant factor in Indigenous dispute resolution systems, and based on a large study of tribal courts, legal scholars Robert Cooter and Wolfgang Fikentscher pointed out in the late 1990s that "Indian judges inevitably draw upon their own sense of justice and fairness in deciding cases and interpreting legislation so their decisions reflect custom and tradition" (1998, p. 562). They concluded that, as a consequence, "tribal law is distinctly more Indian as applied than written" (p. 563).

This ongoing variation and creativity in the arena of dispute resolution is partly a result of learning across intertribal and even—as the Kake example shows—international boundaries as nations discover what each other is doing and learn what works. But it also results sometimes from necessity. The late George Bennett, former chair of the Grand Traverse Band of Ottawa and Chippewa Indians, once told us, "We added a peacemaker component to our court system because in a small community like ours, the adversarial western system is sometimes too divisive. It puts too many relationships at risk."[52]

[51] This brief account is based on Haney (2014).

[52] In conversation, early 2000s. Much the same point was made by the same nation's former judge Michael Petoskey: "The way we do things in an adversarial court is really counterproductive…. We are saying all the negative things about people instead of working together toward common ground. Things peoples say about each

As Native nations look for ways to incorporate Indigenous values and traditions in their dispute resolution systems, those systems also are becoming important arenas of education. This is readily apparent in some of the decisions of the Navajo Nation courts (see various examples in Austin 2009) and in one of the Oneida cases reviewed by Nesper (2018), where judges in effect find themselves teaching what some of those values and traditions are and mean and how they can be applied in contemporary times. It also is apparent, in a different way, in the back and forth among judges, elders, and other participants in the Hopi Tribal Court's proceedings as they struggle together with the complexities of language and divergent meanings (Richland 2008). But this is what nation rebuilding often requires: an effort, under new circumstances, to reach a shared understanding that can serve the nation's long-term goals of self-determination, self-government, and justice for its people.

## V. MAKING LAW

According to Matthew Fletcher in *American Indian Tribal Law*, "There are 573 federally recognized Indian tribes in the United States as of this writing. Each Indian nation has the authority, often expressed in an organic document such as a tribal constitution or a treaty with the United States, to legislate for the general welfare of the tribe, its people, and its land" (2020, p. xxi).[53] In other words, Native nations have the authority to make law, to establish for themselves laws that the nation intends to observe and enforce.

The exercise of that authority has changed over time. From the 1930s into the 1960s and early 1970s, years of mostly modest tribal self-government under direct U.S. administrative control, some nations simply adopted portions of the existing federal Bureau of Indian Affairs Law and Order Code as their own statutory law, enforced through the federally established Courts of Indian Offences.[54] Later, as circumstances changed under U.S. policies of self-determination, and as many nations claimed and began to implement more governing authority of their own, they began making new law, particularly in areas of activity where they were expanding that authority, including domestic relations, child welfare, criminal behavior, land use, environmental regulation, and others.

As Native nations engaged increasingly in making their own law, many of them took up the question of how to incorporate and apply tribal customs and traditions. The task is complicated by history, among other things. Some nations have lost critical knowledge about those customs and traditions; in some nations there are disagreements about their content or meaning; and there may be disagreements about their appropriate place in contemporary tribal law.[55]

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other can be very hurtful and lasting" (quoted in Fletcher 2020, p. 72; see also the report on the Grand Traverse tribal court in Harvard Project on American Indian Economic Development (1999c)).

[53] As of November 2022, the number of federally recognized tribes was 574.

[54] See the previous section on dispute resolution and the provision of justice.

[55] Fletcher writes that "'Tribal law' is to be distinguished from 'federal Indian law.' Loosely speaking, federal Indian law is the law covering the relationships between the federal, state, and tribal governments. The key feature of

Despite such issues, a number of Native nations treat custom and tradition as common law.[56] As shown in the preceding section of this paper, this is particularly apparent in dispute resolution and in the actions of tribal courts. Here is the view expressed by the **Navajo Nation** court system:

> The Navajo Nation courts prefer to call… the norms, values, customs, and traditions of the Navajo people, Navajo common law. In 1987 the Navajo Nation Supreme Court proclaimed that the customs and traditions that Navajos understand are collectively Navajo common law: "Because established Navajo customs and traditions have the force of law, this Court agrees with the Window Rock District Court in announcing its preference for the term 'Navajo common law' rather than 'custom,' as that term properly emphasizes the fact that Navajo custom and tradition *is* law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law (emphasis in original)" (Austin 2009, pp. 44-45).[57]

The **Hoopa Valley** Tribal Code states that

> The traditional law of the Hoopa Valley Tribe is the common law of the Tribe tantamount to the written law of the Tribe and will be applied in all situations where it is relevant to the issues raised in an action before the [Hoopa Valley] Court. The Court will first look to the laws adopted by the Tribe and to the Constitution and Bylaws of the Hoopa Valley Tribe. If no written Tribal law applies to a cause of action or the issues involved in an action, the Court will look to the Tribe's traditional law and if it finds the traditional law to be applicable in settling the dispute, will base its decision on traditional Tribal law (quoted in Fletcher 2020, p. 87).

The Tribal Code of the **Kenaitze Indian Tribe** of the Kenai Peninsula in what is now the state of Alaska requires that "To ensure the efficient and fair administration of justice, the Tribal Court shall continue to resolve conflicts and disputes and enforce Tribal Laws through the application

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federal Indian law is the exclusion of federal and state laws from the internal governance of Indian tribes. In short, every Indian nation is free to adopt its own laws and be ruled by them" (2020, p. xxi). The result is tribal law. See also Austin (2011), showing that "Indian nations have proven that traditional values work very well when used as law in Indian nation courts" (p. 351).

[56] Hopi legal scholar Pat Sekaquaptewa argues that "In tribal communities, development of the common law is the key to ensuring tribal ownership over once imposed justice systems and often imported foreign legal standards" (2000, p. 762).

[57] The relevant reference is *In re Estate of Belone, 5 Navajo Reporter,* [Navajo Nation Sup. Ct. 1987], 161-68). Austin points out that "Navajo common law is not difficult to find and understand. Navajo court opinions are published in the *Navajo Reporter* and the *Indian Law Reporter* and are available through VersusLaw, a commercial online legal research source. The written decisions of the Navajo Nation courts contain generous amounts of Navajo common law with appropriate explanations" (2009, p. 45). Navajo Chief Justice Herb Yazzie points out that court transcripts are provided in both Diné and English (an improvement over previous practice when the tribe was using non-Navajo contract reporters). See Fletcher (2020, p. 80).

of Cultural Traditions, Customary and Traditional Values, Written Law, Codes, and Ordinances" (quoted in Fletcher 2020, p. 87).

Some nations in various ways qualify or restrict the use of custom or tradition. The **Winnebago Tribe of Nebraska**, for example, has a court rule that "mandates that the tribal court 'apply traditional Tribal customs and usages, which shall be called the common law,' but only if no tribal statute answers the legal question…. The rule also provides that '[w]hen in doubt as to the Tribal common law, the Court may request the advice of counselors and Tribal elders familiar with it'" (Fletcher 2020, p. 89).

As we already suggested in the preceding section on dispute resolution, and as with common law more generally, this means that a good deal of tribal law is made by tribal courts in the process of resolving various disputes. In some ways, this follows an older Indigenous tradition. Vine Deloria, Jr. and Clifford Lytle pointed out in 1983 that "the primary thrust of traditional government was more judicial than legislative in nature…. Unless an offense endangered the well-being of the tribe, the issue was to be settled privately among those affected…. When the bargaining and negotiations failed, the chief would mediate and make every effort to preserve the peace…. This adjudicatory nature of traditional tribal government stands in sharp contrast to the legislative orientation that the European influence would later introduce into Indian Country" (1983, p. 89).[58]

Just as tribal courts in the U.S. can make tribal law, they also can modify it. Austin offers an example from the Navajo Nation. In a 1983 dispute over the distribution of marital property following a divorce, the Navajo court followed Navajo tradition, in which all marital property belongs to the woman. In more recent decisions, however, the Navajo courts have made clear that they prefer a more equal distribution of property between the parties to the divorce (Austin 2009, pp. 181-82). Thus law based on tradition—like traditions themselves—may change over time.

Making tribal law, however, happens not only through tribal courts or other dispute resolution mechanisms. Notwithstanding Deloria and Lytle's emphasis, noted above, on this more "adjudicatory nature of traditional tribal government," most contemporary Native nations in the U.S. also have distinct legislative or lawmaking bodies variously referred to as tribal councils, general councils, business committees, or even congresses. Within certain constraints imposed by U.S. law (for example, the Major Crimes Act of 1885 that placed certain crimes—among them murder and rape—under federal jurisdiction, or the *Oliphant* decision in which the U.S. Supreme Court determined that tribal courts have no criminal jurisdiction over non-Indians[59]), these bodies create contemporary Native nation law through the use of resolutions,

[58] Matthew Fletcher describes this as an inclination to "resolve disputes as they arose, rather than to legislate and enforce" (2020, p. 11).

[59] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *Oliphant* constituted a significant restriction on tribal jurisdiction in the United States, in effect placing above the law all non-Indian offenders acting within Indian Country, defined in federal statute as "all land within the limits of any Indian reservation under the jurisdiction of

ordinances, and statutes that express community standards for appropriate civil behavior and determine criminal infractions.

In the process, these legislative entities typically wrestle with some of the same dilemmas that vex the authors of tribal constitutions: to what extent should Native nations' laws reflect Indigenous cultures? If some aspects of Indigenous cultures depart from or go beyond mainstream principles or assumptions, can they and should they be incorporated into tribal law?

Approaches to such issues vary among Native nations, and may vary even within a nation. For example, one nation's legislature may wish to consult with cultural advisers concerning probate law but opt to mimic a model code from the mainstream for business law.[60] Legislators also have to consider the risks and benefits of codifying custom and tradition. On one hand, codification can bring clarity in situations where populations with increasingly dissimilar experiences may make different assumptions about the law or its meanings. On the other hand, as Bruce Miller has pointed out, in some cases codifying Indigenous justice practices may eliminate an inherent flexibility. "My concern," he writes, "is that communities will be stuck with them in later years when the political issues have shifted and new representations are needed" (2001, p. 16).

The previous section (IV) on dispute resolution offered a number of examples of ways that culture shapes not only the content of law but also the processes of judicial decision-making and, thereby, judicial law-making. Processes of legislative law-making also may be culturally mediated. For example, some nations may require a specified degree of consensus among councilors, clans, districts, or citizens generally before a new law is formally adopted. Laws on some topics may require consultation with certain parties, such as elders. Some nations may require that all proposed laws be vetted in community meetings.

Such processes may reflect cultural principles or values, but they also constitute opportunities for dialogue about culture itself, about what those principles or values may be and about whether—and how—they should be embodied in the nation's governing system. Thus law making is not only affected by culture; it is an arena in which culture itself sometimes becomes a subject.

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the United States government…, all dependent Indian communities within the borders of the United States…, and… all Indian allotments, the Indian titles to which have not been extinguished…" (quoted in Pevar 2002, pp. 21-22). Combined with the fact that crimes committed by non-Natives on Indian reservations have often been "a low priority of state and federal law enforcement and prosecutors" (Garrow and Deer 2004, p. 97), this turned Indian women within Indian Country into low-risk targets of sexual assault by non-Native predators, with predictable results (see, for example, Amnesty International 2007). In an inexcusably tardy response to what quickly became a critical situation, the U.S. Congress passed the Violence Against Women Reauthorization Act of 2013, which recognized tribal jurisdiction "over domestic violence, dating violence, and violations of protective orders that occur on their lands," regardless of the identity of the offender (Public Law No: 113-4 (03/07/2013), Section 904).

[60] Fletcher (2020) offers numerous examples of variation in tribal law across Native nations and across substantive areas of law.

## VI. SELECTION OF LEADERS

In both Canada and the United States, external governing models, such as those set out in the Indian Act of 1876 in Canada and encouraged under the Indian Reorganization Act of 1934 in the United States, specify or promote the selection of leaders via election: a taken-for-granted best practice in most western democracies. But democracy can take—and does take—a variety of forms. The political traditions of many Indigenous nations, while adhering to the core democratic principle that governors should be subject to the consent of the governed, used other methods of obtaining that consent, variously embedding the selection process in the hands of trusted elders or senior members of lineages, relying on one or another version of consensus decision-making, or using some other, non-electoral way of assuring the support and trust of the community in those chosen to lead it. However achieved, that support and trust, that community consent, were the fundamental sources of a leader's power.[61]

Today, most Indigenous nations in both countries use elections as means of leadership selection. But those same elections can become divisive sources of recurrent upheaval as families or factions compete for the perks of office—the ability to control limited resources in economically struggling communities—and recycle such competition year after year, often breeding community cynicism, division, and distrust in their governing institutions. This has led some nations to retain, restore, or otherwise draw on their own traditions.

We have already covered this topic in the case of Cochiti Pueblo, where leaders are appointed by the senior spiritual leader of the Pueblo (see the Constitutions section above). Below we briefly consider leadership selection practices at Laguna Pueblo, another of the Pueblo nations located in what is now New Mexico, and a distinctive aspect of the leadership selection process as specified in the Hopi Tribe's constitution.

**Laguna Pueblo.**[62] The Pueblo of Laguna includes six villages located on approximately half a million acres of land in the foothills of Mount Taylor west of Albuquerque, New Mexico. The

[61] In his analysis of Indigenous political organization in the Americas, Pierre Clastres refers to "a vast constellation of societies in which the holders of what elsewhere would be called power are actually without power." He goes on to say of these communities that "The chief is there to serve society; it is society as such—the real locus of power—that exercises its authority over the chief" (1977, pp. 5, 175). In broad terms, this is democracy, and we believe it is what Onondaga elder Oren Lyons had in mind when he said that "From what I know of all the people I have met and places I have traveled in Indian Country, they are all democratic" (2007, p. vii). He wasn't referring to elections or to the common mis-reduction of democracy to "one person, one vote" but instead to a more generic version of democracy as *rule by the people* who, via their consent, however achieved, allow their leader to serve. Even at Cochiti Pueblo, where the senior leadership is chosen yearly by the cacique, the public portion of the process begins with the cacique asking those assembled in the plaza of the village, "Do you want to continue to govern ourselves this way?" For generations, the answer has been "yes," a necessary and fundamentally democratic step in the process. For an overview of some of the variation in systems of government and leadership selection across Indigenous North America, see Driver (1969).

[62] This discussion of Laguna government is based largely on multiple conversations with Richard Luarkie, a former governor of the Pueblo, on several presentations Governor Luarkie has made to various audiences, and on a

primary decision-making body in the Pueblo is the Council. Each of the six Laguna villages sends two representatives and a staff official to sit on the Council. The staff official is analogous to the "mayor" of the village. The staff officials also serve in an advisory role to the Governor, similar to cabinet secretaries in state or federal government structures.

These representatives are described as elected officials, and voting is involved in their selection, but the method is distinctive. By long-standing processes not laid down in any written constitution, each village nominates qualified individuals to serve as council representatives, with qualification based on evidence of the individuals' accumulated knowledge of the tribe and its governance system, individual qualities, and character. Once discussion among village citizens yields a decision on who the nominees are, votes are cast by meeting participants, and the person receiving the highest number of votes is appointed to a two-year term.

Richard Luarkie, a former Laguna governor, points out, however, that at Laguna, "our structure does not allow for a person to declare candidacy or to campaign. If a person does this, they are admonished and/or not considered for tribal council or leadership positions. The motive behind this teaching is that leadership is not about self-service, self-promotion, or criticism/degradation of others. It's about working for everyone in the tribe, whether they agree with you or not. The focus is on the whole, not on the individual. The evidence of how you live your life is what matters; this is what the people base their nominations on."[63]

As one man in his late thirties or early forties, chosen by his village to serve, informed us, "When they tell you that you're the one to serve on council, they're not giving you power. They're giving you responsibility. You know they'll be watching. It's sobering."

**The Hopi Tribe.** As noted in the section on Constitutions above, the Hopi Tribe links twelve villages in an unprecedented tribal government. The constitution specifies that each village can send two representatives to sit on the Tribal Council for terms of two years. But it leaves the selection process up to the villages themselves: "Each village shall decide for itself how it chooses its representatives…"

That done, however, the constitution goes on to say that "Representatives shall be recognized by the Tribal Council only if they are certified by the Kikmongwi of their respective villages."[64] The Kikmongwi are the leaders, or chiefs, of the villages in the traditional Hopi governing system in which each village was autonomous. The constitution thus makes representatives of the old way—the Kikmongwi—gatekeepers to the new.

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presentation by the Laguna Pueblo Council to a visiting group of Aboriginal Australians, at Laguna, February 13, 2017.

[63] Written email communication, November 2, 2022.

[64] See the Hopi Tribal Constitution, Article IV, Section 4, at https://www.narf.org/nill/constitutions/hopi/hopi_const_1993.pdf, p. 4.

Without certification by the traditional leadership of the village, you cannot be seated on the Council.

## VII. CHILD WELFARE

In 1978 the U.S. Congress passed the Indian Child Welfare Act (ICWA). The Act formally recognized the inherent jurisdiction of Indigenous nations over child welfare cases involving children who are citizens of those nations. It also recognized tribal codes as the appropriate mechanisms for implementing that jurisdiction and tribal courts as the appropriate venues for relevant hearings and decisions.[65]

In response to ICWA a large number of Indigenous nations in the U.S. proceeded to establish child welfare codes and use them in tribal courts. In some cases tribes have simply adopted state codes, replicating them in tribal ones. But in other cases, tribes have rethought prevailing, mainstream approaches to child welfare, reshaping codes to reflect tribal concerns with culture and community. Here are two examples.

**Port Gamble S'Klallam Tribe**. Located in what is now the State of Washington, the Port Gamble S'Klallam Tribe states on its website that its child welfare program "offers services in a way that… respects and preserves the culture, values, and traditions of the Port Gamble S'Klallam Tribe."[66] S'Klallam values are made explicit in the code, which conceives care of children as both a family and a tribal responsibility. Holding that the nation itself is part of the child's family, the code emphasizes the importance of ongoing roles for parents, extended family, and the nation in the life of the child.

The Tribe's provisions for involuntarily terminating parental rights are more stringent than state rules, doing more to try to sustain parental relationships. S'Klallam teachings recognize that parents may always have gifts to offer their children, even if they are unable to provide continuing care—a departure from state and federal child welfare programs. If for some reason a child can no longer remain safely in the home, parents and relatives participate in planning for the child's future. The code also requires that custody determinations must consider how children will retain significant contact with parents, extended family, and the S'Klallam way.

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[65] ICWA recently was challenged in the U.S. Supreme Court as racially discriminatory. In a major decision in June of this year the Court turned down the challenge, affirming tribal jurisdiction. See *Haaland v. Brackeen,* 599 U.S. (2023) and, for some background, a 2022 interview with Professor Joseph Singer in *Harvard Law Today* at https://hls.harvard.edu/today/supreme-court-preview-brackeen-v-haaland/.

[66] See https://www.pgst.nsn.us/tribal-programs/tribal-services/children-family-services/family-care-coordinator-program-icw. The following account is an abridged and slightly modified version of Harvard Project on American Indian Economic Development (2014), accessible at https://www.pgst.nsn.us/tribal-programs/tribal-services/children-family-services/family-care-coordinator-program-icw.

Furthermore, in an important exercise of autonomy and self-government, the Tribe reached an agreement with the State of Washington through which the Tribe can license its own foster homes according to tribal standards. As a result, the number of children going into foster care outside the nation has dropped dramatically.[67]

**Sitka Tribe of Alaska.**[68] Located on Baranoff Island in southeast Alaska, the Sitka Tribe shares with many others a history of trauma, including the loss of many of its children over the years. This history was partly a product of assimilationist policies that emphasized the removal of children from the community and placing them in distant residential schools, undermining their relationships to community and culture, and partly a product of severe state child welfare policies that were quick to terminate parental rights and adopt children into non-tribal homes. The tribe resisted these policies with protest and litigation but achieved few positive results, continuing an adversarial relationship between the tribe and the State of Alaska.

In 2001 a committee of tribal elders called "For Our Grandchildren" urged Sitka leaders to take whatever steps necessary to secure the safety, health, and cultural connections of future generations of Sitka children. In response, the Tribe decided it was time to move beyond its grievance-based adversarial approach and instead reach out to the State's child protection system and explore a more collaborative relationship. With effort and patience, its willingness to engage and collaborate eventually produced a joint commitment between the Tribe and the State to work together. Toward this goal they engaged in extensive meetings, workshops, and cross-training. State and tribal caseworkers enroll together in both the State's child-welfare trainings and in the Tribe's ICWA-related trainings, which include cultural curricula, and work together to enhance shared understandings of the issues facing Indigenous children. Cases involving tribal children are now handled cooperatively. As a result, the Tribe is now involved in every case involving a tribal child and has achieved one of the lowest child removal rates in Alaska. Most children in need of care are cared for by relatives or by other tribal citizens.

The 2018 report on the Sitka Tribe's program states that "The best interest of the child is carefully weighed on a case-by-case basis; in those special circumstances where a non-ICWA placement is warranted, caregivers are required to sign a cultural connection agreement to secure the Tribe's blessing going forward. These agreements insure that all children, regardless of placement, are entitled to know who they are, have the opportunity to engage with healthy extended family, and to remain connected to the Sitka Tribe as valuable and productive citizens" (Harvard Project on American Indian Economic Development 2018, p. 41).

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[67] Since the 1990s the Fond du Lac Band of Lake Superior Chippewa, located in what is now the State of Minnesota, has been licensing foster care homes not only on *but off* its reservation through its Fond du Lac Foster Care Licensing and Placement Agency, a tribal entity. See Harvard Project on American Indian Economic Development (1999b).

[68] This account is based on Harvard Project on American Indian Economic Development (2018).

Child welfare issues arise not only in cases of child endangerment or abuse but in cases of divorce and child custody, and traditional norms or values can play a role in these as well. Ray Austin quotes a decision by one of the Navajo trial courts in determining child custody in a divorce case: "This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan." The court emphasized the importance of a child's relationships not only with parents but with "members of an extended family." Based on these principles, the court concluded that in this case joint parental custody was in the best interests of the child (Austin 2009, p. 174).

There also is a good deal of experimentation underway as Native nations not only reclaim control over child welfare but search for more effective child-welfare strategies. For example, the Yurok Tribe's child support program allows tribal members to provide non-monetary forms of child support, such as food and labor, in place of cash payments (Steinberger 2014, pp. 2-3).

A 2016 review of more than 100 child welfare codes adopted by Native nations in the United States found numerous echoes of the thinking apparent in these examples. While variation among codes is substantial, a significant number of them:

- Give child welfare programs the authority to determine, in cases of neglect or abuse, if it makes sense to first try alternative strategies to removing the child;

- Begin by wrapping services around families in trouble, trying to address the issues that produced the problem in the first place, before considering removal;

- Treat termination of parental rights as a last resort, to be applied only when other strategies—perhaps including temporary removal of the child from the home—have failed;

- Prioritize familial and cultural continuity, asking "is there a way to address the situation while retaining for this child links to relatives and engagement with the community and the nation's culture?"

- Conceive "family" in broad terms that include various versions of the extended family or even clan relatives as preferred candidates to serve in the caretaker role, either temporarily or permanently.[69]

## VIII. CONCLUSION

We began this paper by referring to two self-determination goals of Indigenous peoples in the CANZUS states: to regain the right to govern their lands, communities, and affairs themselves,

[69] Starks et al. (2016).

and to regain the right to make their own choices about *how* to govern. Over the last several decades, Native nations in the U.S. have been aggressive on both fronts: pushing against externally imposed jurisdictional limits and building governments that, in various ways, incorporate Indigenous values, practices, and organizational preferences. These initiatives remain works in progress, but the progress has been substantial.

Of course a common critique is that while these efforts have led to change, both effort and impact are themselves limited by the decisions, laws, and policies of the colonizer. Whatever sovereignty Native nations claim ultimately is subordinate, in practice, to a more powerful and comprehensive sovereignty: that of the United States. True enough. Native nations may never fully escape the constraints imposed upon them by the encompassing society and its decisions unless and until that society is itself somehow transformed.

But consider what Native nations already have accomplished. Our brief accounts refer only to the United States and cover only the six aspects of Indigenous government that we specified at the start of this paper. We could have added others, from natural resource management and environmental regulation to education, from the reorganization of social service provision to policing—all arenas not only of Indigenous agency but of Indigenous cultural introductions. The specifics vary from nation to nation, but the evidence is ample and rapidly growing: Native nations are creating capable governments with substantive decision-making power, and they are using those governments effectively to address the issues that matter most to them. In the process they also are expanding, in many cases, the boundaries of their jurisdiction and are rewriting, in effect, the governmental rule book, from constitutions to policies to regulatory requirements.

These are *polities—governments*—in action. Their political authority, admittedly, is limited to the spaces they can find or pry open in the constraint regimes of settler colonialism. But to therefore minimize their successes is to deny their apparent and substantial impact on Indigenous lives.

Australian scholar Elizabeth Strakosch asks (2015, pp. 61-62): "…why does the existence of settler sovereignty necessarily negate the existence of Indigenous sovereignty? We assume that it does, because we assume that sovereignty's own claims about itself are true—it is, as it itself claims, a zero-sum game." She goes on to argue for an understanding of sovereignty "as a practice of power." This means, she writes, "that we can refuse to take the claims of sovereignty at face value—especially the claim that it is possible for only one unified political authority to exist in a geographical area. This claim itself, when it is taken for a fact rather than a claim, undermines the possibility of acknowledging the ongoing existence of Indigenous political life" (pp. 66-67).

That existence may be more or less fragile, depending on the current laws and leadership of individual settler-colonial states—clearly a vulnerability—but it is also real. The "practice of power"—which in the Indigenous world is at the same time an assumption of responsibility—

can have practical and profound effects, not only on jurisdictional boundaries but on the Indigenous experience.

Consider, for example, the following account. Jaime Pinkham, former council member and treasurer of the **Nez Perce Tribe**, tells it this way:

> In the mid-1990s, the U.S. government moved to reintroduce gray wolves to parts of their historic range, including a majority of the Nez Perce ancestral homeland in central Idaho. Typically in such species-recovery actions, the federal government partners with state agencies in implementation. But in Idaho, the state wildlife agency had to get legislative approval for any recovery plan, and Idaho is a conservative state. The legislature moved to halt this nonsense about returning wolves to the state.
>
> The Nez Perce were on the other side of this debate, favoring wolf reintroduction. After all, the history of the Nez Perce and the history of the wolf mirrored each other. As the Euro-American trailblazers sought to tame and bring order to the frontier, they attempted to rid the land of barriers and threats to their way of life. The Nez Perce and the wolf were obstacles. We both were dispossessed (2019, p. 300).

When Idaho declined to partner with the U.S. government in wolf recovery, the Nez Perce Tribe stepped in and forged an agreement with the U.S. to act as its partner in managing wolf recovery statewide. This was a major challenge: monitoring and managing the restoration of an apex predator across vast wilderness lands in a hostile political environment. Nonetheless, the Tribe succeeded, and it did so within five years, yielding healthy wolf packs and sufficient breeding pairs to sustain them.

This is in part a governance story. The wolf project forced the Nez Perce Tribe to ramp up its organizational, managerial, technical, and even political capacities. Writes Pinkham, “We learned that flexing our sovereignty muscles required us to develop our governance muscles as well” (p. 304). Nez Perce investments of time and energy in strengthening their own governing systems and capacity not only enabled wolf recovery; they brought benefits to others of the nation’s activities as well.

But this also is a cultural story, and in two ways. First, it shows how cultural principles and practices can inspire and shape governmental organization and activity. “Bringing wolves home to Idaho,” says Pinkham, “was not just about biology. It also was about restoring a tribal voice to the land” (p. 303). Nez Perce governmental strengthening was a direct response to what the nation saw, once the opportunity presented itself, as a cultural imperative.

Second, it also shows how capable government can strengthen cultural principles and practices. “As the wolf returned, so did some of the cultural practices that, in the absence of the wolf, had been fading. Naming ceremonies began to include wolf-related names again; the old stories that for generations had told of the relationship between wolves and the Nez Perce, stories that had nearly disappeared, were being told again.” (p. 303). Adds Pinkham, “Both the wolf

and the Nez Perce regained our rightful place not just physically but also socially, politically, and spiritually as occupants on lands from which we both were once removed" (p. 301).

In other words, the relationship between government and culture potentially goes both ways: culture strengthening government, government strengthening culture.

What is also apparent in these accounts is that Indigenous cultures play diverse roles in Indigenous government in the United States. In some cases a nation's culture provides its government with purpose (see, for example, the constitutional preambles on pp. 12-13 above). In some it offers practical tools for governing (for example, peacemaking). It may provide a nation's government with directions on how to do things (see the sections on child welfare codes and leadership selection) or limit what a nation's government can do (as it does, in quite different ways, through the Osage and Hopi constitutions). And for some nations, it provides what amounts to a comprehensive plan for governing (for example, Cochiti Pueblo). But in all the cases reviewed here and in almost all the many nations we have worked with over the years, in the United States and beyond, figuring out the appropriate role of culture in the nation's government has been a central community concern.

In the CANZUS countries, "nations within"[70] face a complex task. On one hand they have their own visions and priorities to pursue; on the other, they have to operate within the legal and political confines and policies of the nation-states that have displaced them from their lands. They can resist those confines and policies, and many do so on a daily basis. But they have to take them into account.

As both Larry Nesper and Frank Pommersheim have noted in different ways (see p. 20 above), this reflects a particular burden that Indigenous nations, committed to genuine self-government, have to carry: the need to maintain legitimacy both with their own people and, as a hedge against interference, with an encompassing society that often does things very differently. For many, this has meant finding ways to use at least some of the tools of that society to achieve Indigenous goals.

But this effort faces a challenge of its own. Canadian political scientist Peter H. Russell has put the issue this way: "Adopting the white man's political means to achieve Aboriginal ends is a deeply ironic process… Using the dominant society's language and politics, and becoming good at it—as many Aboriginal leaders do—entails a significant integration into that society… That is

[70] Deloria and Lytle (1984). See also Anaya (2004) who writes, "the normative regime concerning indigenous peoples' self-government… reflects the view, apparently held by indigenous peoples themselves, that they are not to be considered a priori unconnected from larger social and political structures. Rather, indigenous groups—whether characterized as communities, peoples, nations, or other—are appropriately viewed as simultaneously distinct from yet parts of larger units of social and political interaction, units that may include indigenous federations, the states within which they live, and the global community itself. This view challenges traditional Western conceptions that envisage mutually exclusive states as the primary factor for locating power and community…" (p. 156).

bound to have a moderating influence on the objectives that native groups pursue through such participation" (2006, p. 131).

While it is the situation of Australia's Aboriginal and Torres Strait Islander peoples that precipitated Russell's remarks, his discussion of the issue is explicitly more general, embracing all four of these English-settler-colonial states where Indigenous efforts to pursue self-governing power have included not only claims-making but nation rebuilding: among other things, the construction of governments that can exercise power effectively on behalf of Indigenous collectives and Indigenous visions. The problem, as Russell notes, is that the most promising political pathways toward self-government often lead through "European political technologies" (p. 130): not only courts and legislatures but written constitutions, lobbying, political parties, elections, and more.

This raises a number of issues, for it is not only Native peoples' objectives that may be influenced by such participation; it is also their institutional constructions—their governments—and their entire societies. As Frank Ettawageshik, former chair (equivalent to chief in First Nations) of the Little Traverse Bay Bands of Odawa, has put it, in the process of asserting self-governing power, Native nations have to be careful. Otherwise, "we'll end up assimilating ourselves."[71]

This is not to argue that such tools are inherently problematic. As some of the above material suggests, some nations have used them to great and positive effect. It is to argue instead for prudence and deliberation and for paying attention to alternative possibilities, including principles and practices drawn from Indigenous cultures themselves. After all, many of those cultures, including ones still vibrantly alive, have multi-generational, centuries-long records of successful governing via institutions that may bear little resemblance to those being put forward as preferred models by settler-colonial governments. As we have tried to show, these older ways of governing constitute a resource on which many nations continue to draw in either their original or modified forms, sometimes as transferable practices or organizational templates, sometimes as sources of direction, inspiration, and commitment.

Melissa Tatum, Miriam Jorgensen, Mary Guss, and Sarah Deer suggest that as nations consider their options, they try to answer three related questions:

- Are historic governing systems still useful today? In whole, or in part?
- Have norms concerning the distribution and exercise of governmental power changed?

[71] In conversation, May 9, 2013. See also Feit (2001) who argues that one of the challenges facing the leadership of the Grand Council of the Crees in their relationships with Quebec and Canada "is to resist fighting the battles in forms the state or market institutions prescribe and, instead, to find ways to communicate and reassert Cree cultural meanings without extensively or simply remaking them in the image of the dominant cultures of North American institutions" (p. 412). Niezen (2003) spends some time on this general issue (pp. 140-42) while also acknowledging, in the particular case of the Crees, what he calls their "strategic multiculturalism" (p. 159).

- What kinds of political institutions could be adopted that both resonate with community norms and effectively address modern-day governance needs? (2014, p. 19)

The specific responses that nations make to these questions matter less than their freedom to reject outsiders' preferences or impositions and produce answers of their own. Some will find powerful governing tools in their own traditions; some may conclude that they need new tools—borrowed or invented—that can address new circumstances or challenges. And some will do both.

For Indigenous nations, as Begay et al. concluded more than fifteen years ago, diversity in governmental form is not a problem; "it is a solution" (2007, p. 53). As Native nations reclaim their right to govern themselves in ways of their own choosing, they are recreating, in new forms, the diversity that colonialism worked so hard to destroy. They are doing so, in part, by finding, in their own histories and cultures, principles and practices that are usable today, and putting them to work.

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