Responsible Governance and Tribal Customary Rights

*By Kekek Jason Stark**

Abstract

"[T]raditional laws are fundamental laws of society" and are derived from "custom – [the] language, ceremonies, teachings and value system" of the Tribal Nation.[1]

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Introduction

This article explores the question of how tribal constitutional law is interpreted and controlled by traditional tribal law principles in the context of tribal customary rights. Specifically, this article addresses the notion of whether an action, by the tribal government or a citizen, can infringe the fundamental rights of citizens or whether the infringing action is limited by the customary obligation of responsible governance. This article addresses these competing views and argues that tribal courts can restore

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[1] Maha Jweied, U.S. Dep't of Just. & U.S. Dep't of Interior, *Examples of Successful Traditional Justice Practices: Navajo Nations' Peacemaking*, *in* Expert Working Group Report: Native American Traditional Justice Practices 4 (2014) [hereinafter "Navajo Nations' Peacemaking"] (speaking to Chief Justice Herb Yazzie's characterization of "the Navajo Nation's legal system").

harmony—the goal of tribal law—by ensuring responsible governance through the appropriate balancing of tribal customary rights with the need for tribal government and citizen action. In doing so, Part I details the principle of responsible governance. Part II details which rights are fundamental pursuant to tribal customary law. Specifically, this Part will address the fundamental rights that go to the core of Indianness or tribal identity. Part III provides recommendations for tribal courts in their ongoing review of tribal customary rights. Part IV concludes by emphasizing the principle that tribal courts can advance tribal sovereignty and governance through a focus on the utilization of tribal customary law principles.

I. Responsible Governance

In the examination of Indigenous political theory, it is important to understand that tribal law is complex and derived from various sources of law, including sacred law, natural law, deliberative law, positivistic law, and customary law.[2] As John Borrows describes, "[w]hile some Indigenous law is customary, it can also be positivistic, deliberative, or based on theories of divine or natural law."[3] As an example, Anishinaabe political theory establishes that "Anishinaabe law is the collective body of principles and values that guide our way of life as Anishinaabe people."[4] In this regard, Anishinaabe law is broken into four areas or categories and these categories collectively produce *Anishinaabe-inaakonigewin*, Anishinaabe law.

The first area of Anishinaabe law encompasses *manidoo-inaakonigewin*. This concept is defined as spirit law, or the Creator's law. The second area of Anishinaabe law encompasses *gaagige-inaakonigewin*. This concept is defined as eternal law, or "the rights and responsibilities intrinsic to the belief systems of the Anishinaabeg." The belief systems of the Anishinaabe as embodied in the term *gaagige-inaakonigewin* can be further explained by the principle "*Minik igo giizis bimosed, minik gegoo ji-nitaawigik, minik nibi ge-bimijiwang. Mii'iye gaagige-onakonigewin*." This concept is understood to mean "as long as the sun shines, grass grows, and the waters flow, that's eternal law." The third area of Anishinaabe law encompasses *gete-inaakonigewin*. This concept is defined as traditional law. The fourth classification of Anishinaabe law encompasses *zaagimaa-inaakonigewin*. This concept is defined as natural law. Anishinaabe law, as produced from these four categorical areas, is "instructive in nature" and is embodied in *anishinaabemowin*, the language; *aadizookaanan*, traditional stories; *dibaajimowin*, personal narratives; and *izhitwaawin*, Anishinaabe culture.[5]

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[2] *See, e.g.*, John Borrows, Canada's Indigenous Constitution 23–58 (2010).

[3] *Id*. at 12.

[4] Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 Mont. L. Rev. 293, 295 (2021).

[5] *Id.* at 302–3.

As explained in this excerpt, Anishinaabe law embodies a mixture of the various sources of law including sacred law, natural law, deliberative law, positivistic law, and customary law. With this principle in mind, this article utilizes the term tribal customary law by encompassing the embodiment of these various sources of law in the term. The blending together of the sources of law is an integral aspect of tribal customary law. This is in stark contrast to Anglo-American law which primarily draws its source from positivistic law. As explained by John Borrows, "[t]he exercise of positivistic law potentially places too much authority in the hands of powerful individuals or popular majorities without other checks, balances, or measurement against a broader normative base. In time, the exercise of legal traditions through positivistic law could lead to abusive domination if the person or group in authority does not submit to other normative legal considerations."[6]

For many tribal nations, the traditional legal doctrine of responsible governance was implemented pursuant to the principles of achieving harmony and balance within tribal communities as a blending of various sources of law. This is because all Indigenous people exist as a part of creation, in the recognition of sacred law.[7] The essence of this existence is to live in harmony, in the recognition of customary, natural, and deliberative law.[8] "For the Anishinaabe, the concept of achieving harmony in life—to live in balance with all of creation—is expressed by the term *mino-bimaadiziwin*."[9] This term "is literally defined as to 'live a good life.'"[10] The principles embodied in *mino-bimaadiziwin* are utilized to shape tribal governance and thereby interpret and develop tribal law.[11] The Nottawseppi Huron Band of Potawatomi Supreme Court acknowledged, "[*Mino-bimaadiziwin*] is not a

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[6] Borrows, *supra* note 2, at 48.

[7] *See, e.g.*, Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 15 (2d ed. 2015) (for example, "The Haudenosaunee Great Law is based on beliefs about the Creator. Strong spiritual beliefs in the Creator regulate behavior more than written rules about right and wrong.").

[8] Aaron Mills, Karen Drake, & Tanya Muthusamipillai, An Anishinaabe Constitutional Order 7 (2017) (on file with Osgoode Hall Law School of York University) ("[A]ll aspects of the natural world are already imbued with law—The Great Laws of Nature—and are ordered. These laws govern all aspects of the natural world, including human life. When these laws are followed, the result is harmony.").

[9] Stark, *Anishinaabe Inaakonigewin*, *supra* note 4, at 303; *see also* Cholewka v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Council, No. 2013-16-AP (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Ct. App. Oct. 14, 2014).

[10] Stark, *Anishinaabe Inaakonigewin*, *supra* note 4, at 304–05 ("This concept stems [from] the terms; *minw-* which means good, or well and the term *bimaadizi* which means to live. The term *bimaadizi* is further broken down with the following stems: *bim-*, which means along in space or time, *-aad-* which means of being or life, character or nature, and *-izi*, which means s/he is in a state of or condition . . . . The concept of *mino-bimaadiziwin* is the central goal of Anishinaabe existence and, as an embodiment of the essence of creation, flows through every aspect of Anishinaabe life.") (footnotes omitted).

[11] *See* In re Validation of Marriage of Francisco, 16 Indian L. Rep. 6113 (Nav. Sup. Ct. 1989).

legal doctrine but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law."[12]

The embodiment of the principle of harmony to shape social behavior and thereby interpret and develop tribal law was not unique to the Anishinaabe.[13] Many Tribes embodied this same concept.[14] For example, the Dine' utilize the term *hózhó* to identify a state of harmony.[15] The Navajo Nation Supreme Court explained as follows:

> *Hazhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it's not uncommon for an elderly person to stand and say "*hazhó'ógo, hazhó'ógo sha'átchíní*" ("*hazhó'ógo, hazhó'ógo* my children"). The intent is to remind those involved that they are *Nohookáá Diné'é* (Earth—Surface—People (Human Beings)), dealing with another *Nohookáá Diné'é,* and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion [sic] or to push a decision without explanation and consideration to those involved. Áádóó na'níle'dii éí dooda (delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences). This is *hazhó'ógo*, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our other adopted ways are all intended to be conducted with *hazhó'ógo* in mind.[16]

The principles embodying how we carefully approach each other as individuals, as utilized by the Navajo Nation Supreme Court, help us further understand the tribal customary principle to strive for balance and harmony.

Simultaneously, Indigenous people also observe the tribal customary principle that all citizens possess "free will," meaning that community

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[12] Spurr v. Tribal Council, No. 12-005APP, 2012 Nottawaseppi Huron Band Sup. LEXIS 3, at *6–7, *9 (Nottawaseppi Huron Band of Potawatomi Sup. Ct. Feb. 21, 2012).

[13] *See* Duncan v. Shiprock Dist. Ct., 5 Am. Tribal L. 458, 466 (Navajo 2004) (citations omitted) (In *Duncan*, the Navajo Nation Supreme Court determined, "A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Juries are a part of the fundamental Navajo principle of participatory democracy where people come together to resolve issues by "talking things out." Through this process community members in disharmony are brought back into a state of *hózhó*. . . . The participation of the community in resolving disputes between parties is a deeply-seeded part of our collective identity and central to our ways of government.").

[14] Michael L. Barker, Policing in Indian Country 3–4 (1998).

[15] *See* Navajo Nation v. Rodriguez, 5 Am. Tribal L. 473, 479–80 (Nav. Sup. Ct. 2004).

[16] *Id.* (English translation added).

members are free to act in any manner that they desire. As an example, the Hopi and Zuni have "a strong belief that adult individuals are ultimately free to act as they see fit and are not to be judged by other humans for their actions. . . . In Hopi, this respect for individual freedom is expressed by the phrase, '*Pi um pi*' or 'it's up to you.'"[17] However, this notion of free will is balanced against the individual's "obligations and duties toward one's kin . . . necessary for the proper order of Hopi or Zuni society."[18] The Dine' have a similar value establishing that "no one and no institution has the privilege to interfere with individual action unless it causes an injury to another or the group."[19]

As explained by these examples, this free will is not absolute or unlimited as it is tailored to living in harmony. This state of harmony includes internal harmony with oneself as well as external harmony with the community.[20] Harmony is achieved through addressing the conflicts that an individual possesses within themselves, which may include a range of emotions ranging from self-doubt to egotistical feelings, with the outward expression of cultural principles, such as humility, respect, and generosity to others.[21] In this state of being in harmony, community members are likewise compelled to adhere to kinship and societal norms.[22] This is because the rules of tribal law systems were "embedded in a matrix of social relationships."[23] As Donald Auger explains, "The value of social harmony was instilled in an individual from birth and throughout his life by other members of the community, and in particular by members of his family and kinship group."[24] Therefore, social and familial relationships define how a person is to act.[25] The Dine' have a saying that embodies this principle: "He acts as if he had

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[17] Justin B. Richland & Sarah Deer, Introduction to Tribal Legal Studies 239 (2004).

[18] *Id*.

[19] *Id.* at 240.

[20] *See* Ella Deloria, Speaking of Indians 24 (1998) ("Kinship was the all-important matter."); Ruth Landes, *Ojibwa Sociology*, *in* 29 Colum. Univ. Contributions to Anthropology 5 (1937); Donald J. Auger, The Northern Ojibwe and Their Family Law 118 (2001) (J.D. dissertation, York University) (on file with author) ("When one is able to achieve the goal of living a good life he or she is regarded by others as a model to follow.").

[21] *See* Stark, *Anishinaabe Inaakonigewin*, *supra* note 4, at 306 ("The Anishinaabe attempt to live in a good way, in balance with all of creation in accordance with the principles of *mino-bimaadiziwin,* through the application of the seven sacred laws of the creation—the seven grandfather teachings"); *id*. ("The seven grandfather teachings consist[] of: [W]isdom, [L]ove, [R]espect, [B]ravery, [H]onesty, [H]umility, and [T]ruth.").

[22] Deloria, *supra* note 20, at 31 ("For the most part, then, everyone had his part to play and played it for the sake of his honor, all kinship duties, obligations, privileges, and honorings being reciprocal.").

[23] Barker, *supra* note 14, at 3.

[24] Auger, *supra* note 20, at 119.

[25] Garrow & Deer, *supra* note 7, at 17 ("One reason that traditional laws were designed to protect the community is that the spiritual beliefs of many tribes instructed individuals about their duties and responsibilities to families, clans, and the tribe.").

no relatives."[26] This is a common phrase used to identify people that act outside of societal and kinship norms.

The principle of adhering to kinship and societal norms can equally extend to tribal government officials. Embedded within the responsibilities and obligations that Indigenous people have to one another is the notion of reciprocity.[27] The rationale underlying this principle is that the act of relating is reciprocal in that it is mutually shared by all parties engaged in the act.[28] Understanding the reciprocity in kinship and social relationships helps us understand the duties and obligations that we expect from our government and leaders.[29] Not only are we as individuals obligated to act according to the principles of harmony, but our tribal government officials are also expected to govern pursuant to these same obligations.[30] When this is accomplished, they are able to achieve responsible governance.

As explained by Matthew L.M. Fletcher, "Anishinaabe political theory assumes that harmony is the baseline condition. Anishinaabe governance divides powers and responsibilities of tribal leaders. There is no winner-take-all, majority rule decision-making."[31] This rationale was recognized by the Nottawseppi Huron Band of Potawatomi Supreme Court in *Spurr v. Tribal Council*.[32] The Court utilized the principle of *mino-bimaadiziwin* (*mno-bmadzewn* as the term is depicted in the Potawatomi language) in analyzing acceptable governmental conduct pursuant to the Tribal Constitution.[33] In doing so, the Court acknowledges that *mino-bimaadiziwin*

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[26] Ariz. Pub. Serv. Co. v. Off. Navajo Lab. Rels., 17 Indian L. Rep. 6105, 6112 (Nav. Sup. Ct. 1990) ("The reciprocal obligation required of Navajos is summed up in the saying used to describe someone who has misbehaved: 'He acts is if he had no relatives.'").

[27] *See* Stark, *Anishinaabe Inaakonigewin*, *supra* note 4, at 319.

[28] *See* Leanne Betasamosake Simpson, *Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation,* 3 Decolonization: Indigeneity, Educ. & Soc'y 1, 12 (2014).

[29] *See* Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175, 186 (1994) [hereinafter Life Comes from It] ("A *naat'aanii* is a traditional Navajo civil leader whose authority comes from his or her selection by the community. The *naat'aanii* is chosen due to his or her demonstrated abilities, wisdom, integrity, good character, and respect by the community. The civil authority of a *naat'aanii* is not coercive or commanding; he or she is a leader in the truest sense of the word.").

[30] *See id.* at 186–87 ("A peacemaker is a person who thinks well, who speaks well, who shows a strong reverence for the basic teachings of life and who has respect for himself or herself and others in personal conduct. A *naat'aanii* acts as a guide, and in a peacemaker's eyes everyone—rich or poor, high or low, educated or not—is treated as an equal . . . . Finally, *naat'aanii* is chosen for knowledge, and knowledge is power which creates the ability to persuade others. There is a form of distributive justice in the sharing of knowledge by a *naat'aanii.* He or she offers it to the disputants so they can use it to achieve consensus.").

[31] Matthew L.M. Fletcher, *Erasing the Thin Blue Line: An Indigenous Proposal*, 2021 Mich. St. L. Rev. 1447, 1450 (2021).

[32] Spurr v. Tribal Council, No. 12-005APP, 2012 Nottawaseppi Huron Band Sup. LEXIS 3 (Nottawaseppi Huron Band of Potawatomi Sup. Ct. Feb. 21, 2012).

[33] *See id*. at *28–29 ("We hearken back to our consideration of Mno Bmadzewen, and we find that the government's boundaries of acceptable conduct in administering an Article IX election are broad, but not unlimited . . . . [S]o long as the government's conduct respects, as we believe it does here, elections as expression of the community's will, we will not intervene.").

provides the meaning of the Constitution by incorporating *bimaadiziwin* as a constitutional principle.

Similarly, the Iroquois Constitution exemplifies the notion of responsible governance by balancing the reciprocal responsibilities and obligations of the people and those that govern.[34] Another example of responsible governance is evidenced by the Navajo Nation Supreme Court. In *Navajo Nation v. MacDonald (In re Certified Questions II)*,[35] the Court examined the principle of tribal officials' fiduciary trust duty to the Navajo people.[36] The Court determined "[p]ublic officials serving in the Navajo government, no matter what position they hold, are trustees of the Navajo people. The government officials occupy a fiduciary relationship to the Navajo people. The Navajo people have placed a high degree of trust in these officials; therefore, Navajo government officials owe an undivided duty to the Navajo people to serve the best interests of the Navajo people."[37] The Court explained further:

> After the epic battles were fought by the Hero Twins, the Navajo people set on a path of becoming a strong nation. It became necessary to select *naat'aaniis* by a consensus of the people. A *naat'aanii* was not a powerful politician nor was he a mighty chief. A *naat'aanii* was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a *naat'aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words. The *naat'aanii* indeed was expected to be honest, faithful, and truthful in dealing with his people.[38]

The Court expounded upon this interpretation in *Sandoval v. Navajo Election Admin*.[39] In this case, the Court described how tribal leaders have increased responsibilities.[40] The Court reasoned, "[i]n our Navajo thinking, great responsibilities of public service are placed on a *naat'ánii*, greater than may be commonly understood in other jurisdictions. Those who wish to

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[34] David Wilkins, *Great Law of Peace, Gayanashagowa*, *in* Documents of Native American Political Development: 1500s to 1933, at 14–15 (2009); Kristen A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 Kan. J.L. & Pub. Pol'y 561, 574 (2005) ("The Iroquois Constitution, given to the people by Dekanawidah, makes clear that the people must fulfill duties to ensure the perpetuation of the ceremonies . . . . To understand this constitution more fully, we would need to see it in practice and consult with tribal leaders and members about its meaning. But, on its face, this constitution expresses the interconnected nature of people's rights and duties.") (footnotes omitted).

[35] 16 Indian L. Rep. 6086 (Nav. Sup. Ct. 1989).

[36] *Id.* at 6092.

[37] *Id.*

[38] *Id.*

[39] Sandoval v. Navajo Election Admin., 11 Am. Tribal Law 112, 115–16 (Nav. Sup. Ct. 2013).

[40] *Id.* at 121.

serve must understand his/her own need to self-assess his/her own qualifications under the laws, his/her own abilities to serve, and the great needs of the public that in numerous cases lack the resources to watch over the actions of the *naat'ániis* they select."[41]

This concept of government officials' duty of trust was similarly applied by the Little River Band of Ottawa Indians Court of Appeals, in *People of the Little River Band of Ottawa Indians v. Champagne*.[42] Here, the court relied upon the Anishinaabe traditional story often referred to as the "Duck Dinner" as persuasive authority in addressing the issue of attempted fraud.[43] The Court utilized the concept of *ogimaag*[44] (*ogemuk* as referenced in the Odawa dialect) as follows: "As one of the leaders of the community—*ogemuk*—Justice Champagne was held—and should be held—to a higher standard of conduct."[45] As evidenced by these examples, tribal customary law identifies the confines of responsible governance through our reciprocal relationships and obligations to each other.[46]

II. Tribal Customary (Fundamental) Rights

This Part will set forth the concept of tribal customary rights from a traditional law perspective. In order to understand the basis for tribal customary law, we begin with the case of *Steptin v. Nisqually Indian Community.*[47] In this case, the Nisqually Tribal Court of Appeals acknowledged the origins

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[41] *Id.*

[42] People of the Little River Band of Ottawa Indians v. Champagne, 35 Indian L. Rep. 6004 (Little River Band of Ottawa Indians Ct. App. 2007).

[43] *See id.* at 6004 (citing Charles Kawbawgam, *Nanabozho in a Time of Famine*, *in* Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–95 (Arthur P. Bourgeois ed., 1994) (summarizing the story as follows: "There are many, many versions of this story, but in most versions, Nanabozho is hungry, as usual. After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several ducks and kills them by decapitating them. He eats his fill, saves the rest for later, and takes a nap. He orders his buttocks to wake him if anyone comes along threatening to steal the rest of his duck dinner. During the night, men approach. Nanabozho's buttocks warn him twice: 'Wake up, Nanabozho. Men are coming.' Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he is angry. But he does not blame himself. Instead, he builds up his fire and burns his buttocks as punishment for their failure to warn him.")); *see also* Archie Mosay, *Wenabozho Gaa-kiizhkigwebinaad Zhiishiiban (When Wenabozho Decapitated the Ducks), in* Living Our Language: Ojibwe Tales & Oral History 28–33 (Anton Treuer ed., 2001).

[44] *See Ogimaa*, *in* Ojibwe People's Dictionary, https://ojibwe.lib.umn.edu/main-entry/ogimaa-na [https://perma.cc/9P3G-2LVF].

[45] *Champagne*, 35 Indian L. Rep. at 6007.

[46] Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations,* 11 Wyo. L. Rev. 351, 361 (2011) ("Furthermore, the authority to use normative precepts was inherent in the tribe's culture and longstanding dispute resolution practices. In other words, disputes had to be settled so harmony, peace, and positive relationships prevailed within the community.").

[47] Steptin v. Nisqually Indian Cmty., 2 NICS App. 224 (Nisqually Tribal Ct. App. 1993) (addressing the offense of reckless driving for speeding on reservation roads).

of traditional law explaining, "[tribal jurisprudence] stems from tribal traditions, practices, and teachings that predate the introduction of Anglo-American law in this country. These traditions and customs constitute the original body of tribal law . . . the roots of tribal justice are deeply grounded in tribal custom and tradition."[48] Another way to define tribal custom and tradition are as the traditional Indigenous teachings that are thought about as law.[49] As Raymond Austin explained, "American Indian cultural knowledge, primarily contained in oral narratives, contains doctrines, principles, and postulates that permit the use of customs and traditions in dispute resolution and community problem-solving. Traditional knowledge provides ample authority for the use of customs and traditions as law in modern Indian nation courts."[50] He explained further that, "[r]elying on traditional thinking to construct methods and solve problems is 'doing sovereignty' the American Indian way."[51]

Through customary law, the culture and philosophy of the Tribe is incorporated as law while adding cultural substance to the tribal legal framework.[52] As such, tribal traditions and customs serve as the basis for tribal law and are identified as tribal customary or tribal common law.[53] Therefore, the terms tribal customary law, traditional tribal law, and tribal common law are often used interchangeably.[54] These traditions and customs can be oral or written and can be incorporated in tribal jurisprudence as constitutional provisions, through court decrees, stipulations, as well as tribal codes, ordinances, and regulations.[55] As a result, customary law allows

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[48] *Id.* at 230–31.

[49] *See* Jweied, *supra* note 1, at 4 ("[T]raditional laws are fundamental laws of society [and are derived from] custom—[the] language, ceremonies, teachings, and value system [of the Tribal Nation].").

[50] Austin, *supra* note 46, at 361.

[51] *Id.*

[52] *See* Carpenter, *supra* note 34, at 580 ("The importance of tribal courts is articulated partly in terms of their specialized knowledge of tribal customary law and culture"); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-state and Tribal-federal Court Relations*, 24 Wm. Mitchell L. Rev. 457, 466 (1998) (citing Robert Yazzie, *Traditional Indian Law*, 9 Tribal Ct. Rec. 8, 11 (1996)) ("Indian law is different. It does not rely on 'paper knowledge,' or the theories of academics. If law is norms, values and moral principles, it can be preserved and communicated in many ways. Indians learn it subconsciously.").

[53] See Hopi Indian Credit Ass'n v. Thomas, 25 Indian L. Rep 6168, 6169 (Hopi App. Ct. 1996) ("The customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts . . . the essence of our Hopi law, as practiced, remains distinctly Hopi. The Hopi Tribe has a constitution, ordinances and resolutions, but those Western forms of law codify the customs, traditions and culture of the Hopi Tribe, which are the essential sources of our jurisprudence.").

[54] *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law,* 24 N.M. L. Rev. 225, 245 (1994) (quoting James W. Zion, *Harmony Among the People: Torts and Indian Courts,* 45 Mont. L. Rev. 265, 275 (1984)) ("'Tradition,' 'custom,' and 'usage' are not synonymous, though they are often used interchangeably. 'It is possible for a tradition not to be a custom or usage, and many customs and usages are not traditional. Some traditions may be a custom.' Custom is more than opinion; it is a common belief which results in practice or regularity of conduct.").

[55] *See* Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 Vt.

tribal justice to accord with tribal society as shown through traditions, but also the use of customary law is thought to reinforce these very same traditions.[56] This is because tribal customs and traditions are fundamental and basic to Indigenous life and society and as a result are higher law.[57] Therefore, the use of customary law is fundamental in preserving culture by linking justice with community values.[58] In this regard, the use of customary law enables dialogue for the community to engage and discuss what these teachings / traditions mean in modern society as an essential aspect of achieving harmony.[59]

The next step in this process of identifying the concept of tribal customary rights from a traditional law perspective is understanding how

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L. Rev. 7, 27 (1996) ("There are even broader extrajudicial concerns about the impact of converting (at least in part) the *oral* custom into the *written* decision, the plural into the singular, and the dynamic into the potentially static. Regardless of the final pattern, this process of stitching the cultural past into the judicial present has thoughtfully begun with both zest and caution. The process has set its eyes firmly on the objective of seeking to realize ancient values in contemporary settings: not as museum exercises, but so a people might flourish."); Valencia-Weber, *supra* note 54, at 249 ("Tribal courts and commentators point out that custom does not necessarily mean unwritten, irregular, or inconsistent rules of law . . . Increasingly, the need to codify, document, and publish is recognized because the development of a law system provides the benefits of precedent, predictability, and notice to those subject to the law.") (internal citation omitted).

[56] *See* Tom Tso, *The Process of Decision Making in Tribal Courts*, Nat. Res. L. Ctr., Univ. Co. Sch. of L. 4 (1989) ("I believe the main reason the Navajos have, by Anglo standards, the most sophisticated and the most complex tribal court system is that we were able to build upon concepts which were already present in our culture. Navajos are also flexible and adaptable people. We find there are many things which we can incorporate into our lives that do not change our concepts of ourselves as Navajo.").

[57] *See* Borrows, *supra* note 2, at 24 ("Laws can be regarded as sacred if they stem from the Creator, creation stories or revered ancient teachings that have withstood the test of time. When laws exist within these categories, they are often given the highest respect"); Yazzie, *Life Comes from It*, *supra* note 29, at 175–76 ("The Navajo word for 'law' is *beehaz'aanii.* It means something fundamental, and something that is absolute and exists from the beginning of time. Navajos believe that the Holy People 'put it there for us from the time of beginning for better thinking, planning, and guidance. It is the source of a healthy, meaningful life, and thus 'life comes from it." Navajos say that 'life comes from *beehaz'aanii*,' because it is the essence of life. The precepts of *beehaz'aanii* are stated in prayers and ceremonies which tell us of *hozho*—'the perfect state.".' Through these prayers and ceremonies we are taught what ought to be and what ought not to be. Our religious leaders and elders say that man-made law is not true 'law.".' Law comes from the Holy People who gave the Navajo people the ceremonies, songs, prayers, and teachings to know it. If we lose our prayers and ceremonies, we will lose the foundations of life. Our religious leaders also say that if we lose those teachings, we will have broken the law." (internal citations omitted)).

[58] *See* Pommersheim, *supra* note 55, at 24 ("It is in this realm that tribal courts most ardently strive to maintain cultural continuity with the past by seeking to ensure that certain traditional values and processes continue to play a vital role in the daily judicial life on the reservation. Without such a commitment, disconnection from a central core of cultural meaning and tribal self-understanding will likely occur. Such concerns cannot be left to the private lives of tribal individuals alone, but must also take root and find connection in the modern institutional life of the tribe.").

[59] *See* Yazzie, *Life Comes From It*, *supra* note 30, at 187 ("Navajo common law is not about rules which are enforced by authority; it deals with correcting self to restore life to solidarity. Navajo justice is a product of the Navajo way of thinking. Peacemakers use the Navajo thought and traditional teachings. They apply the values of spiritual teachings to bond disputants together and restore them to good relations.").

customary law is determined or defined. In *Lente v. Notah*,[60] the Navajo Court of Appeals explained that "[c]ustom is the practice or regular conduct of members of a group of people, acting in a certain way."[61] In this regard, custom is what people do, not only what they think.[62] Generally, custom, tradition, or culture is applicable as law if it is generally known and accepted within the Tribe and causes citizens to act according to those principles.[63] As such, tribal customs are those tribal wide practices that are accepted by the community or accepted across multiple communities.[64] In addition, tribal customs can also encompass individual practices and teachings associated with a family, clan or traditional society.[65] Tribal custom considers various rights including the rights of citizenship, property, employment, election, housing, and religion, to name a few.

It is outside the scope of this article to detail how customary law operates in relation to other sources of law.[66] However, as customary law stems

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[60] 3 Nav. R. 72 (Nav. Ct. App. 1982).

[61] *Id.* at 80.

[62] *See* Valencia-Weber, *supra* note 54, at 245 ("Custom and usage identify different parts of the cultural system. Custom is the belief component. Usage identifies the conduct or behavior in conformance to specific customary beliefs. When custom and usage underlie the tribal codified and common law, the created tribal jurisprudence is appropriate for the indigenous people governed by it. 'It is . . . integral to the idea of a custom that the past practice of conformity is conceived as providing at least part of the reason why the practice is thought to be proper and the right thing to do. Clearly the common law is an institution that is in part customary in this sense.' Custom as a concept must be separated from other cultural elements that imply nonformalized ideas and codes of conduct. To become 'enforceable at common law a custom had to be: (1) legal, (2) notorious, (3) ancient or immemorial and continuous, (4) reasonable, (5) certain, (6) universal and obligatory. . . . . a creature of its history.' Custom is distinctively a pattern of thought or way of perceiving and feeling about the elements of life. When conduct is affected by this thought process, then usage occurs through the practice or regularity of behavior.") (internal citations omitted).

[63] *See id*. at 245–46 ("Custom is distinctively a pattern of thought or way of perceiving and feeling about the elements of life. When conduct is affected by this thought process, then usage occurs through the practice or regularity of behavior. For judges in the tribal courts, the thought and conduct must be 'known, accepted, and used by the people of the present day.") (internal citation omitted).

[64] *See id*. at 244 ("For tribal courts, the customary underlying beliefs and conduct provide a contemporary foundation, not just an inescapable past.").

[65] Yazzie, *Life Comes from It*, *supra* note 30, at 182 ("The clan institution establishes relationships among individual Navajos by tracing them to a common mother; some clans are related to each other the same way. The clan is a method of establishing relationships, expressed by the individual calling other clan members 'my relative.' Within a clan, every person is equal because rank, status, and power have no place among relatives. The clan system fosters deep, learned emotional feelings which we call '*k'e.*'.' The term means a wide range of deeply-felt emotions which create solidarity of the individual with his or her clan. When Navajos meet, they introduce themselves to each other by clan: 'I am of the (name) clan, born for the (name) clan, and my grandparents' clans are (name).' The Navajo encounter ritual is in fact a legal ceremony, where those who meet can establish their relationships and obligations to each other. The Navajo language reinforces those bonds by maxims which require duties and mutual (or reciprocal) relationships. Obviously, one must treat his or her relatives well, and we say: 'Always treat people as if they were your relative.' That is also *k'e.*").

[66] *Cf.* Matthew L.M. Fletcher, American Indian Tribal Law 83–98 (2d ed. 2020); *see also* C.B. v. Little Flower Freedom Ctr., 18 Indian L. Rep. 6121, 6123 (N. Plns. Intertribal

from the core cultural foundation of Indigenous sovereignty, it cannot be carelessly infringed by other deliberative or positivistic sources of law.[67] To do so would not only violate traditional cultural tenets, but would also be a direct challenge to the core elements of tribal sovereign existence.[68] Such conduct infringing on tribal customary law, as Kristen Carpenter explained, "represents the assimilation of tribal law, institutions, and peoples."[69] This notion goes to the heart of the difference between tribal law perspectives and Anglo-American legal perspectives.[70] The tribal law perspective is based upon the pursuit of harmony, while the Anglo-American law perspective is based upon the pursuit of power and adversarial justice.[71] Therefore, the violation of traditional cultural tenets by other sources of law perpetuates colonialization through self-imposed assimilation.[72]

I propose that unchecked tribal government and citizens' actions that infringe on tribal customary rights are devastating to tribal nations because the infringement of tribal customary rights leads to the diminishment of tribal culture, identity, and sovereignty.[73] This is important as we begin to

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Ct. App. 1991) ("If there are standards, traditional values, and cultural traditions which a party in an action in a tribal court believes are of great importance and that are required for proper interpretation of the tribal code, then it is the duty, obligation, and responsibility of trial counsel to bring forth testimony to establish facts which would show such traditional values and Indian standards.").

[67] *See* Robert Yazzie, *"Watch your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going*, 23 Am. Indian L. Rev. 497, 501 (1998) ("Another lesson is that Indian nations should return to their traditional law. The Navajo Nation Supreme Court has ruled that Navajo common law is the law of preference in the Navajo Nation and it is often used in our decisions."); Pommersheim, *supra* note 54, at 41–42 ("Tribal courts are also imbued with a sense of sacred trust that is not so much a legal, but rather a cultural, charge. They are charged with providing continuity and a nuanced sense of adaptation of tradition in contemporary circumstances, while also incorporating the best from dominant jurisprudence. Although this is not an easy task, it is possible to suggest some of the touchstones for such an endeavor. These include the concept of law as medicine or healing, the injunction that continuity disfavors dichotomy, and the importance of balance and creativity.") (internal citation omitted).

[68] *See* Pommersheim, *supra* note 55, at 42 ("In much of tribal jurisprudence—especially as it relates to tribal members—there is a concern for right relationships and group harmony as key cultural coordinates in seeking to render justice.").

[69] Carpenter, *supra* note 34, at 561–62.

[70] *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 Colum. Hum. Rts. L. Rev. 235, 277–79 (1997); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 Cardozo Arts & Ent. L. J. 175 (2000).

[71] Yazzie, *Life Comes from It*, *supra* note 30, at 186–87 ("The vertical system [of Anglo-American law] also attempts to treat everyone as an equal before the law, but judges in that system must single out someone for punishment. The act of judgment denies equality, and in that sense, 'equality' means something different than the Navajo concept.").

[72] Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 Harv. L. Rev. 2, 11 (2023) ("[Tribal Nations] are domains and peoples over which the United States has extended its jurisdiction unilaterally, often unlawfully and violently, on the grounds that the peoples within those borderlands require civilization before they achieve self-government.").

[73] *See id*. at 23 (arguing that tribal governments that engage in such authority are perpetuating colonialism by perpetuating systems of "hierarchy and initial power necessary for colonialism").

discuss responsible governance in the context of tribal customary rights.[74] Tribal courts have the obligation to implement the principle of responsible governance by balancing the responsibilities and obligations that the government carries on behalf of the people with the responsibilities and obligations that the people have to the government.[75] In this regard, there is a place for the implementation of tribal customary rights while achieving balance and harmony.[76] The following subparts will review the tribal customary rights pertaining to citizenship, land use (property), employment, election, housing, domestic relations, and religion that tribal courts have determined go to the "core of Indianness," and therefore establish obligations in how both tribal governments and citizens are required to act, pursuant to the reciprocal principle of responsible governance.

A. Citizenship Rights

For tribal nations, disputes relating to citizenship are often complex, confusing, and highly contentious.[77] In applying tribal customary law to citizenship disputes, for many tribal nations the notion of maintaining tribal relations was the essential element utilized in defining citizenship.[78] This conceptualization is important because it has broad implications on various areas of domestic tribal law including jurisdiction, criminal law, child welfare, liquor regulations, employment, and tribal business pursuits.[79]

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[74] *See* Carpenter, *supra* note 34, at 580; *see also* Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 Ariz. St. L.J. 1, 7 (2002) ("'[T]radition plays a very important role' in contemporary questions of Indian governance 'since it lays out values and presents social and cultural justifications.'") (quotation omitted).

[75] *See* Wilma Mankiller, *"Tribal Sovereignty as a Sacred Trust": An Open Letter to the Conference*, 23 Am. Indian L. Rev. 479, 479 (1998).

[76] *See* Pommersheim, *supra* note 55, at 10 ("In many tribal traditions, such as the Lakota's [sic] at Rosebud and at Cheyenne River, harmony and respect are critical. Tribal judiciaries must recognize these traditions in their working relationships. Without such harmony and resect, the requisite equilibrium and unity of purpose are unlikely to be achieved.").

[77] David E. Wilkins & Shelly Hulse Wilkins, Dismembered: Native Disenrollment and the Battle for Human Rights (2017).

[78] Gabriel S. Galanda, In the Spirit of Vine Deloria, Jr.: Indigenous Kinship Renewal and Relational Sovereignty, (July 18, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338913 [https://perma.cc/YSM7-VSWC]).

[79] *See* Santa Clara Pueblo v. Martinez*,* 436 U.S. 49, 59–60 (1978) ("Even in matters involving commercial and domestic relations, we have recognized that 'subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves' may 'undermine the authority of the tribal court . . . may 'undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves.') (quotations omitted); Kekek Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and its Jurisdictional Application for Anishinaabe Territories*, 83 Mont. L. Rev. 79, 94 (2022) ("[C]ourts have recognized that Tribes can extend their laws over their 'members' in the area encompassing their traditional territories in certain instances, such as in the exercise of treaty reserved rights or in certain cases 'involving the internal concerns of . . . members,' which includes tribal membership, probate, child custody, and child support.").

As an example, numerous tribal languages encompass words for identifying themselves as a Nation, that is as being "the original people."[80] In essence, the identification that tribal nations are the "original people" embodies the beliefs and knowledge pertaining to tribal identity. Through the utilization of this interpretation as being "the original people," tribal identity is determined based upon kinship and societal relations.[81] By engaging in and adhering to kinship and societal norms, an individual can maintain their tribal existence as a central component of the tribe's "matrix of social relationships."[82]

In addition, many tribal treaties encompass provisions incorporating this understanding.[83] As an example, the Anishinaabe signed numerous treaties with colonial governments.[84] Fifteen of these treaties contained specific language extending rights and privileges to mixed blood Indians.[85] One example, the 1847 *Treaty with Chippewa of Lake Superior and Mississippi* evidences the degree that tribal relations played in considering a person to be Anishinaabe (an Indian).[86] Article IV stipulates that the "mixed bloods of the Chippewas residing with them shall be considered Chippewa Indians."[87] According to the treaty negotiations, "the treaty provision in reference to the half-breeds came from themselves and was openly assented to by the chiefs in council."[88] The commissioner continued, "[that] (this provision) will operate beneficially upon the great body of the half-breeds there can be no doubt. They live with the Indians and live like them, and there is no reason why any distinction should be made regarding them."[89] With this backdrop in mind, this section will explore how tribal courts have attempted to achieve balance and harmony in addressing citizenship disputes.

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[80] *See, e.g.*, Stark, *Anishinaabe Inaakonigewin*, *supra* note 4, at 299–300 ("This term [Anishinaabe] has also been suggested to encompass many meanings but the common understanding of the term is described as original man (the original people) or more literally 'the humble being that was placed upon the land.'"); Dennis Jones, *The Etymology of Anishinaabe*, 2 Oshkaabewis Native J. 43, 45–46 (1995).

[81] Galanda, *supra* note 78, at 1.

[82] Barker, *supra* note 15, at 3.

[83] *See* 2 Indian Affairs: Laws and Treaties (Charles J. Kappler ed., 1902); Vine Deloria & Raymond J. DeMallie, Documents of American Indian Diplomacy (1999).

[84] Deloria & DeMallie, *supra* note 82. The Ojibwe negotiated 54 treaties with colonial governments.

[85] *Id.*

[86] Treaty with Chippewa of Lake Superior and Mississippi, Aug. 2, 1847, 9 Stat. 904.

[87] *Id.*

[88] 1847 Treaty Negotiations 25 (Y1.1/6: Senate Executive Documents and Reports CIS-NO: 30-1-2).

[89] *Id.*

In *Alexander v. Confederated Tribes of Grand Ronde*,[90] the Court of Appeals of the Confederated Tribes of the Grand Ronde Community addressed a disenrollment challenge.[91] The Court examined whether the tribal court system was a court of equity, and whether the court system could utilize equitable defenses, such as laches and estoppel, and apply them against the tribal government.[92] In addressing the meaning of due process, the court reasoned that "[a]n Indian Tribal Court's interpretation and application of due process represents the unique tribal sovereign, its distinctive tradition, culture and mores."[93] In applying this reasoning, the court held that, "[u]nder the unique facts of this case . . . the Tribe is prevented by equitable principles of laches and estoppel from reopening, after 27 years, the issue of the enrollment status of the lineal (and lateral) ancestors from which the Petitioners/Appellants trace their Grand Ronde citizenship."[94] The Court weighed in favor of the equitable principles of laches and estoppel to prevent the tribal government from infringing on citizenship.[95]

In another disenrollment challenge, *Cholewka v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Council*,[96] the Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court of Appeals upheld the Tribal Council and Membership Department's decision to disenroll the appellants.[97] In its reasoning the court relied upon the principle of *mino-bimaadiziwin* (harmony) as follows:

> While in this case the Appellants have lost the legal standing to be enrolled members of the Grand Traverse Band, our decision changes nothing regarding their family's history and their real belonging to the tribe and the community. Appellants are not banished from the area, nor are they forbidden from practicing their culture or language; they remain as much a part of the community as they wish. The actions of all parties involved moving forward should embody mino-bimaadiziwin; after all, formal tribal enrollment is only a small part of living as an Anishinaabe.[98]

The Court in a true *Nenabozho*[99] fashion, used the Anishinaabe customary principle of *mino-bimaadiziwn* while upholding the tribal government's

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[90] 13 Am. Tribal Law 353 (Grand Ronde Ct. App. 2016).

[91] *Id.* at 355.

[92] *Id.*

[93] *Id.* at 357 (quoting Synowski v. Confederated Tribes of Grand Ronde, 4. Am. Tribal Law 122, 125 n.4 (Grand Ronde Ct. App. 2003).

[94] *Id.* at 355.

[95] *Id.* at 353.

[96] No. 2013-16-AP, at *11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Ct. App. 2014).

[97] *Id.* at *11.

[98] *Id.*

[99] Nenabozho, is the name of the aadizookaan character viewed as the cultural hero of the

decision to disenroll the parties.[100] In doing so, the Court weighed in favor of tribal government authority, reasoning that the appellants may continue to maintain their tribal relations regardless of citizen status.[101] As identified above, pursuant to Anishinaabe customary law, the maintenance of tribal relations is the condition for citizen status. This rationale seems to conflict directly with the tribal customary principle of *mino-bimaadiziwin* that the Court is purporting to invoke.

In *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*,[102] the Appellate Court of the Saginaw Chippewa Indian Tribe of Michigan addressed whether the Tribal Council's power to disenroll currently enrolled members is limited to the narrow grounds expressly identified in the Tribal Constitution, and if not, what the constitutional boundaries in establishing substantive grounds for disenrollment are.[103] The court held that the implied constitutional power to disenroll is limited to matters of fraud and mistake and that due process requires the exercise of such implied power to be established in an appropriate tribal ordinance.[104] The court reasoned:

> Tribal membership involves not only constitutional status, but also serves as the ultimate indication of cultural belonging. With this in mind, we urge the parties . . . to place themselves in the heart of Native American jurisprudence by "healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again."[105]

The Court weighed in favor of the tribal customary principle of cultural belonging by limiting tribal government authority to disenroll citizens to matters of fraud or mistake.[106]

In addressing how these tribal courts attempted to analyze tribal government infringement into the area of citizenship disputes based upon tribal customary rights, we see various approaches. In *Alexander*, the Court utilized the equitable principles of laches and estoppel to prevent the tribal government from infringing on citizenship.[107] Similarly, in *Snowden* the Court also limited tribal government authority to disenroll citizens to matters of

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Anishinaabe. He is called by many names including: Wenabozho, Wenaboozhoo, Nanabozho, Nenaboozhoo, Nanaboozhoo, Nanabush, and Manabozho to name a few.

[100] *Cholewka*, No. 2013-16-AP at *1.

[101] *Id*. at *11.

[102] 32 Indian L. Rep. 6047 (Saginaw Chippewa Ct. App. 2005).

[103] *Id.* at 6048.

[104] *Id*. at 6048–49.

[105] *Id*. at 6051 (quoting Chamberlain v. Peters, 27 Indian L. Rep. 6085, 6097 (Saginaw Chippewa Ct. App. 2000)).

[106] *Id*. (quoting *Chamberlain*, 27 Indian L. Rep. at 6097).

[107] Alexander v. Confederated Tribes of Grand Ronde, 13 Am. Tribal Law 353 (Ct. App. of the Confederated Tribes of the Grand Ronde Cmty. 2016).

fraud or mistake.[108] In balancing this authority, the Court weighed in favor of the tribal customary principle of cultural belonging.[109] On the other hand in *Cholewka*, the Court used the Anishinaabe customary principle of *mino-bimaadiziwn* while upholding the tribal government's decision to disenroll the parties.[110] In doing so, the Court weighed in favor of tribal government authority, reasoning that the appellants may continue to maintain their tribal relations regardless of citizen status.[111] As identified above in *Alexander* and *Snowden*, tribal courts that are engaging in tribal customary law principles are consistently, with the exception of the Court in *Cholewka,* limiting the power of government in the furtherance of the principle that tribal citizenship rights go to the core of Indianness, as an expression of tribal sovereign authority. This analysis is useful for tribal courts in the examination of tribal government infringement into the area of citizenship disputes based upon tribal customary rights. Specifically, the utilization of customary principles involving harmony, equity, fraud, and mistake as articulated pursuant to the beliefs and knowledge of the tribes as utilized in these cases allows the court to focus upon the notion of maintaining tribal relations in an attempt to achieve balance and harmony in addressing citizenship disputes.

1. Land Use (Property) Rights

For many tribal nations, the natural resources occupying the land and waters encompassing their traditional territories are governed by deeply rooted principles grounded in tribal culture, tradition and law.[112] As a result, tribal nations continue to utilize the resources of their territories for "religious, ceremonial, medicinal, subsistence and economic needs."[113] Deriving from a Tribe's original Indian title are the inherent Indian (aboriginal) rights associated with that title. Indian rights include the rights to traditional lands and waters, all rights to practice traditional customs and religion, all rights to retain and develop Indian languages and cultures, and the rights to self-government.[114] Indian rights derive from ancestral use, that is, the use of a specifically allocated area for traditional purposes and cultural expression, which entails the use of the land and water for hunting, trapping, fishing,

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[108] Snowden, 32 Indian L. Rep. at 6051

[109] *Id*. (quoting *Chamberlain*, 27 Indian L. Rep. at 6097).

[110] Cholewka v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Council, No. 2013-16-AP (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Ct. App. 2014).

[111] *Id*. at *11.

[112] Sarah Laslett, *The Ancestor's Breath in the Voice of the Water: Connecting Land and Language in the Ojibwe Revitalization Movement*, 2 Oshkaabewis Native Journal 15 (1995).

[113] Ann McCammon-Soltis & Kekek Jason Stark, *Fulfilling Ojibwe Treaty Promises – An Overview and Compendium of Relevant Cases, Statutes and Agreements*, *in* Minwaajimo: Telling a Good Story – Preserving Ojibwe Treaty Rights for the Past 25 Years 48, 48 (LaTisha A. McRoy & Hoard J. Bichler eds., 2011).

[114] Micheal Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution 27 (1984).

traditional cultivation, irrigation, transportation and domestic uses.[115] Indian rights include aboriginal rights, customary rights, usufructuary rights, usual privileges of occupancy, and permissive occupancy. With this backdrop in mind, this section will use the customary law principles associated with land use rights to explore how tribal courts have attempted to achieve balance and harmony in addressing land use related disputes.

In *Riggs v. Attakai*,[116] the Navajo Nation Supreme Court addressed the issue of gender discrimination associated with the tribal preference in the issuance of grazing permits to female family members over male family members.[117] The Court determined, pursuant to the Navajo Nation's fundamental law, that a grazing permit should be devised to a female member of the family over a male member.[118]

> Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes. The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as *Yoołgaii Asdzáán Bi Beehazáanii.* These principles include *Iiná Yésdáhí* (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising, and teaching), *Yódí Yésdáhí* (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs), *Nitł'iz Yésdáhí* (a position encompassing and being a provider of and a caretaker of mineral goodness for protection), *Tsodizin Yésdáhí* (a position encompassing spirituality and prayer). This is why the women are attached to both the land base and the grazing permits. For the most part, Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas. Because they are keepers of the clan line and land base, Navajo women are often the most logical persons to receive land use rights to hold in trust for the family.[119]

The Court weighed in favor of passing down the property interest in the grazing permit matrilineally.[120]

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[115] Richard Bartlett, Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights 56 (1986).

[116] 7 Am. Tribal Law 534 (Nav. Sup. Ct. 2007).

[117] *See id.* at 535–36.

[118] *Id*. at 537.

[119] *Id*. at 536.

[120] *Id*. at 534.

In *High Elk v. Veit*,[121] the Cheyenne River Sioux Tribal Court of Appeals addressed the due process rights of a former lessee involving grazing rights payments.[122] The court vacated the garnishment order at issue in this case as the order "constituted a departure from Lakota traditions of respect and honor, was contrary to law, and violated the guarantees of due process of law."[123] The court reasoned:

> Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests, including their property or, as here, rent payments contractually owed to them, that they be made parties to any case or judgment that would affect those interests, and that they have a full and fair opportunity to participate as a party in any hearing on such issues.[124]

The Court weighed in favor of the former lessee ensuring that all will have the fair opportunity to fully participate and be heard on the issues based upon the tenets of mutual respect.[125]

In *Ross v. Sulu*, the Hopi Tribe Appellate Court addressed a complaint for the trespass of land between different clans within a Hopi village.[126] In dismissing the claim for lack of jurisdiction the Court determined that "[t]he underlying dispute here is between two clans of the same, traditionally organized village. . . . The determination of which clan has that right is to be made, not by the tribal court system, but by the village according to its established custom."[127] In so ruling, the Court weighed in favor of ensuring that the parties were properly fulfilling clan responsibilities and obligations.[128]

In *Village of Mishongnovi (Cultural Preservation Board) v. Humeyestewa*,[129] the Hopi Tribe Appellate Court addressed a dispute over village funds and other property between the village cultural preservation board and the village board of directors.[130] In addressing the issue of standing, the Court weighed in favor of providing citizens with the opportunity to address disputes:

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[121] 6 Am. Tribal Law 73 (Cheyenne River Sioux Tribal Ct. App. 2006).

[122] *Id.* at 74.

[123] *Id*. at 80.

[124] *Id.* at 78.

[125] *See id.* at 77–80.

[126] Ross v. Sulu, 1991 Hopi App. LEXIS 1, at *1 (Hopi Tribal Ct. App. 1991).

[127] *Id*. at *7–8.

[128] *See id*. at *5–12.

[129] 1 Am. Tribal Law 295, 297 (Hopi Tribal Ct. App. 1998).

[130] *Id.* at 297.

> The exclusionary and highly formalistic operation of federal standing doctrine is a poor fit in the Hopi tribal court system, which exists in a radically different cultural and institutional context. . . . Hopi traditions of discussion and consensus decision-making emphasize maximizing opportunities to air grievances and encouraging participation by clan and village members. Imposing a restrictive standing regime on Hopi tribal courts would deny tribal members access to an important neutral arena for adjudication of disputes.[131]

In *Nelson v. Yurok*,[132] the Yurok Tribal Court of Appeals addressed whether a conviction under the Tribal Fishing Rights Ordinance violated the Yurok Constitution, which protects "traditional practices" from infringement by acts of the Yurok Tribal Council.[133] The Court determined that "the tribe's exercise of its governmental power was based upon a legitimate, rational, constitutionally provided mechanism to protect its tribal resources."[134] In doing so, the Court recognized that the purpose of the Tribal Fishing Rights Ordinance is "to protect the fishery resource and therefore, tribal fishing rights by establishing procedures for the conservation of fish stock and [the] exercise of federally reserved fishing rights" consistent with tribal customary law.[135] The Court relied upon what it phrased as "two fundamental rules of traditional Indian law," which are as follows:

> The First Rule is: Bring Honor and respect to the family, clan, and tribe. The Second Rule is: Live in harmony with nature. . . . In this case, we note, the Yurok Tribe has placed greater emphasis in its Constitution regarding the Second Rule, to live in harmony with nature, over that of traditionally exercising a fishing right.[136]

The Court determined that "the Tribe has placed upon itself and its members, a traditional obligation of living in harmony with nature."[137] In doing so, the Court relied upon the Preamble of the Yurok Constitution which states, "Our people have always lived on this sacred and wonderous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, *Wo-ge'*, made things ready for us and the Creator, *Ko-won-no-eck-on Ne-ka-nup-ceo*, placed us here. From the beginning, we have followed the laws of the Creator, which became the whole fabric of our tribal sovereignty."[138]

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[131] *Id*. at 302.
[132] 5 NICS App. 119 (Yurok Tribal Ct. App. 1999).
[133] *Id.* at 119.
[134] *Id*. at 129.
[135] *Id*. at 123.
[136] *Id*. at 130–31.
[137] *Id*. at 131.
[138] *Id*. at 122 (quoting Yurok Constitution).

Pursuant to the reciprocal element of responsible governance, the citizen has the same obligation as the tribe in protecting the resource. Therefore, just as the government must refrain from infringing on tribal customary rights, so too must the citizen. In *Nelson*, the citizen was violating a tribal customary right that belonged to him and others collectively, to exercise a different customary right. As explained previously, a citizen's free will in exercising a tribal customary right is limited when the exercise of that right infringes on the tribal customary rights of others. The Court weighed in favor of the obligation to live in harmony with nature over the exercise of a treaty right.[139]

In addressing how these tribal courts attempted to analyze tribal government infringement into the area of domestic use disputes based upon tribal customary rights, we see similar approaches. In *Attakai*, the Court utilized tribal customary principles to determine that a property interest in a grazing permit should be passed down matrilineally because according to tribal customary law Navajo women are the keepers of the clan line and land base.[140] Similarly, in *High Elk*, the Court utilized the tribal customary principle of mutual respect, thereby weighing in favor of the former lessee ensuring that all will have the fair opportunity to fully participate and be heard on the issues.[141] In regard to the Village dispute addressed in *Ross*, the Court utilized established tribal customary village procedures to ensure that the parties were acting in accordance with tribal customary law principles pertaining to clan responsibilities and obligations.[142] In *Humeyestewa,* the Court declined to use the federal standing doctrine to limit the customary rights of citizens by weighing in favor of allowing citizens to address disputes in the fulfillment of harmony.[143] Similarly, in *Nelson*, the Court weighed in favor of the tribal government's obligation to live in harmony with nature over the exercise of a treaty right pursuant to the reciprocal element of responsible governance.[144] Collectively, these decisions illustrate the importance of upholding reciprocal kin and clan responsibilities and obligations in the pursuance of harmony.

This analysis is useful for tribal courts in the examination of tribal government infringement into the area of land use and related disputes based upon tribal customary rights. Specifically, the utilization of customary principles involving the fulfillment of family, clan, and tribal responsibilities and obligations as articulated pursuant to the beliefs and knowledge of the tribes as utilized in these cases allows the court to focus upon the religious,

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[139] *Id*.

[140] Riggs v. Attakai, 7 Am. Tribal Law 534, 535–38 (Nav. Sup. Ct. 2007).

[141] High Elk v. Veit, 6 Am. Tribal Law 73, 77–80 (Cheyenne River Sioux Tribal Ct. App. 2006).

[142] *See* Ross v. Sulu, 1991 Hopi App. LEXIS 1, at *5–12 (Hopi Tribal Ct. App. 1991).

[143] Vill. of Mishongnovi (Cultural Pres. Bd.) v. Humeyestewa, 1 Am. Tribal Law 295, 299–302 (Hopi Tribal Ct. App. 1998).

[144] *Id*.; Nelson v. Yurok Tribe, 5 NICS App. 119 (Yurok Tribal Ct. App. 1999).

ceremonial, medicinal, subsistence and economic needs of the people associated with their traditional territories pursuant to the deeply rooted principles grounded in tribal culture, tradition and law. These cases further inform us on the use of the traditional principles of harmony, respect, and honor to ensure that the participants are provided the opportunity to fully participate and be heard on the issues based upon the tenets of mutual respect in addressing land use disputes.

B. Employment Rights

The work of responsible governance administered by tribal governments within the realm of tribal government programs and economic development entities must be operated to ensure that Tribes have the economic resources available to support tribal governance. In the process the directives and priorities of tribal governments must be balanced with the assurance that tribal administrators are operating their programs within the confines of applicable tribal laws and policies. This tension is the most evident in balancing whether to develop tribal laws and policies in the implementation of tribal programs, services, and businesses as tribal employment opportunities versus economic development opportunities.[145] With this backdrop in mind, this section will use the customary law principles associated with employment rights to explore how tribal courts have attempted to achieve balance and harmony in addressing employment related disputes.

In *Hoopa Valley Indian Housing Authority v. Gerstner*,[146] the Hoopa Valley Court of Appeals addressed a dispute regarding the appropriate procedures to be used in an employment termination.[147] The Court reasoned that employment was an important property right and as such due process rights attached to any action depriving an employee of the right.[148] As such, the Court determined that as part of the administrative proceedings addressing the dispute, the employee was entitled to a meaningful opportunity to be heard and that any ambiguities were to be resolved in favor of the right of an employee to file a grievance and obtain judicial review.[149] The Court weighed in favor the right of the employee to have the resources necessary to care and provide for the family over the business prerogative of the Tribal entity.

In *Navajo Nation v. Crockett*,[150] the Navajo Nation Supreme Court addressed the issue of freedom of speech and due process claims relating to

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[145] See *generally* Harvard Project on American Indian Economic Development, The State of Native Nations: Conditions Under U.S. Policies of Self-Determination (2007).

[146] 22 Indian L. Rep. 6002 (Hoopa Valley Tribal Ct. App. 1993).

[147] *Id.*

[148] *Id*.

[149] *Id*.

[150] 24 Indian L. Rep. 6027 (Nav. Sup. Ct. 1996).

an employee termination action.[151] In this case, the Court reviewed a claim of retaliatory termination when employees of a Navajo Nation farming enterprise attended a meeting of the tribal Economic Development Committee, which oversees the enterprise, without the enterprise's permission alleging mismanagement and misconduct. The Court utilized Navajo common law in the employment context and instructed that when an employee has a complaint against their employer, the employee has the obligation to bring the complaint to their supervisor and respectfully discuss the matter.[152] The Court applied the Navajo common law concept of *nalyeeh*, which the court described as "the employee should not seek to correct the person by summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by 'talking things out.'"[153] The Court further explained that these principles should be maintained in the modern tribal grievance process applying the principles of respect, honesty, and kinship.[154] In its application of Navajo common law the Court determined:

> This Court applies Navajo common law to determine whether an individual's right to free speech has been violated. It provides that an individual has a fundamental right to express his or her mind by way of the spoken word with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle. . . . Speech should be delivered with respect and honesty. This requirement arises from the concept *k'e*, which is the "glue" that creates and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and arguments be resolved by "talking things out." This process of "talking things out," called *hoozhoojigo*, allows each member of the group to cooperate and talk about how to resolve a problem. This requirement places another limitation on speech, which is that a disgruntled person must speak directly with the person's relatives about his or her concerns before seeking other avenues of redress with strangers.[155]

The Court weighed in favor of "talking things out," ensuring that the parties mutually participated in a process directed to resolve the dispute.[156] This determination was necessary to uphold the reciprocal obligation that the parties owed to one another in order to restore harmony.[157]

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[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

In addressing how these tribal courts attempted to analyze tribal government infringement into the area of employment disputes based upon tribal customary rights, we see similar approaches. In *Gerstner*, the Court utilized the tribal customary principle embodying the right to employment based upon the principle that citizens are entitled to the right to have the resources necessary to care and provide for the family.[158] In addressing this dispute, the Court balanced the right of the employee with the business prerogative of the Tribal entity by weighing in favor of the employee in an attempt to achieve harmony.[159] Similarly in *Crockett*, the Court utilized the customary principle embodying the obligation of "talking thing out," thereby ensuring that the parties mutually participated in the process directed to resolve the dispute.[160] Interestingly, the Court explained how this customary obligation of "talking thing out," which placed a limitation on speech was overbalanced by tribal governmental policy because requiring the voice of the employee to participate in the process of resolving the dispute was necessary to achieve harmony.[161] This analysis is useful for tribal courts in the examination of tribal government infringement into the area of employment disputes based upon tribal customary rights. Again, the courts utilized the customary principles involving the fulfillment of family, clan, and tribal responsibilities and obligations as articulated pursuant to the beliefs and knowledge of the tribes to avoid disruptions of these relationships. These cases further inform us on the use of the traditional principles of respect and honesty to ensure that the participants are provided the opportunity to fully participate and be heard and the process while the family can obtain the resources necessary to care and provide for the family.

C. Election Rights

An essential component relating to the preservation, protection, and promotion of tribal self-determination is an effective government. For a tribal government to operate effectively, in the furtherance of responsible governance, the tribe must have effective leadership. Integral to the assurance of effective leadership is determining the qualifications necessary for an elected official to hold office. Within this context, Tribes must balance between multiple tribal customary rights. These rights include the individual desire to run for office with the obligation to be asked to govern and to be appointed by the people. With this backdrop in mind, this section will use the customary law principles associated with the right to hold office to

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[158] Hoopa Valley Indian Hous. Auth. v. Gerstner, 22 Indian L. Rep. 6002 (Hoopa Valley Tribal Ct. App. 1993).

[159] *Id*.

[160] Navajo Nation v. Crockett, 24 Indian L. Rep. 6027 (Nav. Sup. Ct. 1996).

[161] *Id*.

explore how tribal courts have attempted to achieve balance and harmony in addressing election disputes.

In *Tsosie v. Deschene*,[162] the Navajo Nation Supreme Court addressed a due process challenge involving whether the Nation can require candidates nominated for presidential office to fluently speak and understand the Navajo language.[163] The court expressed that the fluency requirement was enacted to "preserve, protect, and promote self-determination, for which language is essential," and therefore the Court determined that the regulation was a reasonable requirement for participation in the Nation's political system.[164] The court reasoned:

> While the right or privilege of placing one's name in nomination for public elective office is a part of political liberty, thus making it a due process right, that liberty may be restricted by statute. Any such restriction must be reasonable and forward some important governmental interest. . . . In this society, this court has the obligation to interpret Navajo law and enforce Navajo law. When we carry out that responsibility, that responsibility is not limited to an interpretation of statutory laws – those laws made by human beings to regulate other human beings in society. We consider ancient laws also. The ancient laws of the Holy People take precedence because these are sacred laws that we were placed here with. . . . The value system—the law of the Navajo people—is embedded in the language.[165]

Because tribal law recognized a constitutional liberty to run for office, the Court utilized a balancing approach in addressing the dispute. It reasoned that the liberty to run for office may be restricted by statute if the restriction is reasonable and forwards "some important governmental interest."[166] Here, the Court weighed in favor of the statute due to the importance of the Dine' language as a sacred law over the customary obligations of being a *naat'ánii* (elected leader).[167]

In *Sherlock v. Navajo Election Administration*,[168] the Navajo Nation Supreme Court ordered the removal of an elected official for writing "N/A" in the space for declaring prior criminal convictions on their candidate

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[162] 12 Am. Tribal Law 55 (Nav. Sup. Ct. 2014).

[163] *Id.* at 58.

[164] *Id*. at 62.

[165] *Id*. at 61–63.

[166] *Id*. at 61.

[167] *Id*. at 62; *see also In re* Certified Question II: Navajo Nation v. MacDonald, 16 Indian L. Rep. 6086, 6092 (Nav. Sup. Ct. 1989) ("A *naat'aanii* was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a *naat'aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words.").

[168] 15 Am. Tribal Law 136 (Nav. Sup. Ct. 2017).

declaration form when the official had several convictions.[169] The court reasoned:

> We add the practical application of Navajo reasoning. People enter a *hooghan* [traditional dwelling] through the east door making their presence known to all. Much like entering a *hooghan*, in an election, a *naat'anii* seeking public office must enter an election with complete transparency. Although a *naat'anii* enters a hooghan like the people he or she serves, the standard conduct of a *naat'anii* is higher and stricter. . . . The *naat'anii* indeed [is] expected to be honest, faithful, and truthful in dealing with his [or her] people. Thus, a *naat'anii* betrays the trust of the people when he or she chooses to sneak around the *hooghan* in search of a non-existent side door in an effort to be less than open and honest. Here, Appellee did not enter the election with full disclosure of her personal history, which is expected by the people she serves. Instead, she was silent about her prior convictions and, upon the revelation of her disqualifying convictions, she ran to the state court for an order setting aside her convictions so as to evade removal. We will not condone such behavior. We hereby hold that Appellee's negative response to the inquiry about felony and misdemeanor convictions was a false statement under the Election Code so as to remove her from elected office. A *naat'anii* is greatly respected by the people, however, a *naat'anii* can be relieved of authority if he or she betrays the public trust placed in him or her.[170]

The Court weighed in favor of holding the *naat'ánii* responsible for fulfilling her obligations to the people over the right to participate in the political system by running for office.[171]

In *Spurr v. Tribal Council*,[172] the Nottawseppi Huron Band of Potawatomi Supreme Court addressed a tribal member's challenge seeking to enjoin an election from being held pursuant to an amendment to the Tribe's constitution.[173] The tribal member alleged that the inclusion of a document in an absentee election mailing packet constituted a "form of electioneering" in "violation of the Tribal Council's mandate to call and conduct Article IX elections."[174] The question before the court was what standards govern Article IX elections.[175] In addressing the merits, the Court determined that the standards that apply are a matter of tribal common law, and as a result

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[169] *Id.* at 140.

[170] *Id*. at 141.

[171] *Id*.

[172] No. 12-005APP, 2012 Nottawaseppi Huron Band Sup. LEXIS 3 (Nottawseppi Huron Band of Potawatomi Sup. Ct. Feb. 21, 2012).

[173] *Id.* at *4.

[174] *Id.* at *15.

[175] *Id.* at *4.

the Court turned to Potawatomi customary law for guidance. In doing so, the Court utilized the principle of *mino-bimaadiziwin* (*mno-bmadzewen*, as the term is depicted in the Potawatomi language) as follows:

> We hearken back to our consideration of *MnoBmadzewen*, and we find that the government's boundaries of acceptable conduct in administering an Article IX election are broad, but not unlimited. . . . [S]o long as the government's conduct respects, as we believe it does here, elections as expression of the community's will, we will not intervene.[176]

The Court weighed in favor of the principle that tribal government conduct in administering an election is limited by the principle of respecting the will of the people as the source of the Tribe's sovereign authority.[177] Interestingly, the Court did not address whether the will of the people is also limited by the same customary law principle of respect which is one of the *Niizhwaaso-Gimishoomisinaanig-Gikinoo'amaagewinan* (*Noeg Meshomsenanek Kenomagewenwn* as referenced in the Potawatomi dialect),[178] seven grandfather teachings or seven sacred laws of creation.[179] This is because pursuant to Anishinaabe law, "the principle of reciprocity or mutuality is a core tenet of the concept of *manaaji'idiwin*, which is defined as they respect each other. . . . The understanding of this principle is that the act of respect is reciprocal, in that it is mutually shared by all parties engaged in the act."[180] As a result, the will of the people is reciprocally limited, in the same manner that the tribal governmental authority is limited. Therefore, the Court in implementing balance and harmony should have also weighed whether the will of the people, through their action of amending an article of the Tribe's Constitution was also respectful to the citizens affected by the action as a matter of tribal customary law.

In all three cases, the tribal courts utilized multiple tribal customary principles encompassing the right to hold elected office. In addressing the dispute in *Deschene*, the Court balanced the recognized tribal customary right to participate in the political system by running for office with the customary obligation that elected officials must be able to fluently speak and understand the Navajo as the language is essential.[181] Here, the Court weighed in favor of the statute due to the importance of the Dine' language as a sacred law coupled with the tribal customary obligations associated

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[176] *Id.* at *15–16.

[177] *Id.* at *6.

[178] *See* Spurr v. Spurr, No. 17-287-APP, 2018 Nottawaseppi Huron Band Sup. LEXIS 6, at *6 (Nottawaseppi Huron Band of Potawatomi Sup. Ct. Jan. 25, 2018) (noting that the seven grandfather teachings consist of: Wisdom, Love, Respect, Bravery, Honesty, Humility, and Truth).

[179] *Id*.

[180] Stark, *supra* note 4, at 312.

[181] *Tsosie*, 12 Am. Tribal Law at 62.

with responsible governance.[182] As a result we see the Court achieving harmony by determining that the customary obligation of preserving the Navajo language is an integral aspect of governance and outweighed the customary obligations of being an *naat'ánii*.[183] Similarly in *Sherlock*, the Court balanced the recognized fundamental law right to participate in the political system by running for office with the customary obligation that elected officials seeking public office must enter an election with complete transparency.[184] Here, the Court weighed in favor of holding the *naat'ánii* responsible for fulfilling her obligations to the people.[185] Likewise in *Spurr*, the Court also balanced the recognized tribal customary right to participate in the political system by running for office with the customary principle that the tribal government conduct in administering the election is limited by the customary law principle of respecting the will of the people as the source of the Tribe's sovereign authority.[186] This analysis is useful for tribal courts in the examination of tribal government infringement into the area of election disputes based upon tribal customary rights. Specifically, these cases inform us that the utilization of deliberative and positivistic law, that is, the law made by human beings to regulate other human beings must be utilized in concert with sacred, natural, and customary law, which are ancient traditional laws. These cases further inform us on the use of the traditional principle of honesty to ensure that leaders disclose their intentions in a purposeful manner as a form of responsible governance.

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[182] *Id*. at 62–63 (At the hearing, the court explained the origins of sacred law as follows: "In this society, this Court has an obligation to interpret Navajo law and enforce Navajo law. When we carry out that responsibility, that responsibility is not limited to an interpretation of statutory laws—those laws made by human beings to regulate other human beings in society. We consider ancient laws also. The ancient laws of the Holy People take precedence because these are sacred laws that we were placed here with. As an illustration, we recount the time in our history when the Navajo people, after being placed on this Earth, lived with the Holy People so they would be educated about our ancient laws—the right and wrongs. But there came a time when the Holy People were about to leave. If you can picture that occasion, the people were in a hooghan and the Holy People were one-by-one filing out. One of them, *Haashch'éé*łti*'í* (Talking God), poked his head back through the doorway and said, 'My children, there is one thing that I must tell you: do not forget the value system that we have given you.' In the Navajo language that system is expressed as *Naakits'á*adahgo ójí. Core to that system is the language. The value system—the law of the Navajo people—is embedded in the language. When *Haashch'éé*łti*'í* said that to the people, that in itself became the establishment of a law—*bee haz'á*anii. Now you take that law and apply it. It is how our people survived as a society since time immemorial.").

[183] *Id*. at 62; *see also In re* Certified Question II: Navajo Nation, 16 Indian L. Rep. at 6092 ("A *naat'aanii* was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a *naat'aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words.").

[184] Sherlock v. Navajo Election Administration, 15 Am. Tribal Law 136, 141–42 (Nav. Sup. Ct. 2017).

[185] *Id*.

[186] Spurr v. Spurr, 2018 Nottawaseppi Huron Band Sup. LEXIS 6 at *6.

D. Housing Rights

For many tribes, the principle of citizens having safe and stable housing is a tribal customary right as shelter is a necessity of life recognized by tribes since time immemorial.[187] For the Anishinaabe, the concept of *doodem* (clan or totem), encompasses the spiritual obligations associated with clan identity, which includes the Anishinaabe customary law right of housing.[188] As another example, "the Navajo Nation's internal relations compose the bedrock structure for its sovereignty. One way of understanding the Navajo view of sovereignty is to conceptualize it as endogenous, a process where sovereignty, including nation building, emanates from inside the *hooghan* (hogan) outwards to the Four Sacred Mountains and beyond."[189] Pursuant to this example, the right to housing becomes an essential component of the tribe's sovereignty as the source from where the sovereignty of the people is derived as "a place at the center of Navajo life."[190] With this backdrop in mind, this section will use the customary law principles associated with right of citizens having safe and stable housing to explore how tribal courts have attempted to achieve balance and harmony in addressing housing disputes.

In *Mahkewa v. Mahkewa*,[191] the Appellate Court of the Hopi Tribe examined Hopi customary law pertaining to the principle of truth, fairness and the importance of housing pursuant to Hopi tradition.[192] In this case, a former husband appealed a divorce proceeding requiring him to build a home for his former wife.[193] The court reasoned, "Appellant's [former husband's] behavior is against the Hopi sense of fairness. It is '*Nukpunti*' or an 'act of evil intended to deprive the former spouse of property that is rightfully hers.'"[194] In reviewing the trial court's order, the Appellate Court affirmed the requirement of the former husband in a divorce proceeding to build a home for his ex-wife establishing that the requirement was consistent with Hopi customary law.[195] The Appellate Court also held that the trial court partially erred, as the specific performance remedy was unenforceable.[196] The Appellate Court amended the divorce decree in light of the discharge

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[187] Jacqueline Agtuca, Elizabeth Carr, Brenda Hill, Paula Julian, & Rose Quilt, *The Right to Safe Housing and Federal Responsibility to Indian Tribes*, Restoration of Native Sovereignty and Safety for Native Women, February 2020, at 15.

[188] Basil Johnston, Ojibway Heritage 78 (1990) (As Basil Johnston explained in describing Anishinaabe clan obligations, "what is man as a man entitled to, the Anishinaabe would probably have replied, food, clothing, shelter, personal inner growth, and freedom").

[189] Raymond D. Austin, Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance 76 (2009).

[190] Green Tree Servicing, LLC v. Duncan, 7 Am. Tribal Law 633, 641 (Nav. Sup. Ct. 2008).

[191] 5 Am. Tribal Law 207, 211 (Hopi Ct. App. 2004).

[192] *Id.* at 211.

[193] *Id*. at 210.

[194] *Id*. at 211.

[195] *Id*. at 214.

[196] *Id*.

in bankruptcy of the judgment against the former husband to effectuate the Hopi sense of fairness based upon the principle "*Hak hakiy aw nukpnate' son put akw aapiy neengem nukngwat aw yorikngwu* (if one commits a wrong upon another he cannot realize a benefit to himself by it)" and remanded the matter.[197] The court determined that pursuant to Hopi Customary law, "the Hopi home is a sacred place where children are instilled with Hopi traditions and values and where the wife fulfills her obligations to her clan."[198] In further description of this principle the Court determined:

> Hopi is a matrilineal society. The husband has the duty to provide support and maintenance for the wife in the form of a home and other resources to enable her to fulfill her obligations to her clan. Traditionally, upon the completion of the wedding ceremony at the groom's household, the bride returns to her family home where the groom joins her to begin the marital relationship. After the groom accumulates sufficient resources to build a home for his wife, the new couple moves to the new home to become *nawipti*, or independent. This new home becomes the womb of the new family where Hopi traditions and values are perpetuated. By virtue of her matrilineal duties, the wife's interest in the home is paramount to that of the husband. The husband's obligations to his clan, on the other hand, takes place in the homes of his clanswomen, not his wife's home.[199]

The Court, acknowledging the principles of truth and fairness, weighed in favor of the importance of safe and stable housing in Hopi tradition.[200]

In *Green Tree Servicing, LLC v. Duncan*,[201] the Navajo Nation Supreme Court addressed the issue of a binding arbitration clause involving the foreclosure of a tribal member's home.[202] In declining to enforce the binding arbitration clause, the court reasoned as follows:

> This Court [has] rejected "any rule that conditions the respectful explanation of rights under Navajo due process on subjective assumption concerning the defendant. This right exists for all defendants in our system."[203] Finally, these principles must be applied in the context of the importance of a home in Navajo thought. This Court has noted that a home is not just a dwelling, but a place at the center

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[197] *Id*. at 213.

[198] *Id*. at 211.

[199] *Id*. at 212.

[200] *Id*.

[201] 7 Am. Tribal Law 633 (Nav. Sup. Ct. 2008).

[202] *Id.* at 640–42.

[203] *Id*. at 642 (quoting Eriacho v. Ramah District Court, 6 Am. Tribal Law 624, 630 n.2 (Nav. Sup. Ct. 2005).

> of Navajo life.[204] Based on this principle, the Court scrutinizes procedures to make sure they protect a homeowner's ability to maintain a healthy home and family.[205]

The Court weighed in favor of the homeowner's right to housing in an attempt to achieve harmony.[206]

In both cases, the tribal courts utilized the tribal customary principles embodying the right to safe and stable housing. In addressing the dispute in *Mahkewa,* the Court balanced the tribal customary right to safe and stable housing with the obligation of finality, which is necessary in divorce proceedings.[207] The Court, acknowledging the customary law principles of truth and fairness, balanced the rights of the parties weighing in favor of the customary law principle relating to the importance of housing in Hopi tradition.[208] Likewise, in *Duncan* the Court also balanced the tribal customary right to safe and stable housing with the obligation of a binding arbitration clause.[209] Here, the Court also scrutinized the arbitration procedures weighing in favor of the homeowner's fundamental tribal customary right to housing in an attempt to achieve harmony.[210] This analysis is useful for tribal courts in the examination of tribal government infringement into the area of housing disputes based upon tribal customary rights. Once more, the utilization of customary principles involving the fulfillment of family, clan, and tribal responsibilities and obligations as articulated pursuant to the beliefs and knowledge of the tribes as utilized in these cases informs us how courts have articulated the traditional law principles associated with truth and fairness in addressing housing disputes.

E. Domestic Relation Rights

As explained by Matthew L.M. Fletcher, "[k]ey to the preservation of American Indian cultures and traditions is the ability and authority of Indian nations to adopt laws consistent with Indian culture for the adjudication of domestic relations, which largely include marriage and divorce, child custody and welfare, adoptions, inheritance and devise, and other related subject areas."[211] This is because "[t]he sovereignty retained by an Indian tribe includes 'the power of regulating [its] internal and social relations.'"[212] With

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[204] *Id*. (referencing Fort Defiance Housing Corp. v. Lowe*,* 5 Am. Tribal Law 394, 398 (Nav. Sup Ct. 2004)).

[205] *Id*.; *see* Phillips v. Navajo Housing Authority*,* 6 Am. Tribal Law 708, 711–12 (Nav. Sup. Ct. 2005).

[206] *Green Tree Servicing, LLC*, 7 Am. Tribal Law at 640–42.

[207] *Mahkewa*, 5 Am. Tribal Law at 212.

[208] *Id*.

[209] Green Tree Servicing, LLC, 7 Am. Tribal Law at 641.

[210] *Id*.

[211] Fletcher, *supra* note 65, at 435.

[212] Billie v. Abbot, 16 Indian L. Rep. 6021, 6022 (Nav. Sup. Ct. 1988) (citing United State

this backdrop in mind, this section will use the customary law principles associated with right of domestic relations to explore how tribal courts have attempted to achieve balance and harmony in addressing domestic relation disputes.

In *Miner v. Banley*,[213] the Cheyenne River Sioux Tribal Court of Appeals addressed an order for permanent custody of a child. The court reasoned that in evaluating the "best interests of the child" standard, the Children's Court should consider all relevant factors required by the Children's Code, including any special circumstances of a minor child requiring special care, appropriate child development considerations, considerations of the emotional and physical security of the child, and cultural factors, such as the appropriate familiarization of the child with Lakota customs, traditions and practices and the reported Lakota tradition of returning Lakota children placed with members of the extended family for child rearing to their biological parents upon request.[214] The Court weighed in favor of the principles relating to culturally relevant child rearing over the literal enforcement of the Children's Code.[215]

In *Zephier v. Walters*,[216] the Cheyenne River Sioux Tribal Court of Appeals addressed a case involving a custody dispute where the parent with physical custody of the child resided in Hawai'i.[217] During the summer, the child traveled to the Cheyenne River Indian Reservation to visit the other parent and that parent did not return the child.[218] The Tribal court ordered a hearing without providing sufficient notice of the purpose of the hearing to the parent living in Hawai'i.[219] The court, in determining that reversible error occurred by failing to provide sufficient notice, reasoned as follows:

> The guarantee of due process is embedded . . . . in Lakota tradition and custom. The essence of due process is governmental respect for all individuals subject to its authority. This respect is often translated pragmatically in legal proceedings to mean notice and the opportunity to be heard.[220]

The Court weighed in favor of the right to due process recognizing the obligation to engage the parties with respect and by providing the parties with the "opportunity to be heard."[221] By allowing the parties an equal opportunity to engage in the dispute the Court was able to uphold both parties' tribal

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v. Kagama, 118 U.S. 375, 382 (1886).

[213] 22 Indian L. Rep. 6044 (Cheyenne River Sioux Ct. App. 1995).

[214] *Id.* at 6045.

[215] *Id*.

[216] 2017 Cheyenne River Sioux App. LEXIS 3 (Cheyenne River Sioux Tr. Ct. App. 2017).

[217] *Id.* at 1–2.

[218] *Id*. at 3.

[219] *Id*. at 4.

[220] *Id*. at 5–6.

[221] *Id*.

customary rights associated with child custody as well as truth and fairness in an attempt to achieve harmony.

In *In the Matter of the Adoption of Davis*,[222] the Family Court of the Navajo Nation for the Judicial District of Chinle addressed the issue of an adoption under Navajo common law.[223] In addressing the merits the court reasoned as follows:

> Navajo common law adoption is based on expectations "that children are to be taken care of and that obligation is not simply one of the child's parents." It is common knowledge that "orphans of Navajo families or children of large families or broken homes are adopted by other family members or a family member of the same clan as the child". . . . Navajo adoption is based on need, mutual love and help. . . . [A]n adoption in the truest sense requires the person to maintain a parent-child relationship through their entire lives. In a sense, despite the lack of clan relations, the person becomes a relative of the child and vice versa . . . . [I]n the absence of a clan relative asserting their right to care for a child, a person who assumes the duties and responsibilities of a parent can also effectuate a Navajo Common Law Adoption. In this, the person must consider the child as *shi awe* (my child). Conversely, the child must consider the caretaker as *shi ma'* (my mother) or *shi she'e* (my father) . . . . [I]t is a universal requirement for this Court to ensure that *k'e* (relations) is maintained. All court actions should also strive to obtain *hozho* (harmony). In this case, all of the late Mr. Kinlichee's biological children are agreeing to this adoption. Thus, by recognizing the adoption of Priscilla by the late Mr. Kinlichee, this Court is assured that *k'e* and *hozho* will continue to be preserved for this family.[224]

The family court weighed in favor of upholding clan and kinship obligations by effectuating a Navajo common law adoption.[225]

In *In re Validation of Marriage of Francisco*,[226] the Navajo Nation Supreme Court addressed a request to validate a citizen's common law marriage.[227] The Court determined that common law marriage was invalid because it was not recognized pursuant to Navajo customary law.[228] In upholding the sanctity of traditional Navajo marriage, the Court synthesized this principle: "[T]he concept of justice has its source in the fabric of each

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[222] No. CH-FC-532-12 (Nav. Fam. Ct., Chinle Judicial Dist., Ariz. 2012).

[223] *Id.* at *5.

[224] *Id*. at *6–9.

[225] *Id*. at *9.

[226] 16 Indian L. Rep. 6113 (Nav. Sup. Ct. 1989).

[227] *Id.* at 6113.

[228] *Id*. at 6115.

individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people."[229] The Court explained further:

> Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the "Holy People." This blessing ensures that the marriage will be stable, in harmony, and perpetual.' Under traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other. Thus, in traditional Navajo society the Navajo people did not approve of or recognize common-law marriages.[230]

The Court weighed in favor of the right to marriage by acknowledging that common-law marriages were not recognized pursuant to Navajo common law.[231] Although the Court refused to validate the citizen's request, which on the surface appears to be an infringement in their right to marriage, the Court in fact was upholding the core tenet of the right to marry.[232] In this instance, the Court was encouraging the citizen to have the marriage blessed by the "Holy People" thus achieving harmony.[233]

In addressing how these tribal courts attempted to analyze infringement into the area of domestic relation disputes based upon tribal customary rights, we see similar approaches. In *Miner*, the Court balanced the recognized tribal customary right related to child custody with the obligation of a government agency to act according to the Children's Code's "best interest of the child" standard.[234] The Court determined that the tribal customary law principles relating to culturally relevant child rearing outweighed the literal enforcement of the Children's Code.[235] In *Zephier*, the Court also balanced the recognized tribal customary right to child custody with the with the other parent's tribal customary right to due process.[236] Here, the Court weighed in favor of the tribal customary right to due process recognizing the tribal customary obligation to engage the parties with respect and by providing the parties with the "opportunity to be heard."[237] By allowing the parties an equal opportunity to engage in the dispute the Court was actually able to uphold

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[229] *Id*.

[230] *Id*. at 6113 (citing Navajo Nation v. Murphy, 15 Indian L. Rep. 6035 (Nav. Sup. Ct. 1998) (internal citation omitted)).

[231] *Id*. at 6115.

[232] *Id*. at 6113.

[233] *Id*.

[234] *Miner v. Banley*, 22 Indian L. Rep. 6044, 6045 (Cheyenne River Sioux Ct. App. 1995).

[235] *Id*.

[236] Zephier v. Walters, 2017 Cheyenne River Sioux App. LEXIS 3, at *3 (Cheyenne River Sioux Tr. Ct. App. 2017).

[237] *Id*.

both tribal customary rights in an attempt to achieve harmony. In *Davis*, the family court balanced the tribal customary right related to adoption under Navajo common law.[238] In doing so the family court weighed in favor of upholding clan and kinship obligations by effectuating a Navajo common law adoption, in an attempt to achieve harmony.[239] Lastly, in *Francisco* the court balanced the tribal customary right to marriage under Navajo common law.[240] In this instance, the Court weighed in favor of the tribal customary right to marriage by acknowledging that common-law marriages were not recognized pursuant to Navajo common law and thereby encouraging the citizen to have the marriage blessed by the "Holy People" thus achieving harmony.[241] This analysis is useful for tribal courts in the examination of tribal government infringement into the area of domestic relation disputes based upon tribal customary rights. Yet again, these cases inform us that the utilization of deliberative and positivistic law must be utilized in concert with sacred, natural, and customary law. These cases once again inform us on the use of the traditional principles of truth, fairness, and respect to ensure fulfillment of family, clan, and tribal responsibilities and obligations with regard to domestic relation disputes.

F. Religious / Ceremonial Rights

In the discussion of tribal customary rights associated with the exercise of traditional tribal cultural practices, the concept of "religion" does not necessarily fit as the term is used in an Anglo-American law context. As Kristen Carpenter depicted, "the word 'religion' may be a misnomer when we are talking about tribal peoples' spiritual experiences."[242] This is because for many tribal nations, the practice of ceremonial obligations and traditions are a way of life, entirely immersed into to the fabric of their being and existence.[243] For example the Anishinaabe understand the concept of culture as contained in the concept *Anishinaabe-izhitwaawin*.[244] The concept of *izhitwaawin* is defined as a certain way of belief, a religion, a culture.[245] As a

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[238] In the Matter of the Adoption of Davis, No. CH-FC-532-12 at *9 (Nav. Fam. Ct., Chinle Judicial Dist., Ariz. 2012).

[239] *Id*.

[240] In re Validation of Marriage of Francisco, 16 Indian L. Rep. 6113, 6113 (Nav. Sup. Ct. 1989).

[241] *Id*. at 6113–15.

[242] Carpenter, *supra* note 34, at 562.

[243] *Id*. ("In many Native cultures, religion is inseparable from relationships and rituals, from stories and place").

[244] Stark, *supra* note 4, at 319.

[245] *Id*. ("This term is derived from the root term *izhitwaa,* which is further broken down into *in-*, which means thus, in a certain direction, in a certain manner, and *-twaa* which means belief, way of life").

result, "through the existence and embodiment of *Anishinaabe-izhitwaawin* is the manifestation of Anishinaabe harmony and well-being."[246]

Similarly, the Cherokee concept of religion is "*eloh*," that literally means "'history,' 'culture,' 'law,' and 'land.'"[247] James Zion expounds upon this notion explaining the Navajo concept entailing traditional cultural practices through the "principle *sa'ah naaghai bik'eh hozho* ('SNBH'),which states that 'the conditions for health and well-being are harmony within and connection to the physical/spiritual world.'"[248] With this backdrop in mind, this section will use the customary law principles associated with religious rights in the context of the "ceremonial practice, spiritual beliefs, and cultural lifeways of American Indians" to explore how tribal courts have attempted to achieve balance and harmony in addressing religious disputes.

In *Townsend v. Port Gamble S'Klallam Housing Authority*, the Tulalip Court of Appeals determined that a tenant's right to freely practice her religion did not entitle her to create a public nuisance concerning excessive noise in a tribal housing complex by engaging in Native American Church activities (drumming and singing) late into the night.[249] In this case, the Court analyzed the dispute based upon Anglo-American law principles, mainly the Indian Civil Rights Act and the federal free exercise clause pursuant to *Lyng*,[250] *Smith*,[251] and *Rucker*,[252] rather than the tribal customary right to freely practice ceremonial activities.[253] As a result, the Court weighed in favor of the tribal governmental action to evict the tenant for her religious activities.[254] Had the Court properly engaged in a tribal customary law analysis, the Housing Authority would have been required to mitigate the infringement of the tenant's religious exercise. One possible accommodation that the Court could have required would include the use of a community center building or alternative location to conduct the religious ceremony, rather than an outright infringement on the religious exercise and eviction action.[255]

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[246] *Id*.

[247] Jace Weaver, Other Words: American Indian Literature, Law, and Culture 301 (2001).

[248] James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 Touro L. Rev. 563, 603 (2002) (quoting Elizabeth L. Lewton & Victoria Bydone, *Identity and Healing in Three Navajo Religious Traditions: Sa'ah Naaghai Bik'eh Hozho*, 14 Med. Anthropology Q. 463, 477–78 (2000).

[249] Townsend v. Port Gamble S'Klallam Housing Authority, 6 NICS App. 179 (Tulalip Ct. App. October 18, 2004).

[250] Lyng v. Northwest Cemetery Protection Association, 485 U.S. 439 (1988).

[251] Employment Division v. Smith, 494 U.S. 872 (1990).

[252] Department of Housing and Urban Development v. Rucker, et. al., 535 U.S. 125 (2002).

[253] *Townsend*, 6 NICS App. at 185–86.

[254] *Id*. at 186.

[255] *See, e.g.*, Topping v. Ho-Chunk Nation Grievance Rev. Bd., 11 Am. Tribal Law 388, 393-94 (Ho-Chunk Sup. Ct. 2010) ("The concept of *woigixate* requires the GRB and the disabled employee's supervisor to try to understand and appreciate what the disabled employee is experiencing and what the nature of his disability is before dismissing him. *Woigixate* requires that all people be treated with respect and compassion and that no one should be treated badly or

Whether the particular tribal ceremony in question, including the Native American Church activities in *Townsend*, goes to the "core of Indianness" and/or to the "core of tribal identity" is a matter for each Tribe to determine. Some tribal ceremonials are easily described as meeting the "core of Indianness" standard while others such as ceremonies gifted by other tribes and/or communities may cause more debate.[256] Even with this distinction, it may be argued that the ceremonials that are on the fringes of being a collective tribal ceremony are still fundamental from a customary law perspective since the essence of most ceremonies encompass healing and the restoration of harmony and balance to the Nation and the World.

In *Mille Lacs Band of Ojibwe Indians v. Williams*, the Non-Removable Mille Lacs Band of Ojibwe Indians Court of Appeals addressed the constitutionality of the Band's Exclusion and Removal Ordinance as it applied to a Band member under the Band and Minnesota Chippewa Tribe Constitutions.[257] The court, utilizing the importance of maintaining relationships rationale, held that a heightened standard of removal for Band members applies "because they possess unique interests in remaining on the Mille Lacs reservation that non-members may not possess."[258] The court remanded the matter back to the lower court to stay the removal petition at issue in this case until a revised Exclusion and Removal Ordinance could be enacted that addressed the issues raised in this matter.[259] The court emphasized the importance of kinship and community relationships as follows:

> It[] could certainly impair a Band member's rights to participate in the exercise of his "religion" if he is desirous of learning the traditional ways of the Anishinabe and his access to the patrimony necessary for practicing these ways was defeated by his inability to come on to the reservation. The court also believes that a right of a person to live with his child and raise his child is that type of intimate relationship that many Courts have recognized as being within that core group of persons whom a person has a First Amendment right to live with and associate with.[260]

The Court weighed in favor of the importance of kinship and community relationships as an exercise of tribal customary law.[261] However, the

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demeaned because of their situation. Not just disabled people, but all people, should be treated with *woigixate.* Hence, *woigixate* requires reasonable attempts at accommodating a person's disability rather than just throwing the employee out like a broken tool.").

[256] Carpenter, *supra* note 34, at 583 ("Individuals' interests in religious freedom or choice may also arise when new religions arise in, or come to, tribal communities. Well-known examples include Handsome Lake bringing a new religion to the Senecas, the arrival of the Ghost Dance on the Plains, and the spread of the Native American Church.").

[257] Mille Lacs Band of Ojibwe Indians v. Williams, No. 11-APP 06 (Mille Lacs Band Ct. App. 2012).

[258] *Id*. at *15–16.

[259] *Id*. at *17.

[260] *Id*. at *5.

[261] *Id*.

Court only stayed the ordinance until the Band enacted a revised exclusion ordinance.[262]

In addressing how these tribal courts attempted to analyze tribal government infringement into the area of religious disputes based upon tribal customary rights, we see similar approaches. In *Townsend*, the Court utilized Anglo-American law principles rather than tribal customary principles in balancing the tribal nuisance ordinance with the tribal customary right to freely practice ceremonial activities, thereby weighing in favor of the tribal governmental action.[263] Otherwise, in *Williams* the Court also utilized Anglo-American law principles rather than tribal customary principles in balancing the tribal exclusion and removal ordinance with the tribal customary right to freely practice ceremonial activities as well as the tribal customary right to live with and raise his child in a cultural community.[264] In *Williams*, unlike in *Townsend*, the Court weighed in favor of the tribal customary right in the fulfillment of harmony.[265] Or perhaps the Court's actual ruling was only in fulfillment of temporary harmony as the Court only stayed the ordinance until the Band enacts a revised exclusion ordinance.[266] As a note of caution, both *Townsend* and *Williams* inform us that Anglo-American law principles encompassed in the Indian Civil Rights Act, the American Indian Religious Freedom Act, and the federal first amendment do not provide the necessary protection of the tribal customary right to freely practice ceremonial activities, even in tribal courts. This is precisely why tribal courts need to utilize responsible governance principles in balancing tribal customary rights. This analysis is useful for tribal courts in the examination of tribal government infringement into the area of religious disputes based upon tribal customary rights. Once more, the utilization of customary principles involving the fulfillment of family, clan, and tribal responsibilities and obligations as articulated pursuant to the beliefs and knowledge of the tribes as utilized in these cases informs us how courts have articulated the traditional law principles associated with maintaining tribal relations in addressing religious disputes.

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[262] *Id*. at *17. It can be noted however, that over a decade later the Mille Lacs Band is still working on the revised Exclusion Ordinance.

[263] Townsend v. Port Gamble S'Klallam Housing Authority, 6 NICS App. 179, 185–86 (Tulalip Ct. App. October 18, 2004).

[264] Mille Lacs Band of Ojibwe Indians v. Williams, No. 11-APP 06 at *9–10 (Mille Lacs Band Ct. App. 2012).

[265] *Id*. at *17.

[266] *Id*. at *17. It can be noted however, that over a decade later the Mille Lacs Band is still working on the revised Exclusion Ordinance.

III. Recommendations for Tribal Court Review of Tribal Customary Rights

As tribal courts address tribal government infringement in the area of tribal customary rights, they must ask themselves, what is the appropriate test to utilize for review?[267] Should tribal courts use Anglo-American standards of scrutiny?[268] As Kristen Carpenter explains, the tests utilized to scrutinize government infringement on individual rights in the federal constitutional law context "may be too narrow, or just a bad fit, for tribal worldviews and cultures."[269] As the Navajo Nation Supreme Court articulated in *In Re Validation of Marriage of Francisco*:

> As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty. The Navajo Nation must control and develop its own legal system because 'the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people.'[270]

As numerous scholars have articulated, Anglo-American legal norms are rooted in conflict.[271] That is, they are "adversarial in nature."[272] What then are the alternatives to Anglo-American notions of scrutiny? Let's think Indian![273] Then tribal courts will be able to creatively find a solution that is culturally responsive. Utilizing this reasoning, this Part will provide recommendations for tribal courts review of tribal customary rights.

As a recommendation, a balancing approach allows courts to consider tribal interests in preserving and promoting tribal sovereignty while

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[267] *See* Blackhawk, *supra* note 72, at 82 ("From the Founding, individuals have turned to law to structure the shape and reach of American empire. United States agents have turned to law to push forward the American colonial project and colonized peoples have turned to law to shape and mitigate its progress").

[268] *See* Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 Kan. J.L. & Pub. Pol'y 74 (1999).

[269] Carpenter, *supra* note 34, at 576.

[270] In re Validation of Marriage of Francisco, 16 Indian L. Rep. 6113, 6113 (Nav. Sup. Ct. 1989) (internal quotation omitted).

[271] Yazzie, *Life Comes From It*, *supra* note 30, at 186.

("The vertical system also attempts to treat everyone as an equal before the law, but judges in that system must single out someone for punishment. The act of judgment denies equality, and in that sense, "equality" means something different than the Navajo concept."); *See* also Porter, *supra* note 70, at 277.

[272] Carpenter, *supra* note 34, at 580 ("[T]ribal courts are usually still adversarial in nature – casting parties in oppositional roles, fomenting argument, and deciding a 'winner' and 'loser'").

[273] Hoopa Valley Tribal Council v. Jones, Hoop Valley Tribal Court of Appeals, No. A-12-002 (Hoopa Valley Tr. Ct. App. 2013) (quoting Reply Motion to Recuse at *5.) ("Here, the Court should attempt to think Indian.").

weighing these interests with tribal customary rights. In this regard, a balancing approach provides a practical and realistic method to restore and maintain harmony while considering the unique tribal customary principles and values of the tribe thereby allowing the tribal court the flexibility to center upon customary law.

In *Rave v. Reynolds*, the Winnebago Tribe of Nebraska Supreme Court addressed the appropriate standard of review to be applied to tribally enacted nondiscriminatory restrictions on a candidate's eligibility for election.[274] The court reasoned as follows:

> Tribal customs and usages, both traditional and evolving, will constitute tribal common law. . . . the healing approach traditionally taken to resolve tribal disputes. The traditions of most Indian Tribes in the United States, including the Ho-Chunk people, part of whom compose the Winnebago Tribe of Nebraska, encouraged participatory and consensual resolution of disputes, maximizing the opportunity for airing grievances (i.e. hearing), participation, and resolution in the interests of healing the participants and preventing friction within the tribal community.[275]

In applying a sliding scale standard of review, thereby choosing a balancing approach the court held that tribal members and a Tribal member organization have standing to challenge the constitutionality of the rules for tribal elections under tribal law.[276]

In *Hoover v. Colville Confederated Tribes*,[277] the Colville Confederated Tribes Court of Appeals addressed a matter involving the Tribes ability to regulate fee lands of a non-member within the exterior boundaries of the Colville Confederated Tribes Reservation.[278] The Court determined that the Tribes had jurisdiction to regulate the non-member's fee lands, because the non-member's conduct would affect the health and welfare of members of the Tribes.[279] In doing so, the Court addressed the spiritual and cultural health of the Tribes in connection with its lands as follows:

> Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve.

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[274] Rave v. Reynolds, 23 Indian L. Rep. 6150 (Winnebago Tribe of Neb. Sup. Ct. 1996).

[275] *Id*. at 6157.

[276] *Id*. at 6150.

[277] 29 Indian L. Rep. 6035 (Colville Ct. App. 2002).

[278] *Id.* at 6035.

[279] *Id*. at 6041.

> The ceremonies play an integral role in the current wellbeing and future survival of Colville people, both individually and as a tribal entity.[280]

In upholding the importance of the spiritual and cultural health of the Tribes in connection with its lands, the Court determined that "[t]he inability of the Tribes to apply comprehensive planning regulations to fee lands within the Reserve will substantially impair the Tribes' ability to preserve the general character, cultural and religious values, and natural resources associated with the Reserve."[281] The Court acknowledged that "spirituality" and its connection to the earth is "vital to the spiritual health of the Tribes and its members."[282] In doing so the Court adopted a "totality of the circumstances" test in weighing all the factors and interests involved in balancing the purpose of the land in question with the intent of the proposed regulatory action.[283]

Conclusion

If tribal courts fail to adhere to tribal principles of responsible governance, tribal sovereignty in its truest form—sovereignty based upon traditional culture and beliefs—will no longer exist. As a result, tribal government officials should embrace the principle of responsible governance as they enact and implement tribal law and policy. Furthermore, tribal courts should ensure that that there is the appropriate check on any action that attempts to infringe upon fundamental tribal customary rights. By ensuring responsible governance, by balancing tribal customary rights with tribal government and citizen actions, we can further harmony.

All in all, this article shows that the existing tribal courts that are engaging in tribal customary law principles are successfully balancing tribal customary rights with tribal government and citizen actions, with few exceptions. In the process of the continued development of tribal court infrastructure, tribal courts can ensure that they are as explicit as possible in their opinions when providing a specific rationale in balancing tribal customary rights with tribal government and citizen actions. Tribal courts, government officials, and citizens should be encouraged for the future as more and more

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[280] *Id.* at 6039.

[281] *Id.* at 6038.

[282] *Id*. at 6039–40 ("It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies—all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members. The spiritual health of the American Indian is bound with the earth. . . . It is the land and the animals which renew and sustain their vigor and spiritual health.").

[283] *Id*. at 6040–41 ("Again, we are of the opinion we should look at the totality of circumstances.").

tribal courts begin to engage and utilize tribal customary law. In doing so, in the words of Wilma Mankiller, tribal courts can further harmony while tribal communities "make medicine together. . . . We [can] let go of all negative things, get well together, and get into a good relationship with the world."[284]

[284] WILMA MANKILLER, EVERY DAY IS A GOOD DAY, REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN 27 (2004) ("When my family comes back to Oklahoma for the Green Corn Ceremony at Hillubee Stomp Grounds, we make medicine together. . . . We let go of all negative things, get well together, and get into a good relationship with the world.").