

# TRIBAL SOVEREIGNTY IN A POST-9/11 WORLD

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## I. INTRODUCTION

It is not uncommon today for Americans to reference their lives in binary fashion: for many, time is now divided quite simply into life pre- and post-September 11, 2001. I have only been a law professor in a post-9/11 world. In one sense this is unfortunate, because I cannot offer insights into the differences between teaching Federal Indian Law and *Santa Clara Pueblo v. Martinez*,<sup>1</sup> in particular, before and after 9/11. On the other hand, because I did not teach this controversial case in the late 1970s when it was decided—at the height of the feminist movement and on the heels of America’s civil rights revolution—my perspective on the case is decidedly post-feminist, post-modern, and assuredly post-9/11.

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1. 436 U.S. 49 (1978).

Since it was decided, *Santa Clara Pueblo* has proven itself an extremely controversial case. An examination of recently published law review articles, books, and cases indicates that there is a renewed interest in *Santa Clara Pueblo* today. The forces behind this trend—which is the subject of this essay—influence the way I approach, teach, and contemplate this very provocative decision that is now clearly situated in the canon of American Indian law.

I contend there are two, interrelated events giving rise to renewed interest in *Santa Clara Pueblo*. First, the relatively high-profile nature of Indian gaming has put the previously unknown inner workings of tribal governments under intense scrutiny; and, secondly, the events of September 11 have fueled rapidly changing conceptions of sovereignty and governmental responsibility across the globe.

We've all heard news of the purportedly massive increase in civil rights claims (including allegations of banishment and disenrollment, among others) brought by tribal members against their own governments.<sup>2</sup> Perhaps not surprisingly, the vast majority of such claims reported in the mainstream media are initiated against tribes that are generating significant gaming revenues.<sup>3</sup> Thus, for the CNN junkie or casual Indian law consumer, the insularity of tribal governments becomes conflated with money and greed. Combined with the knowledge that *Santa Clara Pueblo* foreclosed federal court review of tribal court decisions, fear and suspicion of tribal governments is only exacerbated.

With Indian tribes already under increased scrutiny because of the gaming backlash, they are growing even more vulnerable to criticism as the world begins to look skeptically on claims of sovereignty. The terrorist attacks of September 11 inspired an already growing global consensus that the nature of state sovereignty is changing.<sup>4</sup> Today, many people believe that there can be no sovereignty for a state that does not respect individual civil liberties and human rights.<sup>5</sup> Accordingly, given that *Santa Clara Pueblo* has become symbolic of the federal courts' deference to tribal sovereignty—even when tribal court decisions are seemingly inapposite to

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2. See *infra* notes 41-43.

3. See, e.g., Michael Hiltzik, *Fairness Is the Loser in Tribal Identity Crisis*, L.A. TIMES, Apr. 5, 2004, at C1 (“Tribes with multimillion dollar casinos are ejecting members by the score, questioning ties of heritage and blood that hadn’t been challenged in three or four generations.”).

4. See, e.g., Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2043-51 (2003); Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841, 842 (2003) [hereinafter Raustiala, *Rethinking*].

5. Stacy, *supra* note 4, at 2050.

Western liberal ideals—tribal governments and *Santa Clara Pueblo*, by extension, are viewed with increased skepticism.

This unique confluence of events informs the way I approach *Santa Clara Pueblo* in the classroom.<sup>6</sup> For me, teaching this controversial case in a post-9/11 world means viewing it through an international lens. Specifically, it requires that Indian law scholars—particularly those of us who promote tribal self-governance and tribal autonomy—look seriously at growing global concerns regarding sovereignty, and also contemplate the relevance of these changes to the future of Indian Nations.

## II. SANTA CLARA PUEBLO

### A. BACKGROUND

*Santa Clara Pueblo v. Martinez* involved a dispute over the membership status of the children of Julia Martinez, a member of Santa Clara Pueblo, and her husband, Myles Martinez, a Navajo.<sup>7</sup> The Santa Clara Pueblo passed a membership ordinance in 1939 which stated that children of females who married outside the Pueblo were not members, while the children of men who married outside the Pueblo could be members.<sup>8</sup> Unable to persuade the Pueblo to change its membership rules, Julia Martinez and her daughter filed a lawsuit under the Indian Civil Rights Act of 1968 (ICRA) in federal court, asking the court to invalidate the ordinance and require the Pueblo to include her children as members.<sup>9</sup>

Justice Thurgood Marshall wrote for the majority, focusing, in particular, on the purposes behind the ICRA and the Pueblo's right to self-determination and continued existence.<sup>10</sup> First, the Court noted that Title I of the ICRA imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."<sup>11</sup> The Court expressly held that tribal courts could give effect to norms imposed by the ICRA in ways that are in keeping with

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6. I teach this case in my Federal Indian Law course as well as in my seminar, "Illiberal Groups in the Liberal State."

7. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978). See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 672 (1989) [hereinafter Resnik, *Dependent Sovereigns*].

8. *Santa Clara Pueblo*, 436 U.S. at 52 n.2. See Resnik, *Dependent Sovereigns*, *supra* note 7, at 672.

9. *Santa Clara Pueblo*, 436 U.S. at 53. See Resnik, *Dependent Sovereigns*, *supra* note 7, at 672.

10. *Santa Clara Pueblo*, 436 U.S. at 62. See also Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 445-46 (2005).

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

traditional tribal structures.<sup>12</sup> The Court recognized that membership decisions are at the core of tribal self-government and that the Pueblo are in the best position to determine what it means to be Santa Clara.<sup>13</sup>

Marshall also took up the question of sovereign immunity—that is, whether a tribal nation, as a separate sovereign from the United States, could ever be sued in federal court absent a clear waiver of immunity by the tribe or by Congress. Finding no such waiver within the statute, the Court concluded that the tribe could not be sued under the ICRA in federal court.<sup>14</sup> Marshall went on to point out that “[t]ribal forums are available to vindicate rights created by the ICRA.”<sup>15</sup> He emphasized: “Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”<sup>16</sup> The Court made no exception for tribes in which judicial authority is vested in a nonjudicial entity, such as (in the case of the Santa Clara Pueblo) a tribal council, calling such fora “competent law-applying bodies.”<sup>17</sup>

12. *Id.* at 72.

13. *Id.* at 72 n.32. *See also* Frickey, *supra* note 10, at 445-46.

14. *Santa Clara Pueblo*, 436 U.S. at 58-59. The Court pointed out that, when a petitioner brings a habeas corpus action in federal court, the respondent in the action is the individual custodian of the prisoner, not the tribe. *Id.* Therefore, the ICRA’s habeas provision cannot be read as a general waiver of the tribe’s sovereign immunity. *Id.*

15. *Id.* at 65.

16. *Id.*

17. *Id.* at 66. Many tribal courts have interpreted the ICRA—as analyzed by *Santa Clara Pueblo*—as creating an implied waiver of tribal sovereign immunity in tribal courts for purposes of ICRA claims. *See* Alexander Tallchief Skibine, *Respondent’s Brief: Reargument of Santa Clara Pueblo v. Martinez*, 14 KAN. J.L. & PUB. POL’Y 79, 86 (2004) (stating that “most tribal courts interpret the ICRA as an implied waiver of the tribes’ sovereign immunity in their own tribal courts and have taken seriously their role in implementing the Act’s protections.”) (citations omitted). Others expressly waive their immunity for civil rights suits in tribal courts through their tribal constitutions; *see, e.g.*, MENOMINEE INDIAN TRIBE CONST. art. XVIII, §§ 1-2 (1977) (waiving tribal immunity in tribal court for Indian Civil Rights Act cases); *see also* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. L. REV. 889, 900 (2003) (“Most tribal courts or councils waive sovereign immunity so as to enable litigants to challenge actions of tribal officers for violating the Act.”); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 480-83 (1998) (discussing those tribal courts that have found tribal sovereign immunity to be waived for purposes of ICRA claims). *Cf.* Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 959 (2002).

A number of tribal courts have held that ICRA does not abrogate a tribe’s sovereign immunity in tribal court and have declined to entertain suits brought against tribes under ICRA. Accordingly, even for violations of ICRA, injured parties find themselves without a forum in which to adjudicate their claims against these tribes.

*Id.*; Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 509 (2000) (“The doctrine of tribal sovereign immunity, however, is a potential doctrinal obstacle to the tribal courts’ functioning as fora to vindicate ICRA rights.”). Despite its controversial nature, tribal sovereign immunity is essential to tribal self-government. *See generally* Wenona T. Singel, *Labor Relations*

Much of the Court's rationale rested on its simultaneous faith in tribal dispute forums and its concern over the competency of the federal courts to decide issues critical to tribal governance. Marshall revealed great unease at the prospect of authorizing the federal courts to adjudicate disputes within Indian tribes, maintaining that to do so would threaten the survival of the community as a distinct group.<sup>18</sup> The Court stated: "[R]esolution of statutory issues under [the ICRA] . . . will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."<sup>19</sup> Also, "efforts by the federal judiciary to apply [the ICRA] . . . may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."<sup>20</sup> Accordingly, the Court construed the ICRA narrowly and held that the only remedy in federal court was for habeas corpus violations as expressly provided for in the statute. The Court declined to imply a right of action, holding that to do so would undermine Congress's purpose in protecting tribal sovereignty and the Pueblo's right of self government.<sup>21</sup>

#### B. REACTION TO THE CASE

*Santa Clara Pueblo* caused a furor. The Court's deference to tribal sovereignty allowed the Santa Clara Pueblo to continue to determine its membership pursuant to sexually discriminatory membership rules.<sup>22</sup> Dozens of law review articles were inspired by the Court's controversial opinion.<sup>23</sup> Professor Robert Laurence calls it "the single most interesting case in all of Anglo-American jurisprudence."<sup>24</sup> It stands today as one of the most cited cases in American law.<sup>25</sup>

After the decision came down, commentary flooded in from all sides. Mainstream feminists, constitutional law scholars, and civil rights

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*and Tribal Self-Governance*, 80 N.D. L. REV. 691, 708 (2004) (discussing the importance to self-governance of tribal sovereign immunity for tribal governments in federal courts).

18. *Santa Clara Pueblo*, 436 U.S. at 71.

19. *Id.* at 71.

20. *Id.* at 71-72.

21. *Id.*

22. *Id.* at 72.

23. Though not a definitive resource for determining *Santa Clara Pueblo*'s popularity, it is worth noting that the Westlaw search ("Santa Clara Pueblo" & "tribal sovereignty") yields 630 articles; the search ("Santa Clara Pueblo" & "discrimination") produces 474 hits; and a search of articles with the case name in the title identifies ten articles.

24. Robert Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307, 307 (1991-92).

25. See Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 362 (2004).

advocates wrote passionately about the case and its implications.<sup>26</sup> Some of the most distinguished legal scholars in North America—including Will Kymlicka,<sup>27</sup> Catherine MacKinnon,<sup>28</sup> Judith Resnik,<sup>29</sup> and Amy Gutmann<sup>30</sup>—feverishly produced scholarship on the topic. And Indian law’s most highly respected scholars—Gloria Valencia-Weber,<sup>31</sup> Carole Goldberg,<sup>32</sup> Christine Zuni Cruz, and Alexander Tallchief Skibine,<sup>33</sup> among others—have strategically taken on *Santa Clara’s* critics through scholarship of their own.<sup>34</sup>

In my own work, I have grappled with the intriguing and, oftentimes, thorny implications of this case. Of note is how widely known *Santa Clara Pueblo* is beyond the field of Indian law. On the one hand, I credit the case for bringing to light the existence of tribal governments for those who previously had little knowledge or interest in Indian law. On the other hand, I lament the fact that, oftentimes, *Santa Clara Pueblo’s* fame means it is the only Indian law case legal scholars outside of the Indian law community have heard of.<sup>35</sup> Thus, *Santa Clara Pueblo* shapes outsiders’ perceptions of American Indians, tribal governments, and the brand of justice available in the tribal courts. In this sense, it inspires continued suspicion and scrutiny of Indian tribes.

Despite the resurgence in its popularity (or infamy, as the case may be), there has been little scholarship examining *Santa Clara Pueblo* through a

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26. *Id.* at 363.

27. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 38, 165 (1995).

28. CATHERINE MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987) (arguing that Pueblo tribal governance is rooted in male supremacy).

29. Resnik, *Dependent Sovereigns*, *supra* note 7, at 702 (discussing sovereignty and membership through *Santa Clara Pueblo* and noting that neither the membership rule nor the resulting lawsuit can be understood outside of a federal Indian law context).

30. See AMY GUTMANN, IDENTITY IN DEMOCRACY 45 (2003).

31. See Gloria Valencia-Weber, *supra* note 25, at 362 (stating that “[t]he litigation revisited what had been historical problems at Santa Clara Pueblo: individual claims to the communal land, often by non-members, in challenge to the tribal government’s cultural system to protect resources for the community.”).

32. See Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 448 (2002) (arguing that, despite the Supreme Court’s ruling in *Santa Clara Pueblo*, “federal involvement in tribal decision-making about citizenship is alive and well”).

33. See Skibine, *supra* note 17, at 87.

34. Cf. Laurence, *supra* note 24, at 338 (arguing that, since the ICRA is a check on tribal unfairness and *Santa Clara Pueblo* limits the reach of the ICRA, *Santa Clara Pueblo* should be reversed).

35. Riley, *Illiberalism*, *supra* note \*.

post-9/11 lens.<sup>36</sup> Certainly, the case is still heavily cited in works discussing the inextricably connected matters of gender discrimination,<sup>37</sup> multicultural citizenship,<sup>38</sup> law and religion, and sovereign immunity.<sup>39</sup> But, as the next part sets forth, I believe that *Santa Clara Pueblo* can only be understood in a contemporary context if it is viewed through the lens of changing global conceptions of sovereignty and the freedom (or lack thereof) of sovereign states to govern illiberally.<sup>40</sup>

### III. CONTEMPORARY CIRCUMSTANCES

#### A. RENEWED SCRUTINY OF *SANTA CLARA PUEBLO*

Given that *Santa Clara Pueblo* was decided nearly three decades ago, it is curious that it is experiencing a revival in legal literature today. As stated at the outset, I attribute this renewed interest to the convergence of two seemingly unrelated phenomena. First, news of massive gaming revenues by Indian tribes has invited significant scrutiny of internal tribal disputes, including high-profile banishment and disenrollment cases. Additionally, in a post-9/11 world, scrutiny of all governments—tribal and otherwise—has been enhanced, as there is today an increased focus on sovereign nations' compliance (or lack thereof) with international human rights standards.<sup>41</sup>

##### 1. *Indian Gaming*

News reports of banishment and disenrollment of individual Indians by wealthy tribes, in particular, are fueling deeply embedded misconceptions about tribal governments.<sup>42</sup> Though it's not clear that there are more

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36. Cf. Robert Laurence, *Don't Think Like a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Bagdad, The Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137 (2004) (comparing the United States Government's attempt to bring democracy to Iraq with the Indian Civil Rights Act) [hereinafter Laurence, *Hippopotamus*].

37. Resnik, *Dependent Sovereigns*, *supra* note 7, at 715, 722.

38. KYMLICKA, *supra* note 27, at 233 n.4.

39. See, e.g., Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982) (discussing *Santa Clara Pueblo* and its effects on tribal sovereign immunity).

40. Riley, *Illiberalism*, *supra* note \*.

41. Stacy, *supra* note 4, at 2043-51.

42. See, e.g., Hiltzik, *supra* note 3, at C1 (discussing a case at the Redding Rancheria where 76 members of one family were expelled from the tribe allegedly because the relative to whom they traced their ancestry had never borne children); James May, *Tribal Recall: Members Disenrolled After Financial Dispute*, INDIAN COUNTRY TODAY, Dec. 8, 2003, available at <http://www.indiancountry.com> (follow "ICT Archives" hyperlink) (last visited Nov. 21, 2006) (stating that disenrolled members allege the tribal government defeated the recall by disqualifying

membership disputes today than in the past, they are certainly more widely reported than before.<sup>43</sup> Tribes concede that they are carefully scrutinizing tribal membership decisions. One reason is that casino wealth has attracted masses of people who wouldn't have bothered to claim tribal membership before.<sup>44</sup> Thus, tribes are faced with the unenviable task of verifying the membership of new and existing members.

News reports of tribal members suffering disenrollment or banishment after, for example, contesting the scope of tribal leaders' powers, alleging civil rights violations, or opposing major economic development projects have added to negative public sentiments about tribal governments. Many tribes believe this is due much more to a backlash over gaming than anger over civil rights violations of individual tribal members.<sup>45</sup> But, in any case, civil rights lawyers (including Indian attorneys themselves) are aggressively representing individual Indians and pressing for federal court review of tribal court decisions. These cases appear to inspire a level of opposition to tribal governments—coming especially from tribal members themselves—that was not seen immediately following *Santa Clara Pueblo*.

Judith Resnik once wrote that *Santa Clara Pueblo* was an “easy case” for the Supreme Court, because it accorded with federal norms about the treatment of women.<sup>46</sup> However “easy” the Court's decision was in 1978, I contend that a reversal of *Santa Clara Pueblo*—by either the courts or Congress—would be comparably effortless today. As we all know, the stakes in tribal membership are now very different than they were thirty years ago. And, I contend that, to an Anglo world, they are perceptibly higher than they were at the time of *Santa Clara Pueblo*. We don't know if Resnik's theory was correct: that is, that the Court declined to decide for Martinez because it was comfortable reflecting its own (as well as society's) bias against women. But I am confident in suggesting that today's Court—and much of the Western world—even if unsympathetic to

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members facing disenrollment and adding members from outside the tribe to participate in the vote).

43. See Hiltzik, *supra* note 3, at C1.

44. *Id.* (quoting Professor Carole Goldberg as saying, “Tribes are taking a closer look. It didn't use to matter so much if you made one or two mistakes.”).

45. Brendan Ludwick, *The Scope of Federal Authority Over Tribal Membership Disputes and the Problem of Disenrollment*, 51 FED. LAW. 37, 43 (Oct. 2004).

46. Resnik, *Dependent Sovereigns*, *supra* note 7, at 727. For a different view of the Court's decision, see Bethany Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103 (2004).



claims of gender bias, are deeply concerned about allegations of financial harm.<sup>47</sup>

The scrutiny of tribal governments is only going to increase as Indian tribes continue to operate profitable gaming operations. It is, therefore, unsurprising that tribal banishment and disenrollment cases are being framed largely in terms of lost economic benefits, rather than cultural or communal loss. Thus, I boldly suggest that, even if (perhaps perceived)<sup>48</sup> gender discrimination was not enough to move the Court to abrogate tribal sovereignty in 1978, the perception that individuals are being deprived significant gaming revenues just might be enough to do so today.

I do not know for certain whether this theory, which connects the rise in Indian gaming to encroachments on tribal sovereignty, is correct. And, while I think the answer to the question is important, it is not dispositive. The fact is, there are other compelling reasons for tribal governments to undertake a critical and comprehensive examination of tribal governance systems. This is important, not only so we can avoid greater infringements on our sovereignty by the outside world, but so we can work towards more effectively serving the needs of our people.

## 2. *Sovereignty in a Post-9/11 World*

In my writings I have advocated that tribes embrace a concept I call “living sovereignty.”<sup>49</sup> By this, I mean that tribal governments—if they seek to be treated as sovereigns—ought to act accordingly, without allowing the colonial powers to limit their vision of governance.<sup>50</sup> In my own Federal Indian Law course, I take as a given that Indian tribes are sovereign, or at least that they enjoy internal—if not all external—attributes of sovereignty.<sup>51</sup> But I have come to see that tribal sovereignty is tricky business. As sovereign nations, tribes owe duties to their people. And, as

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47. For example, the *Cobell* case, which involves individual trust accounts, has garnered much more attention from the mainstream media than tribal claims for reclamation of communal lands and/or issues surrounding indigenous culture or sacred sites.

48. See Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004) (explaining that the Santa Clara Pueblo were not traditionally patriarchal, but revered both genders for creating balance in the universe, and telling the story of her own children who—though not born to Santa Claran fathers—lived their lives at the Pueblo).

49. Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 119 (2005) [hereinafter Riley, *Straight Stealing*].

50. *Id.* (“The act of ‘living sovereignty’ is not and should not be dependant on the colonizer’s attempts to limit indigenous nations.”).

51. The inability of Indian nations, for example, to negotiate with other states on the international plane may negate, by some definitions, their sovereignty. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003) (stating that the modern definition of “sovereignty” refers to a nation-state’s “capacity to participate in international affairs”).

we have learned in the wake of 9/11—if we were not aware of it already—more is required today of sovereign nation-states than ever before.<sup>52</sup>

*Santa Clara Pueblo*'s holding—that sovereignty insulates tribal court's ICRA decisions against federal court review (save habeas), even when tribal rulings are seemingly inapposite to American civil rights norms—invites the questions that loomed after September 11: To what extent ought sovereignty shield nations from the imposition of outside forces when there are legitimate concerns that the polity living under those governments are being treated unfairly, or are subject to the tyranny of an illiberal regime? Is sovereignty—tribal or otherwise—improperly being used as a shield against governmental abuses of human rights?

While I do not attempt to answer these very provocative, hard questions here, I do consider them to be of imminent importance. And, when teaching *Santa Clara Pueblo*, I raise them to inspire students to undertake a critical examination of the legitimacy of sovereignty.

Today sovereignty is being re-examined on a global front.<sup>53</sup> There is now a massive body of literature devoted to detailing sovereignty's evolution.<sup>54</sup> Specifically, in the wake of globalization, it appears that the nation-state is shrinking, or at least is becoming less relevant.<sup>55</sup> Scholars argue that the old Westphalian model of sovereignty that under girds the territorial state system “has never been absolute and is increasingly compromised.”<sup>56</sup> As the world becomes more interconnected, territorial sovereignty feels more and more remote.

Until now, sovereignty has protected the state from interference by outsiders.<sup>57</sup> It has, in a broad sense, “permit[ted] a polity to define and govern itself freely.”<sup>58</sup> However, sovereignty's protective role is increasingly questioned, particularly as some scholars allege that sovereignty is

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52. I am not the first to make a connection between the United States' actions in Iraq and the sovereignty of Indian tribes. See, e.g., Laurence, *Hippopotamus*, *supra* note 36, at 140 (questioning the United States' legitimate authority to occupy Indian country and/or Iraq).

53. Stacy, *supra* note 4, at 2043-51. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1960 (2003).

54. See, e.g., Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 306 (2001); Raustiala, *Rethinking*, *supra* note 4, at 842 (“Sovereignty is often defined as supreme and independent power or authority in government as possessed or claimed by a state or community in a defined territory.”).

55. Stacy, *supra* note 4, at 2043 (distinguishing article from two historical conceptions of sovereignty put forth by Locke and Hobbes). Cf. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1407 (2003) (referring to religion and culture as “the New Sovereignty”).

56. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2513 (2005) [hereinafter Raustiala, *Geography*].

57. Raustiala, *Rethinking*, *supra* note 4, at 875.

58. *Id.*

being used as a shield for states that don't uphold human rights and civil liberties.<sup>59</sup> These same critics contend that sovereignty impedes effective intervention in dealing with human rights issues.<sup>60</sup>

As human rights discourse grows, sovereignty is ever more reliant on perceived notions of "good governance." That is, greater emphasis is being placed on the duties owed to citizens by sovereign governments, rather than merely focusing on the benefits to which a nation is entitled per its sovereignty.<sup>61</sup> Helen Stacy titles this phenomenon "relational sovereignty" and argues that it "places a higher obligation on the sovereign state to care for and regulate the behavior of its citizens both inside and outside state borders."<sup>62</sup> In short, today a nation's sovereignty is equal to the degree of care the government undertakes for its citizens.<sup>63</sup>

As I stated at the outset, when teaching *Santa Clara Pueblo*, I situate the discussion in the larger framework of these changing global conceptions of sovereignty. And, in fact, I explain to my students that I am in agreement that national sovereignty and respect for human rights must go hand in hand. But I accept this premise with one important caveat. That is, the status of Indian tribes as "domestic dependent nations"<sup>64</sup>—whose territory is encompassed within a larger, dominant government—significantly complicates these issues. Thus, I contend that today's "human rights culture"<sup>65</sup> must not only contemplate the claims of individual Indians *vis-à-vis* tribal governments. It must also encompass indigenous peoples' claims of self-determination and sovereignty *vis-à-vis* the dominant state.

Virtually all indigenous nations exist within the borders of larger nation-states who owe them duties. All too often, the relationship between indigenous groups and the nations in which they reside is marked by a denial or complete abrogation of the responsibilities owed to indigenous peoples. Accordingly, indigenous groups in the past few decades have begun to use human rights instruments to assert their own claims for fair treatment from the governments to which they are subject.<sup>66</sup>

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59. *Id.*

60. Diane Sabom, *U.N. Wants to Rule New World Order*, INSIGHT ON THE NEWS, Oct. 23, 2000, at 21 (citing Kofi Annan).

61. Stacy, *supra* note 4, at 2048.

62. *Id.* at 2050-51.

63. *Id.* at 2045.

64. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

65. Stacy, *supra* note 4, at 2039.

66. See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13 (2004) (discussing the international human rights regime and its connection to indigenous peoples); Stacy, *supra* note 4, at 2049; see, e.g., *United States v. Dann*, 470 U.S. 39 (1985); see also Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement under the Native American Graves*

As scholars, theorists, activists, and world leaders contemplate the relationship between sovereignty and human rights, indigenous peoples must be regarded with particular care. Their status—particularly in the United States—of sovereigns within a sovereign, makes their situation unique, complicated, and worthy of considerable thought.

It is clear to me that contemporary governments—tribal or otherwise—cannot ignore the human rights of their members. Sovereignty should not be asserted as an absolute defense to the denial of basic rights and liberties.<sup>67</sup> All sovereigns should, in some sense, strive to be “good.” At the same time, however, the obligations of tribal governments to their members must be contemplated in the context of the concomitant duties owed to tribes by the larger, dominant regime.

With this in mind, I encourage indigenous nations to be skeptical of mandates that they imitate the “good governance” of the developed West.<sup>68</sup> Accordingly, rather than building on prevailing notions of “good governance,” I promote, instead, the concept of *good (Native) governance*, of which a core feature is securing the autonomy of Indian nations to respond to their communities’ needs consistent with tribal culture and tradition.<sup>69</sup> Whether this means that tribal governments wholly depart from or partially emulate the dominant system is not the critical inquiry. For me, the foundation of good (Native) governance means staying true to our indigenous cultures, while simultaneously ensuring our members that we are fulfilling the most basic function of all governments—acting on behalf of the common good of the people.

#### IV. CONCLUSION

Teaching *Santa Clara Pueblo* in light of contemporary circumstances can be a challenging endeavor, but it is, to my mind, a worthwhile one. As Americans and Indians, we are increasingly confronted with the challenges

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*Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49 (2002) (discussing the Inter-American Court’s decision in favor of the human rights and aboriginal property claims of the Awas Tingi people of the Mosquito Coast in Nicaragua).

67. Resnik & Suk, *supra* note 53, at 1926.

68. Some scholars contend that “good governance” as promulgated by the developed West is simply another form of Western imperialism. See ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 249-50 (2004). By “good governance” I mean (as the term has been used in the literature) a government that possesses certain attributes, usually including democracy, the rule of law (encompassing transparency, equality, a separation of powers with a competent, independent, and fair judiciary), discretion, and decentralization. See Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 FLA. J. INT’L L. 159, 162 (2001).

69. For a detailed examination of “good native governance,” see Riley, *Good (Native) Governance*, *supra* note \*.

raised by a rapidly changing economic landscape, as well as grave threats to our security and dignity. As such, we must seriously contemplate the message of *Santa Clara Pueblo*. Though Marshall's powerful opinion may not have specifically articulated it, we know that our sovereignty not only empowers us to live autonomously, in ways controlled and directed by us, but it simultaneously obligates us to fulfill our responsibility to act on behalf of the polity. This dual-charge is one I believe we are ready to take on, and one we ought to readily accept.