

**Developing Effective Processes of American Indian
Constitutional and Governmental Reform: Lessons from the
Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation
and Northern Cheyenne Tribe**

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Abstract: Over the past several decades, numerous American Indian nations have been revising their constitutions to create more legitimate, effective and culturally-appropriate governments. However, successful processes of reform have been hindered by a variety of universal challenges, including political obstacles to changing the status quo, difficulties in achieving effective citizen participation and insufficient mechanisms for resolving conflict. Drawing from the recent constitutional and governmental reform experiences of the Cherokee Nation of Oklahoma, the Hualapai Nation, the Navajo Nation, and the Northern Cheyenne Tribe, this paper discusses how four American Indian nations addressed these challenges. The four nations' experiences demonstrate how an increased reliance on tribal institutions such as constitutional reform commissions, constitutional conventions and tribal courts – combined with a focus on short and long-term programs of civic education – can help American Indian nations realize their goals of creating more effective and legitimate constitutions.

Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation and Northern Cheyenne Tribe

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"We had constitutionalists and then we had people who felt the constitution wasn't in depth enough and then we had people who didn't really care about the constitution... We had those individuals who were fighting the system. We had a lot of different people that had a lot of different questions and opinions."

-- Member of Hualapai Nation constitutional reform committee

The Constitution of the United States of America holds a sacred place in American society. The product of vigorous debate and discussion, it is revered as the country's supreme law and ultimate embodiment of western and American political thought. Streams of citizens parade by its display in an airtight chamber in the nation's capitol; lawyers and judges give its individual provisions the strictest scrutiny; and scholars endlessly analyze and dissect the process of its adoption. In contrast, the constitutions of over one hundred American Indian nations are largely generic documents, patterned after model constitutions drafted by officials in the U.S. Department of Interior to help implement the landmark Indian Reorganization Act of 1934¹ ("IRA"). While the U.S. Constitution is a unique reflection of the country's traditions, culture and values, IRA and IRA-influenced constitutions are foreign, boilerplate documents² that often conflict with pre-colonial tribal traditions of recognizing, organizing and allocating governance.

IRA constitutions' structural deficiencies, rushed processes of adoption, and divergence from traditional structures of political organization have contributed to a weakening of tribal government stability. Combined with the federal courts' steady erosion of the sovereignty of American Indian governments,³ this instability has left American Indian nations less potent to address outside, and often hostile, private and government interests and less competitive with other governments in an increasingly globalized world.⁴ While the media has highlighted and documented instances of tribal government corruption, intense personalized politics and even violence, American Indian nations – like countries around the world confronting the effects of colonialism – continue to wrestle with the larger question of how best to address the historical and structural sources of many of these problems.⁵ To varying extents, American Indian nations are amending and rewriting their constitutions to better reflect their individual political cultures and traditions, assert their inherent governing powers, enhance the accountability of elected officials, strengthen government stability, and provide a foundation for the increased exercise of sovereignty.⁶

Like any country engaged in the monumental task of governmental and constitutional reform, American Indian nations face an array of obstacles. Incumbent officeholders may

obstruct reform. Methods for engaging and informing the public during the reform process may be of limited effectiveness. Sufficient institutions for resolving conflict may not exist. In addition to these roadblocks, American Indian nations also confront unique difficulties in their attempt to develop legitimate and effective constitutions within the larger U.S. political framework. Most tangibly, centuries of adverse statutes and U.S. federal court cases have severely limited the full exercise of tribal governing powers. American Indian nations' historical and legal relationships with the United States also raise deep questions impacting the process of governmental and constitutional reform. How and to what extent can contemporary, multi-cultural societies incorporate traditional methods of governing into their new constitutions? How can efforts to obtain public input and participation in the development of new constitutions best address the enormous amount of civic knowledge lost during the removal of generations of Indians from their homelands, their forced enrollment into distant boarding schools, and their participation in federal relocation programs? And how can American Indian nations best resolve disagreements that arise during the constitutional reform process without yielding their sovereignty to outside courts and federal agencies? In short, even when tribal citizens reach consensus on the need for reform, the initiation, development, and implementation of effective *processes* of reform prove difficult.

Despite these challenges, the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation and Northern Cheyenne Tribe are four American Indian nations that have recently engaged in large-scale governmental and constitutional reform. Collectively, the four nations have tackled a wide spectrum of government reform, including strengthening their judiciaries, separating powers between executive and legislative bodies, reorganizing their governing structures and implementing primary elections, staggered terms and term limits for elected officials. Three of the four – the Navajo, Hualapai, and Northern Cheyenne nations – formally ratified their reforms in 1989, 1991 and 1996, respectively. The Cherokee Nation of Oklahoma currently is in the process of negotiating with the U.S. Government before it holds a referendum on its proposed new constitution.⁷ Drawing from the words and experiences of reform leaders from the four nations, this paper aims to begin a discussion of key issues related to the process of American Indian constitutional reform.

Although preliminary, two important themes have emerged from the four nations' experiences. First, the effective use of tribal institutions has proven to be a powerful tool in overcoming the politics of reform. Based on the experiences of the four nations, tribal institutions such as reform commissions, constitutional conventions, and tribal courts can help catalyze the process of reform, achieve effective citizen input and participation, incorporate cultural traditions into new governing frameworks, and resolve conflicts that arise during the reform process. Second, the need for short and long-term programs of civic education has emerged as a crucial ingredient in increasing citizens' participation in reform processes and strengthening the legitimacy of new and amended constitutions. From utilizing native languages as a tool to explain proposed reforms to reaching out to people where they live and work, reform leaders have consistently stressed the need to supplement typical methods of engaging and educating the public about reform issues (i.e. public meetings and surveys) with more intensive and personalized approaches. Reform leaders have also stressed the need for the development of long-term programs of civic education – such as high school and college classes in tribal government and history – as a necessary precondition for enhancing the participation of tribal citizens in reform efforts. Relatedly, tribal reform leaders have expressed a great interest in gaining expanded access to

information about other nations' constitutions and constitution-making processes as a way to expand their scope of potential approaches to reform. Together, the four nations' experiences demonstrate how an increased reliance on tribal institutions and a focus on short and long-term programs of civic education can help American Indian nations realize their goals of creating more effective and legitimate constitutions.

Part I of this paper will provide a short overview of the historical background of current reform efforts. Part II will briefly summarize the recent constitutional and governmental reform experiences of the Cherokee Nation of Oklahoma, the Hualapai Nation, the Navajo Nation and the Northern Cheyenne Tribe – experiences that are in many ways a microcosm of some of the major issues other American Indian nations are seeking to address through constitutional reform. Citing experiences from the four nations, Part III will raise “on the ground” challenges involved in engaging in effective processes of reform, from getting started and choosing a reform body to obtaining citizen participation and resolving conflict. At the same time, Part III will highlight the role that tribal institutions and education can play in overcoming these challenges. Part IV offers concluding thoughts.

Part I

Historical Background of Contemporary Constitutional Reform Initiatives

A quick historical review provides the background of American Indian nations' contemporary constitutional reform. Prior to European contact, tribes governed according to their own inherent powers.⁸ Although missionaries and government agents pressured tribes to adopt western notions of political organization, the early U.S. Government entered into treaties with tribes on a nation-to-nation basis. Through a series of U.S. federal laws and court decisions, however, the scope and power of tribal governments began to diminish throughout the nineteenth century. In a landmark 1831 decision of the United States Supreme Court, tribes were labeled “domestic dependent nations” for the first time.⁹ In 1871, Congress stopped entering into treaties with Indian nations altogether.¹⁰

Perhaps the biggest setback to tribal government occurred in 1887, with the passage of the General Allotment Act (or Dawes Act). By taking land out of tribal ownership and distributing it to individual families in fixed allotments, the Dawes Act led to a sweeping loss of Indian land ownership. Surplus and resold lands quickly found their way into non-Indian hands. Between 1887 and 1934, the size of Indian land holdings fell from 138 million acres to 48 million acres – a 65% loss of land holdings.¹¹ With a declining and fragmented land base and scores of displaced families, the fabric and strength of tribal government withered. Although traditional ways of political organization and interaction continued to exist, their formal recognition by the U.S. Government often did not.¹² The early decades of the twentieth century saw non-Indian agents and superintendents from the Department of Interior's Bureau of Indian Affairs assume responsibility for a host of tribal government functions. By the 1930s, federal policies had led to the erosion of traditional tribal governments on approximately half of all reservations.¹³ In a sense, this period marked the beginning of the existence of parallel governments (traditional and elected) that splits some tribal communities to this day.

To halt the failed policy of allotment and to help revitalize tribal government, Congress passed the landmark Indian Reorganization Act in 1934.¹⁴ With respect to governance, the IRA provided that tribes could adopt tribal constitutions that would, after approval by the Secretary of Interior, be formally recognized by the U.S. Government.¹⁵ The Act stated that IRA constitutions would provide for the exercise by tribal governments of “all powers vested in any Indian tribe or tribal council by existing law.”¹⁶ Several months after passage of the Act, an opinion of the Department of Interior’s Solicitor defined “existing law” as those powers of self-government that “have never been terminated by law or waived by treaty.”¹⁷ The opinion’s enumeration of specific examples of permissible powers of self-government formed the basis of the Department’s model constitutions, the provisions of which eventually found their way into tribes’ subsequent IRA constitutions.¹⁸

In many ways, the IRA helped revitalize and provide formal federal recognition to tribal governments at a time of their great fragility. But for the many American Indian nations with histories and cultures of decentralized, consensus-oriented, and deliberative methods of decision-making, IRA constitutions’ centralization of power in small tribal councils acting by divisive majority votes with few checks or balances has been a difficult transition. In addition to their substantive drawbacks, IRA constitutions have been criticized for the way in which they were imposed “top-down” upon tribal memberships that did not fully understand their contents and purposes. The IRA required all tribes to hold referenda on the adoption of IRA constitutions within one year of passage of the Act, regardless of the level of familiarity (or unfamiliarity) tribal members possessed with respect to the introduction of offices and concepts such as chairman, vice-chairman, treasurer, secret ballot, and electoral districts.¹⁹ All tribal members who didn’t vote were considered to have approved the IRA.²⁰ And if a tribe rejected the IRA, it couldn’t receive other IRA benefits such as access to its revolving credit fund and educational scholarships.²¹

There are approximately 560 federally recognized tribal communities in the United States, of which 334 are located in the lower 48 states and 226 in Alaska. Following its passage, 181 tribal communities voted to accept the terms of the IRA and 77 voted to reject it.²² By the mid 1940s, 93 tribes, bands, and Indian communities had adopted IRA constitutions.²³ Since that time, other American Indian nations, including those recently recognized by the U.S. Government, have also opted to adopt IRA constitutions.²⁴ Following the extension of the IRA to Alaska in 1936, approximately 70 Alaskan villages have organized IRA councils.²⁵ Altogether, over 200 federally recognized tribal communities in the United States currently are organized pursuant to the IRA, with approximately 100 governing through IRA constitutions.

Significantly, the United States Government’s impact over the organization of tribal government extends beyond the sheer numbers of IRA governments. Over the course of the last century, numerous non-IRA tribes have adopted provisions from IRA constitutions, including the requirement that the Secretary of the Department of Interior approve constitutional amendments.²⁶ Others, such as the 200,000 member Navajo Nation, have governed through tribal councils that also were originally created by officials from the Department of Interior and that share characteristics, such as centralized and unitary government, mirroring those of IRA governments. In effect, many problems and challenges associated with IRA constitutions also apply to the larger number of tribal nations that govern through similar governing structures.

Today, a number of American Indian nations have overcome IRA constitutions' lack of effective mechanisms for separating government power, resolving disputes, and providing avenues for popular participation in government to form strong tribal governments. More often than not, however, these characteristics have posed daunting challenges of tribal governance.

American Indian leaders' efforts to revise or replace IRA constitutions have been reinforced and accelerated by the commencement of the U.S. Government's self-determination policy in the 1970s.²⁷ On a practical level, the increased governmental responsibilities assumed by tribal governments over the past 25 years require stronger and more responsive government institutions. By contracting and compacting with federal agencies of the U.S. Government, numerous American Indian nations have taken over responsibility for managing and delivering a wide range of government programs and services in areas as diverse as health, education, gaming, economic development, housing, and the environment. This expansion in governmental responsibilities has been complemented by a simultaneous opening in the political space within which tribal constitutional reform can take place. After the 1930s Depression and the 1940s decade of war, American Indians spent the 1950s and 1960s battling Congressional efforts to terminate tribal nations and assimilate individual Indians into white society.²⁸ Only under the U.S. Government's policy of self-determination have American Indian nations been able to turn their attention beyond protecting their political survival and toward rebuilding their nations. This combination of practical necessity and political opportunity has helped placed constitutional reform at the fore of American Indian politics.

Part II

Constitutional and Governmental Reform Experiences of the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation and Northern Cheyenne Tribe

The following sections summarize the constitutional and governmental reform experiences of the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe. These summaries are not meant to be exhaustive histories. Rather, they are intended to offer a window into the motivations of American Indian nations to strengthen the stability, efficiency, accountability, and legitimacy of their governments. The four nations' experiences also provide a context for a discussion of common challenges associated with developing effective processes of reform in Part III. A chart summarizing the four nations' reform processes is located at the end of this paper.

Cherokee Nation of Oklahoma. The Cherokee Nation of Oklahoma is comprised of over 200,000 citizens, the second largest American Indian nation in the United States. Its seat of government is located in Tahlequah, Oklahoma. Originally residing in the southeastern United States, the Cherokee's political organization was largely decentralized. Encountering early problems with white settlers and government agents, the Cherokee began adopting U.S.-style governing institutions as a defensive strategy to ward off accusations that they were unfit to retain their land.²⁹ In 1827, the Cherokees elected delegates to a constitutional convention and adopted their first constitution. After the

Nation's infamous 1839 "Trail of Tears" removal to Oklahoma, the Nation organized another constitutional convention and drafted its second constitution. An Act of Congress dissolved the Cherokee Nation government in 1907.³⁰ The Nation reconstituted itself in the 1970s and, in 1976, drafted its current constitution.³¹

The 1976 constitution created a three-branch government led by a 15-member Council, an executive branch headed by a Principal Chief and Deputy Principal Chief, and a judiciary – a framework that worked well for the Nation for the next 20 years. In the mid-1990s however, the Nation suffered through a widely publicized constitutional crisis involving all three branches of government. The crisis led to impeachments, dual court systems, boycotted Council meetings, and a flurry of lawsuits. By coincidence, a clause in the Nation's 1976 constitution required a tribal referendum every 20 years on the question of whether or not the membership wanted to convene a constitutional convention.³² Two years after the citizenry voted in 1995 in favor of a convention, the Nation formed the Cherokee Nation Constitution Convention Commission to lead its constitutional reform process. Each of the three branches appointed two members to the Commission and the six then collectively chose a seventh member. After holding a series of public meetings, the Commission developed a process for selecting 79 delegates from a cross-section of the Nation to serve in the constitutional convention. Delegates included elected and non-elected leaders from all branches of government as well as tribal members residing on and off of the reservation. The delegates met for nine days in February and March, 1999 and, after working through the old constitution section-by-section, voted to adopt a proposed new constitution.³³

Major changes in the proposed constitution include the addition of two Council seats for off-reservation tribal members, the removal of the Deputy Chief from his position presiding over Council meetings, the creation of the position of Speaker of the Council, the creation of an independent election commission, term limits, removal of all references in the old constitution requiring federal government approval of tribal laws, and a complete overhaul of the judiciary, including the creation of a Court on the Judiciary charged with suspension and recommendation of removal of judges and justices. Because of the Nation's ongoing battles with the Bureau of Indian Affairs regarding federal approval of the proposed new constitution, however, a referendum concerning its ratification has yet to be scheduled.

Hualapai Nation. Approximately 2,250 members comprise the Hualapai Nation, half of whom live on the Nation's reservation in northern Arizona. The Hualapai Nation adopted an IRA constitution in 1935. The legislative body was a nine-member Tribal Council. The tribal membership elected the Council's Chair and Vice Chair from a pool of the nine Council members. The Chair and Vice Chair served at the pleasure of the Council and did not constitute a separate branch of government. Although the constitution authorized the Council to create a tribal court, it did not provide details as to its relationship with the Council. By the 1980s, many members felt that the Nation had outgrown its IRA constitution. Two major areas of concern were interference by Council members in tribal court decisions and an overabundance of recall elections of Council members.³⁴ Several members cite the latter problem as not only disruptive to day-to-day government but personally destructive to those defending themselves at recall elections.³⁵

The Nation undertook several attempts at constitutional reform in the 1980s. One tribal leader said these efforts were consistently put on the "back burner" to more pressing

issues.³⁶ In 1991, as part of a national solicitation to tribal governments, a New York-based non-profit organization offered to facilitate Hualapai's constitutional reform effort. Hualapai soon began working with a lawyer-consultant at the organization to form a constitutional reform committee composed of approximately 25 tribal volunteers.³⁷ The facilitator met with committee members once a month to help lead discussions and to draft language for proposed constitutional revisions.³⁸ The committee went through the old constitution section by section to determine areas of potential revision and reached out to the wider tribal membership through newsletters and public meetings.³⁹

At a special election in 1991, the Nation approved a new constitution. Major changes include the creation of an enrollment committee and election commission, the creation of primary elections for the positions of Chair and Vice Chair, term limits, lengthened terms for the Chair and Vice Chair, and revised referendum and recall procedures. The new constitution also enhances the jurisdiction and powers of the judiciary.

Navajo Nation. The Navajo Nation is comprised of over 250,000 citizens, the largest American Indian nation in the United States. Its reservation – the size of West Virginia – is spread over northern Arizona, western New Mexico and southern Utah. Traditionally, political power and decision-making took place at a local level, with bands of ten to forty families comprising political units. In the early 1920s, however, outside oil interests – eager to tap into Navajo's potential energy riches – urged the U.S. Department of Interior to authorize the establishment of a centralized, Navajo tribal council for the purpose of approving oil leases.⁴⁰ In 1923, the Department initiated the creation of the Navajo Nation Tribal Council, the first body in Navajo history organized to act on behalf of the entire nation. Officials at the Interior Department drafted the Council's regulations. Although the Council has continued to operate as the Nation's governing body, its governing authority has never been consented to by the Navajo people in a referendum.

The Navajo Nation does not govern through a written constitution. Instead, the Nation operates on a "government by resolution" basis. Title 2 of the Navajo Nation Code spells out the governing structure for the Nation. The governing body of the Navajo Nation is the 88-member Navajo Nation Council. Prior to the Navajo Nation's 1989 Title 2 amendments, the Chairman of the Council enjoyed great, and largely unchecked, powers stemming from his ability to preside over Council meetings and to select members of the Council's Advisory Committee, the body which controlled the Council's agenda and governed the Nation in between Council meetings. In the late 1980s, the Nation endured a nationally publicized political crisis revolving around allegations that the Council's Chairman had abused his office for personal gain.⁴¹ Council members split into two camps, those supporting and opposing the Chairman, and day-to-day government operations became deadlocked. The anti-Chairman Council bloc formed a majority and voted to place the Chairman on administrative leave, effectively removing him from office. The Navajo Supreme Court subsequently upheld the legality of the Council's action.⁴²

A few months later, the Council appointed its lawyer to draft comprehensive revisions to Title 2. The primary purpose of the revisions was to "reorganize" Navajo's government to redistribute some of the Chairman's many powers. The Title 2 changes were viewed as a temporary, stopgap measure. The Council had planned the Title 2 amendments to take place concurrently with a larger, grassroots reform effort to examine the basic governing

structure of the Nation. For a variety of political and fiscal reasons, however, the organizers of this larger government reform effort never completed their work.

Title 2's most significant amendment was the replacement of the Chairman's position with the position of President. Although the President heads a new executive branch, the President's powers are much weaker than those previously enjoyed by the Council Chairman. Additional changes included the creation of the position of Speaker of the Council, the development of an intra-governmental review process of proposed Council resolutions, and the creation of a 12 member Commission on Government Development advise the Council on future governmental reform initiatives. Importantly, the citizenry never had the opportunity to approve the Title 2 changes at a referendum.

Another round of significant governmental reform took place in 1998, with the passage of the Navajo Nation Local Governance Act. The Act devolved more power to the Nation's 110 local governing units, or Chapters, by providing them with the authority (after approval by the Nation's central government) to assume a wide variety of local government functions.⁴³

Northern Cheyenne Tribe. The Northern Cheyenne Tribe is comprised of almost 7,000 citizens, approximately half of whom live on the Tribe's 450,000-acre reservation in southeastern Montana. Prior to European contact, the Northern Cheyenne's Council of 44 Peace Chiefs served as its primary governing body. The Council of 44 was comprised of respected leaders from each of the Tribe's ten bands. In addition to its responsibility for making decisions affecting the entire Tribe, the Council also served as Northern Cheyenne's judicial body. Separate military societies were responsible for matters relating to war.⁴⁴ Because of its isolated location, the Northern Cheyenne did not experience heavy contact with white settlers until the mid 1800s. In 1884, President Arthur signed an Executive Order establishing the Tribe's reservation in its present location.⁴⁵ In 1911, the Nation organized a 15-member Business Council with three members serving as representatives from each of the reservation's five districts.

In 1935, the Tribe adopted an IRA constitution. The constitution's provisions were similar to many IRA constitutions prepared in large part by officials in the U.S. Government's Bureau of Indian Affairs. It remained largely unchanged until 1991, when Council member Clara Spotted Elk applied for, and received, a federal grant to organize a constitutional reform effort aimed at enhancing the government's stability and accountability.⁴⁶ At the time, the legislature was composed of a 21-member, part-time Council. A directly-elected tribal Chair and Vice Chair headed the executive branch, with the Vice Chair also presiding over Council meetings. A judiciary existed, but was not recognized in the Constitution as an independent body. A constitutional reform committee made up of appointees and volunteers worked closely with Northern Cheyenne's tribal lawyer. The committee met regularly over 15 months and utilized surveys and public meetings to engage public opinion.⁴⁷ At least one Northern Cheyenne tribal member credited the constitutional reform committee with serving as the "institutional memory" for a high-turnover, part-time Tribal Council often unaware of the Tribe's history and progress with constitutional reform.⁴⁸ At the same time, the committee encountered Council opposition to one of its proposed amendments reducing the size of the Council from 21 to 10 members. Committee members overcame Council members' opposition only after informing them that the Tribe's constitution allowed for tribal referenda concerning constitutional

amendments to be held upon the petition of one-third of the qualified voting member's of the Tribe – thereby bypassing the need for official Council approval.⁴⁹

The committee decided to bring three major amendments to the membership for approval at a special election: reform and reorganization of the Council, separation of powers and development of an ethics code. Although originally considering more far-sweeping revisions, committee members felt that some proposals concerning citizenship criteria and qualifications for office were too divisive.⁵⁰

In 1996, the membership approved the following changes at a special election – reduction of the size of the Council from 21 part-time members to 10 full-time members, implementation of staggered terms and primary elections, extension of Council members' terms from two to four years, and the creation of an ethics code. In addition, the Tribe amended the constitution to provide for an independent judiciary, the details of which were later set forth in a separation of powers ordinance.

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Although each of the four nations' stories is unique, several patterns emerge. For all four nations, problems or crises involving separation of powers issues played central roles in their decisions to begin reform. All four were also motivated to strengthen their judiciaries. These and other fundamental motivations helped catalyze processes of change that ultimately led to additional reforms and amendments. Because a relatively small number of such constitutional structures and provisions propel the constitutional and governmental reform efforts of so many American Indian nations, a short discussion is useful in setting the context of challenges associated with the engaging in effective processes of American Indian constitutional reform.

Separation of Powers. Traditionally, tribes separated different functions of government, in many cases pursuant to unwritten norms.⁵¹ The introduction of IRA and IRA-influenced constitutions, however, vested the overwhelming majority of political power in small legislatures, or tribal councils. Many American Indian nations now are revising their constitutions to better separate – or reparate – the powers of different government branches. The Navajo Nation, for instance, moved in 1989 from two to three branches of government, adding an executive branch, headed by a President with veto powers.⁵² The Northern Cheyenne Tribe buttressed a separation of powers mandate in its new constitution with a full-scale separation of powers ordinance defining the role of the judiciary and its ability to review the constitutionality of the actions of the tribe's two other branches. The proposed new constitution of the Cherokee Nation of Oklahoma eliminates the role of the Deputy Principal Chief, an executive branch official, as the presiding officer of the Tribal Council.⁵³

Newly-Formed and Strengthened Judiciaries. Perhaps no constitutional area has received as much attention as tribal judiciaries. The weak powers and non-independence of judiciaries in many constitutions have led to a host of problems, including interference in court decisions by officials from other branches of government, tribal citizens' feelings that their rights are not adequately protected, outside investors' fears that their contracts will

not be upheld in tribal courts, and incursions on tribal sovereignty by United States' state and federal courts.

To remedy this situation, American Indian nations have reformed their court systems in a variety of ways. The Cherokee Nation of Oklahoma, Hualapai Nation, and Northern Cheyenne Tribe are only three of numerous American Indian nations that have revised their constitutions to expand the jurisdiction and powers of their courts and increase the number and tiers of courts and judges. All three bolstered the independence of their judiciaries by inserting language in their new and revised constitutions acknowledging the judiciary as a separate and independent branch of government, vesting their courts with the power to review the constitutionality of tribal council laws and actions of tribal officials, lengthening judges' and justices' terms of office, and prohibiting any decrease in pay during their term.

Restructured Tribal Councils and Patterns of Representation. Tribal councils are charged with representing diverse and even multi-cultural communities, interacting with local, state and national governments, and generally overseeing tribes' social, political and economic health. Historically, IRA tribal councils have received criticism for serving as centralized, inefficient governing bodies that often fail to represent adequately all community interests. Today's increased tribal governmental responsibilities and changing membership demographics have placed an even higher premium on making tribal legislatures more representative and efficient.

To tackle these concerns, several American Indian nations have engaged in a fundamental rethinking of more appropriate forms of representation. To enhance government efficiency and bring representation more in line with traditional, decentralized forms of government, the Navajo Nation passed its Local Governance Act in 1998, allowing local government chapters greater autonomy in governmental decision-making.⁵⁴ To address the fact that 40 percent of the Cherokee Nation lives outside the boundaries of its reservation, delegates to the 1999 Cherokee Nation Constitution Convention approved the addition of two seats to the 15-member Cherokee Nation Tribal Council to represent off-reservation residents. To balance various concerns over representation, the Northern Cheyenne Tribe's 1996 Constitution calls for the election of half of the Council members on a basis of one member per district and the other half based on district population.

Longer and Staggered Terms. IRA constitutions often set executive and legislative terms of office at two or three years and do not provide for staggered terms. Not surprisingly, these provisions exacerbate problems of turnover within tribal governments, with newly-elected administrations and council members having to "reinvent" the tribal policy wheel without the benefit of the presence of more experienced colleagues. To strengthen the stability and efficiency of their governments, many American Indian nations, including the Hualapai Nation and the Northern Cheyenne Tribe, have revised their constitutions to provide for longer and staggered terms of elected officials.

Election Reforms. Tribes have made numerous constitutional revisions to their election procedures. One of the most frequent reforms has been to adopt primary elections. This has helped to address the problem of "12 candidates for Tribal Chair" by providing incoming officials with governing mandates supported by a majority of the popular vote (as opposed to a mere plurality). Other areas of reform have focused on voter eligibility disputes arising

out of the residency and enrollment status of tribal members. To address the frequent contesting of election results, the Cherokee Nation of Oklahoma and the Hualapai Nation provided for an independent election board in their new constitutions.⁵⁵

Part III

Developing Effective Processes of Constitutional and Governmental Reform

The experiences of the Cherokee Nation of Oklahoma, the Hualapai Nation, the Navajo Nation and the Northern Cheyenne Tribe demonstrate how American Indian nations are not immune from universal challenges associated with reform, including political biases toward maintenance of the status quo, disengaged citizenries, and insufficient mechanisms for resolving conflict during the reform process. In addition, numerous American Indian nations face the additional challenge of attempting to incorporate traditional aspects of governance into new constitutions and institutions.

Cumulatively, challenges along the road to reform often thwart American Indian nations' efforts to create stronger, more legitimate and culturally-appropriate constitutions and governing frameworks. These challenges underscore the need to develop reform processes that overcome political obstacles, resolve conflict and produce results that are not only legally valid but enjoy widespread political legitimacy. Based on the experiences of the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe, many tribal nations and reform leaders have developed a variety of solutions for smoothing the road to more effective reform processes. The following sections highlight specific challenges American Indian nations face during the process of reform and begin a discussion of proposed solutions for overcoming such challenges based on the experiences of the four nations.

Getting started

“[Our] tribe had always been interested in constitutional reform but never got around to doing it.”

-- Northern Cheyenne reform leader

“[We] made attempts before but it ended up being on the back burner.”

--Member of Hualapai Nation constitutional reform committee

Developing institutional reforms is an inherently difficult task. Reforming constitutions, a nation’s supreme institutional architecture, may be the most difficult collective task of all. Even when a general desire exists to draft or amend a constitution, the realization of this goal may be frustrated or delayed. Leaders in South Africa spent years trying to start and re-start the process of adopting a democratic constitution.⁵⁶ First stated as a priority by Nelson Mandela’s African National Congress party in the 1960s, the country finally adopted its new constitution in 1996. Canada has spent the better course of two decades debating how best to revise its constitution.⁵⁷ In the United States, the original states governed as a confederacy for several years before agreeing, after much debate and a difficult ratification process, to the formation of a union and the adoption of its current constitution.

Like other countries, it is not unusual for American Indian nations to have attempted the constitutional reform process several times over many years before finally achieving a breakthrough. As a high-ranking member of the Hualapai Nation government reflected, constitutional reform had been on the nation’s “back burner” for many years before the nation finally launched its reform process in 1989. In many instances, reform processes don’t even get off the ground unless there exists some type of political crisis strong enough to overcome other governing priorities and a bias toward the status quo. Although the Navajo Nation talked about reforming its central government for several decades, it wasn’t until a 1989 crisis involving its Council that amendments to its governing code were finally passed. Similarly, although voters of the Cherokee Nation of Oklahoma voted at a referendum in 1995 to establish a constitutional convention, it wasn’t until 1998 – and the embroilment of the Nation in a constitutional crisis involving all three branches of government – that the Nation began forming a constitutional commission charged with planning a constitutional convention.

To help launch reform processes, many American Indian nations choose to appoint a constitutional reform committee. Committees are usually comprised of tribal council appointees and volunteer community members, or some combination thereof. Meeting on a part time basis, these committees usually report directly to the tribal council. Although relatively easy to form, volunteer committees or those appointed by tribal councils suffer from problems of sufficient funding and political independence. In addition to problems of attrition among committee members, these committees find it difficult to propose reforms that clash with the interests of incumbent officeholders. The Northern Cheyenne Tribe, for example, saw its first constitutional reform committee run out of funds in the early 1990s before a second group working on a volunteer basis finished its work several years later – but only after narrowly overcoming Council resistance to its plans to reduce the size of the Council.

To confront these problems, a host of countries have experimented with different types of reform bodies that are both independent from the incumbent legislature and representative of their respective societies. From constitutional commissions to constituent assemblies, countries from Uganda to South Africa have developed processes that help ensure reforms are developed, debated and ratified in inclusive, participatory and independent ways.⁵⁸ In Indian Country, several nations have similarly seen a benefit in charging tribal institutions with launching and managing reform processes. These institutions can serve as a nation's institutional memory between administrations and provide a neutral home for the commencement of reform. In 1999, the Cherokee Nation of Oklahoma formed a seven member Cherokee Nation Constitution Convention Commission to lead its reform process. Importantly, the Commission successfully obtained enabling legislation from the Council vesting it with sole authority to manage the reform process. The legislation also allowed the Commission to place proposed reforms directly on a referendum ballot – bypassing the need for Council approval and a potential veto of controversial proposals.

Another example is the Navajo Nation's Commission on Government Development. Created as part of the Nation's reform amendments in 1989, the Commission – and a related Office of Government Development – is a 12-member body responsible for soliciting information from the tribal membership and developing ideas and plans for reforming the Nation's governance structure.⁵⁹ The twelve members are drawn from all cross-sections of Navajo society and include appointees from each of the three branches of government, a student representative, a tribal college representative, a women's association and a representative from the Nation's traditional sector. Although still suffering from issues of political independence from the Navajo Nation Council, the Commission helped to develop and implement the 1998 Navajo Nation Local Governance Act, allowing for the devolution of political power to the Nation's 88 local Chapters.

American Indian nations opting for commissions and constitutional conventions must confront several questions. How can such reform bodies be structured so as to maximize their political independence? Are they feasible for smaller tribal communities? What should be the role, if any, of non-tribal members lawyers and consultants in facilitating the work of reform bodies? These questions can play a part in any discussion about developing effective processes of reform.

In addition to the creation of tribal institutions charged with developing and managing constitutional reform processes, American Indian nations may also benefit from the presence in tribal constitutions of “institutional triggers.” To overcome the pressures and priorities of day-to-day politics, several states have provisions in their constitutions mandating elections at periodic intervals on whether or not the citizenry wants to call a constitutional convention.⁶⁰ This type of trigger may be effective in placing constitutional reform beyond the control of entrenched political officeholders inclined to maintain the status quo. It also can protect against the possibility that the development of structural reforms will be crowded out by more pressing legislative priorities. The Cherokee Nation of Oklahoma, used such a provision to help catalyze its reform process in the mid 1990s.

Delegating authority to reform institutions and utilizing institutional triggers are two methods native and non-native nations have used to help initiate the reform process. Undoubtedly, additional American Indian nations have developed alternative mechanisms

that have helped facilitate the launching of reform. The crucial next step is to share these successful measures with still additional American Indian nations interested in pursuing reform.

Engaging and Informing the Public

"If we could get the same fanaticism that we have for sports and somehow be able to transfer that to having an interest in our government, we'd have the best government in the world."

-- Member, Northern Cheyenne Tribe

"[We need to] try to lure people into it [the reform process] because a lot of people feel like what they say won't make a difference. And they're just going to give up on it. But there comes a time when something impacts them and they'll speak up. So, even though people aren't going to come [to community meetings], we have to find a way to get to them."

-- Member, Hualapai Nation Tribal Council

American Indian government reform leaders have confronted the universal difficulty of engaging and informing citizens about the purpose and status of constitutional reform efforts. Like reform leaders around the world, they have experienced first-hand the limitations of public meetings, surveys, and newsletters. Whether it is a lack of awareness of their existence, pressure to attend to other daily priorities, or a feeling that their views will not be heard, a large percentage of tribal citizens are not likely to attend public meetings or provide detailed responses to surveys.⁶¹

As a result of these obstacles – applicable to any society – many American Indian nations have completed constitutional reform processes that leave the majority of citizens with little feeling of ownership in the resulting reforms. The universal difficulty of investing every citizen with a voice in reform is often compounded by rushed processes of reform, and less-than-optimal mechanisms for including the viewpoints of all groups within tribal nations. In the Navajo Nation, several leaders and citizens have expressed regret that the Navajo people never voted to ratify the 1989 Title 2 amendments at a nationwide referendum. Citizens of the Hualapai Nation have expressed their disappointment that they were mostly unaware that a constitutional reform process was taking place.

To better engage and inform the public, reform leaders have turned to a number of more intensive approaches to citizen participation and education during the reform process. Realizing the limitations of simply invoking the need for better "separation of powers" or "checks and balances," they have focused on approaches that provide individual tribal members with a sufficient understanding and sense of ownership over potential reforms. These approaches include seeking out and engaging the input of tribal members where they live and work, explaining the purpose and content of individual reforms and how their implementation would affect the day-to-day operations of tribal government (in plain, non-legal language), and engaging specific citizens in the native language. For example, one member of Northern Cheyenne's constitutional reform committee took the lead for explaining proposed reforms at community meetings in the Cheyenne language. Working closely with the committee's tribal lawyer, he and others were able to ensure that citizens' comments made their way into the language of draft proposals. To explain the Navajo

Nation's Local Governance Act in 1998, then-President Albert Hale visited the nation's citizens on horseback, explaining to individual families in the Navajo language how the proposed reforms would impact their day-to-day lives.⁶²

Tribal government reform leaders have also consistently made the case for stronger programs of civic education. Over the past century, failed federal boarding school and family relocation programs have broken the links between generations that traditionally served as a channel for communicating and teaching important cultural knowledge, including civic knowledge. By enhancing citizens' understanding of traditional government, the historical origins of contemporary tribal government, and the impact of U.S. law on Indian governments, American Indian nations can increase the level of interest and participation in governmental reform efforts. These efforts also help lay the groundwork for strengthening the next generation's ability to preserve and expand the sovereignty of American Indian nations. The Northern Cheyenne Tribe, for example, has addressed this issue by establishing high school classes in Northern Cheyenne tribal government and tribal history. The Navajo Nation Office of Government Development has published a Navajo Nation handbook detailing Navajo traditional government, the history and structure of contemporary Navajo Nation government, and recent legislative government reform initiatives, such as the 1998 Local Governance Act.

With the increasing numbers of tribal colleges and non-profit organizations, there is also much room for discussion about the role of such tribal institutions. These and other tribal non-governmental organizations can help to hold governments accountable, disperse media information to tribal citizens during and before governmental reform efforts, sponsor workshops on governance issues, and strengthen civic education generally. Internationally, there has been an enormous amount of discussion and publication about the need for strengthening the presence, role, and capacity of these institutions of "civil society." These types of widespread discussions have not yet taken root in Indian Country. Of course, Indian Country has its share of traditional organizations that serve similar purposes. An important question is how and to what extent can American Indian nations benefit from supplementing these traditional entities with chartered, non-profit organizations capable of receiving independent funding and support?

Finally, the usefulness of increased access to outside information about other nations' experiences with government reform should continue to be explored. Beyond fortuitously coming across useful constitutional provisions from other governments, American Indian nations certainly can benefit from information clearinghouses containing sample constitutions, ordinances, and position papers from both Indian Country and around the world. In addition to looking back to tribal traditions for ideas about structuring new government institutions, tribal nations should be able to look across the spectrum of what nations have done in similar situations. Access to such information does not mean that tribes should cut and paste from the experiences of other governments. Rather, this type of cross-tribal and cross-country information provides the opportunity for tribal governments – like any other sovereign – to decide how and to what extent to incorporate lessons learned from other countries' experiences with reform.⁶³

Resolving conflict

“The Courts saved us.”

-Navajo leader

Amending or replacing a constitution is a task laden with potential sources of conflict. Conflict may arise at a general level over disagreements concerning whether or not reform should be undertaken at all. It may also stem from disputes over fundamental reforms, such as membership criteria and representation for off-reservation members. Even after proposed constitutional amendments have been approved by at referenda, election disputes comprise yet a further source of potential conflict.

In response, American Indian nations have dealt with conflict in a variety of ways. When disagreements over the decision to enter into governmental and constitutional reform have been perceived as intractable, some tribal nations have decided to retain the status quo. Others have decided to delay the resolution of important and divisive issues, such as membership criteria and representation for off-reservation members, for future rounds of constitutional reform. Although engaging in large-scale constitutional and governmental reform within the past 12 years, the Hualapai Nation, Northern Cheyenne Tribe, and Navajo Nation are all seriously considering launching new rounds of reform to deal with issues such as land, criteria for citizenship, improved separation of powers between branches of government, and mechanisms for incorporating aspects of traditional government. In every case, however, reform leaders have encountered the difficulty of re-starting reform processes outside of rare moments of political opportunity.

Alternatively, some American Indian nations have completed reform processes only to see the results challenged by certain citizens. Whether because of feelings that their voices weren't heard during the process, disagreements over the scope and pace of reform, or challenges to referendum results approving constitutions, these nations have seen constitutional reform result in dual governments or federal lawsuits. Even when not required to do so by U.S. federal law, some non-IRA tribal nations, in the past, brought internal disputes to the Bureau of Indian Affairs or federal courts for resolution, even when not required by federal law to do so.⁶⁴ Instead of the anticipated goal of stability and well-accepted uniform rules, constitutional reform in these instances results in weakened stability or a yielding of sovereignty to U.S. courts charged with resolving such disputes.

Every nation's decision in dealing with conflict is, of course, context specific. But there is benefit in discussing potential approaches to conflict resolution. For instance, for nations that decide to delay the resolution of divisive issues for future rounds of constitutional reform, what techniques are available to prevent fatigue, the dissolution of reform bodies, and institutional inertia from obstructing the relaunching of reform? As discussed earlier, “institutional triggers” within constitutions and individual tribal institutions charged with bringing forth new reforms offer two of many potential answers to this question. Other mechanisms should be raised and discussed. For American Indian nations involved with constitutional crises and election disputes, how can such conflicts be resolved in a way that does not yield sovereignty to outside entities? Ideally, tribal institutions, whether tribal courts or more informal entities, can be charged with resolving constitutional disputes. Many Navajos, for instance, credit their Supreme Court with helping to resolve the Nation's much-publicized government crisis in 1989. During the height of the controversy, political blocs loyal and opposed to the Council Chairman each claimed governing control over the

Nation. Only when the Navajo Nation Supreme Court upheld the legality of the Council's removal of the Council Chairman from office did the turmoil begin to end and the opportunity presented itself for the Council to pass its Title 2 amendments. Although the turmoil peaked – and ended – a few months after the Court's ruling, many Navajo leaders credit the Court's respected stature and strong, independent decision-making with preventing a protracted, violent stand-off between the two sides.

The Cherokee Nation also engaged in a process of large-scale governmental reform at a time of political crisis. Although the election of a new Principal Chief in 1995 had helped to ease tensions, the situation was still tense when each of the three branches of the Cherokee Nation's government appointed representatives to the newly-formed Constitution Convention Commission in 1998. The commissioners immediately took an oath of political neutrality and prohibited themselves from holding political office during their tenure. The Commissioners then developed a process for selection Convention delegates that also included tribal members partial to all political parties. Because the commissioners and the delegates were drawn from all three government branches and included members from all political stripes, the Cherokees were able to use their own sovereign forum – the Convention itself – as an arena within which to begin addressing their internal divisions. Over the course of nine days, the 79 delegates were able to discuss, debate and resolve a series of divisive issues within the Nation's own sovereign forum, including blood quantum requirements for candidates for Principal Chief, Council representation for off-reservation residents, and the potential switch to a bicameral form of government.⁶⁵

Incorporating Tradition

“They (elders) keep talking about it (bringing back tradition) and I feel bad about it when I respond to it because I say ‘how are you going to do that when we are so far gone? We don’t live in wickiups anymore. We don’t ride horses or walk around anymore. We don’t have any medicine people anymore. And even the tribes that do, they all charge. We shop in the grocery store. We go to the clinic for our medicine. And we’re third or fourth generation physically, emotionally, sexually abused. How are you going to deal with all that and then want to go back to these traditional ways?’ They’re going to have find a way, instead of just saying we’re going to go back -- because that’s what they always talk about, ‘you have to go back.’ You’re not going back anywhere. That’s gone. You’re going to have to find a way to bring some of that forward. And incorporate it into the lives now. They need to get away from ‘we’re going to go back to this.’ Because there’s nothing to go back to. That’s all gone... The state of the community and the way that we’ve been brought up has not been traditional and how are you all of a sudden going to back to that? And I think it’s going to take the young people to find out what it was and bring it forward and incorporate it into our lives now.”

-- Young tribal council member

“Sometimes they forget they are Indian. They want so much to be in the mainstream. Tradition doesn’t carry too much weight.”

-- Elder at same tribe

Perhaps the thorniest issue faced by American Indian nations engaging in governmental and constitutional reform is developing consensus and shared strategies for incorporating tribal traditions into new governing institutions. Many tribal nations governing under IRA or other western-style constitutions hope to incorporate aspects of traditional government into their new constitutions. But this desire is tempered by the fact that, like any fluid and multi-cultural society, tribal populations diverge in their interest in reviving traditional practices. Even when a general consensus for the inclusion of tradition exists, additional questions remain. To what degree are traditions and traditional institutions both appropriate and capable of being incorporated into contemporary governments? What are the best methods of responding to outside investors who demand institutions with which they are comfortable, such as western-style tribal councils, laws, codes and adjudicative bodies?

Faced with these vexing and often divisive questions, reform leaders have expressed their frustration in adequately addressing the complexities involved in meeting citizens’ desires for more “traditional” governments. Of course, as a select and centralized body, it is inherently difficult for any constitutional reform committee to engage effectively a large number of tribal citizens, solicit numerous and often competing views of appropriate traditional governance, and then incorporate such disparate demands into a written constitution. For American Indian nations with a history of consensus decision-making, developing traditional approaches while operating within the contemporary context of small, centralized, majority-vote tribal councils is especially tricky.

Some tribal nations have found it advantageous to focus on traditional *processes* of reform rather than specific traditional practices. By developing an inclusive and deliberating process for folding members from all different groups and viewpoints into the decision-making process itself –in some form of summit or convention – tribal leaders do not have to “guess” which tribal governing traditions should be incorporated into a new constitution. Instead, summiteers and convention delegates themselves, as a microcosm of the larger tribe, can determine their own collective and *current* vision of governance – a vision that inherently includes and accounts for each members’ view of and weight accorded to specific tribal traditions.⁶⁶ At the very least, this type of bottom-up, inclusive, and participatory approach is consistent with the traditional decision-making values of many Indian communities, thereby increasing the legitimacy and acceptance of any resulting decisions.

Part IV

Conclusion

Each nation pursues constitutional and governmental reform to achieve its own specific goals. At the same time, many of the obstacles to achieving a nation’s substantive reform goals are related to universal problems of process. Fortunately, as the experiences of the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation and Northern Cheyenne Tribe demonstrate, solutions for confronting and overcoming such obstacles reside within tribal nations themselves. Creating representative and independent tribal institutions to manage reform processes and investing in short and long-term programs of civic education can help launch reform processes, achieve effective citizen participation, resolve conflict and incorporate aspects of traditional government into new governing frameworks. Together, tribal institutions and civic education can help American Indian nations achieve their goals of producing constitutional reforms that are both valid and legitimate. Hopefully, this paper will help stimulate a larger effort to share and discuss common obstacles and individual success stories related to engaging in the process of reform. Let the discussion continue.

Summary of Four Nations' Governmental and Constitutional Reform Processes				
Tribe	Reform Body	Time (approx.)	Major Reforms	Status
Cherokee	Constitution Commission composed Of Appointees From Three Branches Of Government; Constitutional Convention Composed of Appointees From Three Branches Of Government, Commissioners And Tribal Members	6 months	Creation of Council Speaker Position; Increased Council Size To Include Reps for Off-Reservation Tribal Members; Staggered Terms and Term Limits; Removal of Provisions Requiring Federal Approval of Cherokee Laws; Expanded Judiciary; Creation of Independent Election Commission	Convention Adopted New Constitution on March 2, 1999; Currently In Negotiations With BIA Over Federal Approval Of Constitution
Hualapai	Constitutional Reform Committee Composed Of Tribal Council Appointees And Volunteers; Retention Of Outside Consultant	1 year	Reorganization of Chair and Vice Chair's Relationship With Council; Expanded Judiciary; Election Board; Primary Elections	Approved New Constitution at 2/14/91 Referendum
Navajo	Tribal Council And Council Lawyer	6 months	Creation of Executive Branch Headed By President; Creation of Council Speaker Position; Reduction and Reorganization of Council Committees; Reform of Process of Adoption of Council Resolutions; Creation Of Commission and Office Of Government Development	Council Passed Amendments to Title 2 of Navajo Nation Code on 12/15/89
Northern Cheyenne	Constitutional Reform Committee Composed Of Tribal Council Appointees And Volunteers	3 years	Reduced Council Size, Lengthened Terms, Primary Elections, Separation of Powers, Ethics Code	Approved Amendments at 5/14/96 Referendum

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¹ Indian Reorganization Act, P.L. 383, 458 Stat. 984, ch. 576, 25 U.S.C. 461 *et seq.* (1934).

² For a discussion of the origins of the boilerplate nature of IRA constitutions, see, *infra*, note 18.

³ Over the past 25 years, the United States Supreme Court has held that American Indian nations have lost their sovereign control over a host of government functions, including aspects of zoning (*Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408, 109 S.Ct. 2994, (1989)) and criminal jurisdiction over non-members, (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978)).

⁴ See Duane Champagne, "Renewing Tribal Governments: Uniting Political Theory and Sacred Communities," *Wicazo Za Review* (forthcoming).

⁵ The following represents only a partial list of the number of American Indian nations and reservation governments that have recently undertaken or are currently planning to engage in large-scale governmental or constitutional reform: Cherokee (North Carolina and Oklahoma), Cheyenne River Sioux, Crow, Flathead, Fort Belknap, Fort Berthold, Fort McDowell, Grand Traverse Band of Ottawa and Chippewa, Ho Chunk, Hoopa, Hopi, Hualapai, Jicarilla Apache, Lummi, Mohawk, Navajo, Northern Cheyenne, Oglala Sioux, Pascua Yaqui, Quinault, Saginaw Chippewa, San Carlos Apache, Seminole (Oklahoma), Shakopee Mdewakanton Sioux, and numerous California bands.

⁶ The following articles document American Indian nations' efforts at amending and replacing their constitutions: Sean Paige, "Rewriting Tribal Law," *Insight Magazine*, May 29, 2000; Jeff Hinkle, "Constitutional Crisis: Can Tribal Governments Take the Heat," *American Indian Report*, May 2000; Ian Wilson Record, "Broken Government: Constitutional Inadequacy Spawns Conflict on San Carlos," *Native Americas*, Spring 1999, pp. 10-16. For a thorough analysis of the historical and contemporary issues surrounding tribal government reform, see Robert B. Porter, "Strengthening Tribal Sovereignty Through Government Reform: What are the Issues," 7 *Kan. J.L. & Pub. Pol'y* 72 (1997).

⁷ Although not required by federal law, the current constitution of the Cherokee Nation of Oklahoma contains a clause requiring approval of any new or amended constitution by the President of the United States. Cherokee Nation of Oklahoma Constitution, art. XV, sec. 10. After delegates to the Nation's 1999 constitutional convention adopted a proposed, new constitution, the Nation has spent more than two years seeking its approval from the Department of Interior's Bureau of Indian Affairs.

⁸ Like Israel, New Zealand and Great Britain today, most tribes governed without a written constitution.

⁹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L.Ed. 25 (1831)

¹⁰ 16 Stat. 544, 566 (1871).

¹¹ 73rd Cong., 2d Sess., 16-18 (1934) (Memorandum, Hearings on H.R. 7902 Before the House Committee on Indian Affairs), cited in Timothy W. Joranko and Mark C. Van Norman, "Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments," 29 *Gonz. L. Rev.* 83 (1993/1994).

¹² See Vine Deloria, Jr. and Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon, 1984) p. 26 ("Indians continued to relate to one another in the traditional behavior patterns that had once completely regulated their own forms of government, but they did so within increasingly new and widely differing political structures allowed them by their agents and superintendents").

¹³ Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1989), p. 93.

¹⁴ The IRA, among other provisions, ended the policy of land allotment, authorized the Secretary of the Interior to return any surplus lands to tribal ownership, provided revolving loan funds to promote economic development, and provided funding for educational scholarships.

¹⁵ The original language of Section 16 of the IRA states in part: "any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority of the adult members of the tribe... at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an open election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws."

¹⁶ Section 16 of the original IRA legislation provided the following framework for tribal constitutions: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the federal, state and local governments."

¹⁷ Nathan Margold, *Decisions of the Department of the Interior*, vol. 55 (Washington, D.C.: Government Printing Office, 1938), pp. 14-67. Margold's opinion defines the scope of the phrase "powers vested in any Indian tribe or tribal council by existing law" in Section 16 of the IRA as measures related to internal sovereignty, or self-government, including the power to form a government, define membership, regulate the domestic relations of its members, prescribe rules of inheritance, levy dues, fees, and taxes upon members of the tribe and nonmembers doing business within the reservation (subject to conditions), remove or exclude non-members from the reservation, regulate the use and disposition of all property within the tribe's jurisdiction, and administer justice with respect to all disputes and offenses of or among the members of the tribe, other than certain major offenses reserved to the federal courts.

¹⁸ A 1935 statistical breakdown of provisions contained in 20 IRA constitutions demonstrates their boilerplate nature: "Under the article "Powers of the Council," the items enumerated by Margold and the Wheeler-Howard Act [IRA] were included in the model constitutions [prepared by the BIA staff]. The same provisions, generally using the same words, in nine of the twenty-six powers enumerated were found in 86 percent of all the constitutions examined, and another four in over 70 percent of the

constitutions, so that it could generally be concluded, on the basis of this sample, that in over two-thirds of all the constitutions, more than half of the provisions relating to tribal council powers were taken directly from the model constitution.” Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45*, (Lincoln: University of Nebraska Press, 1980), chapter 6, footnote 11, p. 177. To this day, many IRA constitutions closely resemble the model constitution’s general format of nine articles devoted to Territory, Membership, Governing Body, Powers of the council, Elections, Removal, Referendum, Land and Amendments.

¹⁹ 25 U.S.C. 478 (the deadline for holding Secretarial election was subsequently extended to two years by an Act dated June 15, 1935, ch. 260, 49 Stat. 378).

²⁰ 25 U.S.C. 478. Many scholars and tribal leaders have singled out for criticism this provision of the Act for counting protest abstentions as affirmative votes, thereby influencing the election outcomes of several tribes. For an example, see Curtis Berkey, “Implementation of the Reorganization Act” 2 *American Indian Journal of the Institute for the Development of Indian Law* 2 (August, 1976) (“For example, the Coeur D’Alene tribe voted on December 12, 1934 to reject the Act by a count of 78 against and 76 in favor. “But 49 eligible voters had not voted, and the Bureau counted these as affirmative votes. Therefore, even though the a majority of those actually voting reject the Act, it was made applicable to them”).

²¹ See, for example, Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, (University of Nebraska Press, 1984), p. 964, citing undated letter of Bureau of Indian Affairs Commissioner John Collier (footnote omitted): “If they do this [reject the IRA], they remain exactly as before the passage and approval of the Act. The tribe that rejects the Act does not have the trust period automatically extended, the tribe does not share in the land purchase fund; its members cannot receive the new educational loans; they cannot receive exemption from the general civil service law; they cannot participate in the ten million dollar credit fund; they cannot incorporate under the terms of the Act; the Government can continue to do as it pleases with their tribal assets; the cannot share in the tribal-organization fund”.

²² Theodore H. Haas, *Ten Years of Tribal Government Under the I.R.A.*, (Chicago: Haskell Institute Printing Service, 1947), p. 3.

²³ *Id.*

²⁴ For example, upon receiving federal recognition in 1980, the Grand Traverse Band of Ottawa and Chippewa Indians adopted an IRA constitution.

²⁵ Martha Hirschfield, “The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form,” 101 *Yale L.J.* 1331, 1335 n. 29 (1992) (footnote omitted). Native government in Alaska has a much different structure and history than those of tribal governments in the lower 48 states. For an overview of the key historical events and legal framework, see *Id.*

²⁶ Examples include the current constitutions of the Cherokee Nation of Oklahoma and the Seminole Nation of Oklahoma, which both contain language requiring the approval of the Secretary of Interior of any constitutional amendments.

²⁷ President Richard Nixon officially renounced the United States Government’s policy of termination in a speech delivered on July 8, 1970 (excerpts reprinted in David Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., Eds. *Cases and Materials on Federal Indian Law*, (West Group, St. Paul, Minnesota, 1998), pp. 226-228. The Indian Self-Determination and Education Assistance Act of 1975, 25 USC 450a-450n, provided the legislative antidote to the termination

policy, allowing tribes to contract with federal agencies to plan and administer federally-funded tribal programs.

²⁸ Congress's termination policy is most closely associated with the 1953 Congressional concurrent House Concurrent Resolution 108, which led to the termination of approximately 109 tribes. See Charles F. Wilkinson and Eric R. Biggs, "The Evolution of The Termination Policy", 5 *Am. Indian L. Rev.* 151-54 (1977).

²⁹ For an in-depth, historical discussion of the Nation's adoption of its first and second constitution, see Duane Champagne, *Social Order and Political Change: Constitutional Governments among the Cherokee, the Choctaw, the Chickasaw and the Creek*, (Stanford, California, Stanford University Press, 1992) .

³⁰ 30 Stat. 495 (1898).

³¹ A copy of the constitution is found on the Nation's website, www.cherokee.org.

³² Cherokee Nation of Oklahoma Constitution, art. XV, § 9.

³³ A copy of the proposed constitution is found on the Nation's website, www.cherokee.org.

³⁴ Interview with members of Hualapai constitutional reform committee, August 17, 2000

³⁵ Interview with member of Hualapai constitutional reform committee, October 5, 2000.

³⁶ Interview with member of Hualapai constitutional reform committee, August 17, 2000.

³⁷ Interview with members of Hualapai Nation constitutional reform committee, August 17, 2000.

³⁸ Id.

³⁹ Id.

⁴⁰ See David Wilkins, "A Handbook of Navajo Government", Navajo Community College Press (1987) and Graham Taylor, "The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45," University of Nebraska Press (1980)..

⁴¹ See Sandy Tolan, Showdown at Window Rock, New York Times Magazine, November 26, 1989.

⁴² Navajo Nation v. MacDonald (In the Matter of Certified Questions II, No. A-CV-13-89;N.L.R., Supp., 1989)

⁴³ The Act provides Chapters with the authority to engage in a wide variety of actions including, but not limited to: issuing home and business site leases and permits; acquiring, selling or leasing property, entering into contracts for the provision of goods and services; entering into intergovernmental agreements with federal, state, and tribal entities (subject to the approval of the Navajo Nation Council's Intergovernmental Relations Committee); and entering into contracts for Navajo Nation general funds with appropriate Navajo Nation divisions, programs or agencies for service delivery programs. The Act also gives Chapters the authority to adopt numerous ordinances including, but not limited to, ordinances relating to land use planning, taxing, alternative governance models, and zoning.

⁴⁴ For information on traditional Northern Cheyenne Government, see Adamson E. Hoebel, *The Cheyennes: Indians of the Great Plains*, 2d. ed., (Holt, Rinehart and Winston, 1978) and Karl N. Llewellyn and Adamson E. Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941).

⁴⁵ Orlan J. Svingen, *The Northern Cheyenne Indian Reservation, 1877-1900*, University Press of Colorado, 1993, p. 49.

⁴⁶ James J. Lopach et al., "Tribal Government Today: Politics on Montana Indian Reservations," University of Colorado Press, 1998.

⁴⁷ Telephone interview with Northern Cheyenne tribal lawyer and member of Northern Cheyenne constitutional reform committee, July 13, 2000.

⁴⁸ Interview with member of Northern Cheyenne constitutional reform committee, June 20, 2000.

⁴⁹ Telephone interview with Northern Cheyenne tribal lawyer and member of Northern Cheyenne constitutional reform committee, July 13, 2000.

⁵⁰ Interview with member of Northern Cheyenne Constitutional Reform Committee. A long-serving tribal lawyer who also served on the committee also did not want to clutter the election ballot ratifying the amendments with numerous and potentially conflicting amendments.

⁵¹ See Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache," 33 *Economic Inquiry* 402 (July, 1995).

⁵² Navajo Nation, Title 2 Amendments of 1989.

⁵³ Delegates to the Cherokee Nation Constitution Convention voted to adopt a new constitution in March 1999. However, the current constitution contains a clause requiring federal approval of constitutional amendments. Over the past two years, the Nation's ratification of the new constitution has been delayed while the tribal leadership has negotiated with the Department of Interior to obtain Secretarial approval.

⁵⁴ The Act allows the Navajo Nation's 88 Chapters (with approval from the Navajo Nation Council) to perform a wide variety of powers, including issuing home, business, and other site leases, entering into intergovernmental agreements with state, federal, county, Navajo Nation and other governmental entities for the administration of service delivery functions, appropriating and reallocating chapter funds, employing chapter personnel, and establishing mechanisms for resolving local disputes.

⁵⁵ Another common constitutional revision is the removal of constitutional language requiring review by the Secretary of Interior of Council laws. Although not required by the IRA itself, many tribal constitutions contain such language. These clauses appeared in several early IRA constitutions and have, through time and custom, become ensconced in scores of tribal constitutions. American Indian nations are now exercising their sovereignty by removing these provisions from their constitutions.

⁵⁶ For a comprehensive account of South Africa's constitution-making process, see Hassen Ebrahim, *Soul of A Nation: Constitution-Making in South Africa* (Oxford University Press, 1998).

⁵⁷ See Michael Lusztig, "Constitutional Paralysis: Why Canadian Initiatives are Doomed to Fail," 28 *Canadian Journal of Political Science* 747 (Vol. 1, 1994).

⁵⁸ Julius O. Ihonvbere, *Towards a New Constitutionalism in Africa*, Center for Democracy and Development Occasional Paper Series No. 4 (April, 2000)

⁵⁹ The Navajo Nation Commission on Government Development consists of 12 members. Nominees are pooled from all three branches of government, the five agencies of the Navajo Nation, the President of the student body of the Navajo Community College and the Education Committee of the Navajo Nation Council (Title II, Section 972 of Navajo Nation Code). The Commission's powers are:

1. To develop a series of recommendations and proposals for alternative forms of government for consideration by the Navajo Nation Council and the Navajo People by examining and utilizing the concepts of the separation of powers and the delegation of authority to provide for the appropriate checks and balances in Navajo government; to establish the responsibility of the Navajo government to protect the rights and freedoms of the Navajo People; to establish limitations on how the Navajo government and its officials may use its powers and to define the powers of the Navajo People.
2. To provide short and long range comprehensive planning, evaluation and development appropriate to further enhance a Navajo Government that will perpetually accommodate the Navajo People by providing for their involvement, promote their general welfare, ensure governmental accountability, integrity, justice, domestic order, and retain traditional harmony, cultural respect, heritage and the protection of personal liberties.
3. To review, evaluate, and recommend laws, rules and regulations, including those of agencies, boards and commissions in order to develop a comprehensive system of government for the Navajo People.
4. To collect, assemble evaluate, interpret and distribute information, data statistics and evidence which accurately describes the Navajo Government status, circumstances and the needs of the Navajo People and which would also serve as a repository, library, resource and research center for such information.
5. To encourage the public, private and public organizations, chapters, traditional Navajo leaders, including Native ceremonial practitioners (medicinemen) to actively participate in carrying out the purposes of the Commission and to conduct public hearings. The Commission shall give due consideration to traditional values and philosophical views of the Native People.
6. To encourage appropriate educational curriculums designed to educate students and the general public on the governmental development of the Navajo Nation.

(Navajo Nation Code, Title 2 amendments, Section 973)

⁶⁰ As of 1982, eight states submit this question to the people every twenty years; one state holds a vote every sixteen years; four states vote every ten years; and one state votes every nine years. John Dinan, "Framing a People's Government: State Constitution-Making in the Progressive Era, 30 *Rutgers L.J.* 933, n. 5 (1999) citing Albert L. Sturm, *The Development of American State Constitutions*, 12 *Publius: The J. of Federalism* 57, 83, n.73 (1982).

⁶¹ Interviews with members of Office of Navajo Government Development, member of Hualapai Nation Tribal Council, and members of Cherokee Nation Constitution Commission.

⁶² Interview with Albert Hale, August 14, 2000.

⁶³ In this regard, the National Indian Law Library (<http://thorpe.ou.edu>) and the Center for World Indigenous Studies (www.cwis.org) are two organizations that have taken the lead in posting tribal constitutions and ordinances. Unfortunately, a variety of factors have combined to limit the number of tribal constitutions and codes posted on these websites. The National Indian Law Library has posted approximately 17 tribal constitutions on its website. Interview with David Selden, NILL head librarian, January 11, 2001. Selden believes a large barrier to posting more constitutions is the fear of tribal leaders and lawyers that their work will be copied or criticized.

⁶⁴ The St. Regis Mohawk Tribe, for example, has spent the last several years governing under two governments while U.S. federal courts have adjudicated whether or not a majority of the tribe voted to approve its 1996 constitution.

⁶⁵ Transcripts from the nine-day convention can be found at www.cherokee.org.

⁶⁶ The 1999 Cherokee Nation Constitution Convention, for instance, was the Nation's third such convention. Early constitution conventions took place in 1827 and 1839. The Navajo Nation is currently planning to hold a Navajo Nation Governance Convention, with delegates representing the Nation's local government Chapters. This type of local participation in government decision-making is consistent with traditional aspects of Navajo political organization.