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Tribal Executive Branches: A Path to Tribal Constitutional Reform

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Aanii All:
I am sending this large document regarding tribal constitutions in hopes that you will read it as I believe it will give you a much better understanding of what our Tribal Constitution is. Our constitution is a 3-part government and for good reason. It is unlike many other constitutions such as "IRA constitutions and PL 280 governance that many other tribes use; including other tribes in Michigan and surrounding states.

This research on Indian Law and Harvard Law Review also clarifies some of the benefits, which are few, and pitfalls of those other constitutions. We have a very good constitution which has been even more clarified through recent court decisions in my opinion. If everyone understood our form of government through our Constitution, it may save a lot of misunderstandings. The people who worked on our Constitution over 20 years ago did an excellent job and appear to have been ahead of their time and understood the importance of a three-part government.

I encourage everyone to read this document. Miigwetch *-Ogema Romanelli*

CHAPTER ONE

TRIBAL EXECUTIVE BRANCHES: A PATH TO TRIBAL CONSTITUTIONAL REFORM

In the modern era, tribes have made tremendous gains in retaining — and reclaiming — their sovereignty.[1] But despite this external progress, some tribes have struggled to overcome internal governance challenges.[2] One such challenge is presented by "IRA constitutions": those constitutions either passed in the period shortly after adoption of the federal Indian Reorganization Act[3] (IRA) in 1934 or created later but modeled after constitutions passed during that time.[4] IRA constitutions usually lack separation of powers. Instead, they often concentrate all or nearly all of a tribal government's power into a single "legislative" branch, commonly referred to as a tribal council.[5] Some tribal councils have used their power to micromanage tribal government,[6] grant political favors at the expense of economic development,[7] and, perhaps most troublingly, infringe upon individual rights.[8] In light of these and other good-governance concerns,[9] many scholars and

[1] *See, e.g.*, President Barack Obama, Remarks by the President at the Tribal Nations Conference (Dec. 3, 2014), https://www.whitehouse.gov/the-press-office/2014/12/03/remarks-president-tribal-nations-conference [http://perma.cc/ALK2-VM5K] ("Together, we've strengthened your sovereignty . . . .").

[2] *See, e.g.*, Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184, 185 (Eric D. Lemont ed., 2006) [hereinafter AMERICAN INDIAN CONSTITUTIONAL REFORM].

[3] Act of June 18, 1934, ch. 576, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479). The history and goals of the IRA are discussed in section A.1, *infra* pp. 1664–66.

[4] *See, e.g.*, *Introduction* to AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 1, 2.

[5] *Id.*

[6] *See, e.g.*, Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, *in* REBUILDING NATIVE NATIONS 3, 16 (Miriam Jorgensen ed., 2007).

[7] *See, e.g.*, *id.* at 13–14.

[8] *See, e.g.*, Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 684 (10th Cir. 1980) ("[T]he plaintiffs sought a remedy [against the tribal council for violations of their rights] with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed.").

[9] Generally, when tribal governance scholars refer to good governance they (and this Chapter) mean governments (1) with a "demonstrated ability to serve the polity [that] encourages citizens to feel secure in investing in the future of the community" and (2) that "inspire confidence in outsiders who interact with tribes through social, commercial, and legal dealings." Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1064 (2007).

tribal citizens have called for reform of IRA tribal constitutions.[10] However, the very authority abused by some IRA tribal councils has also sometimes permitted tribal councils to thwart reform efforts.[11] Moreover, some IRA tribes[12] have failed to enact reform because of other obstacles — such as the financial costs of operating multi-branch government — even when political conditions favored reform.[13]

This Chapter is, with one exception,[14] about IRA tribes that desire[15] but struggle to achieve constitutional reform.[16] Extant scholarship has urged IRA tribes to develop independent tribal courts.[17] This Chapter, however, proposes that scholars and reformers also focus on the development of independent tribal executive branches. When enacted together, tribal executive branches and tribal courts might be more effective at overcoming tribal council political opposition to separation of powers than tribal courts are by themselves. Moreover, tribal executive branches might be better suited than tribal courts to overcome other reform obstacles, such as the costs associated with change. And even if independent executive branches do not help tribes overcome their reform obstacles, three-branch separation of powers offers IRA tribes a number of other potential benefits that one-

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[10] *See, e.g.*, Manley A. Begay, Jr., et al., *Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 34, 45.

[11] *See, e.g.*, *Introduction*, *supra* note 4, at 7.

[12] This Chapter uses "IRA tribe" to refer to tribes that have constitutions typical of those adopted during the IRA era, even when such tribes have not organized under the IRA or the Oklahoma or Alaska versions of the IRA.

[13] Of course, some tribes have found that the IRA system serves them well. *See* Joseph P. Kalt, *The Role of Constitutions in Native Nation Building: Laying a Firm Foundation*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 78, 88–89.

[14] The exception is that those tribes that use a "general council" model are sometimes in the same position as IRA tribes when it comes to problems such as funding and size. *See infra* section C.1, pp. 1675–76.

[15] It is difficult to determine what a tribe "desires" without simply relying on the assertions of the tribe's elected leadership. However, what a tribe desires and what its leadership claims the tribe desires do not always align. *Cf.* Cornell & Kalt, *supra* note 6, at 26 (noting that "[t]he standard approach [to economic development in Indian country] empowers selected individuals . . . but fails to empower the *nation*.").

[16] Technically, IRA government reform can be achieved without IRA constitutional amendment, but constitutional amendment is often the most effective path. *Cf.* Joseph Thomas Flies-Away et al., *Native Nation Courts: Key Players in Nation Rebuilding*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 115, 143 n.15 ("[T]here are ways to achieve court independence other than enshrining the principle in the constitution . . . . [However,] embodying judicial independence in the constitution is usually a more direct (and certainly more common) approach.").

[17] *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 283 (1997) (observing the existing focus on tribal courts). A notable dissenter on this point is Robert Porter. He has argued that "developing tribal court[s] in the current manner actually erodes tribal sovereignty." *Id.* Porter, though, supports the development of tribal peacemaking systems. *See id.* at 295–304.

branch systems do not produce. True, both scholars and experience suggest that tribes should not automatically adopt separation of powers. For instance, separation of powers conflicts with some tribes' traditional, non-Western governance principles,[18] and some tribal separation of powers experiments have produced poor results.[19] However, for IRA tribes that desire but have failed to achieve reform, independent executive branches merit further attention.

This Chapter proceeds in four sections. Section A provides background on IRA tribal governments, reviewing (1) their history and typical structure, (2) their perceived flaws, and (3) the most common proposal for their reform: the creation of independent tribal courts. Section A concludes by observing that scholars have largely neglected tribal executive branches as a subject of study in the context of IRA government reform. Section B then addresses a key obstacle to IRA government reform — political opposition by tribal councils — and analyzes how the simultaneous development of tribal courts and tribal executive branches could overcome this obstacle. Section C examines some other key obstacles to IRA constitutional reform: small size, poverty, and Public Law 280[20] (PL 280). It determines that these obstacles might not impede the creation of independent tribal executive branches as they have tribal courts. Thus, for tribes that face these obstacles, the creation of independent executive branches could be a viable temporary alternative to three-branch government. Finally, section D discusses other benefits that three-branch reform can produce.

A. The Current State of IRA Tribal Governments

1. The History of IRA Tribal Governments. — About forty-five percent of modern tribal governments trace their origins to the IRA.[21] A response to the perceived failures of allotment-era policies[22] — the goals of which were assimilation, the end of common tribal land

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[18] *See* Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 11, 20–21; Kalt, *supra* note 2, at 201–03. *But see* Flies-Away et al., *supra* note 16, at 130 (noting that principles like separation of powers "are by no means exclusively Western ideals").

[19] Interview with Jean Dennison, Adjunct Professor, Univ. of N.C. (Feb. 3, 2010), *in* KRAYNAL ALFRED & SIERRA HOWLETT, REFORMING TRIBAL CONSTITUTIONS 88, 91–92 (2010) (discussing the complications the Osage Nation faced when adopting a three-branch system).

[20] Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588 (codified in scattered sections of 18 and 28 U.S.C.). PL 280, discussed in section C.2, *infra* pp. 1677–78, altered the scope of federal and state criminal and civil jurisdiction within certain parts of Indian country.

[21] ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 301 (2000).

[22] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05, at 79 (Nell Jessup Newton et al. eds., 2012 ed.) [hereinafter COHEN'S HANDBOOK].

ownership, and by extension the elimination of "Indian civilization"[23] — the IRA was designed to foster tribal self-governance.[24] Among other things, it contemplated the development and adoption of tribal constitutions. To accomplish this task, the IRA directed the Bureau of Indian Affairs (BIA) to conduct an election in each tribe to determine whether the tribe wanted to be governed by the IRA.[25] If the tribe accepted the IRA, the BIA then facilitated the development of a governmental structure for the tribe.[26] On some accounts, BIA lawyers used a Washington-made model constitution, to be tweaked for the needs of particular tribes.[27] Others have stressed the document was merely an "outline."[28]

Regardless of which account is more accurate, at the prompting of the BIA many tribes did indeed adopt tribal constitutions during this period,[29] and the resultant IRA governments often share a similar governmental structure, one that lacks separation of powers or other checks and balances.[30] Instead, a single tribal council — usually made up of somewhere between five and fifteen[31] democratically elected members[32] — wields nearly all of the tribe's legislative, executive, and judicial power.[33] When the majority of the council's members reach a decision, it is virtually impossible to overturn.[34]

To the extent an executive exists in these governments, that executive is frequently called the tribal chair.[35] Often the council selects the chair from among its own members.[36] Sometimes the voters directly elect the chair.[37] But even under direct elections, "the tribal chair [executive] is chair of the legislature and is only a separate branch of the government in a very weak sense."[38] In part because of this lack of an independent executive, council members in many IRA governments

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[23] *See id.*; *id.* § 1.04, at 74; *see also, e.g.*, Champagne, *supra* note 18, at 18–19.

[24] *See* COHEN'S HANDBOOK, *supra* note 22, § 1.05, at 79–81.

[25] *See* Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 49, 57.

[26] *See id.* at 62–64.

[27] GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM 37 (1980).

[28] *E.g.*, Rusco, *supra* note 25, at 62–64.

[29] *See id.* at 73–74.

[30] Champagne, *supra* note 18, at 20.

[31] Kalt, *supra* note 13, at 86.

[32] Riley, *supra* note 9, at 1077.

[33] *See, e.g.*, Champagne, *supra* note 18, at 20 (describing IRA tribal council powers as "usually . . . plenary").

[34] *Id.*

[35] *See* Stephen Cornell & Miriam Jorgensen, *Getting Things Done for the Nation: The Challenge of Tribal Administration*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 146, 156–57.

[36] *See* Kalt, *supra* note 13, at 86–87.

[37] *See id.* at 87.

[38] *Id.* (brackets in original).

are entangled in the day-to-day execution of the laws and administration of the government.[39]

One significant change has occurred in many IRA tribes since the IRA was enacted. In response to congressional efforts to foster tribal, rather than federal, administration of programs designed to benefit Indians, many tribes have developed bureaucracies.[40] The head of a tribal bureaucracy is often referred to as a tribal administrator, a position akin to a city manager.[41] Yet unlike city managers — who frequently maintain independence from city councils[42] — tribal administrators in IRA tribes usually lack independence.[43]

2. Perceived Flaws in IRA Constitutions. — IRA tribal constitutions have been heavily criticized in recent decades. Scholars have questioned whether adoption of tribal constitutions facilitated tribal governance, and they've speculated that IRA constitutions were designed to force assimilation in response to the non-Indian perception that tribal governance models were inferior to Western ones.[44] They've also criticized the BIA's use of a one-size-fits-all approach to tribal constitutions[45] (and the concomitant failure to incorporate non-Western governance principles into the constitutions[46]). Finally, they've alleged that IRA constitutions cannot achieve political legitimacy within tribal communities because they are a product of the federal government rather than of the tribes they govern.[47]

In addition to these critiques related to the imposition of Western values on IRA tribes, scholars have argued that *if* tribal governments should be modeled after Western governments, IRA constitutions are *insufficiently* Western in a key regard: the lack of separation of powers.[48] Scholars and other commentators have observed that this

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[39] *See* Stephen Cornell, *Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 57, 65, 69–70 (noting the "community expectation" that "tribal councils . . . will do everything," *id.* at 65); Cornell & Jorgensen, *supra* note 35, at 157.

[40] *See* Cornell & Jorgensen, *supra* note 35, at 151.

[41] *See id.* at 154.

[42] *See id.* at 150.

[43] *See id.* at 157–58.

[44] *See, e.g.*, Rusco, *supra* note 25, at 49–50 (noting but challenging this view).

[45] *See, e.g.*, THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS 19 (2008) [hereinafter THE HARVARD PROJECT]; Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 494 n.230 (1998).

[46] *See, e.g.*, DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 65 (3d ed. 2011).

[47] *See, e.g.*, THE HARVARD PROJECT, *supra* note 45, at 126 (describing IRA governments as "culturally mismatched systems"); *Introduction*, *supra* note 4, at 2; Kalt, *supra* note 2, at 185.

[48] *See, e.g.*, Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitution Convention*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 287, 301.

absence of separation of powers produces two primary problems. First, it prevents the enforcement of remedies for violations of individual rights.[49] Second, it incentivizes instability, corruption, and micromanagement[50] that in turn impede the development of a tribe's government, businesses, or economy more generally.[51]

3. Proposals for IRA Tribal Government Reform. — Scholars have suggested addressing this separation of powers problem.[52] But in doing so, they've emphasized the development of independent tribal courts, not both independent tribal courts and independent tribal executive branches.[53] In fact, to the extent that scholars have directly discussed tribal executive branches, they've often expressed skepticism. Professors Duane Champagne and Joseph Kalt have warned that independent tribal executive branches do not match many tribes' cultural norms.[54] Further, Kalt has noted that tribal operations might become too complicated for one office to manage.[55]

Placing these critiques aside for the moment, why else have tribal executive branches received so little attention? Some scholars appear

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[49] *See* Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 684 (10th Cir. 1980) (reviewing a dispute where "[t]he [tribal] judge indicated he could not incur the displeasure of the Council"); Steven Chestnut, *Firsthand Accounts: Governmental Institutions*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 220, 224–26. In the context of tribal government, individual rights can spring from tribal constitutions, tribal statutes, tribal customary or common law, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304 (2012 & Supp. I 2013). *See* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 892, 899 (2003). The federal Constitution, though, does not provide Indians — or non-Indians — rights vis-à-vis tribes because tribes are separate sovereigns that predate the Constitution. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Allegations of violations of individual rights tend to be associated with tribal enrollment, tribal eviction, and tribal banishment. *See, e.g.*, Riley, *supra* note 9, at 1050–51, 1072. These types of disputes are outside of the jurisdiction of state and federal courts, leaving tribal bodies as the only possible fora for vindication of individual rights. *See id.* at 1056. The perceived need to increase protections of individual rights is a key distinction between tribes and a governmental form that otherwise might seem analogous to tribes, or at least small tribes: municipalities. Municipalities often centralize power in a single entity, such as a city council, but federal courts are empowered to prevent municipalities from infringing on federal constitutional and statutory rights.

[50] *See, e.g.*, Kalt, *supra* note 13, at 98.

[51] *See, e.g.*, ANDREA SKARI, THE TRIBAL JUDICIARY 36 (1989); Champagne, *supra* note 18, at 20; Kalt, *supra* note 2, at 206, 210–11.

[52] *See Introduction*, *supra* note 4, at 2–3.

[53] *See, e.g.*, Kalt, *supra* note 13, at 98 ("Today, establishment of separation of powers is a common theme of many Native nations' constitutional reform efforts, particularly when it comes to matters of tribal courts . . . ."); McCarthy, *supra* note 45, at 492 ("[A] series of studies have called for greater independence of the tribal judiciary, culminating in the 1989 report of the Special Committee on Investigations of the United States Senate Select Committee on Indian Affairs."). This general lack of discussion of executive branches in the literature on IRA tribal governments persists despite the fact that many non-IRA tribes do have independent executive branches. *See, e.g.*, WILMA MANKILLER & MICHAEL WALLIS, MANKILLER, at xxi (1993).

[54] *See* Champagne, *supra* note 18, at 22; Kalt, *supra* note 2, at 201–03.

[55] *See* Kalt, *supra* note 2, at 202–03.

to be satisfied that in many IRA tribes, tribal executive branches are already sufficiently separated from tribal councils.[56] Separately, other scholars seem to have determined that some tribal councils are in practice controlled by tribal chairs.[57] When these situations exist, empowering a tribal executive branch could prove superfluous — even harmful.

Yet these observations do not hold for a large number of IRA tribes. Many lack any separation between their executive and legislative branches.[58] And when it comes to the power of tribal chairs, there is evidence that many tribal chairs function as tribal council puppets — rather than the other way around — because they must obey the whims of ever-shifting[59] tribal council coalitions.[60] In short, then, there is room for the development of executive branches should IRA tribes desire to travel that path; as the next two sections argue, those tribes that desire but have not yet achieved constitutional reform have good reason to explore this avenue.

B. Tribal Separation of Powers and IRA–Tribal Council Political Opposition

1. The Problem of IRA–Tribal Council Political Opposition. — As discussed above, one of the very reasons that scholars have advocated for the formation of tribal courts, and the creation of tribal separation of powers more generally, is that tribal councils in IRA tribes normally exercise unchecked, nearly plenary power over tribal affairs. Yet this proposed method for checking tribal council power presents a conundrum: tribal council political opposition itself can prevent the formation and continued operation of independent tribal courts.[61]

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[56] *See, e.g.*, THE HARVARD PROJECT, *supra* note 45, at 19–20; WILKINS & STARK, *supra* note 46, at 71.

[57] *See, e.g.*, Kalt, *supra* note 2, at 201.

[58] *See* Champagne, *supra* note 18, at 20–22.

[59] *See* Manley A. Begay, Jr., et al., *Rebuilding Native Nations: What Do Leaders Do?*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 275, 276 (observing high turnover in elected tribal leadership).

[60] *See, e.g.*, Champagne, *supra* note 18, at 29; Carroll Onsae, *Firsthand Accounts: Governmental Institutions*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 227, 230. The high turnover of elected leadership in Indian country can decrease a chair's power both because the chair must readjust to new council members' priorities and because the chair herself is likely to fear losing her position.

[61] As of 2002, the Bureau of Justice Statistics reported that 188 tribes in the continental United States operated tribal courts, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at iii (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf [http://perma.cc/PC4J-48J4], though that number is now believed to be higher, Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 581 (2012). The Alaska Legal Services Corporation reported that there were seventy-eight tribal courts in Alaska in 2012. ALASKA LEGAL SERVS. CORP., 2012 ALASKA TRIBAL COURT DIRECTORY at ii–iii (2012), http://alaskatribes.org

This conundrum is partly a product of the powers that IRA constitutions frequently grant to tribal councils.[62] Whether it be through an IRA tribal council's unchecked appointment power,[63] removal power,[64] authority to control tribal judge salaries,[65] or outright power to sit as the tribe's appellate court,[66] most IRA tribal constitutions grant the tribal council control over so many facets of the tribal court that the tribal council can prevent a tribal court from forming even when an IRA constitution contemplates that a tribal court will exist. Moreover, these levers of control do not cease to exist after a tribal council appoints a judge. Thus, when a judge decides a controversial case, fear of losing the next election, or personal ethics, might prevent tribal council members from interfering with or ignoring the decision. But law will not.[67]

Yet the problem is more than just the letter of tribal constitutional law. IRA constitutions have skewed incentives in many tribal governments. Tribal councils — and the simple majority of voters that elected them[68] — can lack significant reason to sacrifice their power.[69]

/uploads/2012-tc-directory.pdf [http://perma.cc/NJY3-PJKC]. The BIA reported that there were 566 federally recognized tribes as of January 2016. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 1509 (Jan. 29, 2016).

62 *See* Champagne, *supra* note 18, at 20, 28.

63 *See, e.g.*, CONST. OF THE BLUE LAKE RANCHERIA art. V, § 6(n); CONST. OF THE HOPLAND BAND OF POMO INDIANS art. XIII, § 2.

64 *See, e.g.*, CONST. OF THE BLUE LAKE RANCHERIA art. V, § 6(n); CONST. OF THE HOPLAND BAND OF POMO INDIANS art. XIII, § 4; *see also* Kalt, *supra* note 13, at 91–92 (observing that an absence of constitutional protections for tribal court independence leads to "judges who are routinely appointed and then removed from office, as tribal councils approve or disapprove of those courts' and those judges' decisions," *id.* at 92).

65 *See, e.g.*, CONST. OF THE HOPLAND BAND OF POMO INDIANS art. XIII, § 4; SKARI, *supra* note 51, at 36.

66 *See* FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 32 (David E. Wilkins ed., 2006); WILKINS & STARK, *supra* note 46, at 77.

67 *See, e.g.*, Flies-Away et al., *supra* note 16, at 121–22 (describing tribal courts that exist in IRA tribal governments as commonly being "[p]owerless judicial systems," *id.* at 121, and noting that in some tribes "elected officials repeatedly meddle in court cases," *id.* at 122). And of course, when a tribal court decision is unpopular, disregarding the decision might actually help the incumbent tribal council members win reelection.

68 Cornell & Kalt, *supra* note 6, at 13–14 ("[T]ribal governments — and, therefore, elected tribal leaders — are the primary distributors of the resources that tribal citizens need, especially jobs. . . . People vote for whomever they think will send more resources in their direction."); *see also* Interview with Robert Williams, Professor of Law, Univ. of Ariz. Law Sch. (Feb. 10, 2010), *in* ALFRED & HOWLETT, *supra* note 19, at 118, 120 (observing that when a tribal constitution "spawn[s] . . . a culture of corruption[,] . . . incompetence[,] . . . intransigence[,] . . . and non-accountability," voters don't "trust anybody to reform [their] constitution").

69 *See id.*; *see also* THE HARVARD PROJECT, *supra* note 45, at 27 (noting that "like governmental systems everywhere, [governmental forms and institutions in Indian country] create vested interests in their own perpetuation"). Nor is it necessarily easy for voters to overrule the tribal council. True, IRA constitutions sometimes permit the voters to initiate the constitutional amendment process instead of allowing only the tribal council to do so. *See* Jason P. Hipp, Essay,

When this is so, those in the minority can come to see attempts to influence the tribal council as fruitless exercises.[70] Exacerbating the problem, some tribes have attempted reform in the past but reform was not enacted or did not prove durable,[71] undermining reformers' ability to persuade the citizenry that reform can be achieved in the future.[72] Once incentives are skewed, if reformers successfully enact legal, even constitutional, changes that technically fix the obstacles to tribal court independence, tribal courts can still fail, for self-interest can lead tribal councils to disregard newly enacted legal reforms.[73] As Felix Cohen observed, constitutions that are "not the natural offspring of Indian hearts and minds" are "merely scraps of paper."[74]

These problems are difficult to overcome. In fact, some tribes have found themselves unable to amend their constitutions until confronted with a crisis.[75] But, as the rest of this section details, adding tribal executive branches could substantially change the equation. Three-

Rethinking, Rewriting: Tribal Constitutional Amendment and Reform, 4 COLUM. J. RACE & L. 73, 86–87 (2013). Yet the percentage of voters required to initiate IRA constitutional reform is in fact quite high. *Compare id.* (noting that the BIA recommends that tribes adopt constitutional provisions that initiate the amendment process upon submission of a petition signed by 30% of the qualified voters and citing IRA tribal constitutions that currently contain similar provisions), *with* Jennifer Meling-Aiko Jensen, Comment, *Legislative Power at Odds: The Effect of a Referendum Petition in Idaho*, 48 IDAHO L. REV. 553, 556–57 (2012) (canvassing the thresholds that states set for voter-initiated legislative reform and noting that Wyoming sets its mark at 15%, Oregon at 10%, Washington at 4%, Maryland at 3%, Massachusetts at 2%, Idaho at 6%, and New Mexico at the "hefty" 25%, *id.* at 556).

70 *Cf.* CAROLE GOLDBERG-AMBROSE WITH TIMOTHY CARR SEWARD, PLANTING TAIL FEATHERS 22 (1997) (discussing "tribal elections, where members are tempted to use force because they perceive there is no legal authority to restrain corruption, chicanery, or failure to follow tribal rules"); Beverly Wright, *Firsthand Accounts: Maximizing Citizen Participation and Ownership in Reform Processes*, in AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 2, at 272, 275 ("The lack of 'standing rules' and respect for one another result in an inability to keep order during meetings and create a hostile environment. . . . This has led to the apathy and nonparticipation we face today.").

71 *See* Chestnut, *supra* note 49, at 224 ("So the principle [of separation of powers] is there, but implementation is another question . . . ."); Wright, *supra* note 70, at 274 ("About six or seven years ago, Joe Kalt and some other Harvard researchers came down and put together a report on strengthening our constitution. We went through the whole process and they tore our constitution apart, and they made recommendations and we have a nice report. And I have the report sitting on my shelf and it is covered with dust. The tribal members were not interested.").

72 *See* Stephen Cornell et al., *Seizing the Future: Why Some Native Nations Do and Others Don't*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 296, 311.

73 *See* Chestnut, *supra* note 49, at 226 ("[Asking the council to fire the judge or reverse a decision] still happens, even after this ordinance [assigning judicial discipline to a Constitutional Court]. . . . I recently got a call from the tribal president, who told me that the tribal council had just voted six to two to remove a judge. So you can write things down . . . ."); *see also* Robert C. Jeffrey, Jr., Essay, *The Indian Civil Rights Act and the* Martinez *Decision: A Reconsideration*, 35 S.D. L. REV. 355, 356–57 (1990).

74 COHEN, *supra* note 66, at 3; *cf.* THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003) (questioning the sufficiency of "parchment barriers").

75 *See, e.g.*, Lemont, *supra* note 48, at 287.

branch reform could prove more appealing to tribal councils, eliminating the need to wait for a crisis to achieve reform. Further, once enacted, three-branch reform could prove more effective because it need not assume that tribal leadership will change: three-branch reform is designed to alter incentives, not people.[76] For those tribes where skewed political incentives are the problem, three-branch reform can push political incentives back in the other direction.[77]

2. A Basic Tribal Executive Structure. — As noted above, tribal chairs are the executives within most IRA tribes. But as also noted above, tribal chairs are often "executives" in only a loose sense. In this regard, three characteristics of the relationship between tribal councils and tribal chairs commonly appear. First, a tribal chair's role is to lead the tribal council, while the executive power itself is exercised by the tribal council as a whole. Second, tribal chairs are often, though not al ways, chosen by tribal councils from among their own members. Third, tribal council members other than the tribal chair are frequently involved in day-to-day executive functions, including personnel decisions.

To create an independent tribal executive, this Chapter recommends altering all three of these characteristics. First, the executive power should be condensed into a single figure that this Chapter calls a "tribal governor."[78] Second, the tribal governor should be a tribal citizen who is chosen and removed solely by the tribal citizenry. Third, the tri bal governor's actions should be unreviewable in at least one key area: the hiring and firing of tribal employees who work in departments that have historically lacked independence from the tribal council.[79] Tribal councils — which start from a position of plenary power — should retain whatever authority is not granted to tribal governors and tribal courts, including the ability to enact tribal legislation and appropriate tribal funds.[80]

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[76] *Cf.* Cornell & Kalt, *supra* note 6, at 13–14 (noting that tribal council members face powerful temptation to abuse their authority).

[77] *See* Flies-Away et al., *supra* note 16, at 131–32. As mentioned above, Champagne and Kalt have pointed out that concentration of executive power is sometimes a mismatch with tribal cultural norms. Indeed, a tribe should be careful about adopting a governance structure that is not a "cultural match." At the same time, when a tribe has desired but been unable to achieve reform due to skewed political incentives, that failure in and of itself might be evidence that the tribe's existing system is a poor cultural match.

[78] "Governor" is among a number of terms that tribes have used to refer to their chief executives. *See* WILKINS & STARK, *supra* note 46, at 70 (noting the use of the terms "president," "governor," "chairman," "spokesman," "chief," and "principal chief").

[79] For instance, tribal gaming commissions — the tribal departments that regulate Indian casinos — have often successfully maintained independence from tribal councils. *See* Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 456 n.182 (2006).

[80] For a discussion of other executive reforms IRA tribes might consider, see this Chapter's Conclusion, *infra* section E, pp. 1683–84. This Chapter is less prescriptive regarding the form that

3. Overcoming Political Opposition to Creation of Separate Branches. — One potential way of overcoming tribal council opposition — in the separation of powers context or in any other — is to recognize that tribal councils are not monolithic entities. Rather, they are composed of individual tribal council members. And an individual tribal council member can have incentives that push her to take actions that diverge from the tribal council's institutional interests.[81]

The creation of a tribal governor presents a situation where the tribal council's institutional incentives and at least some of the individual council members' incentives are likely to diverge. After all, many tribal council members, like many politicians in other governments, seek to increase their individual power and prestige. A tribal governor would be more powerful than any individual tribal council member (although not, in this model, than the council as a whole). Consequently, the tribal governor position could also become more prestigious than the tribal council member position. Further, in this model a tribal governor would be a tribal citizen elected by the tribal citizenry. Under IRA constitutions, so are tribal council members. Thus, at the time that the tribal council contemplates whether to embrace or resist the creation of a tribal governor, the tribal council members themselves are the tribal citizens who have the most experience in winning the sort of election that stands as the gateway to the tribal governor position.

It's possible to set up similar individual tribal council incentives in the design of tribal courts, but doing so imposes costs that are not present in the executive context. Many tribes want judges to come from outside the tribe because, for example, tribal citizens are viewed as incapable of being impartial[82] or, especially in small tribes, the citizenry believes it currently lacks enough citizens qualified to be judges.[83] In the same vein, some tribes have required that their judges be attorneys.[84] These requirements inevitably diminish the

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a tribal court should take, as existing literature has already thoroughly explored many potential approaches to structuring tribal courts. *See, e.g.*, Flies-Away et al., *supra* note 16. At a minimum, though, a tribal council's unchecked appointment power, removal power, authority to control tribal judge salaries, and often outright power to sit as the tribe's appellate court, should be restrained, if not eliminated altogether. Moreover, the tribal court should be empowered to decide separation of powers questions. *See id.* at 129.

81 *See* Cornell & Jorgensen, *supra* note 35, at 168 ("Like others, Native Nations confront human nature, the fact that some people are inclined to serve themselves . . . .").

82 *See, e.g.*, GOLDBERG-AMBROSE WITH SEWARD, *supra* note 70, at 44 n.75; Porter, *supra* note 17, at 280.

83 *See, e.g.*, Flies-Away et al., *supra* note 16, at 132.

84 *See, e.g.*, Bishop Paiute Tribal Court Ordinance No. 2003-03 § 9 (Aug. 28, 2003). Tribal judges who are attorneys are rare in some parts of Indian country. *See* David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 GONZ. L. REV. 767, 787 (2012). However, tribes that wish to take advantage of recent federal statutes that affect tribal jurisdic-

appeal of the tribal judge position for council members who might otherwise eye a separate branch as a potential political stepping stone. After all, permitting people from outside the tribe to be judges increases competition. And requiring that tribal judges be attorneys would disqualify many tribal council members from being tribal judges. Thus, proposing the creation of a tribal governor and a tribal court would enable reformers to present a reform package that appeals to individual tribal council members, without having to sacrifice the benefits that can stem from the selection of non–tribal citizen attorneys as tribal judges.

Further, some tribal council members will find the tribal governor position inherently more appealing than the tribal judge position, and vice versa. Judicial functions, executive functions, and legislative functions are generally quite different from one another. Creating two new branches at once, then, increases the chance that a majority of the tribal council will desire at least one of the newly created positions.

Finally, if history tends to repeat itself, then the tribes that desire but have failed to achieve reform are the ones where tribal councils are most likely to undermine the tribal court. And as long as tribal council members perceive a real chance that the tribal court will fail, they have less reason to want to be the tribal judge. Yet this vicious cycle can be turned virtuous: if three-branch reform poses a better chance of withstanding tribal council political opposition once enacted than does two-branch reform — as the conclusion to this section now argues — then it also poses a better chance of being enacted in the first instance.

4. Withstanding Political Opposition Once Separate Branches Are Created. — Tribal governors might be effective at resisting attempts to undermine their authority, particularly when they are combined with tribal courts empowered to resolve separation of powers questions.[85] If so, then a tribal governor may be an important addition to tribal efforts at separation of powers reform even if said addition does not help overcome tribal council resistance to the initial creation of separate branches.

Under this model, the tribal governor would have a political base that is independent from the tribal council's. Thus, when the tribal governor felt her branch was threatened, she would be well placed to make her case directly to the tribal citizens — the citizens she convinced to elect her in the first instance. This benefit is not necessarily

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tion must hire tribal judges who have legal training. *See id.* Moreover, even before Congress passed these federal laws, some scholars recommended that tribes increase tribal judges' minimum qualifications. *See* Flies-Away et al., *supra* note 16, at 133, 145 n.20.

[85] *Cf.* Flies-Away et al., *supra* note 16, at 129 ("Ideally, the tribal judiciary . . . works to ensure that the obligations set forth in the constitution and other tribal laws are met by all those they govern.").

unique to elected tribal governors; tribes might also obtain it by creating elected judges. But in this regard the addition of tribal governors to reform proposals provides at least two benefits over the proposals of tribal courts alone: First, it diminishes the downsides of using appointed judges,[86] because at least two political branches will still exist. Second, because some elected tribal court judges may feel that it is inappropriate for the judicial branch to reach out directly to the citizenry,[87] three-branch reform lessens the risk that, even if tribal court judges are elected, the benefits of having multiple political branches will fail to materialize.

Moreover, by enacting three-branch reform, tribes could achieve the benefits of having both citizens and noncitizens serve as checks on tribal councils. As noted above, tribal judges are sometimes not tribal citizens. In some instances a tribal governor who is a tribal citizen may be more effective at fighting battles with the tribal council than a noncitizen tribal judge, as such a judge might be less invested in the tribe.[88] Other times, noncitizens will feel empowered to challenge a tribal council decision precisely because a noncitizen has nothing to lose but her position. Creating tribal executive branches alongside tribal courts, then, would allow the former to draw from citizens while the latter could include noncitizens.[89]

Most importantly, constitutional actors in a three-branch system face different incentives than do those in a two-branch system, and these different incentives produce at least two effects. First, they can help curb bad behavior. To any one branch, each of the other two

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[86] *See id.* at 132 (discussing why tribes sometimes prefer to use appointed judges, such as the fear that elected tribal judges "may be beholden to certain constituencies whose support was key to putting them in office").

[87] *Cf.* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015) ("Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity."). In particular, judges who are attorneys may have internalized this mindset. *Cf. id.* ("This principle dates back at least eight centuries to Magna Carta . . . .").

[88] *Cf.* Cornell & Kalt, *supra* note 6, at 21 ("[Outside decisionmakers'] incentives to improve decisions are modest. After all, it's not their community's future at stake.").

[89] *Cf.* Alyce S. Adams et al., *Governmental Services and Programs: Meeting Citizens' Needs*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 223, 231 (noting that those tribes that have received the "Honoring Nations" award from the Harvard Project on American Indian Economic Development have "a mix of staff recruited from within the tribe's citizenry and from outside the community"). Relatedly, tribal citizens might end up perceiving some disputes as inappropriate for tribal courts to handle — a perception akin to some of the motivations underlying federal court jurisprudence such as the political question doctrine. *Cf.* MANKILLER & WALLIS, *supra* note 53, at 263 ("I strongly disagreed with that [Cherokee Judicial Appeals Tribunal] decision at the time, and I still believe the judges should have allowed the runoff election to proceed with Bearpaw as a candidate. . . . This virtually handed Byrd the position of principal chief."). Tribal governors could fight such battles with the tribal council, while leaving to the tribal court those battles that the tribal citizenry perceives as more appropriately resolved in a judicial forum.

branches becomes not just a potential opponent, but also a potential ally. For instance, if the tribal governor and the tribal council are at odds, they may turn to tribal court resolution.[90] And if the losing branch subsequently seeks to undermine the tribal court, the winning branch has reason to preserve the court's independence. Even if at other times the tribal governor and the tribal council are united against the tribal court, they may hold back from attacking the tribal court, or else each lose the court as a potential ally for when the political branches no longer stand together.

Second, the different incentives can encourage good behavior. Those tribal leaders who *want* to respect the boundaries of their authority, when presented with requests to exceed such boundaries, can say, "I can't interfere."[91] Of course, for some citizens, this claim may ring hollow, and they may continue to demand tribal council action.[92] But without reform, such leaders cannot even credibly make the claim. And of course, culture can change with time. If some citizens begin to believe those leaders who say, "I can't interfere," the claim, "I *can* interfere," will by extension become less credible, giving even those leaders who are willing to step over the boundaries of their authority less reason to make that claim.[93]

C. Tribal Separation of Powers and Small, Poor, PL 280 Tribes

1. "The California Problem." — Tribal executive branches could also help tribes that desire but have not achieved reform overcome another key obstacle: "the California problem." Tribes that are small, poor, and located in PL 280 states face unique burdens when they attempt to implement tribal courts.[94] Not all such tribes are located in California.[95] However, most tribes in California share these

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[90] *Cf.* Flies-Away et al., *supra* note 16, at 131 (discussing the role that tribal courts can play in "guard[ing] against flagrant abuses" on behalf of the legislative and executive branches).

[91] *Id.*

[92] *See* sources cited *supra* note 73.

[93] *See* Flies-Away et al., *supra* note 16, at 120 ("At the same time, officials who *would* like to interfere in order to curry political favor with certain constituents are much less able to do so.").

[94] Unlike the rest of this Chapter, this section might be relevant not only to IRA tribes, but also to tribes that entrust most of their governmental authority to the general council, "consisting of all adult citizens of the tribe." Kalt, *supra* note 13, at 87 ("In extreme cases . . . general councils are the sole governing bodies — the legislatures — of tribal nations." *Id.* at 88.). As with the IRA model, many scholars have criticized the accumulation of tribal power in general councils. *See, e.g.*, *id.* at 88. To the extent that general council tribes have sought but failed to develop tribal courts due to the California problem, this section may be relevant. However, such tribes might need to also empower their tribal councils or else risk creating unchecked tribal governors who present the problems normally associated with IRA tribal councils.

[95] For instance, many small federally recognized tribes exist in Alaska. *See* Champagne, *supra* note 18, at 12. And Alaska is a PL 280 state. *See* DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE 15 (2012). The Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–

characteristics,[96] nearly one-third of tribes in the lower forty-eight states are located in California,[97] and data from California indicate that not much reform has occurred there[98] despite frequent allegations of individual rights violations at the hands of California tribal governments.[99] Thus, this Chapter calls the obstacles created by the confluence of being a small, poor, PL 280 tribe "the California problem." But these obstacles need not occur simultaneously for them to impede tribal court development. When any one of them exists, creation of an independent executive branch could help a tribe accomplish reform, albeit to a lesser degree than it can when all three factors are present.

2. The Obstacles that Face PL 280 Tribes. — PL 280 is a congressional statute that "withdrew federal criminal jurisdiction on reservations in six designated states . . . and authorized those same states to assume criminal jurisdiction and to hear civil cases against Indians arising in Indian Country."[100] It also "established [for all other states]

1629(e) (2012)), however, presents federally recognized tribes in Alaska with unique problems. *See, e.g.*, Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 523 (1998) (holding that the Native Village of Venetie Tribal Government's ANCSA lands are not Indian country).

[96] *See* Champagne, *supra* note 18, at 12 (noting the small size of California tribes); CHAMPAGNE & GOLDBERG, *supra* note 95, at 16 (noting that all California tribes are PL 280 tribes); *Little Change in Poverty, Employment in CA Tribes Since Gaming Started*, CAPITOL WKLY. (Oct. 2, 2008), http://capitolweekly.net/little-change-in-poverty-employment-in-ca-tribes-since-gaming-started [http://perma.cc/U4FK-E6KB](reporting on the high unemployment and poverty rates among California Indians).

[97] *Compare California Tribal Communities*, CAL. CTS., http://www.courts.ca.gov/3066.htm [http://perma.cc/93GX-FJHD] ("There are currently 109 federally recognized Indian Tribes in California . . . ."), *with* BUREAU OF JUSTICE STATISTICS, *supra* note 61, at iii (placing the number of federally recognized tribes within the continental United States at 341 as of 2002).

[98] Data on California tribal courts are inconsistent, but all reported figures are low given that over 100 federally recognized tribes exist in California. In 2004, the National Center for State Courts indicated that there were 105 federally recognized tribes in California but only nine "tribal justice forums." Nat'l Ctr. for State Courts, *Tribal Courts*, NCSC LIBR. ECOLLECTION (2004), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/159 [http://perma.cc/W3L8-P966]. In 2012, Champagne and Professor Carole Goldberg reported that there were at least twenty-four tribal courts in California, counting twenty that are members of court consortia. *See* CHAMPAGNE & GOLDBERG, *supra* note 95, at 22. The Tribal Law and Policy Institute (TLPI) currently lists twenty-four tribal courts in California. *See* Tribal Law & Policy Inst., *Tribal Courts*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/justice.htm#California [http://perma.cc/ZQ9U-8ZFE].

[99] *See, e.g.*, Jeffredo v. Macarro, 599 F.3d 913, 915 (9th Cir. 2009) ("[D]espite . . . the potential injustice of [the Pechanga Tribal Council's decision to disenroll the appellants], we nonetheless lack subject matter jurisdiction . . . . Only Congress can aid these appellants."); Elizabeth Larson, *Indian Disenrollments a Statewide, Nationwide Issue*, LAKE COUNTY NEWS (Dec. 5, 2008, 9:27 PM), http://www.lakeconews.com/index.php?option=com_content&view=article&id=6567:-indian-disenrollments-a-statewide-nationwide-issue&catid=1:latest&Itemid=197 [http://perma.cc/LHN8-UPT3] ("[Disenrollment] is such a concern in Indian Country that last year, American Indian Movement activist Dennis Banks said that the Bureau of Indian Affairs needed to intervene to stop the California disenrollments.").

[100] GOLDBERG-AMBROSE WITH SEWARD, *supra* note 70, at 1.

a mechanism for the future assumption of the same type of criminal and civil jurisdiction."[101] Today the states that retain at least partial jurisdiction under PL 280 are Alaska, California, Florida, Idaho, Minnesota, Montana, Nebraska, Oregon, Washington, and Wisconsin.[102]

On its face, PL 280 is about state and federal jurisdiction, not tribal jurisdiction. In fact, tribes in PL 280 states retain their inherent jurisdiction, which runs concurrently with state and federal jurisdiction.[103] Nevertheless, PL 280 undermines the development of tribal courts and police departments, primarily by affecting federal funding: the BIA uses PL 280 as a reason not to fund tribal governance initiatives in Indian country, arguing that PL 280 "made tribal jurisdiction unnecessary."[104]

Yet the lack of federal funding for tribal courts is not the only relevant consequence of PL 280. Assertion of state and federal jurisdiction over Indian country undermines corresponding tribal assertions of authority. In non–PL 280 Indian country, tribes are the only sovereigns empowered to adjudicate certain types of cases, such as contract disputes between Indians and non-Indians in which the non-Indians are the plaintiffs (when conventional federal diversity jurisdiction is not triggered),[105] and nonmajor crimes committed by Indians against Indians.[106] But when PL 280 applies, the existence of a state system diminishes the urgency of developing a tribal court: everyday issues that occur on the reservation and that do not involve violations of tribal individual rights or other abuses of tribal authority are handled by the state court rather than left unresolved. Moreover, tribal citizens — not necessarily happy using state courts but at least finding from experience that state court resolution of disputes is tolerable[107] — may be wary of bringing their cases before an "untested" tribal

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101 *Id.*

102 CHAMPAGNE & GOLDBERG, *supra* note 95, at 14–18.

103 *See* COHEN'S HANDBOOK, *supra* note 22, § 6.04[3][c], at 555 ("The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched." (footnotes omitted)).

104 GOLDBERG-AMBROSE WITH SEWARD, *supra* note 70, at 11; *see also id.* at 200 (noting that in this context "funding decisions are a function of past funding, not of policy or formula," and that even when federal grants for tribal courts are available to PL 280 tribes, they "must compete with much more developed tribal judicial systems in non–Public Law 280 states for very limited tribal court funds").

105 *See* Williams v. Lee, 358 U.S. 217, 217, 222–23 (1959) (holding that states cannot exercise jurisdiction over such disputes absent congressional authorization).

106 *See* COHEN'S HANDBOOK, *supra* note 22, § 9.04, at 765 (addressing tribal criminal jurisdiction).

107 CHAMPAGNE & GOLDBERG, *supra* note 95, at 105 (reporting the results of a survey in which 43.8% of PL 280 reservation residents indicated that nontribal PL 280 courts provide good quality services to PL 280 reservation communities).

court.[108] Thus, after a tribal court is developed, it may still struggle to gain a caseload that justifies its cost and enables it to gradually develop a reputation for fairness.[109] Even the Supreme Court, although not specifically in the context of PL 280, has observed: "allow[ing] the exercise of state jurisdiction" can "undermine the authority of the tribal courts over Reservation affairs."[110]

3. The Economy-of-Scale Problems that Face Small, Poor Tribes. — A lack of resources makes operating a government, tribal or nontribal, difficult. And unfortunately, tribal governments usually lack resources, even given the success that some tribes have experienced operating businesses such as casinos.[111]

Exacerbating the obstacle that a lack of resources presents, economy-of-scale problems plague small tribes. A 1991 National Congress of American Indians report noted that the Department of Interior, Office of Inspector General (OIG) — assigned to negotiate most tribes' indirect cost rates for certain tribal-federal contracts — had approved for those tribes with under $500,000 of relevant federal contract funds to spend on direct services an average of 49.5% of that amount to cover indirect costs, such as administrative salaries.[112] By contrast, that rate was 31% when tribes had $1 million to $5 million to spend on direct services and 22.7% when tribes had over $20 million to spend on direct services.[113] Plus, economy-of-scale problems apply to the human capital context.[114] For instance, in the event of a tribal

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[108] Phillip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1985 (1996) (reviewing FRANK POMMERSHEIM, BRAID OF FEATHERS (1995)).

[109] *Cf.* Flies-Away et al., *supra* note 16, at 140 ("As Indigenous nation courts work according to processes and rules that resonate with the community, and as they restore relationships, exercise jurisdictional authority in support of community goals, and protect citizens from inappropriate government actions, they are gaining citizen trust.").

[110] Williams v. Lee, 358 U.S. 217, 223 (1959).

[111] Dwanna L. Robertson, *The Myth of Indian Casino Riches*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (June 23, 2012), http://indiancountrytodaymedianetwork.com/2012/06/23/myth-indian-casino-riches [http://perma.cc/KV45-NCDH] (noting that "many tribes operate casinos primarily to generate employment," that "many 'tribal facilities' are just trailers with bingo," and that the majority of tribes lack casinos).

[112] NAT'L POLICY WORK GRP. ON CONTRACT SUPPORT COSTS, NAT'L CONG. OF AM. INDIANS, FINAL REPORT 8 (1999), http://www.ncai.org/policy-issues/tribal-governance/Final_Report_on_CSC_July1999.htm [http://perma.cc/ST57-2NKY]. The OIG reviews these tribal indirect cost rates to determine, among other things, that "all of the costs are reasonable and necessary." *Id.*

[113] *Id.*

[114] *See* CAROLE GOLDBERG & DUANE CHAMPAGNE, UCLA AM. INDIAN STUDIES CTR. FOR THE ADVISORY COUNCIL ON CAL. INDIAN POLICY, A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES 113 (1996), https://law.ucla.edu/~/media/Files/UCLA/Law/Pages/Publications/CEN_NAT_PUB%20A%20Second%20Century%20of%20Dishonor.ashx/?filedownload=1. [http://perma.cc/6JNT-SREV] ("In small tribal governments, tribal employees have little job security, since grants are usually short term and often cannot be relied upon for stable planning and secure employment. . . . Without a sufficient

judge's unexpected resignation, a tribal court system with a dozen judges can give each remaining judge a higher workload, but a tribal court with just one judge must, at the very least, temporarily stop operating.

Tribal courts, for their part, are not free. Data about tribal court budgets are hard to come by, but even outside the small tribe context, tribal courts have been characterized as "desperately underfunded, many barely able to keep their doors open."[115] Not surprisingly, then, operating a tribal court can be "impractical and inefficient" for many poor, small tribes.[116]

4. The Court Consortium Solution. — Some scholars have proposed that court consortia could help solve the California problem by providing economies of scale.[117] Court consortia, for instance, help tribes collectively build caseloads as well as reduce the per-tribe financial cost of operating a court.[118]

However, many tribes have not adopted the court consortium solution. For instance, only two court consortia exist in California,[119] despite the fact that this solution was first proposed at least twenty years ago. Why haven't more court consortia developed? One possible explanation is that even the reduced costs of running a court consortium present some tribes with too great a financial obstacle. Further, perhaps some tribes are so remote that they have found the geographic distance between themselves and potential consortium partners to be too great.

But another possible explanation is that perhaps many small, poor, PL 280 tribes — such as those in California, which are, again, the subject of many allegations of political corruption — suffer not only from the California problem, but also from the political opposition problem. Court consortia are no more effective than individual courts at

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administrative base, small tribal administrations have difficulty mobilizing grant writing for securing additional programs and funds for the community.").

115 McCarthy, *supra* note 45, at 513; *see also* CHAMPAGNE & GOLDBERG, *supra* note 95, at 43 ("Insufficient funding is a major issue in Indian country . . . court administration.").

116 *See* GOLDBERG-AMBROSE WITH SEWARD, *supra* note 70, at 196.

117 *See id.* at 36–38, 203; *see also* Champagne, *supra* note 18, at 25.

118 *See* GOLDBERG-AMBROSE WITH SEWARD, *supra* note 70, at 202. The close proximity of many small, poor, PL 280 tribes also pushes in favor of court consortia. For example, a large number of California tribes are located in Mendocino, Lake, Riverside, Shasta, Modoc, and San Diego counties. *See California Tribal Lands*, U.S. ENVTL. PROTECTION AGENCY (May 16, 2011), http://www3.epa.gov/region9/air/maps/pdfs/air1100040_3.pdf [http://perma.cc/97HJ-ECD7].

119 At least, the TLPI lists two court consortia in California: the Intertribal Court of Southern California and the Intertribal Court of Northern California. Tribal Law & Policy Inst, *supra* note 98. Champagne and Goldberg reference two court consortia in southern California but not the court consortium in northern California, implying that perhaps three such consortia exist. *See* CHAMPAGNE & GOLDBERG, *supra* note 95, at 22.

addressing this problem.[120] In fact, some of the very benefits that court consortia offer — such as "ensur[ing] a greater level of due process,"[121] "maintain[ing] a degree of disinterest,"[122] and "providing decision-makers who come from outside the small community"[123] — are the very reasons that a tribal council may want to resist creating an independent tribal court. And as with individual courts, there is nothing to impede a tribal council from reversing its decision to create a consortium.[124]

A final possible explanation is that the political opposition problem might also exist on the other side of the court consortia equation. To form a consortium, tribes need not necessarily permit one another to intervene in one another's affairs: the consortium might instead function almost as a "temp agency," simply loaning its judges and staff to tribes without having authority to affect the outcome of the disputes being resolved or the nature of the substantive law being applied.[125] But small tribes that are located near one another are the most likely to have familial ties by blood or marriage,[126] and often in Indian country, tribal politics are family politics.[127] Thus, if one of the consortium tribes' councils attempts to abuse the consortium's tribal court, will the leaders of the other tribes want the headache of fielding complaints from family members and tribal members who believe that the other tribes should intervene?[128]

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120 *See supra* section B.1, pp. 1668–71.

121 GOLDBERG-AMBROSE WITH SEWARD, *supra* note 70, at 202.

122 *Id.*

123 *Id.* at 44 n.75 (acknowledging that use of outside decisionmakers is "sometimes viewed positively, sometimes negatively").

124 *See id.* at 202–03.

125 *See NICS History*, NW. INTERTRIBAL CT. SYS. (Mar. 19, 2015), http://www.nics.ws/about/about.htm [http://perma.cc/A4RM-A885].

126 *See, e.g.*, SUZANNE ABEL-VIDOR ET AL., REMEMBER YOUR RELATIONS (1996) (tracing the genealogy of a family with branches that extend into various small tribes "in Sonoma, Mendocino, and Lake Counties" in California, *id.* at 15).

127 *Cf.* Interview with Dante Desiderio, Econ. Dev. Policy Specialist, Nat'l Cong. of Am. Indians (Dec. 17, 2009), *in* ALFRED & HOWLETT, *supra* note 19, at 69, 77 ("In economic development, when you are hiring somebody, it's family. And inverse, when you are firing somebody, it is family. It has repercussions that are political no matter what. It's not just business like with a bunch of population. And at the same [time] on the council . . . [there] are these different families . . . . [There are] about seven families in the community, they all come with their own status in the community . . . .").

128 *Cf.* THE HARVARD PROJECT, *supra* note 45, at 29 ("The growth of intertribal organizations is often constrained by the fact that tribes do not always share the same interests — and it is a mistake to assume they do. The increased accountability imposed on tribal officials by self-determination understandably compels those officials to pay particular attention to concerns at home. This often leaves little time or resources to be allocated toward intertribal efforts."). The leaders of the other tribes might respond to complaints by noting that they lack the authority to intervene, but the complaints may still come. *Cf.* Chestnut, *supra* note 49, at 226 (noting that even though the Northern Cheyenne Tribe has adopted a system that does not permit its tribal council

5. Tribal Governors and the California Problem. — For those tribes that have not found the court consortium approach sufficient to overcome the California problem, the creation of a tribal governor could be a solution. Unlike judicial functions, executive functions are not fundamentally affected by PL 280's grant of adjudicatory jurisdiction to state courts.[129] Further, in contrast to the consortium approach's potential to create political obstacles when proposed alone, the ways that a tribal governor helps overcome tribal council political opposition to creation of an individual tribal court would also help surmount opposition to the creation of a consortium.

Lastly, like court consortia, tribal governors can help small, poor tribes overcome financial obstacles to reform. As discussed in section A.1, IRA tribes often employ a tribal administrator, akin to a city manager. Even if they do not, tribes must spend some money on administration, whether it be on human resources staff, financial staff, or even just clerical assistance.[130] Some of those functions could be left to the tribal governor, with the resulting financial savings used to fund the tribal governor's salary, if any. As a result, some tribes might even find the tribal-executive approach to be superior to the tribal court consortium approach on this metric: The consortium approach only reduces the costs of running a tribal court. Creation of an executive branch could be budget neutral.

For this reason, the creation of tribal governors might even be an effective temporary alternative to the development of tribal courts. When financial constraints make the operation of a court — consortium or otherwise — impossible in the short term, creation of a tribal governor could still prove feasible. And although tribal governors cannot provide many of the benefits that tribal courts provide, the creation of tribal governors alone would still provide some separation of powers benefits, just as courts have provided some benefits even without the help of tribal governors.

D. Tribal Separation of Powers and Long-Term Benefits

1. Improved Government Administration and Economic Development. — Three-branch reform offers more than just the possibility of overcoming reform obstacles. All of the benefits that might come from

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to hear complaints for removal of judges, "people running to the council" with such complaints "still happens").

[129] PL 280 affects law enforcement funding. CHAMPAGNE & GOLDBERG, *supra* note 95, at 44. However, this Chapter does not contemplate that executive branches should need to resort to use of police to resolve their disputes with other branches.

[130] *See* Cornell, *supra* note 39, at 69–70.

two-branch reform seem likely to result from three-branch reform, and tribal governors may offer additional benefits.[131]

For instance, many scholars have concluded that effective government administration and tribal economic development are linked[132] and that separation of powers facilitates both. Tribal courts send a strong signal to investors that the tribe is committed to nonpartisan resolution of disputes.[133] Additionally, tribal courts can impede political interference in tribal employment decisions by providing a neutral, nonpolitical forum for resolution of employment disputes.[134] Perhaps most convincing, empirical research has shown that tribes with at least some separation of powers perform better economically than do tribes without, whether the separation of powers be the presence of tribal courts[135] or just democratically elected tribal chairs.[136] Even if tribal governors themselves do not help in this regard, if they help tribal courts come into existence, then tribal governors may be worth developing.

Importantly, tribal governors also provide separate benefits. Micromanaging sometimes occurs in IRA tribal governments.[137] But when one person is accountable for day-to-day operations, that person has a strong electoral incentive to ensure the organization operates efficiently.[138] Also, voters choosing a tribal governor can focus more on choosing a person who is a good manager than they can when

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131 This brief review is not a comprehensive list of all the benefits that tribes can reap from the creation of tribal courts and tribal executive branches. *Cf.* Flies-Away et al., *supra* note 16, at 117 ("An effective tribal judiciary is a critical player in the process of nation building: it advances sovereignty, helps uphold the nation's constitution, helps ensure the maintenance of law and order, bolsters economic development, promotes peace and resolves conflicts within the community, preserves tribal customs, and develops and implements new laws and practices for addressing contemporary realities.").

132 *See, e.g.*, THE HARVARD PROJECT, *supra* note 45, at 123.

133 Stephen Cornell et al., *Citizen Entrepreneurship: An Underutilized Development Resource*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 197, 217.

134 Cornell & Jorgensen, *supra* note 35, at 162–63.

135 Kenneth Grant & Jonathan Taylor, *Managing the Boundary Between Business and Politics: Strategies for Improving the Chances for Success in Tribally Owned Enterprises*, *in* REBUILDING NATIVE NATIONS, *supra* note 6, at 175, 196 n.4.

136 *See* Kalt, *supra* note 13, at 88.

137 Kalt, *supra* note 2, at 206; *cf.* Champagne, *supra* note 18, at 20–22 (noting that IRA executives often "d[o] not have direct power over the administration of the tribal government," *id.* at 20, and that IRA tribal governments often lack "general administrative capability," *id.* at 21).

138 As noted above, Kalt has argued that modern tribal operations often become "too large and complicated to be run entirely out of the chief executive's office." Kalt, *supra* note 2, at 203. However, ensuring that one governor is ultimately responsible for day-to-day management of the tribal government need not prevent the governor from delegating her authority when appropriate to do so. After all, outside of Indian country there are not calls for reform of the presidency because the federal government is too complicated for one President and her staff to manage, or for corporate reform because a Fortune 500 company is too complicated for one CEO and her staff to manage.

choosing a tribal council member who is responsible for legislative, executive, and judicial functions.[139] And tribal citizens with strong management skills are more likely to self-select into the tribal governor position if they believe the position encourages voters to reward those skills.[140] Anecdotal evidence provides some support for the claim that these benefits are more than just theoretically achievable. For instance, "Chief Phillip Martin of the Mississippi Band of Choctaw Indians cites . . . longer terms of office for council members and the establishment of an executive branch[] as the critical foundation for the band's well-documented emergence as an economic and political powerhouse."[141]

2. Protection of Individual Rights. — The role that independent tribal courts can play in protecting individual rights is self-evident — so clear as to almost render the observation unnecessary. Yet tribal governors, too, could help solve the individual rights problems that have concerned many advocates of tribal separation of powers.[142] Although a source of contention among (U.S.) constitutional scholars, there has been "a striking resurgence in interest in executive review," especially interest in whether "executive review includes the authority to refuse to enforce federal statutes that the President believes to be unconstitutional."[143] A tribal governor who has the ultimate control over executive enforcement decisions might choose to exercise executive review in this manner. This protection would be more than just an additional safeguard on top of the protection that tribal courts can provide: unlike a tribal court, a tribal governor could act prospectively and broadly, rather than wait to adjudicate a specific dispute.

E. Conclusion

Tribes that have desired but failed to achieve reform should consider three-branch reform. Such reform could overcome the tribal council political opposition that is a key impediment to the development of separate branches in some IRA tribal governments. Further, when

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[139] For the same reasons, three-branch separation of powers might lead to the selection of tribal council members who are better legislators, or at least make it easier for tribal council members to focus on legislating. Cornell & Jorgensen, *supra* note 35, at 158 ("Shifting certain responsibilities from councils to other organs of government allows councils to focus on certain core tasks such as setting strategic direction and policy, making laws, and building effective administrative institutions . . . .").

[140] Further, bad managers might self-select out of the tribal governor position. As tribal council members, such individuals might hide their lack of expertise by blaming other council members for mistakes or reluctance to compromise. By contrast, the accountability expected of a single tribal governor would cast a direct spotlight on the tribal governor's actions.

[141] Kalt, *supra* note 13, at 78.

[142] *See supra* note 49.

[143] Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 565 (2006).

tribes face the California problem, tribal governors might even be a useful alternative to the creation of tribal courts until the California problem becomes surmountable. And even if three-branch reform is no easier to enact than two-branch reform, three-branch reform might provide a number of other important benefits.

Yet this Chapter offers only a starting point for the development of three-branch IRA governments. Many questions of institutional design remain. To name just three: Should tribes create safeguards *within* the executive branch to protect tribal employees from arbitrary employment termination decisions, akin to civil service protections that exist within the federal government?[144] Should tribal governors have veto authority over certain tribal council actions? Should tribal councils be able to define the scope of tribal court jurisdiction?

Moreover, separation of powers is not the only possible path toward good governance. Although this Chapter has argued that three-branch separation of powers deserves another look from at least some tribes, it will still sometimes prove to be the wrong option. Plus, many tribes find that their systems of government function quite effectively, so they do not need to seek reform.[145] Even when an IRA tribe decides to address the problems it perceives in its constitution by pursuing Western separation of powers, separation of powers takes time[146] and is no cure-all.[147] Tribes, and nontribal sovereigns, that seek and achieve three-branch separation of powers still struggle, as governing is not easy.[148] But to achieve good governance, tribes have no choice except to tackle these challenges — creatively, open-mindedly, and head on.

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144 *See, e.g.*, Cornell & Jorgensen, *supra* note 35, at 163.

145 *See, e.g.*, Cornell & Kalt, *supra* note 6, at 3–5 (listing tribal-governance success stories).

146 *See* Flies-Away et al., *supra* note 16, at 129 (recommending that reform efforts not proceed too quickly); Interview with Jean Dennison, *supra* note 19, at 91–92 (noting that the Osage Nation did not find success in adopting a three-branch system but also acknowledging that the Nation rushed its constitutional reform process).

147 *Cf.* Kalt, *supra* note 2, at 211 ("As the United States itself learned through *Marbury v. Madison* in 1803 and repeatedly through FDR's attempt at court-packing, establishing and protecting the independence of a nation's judiciary is an unending challenge." (footnote omitted)).

148 The Cherokee, for instance, have three branches of government, yet the Cherokee Freedmen dispute is perhaps the highest profile instance of controversial tribal governance. *See* Introduction, *Tribal Sovereignty vs. Racial Justice*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 15, 2011), http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice [http://perma.cc/AD3R-HWJ3].