

TRIBAL SOVEREIGNTY AND HUMAN RIGHTS*

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INTRODUCTION

Many Americans have a hard time understanding the history and nature of tribal sovereignty. Many are surprised that it even exists. Those who learn about it often see it as anomalous and extraneous to the basic division of powers between the federal government and the states. Their confusion about the origins and current legal status of Indian nations is further confounded by reading news stories about actions of tribal governments that non-Indians may perceive as incomprehensible or unfair. When a tribe expels members because they cannot prove a sufficient blood connection to the tribe, many wonder how it is possible for citizenship to be defined by race in 2012.¹ They may also wonder if an in-group is trying to maximize returns from casino profits by excluding others from the pool of available recipients of those funds. When a court grants custody of a two-year-old girl to a tribal citizen, removing her from the only (non-Indian) parents she has ever known, some may wonder if tribal sovereignty itself is a luxury we cannot afford.² And when a tribe expels the descendants of its former

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1. *Pala Indian Tribe in San Diego County Expels 154 Members*, L.A. TIMES (Feb. 2, 2012), <http://latimesblogs.latimes.com/lanow/2012/02/indian-tribe-in-northern-san-diego-county-expels-154-members.html>.

2. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 554, 567 (S.C. 2012); *Biological Father Regains Custody of Two-Year-Old Cherokee Daughter in Adoption Battle*,

slaves, they may wonder how a sovereign can enslave people because of their race and then deny them citizenship for the same reason.³

All these cases are in fact far more complicated than they first appear. After all, if a tribe let anyone become a citizen who wished to join the tribe, tribal powers would grow relative to those of state governments and many non-Indians would react negatively to this—perhaps seeking federal laws to limit tribal citizenship to those who can show a sufficient historical connection to the tribe. Nor is it unusual for there to be painful custody battles over children when biological parents change their minds about adoption and the courts take far too long to resolve the matter, as has happened time and again with non-Indian children. Even the freed slave problem has its complications. After all, when African American slaves were emancipated, they were not adopted by their former slave owners—even when those owners were their biological fathers. If tribes are nations in the strong sense—with shared culture, religious life, and political and familial organization—it is understandable why tribes limit membership through norms chosen by the majority.

While each of these cases is complicated, each also highlights the perennial danger that hard-to-accept tribal governmental decisions may result in calls for federal legislation to diminish or even abolish tribal sovereignty completely. Nor is this an unfounded worry; in the past, the United States has, from time to time, disestablished tribal governments or actively reduced or eliminated some of their powers.⁴ The Supreme Court has repeatedly affirmed the power of the United States to do this unilaterally without the consent of the tribes.⁵ Nor is it uncommon today for groups of citizens to lobby for policies that would deny or limit tribal sovereignty.⁶

The legal and political contours of tribal sovereignty are not easy to compass. Federal law regulates both the federal–tribal relationship and the state–tribal relationship in notoriously complicated ways. More fundamen-

INDIAN COUNTRY TODAY (Jan. 9, 2012), <http://indiancountrytodaymedianetwork.com/2012/01/09/biological-father-regains-custody-of-two-year-old-chokechee-daughter-in-adoption-battle-71309>.

3. Steve Olafson, *Second-Largest U.S. Indian Tribe Expels Slave Descendants*, REUTERS (Aug. 23, 2011, 9:16 PM), <http://www.reuters.com/article/2011/08/24/us-oklahoma-chokechee-idUSTRE77N08F20110824>. For an excellent analysis of the issues, see S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387 (2007).

4. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §1.06, at 85-86 (Nell Jessup Newton et al. eds., 2012) (describing the Termination Era).

5. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding that the United States has plenary power over Indian nations); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, §5.02, at 391.

6. *Anti-Indian Sovereignty Movement and Its Politicians*, INDIAN COUNTRY TODAY, (Feb. 22, 2002), <http://indiancountrytodaymedianetwork.com/ictarchives/2002/02/22/anti-indian-sovereignty-movement-and-its-politicians-87520>.

tally, Indian nations themselves have multiple and conflicting conceptions of what tribal sovereignty entails.⁷ Should Indian nations be treated as full-fledged states under international law, as co-equal sovereigns with the United States yet somehow part of the federal system, or as recognized independent sovereigns subject to some, but not all, federal powers? Nor do Indian nations all practice sovereignty in the same manner. Indeed, one of the most salient features of tribal sovereignty is the diversity of structures of government that Indian nations have adopted. Within this diversity we can observe a variety of approaches to the relationship between governmental powers and individual rights. As is the case with all sovereigns, Indian nations have adopted different constitutional frameworks, governmental systems, legal systems, and normative paradigms. Each has adopted a somewhat different set of institutions and laws to ensure fair treatment of citizens and non-citizens alike. Each grapples with one of the hardest questions any sovereign faces: how can governmental powers be exercised in a manner consistent with just and fair treatment for all persons?

In her recent article, *Indian Tribes and Human Rights Accountability*,⁸ Professor Wenona Singel enters this contested terrain with resolve and clarity of vision. She neither tries to marginalize the issue of human rights nor to exaggerate the extent to which it challenges the very notion of tribal sovereignty. Instead, she takes seriously the concern that governments—including tribal governments—may exercise power in unjust ways and that there needs to be institutional mechanisms in place to lower the possibility of that happening and to provide remedies when it does happen. Professor Singel seeks to harmonize and integrate tribal sovereignty with human rights protection. She acknowledges tensions between sovereignty and human rights, but she also helpfully clarifies the nature of tribal sovereignty and its role in recognizing and respecting the humanity and dignity of each person. In so doing, she explains, not how sovereign powers are *limited* by human rights, but how the appropriate exercise of sovereignty *requires* protection of human rights. That insight led her to consider what institutional structures might be appropriate to recognize and enforce human rights.

In this brief Comment, I explore the ways Professor Singel has reshaped our understanding of both tribal sovereignty and human rights. She suggests a new way to frame the relation between power and justice and, in

7. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 526 (1994) (quoting DUANE CHAMPAGNE, AMERICAN INDIAN SOCIETIES: STRATEGIES AND CONDITIONS OF POLITICAL AND CULTURAL SURVIVAL 12 (1989)) ("There is no single Native American culture or normative order; native North America is composed of hundreds of different societies with numerous languages, religious orientations, and world views.").

8. Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567 (2012).

so doing, gives us new institutional mechanisms that might better embody the twin values of self-government and human dignity. I begin in Part I by commenting on the nature of sovereignty. I focus on the expulsion of the Cherokee Freedmen from the Cherokee Nation as a test case. In particular, I argue that legitimate sovereignty is not absolute. The proper relationship between sovereignty and humanity is one of mutual reinforcement rather than tension. The natural rights tradition teaches us that sovereigns only have legitimate powers to act in a manner that recognizes the humanity and dignity of those they regulate.⁹ One need not accept the epistemology of natural rights to benefit from its core insight: just as liberty does not mean license, sovereignty does not mean tyranny. Our freedom to act is limited by the legitimate rights of others, and the legitimate powers of governments are similarly limited by the rights of human beings. This means that limits on sovereignty designed to protect human rights may be better conceptualized as elaboration of the legal framework of legitimate sovereignty.

In Part II, I explain that a core insight of moral, political, and legal theory teaches that we have an obligation to justify our actions to others when our actions affect them. Reason-giving is a core component of practical reason, as well as of normative argument and the rule of law. An act can be deemed moral only if one can give reasons others could or should accept for the ways one's conduct affects them. What is true of morality is also true of politics and law; the practice of reason-giving helps curtail arbitrary power and thus can help render sovereignty compatible with humanity. Professor Singel not only champions this core principle but develops an innovative institutional setting where such reason-giving can occur. To explain what is innovative about her proposal, I present a typology of forms of human rights accountability. In particular, I argue that institutional mechanisms for protecting human rights may adopt forms of accountability that are (1) internal or external; (2) judicial or political; and (3) bilateral or multilateral. I also suggest the typical virtues and vices of each of these forms of accountability.

Finally, I conclude in Part III by showing how an intertribal human rights tribunal, as proposed by Professor Singel, combines these various forms of accountability or reason-giving in a manner that has the potential to maximize their virtues while minimizing their vices. Since such a court would co-exist with other institutional accountability mechanisms, it might both usefully supplement those forms while limiting intrusion on tribal sovereignty. While no institutional mechanism for reconciling power and justice can ever be perfect, Professor Singel's nuanced law reform proposal merits consideration.

9. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that natural rights limit the legitimate powers of government).

The creation of an intertribal human rights tribunal would be an exercise of tribal sovereignty rather than a deprivation of it, both because it would be negotiated and managed by the tribes themselves and because it would establish the legitimate contours of their sovereignty. Such a tribunal may benefit tribes by giving them a legitimate forum where they can account for themselves by giving acceptable reasons for their actions. While all tribes have legal and constitutional practices that require reason-giving internally, an intertribal human rights tribunal would add the benefits that come from giving reasons to outsiders. Because there are costs, as well as benefits, to giving up power to strangers, a negotiated tribal treaty establishing an intertribal human rights tribunal has the potential to protect tribes from unwarranted interference by outsiders while generating the benefits that flow from the practice of explaining oneself to others who are capable of understanding one's perspective and who are similarly sensitive to the dangers of imperialism. If this is all true, then an intertribal human rights tribunal would promote both sovereignty and humanity.

I. SOVEREIGNTY AND HUMANITY

For a long time, the Cherokee Nation of Oklahoma has been embroiled in a persistent, painful controversy over whether the descendants of its former slaves should be counted as citizens of the nation. This controversy has flared up recently and resulted in both political maneuvering and legal action.¹⁰ Those who have sought to exclude the Cherokee Freedmen from the tribe claim that they are not Cherokee, cannot prove they are descended from tribal members, were never really treated as tribal citizens nor acted as such, and that the tribe was forced to include them formally as citizens by a foreign sovereign—namely, the United States—that imposed the terms of a treaty on a less powerful nation.¹¹ Other Indian nations are not required to accept outsiders as citizens, and the Cherokee Nation should be

10. Litigation still proceeds on this question. See generally *Cherokee Nation v. Nash*, No. 11-CV-648-TCK-TLW, 2012 WL 314295 (N.D. Okla. Feb. 1, 2012); *Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159 (N.D. Okla. 2010). See Jarrel Wade, *Department of Interior Makes Counterclaim in Lawsuit over Cherokee Nation Freedmen Descendants*, TULSA WORLD (July 3, 2012, 2:27 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20120703_11_A9_ULNSbr851617; see also Matthew L.M. Fletcher, *Update in Cherokee Nation v. Nash (Cherokee Freedmen Case)*, TURTLE TALK (July 3, 2012, 10:06 AM), <http://turtletalk.wordpress.com/2012/07/03/update-in-chokeee-nation-v-nash-chokeee-freedmen-case/>. For a history of the origins of the relations between the Cherokee Nation and the Freedpeople, see CELIA E. NAYLOR, *AFRICAN CHEROKEES IN INDIAN TERRITORY: FROM CHATTEL TO CITIZENS* (2008).

11. Alex Kellogg, *Cherokee Nation Faces Scrutiny for Expelling Blacks*, NAT'L PUB. RADIO (Sept. 29, 2011, 3:17 PM), <http://www.npr.org/2011/09/19/140594124/u-s-government-opposes-chokeee-nations-decision>.

treated no differently. Nothing less than respect for tribal sovereignty is at stake here. The tribe has voted to adopt a constitution that defines its membership to exclude the Freedmen who cannot prove descent from a tribal member in a manner acceptable to the tribe.¹² If one believes in democracy, cultural pluralism, and the protection of internal affairs of sovereigns, then the Cherokee Nation has the right to control its criteria for citizenship.¹³ Every sovereign controls its immigration policy and its citizenship criteria, and Indian nations should be no different. In this view, requiring the Cherokee Nation to accept the Freedmen as members is unwarranted; for the United States to attempt to impose this on the tribe by withholding federal funds owed to the tribe is nothing more than a vestige of colonialism.

The Cherokee Freedmen and their supporters argue, in contrast, that the criteria used by the Cherokee Nation to determine descent are flawed. Many Freedmen actually do have Cherokee blood but cannot prove it through the defective criteria used by the tribe.¹⁴ Or they criticize the provision in the Treaty of 1866 between the tribe and the United States that recognized Freedmen as citizens of the Cherokee Nation only if they returned within six months of the treaty signing—a time limit that excluded many people who had been relocated during the Civil War and who could not return within that time period because of lack of funds or ill health.¹⁵ Supporters of the Freedmen also argue that they are tribal citizens, whether or not descended from the original Cherokees, because they were brought into the tribe when it enslaved them and thereby made them its own, not because the United States forced the tribe to accept them. A people cannot enslave another and then wash its hands of responsibility for its former slaves. If it is legitimate for the Cherokee Nation to expel the Freedmen from the tribe, then it would have been legitimate after the Civil War for the United States to ship all the freed slaves back to Africa even if they wanted to stay. If the one is unthinkable then so is the other.

If the Freedmen have a plausible legal and moral claim to be counted as tribal citizens, then we have what may appear to be a clash between tribal sovereignty and human rights. It is important to notice that this involves two questions rather than just one. One question is whether expulsion of the Freedmen violates their human rights, and a second, different question, is who should decide this question? Should it be the Cherokee Nation through

12. *See id.*

13. Tsosie, *supra* note 7, at 519 (“[T]ribal autonomy over membership decisions is an essential part of self-government.”); *see also id.* at 520 (stating that tribes should have the power to determine which traditional values will promote cultural survival).

14. Kellogg, *supra* note 11.

15. Ray, *supra* note 3, at 405 (“The confluence of the Treaty’s and Constitution’s six-month deadline for establishing residency, the dispersion of former slaves throughout the region due to war, and limited means of communicating vital information meant that many former slaves did not return in time to receive tribal citizenship . . .”).

its own political and legal procedures that decides this question, or should outsiders, including other sovereigns like the United States, have a say?

If the tribe is the decision making entity, then the conflict is an internal one involving only Cherokee political and legal institutions. Various Cherokee governmental institutions have addressed this question, including the Supreme Court, the Principal Chief, the Tribal Council, and the voters. As of July 2012, the tribal institutions had concluded that the tribe's actions in expelling the Freedmen did not violate anyone's rights; either the Freedmen never were legitimately citizens of the tribe or the citizens amended their Constitution to make this so.¹⁶ If the tribe's sovereign institutions are the relevant decision makers, then this exercise of sovereignty to define citizenship is fully compatible with human rights protection. At the same time, as with any sovereign, its citizens may dispute whether the tribe interpreted its own Constitution and treaty obligations to the United States correctly.

On the other hand, if outsiders like the United States government have a right to criticize the tribe's decisions, and if they come to the conclusion that the human rights of the Freedmen have been violated, then we are confronted with a clash between respect for tribal sovereignty and human rights. As it happens, outsiders, including officials of the United States, have opined that the decision of the Cherokee Nation violates not only the human rights of the Freedmen but also the terms of the 1866 Treaty with the United States.¹⁷ For that reason, both members of Congress and the Department of the Interior have reacted to the tribal decision to expel the Freedmen by withholding, or threatening to withhold, federal funds.¹⁸

The first thing to grapple with is the question of whether, in fact, this case represents a clash of sovereignty and human rights. Assuming for the moment that it is a contested question whether the Freedmen's human rights have been violated, does an effort by the United States to induce the Cherokee Nation to recognize those rights constitute an attack on its sovereignty? To answer this question, consider the reverse case. Suppose, for example, that the United States has engaged in actions that deprive Cherokees of their human rights. Would it be a violation of the sovereignty of the United States

16. Wade, *supra* note 10 (federal litigation is proceeding to challenge the Cherokee Nation's exclusion of the Freedmen from citizenship).

17. *Cherokee Freedmen Dispute Threatens HAHASDA*, INDIANZ.COM (Apr. 24, 2008), <http://64.38.12.138/News/2008/008375.asp>.

18. At one point, the United States Department of Housing and Urban Development suspended more than \$37 million in payments to the Cherokee Nation because of the Freedmen controversy. Kellogg, *supra* note 11. In addition, members of Congress, especially the Black Congressional Caucus, sought to halt all federal payments to the Cherokee Nation unless the Freedmen were reinstated. *NAHASDA Clears Congress with Freedmen Provision*, INDIANZ.COM (Sept. 26, 2008), <http://www.indianz.com/News/2008/011070.asp>; *Cherokee Freedmen Dispute Threatens HAHASDA*, *supra* note 17.

for the Cherokee Nation to demand that the United States desist? The answer, I think, is no. Why not?

Even theorists of absolute sovereignty, such as Thomas Hobbes, acknowledge limitations on sovereignty necessary to protect human rights. Although Hobbes believed the sovereign has full authority to decide what is just and unjust as a matter of civil law, private citizens (like Hobbes) have the right to say what they think the law of nature commands; and if such conclusions conflict with the law of the land, this does not, by itself, constitute rebellion or impinge on the sovereignty of the Crown.¹⁹ Even though Hobbes does not recognize any civil or legal limitations on sovereignty, he does identify human rights that the sovereign should respect.²⁰ Moreover, Hobbes's firm belief in God and the reality of punishment in the afterlife for sinners suggested that there were powerful reasons for the Crown to eschew tyranny and embrace good government.²¹ Nor is Hobbes alone. Even Niccolò Machiavelli argued that a prince who wants to retain power must not abuse his authority if he wants to remain secure from rebellion or disorder.²²

Most political and legal theorists go further. Such thinkers as John Locke, John Rawls, Ronald Dworkin, and Jeremy Waldron argue that sovereigns only have legitimate power to enforce laws that are consistent with the basic injunction to treat each person with equal concern and respect.²³ Sovereignty, in other words, is not absolute. Both the United States Constitution and the state constitutions and all modern constitutions adopted around the world limit state power in order to protect human rights. The international consensus of states seems to be that sovereignty is illegitimate when it is used in oppressive ways, and most philosophers agree. It is simply no answer to a human rights claim to argue that it is wrong to attempt to limit the power of a sovereign nation. To respond to a human rights complaint by a foreign state or a noncitizen by arguing that it is an attack on one's sovereignty is nonresponsive and irrelevant. If sovereign power is used in oppressive ways, then the invocation of sovereignty is no defense whether the complaint comes from inside the state or outside. In other words, it is neither illegitimate, nor an affront to sovereignty, to demand that a sovereign justify its treatment of its people when that treatment is perceived to be unjust.

19. For Hobbes's theory of absolute sovereignty, see generally, THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press, 1996) (1651).

20. *Id.* at 93.

21. *Id.* at 306-20, 402-15.

22. NICCOLÒ MACHIAVELLI, *THE PRINCE* 95-104 (New Am. Library 1952) (1532) (noting that the prince "must avoid being despised and hated").

23. See, e.g., RONALD DWORIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 1-3 (2000). See generally LOCKE, *supra* note 9; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988).

Nor is there anything amiss about one nation criticizing another or making such a demand for justificatory reasons for what appears to be unfair conduct by a sovereign. It is perfectly appropriate for the Cherokee Nation to complain about unfair treatment by the United States and to demand that such behavior cease. If this is so, then it is equally appropriate for the United States to do the same when it perceives a violation of human rights by the Cherokee Nation. When the Cherokee Nation asks, "How dare others tell us what to do," one wants to say, "Be careful what you wish for." If others cannot criticize you, then you cannot criticize them, even when their actions affect you. It is not an affront to sovereignty to demand that other nations comply with minimum standards of civilized treatment of their people. People do not lose their right to be treated with dignity just because they are citizens of another state. No nation is immune from criticism of its treatment of its own people. When one witnesses what one perceives to be oppression, it is not wrong to speak up; indeed, one may have an obligation to do so to speak on behalf of those who are vulnerable and oppressed. In some cases, outsiders have greater power to speak because they are not subject to punishment or control by an oppressive sovereign that may use its monopoly of force to control its own people and stop them from speaking.

A completely different—and more difficult—question is whether another sovereign like the United States has the right, not only to express its opinion about what it considers to be human rights violations by the Cherokee Nation, but to go further and attempt to force its will on the Cherokee Nation. After all, in international affairs, force is generally eschewed in favor of dialogue unless a nation is acting in self-defense. Yet it is routine for nations to make demands of each other and to back up those demands by political and economic sanctions designed to induce compliance. Nations do this far short of going to war by withdrawing or limiting trade or foreign aid, limiting travel of one nation's citizens to the other, withholding economic advantages of one kind or another, and even attempting to isolate rogue nations who persist in violating human rights. Of course, it is the unequal power of the Cherokee Nation and the United States that gives us pause. It is more likely for the United States to impose its will on the Cherokee Nation than the reverse. This inequality of power makes us worry about colonialism and imperialism. In addition, it brings forth the substantial worry that United States officials may be ethnocentric and narrow-minded and unable to understand the values, norms, and traditions of a different people. After all, we have experienced this before when the United States attempted to disrupt and abolish tribal sovereignty, to force Indians to become farmers and to adopt the institution of private property, and to give up tribal religious practices, languages, and customs. How do we know that this is not happening again?

The answer is that we cannot know this for certain and that it remains a danger. It is not as if the U.S. Constitution is perfect or that the United

States has a monopoly on the content of constitutional rights. The U.S. Constitution is a notoriously old-fashioned eighteenth century constitution bereft of any protection for economic and social rights that exist in almost all twentieth century constitutions. And the assertion of sovereign United States power over Indian nations remains at odds with its own core democratic, anti-imperialist values.

All this is true, but it does not mean that a demand for human rights accountability is, by itself, an attack on a nation's sovereignty. Nor does it mean that it is categorically inappropriate for one nation to withhold benefits from another when it perceives the other has engaged in oppression of its own people. Sovereignty is not absolute, and a demand that a sovereign comport itself in a manner that is consistent with modern conceptions of fairness and justice is not an inappropriate demand. Actions have consequences, and just as it is problematic for the United States to impose its will on the Cherokee Nation, so is it problematic for the Cherokee Nation to demand that the United States defer to its decisions about how to treat its own people, *no matter what*, especially when Cherokee citizens are also American citizens.²⁴ This means that the mere fact that Professor Singel has entertained the idea of an external forum designed to criticize, and perhaps enforce, limits on sovereign actions to protect human rights, does not mean that she has, in any way, attacked tribal sovereignty.

At the same time, it behooves both sovereigns and the peoples of each sovereign to try to understand the perspective of the other. What seems to some to be an unjust action may be justified within an alternative, legitimate moral and political framework that can be articulated and defended. Professor Singel is right then to argue that sovereign nations have an obligation to be held accountable for their practices that impinge on their citizens' human rights. This brings us to the question of defining the practical institutional frameworks that can best achieve this goal.

II. REASON-GIVING AND ACCOUNTABILITY

Theorists of morality, politics, and law all agree on the importance of reason-giving. Moral theorists teach that an action is moral if we can give reasons that could or should be accepted (or at least cannot be reasonably rejected) by those our actions affect.²⁵ Political theorists teach that an action

24. See Tsosie, *supra* note 7, at 509 (noting that the exercise of tribal sovereign powers over persons who are "also protected by the laws and Constitution of another sovereign" results in challenges to tribal sovereignty when it is exercised in ways that impinge on other sovereigns that have interests in protecting their own citizens).

25. Christine Korsgaard and T. M. Scanlon have both argued that morality requires that we justify our actions by reasons others can accept or cannot reasonably reject. RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE* 66 (Jeffrey Flynn trans., 2012) (2007); CHRISTINE M. KORSGAARD, *The Authority of Reflection*,

is just if it could or should be accepted by all reasonable persons in a suitable decision-making setting where they are prompted to treat each person with equal concern and respect, understanding that we live in a world with plural values and many competing comprehensive moral doctrines.²⁶ And both legal theorists and our legal institutions are premised on the importance of giving reasons why a rule of law should be acceptable to all affected by it and compatible with our deepest shared values.²⁷

The question then is what institutional form this accountability should take. If we analyze Professor Singel's contribution, we learn that there are three basic choices we need to make in shaping an accountability system. Accountability can be (1) internal or external; (2) judicial or political; (3) bilateral or multilateral. It will be useful to describe the nature of these choices and the advantages and disadvantages of each form.

A. Internal Versus External Accountability

When one thinks about accountability, one generally imagines having to answer to others. If one never had to think about the effects of his or her actions on others or never had to give reasons for why others should not object to one's treatment of them, then one might imagine one would face no accountability at all. The paradigm case of accountability is the obligation to explain to others affected by one's actions why those actions were legitimate. But a moment's notice will remind us that we are also accountable to ourselves. Unless we are psychopaths or otherwise intellectually or morally deficient, we live in a moral universe. None of us feel empowered to act without regard to the morality of our actions. We have to live with ourselves and that means we have to explain to ourselves why what we did was moral. That may require introspection or reflection, and in hard cases, it entails the attempt to reconcile conflicting norms and values, as well as relevant examples. We try to develop consistent treatment of like cases, and this requires a combination of critical thought and intuitive reaction to particular cases.²⁸

So too do nations adopt both internal and external forms of accountability. The human rights paradigm discussed by Professor Singel rests on

in THE SOURCES OF NORMATIVITY 90-91, 113-15 (Onora O'Neill ed., 1996); MICHAEL P. LYNCH, IN PRAISE OF REASON 3 (2012); T.M. SCANLON, WHAT WE OWE TO EACH OTHER 4 (1998).

26. See generally RAWLS, *supra* note 23; JOHN RAWLS, POLITICAL LIBERALISM (1996).

27. See Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 914-15 (2009).

28. See, e.g., Richmond Campbell & Victor Kumar, *Moral Reasoning on the Ground*, 122 ETHICS 273, 286-87, 296 (2012) (explaining this conception of moral reasoning).

the idea that nations are accountable to other nations and the international community to comply with norms developed externally and sometimes cooperatively through international legal norms, practices, and institutions. But of course each nation is also accountable to itself and to its own people. Just as individuals must explain themselves to themselves and learn to live with their actions, nations must defend themselves to their own people and defend their actions as in accord with their own values, practices, traditions, and aspirations.

Internal accountability has the advantage of leaving one free to develop one's own conscience, traditions, and sense of right and wrong. It is a fundamental fact of human development that we must grapple with the morality of our actions. We care about right and wrong, not only because we care about what other people think of us or how they will treat us, but because we care about the kinds of beings we are. Internal accountability protects the freedom of the individual or the nation to chart one's own path and to develop and enact one's own values. It allows the community to develop its way of life, develop and articulate its values, tell its stories, ask its questions, search for meaning, and shape its social, economic, and legal relationships.

But internal accountability has costs as well. Without the need to look outside, one may not learn what is lacking in one's own worldview. It is hard to see how the world could be different if one is imprisoned in one's own perspective. A medieval lord may have no conception of how society could be organized if one abolished classes and statuses and treated each person simply as a human being rather than as a lord or peasant, a priest or congregant, a man or woman, or a king or subject. Being forced to look outside and to answer to outsiders can open one's mind to the fact that actions one thought were normal might be considered by others to be oppressive. Sometimes those outsiders are right. Each of us has something to learn from comparing our institutions and norms to those of others.

One might even think of external accountability as the *sine qua non* of moral reasoning. The base notion moral theorists teach us is that we are obligated to justify our actions to others affected by them through offering reasons that they should accept or that they cannot reasonably reject.²⁹ Any sovereign (or individual) who eschews external accountability deprives itself of one of the most important ways that we discover whether our actions are justified. External accountability is a powerful engine of the self-awareness and self-criticism that are the prerequisites for moral develop-

29. See FORST, *supra* note 25, at 21; CHRISTINE M. KORSGAARD, *Reflective Endorsement*, in THE SOURCES OF NORMATIVITY, *supra* note 25, at 49, 89; SCANLON, *supra* note 25, at 154. For an elaboration of the impact of this central truth on legal reasoning, see Singer, *supra* note 27, at 975 (discussing Korsgaard's and Scanlon's work).

ment and learning. It forces one to articulate what may have been inchoate and to anticipate and answer objections others may pose to one's conduct.

Conversely, although external accountability has the benefit of forcing us to justify ourselves to others, it poses the danger that others may impose their values on us—or we on them. It is not the case, after all, that others necessarily have a greater purchase on right and wrong than we do. They may not see the world the way we do; they may not share our values. There is no guarantee that they have a better answer to the question of right and wrong than we do. Our perspectives may even be so different that we cannot easily communicate our moral frameworks and assumptions to each other.

One might hope that we could reconcile these forms of accountability, gaining the benefits of attempting to understand the views of others and to explain our own views to them while avoiding the costs of having them wrongfully and unjustly impose their views on us (or our imposing our views on them). We do, in fact, gain a great deal by engaging in moral conversation with those who view the world differently than we do; we have much to learn from such dialogues. At the same time, if others are given power over us, the result may not be mutual learning and development, but rather the kind of oppression associated with imperialism, colonialism, or forced conversion or assimilation. This is a tension we need to live with and manage.

B. Judicial Versus Political Accountability

There is a tendency to assume that accountability is absent if there is no legal (meaning judicial) mechanism for enforcing it. But of course, this is not so. Just as individuals can engage in successful moral persuasion, government officials can be held accountable to their people through political, rather than judicial, forms of accountability. We are familiar with this debate through recurrent wrestling with the problem of judicial review. Should judges defer to acts of Congress, such as the recent health care legislation enacted by Congress under the Obama Administration,³⁰ or should the Supreme Court strike down some aspect of the law as an infringement on individual liberty? It is clear that a decision by the courts to defer to Congress does not remove all accountability from either the politicians or the United States itself. As a democracy, the people are free to vote for a new Congress and President that will repeal old laws. The government remains *politically* accountable, both to its citizens and the international community, even if no *judicial* or legal mechanisms exist to enforce that accountability.

30. Patient Protection & Affordable Care Act, Pub. L. No. 111-148 (2010).

Political accountability has the virtue of resting power on democratic norms of self-governance and equal voting rights for each citizen. The processes by which democratic political systems work allow for national dialogue, lobbying, persuasion, party formation, politicking, and voting. Laws adopted through these procedures have some assurance of support by large numbers of people and thus may be more likely to be accepted than those imposed on people by unelected judges or elected judges who are nonetheless insulated from political accountability in various ways.³¹

Conversely, political accountability has well-known deficits, not the least of which is the possibility that majorities may oppress minorities. The major argument for accountability by an independent judiciary is that some decisions are better made by individuals who are partly or totally insulated from the day-to-day pressures of politics. Judges are empowered to interpret and to enforce our most basic values. They may resist pressures to find a defendant guilty when the evidence is scant, no matter that many people are clamoring for his head. They may stop legislative majorities from limiting free speech rather than reacting to short run political pressures to curtail the speech of unpopular groups or individuals. Judicial accountability may allow us to enact our deepest, long-term values rather than responding willy-nilly to the short term desires of the majority that are insufficiently attentive to the need to preserve space for unpopular individuals or causes.

As with internal and external accountability, there are virtues and vices in both political and judicial forms of accountability. Political accountability is often swift and amenable to the strong views of the majority and freed from being undemocratically limited by unelected and unaccountable judges. But political accountability (and deference to the legislative branches of government) also leaves the minority at the whim of the majority and may violate democratic norms by failing to enact our deepest values through protecting human rights. One need only remember the *Korematsu* case to understand what is at stake here.³²

Conversely, judicial accountability has the advantage of allowing considered, slow reflection by individuals who are not subject to immediate removal or sanction because they act according to their—or the nation's—conscience. The processes that judges use promote careful thought and reasoning; briefs are written, oral arguments are heard, and opinions are written to justify how rules are interpreted and applied. Cases present detailed facts and stories that teach us moral lessons we may not have learned when we

31. Although unelected federal judges are, to a large extent, beyond the control of Congress, the impeachment power does render them subject to political accountability of a kind.

32. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (holding an executive order that required Japanese Americans to live in internment camps during World War II constitutional).

were acting in a legislative mode to enact general rules. Cases teach us about unanticipated consequences of rules and enable us to limit their scope to appropriate situations.

At the same time, the comparative isolation of judges from politics may protect them from the need to answer to constituents, and thus free them too much from the need to be accountable themselves to the broad public. We attempt to thread the needle by asking our judges to write opinions to explain their actions while reserving the ultimate sanction of impeachment, as well as the possibility of constitutional amendment. In addition, we hope norms of professionalism will induce judges not to overturn acts of Congress, state legislatures, or tribal councils unless they are very confident that those acts violate fundamental norms and are oppressive. Yet we remain troubled by the role of judges in reviewing the constitutionality of legislative acts, and it is evident that neither form of accountability is perfect. For that reason, one alternative form of judicial accountability is the declaratory judgment where courts eschew a coercive order and exercise their moral authority to proclaim what the standards of justice and fairness require, relying on the moral authority of the court and respect for the rule of law as the way to shape behavior and attitudes.

C. Bilateral Versus Multilateral External Accountability

Finally, it is evident that we are sometimes accountable to other individuals and sometimes to entities that represent collective groups who claim a right to regulate our conduct. For individuals, we experience the need to explain ourselves to those we come into contact with—our family members, our friends, our co-workers. But we also must appear before employers, tribunals, committees, church councils, town governments, and representatives of political bodies such as the police. So too with nations. Foreign affairs involve both bilateral relations between pairs of countries and multilateral relations in entities such as the Organization of American States and the United Nations. For Indian nations, this includes bilateral relations among those nations or between those nations and the United States, and multilateral relations among Indian nations through entities such as the National Congress of American Indians.

Bilateral relations have the advantages of specificity. The United States can tailor its relations with Canada and Mexico differently. Just as the institution of contract allows an individual to shape contractual relations with each individual, so too do bilateral relations allow specific tailoring. Bilateral relations have the cost of eschewing any common standards for fair treatment of other nations. Multilateral relations sacrifice precision in order to achieve a common standpoint from which to judge the conduct of nations. They may require greater acts of compromise among conflicting values than do bilateral accommodations. Multilateral agreements have the

advantage of demonstrating to a rogue nation that many nations have come to a consensus that its actions cannot be justified. The process of multilateral agreement is akin to the process of constitution drafting and adoption. Conversation among the many may even improve the moral status of the legal standard by engaging multiple perspectives. Of course the opposite is also true. Just as the majority may oppress the minority within a nation, the many may gang up on the one nation forcing it to violate its own understanding of what is right for itself and its people.

III. AN INTERTRIBAL HUMAN RIGHTS TRIBUNAL

Our review of the various institutional forms that accountability might take lets us see that Professor Singel's signal contribution is to suggest a new form of accountability for Indian nations that is at the same time external, judicial, and multilateral. She proposes that Indian nations accept the benefits of external accountability. Being forced to explain oneself to others, she argues, is not an oppressive deprivation of sovereignty but one of the ways one acts responsibly as a sovereign. Being held accountable to judicial, rather than merely political, accountability forces a nation to explain why its short-run policies accord with its long-term and deepest values, while insulating decision making from political pressures of majorities. Being held accountable by a multilateral group of Indian nations rather than only being held accountable in bilateral relations with other Indian nations or the United States may generate the benefits of common experience while avoiding the problem of colonial imposition by the United States. In other words, Professor Singel has constructed a plausible institutional framework that attempts to harness the virtues of the various forms of accountability while minimizing their vices.

Of course, as we have seen, each of these forms of accountability has defects as well as benefits. External actors may unjustly impose their ethnocentric views on less powerful neighbors. Judges may similarly impose their personal views on the majority who has reached a considered judgment about the matter in question through democratic political procedures. And multilateral regulation may subject a less powerful nation to an external consensus in a way that deprives it of the right to be different and to chart its own path.

As is, Indian nations face both internal and external accountability. They are subject to the dissent of their own people and to criticism and reaction by both other Indian nations and the United States. Indian nations all enact a combination of judicial and political accountability internally and face a combination of external judicial and political accountability in the forms of Congressional action and federal court review. They face both bilateral and multilateral accountability through the various institutions of

tribal sovereignty, multilateral Indian nation organizations, and international human rights processes.

What is missing from the current forms of accountability is external, multilateral, and judicial accountability by Indian nations. That is precisely what Professor Singel suggests to add to the mix. Her hope is that incorporating such accountability will allow Indian nations to justify themselves to others who are likely to understand where they are coming from and what their worldview is.³³ That will lower the possibility of colonial oppression while generating the benefits of forcing Indian nations to articulate their reasons to outsiders capable of understanding them. Judicial accountability provides the benefits of reason-giving that characterize legal processes; such accountability tests whether political majorities can justify their desires in ways that can be characterized as fair to all affected by those policies. And the multilateral nature of the tribunal Professor Singel proposes may generate greater confidence that its rulings are not ethnocentric but result from a consensus of similarly situated nations on the limits of sovereignty needed to reconcile power with justice. Indian nations would establish such a tribunal through negotiation and would determine its jurisdiction, procedures, and powers. It might, for example, be given the power to make declaratory judgments rather than the power to enact sanctions, or it might limit the sanctions permissible in different classes of cases. Such a tribunal also has the virtue of protecting Indian nations from the prospect of more intrusive and less sensitive impositions on tribal sovereignty by Congress or the Supreme Court, while potentially instilling confidence in both Indians and non-Indians in sovereign nations.

If such a tribunal were to address the question of the Cherokee Freedmen, it might help to answer the question of whether there is—or is not—a legitimate defense to the charge that the Cherokee Nation has engaged in an unjust action by expelling the descendants of its former slaves from citizenship. Such a tribunal would engage representatives of other Indian nations that face similar problems in defining citizenship and that share many aspects of a common worldview. Conversation with and among judges chosen from multiple tribes empowered to attempt to reconcile majority rule and individual rights may help engage the various forms of moral reasoning needed to come to a resolution of this question. The conversation such a tribunal would generate might have significant benefits in itself. Such a tribunal might generate an outcome that would be easier for the majority of citizens in the Cherokee Nation to accept than a political one generated by Congress or the Secretary of the Interior, or a judicial one imposed by a federal court. It might also give the Cherokee Freedmen a tribunal that is

33. Tsosie, *supra* note 7, at 529-32 (explaining that most tribes have a shared conception of individuals as linked to others in their community and thus conceptualize individual rights differently than many non-Indians).

legitimately empowered to protect their rights because it is a tribunal created by Indian nations whose rulings could be understood as an exercise of tribal sovereignty rather than a limitation of it. Such a tribunal would avoid the problems of colonialism that ensue when the United States and its courts tell Indian nations what to do. All this means that a decision of a multilateral intertribal human rights tribunal might constitute an exercise of negotiated self-government that would be more democratically legitimate than unilateral actions by the United States government imposed on the Cherokee Nation by fiat.

It is not clear how such an intertribal human rights tribunal would analyze the case of the Cherokee Freedmen. No political or judicial solution to this issue will satisfy everyone even if all agree that sovereigns should not abuse human rights. Both philosophers and human history teach us that sovereigns have the potential to promote freedom and justice, but they also, from time to time, oppress their own people as well as others. If might does not make right, then we cannot avoid the human task of figuring out what is right. And if human rights are to be respected, then legal rights must be matched with remedies likely to affect behavior of oppressors.

Professor Singel has charted a new path in the woods. Two heads, she counsels, are sometimes better than one. And multilateral institutions provide the benefits of democratic dialogue and mutual persuasion. The obligation to explain oneself to others whom one trusts can be a powerful deterrent to wrongdoing. And a commitment to comply with the considered judgments of a multilateral judicial tribunal can be seen, not as a surrender of sovereignty, but a confident assertion of it.³⁴

34. *See id.* at 524 (“To the extent that the tribe remains a viable political entity, tribal members are able to preserve their cultural integrity, and ultimately, they can enforce their rights within the tribal context.”).