Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law

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Matthew L.M. Fletcher*

Together, my parents and I stepped into our front yard and stared up into the sky. We saw the big planes roar noisily through the rough air above the reservation. We saw the soldiers step from the bellies of those planes and drop toward the earth. We saw a thousand parachutes open into a thousand green blossoms. All over the Spokane Indian Reservation, all over every reservation in the country, those green blossoms fell onto empty fields, onto powwow grounds, and onto the roofs of tribal schools and health clinics.

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"Jonah," said the white soldier. "We don't mean to hurt you. Or your parents."

"Yes, you do," I said. "You're going to eat us. You're going to drink our blood."

The white soldier's face grew harder. Marble, granite, quartz.

"Jonah," he said. "We've come to take you away from here. We need you."

"I knew you were coming," I said.1

I. INTRODUCTION

Sherman Alexie's short story, "The Sin Eaters," is a fable about an unknown contamination sweeping the United States that compels the federal government to abduct Indians of child-rearing years, taking them to a secret location for purposes of extracting some biological element unique to Indians.2 This story represents the fear that exists in virtually every corner of Indian country3 and in the territories of Indigenous peoples worldwide. The exploitation of Indigenous biological knowledge by non-Indian scientists and researchers has long haunted Indian communities. In large part due to the publication of Vine Deloria, Jr.'s scathing attack on anthropologists in his book Custer Died for Your Sins,4 and also due to the increasing international awareness of the rights of Indigenous peoples in both the United Nations Declaration on the Rights of Indigenous Peoples5 and the Convention on Biological Diversity,6 scientific research apparently has attempted to improve on its methods compared to the
abuses of the past. In spite of this improvement, the pressures to exploit Indigenous biological knowledge persist.

The legal protections that Indians and Indian communities might draw upon for protection from these encroachments have received extensive scholarly attention. Professor Angela R. Riley’s excellent argument that the Indian Commerce Clause and the trust relationship between the United States and the American Indian tribes compel the government to enact an “Indian Copyright Act” is one salvo. Other scholars have written that federal environmental protection laws and intellectual property laws could protect Indigenous biological knowledge. Others, such as Professor Russel Lawrence Barsh, dispute that current federal and international laws are sufficient. John Petoskey wrote twenty years ago that the First Amendment would not protect tribal concerns and he was proven right in cases such as Lyng v. Northwest Indian Cemetery Protective Ass’n, where the Supreme Court refused to extend First Amendment protection to Indian land used for religious purposes, and Employment Div., Dept. of Human Resources of Oregon v. Smith, where the Supreme Court refused to extend First Amendment protection to the religious use of peyote.

This Article brings forth the possibility that an American Indian tribe might legislate to prohibit the exportation and disclosure of Indigenous biological knowledge. Such legislation tends to implicate both the due process rights and free speech rights of tribal members and non-tribal members affected by such legislation. This Article, however, will focus on the implications of the freedom of speech concerns resulting from such a prohibition or restriction. The impact on free speech – as well as the tribe’s justification for such restrictions or prohibitions – best brings forth the arguments on the merits.

Part I of this Article sets the table by defining what is meant by “Indigenous biological knowledge.” That Part also provides examples on how that knowledge has been exploited by non-Indians in sometimes extraordinarily negative ways. Part II illustrates the legal regimes currently available for Indian tribes to prevent this exploitation and how these regimes generally fail to adequately protect Indians and tribes. Part III describes civil rights jurisprudence in Indian Country, with a focus on freedom of speech. Part IV discusses a few of the possible tribal law responses to prevent the exportation of Indigenous biological knowledge. Part IV also analyzes the free speech implications of these theoretical legislative solutions in the context of tribal constitutional law on free speech guarantees.

II. INDIGENOUS BIOLOGICAL KNOWLEDGE

Professor Dean Suagee wrote that “[t]he cultures of American Indian tribes hold a wealth of knowledge about the natural world, knowledge that reflects the presence of tribal cultures in North America for countless generations . . . .”
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Michigan Indians have spoken at great length about how when white doctors came to their villages, they would have much to learn from the local Indians about medicine before they could claim to be equals as doctors. In the modern era, Indigenous peoples routinely report that "corporations, government agencies and individual researchers [are] attempting to seize indigenous knowledge and its products for their own purposes."18

A. Definition

For purposes of this Article, “Indigenous biological knowledge” is defined broadly as:

a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.19

It may also include "knowledge, possessed by indigenous people[s], in one or more societies and in one or more forms, including, but not limited to, art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, designs, literature[,]”20 all “local ecological, agricultural, or medical knowledge,”21 and knowledge that might encompass or surpass “patent, trademark, design registration, and biodiversity rights.”22 Indigenous biological knowledge is not static; it evolves and is constantly updated and invented by Indigenous peoples.23

The history of the United States includes a dark lining related to the scientific "value" of Indigenous biological knowledge.24 For example, “[i]n 1798, Thomas Jefferson ordered the excavation of Native American burial grounds, claiming he had the right to remove the remains ‘by virtue of a higher order called science.’”25 Anthropologists and archaeologists visited desert southwest Indian tribes and pueblos, "collect[ing] sacred paraphernalia, bribing destitute tribal members with money, thereby creating a new norm for the illegal selling of sacred items and creating a demand by outsiders for ethnographic materials.”26 Medical doctors took test samples and conducted unnecessary kidney biopsies on Zuni Pueblo Indians without disclosing the results in the early 1980s.27 Smithsonian Institute anthropologists "came to White Earth and other reservations with scapulars in hand, and measured the heads of the Anishinaabeg of White Earth as part of tests designed to show a genetic basis for Natives’ alleged intellectual inferiority.”28

Modern science appears to be more sensitive to the concerns of Indigenous peoples. The University of Washington School of Law’s Native American Law
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Program has recently partnered with that law school’s Health Law Program and University’s School of Medicine to “look at ethical and legal issues related to genetic research and Native Americans.” Museums are also developing community-based models incorporating the experiences, knowledge, and preferences of tribal communities to modern collections.

B. Examples of Exploitation

Despite increasing sensitivity, the pressure from university and corporate researchers, New Age practitioners, and others to tap into Indigenous biological knowledge has become more intense. “Biopiracy” has been defined by one scholar as “the unauthorized extraction of traditional knowledge or biological resources and/or the patenting of ‘inventions’ that derive from such knowledge or resources without any provision for sharing the benefits with the providers.” This article briefly describes two of the more well known examples that have occurred in North America.

1. Human Genome Project

The Human Genome Diversity Project has asked individual members of Indian tribes to provide biological samples in order to preserve for all time a tribe’s DNA. Indians often believe this project is a new form of “biocolonialism” and often believe that the scientists view Indians as “the new biological goldmine.” More specifically, Indigenous peoples often fear that genetic testing “would be used to rewrite their history in order to deny them access to land and other historical tribal claims. . . . [and] could redefine the status of individuals in terms of biological categories, categorizing them in ways that would influence their rights or entitlements.” Others have argued that the exploitation of Indigenous biological materials for profit “might exacerbate disparities in the healthcare available to the wealthy and middle classes and that available to the medically underserved.” Still others argue that focusing on Indigenous biological knowledge in the manner of preserving the allegedly soon-to-be “extinct” tribal DNA is insulting given the need to devote resources toward addressing the underlying causes of the future “extinction.”

It appears likely that Indians will continue to be targets of research, especially given that sampling and re-sampling is not uncommon. According to Professor Russel Barsh, “most of the harm has already been done, from a community-level perspective. . . . [g]roup privacy and property interests have already been compromised, and most of the material likely belongs to third parties who can allege ignorance in their defense. . . .”
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2. Minnesota Wild Rice

Researchers from the University of Minnesota began the process of domesticating wild rice from the Minnesota Chippewa tribes’ lands in the 1950s – without their consent.\(^4^0\) Winona LaDuke reported that “[d]omesticated wild rice was soon produced and then overproduced. The wholesale wild rice price dropped from $4.44 per pound in 1967 to $2.68 a pound in 1976.”\(^4^1\) The Anishinaabeg fear that “the varieties developed by the University of Minnesota researchers [might] possibly contaminate the Anishinaabeg’s wild rice strands[.]”\(^4^2\) The White Earth Land Recovery Project contends that “[e]verything about true wild rice is endangered: the indigenous varieties, the environments they need to flourish, the way of life that long drew Ojibwe families ... to save all of it.”\(^4^3\) For the Minnesota Ojibwe, “wild rice is a sacred gift, and that ... [w]ild rice—manoomin—is central to the Ojibwe creation stories.”\(^4^4\) For Great Lakes Indians, wild rice harvesting was “an important ingredient of social and ceremonial life.”\(^4^5\)

C. Scientific Response to Criticism

Policymakers tend to think of science as inherently good and useful, but (assuming that has any truth at all) Indigenous peoples look at science through the lens of people who “have faced a long history of discrimination, oppression, and genocide.”\(^4^6\) For Indigenous peoples, any policy must take into consideration the collective rights to biological and cultural knowledge – a question that Western scientists rarely consider. As Professor Riley notes, “[t]he philosophical underpinnings of Western law ignore the stake that a group might have in a particular issue, and fail to adequately recognize a group’s communal claim to continued existence.”\(^4^7\)

A major concern for Indigenous peoples related to the research planned on their bodies is as follows:

... the way genetic information can be misused to create and reify population stereotypes. As institutions create distinctions on the basis of genetic predispositions, individuals may be differentially treated, not because of their individual condition, but because of the predispositions attributed to their group.\(^4^8\)

Other commentators have noted that “[r]esearch-related harms to social groups can take many forms, including overt discrimination, stigmatization, unjust distribution of research benefits, and subtle disruptions of existing social relationships within participating communities.”\(^4^9\) It’s the last phrase that catches them the most unawares.

Simply put, scientists and researchers have a difficult time seeing the harm to
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Indian tribes and communities as a whole. They see and understand how individuals can be harmed, but fail to see how a community can be harmed. In their view, "[u]nlike potential harms to individual sample contributors, which can be minimized through the removal of personally identifying information, harms to communities often cannot be easily addressed through anonymization since social identities are important analytic variables in many types of research." And yet, for many scientists, "academic freedom" is all that matters.51

Moreover, none of the ethical guidelines used by researchers in their research on Indigenous communities and peoples "provide[] guidance on how to cope with circumstances when it may be unclear who speaks for a particular aboriginal community. Some aboriginal communities may have multiple representatives, for example, a traditional band council as well as an elected ... government." In addition, "not all the guidelines clearly specify the process of obtaining informed consent from the community."53

Absent consent obtained from an Indian community, "documenting and/or disseminating their knowledge is surely morally wrong."54

D. Known Present and Future Sources of Biopiracy

A few sources of bio-piracy are relatively well documented. One example is sometimes referred to as Big Pharma. These are large multinational corporations that constitute much of the driving force behind historical and continuing bio-piracy. According to Professor Barsh, "Big Pharma is industry jargon for two dozen large, well established, vertically integrated, publicly traded multinational corporations that are capable of taking pharmaceuticals from 'lab' bench to bottle." Despite the concern over multinational corporate bio-piracy, these entities deny they have a significant impact or interest in exploiting Indigenous biological knowledge. According to Dr. Robert Wolkow of Pfizer, the "... hit rate from bioprospecting ... is extremely low, while the transaction costs are quite high." Indigenous peoples reject the assertion that Big Pharma is not much of a threat.57

Other sources that exemplify the threat to Indigenous peoples in this area are universities and their researchers. Activists often cite the greed of the large corporate interests in pressing for the exploitation of Indigenous biological knowledge, but perhaps the larger pressures come from university researchers. Professor Barsh conducted a study of patents and scientific publications and concluded that "academic research in this field is growing, and more of it is being carried out by academics employed by institutions in developing countries."58

Moreover, the University of Minnesota, for example, spent more than $1 million the last five years on its wild rice research. The White Earth Land Recovery Project and several tribes and tribal organizations have registered their opposition to...
the University of Minnesota's continuing research on wild rice. No end to the research is likely, especially given that it is extremely likely that much of the funding for university research likely originates from Big Pharma and the federal government.

II. CURRENT LEGAL PROTECTIONS FAIL TO PRESERVE INDIGENOUS BIOLOGICAL KNOWLEDGE

Biopiracy may continue unabated because current legal regimes offer little or no protection for Indian communities attempting to preserve their Indigenous biological knowledge.

A. Intellectual Property Regimes Fail

The doctrines and rules that protect intellectual property usually fail Indigenous peoples. Indigenous biological knowledge is often held collectively, with individuals rarely "owning" the knowledge. As one intellectual property attorney noted:

Copyright law is premised on individual rights and while it recognizes group rights (such as joint copyright) in certain circumstances, the bundle of rights that accompanies an artistic creation resides with the individual creator. In contrast, traditional or indigenous creations are not considered to be owned by the individual who created them, but rather by the group, tribe, clan, or community. Heritage is communal in nature and the individual's role is as a custodian or steward of such aspect of heritage. Works are produced for the benefit of the traditional group and the entire group, not the individual, controls its use. These individual responsibilities are different than "ownership" in the traditional sense.

Additionally, Dean Suagee noted that, since "the communal knowledge . . . has been handed down through the generations[,]" intellectual property regimes that protect property rights for a limited time do not assist Indigenous peoples.

B. International Law Fails

The United Nations Conference on Environment and Development: Convention on Biological Diversity completed in Rio de Janeiro in 1992 includes provisions intended to preserve Indigenous biological knowledge for the benefit of Indigenous peoples. Article 8(j) states:
Each Contracting Party shall, as far as possible and appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices.  

“Although the United States has ratified the convention, no steps have been taken thus far to implement its provisions on indigenous peoples.” 

In spite of the fact that the intent of this language appears to be to protect Indigenous communities from exploitation, the language itself is ambiguous right from the opening phrase. What does “[s]ubject to its national legislation” mean? Moreover, the description of Indigenous biological knowledge used here—as it is in other statutes and regulations—is indeterminate.

C. Federal Government’s View

The American Indian tribes’ trustee, the United States, has not been leading the charge to defend against the exploitation of Indigenous biological knowledge. The federal government has consistently argued that intellectual property regimes proposed in the international arena to preserve Indigenous biological knowledge should not validate collective rights over individual rights.

In 1999, the Department of Justice Environment and Natural Resources Division asked the Office of Legal Counsel to analyze the effect of the Indian Civil Rights Act on Article 8(j) of the Convention on Biological Diversity. The question presented was whether an Indian tribe could validly restrict or prohibit the disclosure of Indigenous biological knowledge. In the opinion of the Office of Legal Counsel, the answer depended on each tribe’s individual and unique tribal jurisprudence. The Office made no effort whatsoever to research tribal case law, tribal constitutions, or tribal cultures and could come to no concrete conclusion. However, in the view of the authors, conventional, Anglo-American free speech jurisprudence should control. In large part, this Article seeks to examine the application of free speech to such
theoretical restrictions by tribal courts, a step the federal attorneys were unwilling or unable to take.

III. FREE SPEECH IN TRIBAL COURT JURISPRUDENCE

This Part details in chronological order of the eras of Indian civil rights. First, the Article notes that prior to the imposition of the Indian Civil Rights Act by Congress, tribes typically focused more on collective rights than individual rights. After the enactment of the Indian Civil Rights Act, but before the United States Supreme Court decided Santa Clara Pueblo v. Martinez, federal courts took jurisdiction over many civil rights claims arising out of Indian Country and applied the Anglo-American concept of individual rights over collective rights. After Martinez, tribal courts have exclusive jurisdiction over these types of claims. Each tribal court applies civil rights protections in a manner consistent with each tribe's mores and values.

A. The Indian Civil Rights Act

Congress expressly and intentionally codified the unsettled tension between individual rights and group rights in tribal communities by enacting the Indian Civil Rights Act in 1968. Concerned that individual rights were receiving short shrift in tribal courts and by tribal governments, Congress chose to impose a modified form of the Bill of Rights on tribal governments. The tension between "traditional" and "establishment" Indians, for example, became formally codified in the Act — "channelled [sic] into the legal system." In this vein, then, the tribal law of individual rights is entirely foreign, imposed from on high by the federal government — the conqueror, the guardian, the trustee.

Tribal law prior to the Indian Civil Rights Act, generally speaking, was much more oriented toward the rights of the group over the rights of the individual. Professor Riley succinctly described the legal paradigm of Indigenous peoples:

Native peoples . . . understand their place in the world as that of a people born into a network of group relations, and whose rights and duties in the community arise from, and exist entirely within, the context of the group. For these groups, one's clan, kinship, and family identities make up personal identity. The individual sees his/her rights and responsibilities as arising exclusively within the framework of such familial, social, and tribal networks. Rights are part of group membership; individual rights exist in contemplation of how they may be suited to the larger political group.
The kind of coercive, arbitrary, and violent government actions generated by Euro-American governments — *i.e.*, imprisonment, execution, police brutality, denial of governmental benefits and services, eminent domain, interrogation, entrapment, surveillance, quartering of soldiers, and so on — were rarely, if ever, perpetuated by Indian communities. Nevertheless, with the imposition — again, by the dominant government — of hierarchical tribal governments first, through the creation of leadership roles for the purpose of executing treaties and, second, through the creation of tribal governments as we know them today under the Indian Reorganization Act, the coercive, arbitrary, and violent actions inherent in Euro-American governments began to manifest themselves in tribal governments. In short, ICRA is a half-baked federal compromise solution to a problem created by a series of previous half-baked federal compromise solutions.

Scholarship contemporaneous to the enactment of the Indian Civil Rights Act focused much attention on the free speech rights of tribal members and nonmembers as regulated, qualified, or restricted by tribal governments. Some commentators argued strongly for "protection of the 'outside agitator'" in order to preserve pan-tribal "militant Indian movements." Others argued against tribes that imposed criminal penalties on individuals for charges such as "spreading malicious gossip" and "witchcraft." One critical argument was that individual Indians should be allowed greater leeway to criticize their government. Other scholars argued, "The wisdom of affording [freedom of speech] protection to dissident members of closely knit tribes is questionable. Indian tribes being more like families than governmental units, the risk exists that barriers raised against 'intra-family' discipline could well lead to a further breakdown of tribal society . . ." However, this scholarship focused only on the political implications of free speech in tribal societies.

But ICRA allows Indian tribes to decide for themselves what individual rights mean in each tribal community. The United States Supreme Court eliminated any chance for federal court review of tribal government actions under ICRA in 1978 (after a decade of a mishmash of federal court decisions reviewing tribal government actions). Moreover, "the legislative history makes clear that Congress found it necessary to impose a specially designed set of restraints upon tribal government ... operating within the structure of tribal government." One influential commentary on the legislative history of ICRA written by Harvard law students sees "a literal reading of some of the provisions to mean 'the same standards as applied to state and federal governments' would result in seriously undermining the tribes' cultural autonomy, in some case threatening the tribes' capacity for survival in the long run." Prior to the *Martinez* decision, Alvin Ziontz pleaded with federal judges to recognize "[t]he need for Indian communities to maintain their own values and concepts of fairness and justice to the fullest extent." The Harvard Note agreed, contending that, "[i]n
construing the statute, courts should remember that Congress has strongly supported
the policy of allowing Indian tribes to maintain their governmental and cultural
identity." Congress ultimately did not intend for ICRA to be a tool of assimilation.

Despite these warnings and pleas, federal courts gave short shrift to tribal
cultures in federal court decisions prior to Martinez relating to free speech rights and
tribal governments. For example, in Dodge v. Nakai,94 the court took jurisdiction and
ruled that the Navajo Tribe's expulsion of an attorney in charge of Dinebeiiina Nahilna
Be Agaditahe, Inc., the reservation's legal aid office, violated the attorney's freedom of
speech and constituted an unlawful bill of attainder.95 While the court acknowledged
that the attorney had actually laughed at tribal leaders and tribal elders during a critical
tribal leadership meeting - behavior the defendants argued was full of "ridicule and
scorn" and "so obnoxious as to provoke an assault" by a tribal elder96 - the court ruled
that the attorney's rights under ICRA had been violated and vacated the tribe's
decision. Alvin Ziontz argued persuasively that the court's decision smacks of
ethnocentrism:

Unfortunately, the court gave no consideration to the significance such
an act may have had to Indians. For a white man who had previously
placed himself in defiance of tribal government to enter into the seat of
government of that tribe, on their reservation and to laugh scornfully in
the face of tribal government, may, within the culture of the Navajo
tribe, constitute a grave transgression.97

Ziontz concluded that "[t]he actions of the federal court in deciding that banishment
was 'unreasonable' may reflect either mere ignorance of tribal values or a decision to
reject those values in favor of Anglo-Saxon standards of acceptable conduct."98

Later, in Big Eagle v. Andera,99 the federal courts took jurisdiction under the
habeas provision of ICRA100 of a claim that a tribal law prohibiting disorderly conduct
had been used to violate the free speech rights of tribal members.101 The Eighth
Circuit first opined that the disorderly conduct statute appeared - "if tested by
standards applied to communities outside an Indian reservation" - broad enough to
include the exercise of free speech,102 but remanded the case back to the district
court.103 The district court then applied to the tribal ordinance standards that would
normally be applied off the reservation, noting that "[t]he tribal court is not a court of
record."104 Judge Bogue's district court found that the tribal court had allowed the
disorderly conduct statute to be applied to individuals who merely swore at police
officers or merely demanded their rights.105 The court held that since the ordinance
was used as a "catch-all" where "a confusing variety of words, acts, and human
conditions have been found to be within its prohibitions," the ordinance was void for
vagueness.106 The court also held, applying Anglo-American standards of free speech,
that the tribal court had not "required a finding that the speech was likely to arouse anger likely to cause physical retaliation."

As such, the court declared that the ordinance violates the free speech guarantees of ICRA. The federal courts did not seek an opinion from the tribal court. The federal courts frankly did not care what the opinion of the tribal court would have been. The federal court in *Big Eagle II* was hell-bent to apply non-Indian law to strike down a tribal ordinance.

Another example of federal courts applying Anglo-American conceptions of justice to tribal communities is *Janis v. Wilson*, yet another decision from Judge Bogue. In *Janis*, several tribal employees who had been caught protesting against Dick Wilson's tribal government while on the clock argued that the tribal ordinance prohibiting such conduct violated ICRA's free speech guarantees. Judge Bogue first wrote what appears to be mere boilerplate regarding the differences between ICRA's free speech guarantee and the First Amendment: "this Court is of the opinion that the meaning and application of 25 U.S.C. § 1302 to Indian tribes must necessarily be somewhat different than the established Anglo-American legal meaning and application of the Bill of Rights on federal and state governments." Judge Bogue nevertheless relied exclusively on First Amendment jurisprudence in deciding that the ordinance did not violate the free speech guarantees of ICRA.

Federal court decisions imposing Anglo-American conceptions of individual rights on tribal communities such as *Dodge, Big Eagle, and Janis* are now rare, with minor exceptions.

B. Tribal Law

Tribal law develops daily and, since the federal courts will generally no longer hear civil rights claims brought under ICRA, it is appropriate to focus on modern tribal law relating to free speech.

1. Tribal Constitutions

Many tribal constitutions guarantee free speech rights in varying forms. Some tribes guarantee free speech even without the "state action" requirement imposed by the First Amendment's language, "Congress shall make no law . . . ." The Confederated Tribes of Warm Springs Reservation of Oregon provides, "[a]ll members of the Confederated Tribes may enjoy without hindrance, freedom of worship, speech, press and assembly." The Comanche Indian Tribe's constitution has nearly identical language: "[a]ll members of the Comanche Indian Tribe shall enjoy without hindrance freedom of worship, conscience, speech, press, assembly and association." The Sisseton-Wahpeton Sioux Tribe's constitution similarly states, "no person shall be denied freedom of conscience, speech, association, or assembly . . . ." Some tribes
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limit this protection to tribal members. The Blackfeet Constitution states, “[a]ll members of the tribe may enjoy without hindrance freedom of worship, conscience, speech, press, assembly, and association.”

Other tribal constitutions regulate only governmental conduct that would otherwise restrict speech. The Chickasaw Constitution provides, “[e]very citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech, or of the press.” Others substantially mirror the provisions contained in the Indian Civil Rights Act, while other tribes adopt ICRA’s provisions. Many tribal constitutions do not have constitutional protections relating to freedom of speech at all.

Each tribe is unique and it follows that each tribe’s speech rights jurisprudence will be different. As such, it is necessary to analyze what tribal court opinions exist regarding free speech claims. A review of tribal court decisions that are readily available on the subject of free speech in tribal law would be short but essential.

2. Tribal Court Jurisprudence & Constitutional Law

The real question, then, is how tribal courts will interpret these constitutions and statutes that facially restrict the speech rights of tribal members and others for the purpose of preserving tribal culture.

Tribal courts have generally interpreted the provisions of the Indian Civil Rights Act in accordance with the method recommended in 1969 by the leading commentary on the Act: “[u]nless the record shows a willingness to modify tribal life wherever necessary to impose ordinary constitutional standards, courts should take this legislation as a mandate to interpret statutory standards within the framework of tribal life.” One tribal court follows a principle that, where no tribal “custom or tradition has been argued to be implicated . . . , [tribal courts] will look to general U.S. constitutional principles, as articulated by federal and [state] courts, for guidance . . . ”

The most critical element that tends to guide tribal court analysis of fundamental individual rights is whether the activity at issue is a distinctly Anglo-American construct versus a traditional or cultural construct. For example, tribal courts are likely to apply federal constitutional law to decide a wrongful discharge claim or an unlawful search and seizure claim as opposed to a tribal membership claim.

In a theoretical circumstance contemplated here, what should be the standard of review by a tribal court determining the constitutionality of a tribal ordinance restricting the right of tribal members and nonmembers to export indigenous biological knowledge? This question necessarily implicates the more traditional and cultural law
analysis. In other words, federal and state constitutional law based on Anglo-American constructs is less likely to be persuasive to tribal courts. It is not clear at all whether a tribal court would articulate a two- or three-tiered scrutiny analysis of governmental action restricting a fundamental right. Each court can come to its own conclusion and for different reasons.

Alvin Ziontz argued in 1975 that in analogous circumstances (where traditional and customary social and legal questions arise) the standard should be the rational basis test. The standard of review may also depend on whether the individual involved is a tribal member or a nonmember. One commentary suggested that for nonmembers, the standard of review would be lenient: “an outsider seems to have minimal acknowledged interests in participating in or determining the development of the tribe.” While at least one tribal court has analyzed a free speech rights claim using the Anglo-American strict scrutiny/intermediate scrutiny/rational basis test continuum, it is no guarantee that tribal courts would follow this Anglo-American construct at all.

The following subparts describe tribal court cases exemplifying the broad spectrum of tribal courts’ choice of law (federal, state, tribal law, or a combination thereof) and the application of that law.

a. Applying Federal Law

Since most free speech claims heard in tribal courts arise during the course of employment or in the exercise of political rights, tribal courts most often apply federal law as persuasive authority to decide these cases. In LaPorte v. Fletcher, the tribal court rejected a freedom of speech challenge to an employee’s demotion from chief of police and his challenge to a tribal statute that prohibited employees from making statements to the media regarding issues under negotiation. The employee as chief of police had allegedly stated to a local newspaper that the tribe had entered into an agreement with a local sheriff’s department when in fact the tribe had not. Relying on several federal cases, the court upheld the tribal statute and the demotion. Most employment cases alleging free speech violations are dismissed by tribal courts for procedural reasons. This opinion provided little or no analysis of the tribal-specific circumstances that occasioned the enactment of the restriction in the first place, information that would have been useful to analyzing the circumstances in the manner prescribed by the cases cited. However, one of the cases relied upon heavily by the tribal court was Gonzalez, where the Seventh Circuit held that speech made within the context of a citizen’s employment as a police officer rarely is entitled to First Amendment protection, strongly suggesting that the tribal court did not see a valid free speech claim at all. As such, the standard of review applied by the court in LaPorte was generously in favor of the tribal employer.
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In instances where an individual's speech rights as a candidate for tribal election are implicated, at least one court applied a sliding scale standard of review, choosing to apply intermediate scrutiny where the tribe imposed nondiscriminatory restrictions on candidate eligibility imposed to avoid a chaotic tribal caucus process. In *Rave v. Reynolds*, both the tribal court (Rave I) and the tribal supreme court (Rave II) relied exclusively on federal constitutional law to determine the constitutionality of a tribal statute that restricted the right of tribal members to attend more than one electoral caucus. Even an unknowing violation of this rule by an individual other than an electoral candidate resulted in the removal of the candidate from the ballot. Relying on two United States Supreme Court cases that generally discussed the right to freedom of association in the national electoral context, the tribal court struck down the tribal statute. On appeal, the tribal supreme court at least raised the possibility that tribal law or “special facts in the Winnebago tribal community” might counsel in favor of rejecting the application of Federal Constitutional law, but no party chose to assert alternative authority. The court then compared the tribal constitutional provision to the Indian Civil Rights Act provision dealing with free speech and concluded that “the language of these rights is virtually identical to the rights protected against federal governmental action under the first amendment to the United States Constitution.” The tribal supreme court adopted the federal “sliding scale of scrutiny in election rights cases involving the right of political association depending on whether the election regulations in question severely burden political association rights or merely constitute ‘reasonable nondiscriminatory restrictions.’” As such, the appellate court applied “intermediate scrutiny,” which required the government to prove an important governmental interest to justify the tribal statute. Applying the “sliding scale” test and then “intermediate scrutiny,” the court upheld the constitutionality of the tribal statute. The court noted that the purpose of the rule was to prevent “the then common practice of tribal members going from caucus to caucus, thereby creating a disorderly election process.” Since voters could still write-in the candidate removed from the ballot, the court held that the restriction was not severe enough to render the statute unconstitutional. The tribal court adopted federal constitutional law as an analog but recognized the particular tribal election circumstances that provided the requisite important governmental interest.

Tribal courts confronted with the claim that a tribal criminal statute had been used to restrict the speech activities of individuals apply the federal void-for-vagueness doctrine. In *Hopi Tribe v. Lonewolf Scott*, a case involving claims analogous to the claims brought in *Big Eagle v. Andera*, the Hopi Tribal Court upheld a tribal ordinance prohibiting “injury to public property.” In that case, the defendants argued, as the *Big Eagle* defendants argued, that the tribal law enforcement officials used the statute as a catch-all that operated to “include their alleged criminal activity
b. Applying State Law

Occasionally, tribal courts apply the law of the state where the tribe is located as persuasive authority. In *Chase v. Mashantucket Pequot Gaming Enterprise*, the court warned the tribal gaming enterprise that it should be "extremely careful when seeking to regulate their employees’ off-duty conduct so as to not infringe upon the employee’s right to free speech." The court cited a Connecticut statute as an example of a law that would support an employee’s right to off-duty free speech as long as that exercise "does not substantially or materially interfere with the employee’s bona fide job performance...." Like the *LaPorte* court, this opinion provided little information useful in analyzing the purposes of the restriction. Another case, *Gwin v. Bolman*, exemplified a circumstance where a tribe chose to import state law into its election laws, and the tribal court applied state and federal free speech jurisprudence in construing the statute.

Other cases exemplify a tribal court’s nod to federal law, but where the results change depending on the sometimes unspoken influence of tribal customary or traditional law. The standard of review changes depending on the tribe’s collective interest, as opposed to the tribe’s governmental interest. Federal courts, in contrast, are unable and unqualified to determine the collective interest of the American public, whereas tribal courts are in the unique position, not only to have authority to invoke collective rights, but the capability to do so as well.

Tribal courts apply a reduced standard of review on restrictions on the behavior of elected tribal leaders. One case, *Brandon v. Tribal Council*, is an example where a tribal court relies almost exclusively on federal law but issued an opinion contrary to what federal constitutional law scholars would have expected in an analogous federal case. In *Brandon*, the tribal council suspended one tribal council member who had made a “vulgar” statement during a public meeting for three months in accordance with a tribal statute that prohibited tribal council members from behaving in a manner that would bring discredit or disrespect to the tribe. The tribal court noted that tribal leaders had a restricted right of expression, stating, "Being a tribal councilmember [sic]
is a privilege, not a right, and councilmembers should be expected to conduct themselves at a higher level of restraint than other tribal members." The court adopted a form of the strict scrutiny standard of review, find that "[w]hen there is a valid and compelling reason, a governmental body is free to ban certain expressions or conduct on the part of its citizens. These reasons may include prohibiting obscenity or ‘fighting words’ or phrases likely to result in a violent reaction by the person addressed." The court then found a “compelling” reason for the statute, based in part on tribal traditions:

The Grand Ronde Tribe has compelling reasons to have interpreted the ordinance so as to limit the vulgar language that may be uttered by councilmembers [sic] in public...[T]he Tribe has the right to expect its councilmembers to conduct themselves in public with dignity and respect, and refrain from using words or phrases that a normal tribal member is privileged to use. Secondly, the type of language used by Mr. Brandon was arguably ‘fighting words’ that were likely to create a violent or hostile situation, as indeed was created here. The tribe has a right to expect its tribal councilmembers to refrain from using such language so as to avoid fights or other altercations. Finally, the Grand Ronde Tribe has a vested interest in protecting its reputation throughout the community.

The Brandon court created a doctrine of free speech that applied only to the tribe’s elected officials. Finding that preserving the reputation of the tribe through the regulation of the expression of the tribe’s leaders was a compelling governmental interest, the court saw no need to engage in discussing whether the statute was narrowly tailored to accomplish that goal while preserving free speech rights as much as possible, unlike the Rave II court. A tribe’s reputation in business and intergovernmental negotiation is directly related to the quality and behavior of its elected leaders. As Professor Mark Rosen noted, the court appeared to be adopting an analog of the federal doctrine that validly restricts the expression of federal employees. But the tribal court issued a decision that appeared to strongly imply the critical role that tribal leaders play in representing the tribe in tribal meetings, in government-to-government negotiations, and in business relationships.

The factual converse of the Brandon decision is likely Flute v. Labelle. There, an elected tribal leader who was the subject of an unflattering letter to the editor of the local newspaper sued the author of the letter for defamation. The tribal court applied federal and South Dakota constitutional law in analog and found that the plaintiff’s petition met the requirements of libel per quod. Since the plaintiff could not show actual damages, the court awarded only nominal damages and ordered the

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defendant to “write a retraction letter to the Tribal newspaper correcting the false impression she left with readers....” The court noted the political history of the defendant in particular, stating that she had been “one of many persons who several years ago engaged in a protest of tribal council action by occupying the Tribal Council chambers after a Council meeting ended.” In short, the court applied federal and state common law in analog that established the defendant’s culpability, but applied that law to fashion a tribe-specific remedy that severely limited the defendant’s liability.

In a case with many of the same circumstances, Chavez v. Tome, the Navajo Nation Supreme Court affirmed a trial court’s decision finding liability in libel for the publication of false statements about an attorney employed by the Navajo Nation. Unlike the Sisseton-Wahpeton Oyate Court in Flute, the Navajo Nation applied federal free speech jurisprudence to prohibit the lower court from ordering the publisher from printing a retraction.

d. Applying Tribal Traditional or Customary Law

Other tribal courts often express no hesitation in examining a free speech claim using traditional or customary law, even in an employment context. The Navajo Nation Supreme Court in Navajo Nation v. Crockett held that Navajo courts apply “Navajo common law to determine whether an individual’s right to free speech has been violated.” The general rule is:

[Navajo common law] that an individual has a fundamental right to express his or her mind by way of spoken word and/or actions. As a matter of Navajo custom and tradition, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.

The Navajo court discussed how Navajo customary law includes certain restrictions on free speech, such as, “[f]or example, on some occasions, a person is prohibited from making certain statements, and some statements of reciting oral traditions are prohibited during certain times of the year.” Additional restrictions include how speech should be delivered and, in conflict situations, to whom:

Furthermore, speech should be delivered with respect and honesty. This requirement arises from the concept of k’e, which is the “glue” that creates and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and
arguments be resolved by “talking things out.” This process of “talking things out,” called hoozhoojigo, allows each member of the group to cooperate and talk about how to resolve a problem. This requirement places another limitation on speech, which is that a disgruntled person must speak directly with the person’s relative about his or her concerns before seeking other avenues of redress with strangers.¹⁸⁵

Applying these rules to a circumstance where a Navajo government employee has a complaint with a supervisor, the Navajo court invoked “the Navajo common law of nalyeeh” and advised employees to “not seek to correct the person by summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by ‘talking things out.’”¹⁸⁶ The court concluded that if this process failed, the employee could then resort to speaking to strangers, i.e., by accessing “an internal employment grievance process.”¹⁸⁷ The court noted that, even within the employment grievance process, “the traditional rules of respect, honesty, and kinship apply.”¹⁸⁸

In Crockett, the Navajo Nation fired an employee for, as alleged by the employee, speaking at a government meeting about alleged government misconduct and distributing documents that supported the allegations of government misconduct.¹⁸⁹ The court held that this speech was protected by Navajo law by apparently carving a “public concern” exception to the law of hoozhoojigo and nalyeeh.¹⁹⁰ While not explicitly noting an exception, the court noted that “an initial inquiry with management to ‘talk things out’ is [merely] encouraged,”¹⁹¹ not mandated. The court also stated, “When an employee gives a statement before an official government committee, he or she speaks in a context that is inherently public in nature. This includes any documents which the employee may distribute.”¹⁹² As such, though it appeared that the employees had not specifically attempted to ‘talk things out’ prior to surprising the governmental body in a public meeting with the allegations, the court still found the speech protected, in large part, because of the importance of the information to the public:

This Court finds the speech in question was “a matter of public concern.” At the meeting, the employees expressed safety and environmental concerns, undue interference by the Bureau of Indian Affairs in P.L. 96-638 contracts, and allegations and misconduct on the part of ... management. The disclosure of misconduct or malfeasance by a government entity is a matter of public concern, as are questions of effectiveness and composition of the ... management board. Likewise, safety and environmental concerns have the potential to directly impact the general public, and therefore, are a matter of public interest.¹⁹³
In this case, the Navajo court came to the same conclusion an Anglo-American court likely would have reached, but took a far different route. By comparison, in a much earlier case, a Navajo court of appeals followed federal law exclusively in striking down a tribal statute prohibiting “unlawful assembly.”

Some tribal courts provide additional tribe-specific reasons for restricting or otherwise rewarding speech. In *Garcia v. Greendeer-Lee*, the Ho-Chunk Supreme Court rejected a claim by a nonmember employee of the Ho-Chunk Nation that the tribe’s personnel policies violated her right to choose her own religion. The employee, a Jehovah’s Witness, sought paid leave for the time she attended a religious event. The tribe’s Waksig Wogsa Leave Policy allowed for paid leave for attendance of certain tribe-specific religious events, but only unpaid leave for other events. The court majority found that the employee was not prohibited from participating in her religion and rejected the claim. The interesting portion of the opinion came in a concurring opinion of the court’s chief justice. Interpreting the phrase, Waksig Wagsa, to mean “Indian Ways,” and noting that the purpose of the leave policy was to “provide a means in which enrolled Tribal member employees can practice religion, culture and tradition ... without the threat of losing a job or losing pay,” finding that the practice of these “Indian Ways” is both “the essence of tribal sovereignty” and “the backbone of cultural support that makes us distinctly Ho-Chunk,” the chief justice had no problem rejecting the constitutional challenge. Here, the chief judge viewed tribal member religious activities as fundamental to the survival of the tribe and its sovereignty, surely a compelling governmental interest.

In short, tribal courts have no obligation to apply federal and state constitutional law as it relates to free speech. Some tribal courts apply strict, intermediate, or rational basis scrutiny, while others do not. Some courts rely heavily on tribal customary or traditional law while others rely less. However, depending on the strength or intensity of the customary or traditional interest in the free speech restriction, tribal courts are more likely to invoke tribal customary or traditional law. If a legal dispute involving a uniquely tribal practice, tradition, art, or custom arises, it is far more likely (and reasonable, if not desirable) for a tribal court to apply traditional or customary law.

IV. PRESERVATION OF INDIGENOUS BIOLOGICAL KNOWLEDGE AS A COMPPELLING OR IMPORTANT TRIBAL GOVERNMENT INTEREST

A. Theoretical Tribal Enactments to Limit Export of Indigenous Biological Knowledge

At least a few researchers and scientists acknowledge the “the history of oppression and mistrust to which Native peoples accurately refer when considering
new relationships with Euro-Americans. Historically, altruism has not proven to be a two-way street in many Native Americans' interactions with Euro-Americans.\textsuperscript{202}

The Governor of the A:\shiwi (Zuni Indian Tribe) argued in 2002 that the "Zuni people rely on ... the Zuni Tribal Council[] to guide, direct and mediate all facets of our Zuni Indian Nation. [T]he tribal council is entrusted with the protection and welfare of our people, resources, and lands."\textsuperscript{203} The Zuni Pueblo, for example, asserts that "the tribe owns the data, results and manuscripts prior to publication or presentation."\textsuperscript{204}

The most developed proposal to govern the export of Indigenous biological knowledge is entitled, "Model Tribal Research Code\textsuperscript{205} (hereinafter Code). Section 006 of the Code would criminally prohibit research "with respect to materials wherever located as to which the ____ Tribe has a legal or equitable claim of intellectual or cultural ownership...."\textsuperscript{206} While this Code provision appears to be patently void for vagueness,\textsuperscript{207} it also raises a question germane to the issues raised in this Article – whether such a provision would be violative of person's freedom of speech under tribal law.

Tribal legislatures could also enact much stricter prohibitions against the disclosure, dissemination, or export of Indigenous biological knowledge from Indian communities by both tribal members and nonmembers.\textsuperscript{208} They could also enact statutes calling for the removal of nonmembers from the reservation for violations of tribal law. In fact, as Alvin Ziontz noted, "[T]he exclusion power may well be the only way a tribe can deal with a non-Indian whose conduct is offensive, particularly if it has no jurisdiction over non-Indians in tribal courts."\textsuperscript{209}

Some commentators have cautioned that tribal restrictions on the disclosure and publication of Indigenous biological knowledge that "the effort to censor the date and the commentary that flow out of scientific research is generally misbegotten."\textsuperscript{210} Censorship rightfully brings up the question of whether scientists and other researchers have a First Amendment right to publish and disclose their findings. This Article, however, is concerned solely with the question of whether an Indian tribe can lawfully prohibit or restrict the flow of Indigenous biological information – essentially a restraint on free speech.

According to the Office of Legal Counsel at the Department of Justice, the answer to whether tribal restrictions on the disclosure of Indigenous biological knowledge are unconstitutional depends on several factors:

In particular, the analysis could turn on who holds the information that the tribe seeks to protect; whether those who hold the information have a particular relationship of trust with the tribe; the magnitude of the tribal interest underlying the tribe's effort not to disclose the information; and whether the information in question can be viewed as
tribal property under an intellectual property rights regime that is otherwise consistent with applicable law.\textsuperscript{211}

This legal opinion presumes too many facts to be persuasive, including a presumption that Indian tribes are analogous to municipal governments or corporations.\textsuperscript{212} But the opinion correctly concludes that only each individual tribe can make a determination as to the constitutionality of its statutes restricting the export of Indigenous biological knowledge.

B. Application of Tribal Law

The question, then, is do tribal governments have a compelling, important, or rational governmental interest in restricting the speech rights of tribal members and nonmembers?

1. Collective Identity as a Compelling Interest

Indigenous tribal governments can make a very strong case that the preservation of Indigenous biological knowledge is an extremely compelling governmental interest. As Professor Riley established, "tribal people ... define their individual identity largely based on their identification with the group. ... For individuals within these distinct groups, flourishing in the world as a person is intimately related to cultural identity."\textsuperscript{213} Relinquishing the group rights over Indigenous biological knowledge in favor of the individual right to export (and exploit) such knowledge would portend the end of a tribe's identity and even existence. Professor Riley continues:

But identity for tribal peoples reaches further, to form a forceful nexus between the group and its cultural property. For a tribe, the authority to control that property is essential for group survival, as it links its very existence to group creations. Cultural property situates indigenous people[s] in a historical context, tying them to a place from which they came and the point of their creation. Tribal members become linked to the goods of the tribe – turtle rattles, trickster narratives, religious bundles – often resulting in a commitment to the objects outside of themselves; this commitment is the Native peoples' definition of what life is about.\textsuperscript{214}

Professor Riley's argument applies to Indigenous biological knowledge as well as to cultural property, establishing the key relationship between community identity and group rights and how individual rights often have lesser importance.
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Professor Riley’s view is consistent with the point of view of Indians and tribes. Indian tribes are much more than merely governments. Tribes are, without limitation, social organizations, family structures, community social control mechanisms, and protectors of tribal culture, tribal law, tribal sovereignty, both individual and collective fundamental rights, and both individual and collective property rights. And because tribal members have greater and greater confidence in and expectations of their tribal governments, these additional responsibilities acquire a greater importance.

Of importance also is the fact that tribal cultures are usually oral cultures. Restrictions on free speech take on a different meaning in this mixture of group rights over individual rights in predominantly oral cultures. Professor Barsh notes the critical relationship between speech and tribal culture and identity:

The role of language in caring for country cannot be over-stated. Ecological knowledge, the stories embedded in places, place-names, and their meanings, and the key logical relationships between place-names, family names, family chronicles, ceremonies, and ecological processes – are documented in indigenous peoples’ languages.

On the surface it would seem that the restriction of speech in an oral culture would be anathema, but the link between the group right to Indigenous biological knowledge to preserve the identity of the community and the method of communication is actually a strong argument for limiting the export of such speech, communication, knowledge, and so on. Certain tribal ceremonies are linked to very specific landmarks, landmarks often open to the public, so much so that the tribe has a very strong interest in keeping the ceremonies practically secret. Restrictions on the exportation of this knowledge are essential to its preservation. Tribal restrictions on the exportation of this type of knowledge are essential to tribal governments, especially because federal and state laws simply do not cover the contingencies of non-Indian tourism and scholarly research. Simple curiosity about Indigenous knowledge may be the tool that ultimately destroys that knowledge.

This interest is consistent with other speech restrictions imposed by tribal governments. The charge of “spreading malicious gossip,” for instance, is to prevent “the ever present possibility of divisive factionalism breaking out between members of a close homogeneous group.” “Social harmony,” then, is a compelling government interest for Indian tribes. One commentator in favor of advancing a free speech agenda in tribal law grudgingly acknowledged, “The amount of social disorganization among Indian groups appears to rise in proportion to the breakdown of social order within the tribe.” More fundamental than simply preserving civility is the fact that Indian tribes are far more than mere governments, as noted earlier.
Indian tribes maintain an extremely strong interest in maintaining traditional ways. Just as the high rate of suicide of young Indians removed from the reservation to grow up in non-Indian homes and communities suggests, tribes have a compelling interest both in preserving tribal culture and knowledge for living members, but they also have a compelling interest in preserving tribal culture and knowledge for future generations.

2. Intergenerational Justice as a Compelling Interest

Preserving Indigenous biological knowledge supports a second compelling or important tribal governmental interest — “intergenerational justice.” In a way, both past and future generations have standing to assert rights in tribal courts (through the spokespersons of the present) and “[p]reserving the divine nature of cultural works and sheltering them from the market demonstrates Indian respect for those who have walked on, and sets the work aside for use and honor by future generations.”

There is a compelling governmental interest in restricting the export of Indigenous biological knowledge. While the paradigm of group rights over individual rights rarely appears in modern tribal court decisions, in this area of the law so inherently related to the future of Indian tribes and the identity of individual Indians, I foresee tribal courts upholding the constitutionality of these theoretical restrictions.

The establishment of these compelling (or important) tribal governmental interests would “necessarily imply an extremely narrow application of the Indian Civil Rights Act where there is a showing of countervailing customary tribal values, beliefs or standards[].” Alvin Ziontz reached a similar conclusion two decades ago concerning the power and right of tribes to exclude certain persons. He would impose a rational basis test: “Tribes should have the right to exclude outsiders under appropriate ordinances with standards bearing a reasonable relationship to the preservation of peace and harmony within the community.”

As a matter of history, “[a]n Indian reservation must be seen as an ethnic community banded together under the pressure of being surrounded by an alien society, given ownership of compact geographical areas, and allowed a great measure of self-government. Separation has been fostered by the desire to retain—and has in turn fostered the retention of—a traditional culture.” Given the enormous and quantifiable destruction visited upon Indian tribes that suffer the loss of their culture, it is often the only acceptable course for a tribe to take action to prevent this loss and it obliges tribal courts to uphold that choice.
V. CONCLUSION

Whether a tribal law prohibiting the export of indigenous biological knowledge from Indian Country is viable or wise remains to be seen and is outside the scope of this paper. If nothing else, this Article is intended to reinvigorate debate and analysis on the subject of free speech in tribal law, a subject that has had little discussion in the scholarly literature since the years immediately following the enactment of the Indian Civil Rights Act in 1968.

Migwetch.

Notes

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2. See id. at 120 (“They wanted our blood. They would always want our blood.”).
4. VINE DELORIA, JR., Anthropologists and Other Friends, in CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 78, 78-100 (1969) (discussing the impact of the techniques used by anthropologists in studying Indigenous peoples).
7. U.S. CONST. art. I, § 8, cl. 3.
Communities, 18 CARDOZO ARTS & ENT. L. J. 175, 214-22 (2000).

10. See Dean B. Suagee, The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity, 31 ARIZ. ST. L.J. 483, 513-31 (1999) (arguing that both the Endangered Species Act and the National Historic Preservation Act could be used to ensure the cultural survival of Indigenous peoples).


20. Ragavan, supra note 11, at 4 (footnotes omitted).


23. See Dutfield, supra note 11, at 275 ("Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge indigenous people acquire from settlers and industrialized societies.").

24. For an international perspective, see Biodiversity Forum Wants Indigenous Peoples' Rights to be Respected, BERNAMA DAILY MALAYSIAN NEWS, Feb. 11, 2004, available at 2004 WL 56873991; Nancy Kremers, They Thought (Dreamed, Drew, Sang, Found, Grew, Built, Created) It First: Indigenous Peoples Push to Protect Their Traditional Knowledge, Genetic
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27. Id. at 146.


30. Thanks to Bobbi Rhader for mentioning these facts.

31. Dutfield, supra note 11, at 278.

32. See Nelkin, supra note 25, at 121 (citing Margaret Lock, Genetic Diversity and the Politics of Difference, 75 CHI.-KENT L. REV. 83, 91 (1999)).

33. Id. at 127.

34. Id. (quoting Debra Harry, Tribes Meet to Discuss Genetic Colonization, 11 GENEWATCH 16 (1999)).

35. Id. at 128.


39. Id. at 385-86.

40. See LaDuke, supra note 28, at 28.

41. Id.

42. Id.; see also Ron Seely, Science Threatened Tribes “Sacred Plant”; Native Americans Fear Bio-Engineering of Rice Will Change Their Food Sources, A Cultural Icon, WIS. ST. J., Oct. 9, 2003, at A5.


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44. Id. at 147.
46. Riley, supra note 9, at 202.
47. Id. at 203.
49. Sharp & Foster, supra note 36, at 167 (first footnote omitted) (citing Morris W. Foster & Richard R. Sharp, Genetic Research and Culturally Specific Risks: One Size Does Not Fit All, 16 TRENDS IN GENETICS 93 (2000)).
50. Sharp & Foster, supra note 36, at 167
51. See Mertens, supra note 45, at 11.
52. Weijer & Anderson, supra note 37, at 185.
53. Id.
54. Dutfield, supra note 19.
55. Barsh, Pharmacogenomics and Indigenous Peoples, supra note 12, at 365 n. 2.
58. Id. at 154.
59. LaDuke, supra note 28, at 27.
60. See White Earth Land Recovery Project and Coalition Petition in Support of Stopping Wild Rice Bio-Piracy, Model Res. (2002); Fond du Lac Reservation Business Committee Res. # 1143/02 (2002); Res. for Iron Range Area Council for Native Americans (2002); 1854 Authority Board of Directors, Bois Forte, Res. # 04-19-02A (2002); Upper Sioux Community Board of Trustees, USC Res. No. 41-2002 (2002).
61. Grant, supra note 22, at 476.
62. Suagee, supra note 10, at 512.
63. See id. at 512.
64. 31 I.L.M. 818 (1992).
65. Id. at 825-26.
66. Barsh, Grounded Visions, supra note 12, at 148; see also Hartnick, supra note 56, at 3 (“181 nations have signed the 1992 Convention on Biological Diversity. The United States signed but has not ratified.”).
67. Hartnick, supra note 56, at 3.
68. Id.
69. Suagee, supra note 10, at 502 (footnote omitted).
72. See id. at 2.
73. Id. (“It is . . . difficult to predict whether conventional free speech principles will guide the inquiry [in tribal courts] . . . ”).
74. Id. (“[I]n our view, the better reading if the ICRA is that such principles should apply.”).
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77. Constitutional Rights of Indians, 25 U.S.C. § 1302. The text of this section is as follows:

No Indian tribe in exercising powers of self-government shall –

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

78. de Raismes, supra note 76, at 77.
79. See id. at 75 (noting the tribal opposition to the Indian Civil Rights Act, led by the National Congress of American Indians and the National Indian Youth Council); id. at 77 (“There can be no more repugnant act of cultural imperialism than the imposition of alien values on another people . . . .”).
80. E.g., Donald L. Burnett, Jr., An Historical Analysis of the 1968 'Indian Civil Rights' Act, 9 Harv. J. Legis. 557, 578 (1972) (“Because the individual’s sense of well-being is based in part on the security of the tribe, an Indian will frequently react more strongly to an attack on tribal institutions than to an attack on his own individual rights or powers.”) (footnote omitted).
81. Riley, supra note 9, at 203 (citing Robert Clinton, The Rights of Indigenous Peoples As Collective Group Rights, 32 Ariz. L. Rev. 739, 742 (1990)).
82. de Raismes, supra note 76, at 80; see Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1364 (1969) [hereinafter Harvard Note].
84. See Fretz, supra note 83, at 610; and see Harvard Note, supra note 82, at 1363-64.
86. See Burnett, supra note 80, at 577-78.
89. Id. at 6 (emphasis in original).
90. Harvard Note, supra note 82, at 1355 (quoting S. REP. NO. 90-841, at 6, 10-11 (1967)).
91. Ziontz, supra note 88, at 47.
92. Harvard Note, supra note 82, at 1355.
93. See id. at 1359.
95. See id. at 32-34.
96. See id. at 30-31.
98. Id. at 51.
101. See Big Eagle I, 508 F.2d at 1294-96.
102. Id. at 1296.
103. See 508 F.2d. at 1297.
105. See id. at 130.
106. Id. at 131.
107. Id. at 132.
108. See id.
110. 385 F. Supp. at 1147; for more information about the notorious regime of Dick Wilson, see PETER MATTHEISSEN, IN THE SPIRIT OF CRAZY HORSE (1983).
112. Id. at 1150.
113. See id. at 1152 ("[T]his Court is of the opinion that the First Amendment imposes no greater restraint on Indian tribes through 25 U.S.C. 1302(1) than it imposes on the federal government.").
115. See Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2nd Cir. 1996); Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980).
117. CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION OF OREGON CONST. art. VII, § 2,
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125. This Article focuses on the tribal court case law discussing the free speech implications arising
in a more political context, such as elections, employment, and speaking in public forums, and does not emphasize the free speech implications of tribal religious freedom. See generally Kristen A. Carpenter, Religious Freedom Under Tribal Law, Presentation at University of Kansas School of Law, Address at the Tribal Law and Governance Conference (Nov. 12, 2004).

126. Harvard Note, supra note 82, at 1355.

129. See, e.g., In re Menefee, No. 97-12-092-CV (Grand Traverse Band Tribal Court, May 5, 2004) (relying upon the history of the adoption of the Grand Traverse Band constitution to determine whether tribe must count Canadian Indian blood for purposes of blood quantum requirements in the tribal enrollment process).

130. See Ziontz, supra note 88, at 53.
131. Harvard Note, supra note 82, at 1364.


135. See id. at 1, 4.
136. See id. at 1.
137. See id. at 3 (citing Pickering v. Board of Education, 391 U.S. 563 (1968); Gonzales v. Chicago, 239 F.3d 939 (7th Cir. 2001); Youker v. Schoenenderger, 22 F.3d 163 (7th Cir. 1994); Koch v. Hutchinson, 847 F.2d 1436 (10th Cir. 1988)).
138. See id. (“On its face, [the tribal statute] appears to be a clearly valid effort to control employee actions in order to deliver government services properly.”) (citing Little River Band of Ottawa Indians Tribal Council Res. #03-0625-193).
139. See id. at 4 (“There was an admission that the Plaintiff did not attempt to obtain permission from the Tribal Spokesperson prior to the media[,] contact leading to a reasonable basis for the adverse employment action . . .”).
140. E.g., Stensgar v. CCT Natural Resources, 31 Indian L. Rptr. 6037, 6037 (Confederated Tribes
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141. See Gonzalez v. Chicago, 239 F.3d 939, 942 (7th Cir. 2001).
142. Rave I and Rave II, supra note 132.
143. See Rave I, 23 Indian L. Rptr. at 6024; Rave II, 23 Indian L. Rptr. at 6165-68.
144. See Rave I, 23 Indian L. Rptr. at 6024.
145. See id. (citing NAACP v. Alabama, 357 U.S. 449 (1958) and Buckley v. Valeo, 424 U.S. 1 (1976)).
146. Rave II, 23 Indian L. Rptr. at 6165.
147. Id. (citing WINNEBAGO TRIBE OF NEBRASKA CONST. art IV, § 3(a) and 25 U.S.C. § 1302(a)).
148. Id. at 6166 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).
149. Id. (citing Burdick, 504 U.S. at 434 and Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416-18 (1993)).
150. See id. at 6166-67.
151. Rave II, 23 Indian L. Rptr. at 6166.
152. See id.
155. See Lonewolf, 14 Indian L. Rptr. at 6005.
156. See Big Eagle II, 418 F. Supp. at 127.
157. Lonewolf, 14 Indian L. Rptr. at 6005.
158. Id. (citing Big Eagle II, 418 F. Supp. at 131-32).
159. See id.
161. Id. at ¶ 67 n.1 (citing 25 U.S.C. § 1302(1)).
164. See id. at 6122 ("This harms plaintiff's First Amendment rights and equal protection rights under the ICRA, 25 U.S.C. § 1302(1) [&] (8); and alternatively under the U.S. Constitution as state law is being utilized.").
166. See Mark D. Rosen, Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act, 69 FORDHAM L. REV. 479, 553 (2000) ("It is unlikely that a provision such as the tribe's [in Brandon] would be found to fall within the 'fighting words' exception under ordinary federal doctrine.").
167. See Brandon, at 6139-41.
168. Id. at 6140.
Fletcher

169.  *Id.* at 6141 (*citing* Cohen v. California, 403 U.S. 15, 20 (1971)).

170.  *Id.*


173.  *See* id. at 1.


175.  *See id.* at 5. The court defined libel *per quod* as "when a person accuses another of an act by innuendo or insinuation," requiring the plaintiff to prove actual damages. *Id.*

176.  *Id.* at 6.

177.  *Id.* at 3.


179.  *See id.* at 6032.


182.  *Id.* at ¶ 39. It should be noted that Navajo common law did not arise in Navajo court opinions as soon as Navajo courts began to operate. It was a process that took decades. *See generally* James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. Rev. 55 (1997). Thanks to Jerry Gardner and Aliza Organick for pointing out this fact.


184.  *Id.* at ¶ 41.

185.  *Id.* at ¶ 42. For extended discussions of the concept of k’e, *see* Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M. L. REV. 175, 182 (1994); Zion & Yazzie, *supra* note 183, at 76-77.

186.  *Crockett*, 1996.NANN.0000006, at ¶ 43.

187.  *Id.*

188.  *Id.*


190.  *See id.* ¶ 51 ("[T]his Court finds that the district court did not err in its decision that the speech was a matter of public concern. The decision of the district court that the employees' speech was protected is affirmed."). For extended discussions of the concepts of hoozhoojigo and nalyeeh, *see* Yazzie, *supra* note 186, at 184-85; and Zion & Yazzie, *supra* note 183, at 77-80.


192.  *Id.*

193.  *Id.* at ¶ 48.

Sharing of Indigenous Biological Knowledge

196. See id. at 6099.
197. See id. at 6097.
198. See id.
199. See id. at 6099.
200. Id. (Hunter, C.J., concurring) (quoting Waksig Wogsa Leave Policy).
201. Id.
203. Bowekaty, supra note 26, at 146.
204. Id. at 148; see also Andrew Askland, A Caution to Native American Institutional Review Boards About Scientism and Censorship, 42 JURIMETRICS J. 159, 162 (2002) (noting that "some [tribal Internal Review Boards] require that research reports be submitted to them for review before publication.").
206. Id. at 20.
208. Tribal legislatures and executives might also take other action as incidents or facts arise—their powers are not limited to legislation. Even absent legislation or other positive law, the free speech jurisprudence discussed in this Part would apply. Moreover, tribal courts are free to raise these questions sua sponte even where the parties to these cases do not. Thanks to Carey Vicente for raising these issues.
210. Askland, supra note 204, at 162.
212. See id.
214. Id. at 204 (citing Peter Mattheissen, Indian Country 5 (1984); Lesley A. Jacobs, Rights and Deprivation 70 (1993)).
216. Barsh, Grounded Visions, supra note 12, at 133.
217. See id. at 142 ("Consider a traditional ceremonial precinct (the Black Hills in South Dakota, for example, or the Sweetgrass Hills in Montana) that is a checkerboard of federal, state, and private lands. The ceremonies appropriate to the place involve a ritual circuit, visiting and performing at a number of sites around the area in a prescribed annual sequence. Each performance is regarded as anchored in specific landmarks, proprietary to certain initiated men

or women; and transferable (songs, together with special ritual bundles) only under conditions of strict confidentiality.”).

218. See id. ("The state and private landowners may bar access to their [the Indians] tracts altogether, or condition access on allowing or even promoting public access as the same time (i.e., as cultural tourism). For example, a crucial sacred bundle may be picked up by a tourist and removed from the area, where it cannot be recovered under [federal law]. One of the members of another tribe may see the ceremony, copy some of the ceremonial designs on handicrafts and market the crafts as authentic Indian crafts without violating federal laws. A song may be recorded by an observer and sold to a record company without penalty.").

219. Fretz, supra note 83, at 609.

220. See id.

221. Id. at 615.

222. See In re Santos Y., 112 Cal. Rptr. 2d 692, 709 (Cal. App. 2001) (noting expert’s testimony that Indian children’s rate of suicide “is highest when non-Indians adopt Indian children”).

223. Riley, supra note 9, at 205 (citing John Moustakas, Group Rights in Cultural Property: Justifying Strict Inalienability, 74 CORNELL L. REV. 1179, 1208-09 (1990)).

224. Id.

225. Professor Barsh described an instance where exactly that occurred. See Barsh, Grounded Visions, supra note 12, at 151-52 (“Of course, if such a dispute fell within the jurisdiction of a tribal court, the reviewing judge might take a different view of the situation and apply customary law. In the Chilkat Whale House case, a carved house screen was removed from the Whale House at Chilkat village, Alaska, by a Tlingit who claimed the right to dispose of it to a commercial art broker. The Whale clan objected, and tried to recover the screen in federal court in Seattle, where it was being stored prior to sale. The court ruled that the matter arose entirely at Chilkat and should be decided by the tribal court there. Eventually, the tribal court ruled in favor of the clan.").

226. Ziontz, supra note 88, at 47.


228. Note, supra note 90, at 1356.