

TRIBAL SELF-DETERMINATION AND *A NATION WITHIN*

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Native Nations in the United States are stronger today in some respects than they have been in the last 250 years. Despite this growth, however, tribes continue to experience the instability that comes from the ruptures of colonialism and must work to recover, rebuild, and revive the cultural lifeways that make them who they are as Indigenous Peoples. This presents a significant governance challenge for many Indian nations in the modern world. This struggle is at the heart of Ezra Rosser's provocative deep dive into the remarkable experience of the Navajo Nation in his monograph, *A Nation Within*.¹

Rosser identifies some of the central obstacles facing the Navajo Nation, which are likely recognizable to and shared by many nations throughout the world, Indigenous and otherwise, including concerns around housing, education, extractive industry, poverty, and environmental degradation.² But Rosser's work goes beyond these contemporary concerns to examine how the Navajo Nation has managed historically and how it continues to function today as a nation *within*; an Indigenous tribe with inherent rights of sovereignty, surrounded by a vastly different and, at times, hostile and foreign society.³ Thus, the Navajo peoples' process of reconciling the Nation's past with its present—and, most importantly, how to govern for the

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1. See generally EZRA ROSSER, *A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT* (2021).

2. *Id.* at 5-6, 12-13, 16-18.

3. *Id.* at 8.

Nation's future—lies at the heart of *A Nation Within*. For anyone working in Indigenous rights today, this work is markedly timely and relevant.

How did modern Indian tribes, like the Navajo Nation, find themselves in this complicated space within the project that is America? The European colonizers initially, and the United States subsequently, spent untold time, resources, and energy to remove, displace, and even destroy Native people and their cultures.⁴ The Navajo were a prime target of these policies, dispossessed of their homelands and imprisoned at Bosque Redondo before they were allowed to return on the “Long Walk” to (a much smaller swath of) their aboriginal territory.⁵ Policies that were demonstrably genocidal—in some cases culturally,⁶ in others actually⁷—were deployed against Native people, including the Navajo, for hundreds of years.⁸ That bleak history—boarding schools, removal, the reservation system, bounties placed on the ‘skins’ of Native women and children, enslavement in missions, and the list goes on⁹—is not as well-known as it ought to be, but most Americans today have at least a vague understanding of the horrific history of the “settlement” of the continent.

But in the last several decades, the United States has changed course on Indian affairs, shifting to a policy of self-determination, rather than one of destruction and assimilation.¹⁰ Along with these changes came laws to

4. See Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 285 (2022); Kristen A. Carpenter, et al., *In Defense of Property*, 118 YALE L.J. 1022, 1060 (2008).

5. ROSSER, *supra* note 1, at 27; see generally LYNN R. BAILEY, *THE LONG WALK: A HISTORY OF THE NAVAJO WARS, 1846-1868* (2nd ed. 1970) (providing a detailed study of the Navajo wars, their causes and aftermaths).

6. See generally PHILIP J. DELORIA, *PLAYING INDIAN* (1998) (exploring how white Americans have used their conceptions of Native Americans to shape national identity in various areas and how Indian people have reacted to these imitations of their culture).

7. See BENJAMIN MADLEY, *AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846-1873*, at 3 (2016).

8. ROSSER, *supra* note 1, at 4.

9. MADLEY, *supra* note 7, at 3, 86, 176.

10. Congress passed The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, Section 2, 888 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301-5423); For a further discussion on this issue, see Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WISC. L. REV. 263, 270 (2022); CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS*, at xiii (2006) (describing the self-determination movement in the United States); see also Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506, 1510-11 (2016). It bears noting that the language of “self-determination” is now deeply embedded in the international discourse, including most prominently in the UN Declaration on the Rights of Indigenous Peoples. See ASIA PAC. F. OF NAT'L HUM. RTS. INSTITUTIONS & OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., *THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A MANUAL FOR NATIONAL HUMAN RIGHTS INSTITUTIONS* 19-30 (2013).

decriminalize Indian religions (though the Constitution itself has still done next to nothing to guarantee the religious freedom rights of Native people),¹¹ protect Native languages, and even restore some sacred lands to Native peoples.¹² This change in U.S. Indian policy has further empowered Indian nations to live their sovereignty. Tribes today are subject to decreasing federal oversight, enjoy more autonomy in tribal affairs and decision-making, and have greater freedom to devote human and fiscal resources to the revitalization of Indian cultures.¹³ To that end, tribal rights of self-determination have been increasingly recognized and animated by U.S. policy, and tribes have, perhaps unsurprisingly, increasingly flourished.¹⁴ Not all the time, not in every case, but enormous cultural, political, and economic growth has occurred in Indian country in the last half century.¹⁵

But, as *A Nation Within* suggests, such growth is not uniform or consistent in several respects.¹⁶ That is, some tribes thrive while others do not. Others see periods of positive change, then face—like all nations—setbacks that quell progress and development. These experiences have given rise to a central question that has been asked about Indian poverty for decades, one that is at the core of Rosser’s book: why are some tribes doing so well while others seem to struggle so mightily? And, more specifically to the point of Rosser’s book, what explains the particular case of the Navajo Nation, that has so much in its favor, yet has continued to—at least in some respects, as Rosser describes—struggle to situate itself in the modern era?¹⁷

To be clear, governing is messy business. Whether you are a Navajo Nation citizen voting in your next tribal election or an American watching

11. Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious*, 134 HARV. L. REV. 2103, 2116-17 (2021) (reviewing MICHAEL D. McNALLY, *DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT* (2020)).

12. See American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (2017)); Native American Languages Act, Pub. L. No. 101-477, 104 Stat. 1152, 1153-56 (1990) (codified as amended at 25 U.S.C. § 2901-2906 (2017)); Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1438 (restoring land of the Taos Pueblo).

13. ROSSER, *supra* note 1, at 3-5.

14. *Id.* at 3-4.

15. See Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works*, HKS FAC. RSCH. PAPER SERIES, at 10-14 (2010), https://dash.harvard.edu/bitstream/handle/1/4553307/RWP10-043_Cornell_Kalt.pdf [<https://perma.cc/8H5V-67EY>].

16. ROSSER, *supra* note 1, at 5.

17. The Harvard project on American Indian Economic Development, launched by scholars Steve Cornell and Joe Kalt, sought to address this precise question. Decades of research uncovered a nuanced and varied answer to a set of complex questions. See Cornell & Kalt, *supra* note 15, at 11-12.

the January 6th hearings,¹⁸ you know that the hard (and sometimes ugly) work of governance—and good governance, in particular—cannot be overstated. In my own work, I have tried through my scholarship—particularly in *Good (Native) Governance*,¹⁹ but also through many other writings—to explore the challenges that Indian nations face in governing well after so many centuries of dispossession and oppression. Every tribe has its own story, but most in the United States still operate under the vestiges of this shared history. The trauma is real, and it is still very alive and recent for many Native people.

From a governance standpoint, many of the issues percolating up in tribal communities are, in part, remnants of the colonial project, which is still ongoing in the United States (and around the world).²⁰ For example, some of the flawed colonial structures—such as Courts of Indian Offences, Indian Reorganization Act Constitutions, Termination Acts, and/or blood quantum based tribal membership—that were imposed on tribes continue to cause innumerable problems in some tribal communities in the present moment.²¹

However, other issues identified by Rosser, like greed and corruption, also play a role within the domain of Native governance.²² Native people are human, like all others. To deny or romanticize this reality is to deprive Native people of their humanity. Tribal governments and government officials are not immune to destructive behavior. And Indigenous systems of checks and balances, many of which existed long before the formation of the United States, were often disrupted by the imposition of colonial forms of government that do not necessarily resonate with today's tribal communities. When a tribe experiences this phenomenon—what Cornell and Kalt of the Harvard Project call a poor “cultural match”—tribes lack faith in the institutions that are supposed to protect them. Consequently, some tribes

18. See *Select Committee to Investigate January 6th Attack on the U.S. Capitol*, CONGRESS.GOV, <https://www.congress.gov/committee/house-select-committee-to-investigate-the-january-6th-attack-on-the-united-states-capitol/hlij00> (last visited Apr. 10, 2023).

19. See generally Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

20. *Id.* at 1088-89.

21. See *Denezpi v. United States*, 142 S. Ct. 1838, 1849-50 (2022); see also Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*, JOINT OCCASIONAL PAPERS ON NATIVE AFFS., PAPER NO. 2005-02, at 16 (2006), https://www.honigman.com/media/site_files/111_imgimgjopna_2005-02_Approaches.pdf [<https://perma.cc/2ELX-RH35>]; *Trump Administration Takes Indian Country Back to Termination Era*, INDIANZ (Sept. 10, 2018), <https://www.indianz.com/News/2018/09/10/trump-administration-takes-indian-countr.asp> [<https://perma.cc/P5FC-NFEL>]; ROSSER, *supra* note 1, at 131.

22. ROSSER, *supra* note 1, at 11-12.

falter and, at times, repeat a cycle of dysfunction that appears difficult or impossible to break.²³

Rosser does not shy away from these realities. Simultaneously beautiful and harsh in its rendering, his honest, searing examination of the Navajo Nation and its own journey in the modern world delves deep into the challenges faced by Native Nations today. In *A Nation Within*, Rosser takes a magnifying glass to the Navajo Nation, weaving a provocative narrative of the Nation's own attempts to flourish in the midst of what seems like both unfathomable resources and harsh limitations.²⁴

While *A Nation Within* holds lessons for all Indian nations, it is simultaneously and, importantly, a truly Navajo story. Whenever researchers use data sets to determine the "state" of Indian country, the Navajo Nation is often excluded (along with Oklahoma), because it unduly skews results. Why is this? Navajo is the largest land-based tribe in the United States by leaps and bounds. It is (alternating with the Cherokee Nation in Oklahoma) also the tribe with the greatest number of citizens.²⁵ Navajo spans not only numerous counties but traverses several state borders as well.²⁶ Navajo people do not have control and sovereignty over many of their sacred lands, but they are, generally speaking, still in their aboriginal homelands²⁷ (contrasted with tribes, like my own, in Oklahoma, who were removed to reservations in the "Indian territory" at the end of a musket in the late 1800s, never to return to our aboriginal lands as stewards or owners).²⁸ Navajo has a high fluency rate compared to other tribes, controls vast swaths of territory,

23. Cornell & Kalt, *supra* note 21, at 7, 12, 16 (describing "nation-building" approach to economic development as consisting of five primary characteristics, including "cultural match," which requires strong degree of matching between "formal governing institutions and contemporary indigenous ideas").

24. ROSSER, *supra* note 1, at 4-5.

25. The Navajo Nation has several hundred thousand members. See NAVAJO DIV. OF HEALTH & NAVAJO EPIDEMIOLOGY CTR., NAVAJO POPULATION PROFILE: 2010 CENSUS, at 5 (2013) <https://nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf> [<https://perma.cc/3HJP-GQEJ>].

26. *Id.* at 4.

27. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1122 (2004) ("Place is central to Navajo culture and identity, and understanding the modern Navajo Nation necessitates an understanding of the interconnectedness between the Diné [the Navajo people] and their land base.").

28. See, e.g., R. DAVID EDMUNDS, *THE POTAWATOMIS: KEEPERS OF THE FIRE* 265-71 (1978) (recounting the removal of the Potawatomi, an event that has come to be known as the Trail of Death); see also RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* 31-37 (1980) (discussing the process by which the tribes of the southeastern United States were removed to the Indian territory).

and has significant natural resources as a basis for an economic engine.²⁹ The Nation has long been on the cutting edge in terms of developing Navajo jurisprudence, wherein an entire body of Diné law is now recorded in Navajo court decisions.³⁰ In all these ways, Navajo is unique, if not entirely anomalous, within the US system, where there are 574 federally recognized Indian tribes (227 of which are Alaskan Native Villages), but none that are truly comparable to Navajo.³¹

While keeping to the unique situation at Navajo, what Rosser so elegantly does with *A Nation Within* is employ the situation of the Navajo Nation to animate broader, universal problems within Indian country. For example: what is the proper balance between tradition and modernity? How can a tribe successfully govern using institutions imposed by a colonial power that sought to supplant traditional structures that have nevertheless endured? When should one speak and when ought one be silent? What is sacred and untouchable versus what can be commodified so that a tribe may achieve other (traditional) goals? And there are undoubtedly many others.³² In this way, Navajo could stand in for any of hundreds of tribes struggling to answer these and similar questions.

These are all of Indian country's struggles. And the relevance of this examination reaches far beyond U.S. borders as well. Indigenous peoples around the world—and, from my experience, most commonly in the other three “settler” states of Canada, Aotearoa (New Zealand), and Australia—are similarly in the midst of developing solutions to these very difficult questions in their own unique ways. In Native Nation Building I, the course I co-teach with Professor Joe Kalt at the Harvard Kennedy School of Government, we focus on a variety of factors that seem to contribute to functional, effective

29. Angela A. A. Willeto, *Navajo Culture and Family Influences on Academic Success: Traditionalism Is Not a Significant Predictor of Achievement Among Young Navajos*, 38 J. OF AM. INDIAN EDUC. 1, 8 (1999); ROSSER, *supra* note 1, at 10.

30. See, e.g., RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE*, at xvii (2009) (describing “a unique side to tribal court jurisprudence in the United States . . . [that] involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues”).

31. U.S. Dep't of the Interior Indian Affs, *About Us*, BIA, <https://www.bia.gov/about-us> [<https://perma.cc/57KG-MJRM>]; Bureau of Indian Affs., *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, FED. REG.: DAILY J. OF THE U.S. GOV'T (Jan. 28, 2022), <https://www.federalregister.gov/documents/2022/01/28/2022-01789/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of> [<https://perma.cc/7H6K-8L7N>].

32. For scholarly discussion in issues regarding tribes like Navajo and extractive industry, see Sarah Krakoff, *Just Transitions?*, L. & POL. ECON. (Jan. 29, 2018), <https://lpeproject.org/blog/just-transitions/> [<https://perma.cc/Q8T8-MBN2>] (assessing poverty and other issues associated with the declining coal industry on Crow, Hopi, and Navajo reservations).

tribal governments.³³ I have highlighted many of these in my past work, drawn heavily from the research of the Harvard Project and the Native Nations Institute as well. But one that Rosser expressly engages in *A Nation Within* and that Professor Kalt emphasizes in our course, is that of corruption, or as Kalt puts it, “piracy.”³⁴ Professor Kalt places tribal “pirates” on par with leaders like Vladimir Putin and Ferdinand Marcos, who squander the resources and riches of their nations for their own self-advancement, oftentimes leaving the most vulnerable behind.³⁵ When pirates act under these conditions, they undermine the efficacy of government. Nations struggle.

Turning back to the research, it is evident that tribes with internal mechanisms to prevent overreach or wrongdoing by one branch of government are more well-off in various ways than others. In some tribes, like my own, this has meant a process of constitutional reform that created a strict separation of powers between our three branches of government: the executive, the legislative, and the judiciary.³⁶ This simulates in many respects a Western model. But tribes have the freedom and autonomy to create their own culturally relevant watchdog mechanisms. A tribe may have, for example, no independent judiciary but a Council of Elders to oversee matters.³⁷ The tribe may operate with a de-centralized clan system or be built around a village structure where power is distributed and checked amongst and across tribal members.³⁸ In other words, tribes need not replicate a colonial model to find “success.” But research shows that tribes—like all nations—need levers that can be pulled to reign in those who seek to power-grab, self-serve, or engage in acts that work against the good of the whole.³⁹

If there is an answer to the problems raised by *A Nation Within*, it lies within Indian nations themselves. As my frequent co-author, Kristen Carpenter, and I have asserted in our prior work—which builds extensively on decades of research in the field by other scholars—the answer rests in

33. See Juliet Isselbacher, *Building Native Nations*, HARV. MAG. (Mar. 14, 2022), <https://www.harvardmagazine.com/print/79350?page=all> [<https://perma.cc/K3XK-3STG>].

34. ROSSER, *supra* note 1, at 17, 91-108, 166-69, 209-210, 212.

35. Joe Kalt, Remarks at the Assembly of First Nations Policy Forum titled *The Indigenous Resurgence: Culture, Institutions, and Nation Building* (May 2, 2019) (presentation remarks available to download at <https://www.afn.ca/wp-content/uploads/2019/05/AFN-Edmonton-05-02-19-Kalt-copy.pptx>).

36. See Citizen Potawatomi Nation, *Government*, POTAWATOMI, <https://www.potawatomi.org/government/> [<https://perma.cc/4ZZN-GHJ5>].

37. Riley, *supra* note 19, at 1085-87.

38. *Id.* at 1100-02.

39. *Id.* at 1074-76.

tribal self-determination, which is itself fundamentally pluralistic and malleable.⁴⁰ By its nature, it empowers Indigenous Peoples to determine their own futures and destinies based on what fits each tribes' own value system. Those of us who work in the field see the benefits of good Native governance. Indian country is replete with illustrations of Native Nations that, for example, develop economic systems that stabilize their economies, provide basic goods and services to tribal members, and ensure care for their most vulnerable, concomitantly experience comparatively robust cultural revitalization.⁴¹

Consider this. Across Indian country today, there is a bevy of Indigenous language learners of middle age and younger, a phenomenon less commonly present in many tribal citizens of the Baby Boomer generation, who were born too soon to experience much of the tribal revitalization of the last fifty years.⁴² Friends and colleagues of my generation—and their children—take in-person and online courses in Chickasaw, Ho-Chunk, and Potawatomi, among many others, because those tribes have reached a point of governmental stability to make such programs possible.⁴³ In other words, tribal rights of self-determination afford tribes the freedom and autonomy to make their own choices and to advance those things that are of greatest value to them.⁴⁴ And, what we repeatedly observe throughout Indian country is that, when tribes gain resources, they very often—though not exclusively, of course—reinvest in programs that reify the very essence of who they are as Native people. Language revitalization is only one example. Indian nations today have acted courageously and boldly to ensure their futures, having

40. My frequent co-author, Kristen Carpenter, and I, explored many of these issues in *Privatizing the Reservation?*, 71 STAN. L. REV. 791 (2019). Some scholars think the 'answer' to the 'Indian problem' is to privatize and focus on capitalism, alienability of land, and extractive industry. We have vigorously cautioned against such an approach. *See id.* at 794-802. For academic perspectives, see Terry L. Anderson & Bryan Leonard, *Institutions and the Wealth of Indian Nations*, in UNLOCKING THE WEALTH OF INDIAN NATIONS 3-8 (Terry L. Anderson ed., 2016) (discussing the importance of transferable property rights).

41. Riley, *supra* note 19, at 1064-65.

42. Carpenter & Riley, *supra* note 40, at 823, 875.

43. *See Chickasaw Language Revitalization Program*, CHICKASAW NATION, <https://www.chickasaw.net/Services/Chickasaw-Language-Revitalization-Program.aspx> [<https://perma.cc/H3RG-LZHJ>]; *see also* Timothy Wright, Statement, *Reviving Ho-Chunk*, NAT'L ENDOWMENT FOR THE HUMAN., <https://www.neh.gov/article/reviving-ho-chunk>, [<https://perma.cc/H493-EFMX>]; Pokagon Band of Potawatomi, *Éthë Bodwëwadmimwat*, POKAGONBAND, <https://www.pokagonband-nsn.gov/government/departments/ethë-bodwëwadmimwat> [<https://perma.cc/3PD9-E6TM>].

44. Jim Anaya is credited with being one of the first international law scholars to connect Indigenous Peoples' rights of self-determination to international human rights norms. *See* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 97-184 (2d ed. 2004) (elaborating on the norm of self-determination in international law as it pertains to indigenous peoples).

established tribal leadership programs, language immersion schools, beading classes, Peacemaking Circles, civics classes, tribal colleges, and the list goes on, to support and develop the next generation of tribal leaders.⁴⁵ In fact, my own tribe, the Citizen Potawatomi Nation, the furthest removed tribe of Potawatomi in the United States, has been a leader in this regard.⁴⁶

But self-determination is not a panacea; rather, it is a path. It comes with weighty obligations, insofar as it requires Indian nations to determine, by themselves, the metes and bounds of sustainable practices according to their own cultures and communities.⁴⁷ In breaking free from colonial bonds, it also diminishes the impacts of colonialism as a sufficient excuse for dysfunctional government in a modern world.

Notably, while self-determination places both the power and the responsibility in the hands of tribal governments, Indian nations have only been in a period of recovery for several decades. In fact, tribal efforts to address the history of oppression and colonization are, by any measure, embryonic. Tribes, like Navajo, have had remarkably little time to experiment with various systems of economic development, resource management, and governmental infrastructure *vis a vis* the time they governed pre-contact.⁴⁸ That some of the chosen endeavors have failed is not an indictment; rather, it is part and parcel of the path of recovery.⁴⁹

At the same time, as Rosser argues, there are lessons to be learned, even from this recent history. And, with the Navajo Nation, as with all self-governing, sovereign Indian nations within the United States, it is up to us, as tribal people, and tribal leaders, to ensure good Native governance for the preservation of our nations for the next Seven Generations.

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45. Cornell & Kalt, *supra* note 21, at 2.

46. Carpenter & Riley, *supra* note 40, at 867-70.

47. *Id.* at 862.

48. See generally ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 49-57 (2012).

49. See Carpenter & Riley, *supra* note 40, at 864. Rosser's own earlier work delves into the trade-offs associated with self-determination and reduced federal oversight. See Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 346-48 (2005).