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A Tribe Divided: The Threat of the Loss of Tribal Autonomy and Culture Facing Transnational Tribes on the Northern and Southern Borders of the United States

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Notes:

A Tribe Divided:
The Threat of the Loss of Tribal
Autonomy and Culture Facing
Transnational Tribes on the
Northern and Southern Borders of
the United States

ABSTRACT

Indigenous peoples in the northern and southwestern regions of the United States face challenges to the preservation of their cultures, economies, governments, and family relations as a result of the international borders that have bisected their traditional lands. While there is a history of treatymaking and governmental policy attempting to address these issues, the lack of an effective solution and concrete border policy for tribe members in these regions leaves them without recourse. Some scholars suggest universal US citizenship for tribe members, others suggest tribe-specific legislation, and some even suggest that the tribes pursue litigation against the United States to resolve their woes at the borders. While each of these solutions have their merits, there are serious flaws that will likely prevent their implementation or meaningful effect. This Note will examine the history of treatymaking and border issues for these tribes and some of the primary solutions various scholars have proposed. After analyzing the strengths and weaknesses of these solutions, this Note will suggest that a new, polycentric governance system over the tribal lands be instituted to ensure that the collective tribal rights will be effectively balanced with the international government interests in play.

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I. INTRODUCTION

A.B., a Tohono O'odham member, was crossing the border with his tribal ID card, as he had countless times, when he was apprehended by border patrol.¹ When asked where he was born, A.B. responded that he was born in the United States, not thinking this answer would be flagged as a lie.² Tohono O'odham Nation stretches over the border from the United States to Mexico, and A.B. told the agents he believed this meant he was still born in the United States. After being handcuffed to a chair for three hours, A.B. was sent back to Mexico with a deportation order.³ A.B.'s story is just one of many similar stories of those tribal members living on the United States–Mexico border (hereinafter “southern border”).

The indigenous tribal members on the northern border face challenges of their own. Rick Desautel, a member of the Coville Tribes, and a descendent of the Sinixt Tribe, crossed the United States–Canada border in Washington while on an elk hunt, where he shot an elk in British Columbia without a permit.⁴ When the province charged him for this illegal hunt, Desautel argued that his hunt was legal because it was on the traditional tribal hunting grounds of the Sinixt

1. Amnesty Int'l, *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest*, AI Index AMR 51/018/2012, 26 (Mar. 28, 2012) [<https://perma.cc/5QVU-A8RZ>] (archived Aug 13, 2021) (A.B. is an abbreviation for the individual's name, which is on file with Amnesty International).

2. *Id.*

3. *Id.*

4. R. v. Desautel, [2021] S.C.R. 17 (Can.).

Tribe, from whom he descended.⁵ The province, however, argued that those rights were abrogated when the Sinixt Tribe went extinct in 1956.⁶ The Supreme Court of Canada ultimately ruled that people who are not Canadian and who do not reside in Canadian lands can still exercise the Aboriginal rights protected under the Canadian Constitution.⁷ The majority concluded that “Aboriginal peoples of Canada” means “the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact,” regardless of whether those societies currently exist beyond Canada’s modern borders, and held that “[e]xcluding Aboriginal peoples who moved or were forced to move, or whose territory was divided by a border, would add to the injustice of colonialism.”⁸ This ruling is unique to the history of adversity tribes have faced on the United States–Canada border (hereinafter “northern border”). The history of the relationships between the United States, Canada, the northern tribes, and even England in the late-eighteenth to early-nineteenth century has complicated the legal battles the tribes face in maintaining any semblance of sovereignty on the northern border.

Immigration has been a hot topic for the past several presidential administrations, but the Trump administration’s stance and policy regarding immigration brought the subject to the forefront of government policy and public opinion through his calls to “build a wall” along the southern border.⁹ While the primary purpose for these walls,

5. *British Columbia High Court Sides with Native American Tribe in Cross-Border Dispute*, NW NEWS NETWORK (Dec. 29, 2017, 11:56 AM), <https://www.nwnewsnetwork.org/post/british-columbia-high-court-sides-native-american-tribe-cross-border-dispute>, (last visited June 1, 2021) [<https://perma.cc/XQ52-PXQF>] (archived Aug. 13, 2021).

6. *Id.*

7. *R. v. Desautel*, [2021] S.C.R. 17 (Can.); Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 35(1) (U.K.) states, “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

8. *Case in Brief: R. v. Desautel*, SUP. CT. CAN. (Apr. 23, 2021), <https://www.scc-csc.ca/case-dossier/cb/2021/38734-eng.aspx> (last visited June 1, 2021) [<https://perma.cc/AN9P-BN88>] (archived Aug. 13, 2021). For a historic example, see also *United States v. Garrow*, 88 F.2d 318, 318–23 (C.C.P.A. 1937). Annie Garrow, a full-blooded member of the Canadian St. Regis Tribe of Iroquois Indians crossed the northern border on a regular basis in order to sell her handmade baskets. When crossing into the U.S. with twenty-four baskets, Garrow was charged an import duty on the baskets, which she refused to pay, citing the Jay Treaty’s Article III. The court did not agree, claiming that Article III of the Jay Treaty had been abrogated by the War of 1812, establishing a difficult precedent for the Tribe members in that region, who had grown to rely on the treaty.

9. *See, e.g.*, William Cummings, “A WALL is a WALL!” Trump Declares. But His Definition Has Shifted a Lot Over Time, USA TODAY (Jan. 8, 2019, 12:35 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2019/01/08/trump-wall-concept-timeline/2503855002/> (last visited Dec. 18, 2020) [<https://perma.cc/A8TL-ETM2>] (archived Aug. 13, 2021). For an interactive map that shows the progress of the border wall on the southern border, see also *Border Wall System*, U.S. CUSTOMS AND BORDER

the Trump administration claimed, was to protect the people of the United States,¹⁰ it appears that little thought was given to the very citizens of the United States that the wall would hurt. Indigenous nations are the oldest transnational communities,¹¹ and the United States has tribes on both the northern and southern borders whose ancestral lands were split by those borders. These borders have led to years of hardship for the tribe members, particularly those whose lands were cut in half by the borders.

This Note seeks to make sense of the issues faced by some tribes on both the northern and southern borders of the United States and to analyze potential solutions to these issues. The Note will first lay out a background of the most relevant histories of a few, select tribes in those regions and the treaties and laws which were instituted in connection to those tribes and the borders, as well as the issues these treaties and laws have created. The experiences of these tribes do not encompass the totality of border tribe experiences. Rather, they serve as a broad look at problems generally consistent with border tribes. In order to simplify and use these examples effectively, this overview will be broadly cabined into cultural, economic, and political issues, which will then be analyzed by looking at (1) various solutions proposed in previous scholarship, (2) solutions used with specific tribes, and (3) solutions used internationally. Finally, the Note will propose a polycentric governance counsel as the best solution to the issues the current geographic borders present to the northern and southern tribes and will analyze the impact of the proposed "Tribal Council" in light of the potential cultural, economic, and political implications of such a solution.

II. THE BORDER ISSUE FOR NORTH AMERICAN TRIBES

Immigration and border control have been hot-button issues in the United States for years but have become increasingly poignant following the election of former president Donald Trump and his border security agenda.¹² Americans have also become increasingly aware of immigration issues and have become more actively willing to support

PROT., <https://www.cbp.gov/border-security/along-us-borders/border-wall-system> (last visited Aug. 3, 2021) [<https://perma.cc/7CYS-7MA7>] (archived Aug. 13, 2021).

10. See, e.g., *Immigration*, WHITE HOUSE, <https://www.whitehouse.gov/issues/immigration/> (last visited Oct. 16, 2020) [<https://perma.cc/QG95-2LES?type=image>] (archived Aug. 16, 2021).

11. See Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States about the Border: The Rhetoric and the Realities*, 5 *INTERCULTURAL HUM. RTS. L. REV.* 241, 259–60 (2010).

12. See, e.g., *Immigration*, *supra* note 10.

positive reform of the immigration policies in place.¹³ Growing public concern with immigration reform largely focuses on issues on the southern border and asylum seekers.¹⁴

A 2020 Supreme Court decision in *McGirt v. Oklahoma* may have implications in the immigration reform discussion for indigenous peoples in the United States and on its borders.¹⁵ In the majority opinion, Justice Gorsuch stated, “we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”¹⁶ While this decision focuses primarily on the application of criminal law on Indian land, tribes have begun to test the implications of the parts of the decision that state that, barring an explicit rescission by Congress, tribal lands and treaties remain in force to this day, regardless of their treatment in years past.¹⁷

The increasing public interest in border and immigration rights, paired with a ruling that may well make Native American sovereignty a relevant national topic, may create the optimal climate to promote real change on a border and tribal issue that has been hurting indigenous peoples on the American continent for decades.

13. See, e.g., Andrew Daniller, *Americans' Immigration Policy Priorities: Divisions Between—and within—the Two Parties*, PEW RSCH. CTR. (Nov. 12, 2019), <https://www.pewresearch.org/fact-tank/2019/11/12/americans-immigration-policy-priorities-divisions-between-and-within-the-two-parties/> (last visited Oct. 16, 2020) [<https://perma.cc/4HB2-MPCC>] (archived Aug. 13, 2021) (explaining that in 2019, 67% of Americans said that it was very or somewhat important to them to establish a way for most illegal immigrants in the United States to remain in the country legally).

14. See, e.g., *Report: Focus on Mexican Border May Cost Northern Resources*, ASSOCIATED PRESS (July 9, 2019, 9:13 PM) <https://www.voanews.com/usa/report-focus-mexican-border-may-cost-northern-resources> (last visited Oct. 16, 2020) [<https://perma.cc/VBK9-MTS5>] (archived on Aug. 13, 2021); *Stopping Illegal Immigration and Securing the Border*, DEP'T HOMELAND SEC., <https://www.dhs.gov/stopping-illegal-immigration-and-securing-border> (last visited Oct. 16, 2020) [<https://perma.cc/Y5ZE-V966>] (archived Aug. 20, 2021); *Featured Issue: Border Processing and Asylum*, AM. IMMIGR. LAWS. ASS'N (May 14, 2021), <https://www.aila.org/advo-media/issues/all/featured-issue-border-processing-and-asylum> (last visited Oct. 16, 2020) [<https://perma.cc/7XQR-T3E2>] (archived Aug. 13, 2021).

15. See generally *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) (holding that the activeness or inactiveness of a treaty with a Native American tribe may have implications on cross-border treaties with Native Americans and other countries).

16. *Id.* at 2459.

17. Troy A. Eid, *McGirt v. Oklahoma: Understanding What the Supreme Court's Native American Treaty Rights Decision Is and Is Not*, NAT'L L. REV. (Aug. 12, 2020) <https://www.natlawreview.com/article/mcgirt-v-oklahoma-understanding-what-supreme-court-s-native-american-treaty-rights> (explaining the root issue that the tribes faced in Oklahoma—namely the historic pattern of ignoring Congressionally promised jurisdiction over the lands promised to the tribes in the relocation after the Trail of Tears) [<https://perma.cc/AAC5-BUHF>] (archived Aug. 20, 2021).

A. *The Northern Border*

1. History

The border between the United States and Canada bisects the homes of more than thirty tribes, including members of the "Wabanaki and Iroquois Confederacies, the Ojibwe, Ottawa, Lakota, Salish, Colville, several tribes of western Washington, and the Haida, Tlingit, and Tsimshian of Alaska and Canada."¹⁸ The land itself has been governed by more than twenty treaties between the United States and England in attempts to define the boundary, and only two of those treaties mentioned the indigenous people that lived on the land at the time.¹⁹ Those same treaties, the Jay Treaty and the Treaty of Ghent, are the most relevant sources of law for the purpose of this Note.

The United States and Great Britain signed the Jay Treaty, formally termed the Treaty of Amity, Commerce, and Navigation, in 1794 and established rules to settle the boundaries, trade, and evacuations disputed after the Revolutionary War, recognizing some tribal rights on border-crossing.²⁰ Article III of this treaty stated that:

It is agreed that it shall at all Times be free . . . to the Indians dwelling on either side of the said Boundary Line, freely to pass and repass by Land or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America . . . and freely to carry on trade and commerce with each other.

. . . [N]or shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales, or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.²¹

This treaty essentially stated that the border was to have no impact on the Indians and their internal relationships. Following several legal disputes and contention on the matter, the border was confirmed to have no effect on the indigenous people in the region in 1796.²² While the War of 1812 once again disrupted the rights of the indigenous

18. Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 315-16 (1984) (footnote omitted).

19. See *id.* at 316 (stating that only the Jay Treaty and the Treaty of Ghent mentioned the native people in the land at the time of the treaties).

20. See *id.* at 318.

21. Treaty of Amity, Commerce, and Navigation, Gr. Brit.-U.S., art. III, Nov. 19, 1794, T.S. No. 105.

22. See O'Brien, *supra* note 18, at 318-19 ("In 1795, however, the United States and several tribes . . . concluded a treaty that stipulated that all traders residing at any Indian town or hunting camp had to hold a license issued by the United States. Great Britain considered this treaty an infringement on article three of the Jay Treaty . . . Therefore, in 1796 the United States and Great Britain concluded an Explanatory Article that repeated the stipulations of the Jay Treaty").

people at the time, these border rights were restored and reaffirmed in the Treaty of Ghent, namely the right to freely pass through the United States–Canada border and the right to take goods across the border duty-free.²³ Since the ratification of those treaties, no other treaty or legislative action has changed the rights granted to the indigenous people on the northern border; however, both the United States and Canada have issued a number of judicial decisions since the Treaty of Ghent that have reshaped the law on northern tribal border rights in the region in recent years.

2. Case Law

In the United States, several cases have decided issues of transnational tribes on the northern border with Canada. In 1929, the Supreme Court of the United States decided whether Article III of the Jay Treaty was still in force in *Karnuth v. United States ex rel. Albro*.²⁴ In this case, two British citizens seeking admission to the United States fought their denial using the text of Article III of the Jay Treaty.²⁵ The Court interpreted the Jay Treaty under international treaty standards, where the existence of an armed conflict or war does not always repeal the obligations set forth in the treaties in question.²⁶ In this case, the War of 1812 was a potentially abrogating factor to the Jay Treaty, and the Court held that it did abrogate treaty obligations.²⁷ However, such abrogation did not mean that the Native Americans on the border lost their rights. The Treaty of Ghent preserved those rights for the Natives.²⁸

While there were no further Supreme Court decisions regarding the applicability of the Jay Treaty to Natives on the northern border, the issue has come up again in lower courts. In *McCandless v. United States ex rel. Diabo*, the Third Circuit saw the case of an Iroquois tribal member who lived in Canada but had crossed over the border various times to the United States until the United States arrested him for not complying with the immigration laws.²⁹ The court held that these

23. See Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 472 (2001).

24. See *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 235 (1929).

25. *Id.* at 233–35.

26. *Id.* at 238.

27. *Id.* at 240–41.

28. Osburn, *supra* note 23, at 473 (“[T]he rights abrogated by war are not revived unless specifically revived by later acts of the warring nations. In the case of the War of 1812, the parties specifically restored the rights of Indians to cross the border freely. Since the rights of Indians to cross the boundary freely were revived by the Treaty of Ghent, no restrictions, other than [sic] those imposed by the Jay Treaty and the Treaty of Ghent, or later legislation, may be used to halt Indian border crossing.”) (footnotes omitted).

29. *McCandless v. United States ex rel. Diabo*, 25 F.2d 71, 71 (3d Cir. 1928).

immigration laws did not apply to the Iroquois because the tribe's rights under the Jay Treaty had not been abrogated.³⁰ In a contrary decision, border authorities stopped a member of the Canadian St. Regis Tribe of Iroquois Indians carrying twenty-four baskets at the border and ordered her to pay an import duty, which she refused to do under Article III of the Jay Treaty.³¹ There, the court ruled that the War of 1812 had abrogated the Jay Treaty and dismissed the possibility of an Article III restoration under the Treaty of Ghent.³²

Canada has also ruled on similar cases in relation to the immigration rights of these border tribes under Article III of the Jay Treaty. In *Francis v. The Queen*, a member of the Mohawk First Nation of Akwesasne claimed that the Jay Treaty and the Treaty of Ghent absolved him of any duty payment in goods he brought across the border.³³ Here, the Supreme Court of Canada ruled that the War of 1812 abrogated the Jay Treaty and that the Treaty of Ghent did not restore the Article III rights, but rather was an agreement to engage in acts that may restore the rights, which was never put to practice.³⁴ In *Regina v. Vincent*, the Court of Appeal for Ontario reaffirmed *Francis*,³⁵ even under the then-recent constitutional act that affirmed that "existing Aboriginal and treaty rights are hereby recognized and affirmed."³⁶ Finally, in *Mitchell v. Canada*, a Grand Chief of the Mohawk Council of Akwesasne challenged a fine that was imposed on his undeclared motor oil, which he had then sold once he crossed the border to Canada.³⁷ The Supreme Court of Canada ruled that this kind of transaction was not protected under Article III of the Jay Treaty, reasoning that Article III only protected personal, not commercial, use of goods.³⁸

In short, the American position and Canadian position on the treatment of tribes on the northern border are complex and remain unsettled.

American case law is split between decisions like *McCandless*³⁹ and *Garrow*.⁴⁰ The State Department and the Immigration and Naturalization Service follow the more liberal approach in *McCandless*.⁴¹ The State Department declares that Article III of the

30. *Id.* at 73.

31. *United States v. Garrow*, 88 F.2d 318, 318 (C.C.P.A. 1937).

32. *Id.* at 323.

33. *Francis v. The Queen*, [1956] S.C.R. 618, 620 (Can.).

34. *Id.* at 621, 627-29.

35. *Regina v. Vincent* [1993], 12 O.R. 3d. 427 (Can. Ont. C.A.).

36. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 35(1) (U.K.).

37. *Mitchell v. Minister of Nat'l Revenue*, [2001] 1 S.C.R. 911, para. 2 (Can.).

38. *Id.* at para. 25.

39. *See McCandless v. United States ex rel Diabo*, 25 F.2d 71, 71 (3rd Cir. 1928).

40. *See United States v. Garrow*, 88 F.2d 318 (C.C.P.A. 1937).

41. *See McCandless*, 25 F.2d at 71.

Jay Treaty is still in force.⁴² However, the United States Customs Service follows a stricter approach, like the one found in *Garrow*⁴³ or *Karnuth*⁴⁴ in "maintaining that the rights recognized in article three of the Jay Treaty are not aboriginal but rather were granted in source."⁴⁵ Canada has a similar position, namely that the lack of any legislation on the matter essentially abrogates any enforceability of the Treaty of Ghent: "These views perpetuate the unnatural division of tribes and families by the United States-Canada border."⁴⁶

The above cases are important examples of the jurisprudence on the applicability of Article III of the Jay Treaty and the Treaty of Ghent to the indigenous peoples on the northern border. They serve as illustrations of the difficulties that tribal members have in crossing the northern border and navigating the conflicting and unclear rulings from the United States Supreme Court, the Supreme Court of Canada, and lower courts. The difficulties that tribal members face on the northern border, however, are more than external legislative and jurisprudential complexities. The northern border also creates internal issues for the tribes in relation to membership, tribal governance, economy, and land claims.

3. Internal Tribal Issues

Tribal membership has become increasingly complex as the membership qualification requirements differ depending on which side of the border the members are found.⁴⁷ In the United States, 1986 legislation gave the right of border crossing to tribal members who were "at least 50 percent of blood of the American Indian race."⁴⁸ This was near impossible to track, however, as Canada did not maintain blood quantum records.⁴⁹ Thus, the Indian Task Force of the Federal Regional Council of New England determined that some affirmative statement or action by either the individual's tribal government or the Canadian Department of Indian Affairs would be sufficient.⁵⁰ This is problematic, however, in that Canada and the United States describe tribal membership in different ways. "The United States has long recognized the importance of tribal membership and the rights of the

42. See O'Brien, *supra* note 18 at 335 (citing U.S. Dep't of State, *Treaties in Force* (Jan. 1, 1984) at 22 ("Only article 3 so far as it relates to the right of Indians to pass across the border, and articles 9 and 10 appear to remain in force.")).

43. See *United States v. Garrow*, 88 F.2d 318, 323 (C.C.P.A. 1937).

44. See *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 238 (1929).

45. O'Brien, *supra* note 18, at 335.

46. *Id.* at 336.

47. See Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 197 (2000).

48. 8 U.S.C. § 1359 (1982).

49. See Castella, *supra* note 47, at 197.

50. See *id.*

tribes to define their own membership.”⁵¹ Canada, on the other hand, determines tribal membership under federal law where the law requires that women take the status of their mates and the children take the status of their fathers.⁵² This creates complications in various aspects—for tribal women who marry men not of native blood and also for border tribes like the Mohawk, who state that the children of enrolled mothers are eligible for membership in the tribe, a position in direct conflict with the Canadian law, which requires affiliation to the father’s status.⁵³ Thus, if an Indian woman marries a man who is not of native blood, she no longer has a right to vote on reserve matters, own land on the reservation, be buried on the reserve, or receive any of the affirmative action benefits that the government provides tribal members.⁵⁴ While these membership issues create dilemmas for tribal members in relation to tribal rights, they are also problematic in the context of immigration rights.

In the United States today, Canadian Indians are offered broad privileges under American law.⁵⁵ They do not need visas to enter the United States, they can work in the United States, they are considered “lawful permanent residents” just by residing in the United States, and they cannot be deported.⁵⁶ However, these rights are only granted by the federal government to those Indians whose blood is at least 50 percent American Indian blood.⁵⁷ This creates barriers to those rights for many Indians in Canada who may qualify for rights in their tribe but do not have the sufficient blood percentage to receive immigration rights in the United States.

Tribal governance is also complicated where the border bisects tribes. The Mohawk Tribe provides an example. While the Tribe had always governed itself, the creation of the United States–Canada border led to three competing governments ruling over only seven thousand tribal members:

The St. Regis Mohawk Tribal Council, established in 1824, administers the American side; the Band Council, organized under the Canadian Act in 1888, controls the Canadian portion; and the traditional Council of Chiefs, through

51. O'Brien, *supra* note 18, at 346 (footnote omitted).

52. Indian Act, R.S.C. 1970, I-6 § 12(1)(b) (Can.).

53. See Castella, *supra* note 47, at 197 (citing Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 322–23 (1984)).

54. See *id.*

55. See generally American Indian Law Alliance, *Border Crossing Rights*, <https://ptla.org/border-crossing-rights-jay-treaty> (last visited Aug. 17, 2021) [<https://perma.cc/T78T-ZL3T>] (archived Aug. 13, 2021) (discussing the privileges of Canadian Indians).

56. See Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301, 302 (2009).

57. See 8 U.S.C. § 1359 (2006).

which the Mohawks function as the Keepers of the Eastern Door of the Iroquois Longhouse or the Confederacy of the Houdensaunee, continues to operate. Thus, cohesive economic development, intrareserve business transactions, planning, cost sharing and social service delivery is virtually impossible.⁵⁸

The northern border also complicates tribal land claims. Indian land claims in the United States are settled in the United States Claims Court and are limited to claims by Indians within the "territorial limits of the United States or Alaska."⁵⁹ This leads to indigenous tribes of Indians in Canada, whose land straddles the border, losing their land to the tribes on the United States side of the border.⁶⁰

These complications also inevitably lead to economic issues for the tribes on the northern border. The border forces a number of additional financial burdens on tribal members. Tariffs on goods that tribal members sell across the border and tribal members' excess travel to avoid taxation are just some examples of border-created burdens.⁶¹ Relatedly, the *Karnuth* case essentially negated the ability of tribal members to carry their personal goods across the border freely, leading to increased transportation costs for tribal members.⁶² While the application of *Karnuth* is dependent on the agency and jurisdiction in question, as discussed earlier, this financial burden still exists for the tribes that straddle the border.

While not exhaustive,⁶³ these points summarize some of the many challenges faced by tribes on the northern border of the United States. These challenges, however, are not limited to the tribes living on the northern border.

58. See O'Brien, *supra* note 18, at 321–22 (footnotes omitted).

59. See 28 U.S.C. § 1505 (1982).

60. See O'Brien, *supra* note 18, at 325.

61. See O'Brien, *supra* note 18, at 330–31 ("For some tribes the nearest shopping areas are across the border, yet to avoid taxation tribal members must often drive fifty miles to the nearest store on their side of the border. In addition, many tribal members still support themselves through the sale of traditional craft items. These craftsmen must often pay tariffs on hides, beads, feathers, shells and other necessary raw materials, and then must pay an additional tariff if the finished product is bought and sold across the border.") (footnotes omitted).

62. See *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 241 (1929).

63. Due to the historic nature and context added by the treaties referenced in this section, this Note does not include much on similar issues faced by native tribes in the Northwestern region of the United States. The challenges those tribes face are similar—namely ones of economic, cultural, and political threats posed by a bisecting border. However, for a more substantive look into the tribes in that region and their border crises, see generally JOSHUA REID, *THE SEA IS MY COUNTRY: THE MARITIME WORLD OF THE MAKAHs* (2015); BETH LADOW, *THE MEDICINE LINE: LIFE AND DEATH ON A NORTH AMERICAN BORDERLAND* (2001); MICHEL HOGUE, *METIS AND THE MEDICINE LINE: CREATING A BORDER AND DIVIDING A PEOPLE* (2015); JEROME A. GREENE, *BEYOND BEAR'S PAW: THE NEZ PERCE INDIANS IN CANADA* (2010).

B. *The Southern Border*

1. History

The history of the southern border goes back much further than that of the northern border, as the first contact between the Natives of the region that is now occupied by Mexico and the southern states of the United States and the Western world significantly predates the first contact on the northern border.⁶⁴ Nevertheless, for the purposes of this Note, a brief history of the southern border is only necessary from the Mexican-American War to present.

The Mexican-American War was triggered in 1846 due to a dispute between the United States and Mexico over their claims to land between the Nueces and Rio Grande Rivers.⁶⁵ That war was resolved under the Treaty of Guadalupe Hidalgo in 1848, which granted the United States most of the land that constitutes the modern southwestern United States.⁶⁶ This treaty also allowed those Mexican citizens who chose to be incorporated into the United States the entitlement to the same rights of any other United States citizen.⁶⁷ The treaty did not, however, give this privilege to the indigenous peoples located on and around this new border.⁶⁸ The Gadsden Purchase further solidified the border between the two nations and established the border as running in relation to the southern and northern forks of the Gila River.⁶⁹ This new border split the land of the Tohono O'odham Tribe between the United States and Mexico.⁷⁰ The tribe had not been involved in these negotiations and had historically been excluded from any decisions regarding their land and the Western sovereignty under which it was placed.⁷¹

This split in the Tohono O'odham land was not hugely difficult for the tribe initially, as the border was not strictly patrolled by the United States, and tribal members freely passed back and forth across the border with no ramifications.⁷² This norm continued under the 1934

64. See Valencia-Weber & Sedillo Lopez, *supra* note 11, at 262–63.

65. See *id.* at 265.

66. See *id.*

67. See *id.*

68. See *id.*

69. See Courtney E. Ozer, *Make It Right: The Case for Granting Tohono O'odham Nation Members U.S. Citizenship*, 16 GEO. IMMIGR. L.J. 705, 708 (2002).

70. See *id.*

71. See, e.g., *id.* at 706–07 (explaining that the Tohono O'odham Tribe had no non-Indian contact until the 17th Century, as they were ignored by the Spanish government due to the lack of material value seen in their lands, and how the Tribe eventually lost protection and recognition of the King in Mexico's 1810 independence).

72. See *id.* at 708 ("For instance, from the end of the Second World War until the late 1970s, 'federal school buses traveled back and forth to the O'odham communities in

Indian Reorganization Act, which resulted in the formation of the Tohono O'odham tribal government.⁷³ The tribe adopted a constitution in 1937, and the US government then recognized the Tohono O'odham as an indigenous, sovereign government.⁷⁴ Part of this process involved the requirement of a census of the tribal members at the time, which counted members of the tribe on both sides of the US–Mexico border, basing membership on tribal blood rather than the country of “citizenship, residency, or birth.”⁷⁵ It was then established that to be considered a tribal member, an individual needed to have at least 50 percent Tohono O'odham blood.⁷⁶ Tribal membership, however, did not guarantee US citizenship. Tohono O'odham tribal members who lived in Mexico “worked in the [US] federal government, served in the [US] military, and went to war,” but they did not have a guarantee of US citizenship.⁷⁷ This proved to be increasingly troublesome with the implementation of a stricter border policy and its enforcement by the US government in the 1980s.

The free border passage that the Tohono O'odham Tribe used in the years since the Treaty of Guadalupe Hidalgo was essential to the continuation of the education and spread of the tribe's cultural and social ideas.⁷⁸ The 1980s brought tightening of border enforcement in an attempt to slow illegal immigration and trafficking.⁷⁹ However, this border policy has created challenges for the Tohono O'odham and other tribes bisected by the southern border. In 2010, there were twenty-four thousand Tohono O'odham Tribe members, and seven thousand of those members were born in the United States but lived in Mexico and did not have a birth certificate to prove their US birth.⁸⁰ Further, 1,400 Tribal members were born in Mexico and needed to fulfill demands for immigration visas in order to cross the border.⁸¹ More recently, the tribe has increased to thirty-four thousand members, with at least two thousand members living in Mexico.⁸² The Tohono O'odham have to travel, in some cases, up to 120 miles in order to cross the border to be

Mexico transporting O'odham children to school on the Nation's lands in the United States.”) (footnotes omitted).

73. See *id.* at 709.

74. See *id.*

75. *Id.* (footnote omitted).

76. IT IS NOT OUR FAULT: THE CASE FOR AMENDING PRESENT NATIONALITY LAW TO MAKE ALL MEMBERS OF THE TOHONO O'ODHAM NATION UNITED STATES CITIZENS, NOW AND FOREVER 12 (Guadalupe Castillo & Margo Cowan eds., 2001).

77. Ozer, *supra* note 69, at 709 (footnote omitted).

78. See Osburn, *supra* note 23, at 479.

79. See Ozer, *supra* note 69, at 709.

80. See Valencia-Weber & Sedillo Lopez, *supra* note 11, at 292.

81. See *id.*

82. Motion for Leave to File Brief and Brief of the Tohono O'odham Nation as *Amicus Curiae* in Support of Respondents and their Opposition to Application for a Stay, *Trump v. Sierra Club*, 140 S.C. 1, 1 (2019) (No. 20-138) [hereinafter Motion for Leave].

with their fellow tribe and family members.⁸³ Aside from the obvious logistical complications this provides for the tribal government, tribal members, their families, and their travel, the tribe is also concerned with the adverse impact that this border enforcement has on the survival of the tribal culture and maintenance of their traditions.⁸⁴

2. Internal Tribal Issues

One of the key aspects of this issue is the general purity of the traditional Tohono O'odham culture and language that still exists south of the border. Mexican members of the tribe have had less historical exposure to European culture and colonization, which has led to a generally heightened retention of their traditional language and culture relative to the tribal members on the US side of the border.⁸⁵ The border enforcement has allowed the United States to "detain and deport the Tohono O'odham people who are simply travelling through their own lands, practicing migratory traditions essential to their religion, economy, and culture."⁸⁶ Increased customs enforcement has also harmed the Tohono O'odham Tribe. These customs regulations may prevent the tribe members from bringing raw materials, religious goods, cultural items, and economic goods across the border from one part of their land to another.⁸⁷ Finally, there are concerns with the loss of sacred tribal sites, especially in Mexico, as a result of the bisection of Tohono O'odham land. In the early 1990s, the tribe began to report that Mexican ranchers were encroaching on their land and fencing off sacred sites, as well as allowing traffickers to traverse through their ranches, endangering tribal members in the adjacent lands.⁸⁸ Some worry this could lead to the tribe abandoning their lands in Mexico and fleeing permanently to the United States.⁸⁹ The stricter enforcement of border crossings constricts the dissemination and protection of vital tribal history and knowledge.

Border crossing, being an essential activity for Tohono O'odham Tribe members to maintain their culture, has only become more difficult since the initial tightening of the border. Post-9/11, border security was once again scrutinized and tightened, resulting in further tribulation for Tohono O'odham members on the border.⁹⁰ Prior to post-

83. See Osburn, *supra* note 23, at 479.

84. See *id.*

85. *Id.*

86. Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97, 101 (1991).

87. See *id.* at 101-02.

88. See *id.* at 102.

89. See, e.g., *id.*

90. See Valencia-Weber & Sedillo Lopez, *supra* note 11, at 290.

9/11 federal government security practices, Tohono O'odham Tribe members were able to use membership documents issued by their sovereign tribal government in order to cross the border—even though they still needed to cross at a checkpoint.⁹¹ With the new Department of Homeland Security regulations in response to 9/11, tribe members needed proof of US citizenship, a passport, a border-crossing permit, or a visa as foreign nationals from Mexico.⁹² If they do not have these documents, they are classified as aliens unlawfully present in the United States and are deportable.⁹³ These enhanced requirements are “counter to the understandings that the tribe, historically, had in its nation-to-nation relationship with the U.S.”⁹⁴ Aside from the burden of carrying this documentation to do things as routine as visiting family, Tohono O'odham members also must bear the financial burden that obtaining this documentation carries.

Increased border patrol presence in certain areas along the United States border has pushed immigrant and trafficking activity towards the Tohono O'odham reservation lands.⁹⁵ This leads to increased danger, crime, and even death for tribal members.⁹⁶ Further, in response to this, Immigration and Customs Enforcement has increased their presence in tribal lands, which can lead to additional problems for tribal members who are unable to provide documentation supporting their legal presence in the United States.⁹⁷

The addition of the border wall, a policy trumpeted and implemented in part by the Trump administration, has further complicated the lives of the Tohono O'odham Tribe members. In their efforts in *Trump v. Sierra Club*, the Tohono O'odham Tribe unsuccessfully challenged the construction of the border wall and, more specifically, two sections of the wall being built south of Tucson, Arizona.⁹⁸ The tribe claimed that the construction of those specific portions of the wall would cause irreparable harm to the cultural and natural resources of vital importance to their Tribe, both in terms of damage to the resources from construction and the associated impacts at the project sites off-reservation, as well as “damage caused by

91. *Id.* at 297.

92. *Id.*; see also Keegan C. Tasker, *Waived: The Detrimental Implications of U.S. Immigration and Border Security Measures on Southern Border Tribes—An Analysis of the Impact of President Trump's Border Wall on the Tohono O'odham Nation*, 8 AM. INDIAN L. J. 303, 312–13 (2019) (explaining the “Real I.D. Act,” which tightened the identification requirements necessary for border crossing among Tribe members).

93. Valencia-Weber & Sedillo Lopez, *supra* note 11, at 297.

94. *Id.* at 297.

95. *Id.* at 298–99.

96. *See id.*

97. *Id.* at 298–99.

98. *See Trump v. Sierra Club*, 140 S.Ct. 1 (2019); see also Motion for Leave, *supra* note 84, at 2.

increased migrant traffic and interdiction on-reservation.”⁹⁹ The tribe was, and still is, concerned with the harm that the wall will cause to the environment around it, as well as sacred sites and tribal access to those sites.¹⁰⁰ These include sites within the Monument Lands as well as the Quitobaquito Spring.¹⁰¹ The wall would also create another obstacle for various spiritual practices and pilgrimages for the tribe members, including restricted access to sacred tribal burial sites.¹⁰² The tribe also argued that the wall would have an obvious detrimental effect on free travel within the tribal lands as well as tribal sovereignty.¹⁰³ The border wall is just the latest of years of imposition of federal power on the sovereign Tohono O’odham nation simply because of their habitation of land where a border was later instituted by separate nations.

Various other journalistic and scholarly works cover the vast complexities, injustices, and complications that the US–Mexico border and border policy have placed over the Tohono O’odham and other southern border tribes.¹⁰⁴ This brief historical summary is meant only to serve as a basic background to the issues that will be further discussed. These issues, paired with the similar issues faced by the northern border tribes, will be addressed together with possible legal resolutions in the following sections of this Note.

III. CURRENT RESOLUTIONS FOR PRESERVING TRIBAL CULTURE AND AUTONOMY ON THE BORDER

The difficulties that the tribes on both the northern and southern borders face can essentially be cabined into the following categories: economic, political, and cultural. These problems need to be resolved in order to ensure that these transnational peoples are able to maintain their sovereignty and culture for decades to come, as they

99. Motion for Leave, *supra* note 82, at 5.

100. *See id.* at 6 n.8.

101. *Id.* at 7.

102. Tasker, *supra* note 92, at 322–23.

103. *Id.* at 322 (describing the measures tribal members would have to take in order to continue crossing the border and the federal government’s imposition of the Real I.D. laws).

104. *See, e.g.,* Dianna M. Nanez, *A Border Tribe, and the Wall that Will Divide It*, USA TODAY, <https://www.usatoday.com/border-wall/story/tohono-oodham-nation-arizona-tribe/582487001/> (Last visited May 9, 2021) [<https://perma.cc/Q983-V3TM>] (archived Sept. 17, 2021) (a running page with detailed reporting, podcasts, and links to the problems faced by the Tohono O’odham on the border); Jessica Myers, *Blasting Sacred Sites for Border Wall ‘Forever Damaged’* Tribes, CRONKITE NEWS (Feb. 26, 2020), <https://cronkitenews.azpbs.org/2020/02/26/blasting-sacred-sites-for-border-wall-forever-damaged-tribes/> [<https://perma.cc/H2W2-PYW2>] (archived Sept. 17, 2021); Robert Neustadt, *Intervention II: Borders, Strangers and Neighbors: The Tohono O’odham and the Myth of “Us versus Them” on the US/Mexico Border*, 67 CROSS CURRENTS no. 3, 577 (2017).

have in the past. In attempts to resolve these problems, there has been an array of scholarship and policy either suggested or instituted. This Note will analyze three primary categories of potential solutions: tribe-specific legislation, international legislation, and litigation. These solutions draw on examples of policies already in place in other countries (and one in the United States) as well as other not-yet-implemented proposals that are beginning to gain more traction within the legal community.

A. Tribe-Specific Legislation and ID Cards

While the Tohono O'odham Tribe has been the most notably affected tribe on the southern border, in part because it is the largest, there is an important example of a tribe having successfully maintained its sovereignty around the border.

The Texas Band of Kickapoo finds its roots in the Great Lakes region; however, over time, the tribe migrated to the southern United States, in and around Texas, Oklahoma, and Mexico.¹⁰⁵ They traveled frequently between these regions to "avoid conflicts with Americans, to visit family members, and to practice their religious traditions at ceremonial sites in Mexico."¹⁰⁶ Conflicts began to arise in Texas, and the Kickapoo moved to land granted to them by Mexico in return for their help defending Mexico's border, eventually ending up in Nacimiento, Mexico in 1852.¹⁰⁷ The remaining Kickapoo in the United States were granted a reservation in Oklahoma in 1883, and those Kickapoo maintained close relationships with their tribe and family members in Mexico.¹⁰⁸ Like the Tohono O'odham, the Kickapoo tribal relationships across the border were vital for the continuation of tribal identity. Droughts and further conflict led the Kickapoo in Mexico to immigrate seasonally back to the United States *en masse*, seeking safety, farm work, and water,¹⁰⁹ between Eagle Pass, Texas and Nacimiento, Mexico.¹¹⁰ In fact, between November and March, 90 percent of the Band moves to Eagle Pass.¹¹¹ This being the case, obvious immigration concerns arose, and the Immigration and Naturalization Service began to issue renewable border crossing passes to the Kickapoo Band members.¹¹² The yearly renewal was a burden, however, and thus Congress made this pass permanent for the

105. Austin, *supra* note 86, at 107.

106. *Id.*

107. Osburn, *supra* note 23, at 480.

108. *Id.*

109. See Austin, *supra* note 86, at 107.

110. Osburn, *supra* note 23, at 480.

111. *Id.*

112. *Id.*

tribe members in 1983 when they passed the Texas Band of Kickapoo Act.¹¹³

The Texas Band of Kickapoo Act states that "notwithstanding the Immigration and Nationality Act, all members of the Band shall be entitled to freely pass and repass the borders of the United States and to live and work in the United States."¹¹⁴ This was enacted, in part, to assist the tribe in maintaining tribal culture.¹¹⁵ In order to maintain order in this endeavor, Congress established the need for a roll to be maintained, listing all members of the tribe who would be eligible for the border passing.¹¹⁶ Further, any member of the tribe whose name was found on the roll would be eligible for United States citizenship.¹¹⁷ This brought up the question of statutorily defining what membership in the Kickapoo Tribe looked like. Congress answered this with an amendment to the Immigration and Nationality Act, which states that a member of the tribe is an individual of Kickapoo descent; a member of the Kickapoo Tribe of Oklahoma or a member of the Kickapoo Traditional Tribe of Texas; and was born outside the United States, resides permanently in the United States, but is not a citizen or National of the United States.¹¹⁸ The act also defines tribe members as "all members of which were part of the Kickapoo Tribe of Oklahoma as it existed prior to 1989 when a portion of the Band obtained Federal recognition as a governmental tribal entity separate from the Kickapoo Tribe of Oklahoma."¹¹⁹

The act gives tribe members access to Indian services and programs "without regard to the existence of a reservation, the residence of members of the Band on or near a reservation, or the compilation of the roll pursuant to . . . this Act."¹²⁰ Further, the act provides that the US government will "consult and cooperate with appropriate officials or agencies of the Mexican Government to the greatest extent possible to ensure that such services meet the special tricultural needs of the Band and its members."¹²¹

Megan S. Austin argues that the sensitivity of this legislation should extend beyond "basic services such as healthcare, education, and welfare programs."¹²² She believes that this legislation should, with the assistance of both the US and Mexican governments,

113. See Texas Band of Kickapoo Act, 25 U.S.C. § 1300b-11.

114. *Id.* at § 1300b-13(d).

115. Osburn, *supra* note 23, at 480.

116. Texas Band of Kickapoo Act § 1300b-13(a).

117. *Id.* at § 1300b-13(c).

118. Texas Band of Kickapoo Act Amendments, H.R. 5639, 107th Cong. § 4(b)(2) (2002).

119. *Id.* at § 3(1).

120. Texas Band of Kickapoo Act at § 1300b-16(a).

121. *Id.* at § 1300b-16(b).

122. Austin, *supra* note 86, at 109.

“recognize unique rights and needs based on border tribes’ aboriginal traditions.”¹²³ While this was not done specifically for the Kickapoo, she believes it can be done for them in conjunction with legislation to assist the Tohono O’odham Tribe, as they have yet to receive any legislative assistance in their border struggles.¹²⁴

With regard to the Tohono O’odham, one proposed tribe-specific piece of legislation is the implementation of tribal identification cards to facilitate the frequent border crossing on which the tribes rely. Implementing these cards would allow faster border crossing, which would lead to more time for the US Border Patrol to focus on their duties in relation to nontribal noncitizens and would also allow for the tribal members to more easily carry out their cross-border cultural and familial duties. Austin suggests that the membership rolls for the tribe should be maintained by the tribe, border crossing should be done only with tribe-issued membership cards, and that the legislation should “avoid requiring identification issued by the United States Government.”¹²⁵ While Austin does not mention her specific reasoning for leaving out the US government in such tribal identification matters, it is not difficult to see some of the potential problems that a federal mandate over such identification would create.

The first and foremost problem would be the general difficulty and time that a government identification process would take for the tribal members. There are at least thirty-four thousand Tohono O’odham Tribe members currently, and at least two thousand of those members live in Mexico.¹²⁶ The consistent border crossing and growth of the tribe would lead one to assume that the figure of two thousand

123. *Id.*

124. See, e.g., *Issue Brief: The Tohono O’odham Nation Opposes a Border Wall*, TOHONO O’ODHAM NATION (<http://www.tonation-nsn.gov/wp-content/uploads/2017/02/Issue-Brief-Tohono-Oodham-Nation-Opposes-Border-Wall.pdf>) (last visited Aug. 3, 2021) [<https://perma.cc/XKM5-38RZ>] (archived Aug. 13, 2021) (this provides one recent example of a lack of legislative assistance; as the brief explains, the Tohono O’odham Legislative Council passed at least 20 resolutions in opposition to the border wall, but the construction continued).

125. Austin, *supra* note 86, at 109.

126. Motion for Leave, *supra* note 82, at 1. It is also notable that this population size may contribute to the reason for the general success of the Kickapoo in securing favorable legislation for their Tribe. While the numbers vary, it is assumed that, at the time that the Texas Band of Kickapoo Act was passed, the Tribe’s population was around 650 members, owning 125 acres on the border, with only 145 opting to become U.S. citizens. See DONALD RICKY, *ENCYCLOPEDIA OF MISSOURI INDIANS* 172 (1998). This is drastically different, simply in terms of size, from the Tohono O’odham Tribe. The Tohono O’odham currently have an estimated 28,000 members occupying 2.8 million acres. See *About Tohono O’odham Nation*, TOHONO O’ODHAM NATION, <http://www.tonation-nsn.gov/about-tohono-oodham-nation/> (last visited June 2, 2021) [<https://perma.cc/72Q9-PH54>] (archived Aug. 13, 2021). While this is by no means conclusive, the scope of the legislation required for the Kickapoo, compared to that which would be required for the Tohono O’odham, may be an important factor to consider in analyzing the success of the Kickapoo in securing tribe-specific legislation.

members in Mexico is a floor, and there could be more (in 2010, there were only twenty-four thousand Tohono O'odham Tribe members, which signals a minimum of a 42 percent increase in member population in only a decade).¹²⁷ The logistical concerns this population influx and spread create are obvious. With no way for the federal government to have a sure number on the total number of tribe members living in Mexico, the issuance and delivery of federal tribal identification cards could take years, and those at the tail-end of the wait would not be able to enjoy the same border rights as those who will have already received their cards. Those who are without federal tribal identification cards could receive them upon self-presentation at the border. However, the real possibility of detention¹²⁸ at the border and abuse by non-tribe members could render this possibility fairly ineffective.

Federal government involvement in the issuance of tribal membership identification also brings up the challenge of defining who is and is not a member of the Tohono O'odham Tribe. The membership definition is already an issue on the northern border, where only those with 50 percent American Indian blood enjoy LPR rights in the United States.¹²⁹ This border crossing right would need to be tied to some set of criteria, and tribes themselves are the best ones to determine membership; this is not something the federal government should determine.¹³⁰ The Tohono O'odham already have set out guidelines for who is a member,¹³¹ and it is in the tribe's best interests to maintain adherence to the guidelines they have established so as to protect tribal legitimacy. Furthermore, the guidelines that the tribe has already established for membership, as well as their current processes to certify tribe members, have been in place since 1986 when the Tohono O'odham Tribal Constitution was adopted.¹³² These guidelines provide

127. See Valencia-Weber & Sedillo Lopez, *supra* note 11, at 292.

128. Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CTR. MIGRATION STUD., <https://cmsny.org/immigration-detention-behind-the-record-numbers/> (last visited Feb. 6, 2021) [<https://perma.cc/THT4-F2QG>] (archived Aug. 13, 2021) (explaining that since the Obama administration there has been a near 25% increase in border detention, and this detention has increased "fivefold" since 1996).

129. See 8 U.S.C. § 1359 (2006).

130. Tribal membership decisions are a key aspect of tribal sovereignty. See, e.g., Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty, the Law and Economics of Indian Self-Rule* 14 (Harvard John F. Kennedy School of Government, Paper RWP04-016, March 2004), https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf [<https://perma.cc/7GBN-CVKG>] (archived Nov. 9, 2021).

131. See About Enrollment, TOHONO O'ODHAM NATION, <http://www.tonationnsn.gov/membership-services/enrollment-program/about-enrollment/> (last visited Mar. 17, 2021) [<https://perma.cc/2WP3-NJ7G>] (archived Aug. 13, 2021).

132. See Constitution of the Tohono O'odham Nation, <https://narf.org/nill/constitutions/tohono/Constitution.pdf> (last visited Feb. 6, 2021) [<https://perma.cc/22BN-FNF2>] (archived Aug. 13, 2021).

support for Austin's proposal that the tribe maintain control of membership records for the purposes of border crossing.

Another major logistical concern that Austin brings up is the fact that the Tohono O'odham Tribe members would not be exempt from search and inspection laws that are in place as a means of the enforcement of international drug trafficking.¹³³ As pointed out in the earlier examples from the Canadian border tribes, tribe members crossing the border have had, and likely will continue to witness, their personal and sacred items rummaged through, inspected, and even confiscated.¹³⁴ To remedy acts that approach sacrilege for tribe members, while still respecting the strong government interest in preventing drug trafficking, Austin suggests that "the Tohono O'odham people could work in some capacity advising border officials about tribal traditions and monitoring the treatment of the people."¹³⁵ This advisement position seems relatively tenable, as long as the tribe has the resources to commit to it. The primary concern this brings up is the potential abuse of any relatively lenient inspection standards afforded to tribe members. This, in large part, coupled with the affirmation of tribe membership through tribe identification cards, depends on the resolve of the tribe to retain and protect its legitimacy and culture in ensuring its members (and nonmembers) do not abuse these more lenient standards. The question of tribal legitimacy and the correct entity to protect and police this will be discussed further on in this Note.

In order for this type of tribe-specific identification-card legislation to work, Austin's proposal would require significant tribal intervention in border enforcement on the southern border. This intervention may bring up constitutional questions, as Article IV of the Constitution, giving the federal government the authority to enforce borders, states:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall *protect each of them against Invasion*; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.¹³⁶

133. See 19 C.F.R. § 162.6 ("All persons, baggage and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection by a CBP officer").

134. See, e.g., H. R. REP. No. 95-1308 (1978), as reprinted in 1978 U.S.C.C.A.N. 1262, 1264 (explaining the sacred bundles that are brought across the northern border by tribe members); O'Brien, *supra* note 18, at 322 (explaining that the mishandling of sacred medicine bundles by outsiders can destroy the articles' spiritual and ceremonial function).

135. Austin, *supra* note 86, at 110.

136. U.S. CONST. art. IV, § 4 (emphasis added).

This constitutional provision, paired with 8 U.S.C. § 1357,¹³⁷ makes it clear that border enforcement and protection is a duty of the federal government, not of tribes or private citizens.¹³⁸ However, one could see how any proposed legislation could make room for the constitutionality and legality of tribal member advisory positions and other border patrol positions.

These same concerns take place on the northern border as well. As discussed previously, there are many more tribes lobbying for border privileges on the northern border, with more historical legislation in place as precedent. Further, these tribes in the north have split and merged in the past, leading to an array of newer and younger tribes (relative to others in the region) which could lead to added conflict and confusion in the drafting of legislation and issuance of identification cards. This would be a case where, unlike the Tohono O'odham, more federal government intervention would be desirable so as to ensure that there is uniformity in enforcement and border rights among the tribes. Any legislation for those tribes would need to amend the legislation currently in place to address any contradictory or overlapping provisions. This tribe-specific legislation on both the northern and southern border would need intensive tribal involvement and would need to be drafted in a way so as to ensure that the tribes' sovereignty and legitimacy are not threatened, while also remaining simple enough to be easily enforceable and widely available.

Border crossing rights alone, however, would not match the benefits enjoyed by the Texas Band of Kickapoo through their tribe-specific legislation. The Texas Band of Kickapoo Act also promises access to Indian services and programs "without regard to the existence of a reservation, the residence of members of the Band on or near a reservation, or the compilation of the roll pursuant to subsection 4(a) of this Act."¹³⁹ The act also assures that the US government will "consult and cooperate with appropriate officials or agencies of the Mexican Government to the greatest extent possible to ensure that such services meet the special tricultural needs of the Band and its members."¹⁴⁰

137. 8 U.S.C. § 1357 (delineating the powers of immigration officers to enforce the border).

138. See also *Toll v. Moreno*, 102 S.Ct. 2977, 2982–83 (1982) (explaining that Supreme Court cases "have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens . . . This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.")

139. Texas Band of Kickapoo Act § 1300b-16(a).

140. *Id.* § 1300b-16(b).

The benefits that are discussed are largely federal benefits, and thus the issuance of these benefits comes from Congress to federally recognized tribes. In discussing the contours of this type of system on the northern border, Raymond Fadel gave the following hypothetical:

[C]onsider . . . “Tribe A,” which was split into two separate legal entities as a result of the U.S.-Canada border: If a U.S. citizen is a member of Tribe A in Canada, that does not mean that he or she is recognized as a member of Tribe A in the United States as well. Even though Tribe A in the United States and Tribe A in Canada share the same name, culture, and history, there is currently no legal mechanism by which the person can become a member of Tribe A in the United States . . . and without membership in a federally recognized tribe such as the part of Tribe A in the United States, he or she will not be recognized as “Indian.”¹⁴¹

The primary issue, as demonstrated in this hypothetical, is that federal benefits require congressional recognition of the tribe in its definition of “Indian.” While tribes have the ability to identify who is and is not a member of the tribe for certain state and tribal governance purposes, “only Congress—or its delegated official—determines who is recognized as Indian for federal purposes.”¹⁴² This congressional decision-making involves problematic racial classifications with strong opinions on both sides. The United States still uses blood quantum and ancestral lineage standards to determine who is and is not Indian for federal purposes.¹⁴³ While some argue this testing is valid and essential to prevent abuse of tribal benefits from those who have distant or questionable Indian heritage, others argue that the blood quantum and lineage tests are too underinclusive and do not allow all who deserve tribal recognition to receive it.¹⁴⁴

As discussed previously, it is evident that tribal recognition and membership definition is a key issue that must be resolved in order to advance the rights of cross-border tribes.

One piece of sweeping legislation that has been suggested, most specifically in reference to the Tohono O’odham Tribe, is granting US citizenship to all tribal members and eliminating the problem once and for all.¹⁴⁵ While general US citizenship for all tribal members in the Tohono O’odham Tribe, or any of the northern tribes, may seem like an

141. Raymond J. Fadel, *An Indian by Any Other Name: Cross-Border Affirmative Action*, 92 N.Y.U. L. REV. 1107, 1116 (2017).

142. *Id.*

143. *Id.* at 1124. For more on the history of Blood Quantum and Native American identity, see, e.g., Maya Harmon, *Blood Quantum and the White Gatekeeping of Native American Identity*, CAL. L. REV. BLOG (Apr. 2021), <https://www.californialawreview.org/blood-quantum-and-the-white-gatekeeping-of-native-american-identity/> (last visited Aug. 3, 2021) [<https://perma.cc/L2VN-9P9X>] (archived Aug. 13, 2021).

144. Fadel, *supra* note 141, at 1124–25.

145. See generally Ozer, *supra* note 69, at 705.

overly broad solution, the Kickapoo example has shown that Congress has the ability to make this type of legislation happen. Congress noted that a primary reason for its decision to create the Texas Band of Kickapoo Act was to “preserve the Kickapoo culture.”¹⁴⁶ The culture of the Tohono O’odham Tribes, as well as other border tribes, is threatened in the same way as the Kickapoo culture was, but unlike the Kickapoo, these other tribes have been without relief. The Kickapoo legislation “demonstrates the administrability and feasibility of the United States Government to accommodate its immigration laws for indigenous peoples living on the border.”¹⁴⁷

B. International Legislation and Agreements

Another direction that scholars look to in order to solve the dilemma faced by cross-border tribes is to establish international legislation and agreements between the countries on whose borders the tribes are established. The primary international body under which this type of legislation has been proposed in the past is the United Nations.

The United Nations Declaration of Indigenous Rights (hereinafter Declaration) is an early example of such a solution.¹⁴⁸ The Declaration states, in Article 36, that it serves to help indigenous people maintain contacts with their own tribes, memberships, and heritage across international borders.¹⁴⁹ Article 36 states:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.¹⁵⁰

The Declaration merely encourages countries to facilitate the relationships between tribe members allocated across borders.¹⁵¹ However, this presents the first major hurdle this type of legislation encounters—the Declaration from the United Nations is not binding on the United States. To this end, the Declaration has been said to simply establish

146. *Id.* at 710.

147. Castella, *supra* note 47, at 206.

148. See G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter The Declaration].

149. *Id.*

150. *Id.* at Art. 36.

151. *Id.* at 16.

an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. . . . The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples. The Declaration, even in its draft form, has formed the basis for legislation in individual countries, such as the Indigenous People's Rights Act in the Philippines, and it has inspired constitutional and statutory reforms in various states of Latin America.¹⁵²

This Declaration is important, as one of its key purposes is to preserve the cultural rights of indigenous peoples in the world, which would presumably include protections of the rights of border tribes to maintain contact with and connection to their tribal lands and cultural sites that have been bisected by international borders. Simply put, the Declaration serves, at most, as a baseline standard for the United States to aspire to but does nothing in effectively correcting the problem.

The Declaration proved to be ineffective, however, even as a guide. In July 2017, the Human Rights Council for the Expert Mechanism on the Rights of Indigenous people gave a ten-year report on the Declaration.¹⁵³ This report, titled *Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned–2007–2017* (hereinafter, the Ten-Year Report), held that indigenous peoples “still report numerous and growing violations of their human rights.”¹⁵⁴ These violations included the denial of political recognition by their states, protection of their lands, consultation and consent regarding activities that affected the tribes, and the protection of their cultures,¹⁵⁵ including their “languages, religion, and way of life.”¹⁵⁶

In speaking on the shortcomings of the Declaration that were found by the Ten-Year Report, Professor Keegan Tasker said “each of the violations of human rights cited by the UN committee in the [Ten-Year Report] are directly aligned with the difficulties the [Tohono O’odham] Nation faces on a daily basis.”¹⁵⁷ As discussed previously in this Note, the Tohono O’odham Tribe continues to be threatened by the

152. Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 141, 162 (2008) (citing Human Rights Council, *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/9/9, at 85, 88 (Aug. 11, 2008)).

153. U.N. HRC Expert Mechanism on the Rights of Indigenous Peoples [EMRIP], 10th Sess., Item 8 of provis. ag. U.N. DOC. A/HRC/EMRIP/2017/CRP.2 (July 10–14, 2017) [hereinafter EMRIP].

154. *Id.* at 3.

155. *Id.*

156. Tasker, *supra* note 92, at 326.

157. *Id.*

challenges that the Ten-Year Plan notes, and the construction of the border wall only stands to exacerbate those problems.¹⁵⁸

C. Litigation

Keegan proposed a way that the Declaration could still be effective using the example of *Poma Poma v. Peru*.¹⁵⁹ It is first important to note that, while a United Nations Declaration is not legally binding, the United States, as a permanent member of the United Nations, does have certain binding obligations under any United Nations treaty or covenant. The Ten-Year Review clarified that

[t]he Declaration reaffirms and clarifies international human rights standards to ensure respect for indigenous peoples' right to self-determination, cultural rights, languages, land rights, natural resources, environmental protection, consultation, and FPIC. Thus, recommendations and observations to States, seeking the implementation of Declaration rights, by UN agencies . . . special procedures of the Human Rights Council . . . should be implemented.¹⁶⁰

The UN Human Rights Council has demonstrated its efforts in protecting the rights of indigenous peoples, as evident in *Poma Poma*. In this case, an indigenous farm owner in rural Peru brought a claim against Peru alleging that Peru violated Article 1 Section 2 of the International Covenant on Civil and Political Rights when the country diverted groundwater from her lands, which led to the depletion of the indigenous community's access to ground water and the death of its livestock.¹⁶¹ The dispute was heard at the United Nations, and the Committee on Human Rights found that the indigenous community's rights were violated when infrastructure was implemented to divert the groundwater from the indigenous lands, "ultimately removing her right to enjoy her culture and craft with members of her indigenous community."¹⁶² Tasker argues that the Tohono O'odham could bring a similar argument, regarding the implementation of the border wall, by making claims on the border wall's detrimental effect on the tribe's right to enjoy their culture with members of their community.¹⁶³

The primary issue that this resolution presents is the fact that the *Poma Poma* precedent requires some physical infrastructure to cause the detriment to the tribal culture, and the scale of this detriment could be argued to have been much more significant than the scale of potential or current detriment that the Tohono O'odham face. In regard

158. *Infra* note 165.

159. *Poma Poma v. Peru*, U.N. Doc. CCPR/C/95/D/1457/2006 (2009).

160. EMRIP, *supra* note 153, at 4.

161. *Poma Poma*, U.N. Doc. CCPR/C/95/D/1457/2006, at 6.

162. Tasker, *supra* note 92, at 328.

163. *Id.*

to the likely need for some physical infrastructure, this may work for the Tohono O'odham with the border wall,¹⁶⁴ but the northern tribes do not have as imposing a physical barrier (though the legal barrier is clearly harmful). Further, the border wall is being used to divide two separate countries, whereas the diversion of groundwater in *Poma Poma* served no international or constitutional interest in protecting borders but was a completely internal government action.¹⁶⁵ Finally, the diversion of the groundwater in *Poma* completely destroyed the indigenous ecosystem,¹⁶⁶ leading to the death of thousands of livestock, dried wetlands, and utter depletion of the indigenous community's natural resources.¹⁶⁷ While the detriment of the border wall has obviously been significant to the Tohono O'odham Tribe, the physical and material destruction caused by the diversion of groundwater could distinguish *Poma Poma* from the case at hand.

Tribes can try an alternative suit in the form of a takings claim. During a U.S. Senate Committee on Homeland Security and Governmental Affairs hearing, Senator Claire McCaskill said about the border wall, "[i]t is really controversial for the government to be seizing land and that's what this is about, the government seizing private land."¹⁶⁸ The takings clause of the Fifth Amendment states that private property shall not be "taken for public use, without just compensation."¹⁶⁹ Takings claims have been made against the federal government in the past. In *United States v. 1.04 Acres of Land*, the

164. Cf. Lucy Rodgers and Dominique Bailey, *Trump Wall: How Much Has He Actually Built?*, BBC NEWS (Oct. 31, 2020), <https://www.bbc.com/news/world-us-canada-46824649> [<https://perma.cc/T7ER-VSP8>] (archived Aug. 16, 2021). This article goes over several relevant points related to the actual size and coverage of the border wall (specifically in relation to the promises made by President Trump about the size and strength of the wall), and even delineates that portions of the wall are not really a "wall," but something less imposing, physically. While this may lead one to think that the border wall may not be as big of a threat as it was made out to be, both by the media and by Donald Trump, the physical barrier remains in place in portions of the Tohono O'odham land. It is also notable that, while the wall may not have been completed during President Trump's term, the Biden Administration is looking to continue the construction of the border wall. See Hayden Sparks, *Biden Administration May Resume Border Wall Construction After Halting Progress on First Day in Office*, TEXAN (April 7, 2021) <https://thetexan.news/biden-administration-may-resume-border-wall-construction-after-halting-progress-on-first-day-in-office/> [<https://perma.cc/4BE5-U4QJ>] (archived Aug. 16, 2021).

165. See Katja Göcke, *The Case of Angela Poma Poma v. Peru Before the Human Rights Committee*, 14 MAX PLANCK Y.B. UNITED NATIONS L. 337, 342 (2010) (explaining the completely internal nature of the Peruvian decision to divert the river and drill wells, with no international implications).

166. *Poma Poma*, U.N. Doc. CCPR/C/95/D/1457/2006, at 6.

167. Tasker, *supra* note 92, at 327.

168. *Fencing Along the Southwest Border: Hearing Before the Homeland Security and Governmental Aff. Comm.*, 115th Cong. 3 (2017) (statement of Sen. Claire McCaskill, Ranking Member, S. Comm. on Homeland Security & Governmental Aff.).

169. U.S. Const. amend. V.

court ruled that the federal government was required to engage in some level of bona-fide negotiations with the property owners prior to commencing eminent domain proceedings in building a fence on the US–Mexico border in 2008.¹⁷⁰ In *Texas Border Coalition v. Napolitano*, a coalition of landowners and local municipalities challenged the condemnation of border land for the construction of a border fence in 2009; however, the case was dismissed for lack of standing.¹⁷¹ Professor Gerald S. Dickinson compared past condemnation legislation to the current border wall construction and argued that there has been a lack of scrutiny from Congress and thus a lack of takings claims from those affected by the construction of the wall.¹⁷² He argues that “given the extent of such a proposal, debates about the property fragmentation and potential dispossession of lands should be front and center as the construction of a border wall looms.”¹⁷³

The primary concerns with the potential takings claims are two-fold. First, the Tohono O’odham may suffer from lack of standing like the coalition in *Texas Border Coalition*.¹⁷⁴ In *Texas Border Coalition*, the court held that “[i]n the absence of any claims of distinction having been made based on ‘race, alienage, or natural origin . . . [t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.’”¹⁷⁵ If the Tohono O’odham were to bring a case against the United States for the border wall, it would be difficult for the tribe to claim that the wall was built on tribal land due to the tribe’s race, alienage, or national origin. Second, even a successful takings claim by the Tohono O’odham Tribe would only immediately prevent the condemnation of their land for the construction of a border wall, that is, the construction of a physical barrier. The legal barriers that the tribe faces, even in the absence of the wall, would still remain. It should be noted, however, that a successful takings claim could lead to precedent that would open up possibilities for more tribal sovereignty and autonomy on the border, depending on the decision’s language.¹⁷⁶

170. U.S. v. 1.04 Acres of Land, More or Less, 538 F. Supp. 2d 995, 995 (S.D. Tex. 2008).

171. *Texas Border Coalition v. Napolitano*, 614 F. Supp.2d 54, 54 (D.D.C. 2009).

172. Gerald S. Dickinson, *Property Musing at the U.S.-Mexico Border*, 33 MD. J. INT’L L. 162, 181 (2018) (suggesting that a lack of scrutiny from Congress may result in more acquiescence to the use of the “federal power of eminent domain.”).

173. *Id.*

174. *Texas Border Coalition*, 614 F. Supp.2d at 54.

175. *Id.* at 65.

176. See, e.g., McGirt, *supra* note 15, at 2459 (This decision opens with the declaration that “On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever . . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its

The takings claim may not be successful on the southern border, and there are currently no real grounds for a takings claim on the northern border,¹⁷⁷ so this litigation theory is likely to be unsuccessful in solving the problems common to all border tribes.

IV. THE CREATION OF A NEW, POLYCENTRIC INTERGOVERNMENTAL GOVERNING BODY TO PRESERVE THE RIGHTS OF THE BORDER TRIBES IN NORTH AMERICA

A. *Shortfalls of Other Proposals*

The primary issues that the tribes on the northern and southern borders face are the deterioration of their culture and the weakening of their governance. Additionally, tribes on the southern border, like the Tohono O'odham, face threats of increased crime in their land as border restrictions push dangerous activities further onto their territories.

These proposed solutions provide several benefits but do not seem to completely resolve the problems for the border tribes. A more sweeping piece of governance is needed.

Tribe-specific legislation presents several dilemmas. First, this requires tribal membership to be defined, at least in part, by the federal government and could be a laborious, time consuming process that may not encompass all of the tribe members.¹⁷⁸ Further, while the Tohono O'odham represent the primary tribe on the southern border, there are multiple tribes on the northern border, and this would, theoretically, call for several rounds of legislation so as to ensure each tribes' needs regarding their border rights are met—especially given the disparities between the border enforcement on the northern border versus the southern border.¹⁷⁹

International legislation has been enacted, to a degree, through the United Nations Declaration of Indigenous Rights. While the Declaration is effective in laying out the challenges that the border tribes face, it does not provide an effective enforcement mechanism for

word." This may be promising phraseology for the Creek Nation as this case, though based in a federal criminal case, may have opened the doors for more Creek control over the land in much of Eastern Oklahoma. Similarly, a simple takings case, if successful, could be awarded with such sweeping possibility).

177. Due to the lack of any condemnation of land on the northern border for the construction of any type of wall like what is being done on the southern border.

178. See 8 U.S.C. § 1359 (2006).

179. See generally Aurielano Gonzalez Baz, *Comparing the Southern Border to the Northern Border and the Issues to Be Dealt With at Each – Mexican Speaker*, 29 CAN.-U.S. L. J. 383 (2003); Peter Andreas, *A Tale of Two Borders: The U.S.-Mexico and U.S. Canada Lines After 9-11*, (Ctr. for Compar. Immigr. Stud., Univ. Cal. S.D., Working Paper No. 77, May 2003).

carrying out its objectives in remedying these challenges.¹⁸⁰ The Declaration serves only as a baseline, and the United States is not bound by it and has not made any steps to making the Declaration's suggestions a legislative priority.

Finally, litigation seems to be the least effective solution. Cases like *Poma Poma*¹⁸¹ and *Texas Border Coalition*¹⁸² establish precedent showing that the border issues the tribes face likely do not give rise to standing. Further, such suits would be costly and numerous for the tribes to have a chance at solving the challenges they face on the borders.

B. Polycentric Governance and its Potential Framework

The creation of a type of "Tribal Council," agreed upon by the border tribes and the US, Mexican, and Canadian governments, stands as a new solution that could successfully avoid these shortfalls while protecting tribal governance, culture, and identity.

1. Polycentricity Defined

Polycentric governance systems are usually put in place to effectively manage an intangible, international, or indivisible space, like water,¹⁸³ reefs,¹⁸⁴ outer space, or telecommunications.¹⁸⁵ Why, then, would this be an effective way to manage the tribal, cross-border lands? Polycentric governance is common in spaces that encompass resources or other tangible aspects that have different values to the various interested parties, and the various parties bring different perspectives and expertise or skills that are most effectively applied to the space when it is under their control.¹⁸⁶ These systems are "often

180. EMRIP, *supra* note 153.

181. *Poma Poma*, U.N. Doc. CCPR/C/95/D/1457/2006.

182. *Texas Border Coalition v. Napolitano*, 614 F. Supp.2d 54, 54 (D.D.C. 2009).

183. See, e.g., Stefan Carpenter, Elizabeth Baldwin, & Daniel H. Cole, *The Polycentric Turn: A Case Study of Kenya's Evolving Legal Regime for Irrigation Waters*, 57 NAT. RES. J. 1 (Winter 2017) at 101–38.

184. See Tiffany H. Morrison, *Evolving Polycentric Governance of the Great Barrier Reef*, 114 Proceedings of the NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA No. 15 (April 11, 2017) at E3013-3021.

185. See Martin B. Weiss & Marcella Gomez, *Polycentric Governance for Spectrum Sharing*, FREQUENCIES: INTERNATIONAL SPECTRUM POLICY, 207 (Gregory Taylor & Catherine Middleton eds., 2020).

186. Cf. *id.* ("Merging polycentric governance with spectrum management means relying on multiple nested governance entities. Some of these entities can take advantage of their local knowledge to develop spectrum usage plans and guidelines, as well as deal with potential harmful uses. This process shifts the locus of spectrum regulation away from a centralized entity, which may speed up negotiation processes; it also avoids having a single point of failure in the system and allows solutions specific to the local environment." If one switches the references to "spectrum" in this explanation,

described as overlapping because they are nested at multiple jurisdictional levels (e.g., local, state, and national) and also include special-purpose governance units that cut across jurisdictions . . . This multilevel configuration means that governance arrangements exhibiting polycentric characteristics may be capable of striking a balance between centralized and fully decentralized or community-based governance.”¹⁸⁷ Tribal, cross-border issues affect multiple national governments and tribes, but the voices of the tribes are not sufficient by themselves to promote significant change; the tribes are also not able to meet the needs of the governments whose borders bisect tribal lands without assistance.

Polycentricity is a beneficial governance system in the face of collective action for the following six reasons: “it provides opportunities for learning and experimentation; it enables broader levels of participation; it improves connectivity; it creates modularity; it improves potential for response diversity and builds redundancy that can minimize and correct errors in governance.”¹⁸⁸ These benefits can address both the primary issues the United States faces with tribal border lands as well as those issues faced by the tribes, including border security, tribal autonomy, and the preservation of tribal culture. In order to effectively address these concerns through a polycentric governance system, there would need to be permanent involvement in this “Tribal Council” by a branch of the US, Mexican, and Canadian governments, as well as the governments of the tribes on the northern and southern borders, including the Texas Band of Kickapoo.¹⁸⁹

to “cross-border tribal lands,” it becomes evident that such a system could prove beneficial to the governance of these cross-border tribal lands. Tribal, cross-border governance and the polycentric governed spaces are similar in that they all present collective action problems).

187. Keith Carlisle & Rebecca L. Gruby, *Polycentric Systems of Governance: A Theoretical Model for the Commons*, 47 POL’Y STUD. J. 927, 928 (2019) (citations omitted).

188. *Promote Polycentric Governance*, GRAID STOCKHOLM RESILIENCE CTR., <https://applyingresilience.org/en/principle-7#:~:text=Polycentricity%2C%20a%20governance%20system%20in,the%20face%20of%20disturbance%20change> (last visited Mar. 8, 2021) [<https://perma.cc/4J6Q-VJWN>] (archived Sept. 17, 2021).

189. The Texas Band of Kickapoo already have their own tribe-specific legislation, however the issues that would be broached in this “Tribal Council” would be most effectively addressed by all border tribes, and the Kickapoo will likely have valuable insights relating to the effectiveness of the legislation that is in place for their Tribe, currently. It should be noted, however, that the Texas Band of Kickapoo may not necessarily lead the way in this council. As has been noted here, the Kickapoo have a very successful legislative plan already in place for their Tribe. The implementation of this proposed council could jeopardize their historic stability under the Texas Band of Kickapoo Act. While the author does not posit one way or the other, it is important to note that when it comes to matters of conflicting tribal interests, there is not always unity between tribes. See, e.g., *‘Location is Everything’ in Tribal Casino Dispute*, NPR MORNING EDITION (Jul. 29, 2015), <https://www.npr.org/2015/07/29/427055701/location-is-everything-in-tribal-casino-dispute> (last visited June 1, 2021) [<https://perma.cc/724Q-Z6AS>] (archived Sept. 17, 2021).

2. Proposed Structure

Ideally, the council would be composed of those who best understand and represent the interests of their respective groups, including the diverging interests at stake with regard to border policy. For the tribes, this would likely be key members of tribal leadership designated by the tribe's chairperson or legislative branches. In order to maintain the integrity and authority of the council, it would seem essential that the tribal representatives would serve in this role in a full-time capacity, and if chosen by the chairperson of the tribe, their appointments would coincide with the terms of the chairperson in order to best represent the current desires of the tribe. The Canadian representation would likely come from the Canadian Border Services Agency (CBSA), and the US representation may initially start as a congressional committee, similar to the House Foreign Affairs Committee, under the auspices of the Plenary Power doctrine.¹⁹⁰ It may be more effective, in the long run, however, for the US representation to come from a combination of the Department of Homeland Security,¹⁹¹ the Department of the Interior,¹⁹² and even US NAFTA representation.¹⁹³ Several axioms suggested by Kai Monheim in relation to intergovernmental climate negotiations could also serve as important notes for this proposed polycentric governance:

Enhance your influence by acting impartially, recognize the cultural differences in leadership and communication, and be aware of a few helpful personal characteristics. . . . Carefully manage the agenda to create momentum, cluster and prioritize issues, and point out possible trade-offs by linking issues . . . Steer individual negotiation sessions in a time-efficient way and uphold momentum

190. U.S. CONST. art. I, § 8, cl. 3; see also Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. UNIV. L. REV. 363, 363 (2007) (explaining, generally, the role of the Plenary Powers Doctrine in Congress's immigration control).

191. "The Department of Homeland Security has a vital mission: to secure the nation from the many threats we face. This requires the dedication of more than 240,000 employees in jobs that range from aviation and border security to emergency response, from cybersecurity analyst to chemical facility inspector. Our duties are wide-ranging, and our goal is clear - keeping America safe." *About DHS*, DEPT. HOMELAND SEC., <https://www.dhs.gov/about-dhs> (last visited June 2, 2021) [<https://perma.cc/QGZ6-B49C>] (archived Sept. 17, 2021).

192. "The U.S. Department of the Interior protects and manages the Nation's natural resources and cultural heritage; provides scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated Island Communities." *About Interior*, DEPT. INTERIOR, <https://www.doi.gov/about> (last visited June 2, 2021) [<https://perma.cc/T87N-DWES>] (archived Sept. 17, 2021).

193. While not focused on Border Security, the economic focus of NAFTA and its involvement with the international governments needed for this "Tribal Council" could be beneficial. See, e.g., *North American Free Trade Agreement (NAFTA)*, INT'L TRADE ADMIN., <https://www.trade.gov/north-american-free-trade-agreement-nafta> (last visited June 2, 2021) [<https://perma.cc/4C2S-B3N2>] (archived Sept. 17, 2021).

for agreement . . . Build trust and create sheltered negotiation spaces to open up parties for a frank and constructive dialogue, rather than only defending their state's offensive and defensive claims.¹⁹⁴

A similar strategic framework would be beneficial in encouraging participation and reaching an agreement in negotiations within this polycentric governance structure.

With a polycentric governance council, each entity involved would be able to best use their expertise to represent and protect their interests. The tribes would have the strongest interest in establishing policy related to the citizenship and membership of their tribe members, as the integrity and survival of their tribal culture would depend on the legitimacy and enforcement of who makes up the tribe.¹⁹⁵ The tribes' interests would also be vested in the preservation of their culture and access to important cultural and spiritual locations within their tribal lands. The governments, on the other hand, would have the most interest in border security and in maintaining as much autonomy over the lands as possible, given the vulnerability of the borders. The tribes, however, would also maintain some interest in this aspect, as border security can be important for their members living on the border as well, at least as it pertains to protecting their safety.¹⁹⁶ The national governments also have the most expertise and interest in national citizenship and thus will represent those interests in the negotiations in the "Tribal Council."

This "Tribal Council" would not suffer from the same shortfalls as the other proposed solutions. The tribes would still have major influence over their membership and cultural sites, as well as their rights, and its decisions would be binding, unlike those of the UN Declaration. While this proposal would entail the sweeping creation of

194. Kai Monheim, *Conducting Global Climate Change Negotiations: Harnessing the Power of Process*, 2 FIXING CLIMATE GOVERNANCE SERIES, May 2015 at 3–6.

195. See, e.g., Maggie Astor, *Why Native Americans are Angry with Elizabeth Warren*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/elizabeth-warren-dna-test.html> (last visited Mar. 17, 2021) [<https://perma.cc/5J9Y-CGDT>] (archived Sept. 17, 2021); Chuck Hoskin Jr., *Elizabeth Warren Can be a Friend, but She isn't a Cherokee Citizen*, TULSA WORLD (March 9, 2019), https://tulsaworld.com/opinion/columnists/chuck-hoskin-jr-elizabeth-warren-can-be-a-friend-but-she-isnt-a-chokeee-citizen/article_8c4b4d62-15be-536d-bb96-f33368a4488b.html (last visited May 9, 2021) [<https://perma.cc/CU7Z-TUVH>] (archived Sept. 17, 2021); *Determining Who Is A Cherokee Is More Than DNA, Hoskin Says*, NPR (October 16, 2018), <https://www.npr.org/2018/10/16/657749867/determining-who-is-a-chokeee-is-more-than-dna-hoskin-says> (last visited May 9, 2021) [<https://perma.cc/J6X9-LM2B>] (archived Sept. 17, 2021). These articles generally show the displeasure of the Cherokee Secretary of State (Chuck Hoskin) and the Cherokee, in general, with unsupported claims of tribal membership. While these are examples of their displeasure of said claims by a prominent member of the U.S. political system, the general statements made in the articles display the importance of these issues to the Cherokee.

196. See, e.g., Valencia-Weber & Sedillo Lopez, *supra* note 11, at 298–99.

an intergovernmental body, this new polycentric governance system would be the most effective way to address the problems all bodies face while avoiding the shortfalls that other proposals face.

C. Feasibility Issues

The primary hurdle that this type of governance encounters, on its face, is the necessary ideological or paradigmatic shift regarding the perceived autonomy of the land in question. This ideological unity is key in the success of this, and any, polycentric governance system.¹⁹⁷ While this would typically be problematic at the outset, as the tribal lands are recognized as reservations by the United States,¹⁹⁸ the recent ruling in *McGirt* suggests that past treaties may be upheld, extending tribal jurisdiction to matters that would normally be federal.¹⁹⁹ While a dramatic shift in how the United States sees Indian land would be difficult to imagine in the polarized political climate in which the country currently finds itself, the potential affirmation or extension of tribal jurisdiction by the Supreme Court in *McGirt* could assist with this shift. While the implications of *McGirt* are not yet in full focus, as tribes begin to overcome the detriments of COVID-19 and begin to refocus on political lobbying, one can expect to see how this ideological shift may take place.²⁰⁰

The council also presents the concern that any collective action problem faces—who will get the ball rolling? It would be in the best interest of all parties for the United States to begin the negotiations. Cultural issues aside, the United States has two borders that are affected by the tribal activity, and thus, while the impact of any polycentric governance decisions will be immensely important to the tribes and Mexico and Canada, the United States has the most at stake when it comes to border exposure and citizenship requests from tribe members. In any negotiation the initial offers are known to “anchor”

197. Unity in this ideological shift is essential to the success of the system. “While the existence of multiple, semiautonomous decision-making centers may be sufficient to characterize a governance arrangement as polycentric, it does not guarantee that there will be sufficient coordination among the decision centers such that the arrangement functions as a polycentric governance system.” Carlisle & Gruby, *supra* note 187, at 928. See also DAVID FELDMAN, *Polycentric Governance*, in HANDBOOK OF SCIENCE AND TECHNOLOGY CONVERGENCE 878, 878 (W.S. Bainbridge and M.C. Roco eds., 2016) (“The concept of polycentric governance originated in observations of how locally incorporated communities, typically found in the US metropolitan areas, improvise solutions to cross-jurisdictional problems through contractual agreements.”).

198. See, e.g., 25 U.S.C. §§ 211–65.

199. *McGirt*, *supra* note 15, at 2459.

200. See, e.g., Briefly Legal, *The Immediate and Lasting Impacts of McGirt: A Novel Ruling for Oklahoma*, JDSUPRA (July 8, 2021), <https://www.jdsupra.com/legalnews/the-immediate-and-lasting-impacts-of-mcg-27952/> [<https://perma.cc/F3JK-W6JP>] (archived Sept. 17, 2021) (explaining various theories of the potential impacts of the *McGirt* Decision).

the rest of the negotiation.²⁰¹ This means that most parties would want to be “first” so as to gain this state of control. The United States’ natural position of power and various stakes of interest—border security, citizenship, taxation implication—would make the United States the best party to start this type of governance structure, and the benefits of anchoring their interests would provide an incentive to do so. However, a proposal more in tune with polycentrism may help to establish the ideological balance that this council would serve to support. This proposal/negotiation initiation would come from the experts in the issues involved—namely the tribal leaders and Native American rights advocacy groups, like the National Congress of American Indians, as well as those agencies which oversee border security in the United States, Canada, and Mexico. However, as with any negotiation, there are leverage issues to be dealt with when the weaker parties try to initiate such talks.²⁰²

This then leads one to question if, regardless of the benefits of being the anchor in a negotiation, the United States would ever even consider a change in border policy to assist border tribes. While a more lenient border policy for these tribes would be a long shot under the Trump administration, the Biden administration successfully campaigned on a more liberal border policy²⁰³ and has also campaigned on the goal to “[w]ork with Mexico and Canada as partners — not as adversaries.”²⁰⁴ With this new administration in place, and with more modern border policy goals in mind, the time may be at hand to take the steps needed to solve the issues border tribes have been facing for years.

It is no secret that a new, transnational governmental agency or council having a definitive say in US border policy would be a controversial move for any administration to make—no matter how progressive. This does not mean, however, that the basic ideology behind polycentrism cannot serve to present new ways for the tribes and the involved national governments to address these glaring issues at the borders. The basic idea behind polycentrism is that difficult-to-govern spaces are managed by those who best understand them, in a collective manner. Even if there is no new, transnational governance

201. *The Anchoring Effect and How it Can Impact Your Negotiation*, PROGRAM ON NEGOT. DAILY BLOG, HARV. L. S. (Nov. 26, 2019), <https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/> [<https://perma.cc/TR6U-7786>] (archived Sept. 17, 2021).

202. See, e.g., Paul F. Kirgis, *Bargaining with Consequences: Leverage and Coercion in Negotiation*, 19 HARV. NEGOT. L. REV. 69 (2014) (explaining that the inability to inflict consequences on the other side in a negotiation leads to less leverage in negotiation).

203. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, <https://joebiden.com/immigration/> (last visited Mar. 17, 2021) [<https://perma.cc/GG86-KJ9K>] (archived Sept. 17, 2021).

204. *Id.*

council, this does not mean that governments and tribes cannot use this type of framework to reshape policymaking thought processes relating to border lands.

V. CONCLUSION

The indigenous tribes whose land was bisected years ago by the US–Mexico and US–Canada borders have historically faced challenges affecting the preservation of their economies, governance systems, cultures, and family relations because of those borders. Scholars have suggested various solutions to the challenges these tribes face, and the Texas Band of Kickapoo has had legislation enacted specifically to resolve these problems. In order to address the unique border circumstances each tribe faces and to ensure that the tribal and governmental interests are represented fairly, a new polycentric governance system, led by the United States, would resolve the issues present in past academic solutions and solve the problems border tribes are still facing today.

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