

INDIGENOUS RESILIENCE

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The story of federal Indian law is the story of Indian tribal survival in the face of perpetual challenges to their legal and cultural existence, both in law and policy. These assaults have come from every quarter: federal, state, and private actors, as well as from the judicial, legislative, and executive branches. Tribes have often lost key contests challenging their rights and status. Among other challenges, they have overcome disease, starvation, and colonialism. Theirs is a story of striking resilience. Resilience theorists study institutions, systems, and individuals to understand how they withstand, or why they succumb to, significant disruption. Resilience theory has traditionally informed law and policy in a wide range of areas from disaster response to ecology to healthcare strategies. But to date, legal and resilience theorists have largely ignored the indigenous strategies and principles that have enabled the improbable legal and cultural survival of tribes as peoples and self-governing institutions.

Thus, the story of indigenous resilience provides a rich—but previously untapped—resource for understanding how institutions prepare for and adapt to disruption, not only for resilience theorists, but also for all those interested in preparing for and responding to potential threats to peoples and institutions. This Article fills this critical gap in resilience theory and practice by looking to the tribes, particularly through the lens of Haudenosaunee principles, to better understand resilience strategies. In particular, this Article identifies a set of principles of indigenous resilience that have enabled American Indian and Alaska Native tribes to adapt and maintain their core identities in the face of unimaginable assaults. The Article then suggests how these indigenous resilience principles might assist leaders and policymakers, both within and outside the tribal context, to prepare for such looming challenges as climate change, epistemic crises in civil governance, and care for the vulnerable.

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INTRODUCTION

In the 1990s, a young schoolgirl who was studying the American Indian¹ tribes of New York in her elementary school class asked to talk with me about the Seneca Nation of Indians of western New York. I am a member of the Seneca Nation and spent my childhood on the Cattaraugus Territory. We arranged a telephone interview. Her first questions, asked in a voice of earnest innocence, have stayed with me these many years later: “When you were a Seneca Indian, what did you eat?

1. I use the term “American Indian” interchangeably with “Native American” due to both common colloquial usage among Native peoples and the statutes and treaties that reference American Indian tribes as a legal term of art. Similarly, I use the term “indigenous” throughout as a way to encompass the diverse peoples native to the United States.

What did you wear? What was your life like?" I explained to her that Seneca people living in New York today are much like other western New Yorkers in terms of what we eat² and what we wear. But her well-intentioned inquiry encapsulated for me the persistent experience and expectation of American culture that preclude Indian tribes from modernity and relegate Indian people to a bygone era, frozen in a historic past modeled by elementary school dioramas.

The reality is that there are at least 573 federally recognized and 100 state recognized American Indian and Alaska Native tribes and more than 5 million American Indians and Alaska Natives in the United States.³ The enduring presence of indigenous people and peoples, Indians and Indian tribes, in the twenty-first century would likely be a surprising development for those of the founding era. Those responsible for the earliest formulations of American Indian policy, and so many subsequent policymakers, had every expectation that the so-called Indian Problem would go away as the Indian people, their tribal organizations, and their claims to sovereignty were decimated by disease, disbanded after displacement, or dissolved under the weight of forced assimilation.⁴

The expectation of tribes' inevitable consignment to history was not just a widely shared political and cultural value among Americans, it has been a goal explicitly enshrined in American Indian law and policy for most of the nation's history. And yet, tribes and tribal people endure as cultural, political, and legal entities. What principles and attributes enabled this remarkable survival? Might an examination of that story contribute to the field of resilience theory more generally? And how can these lessons learned help tribes and other institutions prepare for future setbacks and assaults?

This Article seeks to answer these questions by identifying principles of indigenous resilience: those characteristics and strategies that have enabled the endurance of America's Indian tribes and Alaska Natives. The Article will argue that tribes have drawn from and relied on indigenous principles and traditions in ordering their societies and governing their communities to weather the legal and cultural assaults against them without losing their fundamental identities or functions. Indigenous ideals have provided the anchoring foundation that has enabled the tribes to overcome efforts marshaled against them.

Such principles of indigenous resilience offer significant lessons for all those interested generally in the resilience of institutions, systems, communities, and

2. To wit, buffalo wings and beef on weck, to be sure. But also, traditional dishes like white corn soup with kidney beans and salt pork.

3. TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 CENSUS BRIEFS 1 (2012), <https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010br-10.pdf>; *Mission Statement*, BUREAU INDIAN AFF., www.bia.gov/bia (last visited Aug. 24, 2018); *Profile: American Indian/Alaska Native*, OFF. MINORITY HEALTH (Mar. 28, 2018, 8:30 AM), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvid=62>. I also note that some tribes are still seeking federal recognition.

4. See generally Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 845 (2001).

individuals. Legal thinkers and policymakers concerned with disruptions that may upend social and political institutions may benefit from the hard-earned wisdom and time-tested strategies that have enabled the tribes to survive. Certainly, tribal leaders and federal Indian law policymakers may also look to these principles in planning for the future of tribal self-governance and responding to threats to tribal institutions.

The Article proceeds as follows: Part I identifies principles of existing resilience theory to situate the discussion of indigenous resilience; Part II examines the nature and history of the assaults on tribal culture and disruptions to tribal identity and some strategies employed by tribes to overcome them; Part III looks to traditional Haudenosaunee principles to augment resilience theory and suggests seven principles of indigenous resilience from that tradition; Part IV begins a discussion of the principles of indigenous resilience in the context of three specific future challenges both for tribes and for other peoples and institutions: climate change, epistemic crises in civil governance, and care for the vulnerable; and Part V concludes with an invitation to resilience theorists to learn from indigenous values.

I. RESILIENCE THEORY

Resilience theory draws upon and informs other fields, such as sociology, psychology, ecology, business, and disaster response.⁵ It has been applied both to systems and individuals.⁶ In the legal context, resilience theory is most commonly associated with environmental and disaster law and concerns the need for flexible management planning to anticipate and adapt to crises and changing needs.⁷ For purposes of this discussion, resilience refers to the ability of an organization or system “to maintain its core purpose and integrity in the face of dramatically changed circumstances.”⁸ Changed circumstances may include accidents, assaults, and other disruptions, intentionally inflicted or unanticipated.⁹ Of course, the concept of resilience can be much broader than the present discussion. It can refer to these same qualities in ecosystems, individuals, economies, and communities: the ability to face change and disruption without being fundamentally compromised.¹⁰

5. ANDREW ZOLLI & ANN MARIE HEALY, RESILIENCE: WHY THINGS BOUNCE BACK 6–7 (2012).

6. See, e.g., Jessica Shaw et al., *Beyond Resilience: Why We Need to Look at Systems Too*, 6 PSYCHOL. OF VIOLENCE 34, 35 (2016).

7. See Gary E. Marchant & Yvonne A. Stevens, *Resilience in Environmental Law: Existing Measures*, NAT. RESOURCES & ENV’T, Winter 2017, at 8; cf. J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 574 (2014); Brian Walker et al., *Resilience, Adaptability and Transformability in Social-Ecological Systems*, 9 ECOLOGY & SOC’Y, No. 2, 2004, at art. 5.

8. ZOLLI & HEALY, *supra* note 5, at 7 (emphasis omitted).

9. Horne v. Flores, 557 U.S. 433, 488 (2009) (Breyer, J., dissenting) (noting that “changed circumstances” include “unforeseen obstacles” (quoting Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 384 (1992))).

10. Beyond mere resilience, antifragility theory, introduced by Nassim Nicholas Taleb, posits that some systems and institutions do not merely survive shocks and disruption without fundamental alteration, “they thrive and grow when exposed . . . to stressors.” NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER 3–4 (2014). In his works (the literary series *Incerto*) exploring uncertainty theory primarily in the context of

This Part looks at resilience theory in relation to the remarkable endurance of tribal nations and peoples. No one would argue that the circumstances of Native American and Alaska Native tribes have not changed dramatically as they have suffered the consequences of colonization's onslaught. If the essence of resilience is that an organization or individual absorbs disruption while preserving core identity and purpose and without being fundamentally altered by it, the stories of the survival of tribes offer significant lessons in resilience. In looking to America's tribal nations, we see them weather disruption and insult from law, policy, military might, natural disaster, and attempted genocide. We see how many of them, in responding to these existential threats, have retained their unique purposes and identities as peoples, communities, and governments.¹¹

Resilience does not mean assault and disruption leave the organization or system unchanged. Rather, resilience means the systems have adapted in the face of threats and endured them so as not to be critically compromised.¹² The ability to fulfill the core mission endures. The core identity endures. Resilience theorists examine how and why some systems adapt and overcome such disruptions, and why some systems fail, or are irretrievably compromised by such disruptions.¹³

Informed by resilience theory, resilience thinking anticipates uncertainty and shocks to assess a system's or organization's capacity to endure them. Andrew Zolli and Ann Marie Healy argue that the concept of resilience is distinct from related concepts of robustness, redundancy, and recovery.¹⁴ Under their formulation summarizing resilience theories, robustness means assets have been hardened to persist for a long time, like the great Pyramids, but they are not adaptable to significant disruption.¹⁵ Robust institutions are able to withstand many changes and assaults but do not have a capacity to rebuild or reconstitute themselves in any meaningful approximation of their original form.¹⁶

Similarly, redundant systems have built-in backups able to preserve the status quo in the event of a failure or disruption. But as Zolli and Healy note, such redundancy is not efficient and may become obsolete in dramatically changed

economic actors, Taleb writes that some things "thrive and grow when exposed to volatility, randomness, disorder, and stressors." *Id.* at 3. Taleb's work consists of seven volumes including *The Black Swan: The Impact of the Highly Improbable*, which examines how organizations might prepare for and respond to rare but significant events, and *Fooled by Randomness: The Hidden Role of Chance in Life and in the Markets*, which is a study of how we perceive and misperceive luck and skill.

11. ZOLLI & HEALY, *supra* note 5, at 7 (emphasis omitted).

12. See BRIAN WALKER & DAVID SALT, RESILIENCE PRACTICE: BUILDING CAPACITY TO ABSORB DISTURBANCE AND MAINTAIN FUNCTION xi (2012) ("As the systems that sustain us are subjected to shock after shock, the question that inevitably arises is, How much can they take and still deliver the things we want from them? That, in a nutshell, is the central question behind resilience thinking.").

13. Many have noted that resilience, in itself, is not always an end to be sought for its own sake. Viruses, for example, are resilient. Understanding how systems react and adapt can help us combat the resilience of potentially harmful systems. *See id.* at 20–21.

14. ZOLLI & HEALY, *supra* note 5, at 13.

15. *Id.*

16. *See id.*

circumstances.¹⁷ Although resilient systems and institutions may be both redundant and robust, these are not the qualities meant by “resilience” for purposes of this discussion. Instead, to possess resilience, systems must have the capacity to adapt to and endure shocks, uncertainty, and assaults.

That adaptive capacity likewise distinguishes resilience from recovery, which is the ability of a system to return to its original state after these shocks and assaults.¹⁸ Zolli and Healy explain the distinction between recovery and resilience:

While some resilient systems may indeed return to a baseline state after a breach or a radical shift in their environment, they need not necessarily ever do so. In their purest expression, resilient systems may have no baseline to return to—they may reconfigure themselves continuously and fluidly to adapt to ever-changing circumstances, while continuing to fulfill their purpose.¹⁹

Examining what makes systems fragile, resilience theorists posit ways both to shore up potential vulnerabilities and to proactively cultivate attributes of sustainability. Resilience theorists have suggested a “multitude of . . . factors that enhance resilience,” but the breadth and variety of studies on the subject “ha[ve] led to a somewhat dispersed and fragmented understanding of what is critical for building resilience and how an understanding of these factors can be applied.”²⁰ The Stockholm Resilience Centre fosters an interdisciplinary study of resilience and has synthesized an imperfect but important list of seven principles it deems “crucial for building resilience in social-ecological systems.”²¹ According to the Centre, resilient social-ecological systems: “1) maintain diversity and redundancy; 2) manage connectivity; 3) manage slow variables and feedbacks; 4) foster complex adaptive systems thinking; 5) encourage learning; 6) broaden participation; and 7) promote polycentric governance systems.”²²

First, maintaining diversity and redundancy means cultivating overlapping systems where possible, so that if one aspect of a system becomes vulnerable, similar functions may be carried out by another part of the system.²³ Organizations that value a variety of sources of knowledge, a diversity of strengths, and sources of funding, multiply their tools for responding to disruption and enhance their ability to withstand shocks.²⁴

Second, connectivity in this context means how the parts of an organization, government, landscape, or ecosystem interact.²⁵ This connectivity

17. *Id.*

18. *Id.*

19. *Id.* (emphasis omitted).

20. *Introduction*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/the-7-principles/> (last visited Aug. 24, 2018).

21. *Id.*

22. *Id.* (alteration to punctuation).

23. *Principle One: Maintain Diversity and Redundancy*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-1/> (last visited Aug. 24, 2018).

24. *See id.*

25. *Principle Two: Manage Connectivity*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-2/> (last visited Aug. 24, 2018).

must be managed because it can either boost resilience against disruptions by allowing connected systems to rebound or increase the vulnerability of a system to disruption as ill effects spread.²⁶ Connectivity can spread the “homogenisation of norms” in social structures and suppress innovation or lead to complacency against threats.²⁷

Third, slow variables provide stability in a system.²⁸ “In the social domain, legal systems, values and traditions can . . . be important slow variables.”²⁹ A resilient system manages these slow variables and calibrates the feedback to provide crucial information to adapt to changes in these variables.³⁰ Governance and ecological management systems that rely on the stability of slow variables enhance resilience by prioritizing the way these variables are monitored and protecting the feedback mechanisms to detect changes.³¹

Fourth, “complex adaptive systems thinking” means that managers acknowledge that social-ecological systems are composed of a complex web of parts and subject to an “unpredictable web of connections and interdependencies.”³² Resilience theorists assert that acknowledging and accounting for the complexity of the relationships in a social-ecological system does not in itself enhance resilience but may foster resilience-promoting planning and behaviors.³³

Fifth, resilient systems have the attribute of encouraging learning.³⁴ Because governments, ecosystems, and other systems are constantly changing, resilience requires adaptation gained by pursuing new knowledge and experimentation; this principle recognizes that our understanding of a complex system and of the threats it may face is always incomplete. Rather than stagnate, resilient systems learn and grow.³⁵

Sixth, many systems thrive when there is broad participation from all stakeholders.³⁶ Broad participation, if well managed, can ensure a variety of perspectives and can facilitate the dissemination of shared values. However, for participation to build resilience, it must not contribute to the inequitable distribution of power or stoke conflict.³⁷

26. *Id.*

27. *Id.*

28. See *Principle Three: Manage Slow Variables and Feedbacks*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-3/> (last visited Aug. 24, 2018).

29. *Id.*

30. *Id.*

31. *See id.*

32. *Principle Four: Foster Complex Adaptive Systems Thinking*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-4/> (last visited Aug. 24, 2018).

33. *Id.*

34. *Principle Five: Encourage Learning*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-5/> (last visited Aug. 24, 2018).

35. *Id.*

36. *Principle Six: Broaden Participation*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-6/> (last visited Aug. 24, 2018).

37. *Id.*

Seventh, resilience can be enhanced by efficient collective action, or what the Stockholm Centre calls “polycentric governance systems.”³⁸ This principle means that connected governance systems that traverse jurisdictions, scales, and responsibilities can combine skills and resources in planning for and responding to disruptions.³⁹ For example, intergovernmental partnerships and agreements can share information and leverage their resources to manage larger-scale disruptions.⁴⁰

While these seven principles encapsulate some of the best research and case studies about how social-ecological systems overcome disruption, there are many additional principles and a wide variety of scholarship on the subject. For example, in his book *Building Resilience: Social Capital in Post-Disaster Recovery*, Daniel P. Aldrich explores the variance in community recovery from significant natural disasters and identifies differences in the social capital of the affected communities as a key factor in that variance.⁴¹

Even in light of the many theories and principles already proposed, current resilience theory may not be adequate to help institutions and communities prepare for threats, both anticipated and unanticipated, that may be just over the horizon. In the tribal context, if past is prologue, tribes remain vulnerable to an intolerance of tribalism and to the cyclically resurgent policy goal of assimilation.⁴² As new assaults on tribal sovereignty present themselves, tribes must not merely survive them; they must develop systems to grow from them to the maximum possible extent. The same is true of other institutions and communities confronting unprecedented threats like climate change.

To be sure, resilience theory offers informative tools for understanding the legal and cultural endurance of tribes, but to date, these theories are incomplete because they fail to consider what tribal knowledge can add to our understanding of resilience. To understand the story of tribal survival, I argue that we must look beyond the framework of current resilience theory to see the principles of indigenous resilience that have enabled tribal survival. Some of these indigenous principles confirm and enhance existing resilience principles, while others provide entirely new insights into resilience theory and strategies. Together, these principles offer not only an understanding of how tribes have survived but also a powerful opportunity to broaden resilience theory’s understanding of how systems adapt and endure.

The following Part will explore the history and landscape of indigenous resilience in the face of a long history of assaults and disruptions. In some ways, tribes have modeled some of the attributes and principles described by existing resilience theory as they have responded to various shocks and threats to tribal

38. *Principle Seven: Promote Polycentric Governance*, GRAID: AT STOCKHOLM RESILIENCE CTR., <http://applyingresilience.org/en/principle-7/> (last visited Aug. 24, 2018).

39. *See id.*

40. *See id.*

41. *See generally* DANIEL P. ALDRICH, BUILDING RESILIENCE: SOCIAL CAPITAL IN POST-DISASTER RECOVERY (2012).

42. *See, e.g.*, Julian Brave NoiseCat, *Rand Paul Thinks ‘Lack of Assimilation’ Is Native Americans’ Problem*, HUFFPOST (Sept. 3, 2015, 4:39 PM), https://www.huffingtonpost.com/entry/rand-paul-assimilation-native-americans_us_55e8986fe4b0b7a9633c4edc.

integrity, but a close examination of indigenous resilience adds an important new dimension to how systems and peoples endure and goes beyond those principles generally recognized by resilience theorists.

II. A BRIEF HISTORY OF INDIGENOUS RESILIENCE

Perhaps until the 1970s, the common presumption of American policymakers was that tribes and separate indigenous identity would (and should) inevitably yield to the superior civilization and might of the United States. This Darwinian idea of tribes as anachronistic entities that would, like the wilderness and the wolf,⁴³ fade into history—under the marching pilgrim feet⁴⁴ of Manifest Destiny—was not just the manifestation of American colonialism’s belief in the superiority of its culture, but an aim enshrined in law and policy for most of the history of the United States. Rather than beating a thoroughfare of freedom⁴⁵ for the tribes, American law and policy more frequently trampled tribal identity, governance, and culture.

Chief Justice John Marshall was an early commentator on the singular nature of tribes as separate sovereigns and the challenges that the enduring aboriginal sovereignty of tribes and their resistance to assimilation presented for America. In the first of the foundational Marshall trilogy cases of federal Indian law, *Johnson v. M’Intosh*, Marshall wrestled with the assertion that the tribes had been “conquered.”⁴⁶ Conquest, he wrote, usually means that the conquered “are incorporated with the victorious nation” and “[t]he new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people.”⁴⁷ Although American law asserts a plenary power over them, the tribes have largely preserved themselves as distinct peoples and legal entities.⁴⁸ The architects of federal Indian law and policy have included both the benevolent and the malign, but much of federal Indian law and policy has posed existential threats to tribal identity and culture. Part II outlines the history of these threats and the ways in which tribes proved remarkably resilient to these assaults.

Early in United States history, federal policy was to engage tribes in government-to-government negotiations, recognizing them as sovereigns capable of waging and ceasing hostilities, and of transferring a clean land title to the United

43. For example, a letter from George Washington to James Duane (Sept. 7, 1783), on the subject of how to deal with the Indian tribes and avoid the expense of military conflict with the tribes detailed:

[T]he gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence[sic].

Letter from George Washington to James Duane (Sept. 7, 1783), *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/99-01-02-11798> (last visited Aug. 24, 2018).

44. KATHARINE LEE BATES, AMERICA THE BEAUTIFUL (1910).

45. *See id.*

46. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 589–90 (1823).

47. *Id.* at 589.

48. *See id.* at 590.

States. Congress exercised the Article I power to regulate commerce “with the Indian Tribes”⁴⁹ in enacting the first Nonintercourse Act,⁵⁰ which was signed by President George Washington. The Nonintercourse Act sought to preserve for the federal government the exclusive right (vis-à-vis private actors or states) to negotiate with tribes for land cessions and to license trade and regulate commerce with the Indian tribes.⁵¹

While the treaty era of necessity relied upon the essential, aboriginal sovereignty of tribes as the governing authorities over vast swaths of land and people, in practice the United States often negotiated treaties in bad faith.⁵² Many treaties were negotiated under the implicit or explicit threat of starvation, and terms were frequently misrepresented or mistranslated by government representatives.⁵³ Often, tribes were induced to rely upon promises that were abandoned as soon as the United States reaped the benefit of the bargain.⁵⁴

Even while the treaty era posed threats of shrinking homelands, disrespected autonomy, and broken promises of rights and resources, tribes used the tools available to them to meet such threats. If the Marshall trilogy stood for the idea that tribes had been deprived of many of the “sticks in the bundle” of property rights by the fact of conquest, tribes fashioned effective tools out of the “sticks from the bundle” that the Court had affirmed: their sovereign character, their right to undisturbed occupancy, and their right to enter government-to-government agreements, including treaties, with the United States. This is, in resilience parlance, adaptation.

Citing the Supremacy Clause of the U.S. Constitution, tribes have gone to courts and to Congress seeking to vindicate the sovereign agreements enshrined in the treaties.⁵⁵ Sometimes they lose those fights, and sometimes they win, but the tribes have used the treaties, many imposed upon them in bad faith, to establish and protect their remaining homelands, and to preserve their rights of self-governance.⁵⁶ Tribes continue to rely upon their rights under the treaties and routinely litigate to vindicate those rights 150 years after the era of treaty-negotiation in federal Indian policy ended.⁵⁷

Congress demanded an end to Indian treaty-negotiation in 1871,⁵⁸ but the insatiable demand for Indian lands and resources did not end. The end of the treaty

49. U.S. CONST. art I, § 8, cl. 3.

50. Act of July 22, 1790, ch. 31, 1 Stat. 136 (1790) (codified as amended at 25 U.S.C. § 177 (2012)).

51. *See id.*

52. *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (Univ. Tex. Press 1985); Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. IND. L. REV. 111, 115–17 (2008).

53. *See* DELORIA, *supra* note 52, at 46–54, 108–39.

54. *See id.* at 108–39.

55. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903).

56. *See generally* DELORIA, *supra* note 52.

57. *See, e.g.*, Oneida Indian Nation v. Cty. of Oneida, 414 U.S. 661 (1974).

58. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (1871).

era marked the beginning of the era of allotment and forced assimilation.⁵⁹ The policy of forced assimilation was intended to compel tribes to abandon commonly held lands and traditions. The policy was enacted through tribe-specific allotment acts and general allotment acts, seeking to dismantle the corpus of tribal lands and transfer those lands to individual ownership, both Indian and non-Indian.⁶⁰ The aim and outcome of the policy was to disrupt the cohesion and tribal character of the lands and to undermine the ability of tribes to govern.⁶¹

Under the allotment acts, the goal was to terminate the corpus of communally held land bit-by-bit by inducing individuals to accept individual allotments and forcing individual Indians into farming, while facilitating the transfer of remaining lands to non-Indian settlement and allotment.⁶² Congress was concerned that individual Indians were mostly incapable of managing a fee interest, so the land would be held in trust by the United States for the benefit of tribes (and individual Indians) for a time of transition.⁶³ The tribes resisted accepting individual allotments and abandoning communally owned sections of their reservation territories on a large scale, ultimately defeating the vision of the allotment acts.⁶⁴

Tribes carried out this resistance to federal policy in the face of tremendous pressures to relent, including the withholding of food and other supplies guaranteed by treaty.⁶⁵ The willingness of tribes to endure extreme depredations, poverty, and hunger to maintain their tribal ties and their rights to communally held lands enshrined the status of tribal lands as being held in trust by the federal government for the benefit of tribes.⁶⁶ While this trust relationship is both paternalistic and deeply flawed, tribes built on and exploited this notion to help preserve their remaining reservation lands and to make claims against the federal government for resources owed to the tribes.

The allotment policy was described by Theodore Roosevelt as “a mighty pulverizing engine to break up the tribal mass.”⁶⁷ It would be fair to suggest that he meant not only to pulverize the lands held by the tribes but also the cultural identities of tribal people. Consistent with the policy of forced assimilation, the Department

59. See, e.g., General Allotment Act, ch. 119, 24 Stat. 388 (1887) (repealed 2000); *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253–54 (1992) (discussing the period of assimilation and commenting that Congress intended “to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large”).

60. See 24 Stat. at 388–91; *Cty. of Yakima*, 502 U.S. at 253–55.

61. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9–18 (1995).

62. See 24 Stat. at 388–91; *Cty. of Yakima*, 502 U.S. at 253–55; Dean B. Suagee, *A Human Rights-Based Environmental Remedy for the Legacy of the Allotment Era in Indian Country*, NAT. RESOURCES & ENV’T, Summer 2014, at 3, 4.

63. See § 5, 24 Stat. at 389; *Cty. of Yakima*, 502 U.S. at 254.

64. See Suagee, *supra* note 62, at 3–4.

65. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903).

66. See 25 U.S.C. § 5102 (2012) (“The existing periods of trust placed upon any Indian lands . . . are hereby extended and continued until otherwise directed by Congress.”).

67. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 143 (Michie Bobbs-Merrill 1982).

of the Interior embraced a mission of prohibiting native people from sacred cultural and spiritual practices, compelled tribal people to cut their hair and abandon traditional clothing, punished them for speaking native languages, and oversaw the systematic removal of Indian children from their tribes and families to be educated in boarding schools designed to “kill the Indian” to “save the man.”⁶⁸ The policy was a pulverizing engine to break up tribal families and identity.

While these measures attempted a cultural genocide and inflicted untold trauma upon families and tribal communities, language, and indigenous identity, they were not ultimately successful in stamping out tribal affiliation and identity. Tribes bounced back.⁶⁹ The mighty force of the federal government could neither compel nor induce the majority of Indian people to abandon tribalism, although the policy did meet its aim of compromising the integrity of many tribal homelands.⁷⁰ It also exacerbated the systemic poverty and intergenerational trauma from which many families and tribes are still working to heal.⁷¹ Here again, the expectation was that under this policy, the so-called Indian Problem would go away as tribes dissolved and individual Indians disappeared into the general population.

Despite its harms, the policy of forced assimilation failed in its aim to eradicate tribes and indigenous identity. For the most part, tribes did not disband or abandon homelands, even when the people were starving and being overrun by outsiders on land that had been legally secured by treaty for their “undisturbed use and occupation” in perpetuity.⁷²

Rather than succumb to the assault of forced assimilation, tribes sought to adapt and transform to their changing circumstances. Tribes have used the paternalistic tool of trust status of lands to cling to tribal identity and adapted the tool to their own means in the 1934 passage of the Indian Reorganization Act (“IRA”).⁷³ Many tribes adapted to the changed circumstances of the IRA by organizing tribal governments eligible to make claims upon the trust responsibility the United States owed to tribes in a formalized government-to-government relationship.⁷⁴

In response to the resilience of indigenous peoples, the architects of the New Deal eventually moved away from a policy of forced assimilation to advocate a policy in the IRA meant to more fully address the reality of stubborn tribalism and the epic poverty ascribed to the failed policies. The key features of the IRA were

68. AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880–1900, at 261 (Francis Paul Prucha ed., Harvard Univ. Press 1973).

69. Cf. ZOLLI & HEALY, *supra* note 5, at 211.

70. See Royster, *supra* note 61, at 17–20.

71. Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 460 (2002).

72. See, e.g., Treaty at Fort Laramie, art. 2, Apr. 29, 1868, 15 Stat. 635.

73. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934).

74. See William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 417–21 (2016) (discussing the “fee-to-trust” process through which tribes have requested that the Secretary of the Interior “acquire and hold (fee) title to the land in trust for the tribe”).

intended to facilitate the formation of recognized tribal governing councils and constitutions, and to enable the Secretary of the Interior to restore tribal trust lands to make the reservations more effective homelands as the tribes were demanding.⁷⁵ While the IRA has a complicated legacy both facilitating and undermining tribal sovereignty, lands were (and continue to be) restored to the tribal trust pursuant to this important statute.⁷⁶

By the 1950s, the voices advocating forced assimilation were again driving federal Indian policy.⁷⁷ They ushered in an era of legal termination. The termination policy sought to undo the trust status of Indian property, revoke federal recognition of the government-to-government relationship with tribes, and abandon the federal trust responsibility to tribes by privatizing tribal lands. Congress passed statutes “terminating” specific tribes, proposing that tribal members be paid a share of the value of tribal lands held in trust, and encouraging Native Americans to relocate, often to urban centers far from their homelands.⁷⁸ During this era, more than 100 tribes were the subject of federal legislation purporting to terminate their federal recognition and the trust relationship.⁷⁹ Tribes rightly perceived the renewed existential threat this policy represented and worked to influence federal policy by banding together and speaking with a more united voice to advocate for enhanced self-determination. In resilience parlance, they swarmed,⁸⁰ working together as a collective through such mechanisms as the National Congress of American Indians to mitigate the threat of termination.

In 1970, President Richard M. Nixon announced the end of the termination policy and introduced a new federal policy of Indian tribal self-determination.⁸¹ Several important statutes were enacted to carry out the policy of tribal self-determination. These statutes included giving tribal governments greater authority and autonomy in self-governance, protecting tribal children in their families and

75. See §§ 4–5, 7, 16, 48 Stat. at 985–87.

76. See *id.*

77. See, e.g., House Concurrent Resolution 108, passed August 1, 1953, which expressed the view of the House that the United States should cease federal supervision of Indian tribes, do away with reservations, disavow tribal sovereignty, and compel the integration of Indian people into mainstream America. H.R. Con. Res. 108, 83d Cong. (1953) (enacted).

78. See, e.g., Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 441–43 (2000) (discussing the various provisions of termination statutes under de jure termination).

79. Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgement Litigation*, 151 U. PA. L. REV. 1827, 1832 (2003).

80. Cf. Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 489 n.115 (2012).

81. President Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), <https://www.presidency.ucsb.edu/node/240040>.

communities, encouraging economic development, and empowering tribal administration of programs and services in furtherance of the trust responsibility.⁸²

While the strength of the commitment to the self-determination policy has waxed and waned in the decades since its inception, especially evident in the federal reluctance to provide adequate funds to carry out statutory mandates, the putative policy of the federal government has continued to respect the right to self-government of tribes.⁸³ However, tribes do not (and should not) take for granted that the policy of self-determination, which has characterized that last few decades, will continue. The last decade has seen periodic eruptions of political sentiment advocating a return to assimilationist policies.⁸⁴

The tribes must be cognizant and prepared for the potential of the United States to change its policy to again undermine tribes and tribalism. Such efforts may be seen in proposals to dissolve the Bureau of Indian Affairs, which carries out the programs and services owed to tribes under the treaties and trust responsibility.⁸⁵ Such efforts may come clothed in the proposal to undermine tribal management of resources, such as in the 85% reduction of the Bears Ears National Monument, which was the first federal monument to be managed in part by a coalition of the area's tribes.⁸⁶ The reduction leaves the region's vast cultural resources vulnerable to threats like looting and energy exploitation.⁸⁷

82. See, e.g., Indian Self-Determination & Education Assistance Act of 1975, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 5301–423 (2012)); Indian Child Welfare Act of 1978, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963 (2012)).

83. See generally Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2014) (discussing the history of self-determination policy in the context of the Indian Self-Determination and Education Assistance Act).

84. For example, on May 31, 2018, South Dakota Republican candidate for the U.S. House of Representatives Neal Tapio announced his promise to “renegotiate” the treaties and disband the Indian reservations in South Dakota if elected. Jonathan Ellis & Dana Ferguson, *U.S. House Candidate from South Dakota Calls for Ending Indian Reservations*, ARGUS LEADER (May 31, 2018, 10:20 AM), <https://www.argusleader.com/story/news/2018/05/31/u-s-house-candidate-neal-tapio-calls-ending-indian-reservations/659341002/>. Tapio was defeated in the state Republican Primary election. Sarah Almukhtar et al., *South Dakota Primary Election Results: At-Large House District*, N.Y. TIMES (June 11, 2018, 11:21 AM), <https://www.nytimes.com/elections/results/south-dakota-house-district-at-large-primary-election>.

85. See Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 9 (2004) (explaining the BIA’s relationship to various aspects of tribal governance and asserting that, despite criticism from many camps and calls for its demise, “the BIA has become emblematic of the federal government’s commitment to tribal sovereignty and individual well-being of Native Americans”).

86. Joe Fox et al., *What Remains of Bears*, WASH. POST (Apr. 2, 2019), <https://www.washingtonpost.com/graphics/2019/national/bears-ears/>.

87. *Threats*, BEARS EARS INTER-TRIBAL COALITION, <http://bearsearscoalition.org/threats/> (last visited Aug. 24, 2018).

As in the past, these threats to tribal legal and cultural sovereignty may come clothed in the robes of benevolent paternalism. In 2015, Senator (and presidential candidate) Rand Paul blamed the “lack of assimilation” of Native Americans for the persistent poverty plaguing many reservations.⁸⁸ Saying the lack of assimilation “has been a disaster for the people,” he insisted that if they would assimilate, “within a decade they’d probably be doing as well as the rest of us.”⁸⁹ Similarly, Senator Orrin Hatch dismissed the interests of the coalition of tribes advocating for the Bears Ears National Monument to protect lands sacred to the tribes from development and resource extraction. He suggested that the coalition of tribes—including the Navajo, Hopi, Ute Mountain Ute, Uintah and Ouray Ute, and Zuni leaders who helped design and lobby for designation of the monument—was ignorant of the designation’s import.⁹⁰ He said, “The Indians, they don’t fully understand that a lot of the things that they currently take for granted on those lands, they won’t be able to do if it’s made clearly into a monument or a wilderness.”⁹¹

Despite ongoing threats to alter what has been a largely successful federal Indian policy, tribes have embraced and exploited (in the best sense) the opportunities of the self-determination era and have undertaken to build and strengthen tribal institutions and assert tribal sovereignty.⁹² They have used the tools available to them and fashioned new tools to mitigate, adapt, and transform.

The doctrine of tribal sovereignty as a principle of federal Indian law and the doctrine of the plenary power of the United States have provided the legal background against which the policies of the political branches have played out in courts. Just as the history of federal Indian policy has presented repeated threats to tribes, so too has federal Indian law often been the source of existential threat to tribes. In particular, the plenary power doctrine holds that the United States has virtually unchecked power to enact laws governing, and even perhaps disbanding, the federally recognized tribes.⁹³ The doctrine is said to be rooted not only in the Indian Commerce Clause of the U.S. Constitution and other powers inferred from the text of the Constitution, and the course of dealings of the United States with tribes, but also in preconstitutional powers of the United States as a sovereign.⁹⁴ Plenary power over tribes is, the theory goes, a concomitant of nationality.

88. See NoiseCat, *supra* note 42.

89. *Id.*

90. See Darryl Fears, *As Zinke Listens in on the Monumental Divide at Utah’s Bears Ears, Natives Feel Unheard*, WASH. POST (May 14, 2017), https://www.washingtonpost.com/national/health-science/as-zinke-listens-in-on-the-monumental-divide-at-utahs-bears-ears-natives-feel-unheard/2017/05/14/3243a7ec-3726-11e7-b4ee-434b6d506b37_story.html. Hatch refused to provide any example of what the tribes do in the land that they could not do under a monument designation saying it would “take too much time” to do so and insisting, “Just take my word for it.” *Id.*

91. *Id.*

92. See generally Rebecca A. Tsosie, *What Does it Mean “To Build a Nation”? Reimagining Indigenous Political Identity in an Era of Self-Determination*, 7 ASIAN-PAC. L. & POL’Y J. 38 (2006) (discussing “the concept of ‘nationhood’ for indigenous peoples” in the context of the era of self-determination).

93. See Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83–85 (1977).

94. United States v. Lara, 541 U.S. 193, 200–03 (2004).

Plenary power presents a paradox. The United States claims virtually unlimited (but not absolute) power over tribes. Some have called tribal sovereignty “sovereignty by sufferance.”⁹⁵ At the same time, aboriginal tribal sovereignty has never been extinguished. Chief Justice Marshall described the unique position of tribes in relation to the United States as “domestic dependent nations.”⁹⁶ In *Lone Wolf v. Hitchcock*, the Supreme Court deemed the exercise of plenary congressional power over Indian tribes to be of a political nature, which may not be subject to judicial review.⁹⁷ States have also frequently sought to insert themselves into this paradox, asserting for themselves some role over people and territory under tribal jurisdiction.⁹⁸

Still, aboriginal sovereignty has been resilient. Legally resilient tribes have been engaged in a continuous process of critical transformation in response to disruptions. When the State of Georgia launched an assault on the treaty-guaranteed rights and sovereignty of the Cherokee Nation, the Cherokee sought to vindicate their treaty rights in the U.S. Supreme Court.⁹⁹ The Cherokee crafted a novel argument pleading access to the Court’s original jurisdiction under Article III as a “foreign nation” because they were a collective of non-citizens.¹⁰⁰ The Court rejected the argument and declined original jurisdiction, denominating the Cherokee Nation (and Indian tribes) “domestic dependent nations” subject to the plenary power of the United States.¹⁰¹ Although the Cherokee lost this particular petition, tribes have built upon the Marshall trilogy’s acknowledgement of the tribal sovereignty doctrine and have sought to ensure a positive content to the phrase “domestic dependent nation” and the powers inherent to this new legal construction.

Even as “domestic dependent nations,” tribes have successfully persuaded courts to acknowledge that tribes govern as an exercise of a separate sovereignty that does not derive from, but predates, the Constitution.¹⁰² However, the question of which inherent powers of tribes endure and which have been extinguished

95. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”); James A. Casey, Note, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 404 (1994).

96. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17–18 (1831).

97. 187 U.S. 553, 568 (1903). In *Lone Wolf*, a tribe sued the United States for the unilateral abrogation of a treaty to which the tribe was a signatory. *Id.* The Supreme Court held restraints on the plenary power were moral rather than legal. *Id.*

98. See, e.g., *Williams v. Lee*, 358 U.S. 217, 223 (1959) (overruling the Arizona Supreme Court, which had held that Arizona courts could exercise jurisdiction over civil suits by non-Indians against Indians when the action arises on an Indian reservation).

99. *Cherokee Nation*, 30 U.S. (5 Pet.) at 2–3.

100. *Id.*

101. *Id.* at 17–20.

102. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (“The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.”).

remains a vexing one for tribes and litigants.¹⁰³ The United States asserts that tribes have lost some inherent powers by treaty or by statute, wherein the United States has explicitly extinguished particular areas of tribal authority.¹⁰⁴ The Supreme Court, too, has asserted a role for itself in determining the scope of tribal authority.¹⁰⁵ The ongoing assault on the scope of inherent tribal sovereignty in the courts continues apace.¹⁰⁶ Exercising sovereign powers in the shadow of the United States' assertion of plenary power is an ever-present challenge for tribes.

Nonetheless, tribes have managed to harness the power of even the troubling and destructive plenary power doctrine to build doctrines that have allowed the tribes to adapt and even thrive in the face of this adverse precedent. For example, tribes have capitalized on the plenary power and "domestic dependent nation" doctrines to claim some measure of protection from the regulatory authority of the states.¹⁰⁷ Having weathered the assault on external tribal sovereignty, tribes transformed to focus on the powers of internal sovereignty, including their regulatory authority. In the modern advent of Indian gaming and economic development—free from state interference and oversight—we see the fruits of this transformative capacity to re-envision the nature of tribal authority in the changed circumstances.¹⁰⁸

Finding themselves subject to an expansive and exclusive plenary power of the federal government, tribes launched gaming and other economic development in the space created by the absence of state regulation.¹⁰⁹ If federal power over tribes was plenary, tribes argued, then states had no power to regulate tribal activities on reservation land.¹¹⁰ To be sure, the federal government responded with statutes and regulations to govern tribal exercise of gaming activities.¹¹¹ However, many tribes that had been deprived of the most productive lands and denied access to economic development and capital, transformed what it meant to be a tribe to exploit the unique opportunities arising from the disruption of external sovereignty and the plenary power doctrine.¹¹²

103. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians); *Duro v. Reina*, 495 U.S. 676, 688 (1990) (applying the Court's holding in *Oliphant* to Indians who commit crimes on another tribe's reservation).

104. *Oliphant*, 435 U.S. at 209.

105. See, e.g., *id.*

106. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS., 3, 5 (2015).

107. The landmark decision in *Williams v. Lee* paved the way for subsequent Supreme Court decisions recognizing tribal sovereignty vis-a-vis state regulatory authority. *Id.* at 4–5; see *Williams v. Lee*, 358 U.S. 217, 220 (1959).

108. See Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 28–52 (2010).

109. *Id.*

110. *Id.*

111. *Id.* at 52–91.

112. See *id.* at 96–97.

Likewise, the tribes have employed the plenary power doctrine to assert a strong federal trust responsibility.¹¹³ If tribes are to be subject to the overwhelming power asserted by the federal government, then, they insisted, they also have claims as the beneficiaries of a federal trust obligation to protection from the federal government.¹¹⁴ Both the plenary power and trust doctrines are rooted in the idea that the powers of the federal government derive from their special obligations to the tribes.¹¹⁵ Thus, tribes have been resilient in the face of federal power in part by transforming the assertion of federal power into a federal fiduciary duty and calling upon that obligation.

The dual-edged sword of the plenary power doctrine and the trust responsibility doctrine has forced tribes to navigate a razor's edge to maintain and assert their culture and sovereignty. The following Part will examine in more detail how tribes have negotiated the difficult demands and persistent assaults on sovereignty at law and policy. In particular, the following Part will identify indigenous principles relied on by the tribes of the Haudenosaunee Confederacy to suggest how tribes have endured and even come to thrive, in many ways, in the face of unrelenting change and disruption.

III. PRINCIPLES OF INDIGENOUS RESILIENCE

Tribes have overcome past assaults on sovereignty and culture by nourishing the roots of indigenous values and ideals.¹¹⁶ Cultural resilience has fostered legal resilience. Principles of indigenous resilience have enabled tribes to not only endure changing circumstances, but also to adapt in ways that have made them stronger. That is not to say that other, nonindigenous cultural groups do not have similar values, nor that these concepts will be entirely foreign or unfamiliar to resilience theorists. The seven principles of resilience identified by the Stockholm Centre for Resilience touch in some ways on similar ideas.¹¹⁷

But the survival of the tribes is a real-world study in resilience that has taken place over hundreds or thousands of years. Indigenous resilience has its roots in indigenous traditions and the principles and values of the tribes have been tested in the cauldron of colonization. Today's tribes have emerged for the most part as resilient institutions able to withstand existential disruptions. The study of the values and principles which enabled that resilience can deepen and refine existing resilience principles as well as suggest new and important insights for resilience theory.

113. See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 166, 175–78 (2011).

114. *Id.*

115. *Id.*

116. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1054–55 (2007) (asserting that “good governance” for tribes seeking to protect tribal sovereignty “draws on indigenous principles of government—based on each tribe’s tradition and contemporary tribal culture”).

117. See *supra* Part I.

These principles of indigenous resilience are found in historic and ethnographic records and oral traditions of the Haudenosaunee.¹¹⁸ Writing in 1851, ethnographer Lewis Henry Morgan said this about Haudenosaunee resilience: “In the drama of European colonization, they stood, for nearly two centuries, with an unshaken front, against the devastations of war, the blighting influence of foreign intercourse and the still more fatal encroachments of a restless and advancing border population.”¹¹⁹ As a product of the nineteenth century, Morgan seemed to have expected that the Haudenosaunee tribes would fade into oblivion, despite their several hundred years’ stand against the march of colonization, and would have been surprised, no doubt, that the tribes of the Haudenosaunee both exist and prosper in the twenty-first century.

How have the Haudenosaunee survived the assaults on culture and sovereignty through the centuries? What has empowered their legal and cultural resilience? The principles I discuss below represent my understanding of principles drawn from two seminal traditions that provide insight into the answer to those questions: the founding of the Haudenosaunee Confederacy, with its governing Great Law of Peace, and the wampum tradition of treatymaking and diplomacy.¹²⁰

Historians date the Haudenosaunee Confederacy to the sixteenth century.¹²¹ It is a political and kinship alliance which originated among Five Nations: the Seneca, the Cayuga, the Onondaga, the Oneida, and the Mohawk.¹²² The traditional homelands of these tribal nations cover much of what is now called New York state, where the tribes continue to reside on reservations. Later, the Tuscarora Nation was invited to join the alliance, and as a result, the Confederacy is sometimes called the Six Nations Confederacy.¹²³ These culturally related tribes united under a system of representative government and adopted the Great Law of Peace, sometimes called the Haudenosaunee Constitution.¹²⁴

118. See, e.g., LEWIS HENRY MORGAN, *LEAGUE OF THE IROQUOIS: A CLASSIC STUDY OF AN AMERICAN INDIAN TRIBE WITH THE ORIGINAL ILLUSTRATIONS 3–4* (Corinth Books 1962) (1851).

119. *Id.* at 3.

120. THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY: AN INTERDISCIPLINARY GUIDE TO THE TREATIES OF THE SIX NATIONS AND THEIR LEAGUE 14–18 (Francis Jennings et al. eds., 1985) [hereinafter IROQUOIS DIPLOMACY].

121. *Id.* at 16; see also FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* 39 (1984) (“We do not know precisely when the League started; but most suggested dates fall between 1400 and 1600 A.D. Recent thinking by some scholars places its origins in the sixteenth century: i.e., within the period of early general contact between Europe and America, and perhaps in response to the conditions generated by that contact.” (footnotes omitted)).

122. WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* 3 (1998).

123. *Id.*

124. ARTHUR C. PARKER, *The Constitution of the Five Nations*, in PARKER ON THE IROQUOIS 7, 7 (William N. Fenton ed., 1968). See generally KAYANESENH PAUL WILLIAMS, KAYANERENKÓ:WA: THE GREAT LAW OF PEACE (2018).

The Confederacy is said to have been founded under the leadership of two great leaders: the Peacemaker and Hyenwatha.¹²⁵ They were responding to cultural and political crisis and chaos that had overtaken the peoples of the Haudenosaunee. They were facing war, poverty, and invasion; their traditional alliances and governments were ineffective. The Peacemaker and Hyenwatha taught the people that peace was better than war and convinced the troubled tribes to seek peace and embrace law.¹²⁶ They oversaw the formation of the Confederacy, with its representative government and rule of law. The people renounced war and buried their weapons under the tallest White Pine, the Tree of Peace.¹²⁷ All were said to be welcome within its shelter and shade. The alliance was a powerful force in military and governing might through the eighteenth century but was weakened by a split among the tribes over the American Revolutionary War.¹²⁸ Although the Confederacy itself is not the same political entity it was during this earlier era, it does provide insight into the values that have steered the Haudenosaunee nations through hundreds of years on the front lines of colonization.

Similarly, the wampum tradition is an important element of indigenous diplomacy for eastern tribes and is a valuable resource for understanding the resilience of the tribal traditions.¹²⁹ Strings of wampum shells were used to solemnize treaties, alliances, and agreements.¹³⁰ Strings were fashioned into belts that could function as pneumonic devices to memorialize the terms of agreements, with the overall pattern that emerged representing the spirit of the agreement.¹³¹

By building on and adapting the principles of Haudenosaunee culture to the challenges that have come their way, the tribes of the Haudenosaunee have become a case study in resilience. Understanding the ways the tribes have relied upon these principles may enhance the field of resilience theory.

Drawing on both the Confederacy and wampum traditions, this Section suggests seven principles that have been the source of indigenous resilience for the Haudenosaunee.¹³² They include: (1) the Seven Generations principle of accountability and taking the long view; (2) the Hyenwatha Belt principle of

125. WILLIAMS, *supra* note 124, at 8–9; FENTON, *supra* note 122, at 51–52; IROQUOIS DIPLOMACY, *supra* note 120, at 14–15.

126. PARKER, *supra* note 124, at 8–9.

127. *Id.* at 9, 49.

128. FENTON, *supra* note 122, at 14.

129. See *id.* at 224–39; IROQUOIS DIPLOMACY, *supra* note 120, at 17–18; PARKER, *supra* note 124, at 7; TEHANETORENS, WAMPUM BELTS OF THE IROQUOIS 10–19 (1999).

130. FENTON, *supra* note 122, at 224.

131. *Id.* at 224, 234.

132. In discussing these Haudenosaunee traditions, I approach the task with profound humility. It is not my intent to be reductive of rich traditions nor to advocate any misappropriation of sacred traditions or principles. I approach the task at the intersection of my roles as both a legal scholar interested in resilience and as a member of the Seneca Nation. I recognize that the tribes have preserved hard-earned wisdom at tremendous human cost. Given the potential threats that nations, communities, peoples, tribes, and individuals may face in coming decades, my purpose in this Part is to offer a respectful review of some of these principles in the hopes of both contributing to the broader field of resilience and strengthening tribal resilience against ongoing assaults.

community, kinship, and interconnectedness; (3) the One Dish, One Spoon principle of the sharing and cooperation in the commons; (4) the Tadodaho principle of caring for the most vulnerable; (5) the Six Nations Belt and the principle of spreading the peace dividend; (6) the George Washington Belt and the principle of adaptive transformation; and (7) the Two Row Wampum principle of cooperative sovereignty.

A. The Seven Generations Principle: Accountability and the Long View

According to the Great Law of Peace which bound the tribes together in political and cultural alliance, each tribe and clan sent representatives to the governing deliberative council of the Confederacy.¹³³ Decisions by the council had to be unanimous in order to take effect.¹³⁴ Women—in particular, clan mothers or grandmothers—had a central role in the appointment and removal of delegates.¹³⁵

The organizing principle of the delegate gathering was that delegates were responsible for the consequences of their decisions on the next seven generations.¹³⁶ Seneca Faithkeeper Oren Lyons elaborated on the application of this principle:

The Peacemaker taught us about the Seven Generations. He said, when you sit in council for the welfare of the people, you must not think of yourself or of your family, not even of your generation. He said, make your decisions on behalf of the seven generations coming, so that they may enjoy what you have today.¹³⁷

If a delegate was determined to be making decisions motivated by self-interest, rather than for the good of the community, born and unborn, the clan mother could strip the delegate of responsibilities and replace that delegate with another.¹³⁸

This check on expediency and self-interest, the Seven Generations principle, bound the delegates to take the long view in their planning and deliberations. Leaders had a political and moral duty to the whole: not just to their contemporaries, but to the women who came before them and the children who would follow. This restraint on the temptation to act on short-term, or self-interest has been an important aspect of resilient tribal systems. Taking the long-term view in tribal leadership has meant dealing with things as they are, while continuing to advocate for and envision a better future.

133. See WILLIAMS, *supra* note 124, at 280–94.

134. *Id.*

135. PARKER, *supra* note 124, at 11, 27, 29, 34–47, 97.

136. *Id.* at 29, 38–39 (“You will receive many scratches and . . . [t]he thickness of your skin shall be seven spans—which is to say that you shall be proof against anger, offensive actions and criticism . . . In all of your deliberations in the Confederate Council, in your efforts at law making, in all your official acts, self interest shall be cast into oblivion . . . Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground—the unborn of the future Nation.”).

137. *Seven Generations – the Role of the Chief*, PBS, <http://www.pbs.org/warrior/content/timeline/opendoor/roleOfChief.html> (last visited Mar. 9, 2020).

138. PARKER, *supra* note 124, at 34–35.

For example, in the 1950s, the United States Bureau of Reclamation planned a dam that would flood much of the Seneca Nation's Allegheny Territory.¹³⁹ Seneca elected leadership and people profoundly opposed construction of the dam because it would mean the further loss of precious homelands on a small western New York reservation and the displacement of families who would be forced to abandon their homes, precious cultural resources, and gravesites.¹⁴⁰ At the same time, the termination era meant that Congress was eager to find tribes with whom it would sever federal recognition, the trust responsibility, and the legal relationship, so the space for tribal resistance was severely constrained.¹⁴¹ This was an era of tremendous, even existential threat for the Seneca Nation.

One of the enticements of termination was a promise that each tribal member would be paid a per capita share of the value of tribal lands and resources.¹⁴² The leaders of the Seneca Nation at the time took the long view and sought to preserve the sovereignty of the tribe, fought termination and the promise that individuals and families might reap a temporary windfall, and adapted to the inevitable construction of the Kinzua Dam.¹⁴³

When it became clear that Seneca voices would be overwhelmed by those advocating for the water downstream in Pennsylvania, the Seneca eventually negotiated compensation for the land taken by the dam.¹⁴⁴ While they would have preferred to keep the land rather than the money, they used the money to establish trust accounts for members of the tribe and to invest in education, housing, and health programs for tribal members. Today, the Seneca Nation manages the reservoir created by the dam for conservation and recreation. The tribe managed the Kinzua and termination crisis according to traditional principles, including planning for future generations and accountable leadership. Taking the long view, the Seneca Nation and its leaders navigated these perilous waters, emerging not unscathed, but resilient as a community.

B. The Hyenwatha Belt Principle: Community, Kinship, and Interconnectedness

In contemporary parlance, “tribal” is sometimes used as a pejorative, meaning closed, divisive, or partisan communities. For members of Indian tribes, there is significant strength in the power of the group. You belong. You matter. You are claimed by a tribe and by a clan. You have responsibilities to the group that help invest you in the well-being of the group and divest you of selfishness. This communal identity and interconnectedness was the attribute that federal Indian policy sought to unravel by seeking to enshrine the primacy of the individual. This kinship and interdependence was part of the target of the great pulverizing engine of assimilation.

139. See generally JOY A. BILHARZ, THE ALLEGANY SENECA AND KINZUA DAM: FORCED RELOCATION THROUGH TWO GENERATIONS (1998); LAURENCE MARC HAUPTMAN, IN THE SHADOW OF KINZUA: THE SENECA NATION OF INDIANS SINCE WORLD WAR II 59–60 (2014).

140. HAUPTMAN, *supra* note 139, at 81–103.

141. *See id.* at 23–24, 32–33, 81–85.

142. *See id.* at 81–103.

143. *Id.*

144. *Id.* at 87–101.

Where these connections have been frayed and have not been healed, we see addiction and self-harm in the native population. The high rates of addiction and suicide that plague native families seem to have roots in assimilationist policies removing children from their families and alienating them from language and culture.¹⁴⁵ Where tribes heal these connections and work to preserve them, individual and community resilience increases.

The Hyenwatha Belt is a powerful symbol of the Haudenosaunee Confederacy and the connections and relations of the alliance.¹⁴⁶ The original Five Nations are represented as linked together as though within a great longhouse.¹⁴⁷ In this symbolic communal dwelling, the Seneca are the keepers of the western door, connected to the east to the Cayuga, to the Onondaga, keepers of the central fire, the Oneida, and the Mohawk, keepers of the eastern door. At the center of the belt is a figure that represents both the shared central fire and the great Tree of Peace representing the Great Law. The Hyenwatha Belt represents these traditional values of community, kinship, and interconnectedness that have helped the tribes overcome the assaults on tribal identity.¹⁴⁸

One manifestation of the kinship principle in Haudenosaunee culture is the Thanksgiving Address. The Thanksgiving Address is offered at communal gatherings and serves to remind the people of their obligation to interconnectedness, both to each other and to the natural world.¹⁴⁹ One of the traditional teachings in Haudenosaunee culture is that the Creator gave the gift of speech to human beings so that they could speak gratitude and could acknowledge the gifts and sanctity of the natural world.¹⁵⁰

145. See generally Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60 (1998), [http://www.ucdenver.edu/academics/colleges/PublicHealth/research/centers/CAIANH/journal/Documents/Volume%208/8\(2\)_YellowHorseBraveHeart_American_Indian_Holocaust_60-82.pdf](http://www.ucdenver.edu/academics/colleges/PublicHealth/research/centers/CAIANH/journal/Documents/Volume%208/8(2)_YellowHorseBraveHeart_American_Indian_Holocaust_60-82.pdf).

146. See *infra* Appendix A.

147. PARKER, *supra* note 124, at 11; TEHANETORENS, *supra* note 129, at 20–22. The longhouse is a traditional, rectangular communal dwelling associated in part with the Haudenosaunee peoples. FENTON, *supra* note 122, at 23–24.

148. See TEHANETORENS, *supra* note 129, at 20–22.

149. See PARKER, *supra* note 124, at 98, 105. Reverend Martin Luther King, Jr. expressed a related principle in his address *Remaining Awake Through a Great Revolution*:

We are tied together in the single garment of destiny, caught in an inescapable network of mutuality. And whatever affects one directly affects all indirectly. For some strange reason I can never be what I ought to be until you are what you ought to be. And you can never be what you ought to be until I am what I ought to be. This is the way God's universe is made; this is the way it is structured.

Martin Luther King, Jr., *Remaining Awake Through a Great Revolution*, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968), in 114 CONG. REC. 9394, 9395 (Apr. 9, 1968).

150. Oral Tradition. Many elements of traditional knowledge are preserved and communicated within the culture through spoken stories and teachings rather than through written text.

With the power of speech and its role in the creative process, discussed more in Subsection IV.A.2 below, the act of speaking the words of thanksgiving becomes a duty that binds and focuses the people on their kinship obligations. The Address reminds the people of the duty and responsibility “to live in balance and harmony with each other and all living things.”¹⁵¹ One by one, the Address verbally acknowledges the elements of the natural world: the people, the earth mother, the waters, the fish, the plants (for food and for medicine), the animals, the trees, the birds, the four winds, the thunders, the sun, the moon, the stars, the wisdom keepers, and the Creator.¹⁵²

The principles embodied in the Hyenwatha Belt and the Thanksgiving Address underscore the duties of kinship and the web of mutuality, by which all living things are interconnected. These indigenous ideals animate the use of tribal resources. In 2003, the Seneca Nation began planning to “displace fossil and nuclear fuel sources with SNI¹⁵³-owned renewable power, a long-term strategic goal of the Seneca Nation and a way to reduce greenhouse gas emissions.”¹⁵⁴ The Seneca Nation formed a subsidiary tribal utility organization, Seneca Energy, to work toward these goals. In April 2017, Seneca Energy commissioned a 1.7 megawatt wind turbine on the Cattaraugus Reservation that “is expected to save the Seneca Nation an estimated \$360,000 annually, reducing monthly electricity bills for some 1,000 Seneca households.”¹⁵⁵

The Onondaga Nation has consistently advocated for a thorough cleanup of the superfund toxic waste site in Onondaga Lake.¹⁵⁶ Honeywell International is responsible for the cleanup, having dumped toxins into the lake since the 1880s.¹⁵⁷ The Onondaga Nation reports that “[o]ver 165,000 pounds of mercury were discharged into the lake, along with a toxic cocktail of other substances.¹⁵⁸ By 1950, Onondaga Lake’s shores were ringed by massive wastebeds with a pH so alkaline nothing would grow on them.”¹⁵⁹ While Honeywell and the State of New York’s

151. *Haudenosaunee Thanksgiving Address: Greetings to the Natural World*, SMITHSONIAN NAT’L MUSEUM AM. INDIAN 1, http://nmai.si.edu/environment/pdf/01_02_Thanksgiving_Address.pdf (last visited Mar. 9, 2020).

152. *Id.* at 1–3.

153. Ernie Tucker, *Seneca Nation of Indians Leverages DOE Support for Wind Turbine Project*, Office of Indian Energy Policy and Programs, ENERGY.GOV (Apr. 28, 2016), <https://www.energy.gov/indianenergy/articles/seneca-nation-indians-leverages-doe-support-wind-turbine-project>.

154. *Id.*

155. *Seneca Nation Celebrates Commissioning of 1.7-MW Wind Turbine with DOE Support*, Office of Indian Energy Policy and Programs, ENERGY.GOV (Apr. 28, 2017), <https://www.energy.gov/indianenergy/articles/seneca-nation-celebrates-commissioning-17-mw-wind-turbine-doe-support>.

156. *Onondaga Nation Calls for Better Cleanup of Onondaga Lake: Point to Cap Failures as Sign Remedy of Superfund Site Needs to be Improved*, ONONDAGA NATION (Jan. 29, 2016), <https://www.onondaganation.org/news/2016/onondaga-nation-calls-for-better-cleanup-of-onondaga-lake-point-to-cap-failures-as-sign-remedy-of-superfund-site-needs-to-be-improved/>.

157. *Id.*

158. *Id.*

159. *Id.*

Department of Environmental Conservation agreed on a plan that constructed a cap in 2005 on the majority of the waste in the sediment on the lakebed, the Onondaga Nation has continued to object to the inadequacy of the remediation.¹⁶⁰

In 2016, the Onondaga Nation learned through a Freedom of Information Act request that the cap had “failed three times” and that mercury and other toxins were still leaking into the water.¹⁶¹ Speaking for the Onondaga Nation, Sidney Hill, a member of the Onondaga Council of Chiefs, expressed the tribe’s priority for healing the lake:

People want to be able to treat Onondaga Lake like a lake We should be able to swim in it, fish in it, and eat the fish we catch. We should be able to drink water from a lake That is what a lake should be, and what this lake once was. But you have to clean out a wound before it can heal. We still have hope for Onondaga Lake’s future. It is our future too.¹⁶²

Most indigenous peoples, including the nations of the Haudenosaunee, see their future as inevitably bound up with the resilience of the resources on which they rely, and for which they have sacred kinship responsibilities. Many tribes have fought to sustainably protect resources.¹⁶³

This principle holds important lessons as nations and communities anticipate and plan for climate change and manage the extraction and protection of resources. It has also been a key factor in the resilience of the tribes.

C. One Dish, One Spoon: Cooperation and Sharing in the Commons

A set of closely related values espoused by tribes are the twin values of cooperation and sharing. Beyond the sense of kinship with peoples and the natural world, tribal groups were cognizant of a responsibility to the commons. These values meant the survival of indigenous peoples in harsh landscapes. They continue to mean survival as tribes beat back assaults on tribal sovereignty through the cooperation of shared strategy and the coordination of shared resources. In particular, cooperation and sharing may help tribes and their neighbors endure the threats inherent to climate change and the scarcity and disruption that will follow in its wake.

160. *Id.*

161. *Id.* Sidney Hill, a member of the Onondaga Council of Chiefs, said: “Scientists have been noting the return of fish and birds to the lake . . . Mercury left in the lake directly affects all the fish, birds and humans who eat the fish. It always will. Mercury does not go away.” *Id.*

162. *Id.*

163. For example, in many tribal traditions, there are those whose responsibility includes the obligation to speak for those who cannot speak for themselves. One such role is water protectors. The 2016 protests of the Dakota Access Pipeline began as a gathering of water protectors, speaking out against the threat to water represented by the pipeline’s proximity to the Missouri River and the water supply of not only the Standing Rock Sioux Tribe, but millions of others down river. See *infra* Part IV.

The Great Law of Peace included a provision establishing the principles for governing shared hunting areas, or in property parlance, the commons.¹⁶⁴ “We promise to have only one dish among us . . . which means that we will all have equal shares of the game roaming about in the hunting grounds and fields . . . and there will be no knife near our dish.”¹⁶⁵ This ideal from the Great Law of Peace is represented in The Dish with One Spoon wampum belt,¹⁶⁶ associated with a treaty between the Haudenosaunee and the Anishinaabe. The idea is that all the members of the Council of Chiefs would eat from one spoon and that none would bring a knife, lest it lead to bloodshed.¹⁶⁷ It was a covenant of peaceful co-existence that required the submission of self-interest to the greater value of sharing; indeed, it required careful attention to treat the common resource gently in the interest of peace.

Although the mechanism by which the United States funds its treaty and trust obligations to tribes has been styled as a zero-sum game, pitting tribes against one another for scarce resources, tribes have often banded together to improve policy and to advocate for common goals.¹⁶⁸ A prime example of tribal cooperation to protect a “common good” resource is shared tribal management and coordination of Supreme Court litigation strategy. While we do not typically conceive of constitutional interpretation as a common good—a widely shared, but depletable, resource¹⁶⁹—scholars have convincingly argued that it is.¹⁷⁰ If one tribal litigant brings a case that may result in Supreme Court precedent on an important point of federal Indian law, other tribal litigants can neither block that litigant from pursuing her case nor exempt themselves from the effects of that ruling. Thus, Supreme Court interpretation of federal constitutional (and even statutory) law relevant to tribal interests may be helpfully viewed as a common pool resource—so might Supreme Court attention to Indian law matters or Supreme Court goodwill toward tribal litigants.

And the importance of tribal management of Supreme Court precedent is clear: it has become axiomatic to observe that tribes have suffered some of their most severe shocks and disruptions at the hands of the United States Supreme

164. *The Dish with One Spoon*, INDIAN TIME (Aug. 5, 2010), <http://www.indiantime.net/story/2010/08/05/cultural-corner/the-dish-with-one-spoon/7510.html>; see also PARKER, *supra* note 124, at 103.

165. WILLIAMS, *supra* note 124, at 339–404.

166. See *infra* Appendix B.

167. PARKER, *supra* note 124, at 103; *The Dish with One Spoon*, *supra* note 164.

168. See, e.g., Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 AM. INDIAN L.J. 35, 40–42 (2017).

169. Brigham Daniels & Blake Hudson, *Our Constitutional Commons*, 49 GA. L. REV. 995, 1000 (2015).

170. *Id.* at 1006 (arguing that “constitutional resources can come in a number of forms, whether it be a constitutionally protected right of the citizenry, an allocation of governance authority between branches of government or among levels of government, or some other benefit that can be derived through a particular interpretation of original or amended constitutional text”; that such resources are depleted—or “appropriate[ed]”—by some litigants at the expense of others; and that these constitutional resources are also “characterized by non-excludability,” or “substantial difficult[y] . . . in denying . . . access [to] the resource system”).

Court.¹⁷¹ The Court, especially in modern times, has often taken a dim view of tribal sovereignty and has taken a broad view of its own powers to alter federal–tribal relations.¹⁷²

The continuing threat that adverse Supreme Court precedent poses to the survival of tribes was underscored in the 2000 term when the Court issued two decisions that seriously undermined the tribal sovereignty doctrine and threatened to hobble tribes in their core mission to exercise the right to self-determination, particularly in the scope of jurisdiction for tribal courts.¹⁷³ For tribes, these decisions were the final straw in what they had observed as a steady diminution of tribal sovereignty at the hands of a Supreme Court hostile to and skeptical of tribal interests. A coalition of tribal leaders gathered to launch the Tribal Sovereignty Protection Initiative (“TSPI”).¹⁷⁴ The TSPI is led by an advisory board of tribal leaders and includes attorneys with expertise in federal Indian law from around the nation. A key mission of the TSPI is the Tribal Supreme Court Project.¹⁷⁵

The Tribal Supreme Court Project aims to take a “coordinated and structured approach” to monitor which cases might be approaching the Supreme Court and to ensure thoughtful advocacy and strategy, including marshaling opposition to petitions for certiorari in certain cases.¹⁷⁶ The Project brings together expert attorneys from the Native American Rights Fund and the National Congress of American Indians, tribal attorneys, academics, and Supreme Court specialists to coordinate how tribal interests are presented to the Court. It maintains a repository of briefs, coordinates moot courts, shares timely information in a National Indian Law Library bulletin, provides amici coordination, and facilitates the sharing of other resources.¹⁷⁷

While the tribes obviously cannot rein in many of the other actors who seek Supreme Court precedent in the realm of federal Indian law (and who would “appropriate” that resource in ways that harm tribes), they have nonetheless been relatively successful in coordinating strategy among those advocating for tribal interests. In this way, tribes have developed a strategy for legal resilience that echoes the coordinated mid-twentieth-century efforts led by Charles Hamilton Houston and Thurgood Marshall in seeking equality before the law: identifying and mitigating a threat to a common pool resource (here, Supreme Court precedent) by sharing expertise and coordinating to manage potential conflicts between tribal interests.

171. See Fletcher, *supra* note 106, at 5.

172. *Id.*

173. *Tribal Supreme Court Project*, NATIVE AM. RTS. FUND, <https://sct.narf.org> (last visited Aug. 24, 2018).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

D. The Tadodaho¹⁷⁸ Principle: Caring for the Vulnerable

At the founding of the Haudenosaunee Confederacy, the Peacemaker and Hyenwatha chose Tadodaho as a kind of prime minister of the League of Chiefs.¹⁷⁹ He was an unlikely choice. His hair was said to be infested with snakes, symbolic of his severe dysfunction. His body was unwell and neglected. He seemed to have been overtaken by dark influences.¹⁸⁰ But the Founders of the Confederacy saw past those outward signs of inner turmoil and past his status as an outcast. They “comb[ed] the snakes from his hair,”¹⁸¹ tending to his needs, physical, emotional, and spiritual. They performed rituals intended to restore his individual humanity and worth, reimagining him as a person of great value to the community.¹⁸²

In seeing and freeing Tadodaho from his individual demons and healing him through sacred expression of grief and compassion, they enacted for Tadodaho the similar healing revitalization that they had performed for the Haudenosaunee nations. They addressed the individual darkness and lifted the burden of his wounds. They spoke compassion and tended to his well-being. In so doing, they modeled the vital principle of indigenous resilience that requires a particular care of the vulnerable and wounded.

Resilience does not mean that a community or individual is impervious to the assaults against them; instead, the resilient respond to and mitigate assaults and bounce back from them.¹⁸³ For both communities and individuals, that resilience requires particular healing interventions and the coordinate investment of resources to acknowledge the vulnerable and provide for their care.

This ancient value informs contemporary notions of what we might call “restorative justice” in modern Haudenosaunee society. The St. Regis Mohawk Tribe has been operating a “Healing to Wellness Court” since 2010.¹⁸⁴ The court is an effort to foster resilience and healing in those tribal families and individuals who have fallen prey to alcohol and substance abuse.¹⁸⁵ The St. Regis Healing to Wellness Court works with federal, state, local, and tribal law enforcement to hold criminal charges in abeyance to allow offenders an opportunity to participate in tribal rehabilitation services.

The St. Regis Mohawk tribal rehabilitation services “incorporate[] cultural traditions for rehabilitation and healing” and “actively seek[] to enhance the program’s cultural components and to involve the community in its

178. Tadodaho is sometimes rendered as “Tarodaho” or “Adodaho” in various versions of his story.

179. IROQUOIS DIPLOMACY, *supra* note 120, at 15.

180. *Id.*

181. PATRICIA ANN LYNCH, NATIVE AMERICAN MYTHOLOGY A TO Z 8 (2004).

182. *Id.*; PARKER, *supra* note 124, at 27–29, 90–92, 114–15.

183. See ZOLLI & HEALY, *supra* note 5, at 7.

184. *The Saint Regis Mohawk Tribe Healing to Wellness Court*, TRIBAL ACCESS TO JUST. INNOVATION, <http://www.tribaljustice.org/places/specialized-court-projects/the-saint-regis-mohawk-tribe-healing-to-wellness-court/> (last visited Jan. 15, 2020).

185. *Id.* (The court “promotes healthy living” and “incorporates cultural traditions for rehabilitation and healing”).

programming.”¹⁸⁶ Like the Founders of the Confederacy, the team of professionals and community support effectively comb the snakes from the hair of those suffering addictions and help them to reclaim their own humanity so that they can become effective, contributing members of the community again. Participants are accountable to the community to meet progress goals along the way. They face consequences, including expulsion from the program and the reinstatement of their criminal charges, if they fail to meet their obligations.¹⁸⁷ But the team of counselors, advocates, and tribal judges work together to provide avenues for successful completion of the program wherever possible.¹⁸⁸ The community’s embrace of the individual, rather than isolating the individual through incarceration, provides an opportunity to heal individuals and families and allows them to realize their obligations to the family and to the tribe.

Indigenous values counsel resilience strategies that value the individual, even the most vulnerable or wounded, as crucial to the well-being of the community.

E. The Six Nations Belt: Spreading the Peace Dividend

When the Haudenosaunee Confederacy was founded, the Peacemaker envisioned that the Tree of Peace symbolizing the Confederacy and its roots would spread out in the four directions.¹⁸⁹ The belief was that the alliance would foster peace and prosperity and that other nations would seek to join in to benefit from the Great Law and to undertake its responsibilities.¹⁹⁰ The Founders of the Confederacy believed that those who sought shelter under the Tree of Peace, or within the Haudenosaunee Longhouse, should be welcomed in not just friendship, but kinship.¹⁹¹

In 1722, the League of Five Nations became the League of Six Nations as the Tuscarora Nation joined the Haudenosaunee Confederacy.¹⁹² The Six Nations wampum belt, commemorating this alliance, features six lines, or rafters, holding up the roof of the longhouse.¹⁹³ The Six Nations wampum was meant to signify that each of the Six Nations was equally subject to the Great Law of Peace and equally entitled to the protection of the League.

The Tuscarora, originally located in the southeastern seaboard, had sought peace with the English in Pennsylvania. They sent wampum belts as entreaties for peace.¹⁹⁴ Tuscarora women seeking safety in their collection of water and firewood sent wampum belts.¹⁹⁵ A second wampum, from children born and unborn, sought safety to play “without the fear of death or slavery.”¹⁹⁶ Another belt was sent by

186. *Id.*

187. *Id.*

188. *Id.*

189. PARKER, *supra* note 124, at 8–9.

190. *Id.*

191. WILLIAMS, *supra* note 124, at 398–400.

192. FENTON, *supra* note 122, at 3.

193. See *infra* Appendix D.

194. *The Tuscarora and the Iroquois League*, NATIVE AM. NETROOTS (Aug. 31, 2010), <https://nativeamericannetroots.net/diary/658>.

195. *Id.*

196. *Id.*

young men, similarly seeking the ability to hunt without facing death or slavery.¹⁹⁷ The English rejected the entreaties, and eventually war followed and the Tuscarora were driven from their homelands. They sought alliance with the Haudenosaunee Confederacy, whose leaders advocated for them with the English governors of New York.¹⁹⁸ They were eventually welcomed into the alliance to share the benefits of the Great Law and to find protection within the shade of the Tree of Peace.¹⁹⁹

The indigenous resilience principle embodied in the Six Nations wampum is that growth through alliance can aid resilience. Rather than colonizing the weaker tribe in this instance, the Haudenosaunee welcomed the Tuscarora as equals who maintained their identity, their sovereign character, and their culture. The Haudenosaunee did not require an assimilation to welcome the Tuscarora under their roof. The addition of the sixth nation strengthened both the original Five Nations and the newly added Sixth Nation. The peace and friendship promulgated by the Haudenosaunee alliance was not a resource depleted by the incorporation of the weaker nation, but one multiplied by the incorporation.

F. The George Washington Belt: Adaptive Transformation

President Washington commissioned what is called the George Washington wampum belt in commemoration of the 1794 Treaty of Canandaigua.²⁰⁰ It was presented to the tribes to symbolize the commitment of the parties to the treaty that has resulted in the government-to-government alliance between the tribes and the United States for more than 200 years.²⁰¹ The belt represents a covenant of peace and friendship between the Six Nations and the United States. Its design features 13 connected human figures, representing the 13 American colonies arrayed around a central house.²⁰² The house represents the Six Nations and is flanked by two human figures, representing the Seneca Nation on the western door and the Mohawk Nation on the eastern door.

The transformation of the relationship reunifying the Six Nations and forging a lasting peace reflects the ability of the tribes and of the United States to learn and adapt to changing circumstances, key attributes of resilience. This required not the sort of new alliance with friendly forces reflected in the Six Nations belt, but the more challenging adaptation of abandoning genuine grievances against enemies in the interest of peace and survival. When the Revolutionary War between England and the United States began, member nations of the Haudenosaunee were split in their alliances to the warring parties.²⁰³ Having had long-standing diplomatic relations with the British King and his representatives, some tribes, like the Mohawk, Cayuga, Onondaga, and Seneca, were true to their alliances with the King

197. *Id.*

198. *Id.*

199. See *id.*; see also FENTON, *supra* note 122, at 382–97.

200. *George Washington Belt*, ONONDAGA NATION, <http://www.onondaganation.org/culture/wampum/george-washington-belt/> (last visited Nov. 6, 2018); see also FENTON, *supra* note 122, at 624–27.

201. See FENTON, *supra* note 122, at 624–27.

202. See *infra* Appendix E.

203. See FENTON, *supra* note 122, at 594–98; BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 25 (1972).

and fought with the British.²⁰⁴ The Oneida and the Tuscarora fought with the Americans. The war fractured the Haudenosaunee Confederacy for a time. In the end, the British relinquished their claims to the lands in New York state and abandoned the promises of protection they had made in agreements with the Haudenosaunee tribes.²⁰⁵

The armies of the United States exacted revenge on the tribes who had fought or were fighting with the British and had continued to carry out raids against American interests. In 1779, General Washington dispatched a contingent of the Continental Army to “completely destroy the principal villages and food supplies of the Cayuga and Seneca Indian Nations.”²⁰⁶ The hope was to eradicate or hobble the ability of these nations to attack American interests; the attack targeted both the food supplies, including burning peach, apple, and cherry orchards cultivated by the tribes,²⁰⁷ and the individuals in the community. The raids, led by General John Sullivan, sought Indian hostages to use as bargaining leverage to negotiate a cessation of hostilities.²⁰⁸

Although Sullivan’s raids were devastating, they were not decimating. The tribes rebuilt and reconstituted themselves.²⁰⁹ Just as they had done in forming the Haudenosaunee Confederacy, the tribes faced a consequential choice: continuing conflict or adaptive transformation to form a new alliance with old enemies, effectively burying their weapons of war and planting a new tree of peace.

In negotiating the Canandaigua Treaty of 1794 and adopting the associated symbolism of the George Washington belt, the participating Haudenosaunee tribes modeled a reliance on the resilience principle of adaptive transformation. Their new reality meant embracing the view that peace was better than war and seeking an alliance with a former enemy in the interest of survival.²¹⁰ The choice to establish formal diplomatic ties with the United States required the tribes to teach the United States the tools of Haudenosaunee diplomacy and meant those tribes involved had to relinquish some interests in lands and to forego the impulse to avenge the losses of war.²¹¹

The United States and the Haudenosaunee had attempted an earlier treaty, the Treaty of Fort Stanwix of 1784, which ignored longstanding Haudenosaunee

204. See GRAYMONT, *supra* note 203, at 74.

205. See *id.* at 254.

206. Fort Stanwix NM Staff, *The Clinton-Sullivan Campaign of 1779*, NAT’L PARK SERV. (Dec. 14, 2018), <https://www.nps.gov/fost/learn/historyculture/the-western-expedition-against-the-six-nations-1779.htm>.

207. *Id.* (“[When] Sullivan’s force had reached Seneca Lake and proceeded to destroy all the principal villages in the area[,] [m]any of the troops were shocked upon entering these villages. They found not the crude bark huts or longhouses of ‘Savages,’ but instead orderly rows of houses built of hewn timbers and frame houses with windows. Well-cultivated vegetable field extended out from the villages, along with extensive apple, peach, and cherry orchards. Many of these Indian villages rivaled or surpassed the towns that the soldiers had come from.”).

208. *Id.*

209. See GRAYMONT, *supra* note 203, at 220–22.

210. See FENTON, *supra* note 122, at 624–27.

211. See *id.*

diplomatic traditions.²¹² The truce did not hold. The tribes had not recognized the terms of the treaty or the alliance-making process as being binding or legitimate.²¹³ A Seneca leader, Red Jacket, sent word to Washington that the links in the chain of their attempted friendship were rusting.²¹⁴ In 1794, President Washington commissioned General Thomas Pickering to go back to the Haudenosaunee tribes to negotiate a more lasting peace between the United States and the Six Nations.²¹⁵ The tribes familiarized Pickering with the diplomatic traditions of the Haudenosaunee.²¹⁶ The resulting Treaty of Canandaigua of 1794, complete with the exchange of wampum and a meeting of the minds on the terms, endures today as a living pact of mutual aid and peace between the Haudenosaunee and the United States.²¹⁷

This adaptation preserved the essential dignity of the tribes as sovereign partners of the United States. The Haudenosaunee became a new kind of legal entity, *tribes* within the United States: treaty partners and cooperative sovereigns. The sovereign character of tribes gives them opportunities to fulfill their essential function to preserve and transmit culture.

G. The Two-Row Wampum: Cooperative Sovereignty

Much has been written about the significance of the Two-Row Wampum, or Gus-wen-tah, dating to the seventeenth century.²¹⁸ It represents an agreement of mutual respect between the Haudenosaunee and the Dutch. As Professor Robert Porter has written, “There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit

212. IROQUOIS DIPLOMACY, *supra* note 120, at 58–59.

213. See FENTON, *supra* note 122, at 616–21, 675, 710 (explaining that tribes did not consider some Indian signatories to possess treaty-making authority and that U.S. commissioners used threatening language to exact agreements against signatories’ better judgment).

214. *Id.* at 635; Rob Capriccioso, *Illuminating the Treaties That Have Governed U.S.-Indian Relationships*, SMITHSONIAN MAG. (Sept. 2014), <https://www.smithsonianmag.com/smithsonian-institution/treaties-governed-us-indian-relationships-180952443/>.

215. COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF A NATION 398, 441 (2018).

216. *Id.* at 72–73, 399–400, 405.

217. One term of the treaty obligates the United States to provide \$4,500 in cloth annually to eligible tribal members. In what is now mostly symbolic fulfillment of the treaty to represent the continuing commitment of the United States and the tribes, the Bureau of Indian Affairs presents the equivalent of about one square yard of cloth per capita to the tribes each year. Capriccioso, *supra* note 214.

218. See, e.g., Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 987–88 (1998) [hereinafter Porter, *A Proposal*]; cf. Desmond Manderson, *The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law*, 57 N.Y. L. SCH. L. REV. 153, 166 (2012–13) (“[T]he Two Row Wampum . . . recognizes . . . communities whose difference is valuable to them and worthy of respect, and whose trajectories may therefore not be identical.”).

of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship, and respect.”²¹⁹

The two parallel purple lines incorporated into the belt are said to represent two canoes traveling the same river. Both allow the other to travel unimpeded, neither endeavoring “to steer the other’s vessel.”²²⁰ The essence of the agreement is a respectful relationship between parallel sovereigns. This Haudenosaunee ideal is at the heart of their determination to build a relationship of mutual respect and tolerance for coexisting sovereigns. It undergirds the fundamental assertion of tribes that they have the right to exist, not merely as communities, not as cultural clubs with a mere right of association, but as duly constituted sovereigns within the United States, governing people and territory.

The jealous regard for this fundamental characteristic of tribal identity as sovereigns, this insistent demand for a co-existing sovereignty that does not diminish the sovereignty of the United States, has been a powerful principle enabling legal and cultural resilience against the forces that would diminish or alter tribal identity.

As Brian Walker and David Salt observe, “[t]here are limits to how much you can adapt,”²²¹ and so resilient systems and institutions must have a capacity to transform without losing their essential character.²²² The tribes of the Haudenosaunee have retained their essential character as tribes, unique legal entities, and unique cultural entities, in spite of radically changing circumstances and potentially existential threats. That resilience has been built in large part upon the foundation of traditional indigenous principles, including the seven principles discussed in this Part. While many other cultural values have contributed to resilience, these seven principles identify a representative set of ideals by which the tribes have navigated the rough waters of American history.

The next Part suggests how these principles may contribute to developing resilience both for tribes and for nontribal social-ecological systems that are the object of resilience theory’s endeavor.

IV. LEARNING FROM INDIGENOUS RESILIENCE

The legal and cultural resilience of American Indian and Alaska Native tribes offers an essential and timely narrative for those seeking to understand what enables individuals, communities, economies, nations, institutions, and organizations to survive serious, even existentially threatening, disruption. Within the story of tribal survival, one may come to understand ways of being and

219. Porter, *A Proposal*, *supra* note 218, at 987–88 (quoting SPECIAL COMMITTEE ON INDIAN SELF-GOVERNMENT, INDIAN SELF-GOVERNMENT IN CANADA back cover (1983)); see *infra* Appendix F.

220. Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125, 182 (1999) (“The Two Row Wampum requires that ‘We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other’s vessel.’” (quoting Porter, *A Proposal*, *supra* note 218, at 987–88)).

221. WALKER & SALT, *supra* note 12, at 100–01.

222. Ruhl, *supra* note 7, at 574 (describing the necessity of “evolvability” in resilient legal systems).

overcoming, of organizing against and responding to tragedy and insult without compromising the essential integrity of the assaulted.

Resilient systems engage in risk mitigation. To mitigate a disruption means to anticipate the coming threats and to take steps to divert the threat before it arrives or to minimize its impact once it does. If legal and resilience theorists are charged in part with anticipating potential threats and building adaptive capacities against those threats, both seen and unforeseen, the embedded experience and wisdom, hard-earned by the tribes, may prove a fruitful study. This Part begins the discussion about what resilience theory and practice can learn from indigenous resilience principles and suggests areas for future inquiry.

In particular, this Part will discuss three potential threats that both tribes and nontribal systems face: climate change, epistemic crises in governance, and care for the vulnerable. This Part suggests ways in which traditional resilience principles for managing these threats can be augmented and enhanced by the principles of indigenous resilience, including the Seven Generations principle representing long-term planning and accountability; the Hyenwatha Belt principles of community, kinship, and interconnectedness; the principle of shared responsibility and cooperation in the commons, represented by the One Dish, One Spoon Belt; the responsibility to care for the most vulnerable embodied in the Tadodaho Belt; the Six Nations principle of spreading the peace dividend; the George Washington Belt's message of the need for adaptive transformation; and the Two Row Wampum principle of cooperative sovereignty.

This Part proceeds in two Sections, each addressing the challenges of climate change, epistemic crises in governance, and care for the vulnerable. Section A begins a discussion about how these threats may affect tribes and argues that indigenous principles of resilience may assist tribes in preparing for and countering such threats. Section B examines how other people and institutions, outside of the indigenous context, can likewise learn from indigenous resilience principles as they seek to anticipate and inoculate individuals and organizations from similar threats.

A. Indigenous Resilience and the Future of Indigenous Peoples

As discussed above, tribes have modeled legal resilience in preserving their core purpose and identity through countless assaults and shocks in law and policy. Given that there are more than 573 federally recognized and 100 state recognized tribes with widely varied language, culture, and history, it is highly reductive (and culturally fraught) to presume to identify the core purposes at the heart of each tribe and beyond the scope of this Article to examine all of the indigenous principles that have animated that resilience. But there are some core purposes that American Indian and Alaska Native tribes have described and asserted for themselves that may, in part, comprise the essence of enduring tribal identity to date.

In my view, there are three overarching aims and aspirations that sit at the heart of tribal purpose, across time, space, and culture: first, tribes exist to preserve and transmit culture, including management of lands and resources in accordance with traditional beliefs and responsibilities; second, tribes seek to exercise their aboriginal powers of self-governance and inherent sovereignty over people and

territory, the right to “make their own laws and be ruled by them”²²³ without interference or oppression; and third, tribes seek to facilitate the health and prosperity of their members through education, economic development, and flourishing homelands. These are surely underinclusive descriptions of tribal core purposes, but they include a succinct description of the core areas that have been the targets of assimilative assaults on tribal sovereignty and identity.

There are three significant threats that may challenge the ability of the tribes to maintain their core purposes of preserving and transmitting culture, sustainably managing lands and resources, exercising their inherent sovereignty over people and territory, and facilitating health and prosperity for their members. Climate change, the epistemic crisis of governance, and overwhelming and pressing needs of the vulnerable each represent significant threats to the core purposes of tribes.

1. Climate Change

Tribes must prepare for the consequences of climate change, which poses a particularly dangerous threat to many tribal communities and their ability to maintain their core identity and function. Professor Rebecca Tsosie has described the threat to tribes from climate change as potentially “genocidal” because the unique cultures and identities of many indigenous peoples are location and resource specific.²²⁴ Tribal access to adequate water, already a challenge for some, may face additional restrictions or scarcity in the event of drought. On the other hand, some may find their homelands submerged by rising sea levels, or subject to intensifying storms, or uncontrolled fires. Warming arctic oceans threaten the subsistence resources of Alaska Natives on both land and sea.²²⁵ Despite a limited role for tribes in national and international planning to combat climate change, and despite a relatively small carbon footprint,²²⁶ climate change may take an acute toll on tribes who already face ecological and economic vulnerability.

While the Bureau of Indian Affairs had established a Tribal Climate Resilience Program to assist tribes to prepare for climate change, the Trump Administration has proposed eliminating the program’s funding and removed references to climate change from the program’s website and materials.²²⁷

Rather than rely on the federal government to fulfill its trust responsibility to tribes, many tribes are already implementing indigenous resilience principles, like those found among the Haudenosaunee, to prepare for the threat of climate change. They are taking a long-term view and holding themselves accountable for the future consequences of their present choices on the climate; they are working to protect the shared resources of the commons, as the One Dish, One Spoon principle directs; and they are seeking to work with other sovereigns cooperatively in the same spirit as

223. Williams v. Lee, 358 U.S. 217, 220 (1959).

224. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1675 (2007).

225. Lyndsey Gilpin, *Tribes Commit to Uphold Paris Climate Agreement*, HIGH COUNTRY NEWS (Sept. 18, 2017), <https://www.hcn.org/issues/49.16/tribes-commit-to-paris-climate-agreement>.

226. *Id.*

227. *Id.*

the Two Row Wampum. For example, when President Trump announced that the United States would withdraw from the United Nations' Paris Climate Agreement, several tribes and the National Congress of American Indians announced their intention to continue to abide by the Agreement.²²⁸ This assertion of their sovereign responsibilities on the world stage reflects the indigenous commitment to cooperative sovereignty, in this case, with fellow tribes and international partners, if not the United States.

Federally recognized tribes whose land is held in trust by the federal government find a weighty bureaucracy can impede their ability to manage resources according to their best judgment or in ways that sustain economic development. State and local governments frequently object to tribal priorities for management of federal lands, as evidenced in the recent fight over the designation of Bears Ears National Monument.²²⁹ Cultural resources such as sacred sites, archeologically significant sites, and others are often out of the reach of tribal management, having been long ago deemed private, state, or federal in ownership.²³⁰ Many tribes continue to litigate their reservation boundaries as states and localities claim a legal diminishment has occurred. The indigenous principle of cooperative sovereignty counsels that tribes seek partnerships where possible with other sovereigns or stakeholders, and where such partnerships are not possible, that tribes insist on pursuing their own path unimpeded, as embodied by the Two Row Wampum. As tribes chart a path with a long-term view and hold themselves and others accountable, and as they insist on cooperative sovereignty in law and policy, they will be better prepared to meet the consequences of climate change.

Other principles of indigenous resilience may also help tribes cope with and adapt to climate change. For example, the Six Nations principle of spreading the peace dividend may suggest that tribes that already enjoy federal recognition should be supportive of the efforts of other tribes to become federally recognized. Tribes that lack federal recognition confront particularly acute difficulties in trying to protect their lands from the ravages of a changing climate,²³¹ yet some federally recognized tribes have advocated against federal recognition for other tribes because they view them as potential competitors for federal aid and economic development

228. *Id.*

229. See generally Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213 (2018) (reframing the moral history of public lands and conservation through the lens of the Bears Ears monument designation).

230. *See id.* at 214–16.

231. See, e.g., Sara Sneath, *Louisiana Tribes Say Federal Recognition Will Help to Face Threat of Climate Change*, NOLA.COM (July 26, 2018, 10:30 AM), <https://www.nola.com/expo/news/erry-2018/07/449c2f22d39490/louisiana-tribes-say-federal-r.html> (noting the difficulties faced by Louisiana tribes lacking federal recognition and asserting that “[f]ederal recognition could help the [Pointe-au-Chien] tribe to protect [sacred] sites, pursue financial assistance and give tribe members more say in decision-making about their ancestral land”).

opportunities.²³² Indigenous resilience principles suggest that tribes are stronger and more resilient when they support other tribes and pool knowledge and expertise.

2. *Epistemic Crises of Governance*

Longstanding democratic institutions face what has been termed an “epistemic crisis” challenging the sources and reliability of the shared facts and information upon which a society relies.²³³ The epistemic crisis is a “split not just in what we value or want, but in who we trust, how we come to know things, and what we believe we know—what we believe exists, is true, has happened and is happening.”²³⁴ In some ways, partisan rancor threatens to overwhelm the rule of law and to undermine civility and civic duty. Ralph Keyes calls this the “post-truth era” in which the promulgation of lies and mistrust in public and private discourse gives rise to a “widespread sense that much of what we’re told can’t be trusted.”²³⁵

As this epistemic crisis spreads among countries and communities, fueled by malign actors in social media, politicians seeking to sow division, and peddlers of misinformation for profit in the media, tribes should draw upon indigenous resilience principles to prepare for the potential upheaval and disruption to tribal institutions posed by this crisis.

As the political winds blow with uncertainty and competition for resources is exacerbated, it is not difficult to imagine a resurgent movement to compel the assimilation of tribes and terminate the federal trust responsibility. Tribes must prepare to meet that eventuality and to continually defend the vitality of the principle of tribal self-determination in the public square. Many litigants continue to challenge the principle and scope of inherent tribal sovereignty on a case-by-case basis.²³⁶ Tribes have also seen the Supreme Court waver in its application of the principle of tribal sovereignty.²³⁷ Intolerance to tribes and tribalism has been a hallmark of federal Indian policy in the past, and tribes may anticipate its potential to return.

Effective tribal resilience in this climate of epistemic crisis depends upon the ability of tribes to navigate and influence public policy and debate. Since the

232. Teresa Wiltz, *Indian Tribes Find Opposition to Gambling a Barrier to Recognition*, PEW (Feb. 8, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/02/08/indian-tribes-find-opposition-to-gambling-a-barrier-to-recognition> (noting that the federal recognition process “often pits tribes against one another” and that “[f]ederally recognized tribes sometimes block others because they don’t want the competition that would come with new casinos”); *see also id.* (“Federal recognition is a divide-and-conquer thing,’ said [Mary Ann] Jacobs, whose tribe of 55,000 members has been seeking federal recognition since 1888. ‘It’s the haves and have-nots.’”).

233. Peter Dahlgren, *Media, Knowledge and Trust: The Deepening Epistemic Crisis of Democracy*, 25 JAVNOST 20, 20 (2018).

234. David Roberts, *America Is Facing an Epistemic Crisis: What if Mueller Proves His Case and It Doesn’t Matter?*, VOX (Nov. 2, 2017, 8:40 AM), <https://www.vox.com/policy-and-politics/2017/11/2/16588964/america-epistemic-crisis>.

235. *The Post-Truth Era: Dishonesty and Deception in Contemporary Life*, RALPH KEYES, <https://ralphkeyes.com/book/the-post-truth-era/> (last visited Feb. 23, 2020).

236. *See, e.g.*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2159 (2016) (affirming by an equally divided Court, the Fifth Circuit decision about the scope of the tribal court’s inherent civil jurisdiction).

237. *See id.*

Canandaigua Treaty's establishment, the tribes of the Haudenosaunee have educated, advocated, negotiated, and litigated with the federal, state, and local communities that surround them. They have used the power of the word rather than the power of the sword to vindicate their interests.

The power of the word as a source of creation and healing is a deeply indigenous principle, as the Thanksgiving Address and Ritual of Condolence of the Haudenosaunee illustrate. N. Scott Momaday, an author from the Kiowa Nation, identified the threat of epistemic crisis in his Pulitzer Prize-winning *House Made of Dawn*.²³⁸

In the white man's world, language, too—and the way in which the white man thinks of it—has undergone a process of change. The white man takes such things as words and literatures for granted, as indeed he must, for nothing in his world is so commonplace. On every side of him there are words by the millions, an unending succession of pamphlets and papers, letters and books, bills and bulletins, commentaries and conversations. He has diluted and multiplied the Word, and words have begun to close in upon him. He is sated and insensitive; his regard for language—for the Word itself—as an instrument of creation has diminished nearly to the point of no return. It may be that he will perish by the Word.²³⁹

The Dakota Access Pipeline protests illustrate the potential for tribes and tribal members to use words, backed by civil disobedience and protest—not to dilute and multiply words, but instead to join their voices together to advocate and speak for their people and for the earth. The protests of the Dakota Access Pipeline were launched by traditional water protectors, whose responsibility was to speak for and protect the interests of the waters.²⁴⁰ Their camps soon attracted representatives from indigenous peoples around the world to stand in solidarity with the cause of giving the tribes a voice in the Dakota Access debate, protect the cultural resources of the tribes threatened by the project, and endorse the message of the water protectors that water is life. Threats to the water posed by the pipeline, the water protectors argued, were existential threats to the region's human, animal, and plant life.²⁴¹

The alliance of state law enforcement with the private security company hired by the pipeline developer not only deployed military-style tactics against the water protector camp, but state and private officials also sought to interfere with media efforts to report on the rough treatment of the water protectors.²⁴² They arrested reporters and charged them with crimes.²⁴³ The images that nonetheless emerged were stark: photos and reporting of peaceful protestors being sprayed with

238. N. SCOTT MOMADAY, *HOUSE MADE OF DAWN* 84–85 (2010).

239. *Id.*

240. See Trish Glazebrook & Jeff Gessas, *Standing Rock: Water Protectors in a Time of Failed Policy*, in THE WONDER OF WATER: LIVED EXPERIENCE, POLICY, AND PRACTICE 180–81 (Ingrid Leman Stefanovic ed., 2020).

241. *See id.* at 181.

242. See Peter Sterne & Jonathan Peters, “Put the Camera Down”: Covering Protests Has Become the Riskiest Job in Journalism, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/covering-protests-threats-press-freedom-tracker.php.

243. *Id.*

pepper spray and fire hoses, assaulted by dogs, and subdued by batons.²⁴⁴ While the protest could not prevent the pipeline from being built, the voices of the waterkeepers and the images of peaceful protest, even in the face of abuse, pricked the conscience of the nation and recalled the police brutality against the civil rights movement. By their persistence and even their willingness to endure abuse, the tribal protestors asserted not only the truth of the indigenous principles of interconnectedness and care for the earth that they voiced, but also implicitly asserted that there is truth, rooted in long-standing traditions and knowledge, that can be known and recognized as such.

Tribes must not only be prepared to respond to the epistemic crisis in broader society, but also guard against the possibility of that crisis taking hold at the tribal level. The ability to communicate effectively and to sort information from misinformation will be important tools for tribes in building resilience against the epistemic crisis that surrounds them. To that end, many tribes are working to build language preservation and cultural instruction programs by empowering tribal elders to teach youth and by organizing preschool programs that teach traditional language and culture to center indigenous ways of seeing and being in the world.²⁴⁵ Tribal leaders have identified the goals of preserving and transmitting culture as tools to build individual and community resilience, to provide a stabilizing foundation and cultural home for members of the tribes.²⁴⁶ These efforts are proceeding apace, despite state and federal education programs that often work at cross purposes with tribal goals regarding culturally appropriate education and language preservation.²⁴⁷ Numerous tribes are working with available resources to preserve endangered languages, a vital cultural asset.²⁴⁸ But the loss of native or fluent speakers as they age presents many tribes with a significant hurdle in attaining that goal, and tribes must find ways that work to preserve culture and traditional methods of transmitting knowledge in the face of epistemic crisis about what sources of information and knowledge are trustworthy and legitimate.

3. Care for the Vulnerable

Perhaps the most immediate challenge to tribes' ability to carry out their core purpose is the crisis of health and education among tribal members. While educational attainment lags behind other measured groups,²⁴⁹ it is the health

244. See VICTORIA TAULI-CORPUZ, INDIGENOUS RESISTANCE TO THE DAKOTA ACCESS PIPELINE: CRIMINALIZATION OF DISSENT AND SUPPRESSION OF PROTEST 1–3 (2018).

245. See Kyley Schultz, *Lack of Resources Leads to Grim Statistics in Native American Schools*, CRONKITE NEWS (May 11, 2018), <https://cronkitenews.azpbs.org/2018/05/11/lack-of-resources-leads-to-grim-statistics-in-native-american-schools/>.

246. See generally *Recovery and Preservation of Native American Languages: Field Hearing Before H. Comm. on Educ. & the Workforce*, 109th Cong. (Aug. 31, 2006).

247. See *Profile: American Indian/Alaska Native*, *supra* note 3 (stating that 26.9% of Native Americans speak a language other than English in the home).

248. See *Recovery and Preservation of Native American Languages*, *supra* note 246.

249. From the U.S. Department of Health and Human Services:
In 2017, 83.8 percent of American Indians and Alaska Natives alone or in combination had at least a high school diploma, as compared to 92.9

disparity for American Indians and Alaska Natives that may be most alarming. The U.S. Department of Health and Human Services (“HHS”) has found that “American Indians/Alaska Natives frequently contend with issues that prevent them from receiving quality medical care. These issues include cultural barriers, geographic isolation, inadequate sewage disposal, and low income.”²⁵⁰ HHS notes disproportionately high rates of “heart disease, cancer, unintentional injuries (accidents), diabetes, and stroke,” and “a high prevalence and risk factors for mental health and suicide, obesity, substance abuse, sudden infant death syndrome (“SIDS”), teenage pregnancy, liver disease, and hepatitis.”²⁵¹ As in so many communities, the opioid crisis has not spared the tribal populations. These significant health and healthcare disparities present a potentially existential threat to tribes. They underscore that members of tribes are an especially vulnerable population.

In addition to these many health challenges, the Washington Post reported in 2014 on a “toxic collection of pathologies—poverty, unemployment, domestic violence, sexual assault, alcoholism and drug addiction—[that] has seeped into the lives of young people among the nation’s . . . tribes. Reversing their crushing hopelessness, Indian experts say, is one of the biggest challenges for these communities.”²⁵² Historical trauma also contributes to the crisis of vulnerability of tribal families and individuals. Senator Byron Dorgan, a former Chairman of the Senate Committee on Indian Affairs, noted that the crisis cannot be understood in a vacuum, but that the “agony on reservations” must be understood as “directly tied to a ‘trail of broken promises to American Indians,’ . . . noting treaties dating back to the nineteenth century that guaranteed but largely didn’t deliver healthcare, education and housing.”²⁵³ Tribes have not had the resources to meet the collection of pathologies that has fueled this crisis with adequate mental health treatment opportunities but have been working to leverage resources and develop responses that will build resilience in these most vulnerable tribal members.

percent of non-Hispanic whites. 19.6 percent of American Indians and Alaska Natives age 25 and over had at least a bachelor’s degree, in comparison to 35.8 percent of non-Hispanic whites. 6.8 percent of American Indians and Alaska Natives held an advanced graduate or professional degree, as compared to 13.8 percent of the non-Hispanic white population.

Profile: American Indian/Alaska Native, *supra* note 3.

250. *Id.*

251. *Id.* The report further notes that “American Indians and Alaska Natives [(AI/ANs)] have an infant death rate 60 percent higher than the rate for Caucasians . . . [and] are twice as likely to have diabetes as Caucasians. . . . AI/ANs also have disproportionately high death rates from unintentional injuries and suicide.” Lyubov Slashcheva et al., *Would People with Intellectual and Developmental Disabilities Benefit from Being Designated “Underserved”?*?, 18 AM. MED. ASS’N J. ETHICS 422, 423 (2016) (quoting the report).

252. Sari Horwitz, *The Hard Lives—and High Suicide Rate—of Native American Children on Reservations*, WASH. POST (Mar. 9, 2014), https://www.washingtonpost.com/world/national-security/the-hard-lives—and-high-suicide-rate—of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28_story.html.

253. *Id.*

At the risk of oversimplification, resilience theory posits that vulnerabilities should be monitored and perhaps addressed through redundancy and diversity. The Tadodaho principle of indigenous resilience moves beyond this traditional approach, instructing that the society cannot effectively move forward without its most vulnerable, and that those who seem compromised may have tremendous potential for the society. As the Founders of the Confederacy sought a sort-of prime minister, they turned to Tadodaho, whom society had exiled. They saw something that Tadodaho's infirmities had hidden from others. They combed the snakes from his hair, helped him heal, restored his dignity, and gave him a place of great responsibility in the Confederacy.²⁵⁴

How might the Tadodaho principle of indigenous resilience assist tribal leaders and policymakers in the struggle to address the crisis of suicide, itself a resilient crisis, especially among the youth? The Tadodaho principle calls on the community to notice, care for, and embrace the individual who is suffering and to assist that individual to play a role in the community and realize her potential.

In addition to the wellness courts discussed in Section III.D above that seek to integrate and heal rather than to punish and isolate, one way this principle is playing out in contemporary tribal communities is the growing push to draw on indigenous values to inform juvenile justice strategies for tribal youth.²⁵⁵ Cataloguing the startlingly disproportionate presence of risk factors for delinquency for native youth, Professor Addie C. Rolnick observes that Native youth suffer “the harshest sanctions for their misbehavior” and are exposed early to “draconian interventions . . . [d]espite widespread agreement in the juvenile justice community and among many in Indian country that incarceration is more likely to harm vulnerable youth.”²⁵⁶ While most tribes advocate for and favor “a treatment-based system” for vulnerable youth, “tribes must work around a patchwork of external policies and authorities. The result has been a lopsided focus on incarceration and sparse (at best) resources for treatment and rehabilitation services.”²⁵⁷ The current funding mechanisms for juvenile justice fail to reflect or facilitate tribal priorities that would prefer to integrate, rather than isolate, youth offenders.

Tribes are working to meet the crisis of vulnerability and to foster resilience in the families and individuals whose contributions to the community are limited by their current infirmities. The Tadodaho principle of indigenous resilience stands for the significant value of each individual, no matter how infirm, to the tribe. The Founders of the Haudenosaunee Confederacy modeled the attention, care, and priority that indigenous leaders owe to the plight of the vulnerable. Similarly, the Seven Generation principle may also underscore this obligation: the history of tribes is one of intergenerational trauma—trauma that will presumably continue if the vulnerable of today aren’t healed, potentially perpetuating that trauma to coming generations.

254. See LYNCH, *supra* note 181, at 8.

255. See, e.g., Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 58 (2016).

256. *Id.* at 80–81.

257. *Id.* at 82.

Tribes have risen to challenges as great as or greater than those elaborated here. Tribal leaders have a keen sense of their duty to serve the people and guide and prepare them for the storms ahead. As tribes anticipate and plan for the coming threats of climate change, epistemic crises, and the plight of the most vulnerable, they may find the keys to resilience in the traditional wisdom they have inherited in the cultural values, oral traditions, spiritual teachings, and long experience of those who came before.

B. Indigenous Resilience and the Future of Resilience Theory

Resilience thinkers must consider an ever more complicated array of threats and disruptions in theorizing, researching, and articulating strategies to support the resilience of desirable systems. At the same time, resilience theory seeks to understand and thwart the resilience of unwanted but resilient phenomena, like pandemics or poverty. Just as resilient systems and institutions have adaptive capacity, or the ability to absorb large shocks and make necessary adjustments,²⁵⁸ the field of resilience theory broadly will have to adapt to help people and institutions confront new and unanticipated threats in a rapidly changing world.

But there are plenty of threats or disruptions within the present imagination of those working to help build adaptive and transformative capacity or the ability to “re-envise what the system might become.”²⁵⁹ Whether the systems are legal, ecological, political, economic, or individual, the story of the persistence of the world’s indigenous peoples offers powerful insights for overcoming these threats and disruptions. This Section is intended to invite study and discussion that looks to the stories and values of indigenous peoples to broaden the reach and deepen the scope of resilience theory. The Subsections below look to the same three areas of resilience interest considered already in the tribal context—climate change, epistemic crises of governance, and the tremendous need to care for the vulnerable—to begin that study.

1. Climate Change

There is perhaps no other set of challenges, both anticipated and unanticipated, more consequential than the effects of climate change.²⁶⁰ The United Nations Environmental Programme reported in its Climate Change Science Compendium 2009²⁶¹ that some climate impacts have arrived ahead of pace as the science finds “faster sea-level rise, ocean acidification, melting of Arctic sea-ice cover, warming of polar land masses, freshening in ocean currents, and shifts in circulation patterns in the atmosphere and the oceans.”²⁶² Although climate change presents a growing threat to an exponentially increasing percentage of the

258. WALKER & SALT, *supra* note 12, at 91.

259. *Id.* at 100.

260. Richard A. Kerr, *Amid Worrisome Signs of Warming, ‘Climate Fatigue’ Sets In*, 326 SCIENCE 926, 927 (2009) (“Almost all climate scientists are of one mind about the threat of global warming: It’s real, it’s dangerous, and the world needs to take action immediately.”).

261. *See id.*

262. *Id.*

population, many indigenous peoples have been the earliest victims of the consequences of climate change.²⁶³

Climate science and resilience theory recognize the interconnectedness of all living things and that damage to coral reefs or oceans or rainforests can launch cascading consequences to ecosystems, economies, and societies in large and small ways. In the Haudenosaunee tradition, the Thanksgiving Address underscores the interconnectedness of all living things and serves to remind human beings of their key role in speaking on behalf of beings and things that cannot speak for themselves. Similarly, the message of the Hyenwatha Belt stresses the interconnectedness, even kinship, of all people. So too, the One Dish, One Spoon principle obligates users of the commons to conserve and protect mutual resources.

Even beyond these overarching ideas of ecological kinship in the commons, indigenous values can inform the study of climate, ecological risk, and resilience in substantial ways.²⁶⁴ For example, Mary Arquette reports that the Akwesasne Mohawk Nation's Environmental Task Force "found that traditional [non-indigenous] risk assessment and management models have not been effective in defining environmental risk, promoting remediation, decreasing exposure, or restoring community health at Akwesasne."²⁶⁵ Arquette asserts that while many scientific studies calculating community health risks "tend to focus on identifying average exposures in a given population," that methodology is inappropriate and inadequate for the Akwesasne Mohawk.²⁶⁶ The Akwesasne cannot ignore their Haudenosaunee cultural values of looking to the seventh generation or tending to the most vulnerable in designing risk assessment studies. Arquette reports, "[c]ultural value systems followed by Native people often mandate special protections and considerations . . . for given groups of individuals, including elders, unborn generations of children, and sensitive species of wildlife."²⁶⁷

The cultural responsibility of Native decision-makers to a broader constituency than the average healthy adult, Arquette says, provides a new perspective for scientists developing models for environmental risk.²⁶⁸ Looking to these indigenous values, Arquette argues for a more holistic approach to designing risk assessments and an expanded definition of health itself.²⁶⁹ Health in the Akwesasne model is much broader than physical soundness and the absence of illness or disease. "Health is based on peaceful, sustainable relationships with other peoples including family, community, Nation, the natural world and spiritual beings."²⁷⁰ Those interested in building resilience to climate change will need to

263. See generally Tsosie, *supra* note 224 (explaining that "many of the geographical regions that are most vulnerable to the effects of climate change are also the traditional lands of indigenous communities" and specifically discussing the harmful effects of climate change on Native communities in the Pacific and the Arctic).

264. See, e.g., Mary Arquette et al., *Holistic Risk Assessment: A New Paradigm for Environmental Risk Management*, 11 RACE, POVERTY & ENV'T 49 (Winter 2004–05).

265. *Id.* at 49–50.

266. *Id.* at 50.

267. *Id.*

268. *Id.* at 50–51.

269. *Id.*

270. *Id.* at 51.

deploy every instrument at their disposal, refine those tools in response to changing threats, and imagine new tools that have yet to be invented. The resilience strategies and values of indigenous peoples have much to offer resilience thinkers reconfiguring risk populations, remodeling risk assessments, and revitalizing the health of the planet.

2. Epistemic Crises of Governance

Just as climate change threatens ecological and political upheaval, the epistemic crises in governance threaten to tear at the fabric of social order and the rule of law. The growing rift in ways of knowing and being threatens the shared liberal values of equality and liberty that have animated the West in modern democracy. The epistemic crises threaten the ability of the United States to carry out its core functions and live out its creeds, embodied in such founding documents as the U.S. Constitution and the Declaration of Independence. Political parties and the two-party system on which Americans have relied may need new tools for responding to the threats of dissolution or capture. Information warfare threatens to disrupt public discourse and upend objective reality.

The same indigenous resilience principles that may steer tribes through these modern epistemic threats may hold particular value to legal and resilience theorists as they seek to develop effective responses to enhance the resilience of public institutions or to combat the resilience of threats, like fake news, to these institutions. If American society is to be resilient against the rising tide of division and committed to an objective reality in pursuit of liberal values, indigenous resilience offers several principles that may contribute to those endeavors.

In particular, the Seven Generations principle drawn from the Haudenosaunee Confederacy—that leaders must be held accountable for acting in self-interest rather than in the interest of future generations—has important implications for America’s current political situation. When the Haudenosaunee Confederacy adhered to that principle it thrived, but when that principle was flouted, the Confederacy ultimately waned as a political power. There has been some scholarly debate about whether, and to what extent, the drafters of the Articles of Confederation and the Constitution were aware of or influenced by the Confederacy’s organization of allied sovereigns and representative deliberations.²⁷¹ Whatever that historic reality, there are both parallels and important distinctions in the resulting constitutions. The Haudenosaunee Constitution held the Confederacy together as a powerful political alliance through centuries of assaults and articulates values that are still guiding Haudenosaunee governments.

As discussed above, the Haudenosaunee Constitution enacted specific checks on the temptation of representatives to use their positions for their own self-

271. See Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America’s Democratic Roots*, 14 AM. INDIAN L. REV. 323, 327 (1989) (arguing that Benjamin Franklin, in particular, used an understanding of the Iroquois Confederacy’s representative alliance in designing America’s founding documents). But see Eric M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295, 300 (1991) (arguing that historians relied more on imagination than primary historical sources in drawing connections between the Haudenosaunee Confederacy and the American Constitution).

interest. Acting in self-interest was an impeachable offense, so to speak. The clan mothers who chose the representatives were empowered to strip the representatives of the position if they were found to be acting in self-interest rather than in the best interests of the represented.²⁷² This provision not only empowered and elevated women within the system, it also underscored the primacy of a duty to the group over individual enrichment, and the concomitant particular duty to the elderly (as represented by the clan grandmothers) and the next seven generations.

The U.S. Constitution “split[s] the atom of sovereignty” through separation of powers and federalism doctrines.²⁷³ The arrangement does provide explicit and structural checks on self-aggrandizement by the government itself and its components, but it presumes that elected representatives usually pursue the public interest because they are accountable to voters. Ethical norms for politicians have been sporadically asserted and subverted, with inconsistent application and self-policing. Where self-interest infects the political classes and elected representatives, their interest in the accurate dissemination of information and a commitment to an educated citizenry may conflict with self-enrichment motives. The war on truth and empirical facts is likely to continue so long as it serves the unchecked political interests of the powerful; therefore, holding leaders accountable is critical. Employing the principle of cooperative sovereignty, state and local leaders can and should continue to take steps to hold federal leaders accountable to facts²⁷⁴—and, conversely, federal officials can similarly check state and local inattention to truth. Additionally, officials in each coordinate branch of the federal government must likewise hold other federal officials to account. For example, the courts can continue to insist that factual assertions can be critically evaluated, that facts can be ascertained and weighed, and that doing so is critical to the making of legitimate policy decisions.²⁷⁵

272. See *supra* Section III.A.

273. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

274. See, e.g., Phil McKenna, *California Climate Change Report Adds to Evidence as State Pushes Back on Trump*, INSIDE CLIMATE NEWS (Aug. 27, 2018), <https://insideclimate.org/news/27082018/california-climate-change-assessment-evidence-global-warming-science-risks-policy-clean-energy> (“California published a comprehensive assessment . . . of the risks global warming is creating for the state, providing a thick tome of evidence advocates can now use to push climate legislation, pursue litigation, and attempt to sway public opinion as they take on industry and try to counter the Trump administration.”).

275. See, e.g., Quinta Jurecic, *How Courts Are Neutralizing Trump’s Deceptions*, ATLANTIC (Apr. 16, 2018), <https://www.theatlantic.com/politics/archive/2018/04/how-courts-disarm-trump/558086/> (“Again and again, judges have refused to let Trump get away with his usual trick of evading consequences by simply denying any involvement in what he did or said. Instead, they’ve written his tweets into legal opinions as evidence of animus against Muslims or transgender servicemembers. Law, after all, is a structure of meaning used to weigh facts and arguments and then impose consequences—the opposite of Trump’s glib insistence on the irrelevance of truth.”); see also Josh Siegel, *Federal Court Kills EPA’s Delay of Chemical Safety Rule, in Latest Rebuke of Trump’s Deregulatory Agenda*, WASH. EXAMINER (Aug. 17, 2018), <https://www.washingtonexaminer.com/policy/energy/federal-court-kills-epas-delay-of-chemical-safety-rule-in-latest-rebuke-of-trumps-deregulatory/>

For the United States and its political institutions, remaining resilient in the face of growing conflicts about shared truth, common identity, and unifying purpose will require these types of strategic responses to build that resilience.²⁷⁶ Other strategies may include a public reinvestment in fundamental values, developed through consensus-building or other public processes. In an article suggesting strategies for strengthening and evaluating democratic deliberation to respond to the “fundamentally connected” political and epistemic crises of legitimacy, David E. Meens argues:

Those promoting, in the name of democracy, the disinterested yet passionate pursuit of truth, principles of equity, justice, and the like, need a strategy for realizing these values that is responsive to our rapidly changing political milieu, and that addresses effectively the twin legitimacy crises we now face: one epistemological, the other political.²⁷⁷

The endurance of the tribes in the face of tremendous political and epistemological change may be instructive for those seeking strategies to shore up the resilience of democratic values going forward.

3. Care for the Vulnerable

A third area in which this Article invites a broader study of indigenous resilience is in society’s care, or lack thereof, for the most vulnerable individuals and communities. Ironically, indigenous tribal values were historically rejected as inferior to American ideals in part because the communal identity of tribes appeared at odds with the more individualistic vision of liberty that prized self-sufficiency over obligations to the group. But a deeper examination of indigenous values in building resilience in the vulnerable reveals a deep concern and obligation to the most vulnerable and the exiled.

These values not only inform how tribes are responding to the trauma and afflictions of their people, discussed above in Subsection IV.A.3, but also offer an opportunity for those interested in building resilience in the vulnerable more broadly to re-envision current practice and policy. In particular, the tribal effort, informed by indigenous values, to build resilience in vulnerable young people and those who suffer addiction offers important lessons.

agenda (reporting a federal appeals court ruling that the EPA could not delay implementation of an Obama-era chemical safety rule because the “EPA has not engaged in reasoned decision-making” and thus has “ma[de] a mockery of the statute”). Universities and scholars can likewise help hold leaders accountable to facts. See, e.g., Zoë Schlanger, *Rogue Scientists Race to Save Climate Data from Trump*, WIRED (Jan. 19, 2017, 9:00 AM), <https://www.wired.com/2017/01/rogue-scientists-race-save-climate-data-trump/> (reporting how “roughly 60 hackers, scientists, archivists, and librarians” at the University of Pennsylvania preserved “hundreds of government web pages and data sets . . . all strategically chosen from the pages of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration” to prevent “delet[ion], alter[ation], or remov[al] from the public domain by the incoming Trump administration”).

276. See generally David E. Meens, *Fact, Values, and Democracy Worth Wanting: Strategic Public Deliberation in the Era of Trump*, 26 GOOD SOC’Y 274 (2017).

277. *Id.* at 275.

As illustrated by the Tadodaho principle, society is greatly diminished by the isolation of the infirm. Mental health and addiction are seen as robbing the group of that individual's unique contributions, and the response is individualized care. When a young woman died in Haudenosaunee society, the grief of the group was multiplied by the loss of those who would have come after her, the grandmother she might have been. These traditional ideals prize the individual and obligate the group to address the particular afflictions of the infirm and integrate their gifts into the group, as with Tadodaho.

In the realm of juvenile justice, this value manifests in the tribes' persistent objection to funding that prioritizes incarceration (isolation from society) over strategies for reintegration of troubled youth. Such a position invites those interested in juvenile justice more generally to re-evaluate the principles that have warehoused adjudicated youth and compromised their ability to contribute to society. Indeed, the most vulnerable seem to face the harshest penalties along the spectrum of juvenile punishments, from detention and suspensions at school, to adjudications, including being tried as adults, that prove highly disruptive to individual development and education, and to families and societies.²⁷⁸ The current model of juvenile incarceration "exacerbate[s] the trauma that most confined youth have already experienced and reinforce[s] poor choices and impulsive behavior. Maltreatment is endemic and widespread."²⁷⁹

Bryan Stevenson of the Equal Justice Initiative has called for a re-evaluation of how our society sees and responds to brokenness, especially as relating to those broken individuals caught in the web of the penal system.²⁸⁰ Professor Stevenson asserts that the American justice system has "submitted to the harsh instinct to crush those among us whose brokenness," like Tadodaho's, "is most visible."²⁸¹ A system of justice that overemphasizes punishment at the expense of rehabilitation, "simply punishing the broken—walking away from them or hiding them from sight—only ensures that they remain broken and we do, too."²⁸² Indigenous resilience principles echo Stevenson's observation that "[t]here is no

278. Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, in NEW THINKING IN COMMUNITY CORRECTIONS 2 (Harv. Kennedy Sch. Program in Crim. Just. Pol'y & Mgmt./Nat'l Inst. of Just. 2016) (calling the current juvenile justice incarceration model an "ill-conceived and outmoded . . . failure" requiring "a watershed change to one that is more effective, more informed by evidence of what works, more likely to protect public safety, more developmentally appropriate, more humane, and more community based").

279. *Id.* at 4.

280. BRYAN STEVENSON, JUST MERCY 288–91 (2014). On working with clients sentenced to death, Stevenson writes:

I worked in a broken system of justice. My clients were broken by mental illness, poverty, and racism. They were torn apart by disease, drugs and alcohol, pride, fear, and anger. . . . In their broken state, they were judged and condemned by people whose commitment to fairness had been broken by cynicism, hopelessness, and prejudice.

Id. at 288.

281. *Id.* at 290.

282. *Id.*

wholeness outside of our reciprocal humanity.”²⁸³ Just as Tadodaho’s infirmities deprived the Haudenosaunee of his great gifts for leadership until the snakes were combed from his hair, his needs were named, his wounds healed, and his talents recognized, today’s society is deprived of the participation and contribution of those, both juvenile and adult, consigned to “America’s new undercaste” through mass incarceration.²⁸⁴ To date, our American approach to those most vulnerable and broken among our number has resulted in nearly 2.2 million of our society incarcerated.²⁸⁵ While we represent fewer than 5% of the world’s population, we house 25% of the world’s incarcerated.²⁸⁶

The lessons of indigenous resilience may contribute guiding principles for the effort to build a more just, more merciful, more apt justice system that seeks to foster resilience in the most vulnerable.

CONCLUSION

My grandmother, Norma Seneca, was keenly aware of the improbability of the survival of the Seneca people in western New York after centuries of efforts to remove or terminate them. “We are not supposed to be here,” she would say with a sly and defiant gleam in her eye. “But we are here. That’s what we do. We survive.” That same resolute determination has characterized the survival of many Indian tribes. For all the efforts to seize their resources, break their bonds, quiet their language, still their dances, and strip their sovereignty, the tribes survive.

Tribes have shown themselves to be resilient institutions, legally and culturally. They have mitigated, adapted, and transformed to maintain their core purposes and functions in the face of repeated existential threats. Tribes are enduring legal entities in part because they have been resilient in their response to legal assaults. While no one would reasonably suggest that tribes are better off for the assaults on their sovereignty and the threats to their very survival, many tribes are thriving in spite of the assaults and have grown their capacity to respond to challenges to their sovereignty. Rather than allowing themselves to be consigned to history, as American law, policy, and culture might have had it, many tribes are highly effective in carrying out their core missions to preserve and transmit their

283. *Id.*

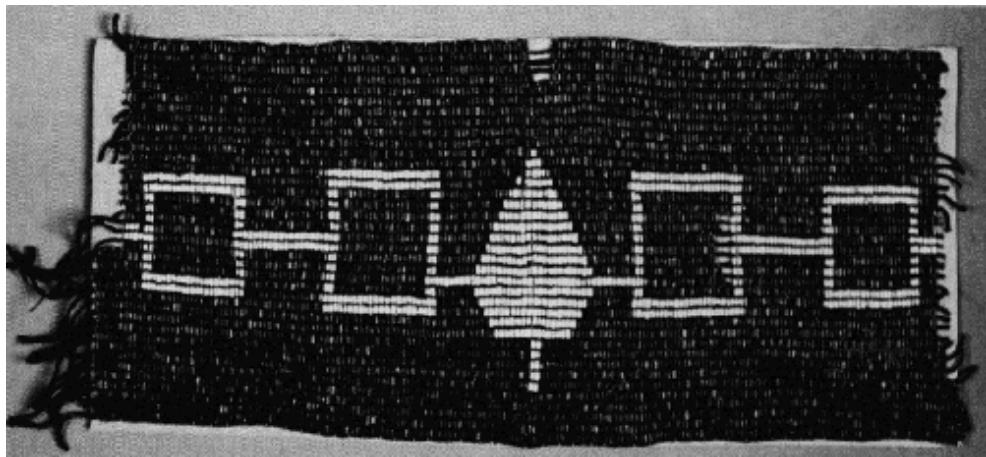
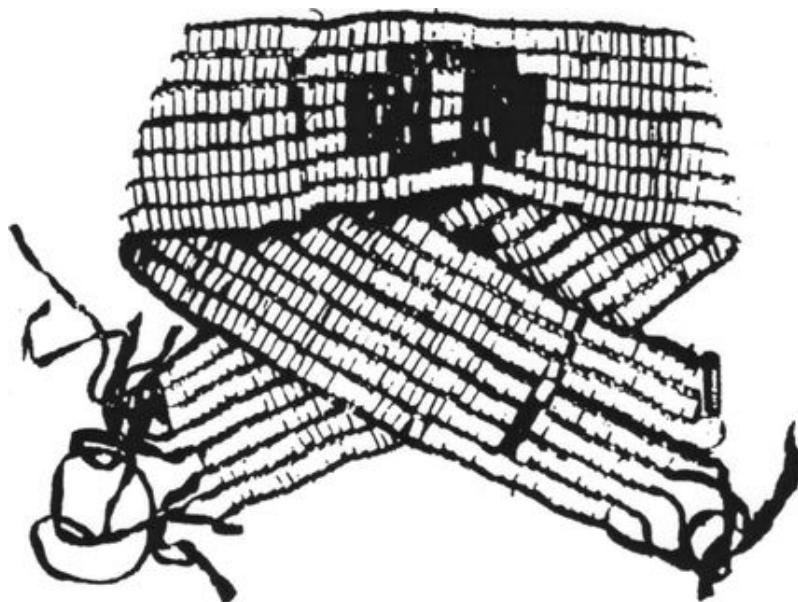
284. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2012) (referring “not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion”).

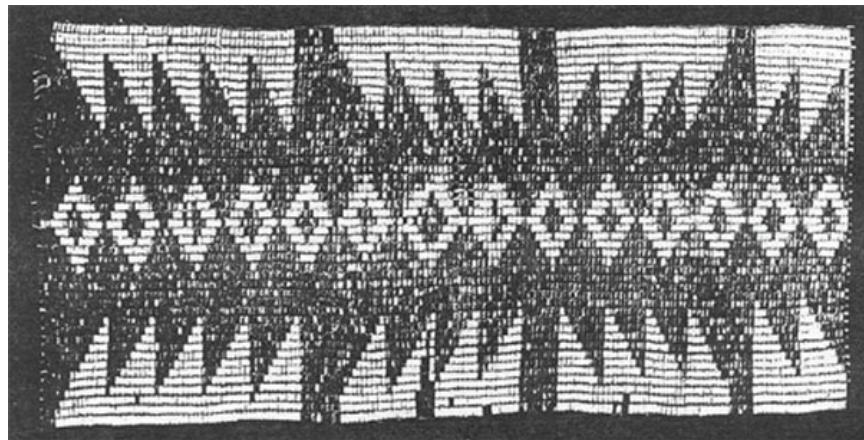
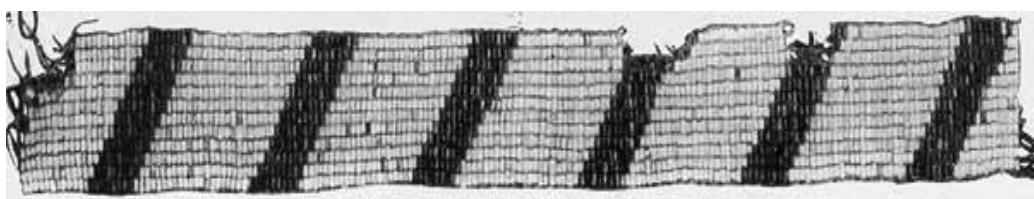
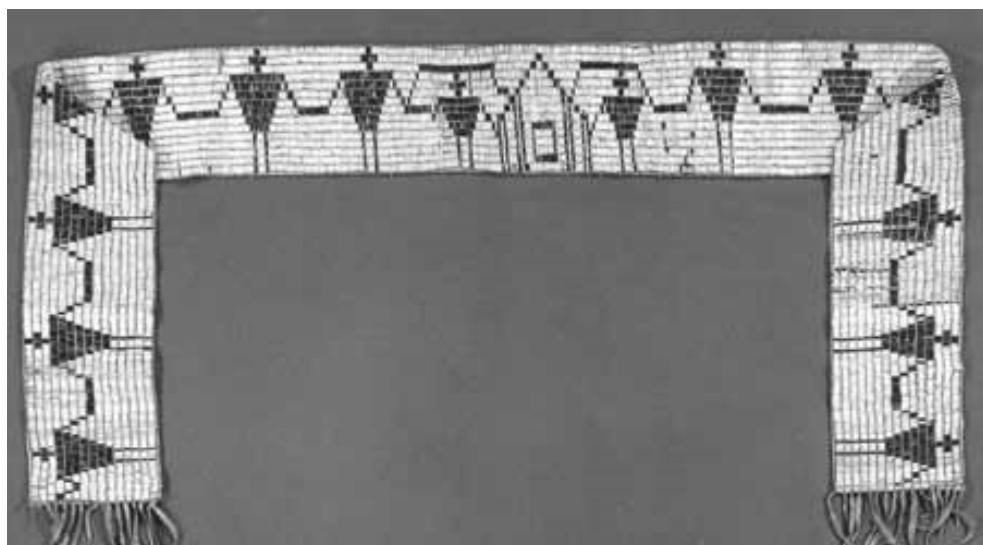
285. DANIELLE KAEBLE & MARY COWHIG, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, BUREAU OF JUSTICE STATISTICS 2 (April 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>; Drew Kann, *5 Facts Behind America’s High Incarceration Rate*, CNN (Apr. 21, 2019, 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html>.

286. Stanley Andrisse, *I Went to Prison but Now I’m a Professor—Here’s Why Criminal Records Should Not Be Used to Keep People out of College*, BUS. INSIDER (Aug. 25, 2018, 10:21 AM), <https://www.businessinsider.com/criminal-records-should-not-keep-people-out-of-college-2018-8>.

culture, exercise inherent sovereignty as self-determining communities, and facilitate opportunities for their membership to thrive.

There are important lessons in the resilience of tribes about adapting to changed circumstances and rebounding from threats without losing the integrity of identity. History warns that future threats and volatility are always on the horizon. By embracing the indigenous principles that have helped the tribes to survive and thrive, tribes can prepare to meet and even grow in strength from future threats. So too, as resilience theorists contemplate the potential of existential threats from climate change, political volatility, and social vulnerability, they may be well advised to look to the tribes to better understand how to prepare for and respond to these threats.

APPENDIX A: THE HYENWATHA BELT**APPENDIX B: THE ONE DISH, ONE SPOON BELT**

APPENDIX C: THE TADODAHO BELT**APPENDIX D: THE SIX NATIONS BELT****APPENDIX E: THE GEORGE WASHINGTON BELT**

APPENDIX F: THE TWO ROW WAMPUM