Accommodation and Rectification: A Dual Approach to Indigenous Peoples in International Law

This Note seeks to demonstrate that the goals of multiculturalism and historical injustice rectification are closely interrelated, and that a dual analysis of these two fields can aid international law in resolving claims by indigenous peoples for both historical injustice rectification and multiculturalist accommodation. Using a “multiculturalist lens” to inform rectification efforts and a “historical injustice lens” to inform accommodation measures, this Note proposes a revised approach towards indigenous peoples in international law. Compared to the current property-based rectification scheme in international law, a rectification agenda that emphasizes multiculturalist group-differentiated rights for indigenous peoples offers a remedy that is more effective for indigenous victims of historical injustice and more palatable for the implementing states. In turn, an accommodation agenda that relies on considerations of historical injustice to circumscribe indigenous self-government rights offers the limiting principle that multiculturalism has so crucially lacked when dealing with illiberal indigenous groups.

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I. INTRODUCTION

Indigenous peoples around the world face the threat of cultural extinction. After enduring long histories of colonialism and sub-
jugation, many indigenous cultures are now battling to preserve their lost lands, economic viability and distinctive ways of life. International law has recognized the need to guard against such cultural disintegration, and has sought to promote the "economic, social and cultural development" of indigenous peoples. Yet despite acknowledging the importance of ensuring indigenous group development, the international legal community has often struggled to define a comprehensive approach to supporting indigenous groups in their fight for cultural survival.

The development of legal scholarship examining the treatment of indigenous peoples has largely emerged through two separate fields in the "group rights" genre. First, scholars have looked to issues of rectifying historical injustice, questioning whether modern society ought to "make amends" for the tangled web of injustices inflicted on indigenous groups over time, and, if so, how such resolution ought to occur. Second, scholars have looked to issues of multiculturalism, questioning whether and when the accommodation of an indigenous culture's distinctive ways of life is justified in a world marked by a pluralism of comprehensive religious, philosophical and moral doctrines. Despite extensive scholarship in each separate field, however, it is rarely recognized that the two fields are closely linked, and that the problems facing multiculturalists are themselves the product of historical injustice.

The missing linkage between the two fields of group rights is especially striking when one considers that indigenous groups often represent the archetypal claimant under each field. In fact, many indigenous groups simultaneously embody the most difficult dilemmas for both "historical rectification" and multiculturalist theories. Many indigenous peoples continue to suffer from social, political and economic marginalization as a result of the injustices committed against their ancestors, but nations continue to struggle in their efforts to delineate appropriate rectification measures. Meanwhile,
indigenous groups have requested cultural accommodation—often in
the form of self-government rights—to mitigate the disintegrative ef-
fects of their continued marginalization; however, such requests have
frequently entailed demands to ensure the group’s ability to maintain
certain “illiberal”\(^5\) practices that offend liberal nations’ concept of
civil liberties.

Independent analyses of the “historical injustice” and multicultu-
ralist dilemmas have yielded unsatisfactory results for both in-
digenous groups and liberal states. The current emphasis on restor-
ing indigenous individuals’ land and property rights in international
rectification efforts has proven largely untenable for states, and in-
complete for indigenous peoples. Similarly, efforts to promote in-
digenous cultural survival through indigenous self-government rights
have been largely unable to establish principled limits to liberal ac-
commodation when faced with illiberal cultural practices.

Accordingly, this Note seeks to demonstrate that the goals of
multiculturalism and historical injustice rectification are closely in-
terrelated, and that a dual analysis of these two fields can aid inter-
national law in resolving claims by indigenous peoples for both histori-
cal injustice rectification and multiculturalist accommodation.\(^6\)
Using a “multiculturalist lens” to inform rectification efforts and a
“historical injustice lens” to inform accommodation measures, this
Note proposes a revised approach towards indigenous peoples in in-
ternational law. Compared to the current property-based rectification
scheme in international law, a rectification agenda that emphasizes

\(^5\) As Angela Riley notes, “[d]espite volumes of scholarship on the topic, there is a
dearth of literature discussing or debating exactly what illiberalism is.” Angela R. Riley,
*(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 803 (2007). In fact, it is “quite
misleading to talk of ‘liberal’ and ‘illiberal’ cultures, as if the world was divided into
completely liberal societies on the one hand, and completely illiberal ones on the other.”
WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS*
94 (1995). Instead, “the liberalism of a culture is a matter of degree.” *Id.* However, for the
purposes of this Note, illiberal groups are defined as those that “simply assign particular
roles and duties to people, and prevent people from questioning or revising them.” *Id.* Such
immutable status is often placed on certain sub-groups, such as women, low-ranking social
castes and racial and ethnic minorities. *See* Riley, *supra*, at 803. For example, Riley notes
that “because of its gender-based rule excluding women from the priesthood, the Roman
Catholic Church constitutes an example of an illiberal organization.” *Id.* While the
assignment of particular roles and duties is common to all illiberal cultures, illiberal cultures
differ in their means of enforcing such assignments. As illustrated in Part II Section A and
discussed further in Part VI, *infra*, the methods of enforcement can typically be categorized
as either coercive or exclusionary.

\(^6\) *See* Freeman, *supra* note 3, at 51 (suggesting that a project “relating the analyses in
these two fields will advance both”).
multiculturalist group-differentiated rights for indigenous peoples offers a remedy that is more effective for indigenous victims of historical injustice and more palatable for the implementing states. In turn, an accommodation agenda that relies on considerations of historical injustice to circumscribe indigenous self-government rights offers the limiting principle that multiculturalism has so crucially lacked when dealing with illiberal indigenous groups.

Part II of this Note grounds the issue in context, describing examples of illiberal practices within indigenous cultures, the degree of State accommodation that such illiberal practices have received and the international law efforts to rectify the historical injustices inflicted on such indigenous cultures. Because these efforts have generally proven either insufficiently retrospective or insufficiently sensitive to the cultural harms imposed on indigenous groups, Part III suggests a multiculturalist rectification solution as a preferable alternative for restoring the autonomy of indigenous peoples. After demonstrating the importance of one's culture to the full exercise of individual liberty, Part IV examines whether illiberal indigenous cultures can likewise be said to promote the exercise of individual liberty, and whether such cultures should enjoy the accommodative treatment proposed in Part III. Upon concluding that certain illiberal indigenous practices should be accommodated in international law, Part V assesses limiting principles that promote cultural flourishing without undue human rights infringements.

II. THE ISSUE IN CONTEXT

A. "Illiberalism" in Indigenous Cultures and Accommodation Responses

1. U.S. Examples: Pueblo Protestants and Poodry

Native American tribes have, for some time, enjoyed a significant degree of sovereignty as recognized by U.S. courts. As one scholar has noted, "Indian tribes are the only governmental bodies within the United States not bound by the U.S. Bill of Rights." Illustrating this significant autonomy for Native American tribes, the Tenth Circuit upheld the "enforcement of an ordinance adopted by

7. Riley, supra note 5, at 800–01. See also United States v. Lara, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring) (referring to Indian tribes as "extraconstitutional sovereign[s]").
the Navajo Tribal Council making it an offense to... sell, use or have in possession within the Navajo country, the bean known as peyote.”8 The court rejected the claim that the ordinance violated the Indians’ First Amendment right to religious freedom, because “the First Amendment places limitations upon the action of Congress and of the States... [but] Indian tribes are not states. They have a status higher than that of states.”9

The U.S. courts similarly upheld this unique ability of Native American tribes to restrict their members’ freedom in Toledo v. Pueblo de Jemez, in which Protestant tribal members sued the tribal government for violating their religious freedom.10 Given its history of Spanish colonial influences, the Pueblo tribe operates under a “‘theocratic’ form of governance that combines elements of Native spiritualism and Spanish Catholicism.”11 When a minority group of Pueblo members decided to convert to Pentecostalism, tribal leaders allegedly denied them “the right to bury their dead in the community cemetery, the right to build a church on Pueblo land, the right to have missionaries, and the right to use a communal wheat threshing machine.”12 More significantly, the Pueblo government had “threatened them with loss of their birthrights, homes and personal property unless they accept the Catholic religion.”13

For the greater Pueblo community, a “live and let live” impartiality could not sufficiently resolve the conflict because the Protestant converts had offended social norms and customs deemed integral to community membership, such as obligatory participation in communal rituals and deference to tribal religious leaders, which the communal authority had determined to be integral for community membership. Accordingly, the communal authority responded to the Pueblo Protestants’ pattern of preaching abstention from common Pueblo cultural practices such as “dancing, drinking, smoking and taking medicines of any kind” by banishing the Pueblo Protestants from the village and revoking their rights to communal lands.14

9. Id. at 134.
Instead of alleging a First Amendment violation, the Pueblo Protestants sued their tribal government for violating a portion of the Civil Rights Act, now codified as 42 U.S.C. § 1983, which protects an individual’s “rights, privileges, or immunities secured by the Constitution and [federal] laws” against deprivation by authorities operating “under color of” State or territorial law. Ruling against the Protestant minority, the United States District Court for the District of New Mexico found the Civil Rights Act inapplicable to tribal authority because it did not act under color of state law, stating that “the powers of an Indian tribe do not spring from the United States although they are subject to the paramount authority of Congress.”

The court thus implied, once again, that without an express act of Congress extending religious protection to individual members of Native American tribes, tribal authorities could effectively restrict the religious freedom of members with impunity.

Reflecting concern over the ability of tribal authorities to restrict their members’ rights, the Indian Civil Rights Act of 1968 (ICRA) offered a potential remedy for individuals wishing to reject their tribal religion without sacrificing tribal ties. The Act expressly proscribes any Indian tribe from exercising powers of self-government to “make or enforce any law prohibiting the free exercise of religion.” Interestingly, the ICRA does not include the equivalent of the Establishment Clause, as Congress recognized the legitimate tribal interests in securing a tribal religion that might otherwise be seen as a violation of the First Amendment. Although well-intended, the ICRA ultimately proved toothless. Just ten years after the ICRA’s enactment, the Supreme Court’s decision in Santa Clara Pueblo v. Martinez held that the ICRA did not “authorize actions for declaratory or injunctive relief against either the tribe or its officers,” and that federal courts “lack authority to hear any ICRA claims other than habeas corpus petitions.”

For close to twenty years after the Santa Clara Pueblo ruling, the ability of the Pueblo tribe to enforce its internal restrictions, which often discriminate based on religion or gender, seemed to be firmly entrenched in U.S. precedent. As a consequence of the limita-

17. See Carpenter, supra note 12, at 568.
19. Riley, supra note 5, at 811. See also Santa Clara Pueblo, 436 U.S. at 62.
tions created by *Santa Clara Pueblo*, individuals seeking to lodge a religious freedom claim against their tribal government are more likely to look to their tribal courts, which will, in turn, likely apply tribal law to decide the claim. However, the ability of Native American tribal governments to impose discriminatory internal restrictions on their members was significantly curtailed following the Second Circuit’s ruling in *Poodry v. Tonawanda Band of Seneca Indians*. In that case, plaintiffs were stripped of their tribal citizenship and banished from the tribe’s territory after breaking away from their tribe’s Council of Chiefs to form a competing government. The Second Circuit ruled that it had jurisdiction since the banishment met both requirements for habeas review: the presence of a criminal sanction and “detention.” Though not physically imprisoned, the Plaintiffs were “detained” for purposes of the ICRA because they were subjected to “a severe actual or potential restraint on liberty.”

While courts continue to disagree over the extent of their jurisdiction to hear claims under the ICRA, the *Poodry* case and its progeny opened the door for federal courts to interfere with indigenous tribes’ internal affairs, including internal restrictions on tribe members. The competing doctrines of *Poodry* and *Santa Clara Pueblo* demonstrate the liberal’s cultural rights dilemma—granting the individual religious freedom claims from minority tribal members frees these individuals from internal restrictions, but risks undermining fundamental cultural standards and threatens the survival of the culture itself. By allowing for interference with certain internal tribal membership restrictions, *Poodry* marks a reemergence of the fear that “Indian tribal governance is simply too far afield from Western liberalism to be tolerated.”

2. International Examples: Marrying Non-Members, Divorcing Members

While courts in the U.S. have shown an increasing willingness to interfere in the affairs of indigenous groups, the international community purports to endorse heightened respect for indigenous cultures and other minority groups. Under Article 27 of the Interna-
tional Covenant on Civil and Political Rights (ICCPR), persons belonging to “ethnic, linguistic or religious minorities” are guaranteed the right “to enjoy their own culture, to profess and practice their own religion, [and] to use their own language.” Superficially, this provision might be viewed as protecting the right of people to “enjoy” their culture even if their culture imposes illiberal internal restrictions on group members.

Despite appearing to protect the right of cultures to define their own practices, it should be noted that Article 27 expresses rights of individuals as members of cultural groups, as opposed to rights of the groups themselves. Accordingly, Article 27 has been interpreted as “an individual right to participate in the life of a minority group, and does not amount to a group right per se.”

The United Nations Human Rights Committee (the “Human Rights Committee”) affirmed this individualistic interpretation of Article 27 in the case of Lovelace v. Canada. After Sandra Lovelace, a woman born into the Maliseet Indian band residing on the Tobique Reserve in New Brunswick, Canada, married a non-Indian man, the tribe stripped her of her tribal status and benefits, in accordance with section 12(1)(b) of Canada’s Indian Act, an act based on indigenous customary law. Lovelace sued to challenge the legality of section 12(1)(b) and the denial of her residency on the Tobique Reserve due to her marriage of a non-Indian. Finding Article 27 to be “directly applicable” to Lovelace’s situation, the Committee ruled in Lovelace’s favor, holding that “the right of Sandra Lovelace to access her native culture and language ‘in community with the other members’ of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists.” Accordingly, the Human Rights Committee concluded that excluding Lovelace from the reservation and denying

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29. *Id.* at 166 (explaining that Lovelace lost her rights and status as a Maliseet Indian after marrying a non-Indian under Canada's Indian Act provision).

Lovelace’s tribal status violated Lovelace’s Article 27 rights. In order for Lovelace to be able to enjoy her culture in community with other members of the group, the Maliseet were required to allow Lovelace to live on the reserve, even if this meant infringing on the Maliseet’s ability to demarcate its own cultural bounds; after all, “one cannot speak one’s language or tell one’s stories alone.”

In effect, the Lovelace interpretation of Article 27 implicitly held that Lovelace’s individual rights superseded the rights of her tribe to enforce its customary laws. Lovelace’s Indian status—and the benefits flowing therefrom—were hers as long as she wished to hold onto them. As the Committee put it, “Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the [ICCPR].” As Christina Brandt-Young contends, the Committee can be understood as protecting Lovelace’s “one-way ‘relational’ right: to relate to others as a Maliseet Indian.” To protect Lovelace’s one-way relational right, however, the Human Rights Committee undermined the Maliseet’s ability to defend cultural boundaries and traditional definitions of group membership.

In light of its individualistic focus in Lovelace, the Human Rights Committee’s suggestion in Kitok v. Sweden that a group’s interest in cultural survival may supersede an individual’s Article 27 rights was somewhat surprising. In Kitok, Ivan Kitok challenged the Swedish Reindeer Husbandry Act, which “reserves reindeer herding rights exclusively for members of samebys, a Saami social and legal entity with foundations in Saami customary reindeer herding practices.” Kitok had lost his membership to his ancestral sameby after failing to herd reindeer in the community for three

32. See Perry, supra note 27, at 90.
33. Lovelace, supra note 28, at 173.
34. Brandt-Young, supra note 31, at 250 (emphasis added).
36. See Perry, supra note 27, at 90.
38. Anaya, supra note 1, at 23.
years, and the Saami community denied him readmission. After the Swedish courts refused to overturn the community’s decision to deny readmission, Kitok brought his case to the Human Rights Committee, alleging a violation of his Article 27 rights.

Although reindeer husbandry is largely an economic activity, it is more significantly an “essential element of the Saami culture.”\(^39\) By effectively limiting the number of herders grazing reindeer on community lands, the Swedish Reindeer Husbandry Act provided a means to make this essential element of Saami culture economically feasible for Saami members. Thus, while the decision of the Saami to deny Kitok’s cultural membership prevented him from partaking in this traditional way of life, the Committee allowed Kitok’s exclusion in order to “secure the preservation and well-being of the Saami minority.”\(^40\)

The Committee’s Kitok decision seems hard to reconcile with its Lovelace decision. Regardless of the tension, Kitok unquestionably restored some ability of indigenous cultures to demarcate their membership boundaries and restrict their members’ behavior. In light of these two rulings, one can presume that the exercise of such cultural autonomy will likely be upheld when it can be seen as necessary action to preserve a distinctive way of life, since “distinctive ways of life like reindeer herding fit neatly into the relational rights concept protected under article 27.”\(^41\) Ultimately, however, the continued characterization of Article 27 as a statement of the rights of individuals as members of groups—rather than rights of groups \textit{qua} groups—limits the potential protection for indigenous cultures.\(^42\)

3. Denying Women a Political Voice

While the examples of “illiberal” indigenous cultural practices discussed above typically involved the imposition of a restraint related to a \textit{distinctive} way of life, internal restrictions on women’s right to political participation involve restraints that are unrelated to any particularly distinctive way of life. Instead, such restraints are common to many indigenous (and non-indigenous) cultures. To combat this pattern, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination

\begin{itemize}
  \item[39.] \textit{Id.}
  \item[40.] \textit{Kitok, supra} note 35, at 229.
  \item[41.] \textit{Brandt-Young, supra} note 31, at 255.
  \item[42.] \textit{See} \textit{Perry, supra} note 27, at 90.
\end{itemize}
Against Women (CEDAW) which, among other things, requires State Parties to "eliminate discrimination against women in the political and public life of the country." Specifically, CEDAW demands equal protection of three rights: "(a) to vote in all publicly held elections; (b) to hold public office and participate in government activity at all levels; and, (c) to participate in non-governmental organizations relevant to political concerns of the country."45

However, CEDAW’s effort to improve the exercise of women’s autonomy has proven difficult to reconcile with efforts to improve the exercise of indigenous peoples’ autonomy. A story from Mexico exemplifies the tension between these two competing goals. Although a party to CEDAW, Mexico has also, by virtue of Mexico’s adoption of ILO Convention No. 169 and language in Article 2 of the Mexican Constitution,47 guaranteed its indigenous population the right of self determination and the autonomy to apply their own customary systems of law and political representation. As a result of this respect for indigenous peoples’ internal governance, a significant number of indigenous Mexican communities have limited women’s political participation; according to one study, “women have the right to vote in only seventy-six percent of customary-rule municipalities.”48

The Mexican village of Santa Maria Quiegolani—which operates under the customary traditions of its indigenous Zapotec heritage—is one such municipality that denies women the right of political participation. For example, when twenty-seven year-old

44. Id. at art. 7.
47. See Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); see also Mexican Constitution as of 2009 (Ron Pamachena trans.), http://historicaltextarchive.com/sections.php?action=read&artid=9371C2 (translating the Mexican Constitution Title I, Chapter I, Article 2(A) as providing indigenous peoples with the right to “[d]ecide their internal forms of living and social, economic, political, and cultural organization”).
Eufrosina Cruz decided to become the first woman to run for mayor of the village, the all-male town board tore up all the ballots cast in her favor, “arguing that as a woman, she wasn’t a ‘citizen’ of the town.”49 The Secretary of the town board shed light on the motivation for the board’s conduct, stating, “[w]e live differently here . . . than people in the city. Here, women are dedicated to their homes, and men work the fields.” 50

When Cruz challenged the nullification of the ballots cast for her through an equal protection claim under the Mexican Constitution, both the state electoral council and the state congress upheld the election “to avoid stirring up the village or causing a conflict there.”51 While Mexico’s National Human Rights Commission ruled that the town board had violated Cruz’s rights by tearing up the ballots cast in her favor, its decision carried little force due to the fact that the Commission lacked authority to review the acts and decisions of electoral officials.52

In sum, although Mexico’s legal recognition of indigenous forms of government has helped Mexico to preserve its ethnic and cultural diversity, it has also undercut the international legal framework of protecting individual rights. For people like Eufrosina Cruz, the protection of indigenous peoples’ “use and customs” has become “more like ‘abuse and customs.’” 53 Excluding women from the political process according to some traditional ‘use or custom’ plainly violates the individual rights of an indigenous culture’s individual members. These individual rights violations arise directly from Mexico’s adherence to the “evolving body of international law” that seeks to protect the collective rights of indigenous peoples by obligating states “to respect indigenous peoples’ desires ‘to exercise control over their own institutions [and] ways of life.’” 54

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50. Id.

51. Id. (citing comments by Rep. Perla Woolrich, an Oaxaca state legislator who supported Cruz’s cause).

52. Gross, supra note 45, at 85–86.

53. Stevenson, supra note 49, at 1 (citing a statement by Cruz as she submitted her complaint to the National Human Rights Commission).

B. Historical Injustice Against Indigenous Cultures and Rectification Responses

While the above case studies of illiberalism demonstrate vast differences among indigenous cultures, indigenous peoples around the world share a common history of injustices. Although a thorough exploration of the history and extent of wrongdoing against indigenous peoples falls beyond the scope of this Note, it is widely recognized that indigenous groups, "practically as a matter of definition, have been treated adversely on the basis of their immutable cultural differences."55 Despite differences in the details of such adverse treatment, the marginalization of indigenous peoples typically has been the outcome of a historical process of "conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as 'primitive' and 'inferior.'"56

To counteract this marginalization, international authorities have largely focused on the protection of indigenous peoples' rights over land and natural resources. Rebecca Gross, for example, suggests that "[u]nlike the traditional concerns of national minorities in protecting their language, religion, and culture," protective measures for indigenous cultures have "always involved claims to resources, territory, and governmental powers."57 Similarly, the U.N. Economic and Social Council has demonstrated the primacy of land rights in recognizing the fact that indigenous peoples "have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises."58

Indeed, the protection of property such as land and natural resources is well-grounded in international human rights law. The 169th Convention of the International Labor Organization (ILO Convention No. 169), for example, recognizes for indigenous groups "the rights of ownership and possession of its peoples concerned

55. Anaya, supra note 1, at 17.
57. Gross, supra note 45, at 73 (emphasis added).
over the lands which they traditionally occupy.” While the number of signatories to ILO Convention No. 169 remains limited, international authorities have recognized the legitimacy of indigenous land rights through the interpretation of international human rights treaties. The Universal Declaration of Human Rights, for example, affirms that “[e]veryone has the right to own property alone as well as in association with others,” and that “[n]o one shall be arbitrarily deprived of his property.”

Courts—especially international human rights courts—have likewise been willing to affirm such protection of land rights for indigenous peoples. In the Awas Tingni Case, for example, Awas Tingni and other indigenous communities of Nicaragua’s Atlantic Coast petitioned the Inter-American Court of Human Rights for an order requiring the government of Nicaragua to demarcate their traditional lands and prevent logging in their territories by a Korean commercial logging company that possessed a thirty-year government-granted concession. The court ruled for the Awas Tingni on the merits, ordering the Nicaraguan government to adopt domestic law demarcating and titling indigenous properties. Because “the Inter-American Court possesses the power to require states that have consented to its jurisdiction (as has Nicaragua) to take remedial measures for the violation of human rights,” the Awas Tingni ruling established an important precedent on indigenous land rights under international law.

Similarly, the Inter-American Commission accepted a petition in 2000 filed by the Toledo Maya Cultural Council on behalf of thirty-seven indigenous Maya communities in southern Belize. The petition challenged “government grants of logging and oil concessions to over 700,000 acres of rain forest in Maya traditional territories and the government’s failure to recognize and protect Maya traditional land and resource tenure outside of small, confining

59. ILO Convention No. 169, art. 14, supra note 46.
61. See Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter Awas Tingni Case].
62. Id. at ¶ 173.
reservations." 65 Significantly, the Commission ordered precautionary measures on behalf of the Maya to prevent irreparable damage to the Maya territories, and demanded that Belize "suspend all permits . . . for . . . natural resource development activity on lands used and occupied by the Maya communities" until the Commission had completed its investigations. 66

Although these cases may appear to present relatively typical disputes over the allocation of physical resources, it would be a mistake to consider indigenous lands as constituting mere economic commodities for their people. As the Awas Tingni Case acknowledged:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. 67

In some instances, contemporary international law has adopted a robust understanding of land rights' symbolic importance to indigenous peoples. ILO Convention No. 169, for example, states:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 68

Still, the instances of international law that have recognized the symbolic significance of indigenous land rights have done so mostly in a prospective manner: the provisions have largely concerned preventing future abuses of indigenous peoples, and have paid surprisingly little attention to rectifying the wrongs already committed against

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65. Anaya & Williams, supra note 63, at 39.


67. Awas Tingni Case, supra note 61, ¶ 149.

68. ILO Convention No. 169, supra note 46, art. 13(1).
such groups. For example, while the ILO Convention No. 169 affirms that the "rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognized," the Convention's conspicuous use of the present tense "traditionally occupy"—as opposed to the past tense "occupied"—suggests that "the occupancy must be connected with the present in order for it to give rise to possessor rights."69

Meanwhile, the limited attention paid to reparations for past injustice in international law too often demonstrates a misunderstanding of the nature of the deprivation suffered by indigenous groups through land takings. For example, when the U.S. government has unilaterally extinguished an indigenous group's right to use and occupy the group's traditional land, reparation claims related to the extinguishment have typically been settled by a simple money transfer.70 The ILO Convention No. 169 allows for removal of indigenous peoples from their land when necessary as an "exceptional measure," but grants "the right to return to their traditional lands" when the exceptional measure is no longer necessary.71 Yet when return is not possible, the Convention guarantees only that "these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them."72 In both cases, the traditional lands of indigenous peoples are treated as fungible economic assets, not recognized for the unique value they carry for the particular cultures.

The story of the Lakota Sioux illustrates the point nicely. In 1868, the Treaty of Fort Laramie—which ended a war arising from Sioux efforts to protect their previously-recognized lands from the incursion of white settlers—promised that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians."73 Shortly thereafter, the U.S. government reneged on the treaty to pursue a gold discovery.74 The U.S. government attempted to take back the land, first by military force and then by cutting off appropriations "made for the subsistence" of the Sioux. Over 100 years after the Sioux signed over the Black Hills to the United States under threat of starvation,

69. Anaya, supra note 1, at 40.
70. Id. at 38.
71. ILO Convention No. 169, supra note 46, art. 16.
72. Id. art. 16(4).
73. Treaty with the Sioux and Arapaho (Treaty of Fort Laramie) art. II, April 29, 1868, 15 Stat. 635, 636.
the U.S. Supreme Court awarded to the Sioux $106 million in compensation—the value of the land as of the 1877 taking plus 100 years’ worth of interest.\footnote{Id. at 390 n.16.} Still, the court refused to return the land itself. In turn, the Sioux refused to accept the monetary compensation, insisting that their sacred land cannot be bought.\footnote{See Jeff Spinner-Halev, From Historical to Enduring Injustice, 35 Pol. Theory 575, 582 (2007).} The full amount remains untouched in an interest-bearing government account, and as of 2010 had grown to over $570 million. To the Sioux, the harm incurred from the original taking was a cultural—rather than economic—deprivation.

III. Rectification Through a Multic和平ist Lens

A. The Harm Inflicted by the Loss of One’s Culture

The story of the Lakota Sioux demonstrates the failure of property-based rectification efforts to address all forms of harm inflicted on indigenous peoples by historical injustices. Nevertheless, recognizing that historical injustices have damaged indigenous cultures as much as indigenous land holdings does not obviate the need for additional rectification measures to address such cultural harm. Within liberalism, cultural groups in and of themselves “are not of ‘moral considerability.’”\footnote{Ori J. Herstein, Historic Injustice, Group Membership and Harm to Individuals: Defending Claims for Historic Injustice from the Non-Identity Problems, 25 Harv. Blackletter L.J. 230, 236 (2009). For a discussion of the term ‘moral considerability,’ see generally Mark H. Bernstein, On Moral Considerability: An Essay on Who Morally Matters (1998).} This is not to say that cultural group claims can carry no normative weight. Rather, harms to cultural groups “matter ultimately only to the extent that they affect actual individuals.”\footnote{Chandran Kukathas, Are There Any Cultural Rights?, 20 Pol. Theory 105, 112 (1992).} Therefore, before implementing measures to rectify injustices that have had a destructive effect on indigenous cultures, one must determine the extent to which individual members of indigenous cultural groups have been harmed by such injustices.
1. The Instrumental Value of Culture in Liberalism: Choosing Conceptions of the Good

The freedom to choose one's conception of "the good" is a central principle—perhaps the central principle—of liberalism. Living according to one's own conception of "the good life"—what Aristotle called eudaimonia—is the highest end in life, which subordinate goals such as wealth and health, only serve to promote. In order to attain this eudaimonia, however, individuals must first ascertain the paths and pursuits in which one's concept of the "good life" consists.

Because it is "only through having access to a societal culture that people have access to a range of meaningful options" in life, appraising various paths and pursuits in one's determination of the good life is only possible through a societal culture. In fact, societal culture provides not only access to a range of life options, but perhaps more significantly, also provides access to the language, tradition and norms that color the lenses through which individuals assign meaning to those available options. Historical injustices that obstruct access to a societal culture, therefore, harm individuals by impeding their ability to choose their conception of the good life.

Still, an individual's need for a societal culture to choose conceptions of the good does not necessarily imply that one's own culture is necessary for this meaningful freedom of choice to flourish. In other words, just because individuals assign significance and value to each of their various life options through cultural meaning, it does not follow that any single culture is necessary to assign meaning to each option. Because the assignment of meaning necessary for the proper exercise of free choice may emanate from multiple cultural sources, individuals are no longer connected to their own culture in any deep way:

It can no longer be said that all people need their rootedness in the particular culture in which they and their

79. See Kymlicka, supra note 5, at 80 (claiming that the "defining feature of liberalism is it that ascribes certain fundamental freedoms to each individual," including "a very wide freedom of choice" in one's conception of the good life). See also Michael Sandel, Liberalism and the Limits of Justice 1 (1998) (claiming that a liberal society, "being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conception of the good") (emphasis in original).


81. Kymlicka, supra note 5, at 83.
ancestors were reared. Such immersion may be something that particular people like and enjoy. But they no longer can claim that it is something that they need. If Waldron were right to suppose that “a freewheeling cosmopolitan life, lived in a kaleidoscope of cultures, is both possible and fulfilling,” his argument would significantly undermine indigenous claims for measures to rectify damage to indigenous cultures. Cosmopolitan individuals assign meaning to their life options using multiple cultural sources, such that cultural damage to any particular source of meaning would not significantly restrict their freedom of choice. In the absence of delineating cultural boundaries, demands for cultural reparation efforts become analogous to demands from the owners of an eroding beach for special measures to ensure that they will not have to resort to using another group’s adjacent beach. If there exist no boundaries to demarcate where one group’s beach ends and the other begins, the erosion would only lead the owners to use a new section of the same beach they had been using and sharing all along, rather than an entirely different beach owned by an entirely different group. Because the individual members of an eroding culture still have access to “another section” of their original societal culture, one might question the extent of harm inflicted on those individuals by the culture’s erosion.

2. Understanding Culture through Semiotic Practices and Constitutive Attachments

Waldron’s argument for the availability of a “cosmopolitan alternative,” and his claim that most modern individuals exist in a “kaleidoscope of cultures,” highlights a crucial epistemological issue in defining the bounds of any particular culture. Upon recognizing the widespread cross-fertilization of ideas and practices among cultural groups, one realizes that the reified conception of “culture” as a set of primordial values or traits that ostensibly distinguish one group from another is empirically untenable. Instead, a proper conception of culture cannot presuppose a “closed and already configured set of meanings,” nor be “blind to the processes by which ongoing practic-
es and systems of meaning change.” 85

To acknowledge the amorphous character of “culture” requires a shift in conceptualization, from culture as a reified schema towards “culture as the practices of meaning-making through which social actors attempt to make their worlds coherent.” 86 These “semiotic practices” involve a dialectical relationship between individuals and their culture. Individuals do not assign meaning to their various life options through a dogmatic “cultural schema;” instead, meaning is formed through the interplay between individual practices and the culture’s systems of signification. For example, the meanings of words such as “flag” and “allegiance” are often learned “through other people’s uses of words in contexts such as pledging allegiance to the flag.” 87 Group practices and personal signification, themselves, do not merely influence each other, but are rather defined and generated in reference to each other. To understand a culture through semiotic practices is to appreciate this process of meaning-construction, and not merely its end result.

As Wedeen notes, “[c]oding ethnic groups is an inherently perilous enterprise.” 88 The benefit of doing so through an understanding of semiotic practices, however, is that the process requires a respect for individual agency and freedom. Culture as a system of signification implies some degree of structure: the available options subjected to the process of meaning-construction are limited to the range of options conceivable in one’s culture. Nevertheless, individuals choose amongst the available paths and pursuits within the confines of institutional and semiotic structures with “what game theorists call ‘choice under structural constraint.’” 89 Through this autonomous choice under structural constraint, individuals create the culture’s component language and symbols, and assign culturally-relevant meaning to the semiotic practices. Because an individual’s own interpretations help weave semiotic practices into the cultural fabric, certain cultural practices take on a special meaning for him, such that affiliating with a group affiliates the individual with a ritual, institution or history.

When certain cultural practices take on a sufficiently special meaning for individuals, they create formative attachments with
which one would answer the question: “Who am I?” These “identity-forming group attachments” resemble what Michael Sandel terms “constitutive attachments,” composed of personal attributes that are “not merely descriptive but also partly constitutive of the kind of beings we are.” 90 Immersed in a culture, we form such attachments when we absorb the semiotic practices from the culture and make them part of us, part of what constitutes me as me. Through this process, as a desire or ambition “becomes increasingly constitutive of my identity, it becomes more and more me, and less and less mine.” 91

Thus, while inter-culture relations should not be envisioned as an “archipelago of communities,” 92 it does not follow that citizens’ identities cannot be accounted for completely by any one particular membership. Consider an image of identity-forming cultural attachments as a series of concentric circles of group memberships. Broader, thinner attachments may well be shared with members of other cultural communities, such as one’s attachment to the liberal state as a citizen, but when individuals do retain attachments to more concentrated minority cultures, their self-identification would not be fully encapsulated by their membership to the largest cultural circle. Instead, through a process of specification, we narrow the concentric circles of group membership, each a subset of the last, until we arrive at the one that accounts for our constitutive attachments—our identity. The process is like working one’s way through a Russian nested doll; we gradually specify our identity down from our most basic shared attachments (as citizens of the broader society, for example), at each step opening the larger shell to reveal a better-fitting answer to the question “who am I?” The last concentric circle of attachments, the most specified group to which one is attached, is composed of the individual’s “religious, philosophical, and moral convictions, or [other] enduring attachments and loyalties,” apart from which individuals regard it as “simply unthinkable to view themselves.” 93 It is one’s membership in this last concentric circle that encapsulates one’s constitutive attachments and defines one’s identity.

On these grounds, individuals require access to their own cul-

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90. Sandel, supra note 79, at 50.
91. Id. at 56 (emphasis in original).
ture if they are to enjoy a substantive ability to assign meaning to available life options and choose a conception of the good life. Injustices against indigenous groups have not simply moved their members to "a new section of the same beach," but rather have obstruc
ted indigenous peoples' access to their cultures' semiotic practices that had come to form their constitutive attachments. In so doing, historical injustices have infringed on the identity-formation process for indigenous individuals, and have denied these indigenous individuals the freedom to choose their conception of the good life.

B. Cultural Rights as a Rectification Measure

With this understanding of the harm that historical injustices have inflicted on indigenous individuals by damaging indigenous cultures, international law should recognize the need to improve upon its current property-based rectification scheme. Approaching historical injustices against indigenous peoples as exclusively economic harms, requiring only an economic approach to rectification, fails to recognize the unique value that traditional lands carry for the particular indigenous cultures. Even injustices consisting of land takings do not constitute purely economic harms, repairable by cash or similar property. Rather, the deprivation of an indigenous group's traditional lands has exacted more significant harms on the group—"its attachments were broken, or severely harmed, its people scattered or killed, or its sacred places invaded." At their core, these harms are destructive not only to the native people's economic well-being, but more importantly to their way of life, to their culture. As such, these cultural harms can be rectified only by measures aimed at cultural protection and cultural restoration.

Of course, complete restitution (in the form of returning expropriated lands to their original indigenous inhabitants) would be "in one sense the ideal of rectification." However, when a complete return to the pre-wrong condition is impossible to achieve, international law must depart from this ideal. Indeed, the idea of re-

94. For an illustration of the point, see Lovelace, supra note 28, ¶ 9.9 ("The major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity.") (emphasis added). For a discussion of the Lovelace case, see supra text accompanying notes 28–34.

95. Spinner-Halev, supra note 76, at 581.

storing expropriated lands is intuitively unpalatable; the costs of returning the island of Manhattan to the Lenape people, for instance, would predictably impose astronomical costs. Accordingly, land rights may be, in theory if not in practicality, a plausible way to restore the right of self-determination to indigenous peoples. However, the expropriation of indigenous lands was but one manifestation of the original historical injustice: "the denial by whites that [indigenous groups] are distinct peoples with their own cultures and communities." 97

The need to develop a non-economic means of rectifying this form of historical injustice is apparent in the self-adopted rectification claims from indigenous groups. Indigenous peoples typically do not demand monetary reimbursements, or even improved inclusion into Anglo-American society. Rather, they seek recognition of their distinct cultural identities and practices, including the "right to identify themselves as indigenous and to be recognized as such." 98

Such statements represent an expansion of indigenous peoples' claims to now include claims for "autonomy over internal tribal matters," often "in the form of self-government." 99 As Marco Palau argues, "the idea of autonomy has now come to the fore, succeeding land as the single most important means through which these populations can secure a better life, as well as minimum standards of respect and dignity." 100 By incorporating a multiculturalist accommodation agenda into rectification efforts, international law can grant these indigenous requests for autonomy and restore the substantive freedom that historical injustices have denied to indigenous peoples. Granting an indigenous culture special self-government rights, for example, would help ensure the survival of the culture's semiotic practices,

97. KYMLICKA, supra note 5, at 60.
99. Gross, supra note 45, at 78.
and provide access to these practices for any members who hold them as constitutive attachments. In this way, multiculturalist self-government rights could rehabilitate the ability of indigenous group members to freely choose their conception of the good life.

IV. THE PROBLEM OF ILLIBERAL INDIGENOUS CULTURES

A. Presenting the Paradox

If the preceding arguments for a multiculturalist-based rectification scheme are to justify self-government rights as a protection of substantive freedom for members of marginalized indigenous cultures, they must overcome the apparent problem posed by illiberal indigenous cultures. On the one hand, members of a group whose practices are prohibited face an inability to choose their constitutive attachments. On the other hand, liberal states may be especially reluctant to grant the protection of special accommodation and self-government rights to cultures adhering to illiberal practices. Rather than allowing members the freedom to "move around within one's societal culture" or to "distance oneself from particular cultural roles," the illiberal practices of the Pueblo, Maliseet, Saami and Zapotec cultures seem to restrict members' freedom by simply assigning members to particular roles and duties within the culture. If illiberal cultures do, in fact, impede the freedom of their individual members, cultural rights for the sake of freedom protection would seem unjustified.

As the preceding arguments emphasized, however, it is the process of forming constitutive attachments through individual meaning-construction, rather than the specific content of such attachments, which ensures meaningful freedom for individuals. Crucially, there is nothing inconsistent in choosing, through this process of identity formation, attachments or ends that place one in a subordinated position or restrict one's opportunities for social advancement, as members of illiberal cultures do. Instead, as Azizah Y. al-Hibri argues, "[t]here is something condescending, even patriarchal" about claims that attempt to "save" members of illiberal cultures from their constitutive ends. These ends fail to accord with the constitutive attachments of liberal individuals, but it does not follow

101. KYMLICKA, supra note 5, at 90.
that they are thereby unworthy or unjust.

Instead, the constitutive attachments of illiberal cultures and the semiotic practices that form them should be conceived in terms of their role in fostering intelligibility for group members, which is “produced through and compounded by repeated, context-dependent use.” 103 Fostering the intelligibility of these practices is necessary for the ability of individuals to construct and interpret their meaning; an unintelligible practice is manifestly meaningless.

Viewing illiberal practices as potentially constitutive attachments that foster cultural intelligibility for group members helps liberal theorists avoid the temptation to presuppose the attitudes or interpretations of individual members of illiberal cultures. The assessment of illiberal practices should instead center “on the ways in which people attempt to make apparent, observable sense of their worlds—to themselves and to each other—in emotional and cognitive terms.” 104 All individuals must be free to assign meaning to their chosen attachments, which must be made intelligible through language and symbols, and which must be allowed to manifest in practice. To permit the dissolution of illiberal semiotic practices, which are vital to the members’ personal identity and individual freedoms, merely because the larger society objects to their content, would be unavoidably intolerant.

Nevertheless, indigenous groups are generally unable to remove themselves completely from contact with this broader society; members of “even the most conservative and traditional associations are also citizens, whether they like it or not,” and so maintain connections and obligations to the broader society. 105 On these grounds, a liberal state’s prohibition against certain internal restrictions does not necessarily constitute an “intolerant” imposition of “alien” values on an individual’s illiberal cultural identity. Instead, such prohibitions may simply represent the exercise of the values of the larger society, in which the individual simultaneously maintains some portion of group membership.

However, the fact that members of illiberal indigenous cultures may simultaneously exist as citizens of the broader liberal society does not invalidate the requests for cultural protection by illiberal indigenous cultures. One might acknowledge the existence of other

103. Wedeen, supra note 84, at 722.
104. Id. at 721.
overlapping societal attachments, yet still consistently maintain that an illiberal indigenous culture, as a source of his constitutive attachments, is essential to an adequate and fulfilling life for him. On these grounds, indigenous individuals may seek the protection of modern society for the boundaries of their illiberal culture. Without such protection of cultural boundaries, illiberal indigenous cultures face a form of coercive assimilation. The assimilative threat they confront destabilizes the culture by dissolving the demarcation of group identity, and thus denies individual members full realization of their personal identity.

B. Restrictions on the Enforcement of Illiberal Practices

1. Love It or Leave It: The Right to Exit

While it may be true that there is nothing inherently inconsistent with individuals choosing “illiberal attachments” through the process of identity formation, it need not follow that international law must accommodate an illiberal culture’s attempts to prevent individuals from crossing its cultural boundaries as a means to protect against cultural decay. To the contrary, “[i]f the culture is decaying, it must be because some people no longer find it worthy of their allegiance.” By effectively subsidizing failing cultures, group-differentiated treatment would come only at the expense of a “tax” on the majority culture, and the inefficiency of a dead-weight welfare loss. If international law is to tolerate illiberal practices on the grounds that such practices represent members’ freely chosen constitutive attachments, it must allow the ‘cultural marketplace’ to operate—members must be free to express when such illiberal practices no longer represent their constitutive attachments.

Crucially, however, if members are to freely express when such illiberal practices no longer represent their constitutive attachments, international law must be confident that members are able to leave their culture when they no longer find it worthy of their allegiance. In fact, this freedom to exit the cultural community must be a fundamental right—if not the fundamental right—of individuals; its absence suggests that individual members lack any meaningful freedom of choice, while its presence indicates that members “recognize

106. See supra note 5 (noting that while illiberal cultures are alike in imposing assigning members to particular roles, duties or statuses, they diverge in enforcing these assignments through either coercive or exclusionary methods).

107. Kymlicka, supra note 5, at 108.
as legitimate the [culture’s] terms of association and the authority that upholds them.”

By allowing members to freely dissociate from the illiberal group, the right of exit “can excuse group conduct that would otherwise be considered unreasonably oppressive of individual members.”

Accordingly, international law can safely accommodate certain internal restrictions when members face little difficulty in dissociating themselves from these “illiberal” practices, with the assurance that the “cultural marketplace” will be allowed to operate. The freedom of choice within the “cultural marketplace” ensures that an individual adheres to a particular culture’s internal restrictions only as the result of a voluntary decision to select one of many available life options. Catholicism’s internal restrictions regarding premarital sex, for example, seem palatable precisely because of the relative ease with which a Catholic can exit the faith for another, more liberal Christian sect.

By contrast, where illiberal cultures flatly deny a member the freedom to exit by, for example, adopting coercive methods of illiberal enforcement, ensuring individual members’ ability to freely choose among life options may necessitate the exercise of a degree of intolerance in international law. A culture that coercively denies members the freedom to exit effectively prevents its members from “shopping” for otherwise-available life options, and thus distorts the cultural marketplace through culturally monopolistic practices. Accordingly, international law should condemn such coercive practices unconditionally.

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110. See infra note 111 (defining and discussing “coercion”). See also infra notes 135–139 and accompanying text (discussing further preconditions for the freedom of exit).

111. The Merriam-Webster Dictionary defines the verb “coerce” as “to achieve by force or threat.” On these grounds, this Note’s theory would condemn any attempts by a culture (indigenous or otherwise) to restrict its members’ freedom through coercive practices, including those involving physical violence or threats of physical violence. This Note’s theory would thus advocate a flat prohibition on internal restrictions involving or enforced by practices such as rape, genital or other physical mutilation, forced marriage or other coerced family planning, domestic abuse or honor killings. For a discussion of such forms of deplorable coercion, see generally Crystal Doyle, Isn’t “Persecution” Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 519 (2009).
2. Drawing Lines in the Sand: The Right to Eject and Exclude

Allowing members to freely dissociate is thus a necessary condition to legal accommodation for cultures seeking to impose internal restrictions on members. But while monopolistic cultures retain members who would otherwise wish to leave only by eliminating available alternatives, the indigenous cultures highlighted in this Note act more as a monopsony, excluding members who would otherwise wish to join. With respect to monopsonistic cultures, ensuring the right to exit provides an unsatisfactory response to objections against the internal restrictions of the Pueblo, Maliseet, Saami and Zapotec cultures. These indigenous cultures enforce their internal restrictions not by limiting members’ right to exit, but by asserting the community’s right to eject or exclude members from cultural participation through rigid demarcational and distributive policies. Just as a culture that forces its members to stay limits individual free choice by denying members access to external communities, a culture that forces members to leave limits free choice by denying access to the internal community. Both practices restrict individuals’ ability to freely choose their constitutive attachments, and thereby distort the cultural marketplace.

Although coercive methods of illiberal enforcement are patently harmful, the forced removal from one’s “identity group” that cultures impose through exclusionary methods of enforcement can likewise involve very real deterrents such as “economic hardship, lack of education, skill deficiencies, or emotional distress.”\(^{112}\) Ejecting a member from a cultural group may disrupt that individual’s settled expectations concerning his or her identity or life options.\(^{113}\) But because these monopsonistic cultures remain a source of freely chosen constitutive attachments for the members who remain, a decision not to eject an individual who threatens the definitional bounds of such constitutive attachments may disrupt the expectations of remaining members concerning their own identities or life options.\(^{114}\) While international law should flatly prohibit coercive methods of enforcing internal restrictions, it cannot so easily reject exclusionary methods. After all, a “refusal to recognize the possibility of rights to eject would be tantamount to refusing to take seriously the collective inter-


\(^{113}\) See Newman, supra note 109, at 78.

\(^{114}\) Id.
ests groups embody.”

The ability to eject or exclude is necessary for the identity-formation process of cultural members who wish to remain. If individuals are to be free to assign meaning to their chosen attachments, these attachments must be made intelligible through a culture’s semiotic practices. In order for the semiotic practices of a culture to carry any meaning, though, the community must be composed of individuals who share an understanding of a symbol’s meaning and the ways it contrasts with other symbols. This shared understanding is necessary for community members to “engage in mutually comprehensible symbolic action.”

Because culture “is a product of, and is manifested through group dynamics,” cultural rights become most meaningful only within the community of a group. As Anaya states, “[i]t would be impossible or lacking in meaning, for example, for an indigenous individual to partake of a traditional indigenous system of dispute resolution alone, or to speak an indigenous language alone, or engage in a communal religious ceremony alone.”

While this shared understanding of meanings need not be a single, coherent, stable symbolic system, it must adhere to at least a “minimally shared set of relations among signs”—resistance to cultural meanings and understandings can be intelligible only to the extent that it makes reference to the culture’s shared semiotic system. Accordingly, for self-preservation, indigenous illiberal cultures must be permitted to define group character and identity internally, to “‘circle the wagons’ and cleave to a fairly rigid characterization of its culture, lest syncretism and mélange give rise to outright assimilation.”

V. ACCOMMODATION THROUGH A HISTORIC INJUSTICE LENS

A. Subsidizing Victims of Historical Injustice

Although a cultural group that enforces its internal restrictions through exclusion (rather than coercion) may ensure the survival of its marginalized culture, the group’s exclusionary practices inevitably

115. Id.
116. Wedeen, supra note 84, at 722.
117. See Anaya, supra note 1, at 22.
118. Id. (emphasis in original).
119. Wedeen, supra note 84, at 722.
120. Weinstock, supra note 105, at 263.
distort the cultural marketplace and have the potential to impose deadweight loss on society. In fact, international law should expect the market distortion from illiberal indigenous groups to be especially significant; the marginalization of these indigenous cultures due to the history of injustices committed against them will predictably lead these groups to choose to “circle the wagons” fairly tightly. Marginalization leads to a scarcity of communal resources, which in turn leads to significant competition for those resources. With such competition, the culture’s “demarcational policy (defining the group’s members) and distributive policy (determining the access each group member has to resources, including power) must be fairly tightly coordinated.”

However, the histories of injustice that cause monopsonistic cultures to establish such rigid demarcational and distributive policies can simultaneously be used to justify international law’s accommodation of illiberal cultures that enforce internal restrictions through ejection or exclusion. Under certain conditions, practices that usually distort markets can instead promote or restore markets. For example, state manufacturing subsidies typically distort markets by allowing domestic manufacturers to charge a price below the market clearing price under perfect competition. A subsidy recipient can collect economic “rent” either by capturing market share from unsubsidized foreign competitors, or by charging competitive prices above their marginal costs of production. Allowing certain firms to collect this economic rent can have the effect of protecting a nascent domestic industry from the destructive effects of predatory “dumping” by foreign competitors. Analogously, a state’s decision to permit a marginalized culture to “circle the wagons” and protect itself through exclusionary enforcement methods of internal restrictions may be permissible when doing so corrects a previously incurred distortion in the cultural marketplace. A state’s tolerance of a monopsonistic culture would thereby act as a form of “cultural subsidy,” bolstering the illiberal culture’s ability to survive in the cultural marketplace after the culture had been previously weakened by extraneous threats.

This “cultural subsidy” highlights the intersection between multiculturalism and rectification of historical injustice. Liberal societies, and international law’s liberal framework, help to transfer social welfare from cultural groups to individuals by ensuring the competitive operation of the cultural marketplace. Under such free competition, the success or failure of any particular culture depends only on the extent to which individuals find it worthy of their alle-

giance. The historical injustices inflicted upon indigenous cultures, however, have disrupted such free-market cultural competition—that is, the disintegration of these cultures is not due to members finding them unworthy of allegiance, but instead due to the colonial “conquest, penetration and marginalization,” of these cultures, and the projection of non-indigenous superiority as evidenced by continual depictions of indigenous peoples as “primitive” and “inferior.”

Allowing monopsonistic indigenous cultures to collect “cultural rent” by exercising a rigid policy of ejection and exclusion would normally distort the cultural market away from a baseline of perfect competition. Given the historical injustices perpetrated on indigenous peoples, however, this “cultural rent” appropriation instead helps restore the cultural marketplace back towards a baseline of free competition. While this method of rectification does not meet the ideal, and largely impossible, redress strategy of returning indigenous peoples to the pre-wrong condition, it succeeds in improving on current rectification efforts in several ways. First, by avoiding a method of redress through wealth or property transfers, this theory offers a rectification strategy which does not directly tax or harm members of the external society (who typically carry no direct guilt for the original injustices), and thus avoids the “supersession through changed circumstances” problem within historical injustice debates. Relatedly, by focusing the object of redress on the indigenous culture itself, rather than any individual members (who typically were not the direct victims of the original injustices), this theory avoids the “non-identity” problem frequently raised in historical injustice literature.

More significantly, redressing historical injustices through cultural subsidies improves on the sterile method of rectification through cash compensation by recognizing the true cultural nature of the injustices originally inflicted on indigenous peoples. As discussed previously, historical injustices against indigenous cultures were destructive not only to the indigenous peoples’ economic well-being, but more importantly to their way of life, to their culture. Allowing indigenous groups to appropriate “cultural rent” from the

122. See supra note 56 and accompanying text.

123. See Waldron, Superseding Historic Injustice, supra note 4, at 24 (arguing that even when a certain distribution of resources is just in one set of circumstances, the same distribution may be unjust in a different set of circumstances due to the change in its impact on “others’ interests of being excluded from the resources in question”).

124. See, e.g., Herstein, supra note 77 (discussing the non-identity problem and the challenges it poses for historic injustice claims).
wider liberal society would help to restore indigenous peoples’ way of life and their culture.

Because this cultural restoration is desirable only to protect cultures that allow individuals to access and interpret their freely chosen constitutive attachments, it bears emphasizing that this Note’s position would promote accommodation only for illiberal indigenous cultures exercising exclusionary methods of enforcement. When the method of enforcement is limited to excluding or ejecting those “who threaten the non-individualizable interests others would pursue”125—unlike in cases of coercive cultures—international law can be assured that the remaining members of such exclusionary cultures remain by their own volition.

B. Historical Injustice as a Limiting Principle

By tying the permissibility of an illiberal group’s enforcement of its internal restrictions through exclusionary practices to the history of injustice inflicted upon the group, this Note’s theory includes a limiting principle that multicultural theorists advocating for tolerance of illiberal cultures have so conspicuously lacked. Under the premise of correcting a historical failure in the cultural marketplace, this Note’s “cultural subsidy” theory promotes the accommodation of indigenous groups seeking to eject or exclude members if the group has been subjected to historical injustice, and only if the group has been subjected to historical injustice. In the absence of such historical injustice, the distorting effects of the cultural subsidy would not correct any market defect, but rather would inefficiently restrict individuals’ ability to access and enjoy their constitutive attachments, lower the returns that cultural members enjoy from membership, and impose a deadweight loss on society as a whole. Accordingly, international law need not accommodate the enforcement of illiberal internal restrictions for simply any marginalized culture—where the marginalization is due to members no longer finding their culture worthy of allegiance, international law need not buoy the dwindling culture.

This account further suggests that marginalization itself should not be taken as sufficient to establish the history of injustice required for protective treatment. At the margins, states will be required to conduct further factual inquiries as to the history of a particular group demanding accommodation for its illiberal internal restrictions; as a starting point, however, such accommodation should be granted to indigenous cultures since they have, by definition, suf-

125. Newman, supra note 109, at 78.
fered a history of encroachment and subjugation by colonialism, or something like colonialism.\textsuperscript{126} One can also imagine other clear-cut cases of historical injustice, such as groups that have suffered a history of genocide or other crimes against humanity,\textsuperscript{127} for which such accommodation should be extended. By limiting the permissible internal restrictions in this way, international law can adhere to the policy of toleration while ensuring that the cultural marketplace continues to foster the liberal ideals at the foundation of international law.

VI. CLOSING REMARKS

A. Normative Implications

This section returns to the cases of the Pueblo, Maliseet, Saami and Zapotec cultures discussed in Part II Section A to discuss the normative conclusions international law should draw from this dual theory of multiculturalist accommodation and historical injustice rectification. To protect the moral importance of these cultures, the rights granted to these illiberal groups “must be designed to preserve the underlying conditions without which the context of values could not exist: for example, relationships, processes of socialization and ways of life.”\textsuperscript{128}

For the case of the Pueblo Protestants, this Note’s theory would allow the theocratic restrictions against internal religious dissidents within the Pueblo community. Because the Pueblo community is itself largely characterized and defined by intimately religious practices, such as obligatory communal rituals and deference to tribal religious leaders, the Protestant dissidents threatened to undermine the very source of constitutive attachments and personal identity for the majority of the Pueblo community. In fact, by proselytizing their Pentecostal religion, their label as Pueblo Protestants effectively became a misnomer; the Protestants renounced the traditional attachments that had so fundamentally defined their Pueblo membership as no longer constitutive, and so ceased to identify as Pueblos. They attached meanings and interpretations to the Pueblo practices that were unintelligible to the greater Pueblo community, and so could no longer constitute members of the Pueblos’ semiotic community.

\textsuperscript{126} See supra note 1.
\textsuperscript{128} Robinson, supra note 11, at 121.
While these circumstances alone would not be sufficient to justify the Pueblo in restricting its members’ freedom of religion or disrupting members’ expectations concerning their identities or lives more generally, the Toledo court’s non-interference129 was appropriate, on this Note’s theory, in light of the historical injustices committed against the Pueblo culture. In fact, withholding from these dissidents the benefits of cultural membership was necessary to protect the cultural resources and non-individualizable interests others would pursue. The Pueblo Protestants, in other words, cannot have their culture and leave it too. On these grounds, the court in Kitok v. Sweden130 was likewise correct to allow the Saami’s exclusionary enforcement of its internal restrictions on occupational choices.

By contrast, the courts in both Poodry131 and Lovelace132 were incorrect to interfere with the indigenous culture’s “circling of the wagons.” In Poodry, the court was right to note that the ejected Seneca Indians had been subjected to a “restraint on liberty”133—the tribe’s decision to remove their tribal citizenship restricted the plaintiffs’ ability to freely choose their constitutive attachments, and thus distorted the cultural marketplace. Yet in light of the threat that these dissidents posed to the constitutive attachments of those who remained in the Seneca culture, such ejection was necessary to preserve the liberty of continuing members. Furthermore, despite its distortion of the cultural marketplace, such exclusionary enforcement of the tribe’s illiberal practices was justified as a reparation effort, in order to allow the Seneca to fully “compete” in the cultural marketplace. Similarly, while the court in Lovelace sought to protect Lovelace’s one-way “relational” right—to relate to others as a Maliseet Indian—134 it ignored the importance of the Maliseet’s right to assert that Lovelace failed to relate as a Maliseet Indian.

Of course, in each case, members must enjoy the freedom to exit their culture’s internal restrictions, which necessarily requires freedom from coercion.135 Additionally, for this freedom of exit to

129. See supra notes 10–15 and accompanying text.
130. See supra notes 35–40 and accompanying text.
131. See supra notes 21–24 and accompanying text.
132. See supra notes 28–34 and accompanying text.
133. 85 F.3d at 880.
134. See supra note 34.
135. See supra notes 110–11 and accompanying text (discussing the need to prohibit coercive enforcement of internal restrictions). The Maliseet, for example, could not prevent Lovelace from marrying a non-Indian, but should be free to deny her membership should she choose to disavow the Maliseet’s requirements for inclusion.
be substantive, individuals must have access to a "wider society that is open to individuals wishing to leave their local groups . . . within which there [is] a considerable degree of individual independence . . . [and] in which the principle of freedom of association [is] upheld." 136 Beyond these minimum preconditions, however, a substantive right to exit requires that an individual be "aware of the options open to her outside of the association . . . be able to assess them [and] view them as real options for her." 137

On these grounds, the case of Eufrosina Cruz is perhaps more troubling than the other examples of illiberalism in indigenous cultures. For Sandra Lovelace and the Pueblo Protestants, exit from the community's internal restrictions simply required a conceptual disavowal, and an acceptance of exclusion from certain cultural benefits; upon dissociation, Lovelace would be free to marry the spouse of her choice, and the Pueblo Protestants would be free to practice the religion of their choice. Cruz, however, could not so easily free herself of the community's restrictions; disavowing her Zapotec membership would do nothing to mitigate the internal restrictions against her access to political power. To the extent that the town board's power extends over non-members living in the same geographic community, therefore, Mexico should condemn the Zapotec's exclusion of certain groups from the political process. 138 Cruz and other Zapotec women, in effect, would lack access to a wider society open to individuals wishing to leave their internal restrictions, and so would lack a substantive freedom of exit. Similarly, to the extent that these internal restrictions on political access are to be allowed, Mexico should not tolerate the denial of educational opportunities, free speech rights or other rights which are necessary for the unrepresented individuals to be aware of and assess the alternative cultural options available. 139

136. Kukathas, supra note 78, at 134. Given this Note's assumption of a wider liberal society, however, these necessary preconditions have been presumably satisfied in nations such as the United States, Canada, Sweden and Mexico. See supra text accompanying note 46 (explaining this Note's presumption of a wider liberal society).


138. Note also that under Zapotec law, men lose their voting rights upon turning sixty. See Stevenson, supra note 49.

139. See Newman, supra note 109, at 45 (suggesting that restrictions on the right to free speech restrict members' ability to discuss and communicate about the possibility or plans for exiting, while restrictions on the right to education restrict members' ability to become aware of and examine potential exit opportunities).
B. Conclusion

The accommodation of illiberal cultural minorities and the rectification of historical injustice pose difficult challenges to liberalism, and international law has largely failed to sufficiently resolve either issue. Ultimately, liberal theories and policies that do not reserve the ability to enforce some degree of internal restrictions for illiberal cultural minorities fall short of promoting the freedom of choice they set out to secure. Too often, multiculturalist advocates argue for the importance of one’s ability to reject and revise cultural practices, but fail to acknowledge that the proper freedom of choice to be guaranteed in liberalism: the ability to freely form one’s identity by choosing one’s moral attachments and determining which among them are to become constitutive. This process requires the freedom to both interpret cultural semiotic practices and choose whether or not to accept the shared understandings of a particular culture, even when such shared understandings involve liberty-restricting practices or roles.

Typically, this freedom of individuals to choose their constitutive attachments demands respect from both international law and the cultures themselves. To prevent undue distortions in the cultural marketplace, cultures cannot be permitted to enforce their internal restrictions by denying members the right to exit through coercion or intimidation. Such a denial disables the presumption that individuals who remain in the culture’s membership community do so of their own volition. Nevertheless, when a culture has been subjugated to a history of injustice, as have many indigenous cultures, international law should allow the group to enforce its internal restrictions by denying membership to those who seek to join or remain. While permission for such ejection or exclusion enables some distortion of the cultural marketplace, the distortion serves as a corrective reparation for past injustices, rather than disruptive inefficiency. By re-examining the demands of liberalism in this way, it is the hope of this Note that international law can reconcile its internal conflict with illiberal indigenous cultures, while simultaneously offering a robust and effective method of rectification for the histories of injustice these indigenous cultures have suffered.

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