TRIBALISM, CONSTITUTIONALISM, AND CULTURAL PLURALISM: WHERE DO INDIGENOUS PEOPLES FIT WITHIN CIVIL SOCIETY?

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INTRODUCTION

The effort of modern political theory to understand multiculturalism has engendered a variety of responses, depending upon the theoretical tradition (e.g., liberalism, communitarianism) and the nature of the group (e.g., immigrant groups, descendants of slaves, indigenous peoples). Contemporary political philosophers struggle with two primary issues: the rights and status of “ethnocultural minorities in multi-ethnic societies,” and the virtues and responsibilities of democratic citizenship. There are, of course, many tensions between these two areas of civic life in multicultural societies, and philosophers differ as to whether these are ultimately irreconcilable aspects of multiculturalism.

Indigenous peoples pose one of the most problematic cases within multiculturalism. Universally recognized as being the “first” inhabitants of subsequently colonized lands, indigenous peoples across the globe have an ambiguous status—alternatively considered by their encompassing nation-states to be “quasi-sovereign nations,” “tribes,” or “ethnic minorities.” This ambiguous status is largely the result of historical circumstance. With each successive transfer of lands between colonizing governments and indigenous peoples, the Native people lost rights, gained other rights, and reached a new political accommodation with the “national sovereign.” The tensions wrought by multiculturalism in the contemporary world often manifest themselves in tribal wars and nationalistic fervor, leading to uncertainty about how the legal and moral claims of indigenous peoples should be adjudicated within modern pluralistic democracies such as the United States and Canada.

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Today, American Indian nations within the United States are considered “domestic” sovereigns. Indian nations enjoy both political and cultural sovereignty as an aspect of their inherent status as separate governments. This sovereignty is “preconstitutional” and also “extraconstitutional” in character. The sovereignty of Indian nations existed prior to the formation of the United States, and the Indian nations are not signatories to the United States Constitution. Thus, although the Constitution explicitly regulates the relationship of Indian nations with the federal and state governments, the Indian nations are not “parties” to the Constitution and thus, their powers are not limited by provisions such as the Bill of Rights. In short, the nature of Indian tribes as separate “nations” within a pluralistic, constitutional democracy leads to many complexities that have yet to be resolved.

Currently, Indian law jurisprudence is experiencing a concerted attack on “tribalism” as violative of fundamental constitutional norms. Much of that attack is due to the fact that tribal governments increasingly exert jurisdiction as sovereigns within their territorial borders, over both Indians and non-Indians. Non-Indians, of course, are generally the “minority” on reservation lands. The political governance of a minority by a majority, of course, is not a new problem for Indian nations. Since the early days of this nation’s history, Indian nations have been a political minority governed by a non-Indian majority. This continuing reality has inspired tireless efforts to articulate the nature of tribal “rights” as governments, as minorities, and as “peoples.” Yet, the question of tribal governance of non-Indians has become a political football, triggering both legislative and judicial attempts to limit tribal sovereignty and jurisdiction. The underlying assumption appears to be that non-Indians’ rights cannot be respected under tribal judicial and legislative systems. However, rather than asserting rights claims within the tribal system, the non-Indian strategy has been to use external power to curtail tribal governmental authority. The emerging view of tribal sovereignty is insular: a separate domain for members, where tribal governance is tolerated but not accepted under dominant norms of constitutionalism.

3 For example, former Washington State Senator Slade Gorton was notorious for his efforts to curtail tribal sovereign immunity. See Timothy Egan, Senate Measures Would Deal Blow to Indian Rights, N.Y. TIMES, Aug. 27, 1997, at A1. Senator Gorton claimed that tribal sovereign immunity “denies non-Indians due process.” Jeff Barker, Plan Would End Tribal Immunity, ARIZ. REPUBLIC, Aug. 28, 1997, at A1. He also asserted that it might be time to force a change in the status of Indian tribes as “nations within a nation.” Egan, supra at A20.
One of the primary catalysts for this debate resides in the notion of "citizenship." Today, indigenous peoples in Canada and the United States possess citizenship in the larger nations that colonized their lands, with all of the rights which that citizenship entails, yet they also possess citizenship within their aboriginal groups. This "dual citizenship" justifies certain "special" rights, which distinguish indigenous people from citizens belonging to other cultural groups. This engenders resentment among non-Indian citizens, who associate such rights with "affirmative action" and argue that all citizens should have the same rights as "equals" under the Constitution. The resistance to a "differentiated citizenship" for Native people carries over to the question of tribal authority over nonmembers. Non-Indians frequently resist tribal jurisdiction on the basis that it is "unconstitutional" to subject United States citizens to the authority of a government that is not regulated by the Constitution, and which may employ different values and norms of governance.

This essay examines the tension between tribalism and constitutionalism in contemporary Indian law jurisprudence, highlighting the critical departures from historical precedent in contemporary legal doctrine and also the international debates over tribalism, nationalism and cultural pluralism, which provide a rich context for interpretation of domestic law. I use the term "tribalism" to refer to the efforts of indigenous groups to define their political and cultural identity as separate from that of the larger nation-state. I discuss the United States and Canada as examples of nation-states that possess a constitutional democracy which defines the terms under which citizens relate to one another within an overall "civil society." I use the term "constitutionalism" to refer to that process.

The primary purpose of this essay is to examine whether indigenous peoples' claims are inconsistent with the ideals of a "civil society" and evaluate the possibility of an appropriate accommodation between tribalism and constitutionalism. Part I of the essay offers a historical perspective on the tension between tribalism and constitutionalism in American jurisprudence. Part II of the article examines the normative foundations of constitutionalism, America's commitment to pluralism, and discusses how tribalism is reconciled within the discourse of citizenship. Part III of the article explores the dynamic interaction between tribalism, notions of self-determination, and the construction of indigenous peoples' political identity. Part IV provides a doctrinal analysis of the conflict between tribalism and constitutionalism in domestic law, focusing on the discomfort of the federal courts in recognizing "special rights" for Indian nations, and

the perceived conflict between individual rights and group rights. Part V of the article provides a theoretical analysis of the potential accommodation between tribalism and constitutionalism, examining various modes of political accommodation of pluralism in contemporary democratic societies.

I. TRIBALISM AND CONSTITUTIONALISM IN AMERICAN LAW: A HISTORICAL PERSPECTIVE

The tension between tribalism and constitutionalism has been part of American law since the early days of this nation's history. Influenced by international policy and perspectives, these debates have been extended to Indian law jurisprudence as a means of defining the constitutional position of tribal governments. At a fundamental level, Native American "tribalism"—best represented by the concept of "tribal sovereignty"—appears to conflict with national sovereignty. What is the reason for this perceived conflict? It cannot be merely the notion of another layer of sovereignty within the federal system. After all, American federalism is premised on the notion of "dual, or divided sovereignty." The divisions between federal, state and local government are fundamental to American federalism. Moreover, American federalism speaks of the distinction between "legal sovereignty," which is vested in the agents of government, and "political sovereignty," which resides with the people. The concept of tribal sovereignty merely adds another dimension to this rich mixture of legal, political, and popular sovereignty. In reality, the perceived conflict between tribalism and constitutionalism appears to be a response to the character of tribal sovereignty in its relationship to the normative structure of the American constitutional democracy.

A. Tribalism v. Constitutionalism: The Foundations of the Dispute

The foundations for the contemporary dispute over tribalism and constitutionalism emerged in the 1831 case of Cherokee Nation v. Georgia. In that case, three distinct views of tribal sovereignty emerged from the six Supreme Court Justices who considered the legal issue of whether the Court should assume original jurisdiction over a lawsuit by the Cherokee Nation against the state of Georgia on the theory that the Cherokee Nation was a "foreign nation" for purposes of Arti-

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6 WILKINSON, supra note 2, at 54 (discussing generally the concept of dual sovereignty).
7 Id.
At this time, of course, the citizens of the Cherokee Nation were not citizens of the United States, and their attorney argued that as an "aggregate of aliens," they constituted a "foreign nation." 10

Chief Justice John Marshall wrote the majority opinion, holding that the Cherokee Nation was not a foreign nation for purposes of Article III. 11 Justice Marshall's opinion, joined by Justice McLean, found that the Cherokee Nation was instead a "domestic dependent nation." 12 Marshall's "domestic sovereignty" argument established the Cherokee Nation's status as a separate "state"—a "distinct political society, separated from others, capable of managing its own affairs and governing itself." 13 Yet, Marshall claimed that the Cherokee Nation was so completely under the "sovereignty and dominion of the United States" as to negate the Cherokee's claim to "foreign" status. Chief Justice Marshall's "domestic sovereignty" argument has prevailed in federal Indian law, and seems most consistent with what Professor Wilkinson calls the "measured separatism" of Indian tribes in America: a relationship that allows for partial tribal autonomy under federal supervision. 14

Justices Johnson and Baldwin wrote separate concurring opinions asking whether the Indian tribes retained a separate political status that would entitle them to exercise rights in conflict with the interests of the states. Justice Johnson questioned whether a classification of "nations" or "states" could be applied to a "people so low in the grade of organized society as our Indian tribes most generally are." 15 Drawing on themes of conquest and the stereotypical Indian "hunter-gatherer" society, Johnson claimed that the federal government had tolerated the Indians' continued occupation of certain lands for hunting purposes until such a time as they could become incorporated into the rest of society. Yet, he claimed that the preemptive right and "exclusive right of conquest" continued to exist in the states which circumscribed Indian territory. He acknowledged that the Indians retained certain rudimentary rights of self-government. Even so, he claimed, under the Law of Nations, Indians were entitled to nothing more than status as "wandering hordes, held together only by ties of blood and habit, and having neither laws or government,

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9 Article III provides that the federal judicial power "shall extend to... Controversies... between a State, or the Citizens thereof, and foreign states, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.
10 See Cherokee Nation, 30 U.S. at 2.
11 Id.
12 Id.
13 Id. at 17.
14 WILKINSON, supra note 2, at 14.
15 Cherokee Nation, 30 U.S. at 20 (Johnson, J., concurring).
Justice Johnson’s “anti-sovereignty” argument was premised on a perception of Indian tribes as uncivilized savages who were incapable of true governmental status, as well as a states’ rights position that considered the broad exercise of state authority to be the inevitable goal of American federalism.

Justice Thompson filed a dissenting opinion, joined by Justice Story, which concluded that the Cherokee Nation was a “foreign state, within the sense and meaning of the constitution.” Justice Thompson theorized that the terms “nation” and “state” were interchangeable within the Law of Nations, and both terms designated a “body of men, united together, to procure their mutual safety and advantage, by means of their union.” Such a society becomes a “moral person,” Thompson claimed, “having an understanding and a will peculiar to itself,” and “susceptible of obligations and laws.” Thompson found that such a society could be deemed “sovereign” so long as it was able to “govern itself by its own authority and laws.” Justice Thompson’s “international sovereignty” argument equated Indian nations with European sovereigns who had placed themselves under the protection of a more powerful nation for purposes of political expediency. Thus, although the Cherokee Nation had by treaty placed itself under the protection of the United States, Thompson found that the Cherokee Nation still constituted a sovereign state, capable of self-government under its own laws and political institutions.

Throughout subsequent eras of federal policy, these three sets of views have continued to characterize the debate over the constitutional status of Indian tribes. Although American jurists have generally not taken seriously the argument that Indian tribes are “foreign nations,” the issue of a separate national identity continues to surface in Native peoples’ claims for self-determination under international human rights law. This position, for example, underlies the current claim of Native Hawaiians for reinstatement of their historical monarchy, which was illegally overthrown by a group of American nationals with assistance from the United States military. For the most part, however, federal Indian law has incorporated the “domestic sovereignty” view of Justices Marshall and McLean. The emphasis within federal Indian law jurisprudence has focused on testing the boundaries of the dominant society’s political hegemony over Native people, as opposed to Native peoples’ assertions of separate governmental

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16 Id. at 26.
17 Id. at 52 (Thompson, J., dissenting).
18 Id.
19 Id.
status. However, the “anti-sovereignty” position expressed by Justices Thompson and Baldwin has been a consistent undercurrent in Indian Law opinions which treat tribal governments as temporary and seek to establish the point at which tribal sovereignty ends and state sovereignty prevails.

For example, in *Worcester v. Georgia*, the follow-up opinion to *Cherokee Nation*, Chief Justice Marshall held that the boundaries of Cherokee territory defined an area of exclusive tribal and federal authority in which state law had no effect. Marshall’s opinion, which was premised on his domestic sovereignty argument, delineated a version of federalism in which tribal and state power operated in separate spheres under the overriding authority of the federal government. However, Justice McLean’s separate opinion speculated that state law might apply on reservations where tribal society had, in effect, been “detribalized” through the members’ assimilation to non-Indian ways.

McLean’s argument for “de facto termination” based on assimilation formed the basis for his later decision in *United States v. Cisna*, which held that the assimilation of the Wyandots into the surrounding white population justified suspension of federal law on the Wyandott Reservation sufficient to permit the intrusion of state jurisdiction over a criminal act by a non-Indian against an Indian. Justice McLean’s view that the perceived “detribalization” of an Indian nation can serve as justification for ceding jurisdiction to the state has contemporary manifestations. In particular, McLean’s “de facto termination” argument has been incorporated into contemporary cases dealing with “diminishment of reservations and tribal jurisdiction over non-Indians.”

**B. The Normative Critique**

The tensions between tribalism and constitutionalism throughout history, as well as in the modern era, involve whether the exercise of tribal sovereignty tends to defeat the uniform exercise of state law and authority and whether it impairs the normative foundations of Anglo-American democratic society. For example, in the Removal Era of the mid-1800s, federal policy appeared to adhere to Justice Johnson’s view that tribalism was incompatible with a version of American Constitutionalism dedicated to the flourishing of state governments and the expansion of non-Indian civilization. " During the

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21 *See id.* at 592; *see also WILKINSON, supra note 2, at 33.
22 *See 25 F. Cas. 422 (C.C.D. Ohio 1835) (No. 14,795); see also WILKINSON, supra note 2, at 34.
23 *For further discussion of this phenomenon, see infra Part IV(A).*
Termination Era of the 1950s, policymakers associated tribalism with a failure of individual tribal members to reach their full human potential as “citizens.” By “freeing” Indian tribes and their members from “[f]ederal supervision and control and from all disabilities and limitations specially applicable to Indians,” Congress intended to integrate Indian people into a unitary civil society, with all the “responsibilities and privileges” of other citizens.25

The contemporary era of Self-Determination poses a bit of a paradox for American policymakers. On the one hand, the Self-Determination policy affirms the status of Indian nations as separate governments and approves of their expanding regulatory role on the reservation. On the other hand, this expanding regulatory role creates new challenges for the incorporation of tribal sovereignty into American federalism as tribes increasingly exercise jurisdiction over nonmembers and generate policies that impact non-Indian interests.

Congress and the courts have responded unevenly to these contemporary challenges, inspiring different critiques by Indian law scholars. Professor Wilkinson and some other scholars consider tribal governments to be “part of the constitutional structure” of American government.26 Professor Wilkinson argues that tribes were acknowledged by the Constitution and that the treaties between the tribes and the federal government serve as a contract between sovereigns that allocates their respective powers, much as the Tenth Amendment serves as an agreement between the states and the federal government. Under this argument, tribes have been incorporated within the federal system and should be acknowledged as possessing a broad scope of authority within the reservation, even as to activities involving non-Indians.27 On the other hand, under this argument, tribal governments should be willing to submit to a limited degree of review by the federal courts to ensure that persons under tribal jurisdiction are not subjected to unfair treatment.28 Thus, under this model, domestic law can and should be used to effectively regulate the spheres of sovereignty between the Indian nations, the states, and the federal governments.

Other scholars, such as Professors Robert A. Williams and S. James Anaya query the basic justice of domestic law for Native Americans (inclusive of American Indians, Alaska Natives, and Native Hawaiians)

26 See, e.g., WILKINSON, supra note 2, at 103; Richard A. Monette, A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy, 25 U. TOL. L. REV. 617 (1994).
27 WILKINSON, supra note 2, at 117.
28 Id. at 115-16.
and suggest the application of international human rights norms that govern "peoples" as a way to counter the negative impacts of domestic policy on tribal self-government. Under this view, tribal governments may choose some degree of association with the national government, yet they preserve their distinct political identity as "peoples" and maintain a significant degree of independence and autonomy that sets them apart from the states or other ethnic groups that have been incorporated within the United States. The rights of "indigenous peoples" under international law are essentially basic human rights that are tailored to promoting their cultural survival and their ancestral connections to important lands and resources that facilitate that cultural survival. Under this view, an overarching international normative system should regulate the domestic relationship of Indian nations to the federal government and even the state government.

Between these two views are scholars such as Robert Porter, who argue that to be genuinely "sovereign," Indian nations must resist any "domestic" constitutional relationship with the United States government, even as American citizens, and hold out for the same status as international nation-states. Under this view, presumably, Indian nations are completely autonomous and have the ability to choose their associations among the nation-states of the world without regard to their territorial position within the national boundaries of the United States.

These scholarly views structure the interpretation of existing legal rights in the United States for American Indian and Alaska Native Nations. However, they also provide a framework for the development and articulation of rights for the Native Hawaiian people. Currently, the Native Hawaiian people are exploring whether they should accept a domestic status under federal law as a "recognized" Native group with partial rights to self-government, whether they should continue to press for reinstatement of their independent constitutional monarchy under international law, or whether they should try to articulate a new set of rights and relationships as "indigenous peo-

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30 This is the upshot, for example, of an article by Professors Williams and Anaya on The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System, which compares the treatment of indigenous peoples’ land rights under domestic law in several countries with various normative principles of international human rights law. 14 HARV. HUM. RTS. J. 33 (2001).
31 See id. See also generally S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996).
pies” under the self-determination rubric of international human rights law. Senator Akaka has introduced legislation into Congress that would accord Native Hawaiians the right to form a government that would be recognized by the federal government on terms that are similar, but not identical, to the status accorded American Indian and Alaska Native peoples. Participants in the Hawaiian sovereignty movement, however, dismiss this bill as merely another effort to cure the United States’ illegal overthrow of the Hawaiian monarchy, and assert that political recognition of the Nation of Hawaii is the only legitimate mode of self-governance for Native Hawaiian peoples.

Other scholars, such as James Anaya, have suggested that application of human rights norms could provide an intermediate solution that would protect Native Hawaiian rights of self-determination and cultural integrity, while preserving a domestic relationship with the United States.

II. CONSTITUTIONALISM, PLURALISM, AND THE IDEALS OF CITIZENSHIP

The tension between tribalism and constitutionalism is a product of historical circumstance as well as theoretical debates over the “best” ways for communities to organize and govern themselves. The normative foundations of constitutionalism are often perceived to be in tension with those of tribalism, and the central focus of the debate appears to be over which system is best suited to achieve our “common” goals. This Part of the article examines the normative foundations of constitutionalism, America’s commitment to pluralism, and discusses how tribalism is reconciled within the discourse of citizenship.

A. The Normative Foundations of Constitutionalism

Constitutionalism is a “way of political life in which a people constitute themselves as a community, conducting their affairs in accordance with fundamental principles and through prescribed forms, procedures and primary rules of obligation, in order to achieve the ends and purposes that define their corporate existence.” The idea
that a "political community" can be coextensive with a "people" is a central feature of American constitutionalism and responds to the idea that America is a nation of immigrants built upon common ideals. The ideals of American constitutionalism are lofty, intended to secure the goods of "virtue, reason, justice, liberty, property, equality, and order" through a democratic process of government. Under American constitutionalism, individual citizens—rather than groups or classes—hold constitutional and legal rights. However, the ideal of the citizen is founded upon a sense of belonging to a single "political community," perhaps best represented by theories of civic republicanism.

In fact, the idea of a single "political community" embodied within constitutionalism is an important component of America's national identity. There is a mythological "creation story" that surrounds American identity and is embodied in the Constitution: the story of intrepid settlers and pioneers that left the oppression of European imperialism, classism, and religious intolerance to create a new nation founded upon liberty, equality, and freedom. In that sense, constitutionalism serves the goal of nationalism by offering a "super-identity" that trumps "all other identities.

The effort of our pluralistic democracy has been to organize a nation of "Americans," rather than to validate or perpetuate the differences among constituent citizens. Movements such as "English-Only" trumpet the value of cultural uniformity at the governmental or "public" level. There is a movement to accept cultural differences at the "private" level, but to insist upon some uniform notion of "citizenship" that can serve as the foundation for agreement at the "public" level. It is unclear, however, that this ideal of "citizenship" is one that can encompass groups with different notions of identity.

B. Pluralism and Democracy

According to Dalia Tsuk, contemporary political science and legal scholarship associates the term "pluralism" with process theories of
democracy, which recognize a conception of a "neutral political process, free of any substantive commitment to particular values such as the celebration of diversity, in which different groups interact, compete, or trade ends." Professor Tsuk compares early twentieth century theories of pluralism, which recognized diversity as a "constitutive element of American democracy." Under this view, "the extent to which laws and policies sought to accommodate and promote diverse group interests, beyond the sheer recognition of their existence, reflected a nation's commitment to democratic values." Professor Tsuk asserts that Felix Cohen was committed to this view of pluralism, which structured his interpretation of federal Indian law during the New Deal years of Indian policy.

Professor Tsuk elaborates three models of pluralism which informed this policy. "Socialist pluralism" was Cohen's initial model, grounded in a critique of the absolute sovereignty of the state and in a description of society as composed of a variety of self-governing groups (e.g., religious groups, labor unions) coordinated by a centralized government. Under this model, conflicts between diverse interests would be reconciled within a unitary legal system. This model was the inspiration for the Indian Reorganization Act of 1934, which permitted Indian tribes to form constitutional governments under the authority of the Secretary of the Interior.

Over time, Cohen developed a view of "systematic pluralism," which recognized the multiplicity of group interests and value systems. The diverse ethnic groups of America had a right to bring their value systems into the American polity. Because of this, the legal system ought to be flexible enough to encompass the values and assumptions of other systems. The fulfillment of this ideal of systematic pluralism required a commitment to group rights. According to Professor Tsuk, this model provided the impetus for Cohen's Handbook of Indian Law, which recognized that special rights could be granted to American Indians and effectuated by congressional control over Indian affairs.

The third model was that of "comparative pluralism." This model also endorsed the multiple interests of different groups as valid, but sought to reconcile conflicting value systems not by extending one system to include others, but by encouraging dialogue between and among distinct systems. This model provided the foundation for the legislation such as the Indian Claims Commission Act of 1946, which was intended to settle the historical and cultural differences between


42 Id.
Indian tribes and American society, and to provide a forum for Indian tribes to tell their narratives of American history.

Significantly, Professor Tsuk's account of pluralism and democracy highlights the development of both political pluralism and cultural pluralism. Political pluralism rejected the notion of an absolute sovereignty in favor of the view that "sovereignty was distributed among different groups...such as churches, trade unions," and even business corporations. Political pluralists advocated a functional concept of political representation in order to protect the needs of distinct associations. Cultural pluralists, on the other hand, specifically rejected the "melting pot" ideology of early 20th century policymakers, arguing that diverse cultural groups would make a significant contribution to the western democratic tradition. Cultural pluralists explored mechanisms that would accommodate the distinctive cultural heritage of racial and ethnic groups, maintaining that this was central to the identity of individuals from those groups. Both cultural and political pluralists envisioned groups as "repositories of particular ends that policymakers needed to recognize."

C. Multicultural Citizenship and Democracy

According to William Galston, responsible citizenship requires four types of civic virtues: (1) general virtues, such as courage, loyalty, and the will to obey the law; (2) social virtues, such as independence and the ability to keep an open mind; (3) economic virtues, including a strong work ethic and ability to adapt to economic and technological change; and (4) political virtues, including the capacity to discern and respect the rights of others and the willingness to engage in public discourse. According to Kymlicka and Norman, there is widespread agreement that these are positive qualities, although theorists differ on the public policy implications of this list of virtues. Should the government act to ensure that citizens share a sense of membership and belonging in the political community? Should the government act to prevent citizens from balkanizing into adverse groups, which could endanger this sense of unitary membership? Given the centrality of group identity within pluralist society, these concerns are particularly problematic.

Moreover, what are the implications of civic virtue for groups that have suffered a historical legacy of oppression and injustice? Kymlicka and Norman survey the literature on ethnic conflict in pluralistic societies to assert that governments typically regulate such con-

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43 Id. at 201.
44 Id. at 202.
45 Kymlicka & Norman, supra note 1, at 7.
duct through efforts to eliminate differences (including genocide, assimilation, and relocation) or efforts to manage differences. The history of relations between Native people and the United States government is replete with examples of the former: the United States military campaigns against Indian nations, the forced relocation of Native groups from their traditional homelands, and the forcible assimilation of Native people through boarding school policies and Christianization. However, the United States has also attempted to manage differences through "hegemonic control" of Native peoples (e.g., through use of the "federal plenary" power) and through various modes of "multicultural integration" (e.g., the Indian Reorganization Act and federal relocation programs).

Kymlicka and Norman assert that we should move beyond these views on reconciling ethnic conflict to carefully examine the relationship between minority rights and citizenship, focusing on three key questions. First, what is the impact of minority rights on the norms of democratic citizenship? Second, what is the underlying logic of claims for minority rights, and does this logic pose an "undesirable absolutist or non-negotiable conception of culture and identity"? And finally, to the extent that conflict exists between minority rights and democratic citizenship, what "tradeoffs between these values are appropriate and morally defensible"?

These questions will most likely trigger different responses depending upon the underlying value system used to evaluate these inquiries. For example, theorists from the divergent perspectives of "liberal republicanism" and "interest group liberalism" have radically different views on the nature of multicultural citizenship and group rights in a pluralistic society. For example, Professor Cynthia Ward points out that the ideal of republican citizenship entails a "belief in the consensual possibilities of deliberative dialogue," and argues that any effort to incorporate "disadvantaged groups" into the polity "as separate entities" will defeat the most basic purpose of republicanism: "to promote the interconnectedness of all citizens and their ability to arrive at a collective definition of the common good, which the state then implements."

On the other hand, Ward suggests that interest group liberalism rejects the notion of "citizen virtue and participation" which underlies republicanism, and shifts the "burden of support for democracy...from the individual citizen to organized interest groups."
According to Ward, pluralist theory holds that "as long as all relevant groups have equal access to the democratic process, they should be allowed to battle among themselves for whatever benefits are forthcoming from the state."50 Not surprisingly, Ward finds that interest group liberalism engenders balkanization among citizens, including a denial of "connectedness" and an attitude of competitive negotiation and alienation. In short, according to Ward, "[i]nterest-group liberalism is not merely in conflict with republican community, it destroys such community."51

Professor Ward argues that "group representation" in the American polity is "deeply destructive of successful republican community," and that "group-based separatism" is ultimately irreconcilable with "visions of national community."52 Although she does not discuss indigenous peoples' claims specifically, her approach suggests that the increasing focus on group or tribal identity as separate from national identity carries grave consequences for republican ideals of citizenship and community. Before engaging the question of how indigenous peoples' claims for "dual citizenship" can be reconciled within American constitutional tradition, I will explore the nature of tribalism and the significance of indigenous peoples' contemporary claims for "self-determination."

III. TRIBALISM, SELF-DETERMINATION, AND THE CONSTRUCTION OF INDIGENOUS PEOPLES' IDENTITY

In the United States, as in pluralistic societies across the globe, ethnic groups are striving to assert their own identities as distinct from the homogenizing influence of the national identity.53 Scholars claim that the search for a distinctive ethnic identity is a "product of modernity," a way to overcome a colonial history of domination and oppression.54 The assimilationist focus of nationalism is increasingly attacked as a movement that is biased against groups whose cultures differ from that of the majority group. In line with Ward's critique of "interest-group liberalism," however, identity claims are frequently seen as disruptive and potentially destructive of the democracy's uni-

50 Id. at 591.
51 Id. at 597.
52 Id. at 606-07.
53 Friedman, supra note 40, at 506 (discussing how individuals in pluralistic societies identify themselves more with their "sub-group" than with the nation as a whole).
54 See id. at 508; see also Richard W. Perry, The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity, 28 IND. L. REV. 547, 548 (1995) (describing the nation as "an artifact of the . . . discourse peculiar to modernity").
form and beneficial social and political goals.\textsuperscript{55} Movements to define ethnic identity in a \textit{political} sense are often equated with "tribalism." The term "tribalism" is frequently used pejoratively to refer to the negative aspects of ethnic "balkanization" and political resistance.\textsuperscript{56} But what do we mean by "tribalism" and how does tribalism correlate to the formation of ethnopolitical identity?

\textbf{A. Tribalism and Political Identity}

Tribalism is troubling to contemporary nation-states because it represents an alternative structure that enables its members to realize their own political identities as separate from that of the nation-state. This represents a movement away from the institution of the nation-state to an alternative conception of a multicultural federation of diverse groups engaged in relations of mutuality and reciprocity, rather than political control and domination.\textsuperscript{57} In fact, in America, the persistence of Indian nations has depended upon their separation from the larger civic culture of the United States.\textsuperscript{58} Thus, in the words of Professor Charles Wilkinson, the "constitutional status of tribalism" depends upon a "measured separatism" between the Indian nations and the United States.\textsuperscript{59}

Tribalism can be considered the essence of Native American political existence. Indian nations hold to collective values and structures, continuing to exist as separate societies with functioning governmental systems. The cultural worldviews that structure tribal societies often place an emphasis upon understanding the appropriate relationships between individuals, nations, and between human beings and other aspects of the natural world.\textsuperscript{60} Native cultures often resist notions of hierarchy and authoritarian control, and emphasize notions of mutuality, reciprocity, and balance.\textsuperscript{61} The place of the individual within tribal society may look quite different than the place of the individual within the larger "civil society." Notions of rights

\textsuperscript{55} For a popular critique of the "politics of difference" see Shelby Steele, \textit{The New Sovereignty: Grievance Groups Have Become Nations unto Themselves}, HARPER'S MAG., July 1992, at 47.

\textsuperscript{56} Perry, supra note 54, at 553.

\textsuperscript{57} On this general point, James Tully offers an excellent account of how constitutionalism might be restructured to recognize the demands of various groups for recognition. \textit{JAMES TULLY, STRANGE MULTIPLECTY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY} (1995).

\textsuperscript{58} See WLKINSON, supra note 2, at 6.

\textsuperscript{59} Id.

\textsuperscript{60} For a commentary on the cultural content of tribal sovereignty, see Wallace Coffey & Rebecca Tsoosie, \textit{Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations}, 12 STAN. L. & POLY REV. 191 (2001).

\textsuperscript{61} See, e.g., Rebecca Tsoosie, \textit{Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge}, 21 VT. L. REV. 225 (1996) (discussing the implications of these norms on tribal environmental decision-making).
and responsibilities, after all, are culturally constructed. Importantly, the commitment to tribalism encompasses a concept of rights, though not necessarily one centered around the individual. Under many Native American concepts of tribalism, for example, the individual does not "exist isolated from others in some mythic, disorganized state of nature" which would justify a concept of rights as limitations upon governmental power over the individual. Instead, as Professor Robert Clinton observes, in societies organized around a "closely linked and integrated network of family, kinship, social and political relations," these relationships define "one's personal identity and one's rights and responsibilities exist only within the framework of such familial, social and tribal networks."  

This "internal" construction of Native sovereignty, as a system of rights, duties, and responsibilities within familial, social, and tribal networks would most likely be unremarkable for the enterprise of civil society if one could limit individuals' interactions as "tribal members" to a "private sphere" and demand adherence to a universal conception of "citizenship" in the "public sphere." Although this type of configuration might work for certain ethnic groups, it is not a realistic structure for indigenous peoples.

Indigenous peoples' claims stem from their unique historical and legal status as sovereign governments with territorial boundaries, who were colonized by European powers and subjected to political and cultural domination. The history of relations between Native people and European powers is unlike that of any other two groups, and poses a unique challenge for multiculturalism. Michael Walzer characterizes indigenous peoples' status as "somewhere between a captive nation and a national, ethnic, or religious minority." He claims that "[s]omething more than equal citizenship is due them, some degree of collective self-rule, but exactly what this might mean in practice will depend on the residual strength of their own institutions and on the character of their engagement in the common life of the larger society."  

Walzer acknowledges that there are "many conceivable arrangements between dominance and detribalization and between dominance and separation—and there are moral and political reasons for  

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63 Id.
64 Id.
65 It is beyond the scope of this essay, for example, to discuss claims by groups who voluntarily immigrated to the United States (e.g., Italian-Americans), but seek to preserve their identity as distinct cultural groups.
67 Id.
choosing different arrangements in different circumstances. Under Walzer's view, tribalism spans a continuum between "separatism" as distinct governments and full incorporation as "citizens" ("detribalization"). Importantly, full assimilation as citizens within civil society represents the destruction of the tribe as a separate political entity. Walzer finds that to the extent that the ethnic group is perceived to accept the authority of the "neutral state" and share its "characterless citizenship," the group's individual identity becomes subordinated to the common enterprise in a way that obviates any need to recognize its separate status.

Walzer's theoretical appraisal is well supported by history. In the late 19th century, Congress pursued a policy of extending citizenship to Indians selectively through treaties and statutes. Such provisions generally conditioned citizenship upon the Indians' willingness to renounce their tribal culture and traditions and to conform their behavior to the dominant society's norms. Moreover, as descendants of the historic Mashpee Tribe discovered, assimilation within non-Indian institutions and society over time risks a legal finding of "detribalization" and concomitant lack of a separate cultural or political identity. In the Mashpee case, a federal court decided whether the Mashpee existed as an "Indian tribe" at various relevant periods in history, as well as the modern era, for purposes of their claim to lands taken by the state of Massachusetts in violation of the Trade and Intercourse Acts. A jury of non-Indian citizens decided the question of Mashpee tribal status under a four part test, which asks: (1) whether the Indians are of the same or a similar race; (2) whether they are united in a community; (3) whether they are directed by one leadership system or government; and (4) whether they inhabit a particular territory. In the minds of the non-Indian jurors, the Mashpee did not comprise a distinct "Indian community" because of their apparent racial and cultural assimilation within the local white and African-American communities, nor did they appear to possess the continuity of political leadership and distinct institutional structures that would support a finding of separate political identity. In other words, by becoming "detribalized," the Mashpee lost their distinctive political identity as well as any legal claim that they might have once possessed to their ancestral lands.

67 Id. at 166.
69 Id.
71 The test is drawn from Montoya v. United States, 180 U.S. 261, 266 (1901).
The Mashpee case represents a situation where the Indian nation lost its political status as a separate "tribe" and consequently lost its land claims case. Under the United States Supreme Court's jurisprudence, a tribe can also lose its governmental authority if the tribe's lands are perceived to have lost their "Indian character," either because significant numbers of non-Indians reside on the land, or because the lands have become industrialized or developed in a way that appears inconsistent with the "traditional" uses of the land. In both cases, courts interpret the tribes' loss of complete separation as resulting in a loss of tribal identity or political autonomy.

Thus, "separatism" appears necessary for tribal survival. The question, therefore, becomes how to adjudicate between dominance and separation. The most problematic aspect of this debate centers around the external features of tribalism—that is, how tribes should relate to the larger nation-state, and how tribal members might adjudicate their claims both as tribal and national citizens. Although much could be written about the external features of tribalism, this essay will focus on one overarching claim that has been made by a wide variety of indigenous groups: the claim for recognition of a political right to self-determination.

B. Indigenous Peoples' Claims to Self-Determination

The international movement among indigenous peoples to establish their rights has focused on human rights principles. In particular, indigenous peoples seek international recognition of their status as "peoples" with a right of self-determination. As outlined by S. James Anaya, "self-determination is identified as a universe of human rights precepts concerned broadly with peoples... and grounded in the idea that all are equally entitled to control their own destinies." The principle of self-determination is encompassed within Article 1 of the International Covenant on Civil and Political Rights, which provides that "[a]ll peoples have the right of self-determination. By

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72 See, e.g., Hagen v. Utah, 510 U.S. 399 (1994) (applying the test to determine that the Uintah reservation had been diminished); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (finding that the tribe had lost its authority to zone lands within the reservation which had a substantial percentage of non-Indian ownership and were used for commercial and industrial purposes rather than traditional tribal uses such as hunting and gathering); Solem v. Bartlett, 465 U.S. 463 (1984) (holding that a reservation may become "diminished" to the point where the tribe loses governmental authority over the lands if the area has lost its "Indian character"). These cases are discussed in detail in the next Part of this article.

73 For a full account of this movement, see ANAYA, supra note 30, at 39-58.
74 Id. at 75.
virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.\(^75\)

The ideals of group autonomy and self-definition represented by the principle of self-determination appeal to indigenous peoples, who, in many cases, have labored under colonial domination for several centuries. However, the nation-states have hesitated to recognize indigenous groups as "peoples" for purposes of Article 1 of the International Covenant, fearing that this might cause political destabilization and trigger movements toward secession. Instead, indigenous peoples have been treated as holders of "minority rights" under Article 27 of the Covenant. Article 27 guarantees ethnic minorities the right "in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."\(^76\) Article 27 guarantees cultural rights, while Article 1 focuses on political rights. The goal of tribalism is to affirm both sets of rights vis-à-vis the larger nation-states.

The principle of group self-determination is also appealing to indigenous peoples because it responds to their notions of collective identity. In that sense, the concept of self-determination appears to bridge the gap between the individualistic focus of liberalism and the group focus of tribalism.\(^77\) As Professor Anaya observes, the principle of self-determination, as it is linked to "peoples" focuses on human beings not only as autonomous individuals, but as social actors operating in communities and embedded in complex interrelationships with others.\(^78\) In that sense, self-determination also responds to a central theme of republicanism, which is the realization that individuals, as political actors (e.g., citizens), operate within communities to achieve common goals. Interestingly, the reticence of nations to recognize indigenous groups as "peoples" parallels the arguments against "interest group liberalism" as a means of adjudicating group claims within civil society. Opponents of indigenous self-determination argue that recognition of such a right will destroy the collective enterprise of the nation-state, and will trigger attempts at secession, partition and "ethnic cleansing."\(^79\)


\(^77\) I recognize that more work needs to be done to illuminate the concept of self-determination as it applies to individuals and to groups under liberal theory and probe the possible disjunctions, but I reserve that project for another day.

\(^78\) ANAYA, supra note 30, at 77.

The Draft United Nations Declaration on the Rights of Indigenous Peoples seeks to explicate a right of self-determination for indigenous peoples, and this document has been instrumental in furthering the discussion as to whether and to what extent the principle of self-determination should apply to indigenous peoples. Without getting into that complex debate, I acknowledge the possibility that—in line with Walzer’s appraisal of tribalism—the unique position of indigenous peoples may justify an alternative interpretation of self-determination. For example, some commentators suggest that the practical objectives of indigenous groups will be best met by having their right to “internal autonomy” (e.g., self-government) protected, rather than encouraging them to form independent states in the “external” manifestation of self-determination. Others disagree, asserting that such an interpretation perpetuates “the distinction between the rights of indigenous peoples and the rights of other peoples—a distinction which indigenous leaders have long condemned as racist.”

The differences among indigenous peoples, with respect to their historical, legal and cultural status, make it difficult to construct a uniform principle applicable to each and every indigenous group, and so the debate over indigenous self-determination continues, primarily in the context of the Draft Declaration.

Notably, the concept of indigenous self-determination is inclusive of political claims, land claims, and claims for cultural survival. Due to the importance of land and resources for Native peoples, an indigenous right to self-determination represents a political argument for sovereignty and self-governance, a normative argument for indigenous control of land and resources, and a cultural argument for the right to perpetuate Native customs and institutions, even where these diverge from those of the larger nation-state. For indigenous peoples, the battles for land and territory have cultural and political

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80 Article 3 of the Draft Declaration, for example, provides that “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” ANAYA, supra note 30, at 209.

81 See Russell L. Barsh, Indigenous Peoples in the 1990s: From Object to Subject of International Law, 7 HARV. HUM. RTS. J. 33, 36 n.11 (1994) (noting that this is the approach endorsed by the International Labour Organization’s Indigenous and Tribal Peoples Convention, No. 169, which “ensures indigenous peoples’ control over their legal status, institutions, lands, and development, but stops short of recognizing the right to secede”).

82 Id.

83 One important difference, for example, is that in some countries (e.g., the United States and Canada), the nation-state entered treaties with some (though not all) groups of indigenous peoples. This historical fact has given rise to the concept of “treaty federalism” as one way to structure the political relations between the respective groups. See, e.g., Monette, supra note 26.

84 See ANAYA, supra note 30, at 104-07 (discussing the importance of lands and resources to the survival of indigenous cultures and to indigenous self-determination).
dimensions which cannot be captured in isolation from one another. Moreover, international law appears to support an argument for indigenous self-determination based on principles of justice, though exactly what this entails is beyond the scope of this essay.\textsuperscript{85}

Some commentators have suggested that assertions of self-determination by ethnocultural groups "would seem to posit ethnicity over citizenship as the basis of politically significant loyalties."\textsuperscript{86} Under this view, self-determination is incommensurate with citizenship in the larger nation-state. However, I would argue that indigenous peoples' claims for self-determination are different from those of many other groups, and it is possible that tribalism can be harmonized with concepts of rights, duties, and responsibilities which are reflected in liberal theory and American constitutionalism. This may prove to be the case, for example, if the values embodied within self-determination can be understood to establish a foundation for political interactions between indigenous peoples and the nation-states.\textsuperscript{87} In most cases, indigenous groups seek to remain in a political alliance with the nation-state. The primary goal is to establish a basis for this political relationship that does not engage the historical cycle of conquest, oppression, and domination.

Indigenous peoples' claims for self-determination operate at the apex of the global political structure—the international domain which establishes the rights of nations, states and "peoples." The concept of "tribalism" operates at a different level—within the nation-state which orders the operation of civil society. In resolving the tension between tribalism and constitutionalism, then, it is important to examine the Court's struggle to accommodate tribal rights within the jurisprudential structure that governs our general understanding of "rights" within the normative framework of American constitutionalism.

IV. THE CONFLICT BETWEEN TRIBALISM AND CONSTITUTIONALISM IN DOMESTIC LAW: A DOCTRINAL ANALYSIS

The political identity of Indian tribes depends, fundamentally, on their "separateness." The key to a judicial finding of "detribalization" is generally "assimilation"—cultural and/or political—with the sur-
rounding non-Indian population. Thus, tribalism rests on the perceived “difference” of Indian nations from the surrounding states. Unfortunately, “difference” also carries a normative connotation, which inspires distrust of tribal governments among policy makers and non-Indian citizens. Professor Robert Williams, for example, has linked the political discourse of the Removal Era with that of contemporary policy makers who have revived “an uncompromising and racist legal discourse of opposition to tribal sovereignty” to seek the virtual elimination of tribalism from the United States.\textsuperscript{88}

This rhetoric is also present in many contemporary cases dealing with reservation diminishment and tribal jurisdiction over non-Indians. In this respect, it is important to consider a major argument against tribalism: that tribalism contravenes fundamental liberal norms of political organization necessary for the flourishing of a constitutional democracy. Under this view, a political structure that recognizes a group’s separate political identity conflicts with central organizational ideals of constitutionalism, which affirm citizens’ individual identities. The notion of group or collective rights, in particular, appears inconsistent with constitutional norms of liberty and individual freedom.\textsuperscript{89} This Part of the article will first examine the normative implications of “tribalism” and “separatism” within American jurisprudence, which underlie efforts to curtail tribal jurisdiction over nonmembers, and then evaluate the federal courts’ attempts to accommodate pluralism and cultural rights in several categories of cases.

\textbf{A. The Normative Implications of “Tribalism” and “Separatism” Within American Jurisprudence}

Due to the allotment policy of the late 19th and early 20th centuries, many reservations today are comprised of mixed land ownership: tribal trust land, trust allotments held by individual tribal members, and non-Indian owned fee land.\textsuperscript{90} This lack of territorial integrity,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{88} Williams, \textit{supra} note 24.
\item \textsuperscript{89} On a related point, see TESÓN, \textit{supra} note 85, at 128 (noting the hesitancy of liberal theory to recognize “assertions of rights held by collective entities because it is unclear what function they perform in normative political theory,” and specifically because “it is unclear whether or not group rights can coexist with individual rights”). Professor Tesón argues for a liberal theory of self-determination premised on principles of justice and individual human rights.
\item \textsuperscript{90} For a general discussion of the allotment policy, see VINE DELORIA, JR. & CLIFFORD M. LYTLE, \textit{AMERICAN INDIANS, AMERICAN JUSTICE} 8-10, 14 (1983). As Professors Deloria and Lytle note, under the allotment policy, Indian landholdings were reduced from 138 million acres in 1887 to 52 million in 1934 when the Indian Reorganization Act was passed, ending the allotment policy. \textit{Id.} at 8. Indian nations continue to struggle with the difficult legacy of this policy, including fractionated heirships and a “checkerboard” pattern of fee and trust allotments, which complicate efficient land use and cause jurisdictional problems.
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however, does not seem to be the driving force for the Supreme Court's opinions dealing with diminishment of reservation boundaries and lack of tribal jurisdiction. Rather, the fundamental problem appears to be the Court's discomfort with tribal governments exercising authority over non-Indian citizens.

In 1987, Professor Charles Wilkinson identified one of the most perplexing questions arising from the "constitutional status of tribalism": even though the separate landbase of Indian nations is guaranteed to them by law, "how can the United States, consistent with its democratic ideals, allow . . . Indian tribes to govern the non-Indians who have lawfully entered those lands to live and to do business over the course of ensuing generations?" Professor Wilkinson observed that many of the "most perplexing problems in Indian law involve the rights of non-Indians, especially residents in Indian country." Non-Indian residents raise a variety of objections to tribal jurisdiction, often claiming that they are the victims of unfairness because they cannot participate in the tribe's political governance and that they never consented to such governance merely by accepting homestead rights under the federal government's public land policies. The fact that tribal court decisions are not generally subject to federal review adds another layer of opposition related to the claim that non-Indians who are discriminated against have no recourse in outside courts. Moreover, many claimants may face the bar of tribal sovereign immunity to lawsuits against the tribe.

These objections have inspired both legislative and judicial attention. For example, former Washington State Senator Slade Gorton was persistent in his efforts to curtail tribal jurisdiction over non-Indians and permit claimants to sue tribal governments in federal court. The federal courts have partially accomplished these goals by more liberal constructions of congressional intent in diminishing "Indian Country" and by increasingly narrowing the scope of what is perceived to be an attribute of "inherent" tribal sovereignty. Indeed, Professor Wilkinson's 1987 observation has proved prophetic: "If non-Indians have no recourse against tribal governments, then inevitably in close cases judges will be tempted simply to eliminate the potential unfairness to non-Indians by holding that tribal jurisdiction

91 WILKINSON, supra note 2, at 6.
92 Id. at 111.
93 Id.
95 As autonomous governments, Indian nations possess "sovereign immunity," which means that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." See Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 753 (1998).
does not exist in the first place." The truth of this statement is apparent in cases dealing with diminishment of "Indian Country," as well as attempts to establish "implied" jurisdictional limitations on the authority of Indian nations to regulate non-Indians.

1. Diminishment of Indian Country

One means to curtail tribal jurisdiction is to find that "Indian Country" no longer exists; in other words, that the reservation has been diminished or disestablished. Although theoretically only Congress has the power to disestablish a reservation, the Court has become somewhat activist in inferring such intent from ambiguous circumstances. Perhaps the most problematic test is that of "de facto diminishment." In *Solem v. Bartlett*, the Court found that "who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation."98 Citing the factual context of earlier cases, the Court found that "[w]here non-Indian settlers flooded into the open portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred."99

The *de facto* diminishment test is reminiscent of Justice McLean's reasoning in *Worcester* supporting the end of tribalism through the loss of "Indian character" and the eventuality of state jurisdiction. The *de facto* diminishment test accomplished little in the hands of Supreme Court Justices like Thurgood Marshall, who applied the test in accordance with canons of construction and refused to find diminishment on an ambiguous record of Congressional intent. However, in the hands of Supreme Court Justices like O'Connor, Scalia, and Rehnquist, the test has received a new importance. In *Hagen v. Utah*, the Supreme Court examined possibly the most ambiguous record of Congressional intent to date and found that the Uintah Reservation had been diminished when it was opened for settlement by non-Indians by a 1905 statute.100 While O'Connor purported to apply the same three-part test articulated in *Solem v. Bartlett*, which examined the statutory language, the historical context of the Surplus Land Act, and who actually moved onto the opened land, it became apparent that the Court's primary concern was over the governance of the many non-Indians in the area.

Building on language in *Solem v. Bartlett*, O'Connor found that when an area is predominately populated by non-Indians, a "finding

97 *Wilkinson*, *supra* note 2, at 112.
99 *Id*.
100 510 U.S. 399 (1994).
that the land remains Indian Country seriously burdens the administration of state and local governments.\textsuperscript{101} Here, O'Connor noted, the most current census demonstrated that the area was 85\% non-Indian and the largest city in the area was 93\% non-Indian.\textsuperscript{102} These statistics, combined with the fact that the state had exercised jurisdiction within the area, demonstrated "a practical acknowledgement that the Reservation was diminished" and led the Court to claim that "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."\textsuperscript{103} Similarly, in \textit{South Dakota v. Yankton Sioux Tribe}, the Court employed a broad reading of the diminishment doctrine to find that the Yankton Sioux Tribe could not exercise environmental regulatory jurisdiction over reservation lands alienated from tribal ownership because those lands are no longer "Indian Country."\textsuperscript{104} Although the Court's decision was based on a technical construction of historical documentation, it had a very real effect on the tribal community. The Court's decision removed the existing federal-tribal regulatory oversight and authorized the state of South Dakota to apply its more lenient regulations to a landfill that posed a risk to adjacent tribal residents. The diminishment question is an ongoing issue for tribes whose reservations were heavily allotted, particularly where a substantial percentage of the allotments has passed into non-Indian ownership. Thus, the Court's current direction in diminishment cases appears directly in line with Justice McLean's view of the temporary nature of tribalism.

2. \textit{The Diminished Sovereignty Analysis}

A second means to limit tribal jurisdiction is to find that the tribe lacks the inherent sovereign power to exercise such jurisdiction and that the federal government has not delegated to the tribe any authority to exercise such jurisdiction. The effort to judicially reconceptualize inherent tribal sovereignty, of course, is rooted in the Court's 1978 opinion in \textit{Oliphant v. Suquamish Tribe}.\textsuperscript{105} In that case, the Court acknowledged that Indian tribes retain elements of "quasi-sovereign" authority, yet found that the tribes are "prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'"\textsuperscript{106} The Court in \textit{Oliphant} held that the "overriding sover-
eignty” of the United States implicitly barred the Indian nations from criminally prosecuting non-Indians who commit misdemeanors against Indians on the reservation.\footnote{Id. at 208-09.} Importantly, the decision was premised on the belief that the exercise of such jurisdiction would pose an “unwarranted intrusion” on the personal liberty of non-Indian citizens.\footnote{Id. at 210.} Analogizing to the 1883 case of \textit{Ex parte Crow Dog},\footnote{109 U.S. 556 (1883).} which upheld exclusive tribal jurisdiction over an intra-Indian crime, Rehnquist wrote that it would be unfair to subject non-Indians to a criminal system founded upon an alien system of tribal custom and procedure.\footnote{\textit{Oliphant}, 435 U.S. at 210-11.}

As Professor Wilkinson notes, it is likely that the holding in \textit{Oliphant} was based on “Congress’s perceived concern with the civil liberties of United States citizens, and, one can surmise, on the Justices’ own visceral reaction to the issue.”\footnote{\textsc{Wilkinson}, supra note 2, at 43.} This same solicitude for non-Indian rights appears to be the basis of the Court’s subsequent decision in \textit{Montana v. United States}, which held that the Crow Tribe could not exercise hunting and fishing jurisdiction over non-Indians on fee land within the reservation.\footnote{450 U.S. 544 (1981).} In this case, the Crow Tribe had passed a regulation that prohibited nonmembers from hunting or fishing within the reservation.

The Supreme Court found that regulation of hunting and fishing by nonmembers on land not owned by the tribe “bears no clear relationship to tribal self-government or internal relations” and is therefore outside the scope of inherent tribal sovereignty.\footnote{Id. at 564.} The Court appeared to favor the rights of nonmembers to engage in recreational activities over the rights of tribes to govern, which may seem preposterous and inconsistent with the reasoning in \textit{Oliphant}, which was premised upon protection of non-Indians’ fundamental liberty interests. Yet to the extent that the \textit{Montana} Court’s decision is bolstered by arguments of discriminatory tribal regulation of nonmember residents, the need to maximize nonmembers’ enjoyment of property rights, and the need to validate nonmembers’ expectation interests in being governed by the state, rather than the tribe, the \textit{Montana} decision is completely consistent with \textit{Oliphant}’s position against inherent tribal sovereignty.

The \textit{Montana} decision has been supported by subsequent case law. For example, in \textit{Brendale v. Confederated Tribes and Bands of Yakima Indian Nation}, a badly split Court held that the tribe had been divested
of zoning authority over nonmember fee land in the “open” portion of the reservation, but retained such authority in the “closed” portion of the reservation. Justice Stevens’ plurality opinion found that the tribe could maintain residual authority to zone nonmember fee land only in the “closed” portion of the reservation because the tribe had in effect reserved an “equitable servitude” over the land in the closed area to preserve its “Indian Character.” Significantly, population demographics again played an important role. The land in the “closed area” was overwhelmingly tribal in ownership, and furthermore, was quite pristine and used for traditional purposes. Almost half of the land in the “open” area, by comparison, was in fee ownership, and had a strong non-Indian presence and commercial character. The Brendale opinion is another instance of Justice McLean’s argument finding termination of tribal authority by “assimilation” and loss of tribal presence. Moreover, Stevens’ separate opinion in Brendale, which distinguishes Montana as a case involving a “discriminatory” tribal regulation indicates the importance of nonmembers’ civil rights, as well as their property rights, to the non-Indian justices who decide these cases.

The Court’s opinion in Strate v. A-1 Contractors continued the conception of tribal sovereignty as one essentially limited to tribal members. In the Strate case, a unanimous Court ruled that the Fort Berthold tribe did not retain inherent authority to exercise adjudicatory jurisdiction over a tort lawsuit between non-Indians that arose out of an auto accident on a state right-of-way on the reservation. This was a matter purely for the state or federal courts to address. Applying a much more limited reading of Montana, the Court held that tribes do not retain inherent sovereignty to govern the conduct of nonmembers on the reservation except where there is a clear consensual (e.g., contractual) relationship between the nonmember and the tribe, or where the tribe retains such a strong interest in the matter that exercise of such jurisdiction is necessary to tribal self-government and exercise of state jurisdiction would “trench unduly on tribal self-government.” The second part of the Montana test supported tribal jurisdiction over matters that threaten or have a direct effect upon “the political integrity, the economic security, or the health or welfare of the tribe.” Yet, under the Court’s constrained reading of this test, it seems as though in any case where the tribe is merely making an argument for “concurrent” jurisdiction, the “ne-

115 Id. at 433 (Stevens, J., concurring).
117 Id. at 458.
118 Montana, 450 U.S. at 566.
cessity” factor will not be met. For example, in the Strate case, the Court found that the plaintiff could have her claim vindicated in either state or tribal court, and therefore exercise of tribal jurisdiction was not “necessary to protect tribal self-government.” The Court’s assumption that further judicial constraint of tribal self-government does not injure tribal self-government is hard to justify. Thus, had the Court upheld concurrent jurisdiction and left it to plaintiffs to choose either state or tribal jurisdiction, presumably a tribe could not argue that it had been harmed by a plaintiff’s choice to pursue the claim in state court. Yet by using concurrent jurisdiction as proof of lack of any tribal jurisdiction, important tribal governmental interests in regulating traffic safety and enforcing protective laws within the reservation are jeopardized. The tribe becomes dependent upon the state to enforce such interests for the tribe.

Notably, the Court in Strate was careful to issue a very doctrinal and narrow opinion that purports to place the factual situation squarely within Montana as the central authority over what remains of inherent sovereignty. Yet, as Oliphant recognized, only Congress can divest the tribes of sovereignty. There is no discussion in the Strate case of overriding Congressional concerns about personal liberty, discriminatory treatment, property rights, or any other important Constitutional value. The case emerges from a decontextualized judicial vacuum, independent of notions of tribalism, constitutionalism, or the unique relationship of Indian nations to the federal government and the states.

Perhaps a more important inquiry, then, is what was the “subtext” of Strate? What unarticulated judicial values allowed the Court to decide as it did? Based on a reading of the transcript of oral argument in the case, I would suggest that the justices were concerned about two things. First, does tribal tort law approximate state tort law, and if it does not or might not, how could one put a non-Indian motorist on notice that he had now driven into a radically different legal system and could be hauled into a “foreign” court? Second, assuming that a tribal court took jurisdiction of the case, how would the non-Indian defendant be protected from egregious bias, discrimination, and unfair treatment when review by an outside court was not even possible?

119 Strate, 520 U.S. at 459.
121 The reference at oral argument to the alleged egregious conduct in the Burlington Northern case, Burlington Northern Railroad v. Red Wolf, No. 96-35254, 1997 U.S. App. LEXIS 6599 (9th Cir. Jan. 29, 1997), reaffirms my belief that this is an important, but unarticulated, subtext to the Strate opinion. See United States Supreme Court Transcript at *28, Strate v. A-I Contractors, 520 U.S. 438 (1997) (No. 95-1872), available at 1997 U.S. TRANS LEXIS 12 (quoting Pat-
The Court's most recent opinions in *Nevada v. Hicks*\(^{122}\) and *Atkinson Trading Co. v. Shirley*\(^{123}\) continue this line of reasoning, and appear to be premised on a similar set of concerns. In *Atkinson*, the Court held that the Navajo Nation may not impose a hotel occupancy tax on guests of a hotel located on fee lands within the Navajo Reservation. Drawing on *Montana*, the Court found that tribes generally lack civil authority over nonmembers on reservation fee lands, and that this general rule is likewise applicable in tax cases, even though the Navajo Nation extended certain governmental services to benefit the hotel and its guests. In the *Hicks* case, the Court held that the Fallon Tribal Court lacked jurisdiction to adjudicate a state official's alleged tortious conduct in executing a search warrant on a trust allotment within the reservation for an alleged off-reservation crime. Furthermore, the Court found that the tribal court lacked jurisdiction to adjudicate the case as a federal civil rights claim under section 1983. Significantly, the Court reasoned that the consequences of recognizing such jurisdiction would be intolerable because defendants in tribal court would "lack the right available to state-court [section] 1983 defendants to seek a federal forum."\(^{124}\) Finally, the Court held that such actions were to be litigated in state or federal court, and that the state officials were not required to exhaust their remedies in tribal court because this would "serve no purpose other than delay."\(^{125}\)

Justice Souter's separate concurring opinion specifically details a list of concerns about the potential unfairness of tribal jurisdiction over non-Indians, including the assertion that nonmembers have an expectation interest in knowing where tribal jurisdiction begins and ends, that Indian nations are not limited by the Bill of Rights and the Fourteenth Amendment and that the ICRA does not provide "identical guarantees" to the Bill of Rights, and that nonmember citizens must be "protected . . . from unwarranted intrusions on their personal liberty."\(^{126}\) In addition, Souter expressed concern that tribal law may be unwritten and based on custom and tradition, and thus an outsider would not be familiar with these norms.\(^{127}\) Nor would the litigant have access to an effective review mechanism to gauge the fairness of the decision, given that tribal court decisions are not subject to federal review.\(^{128}\)

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\(^{122}\) 533 U.S. 353 (2001).


\(^{124}\) *Hicks*, 533 U.S. at 368.

\(^{125}\) *Id.* at 369 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997)).

\(^{126}\) *Id.* at 384 (quoting *Oliphant*, 435 U.S. at 210).

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 385.
The *Hicks* opinion demonstrates the Court's unwillingness to accommodate pluralism by recognizing the legitimacy of tribal courts as a forum for disputes between tribal members and non-Indians. This article will next examine several categories of cases dealing with issues regarding the accommodation of pluralism and cultural rights. These cases demonstrate the discomfort of the courts in acknowledging group rights that stem from the unique status of Indian nations because of their belief that such rights may conflict with individual civil rights or may violate important constitutional norms of American society.

B. The Accommodation of Pluralism and Cultural Rights

Professor Wilkinson suggests that the federal courts should promote tribal governmental autonomy as part of their duty to fulfill their traditional obligation of protecting minority rights. Under this theory, limited federal judicial review and Congressional authority over tribes may enable the Court to fulfill this obligation while still respecting the rights of nonmembers subject to tribal authority. Wilkinson's proposal, however, may not adequately respond to tribal interests in establishing some normative constraint on the federal legislative or judicial power to limit tribal sovereignty. Thus, to the extent that the Congress itself perceives tribal interests, values or legal principles as contrary to powerful norms of a constitutional democracy, there will be significant political pressure to curtail tribal rights. Similarly, even where Congress has not formally bowed to such political pressure, the Court may infer such "intent" from basic principles of constitutionalism, as it did in the *Oliphant* case.

The discomfort of the federal courts with the normative basis of tribalism is apparent in a range of cases trying to reach an accommodation between pluralism and cultural rights. I will discuss several categories of such cases, which raise both issues of "equality" of citizenship and the justice of "special" group rights, and the perceived conflict between group rights and individual rights.

1. Domestic Relations

Domestic relations has been an area in which Native American rights have had to be addressed by special legislation. In response to statistics indicating that over twenty-five percent of Indian children had been removed from their families and placed with non-Indian families, Congress enacted the Indian Child Welfare Act in 1978.\(^\text{129}\)\(^\text{130}\)

\(^{129}\) WILKINSON, *supra* note 2, at 118.

The ICWA was designed to promote the best interests of Indian children and to protect the cultural heritage of Indian nations from destruction through the removal of children from Indian tribes.

Although the ICWA has been criticized as a statute that favors tribal control over parental control of Indian children, and one that may not necessarily meet the "best interests" of the child, the Supreme Court upheld the statute against these arguments in the 1989 case of Mississippi Band of Choctaw Indians v. Holyfield.131 In the Holyfield case, the Indian parents had intentionally left the reservation to deliver their twin children and had then placed them for adoption with a non-Indian family. The Supreme Court upheld the tribe's attempt to vacate the adoption, holding that the domicile of the children followed that of the parents, and because both parents were domiciled on the reservation, the tribal court had exclusive jurisdiction over the placement of the children. The three dissenting justices argued that the majority's opinion frustrated the clear intention of the children's parents and would set aside an adoption, valid under state law, that had resulted in the children residing with the Holyfields for three years.132 The dissenting justices believed that Indian parents should be able to defeat tribal jurisdiction without going to the expense and trouble of establishing a domicile off the reservation.133

The ICWA inspires debate in part because it appears to subordinate the individual parents' rights and interests to tribal interests.134 Some would also argue that the ICWA violates constitutional principles of equal protection by treating Indian children differently from non-Indian children. While both systems would advocate the course of action that is in the "best interests" of the child, the ICWA contains several statutory constraints that guide application of this test. For example, under the ICWA, the standard of proof for parental unfitness is "proof beyond a reasonable doubt," rather than "clear and convincing evidence." Moreover, the ICWA contains a distinct order of preference for child placement for foster care and adoption that favors placement with Indian families, particularly tribal members.135

The ICWA supports tribalism, and the judicial and scholarly critiques of the ICWA illustrate the tensions between tribalism and constitutionalism. The tribe's rights under the ICWA are collective

132 Id. at 54 (Stevens, J., dissenting).
133 Id. at 64 (Stevens, J., dissenting).
135 See 25 U.S.C. § 1915 (2000) (noting that the order of preference in adoptive placements goes to (1) members of the child's extended family, (2) other members of the tribe, and then (3) other Indian families).
“group rights” that sometimes trump individual rights, such as the right of an Indian parent domiciled on the reservation to subvert exclusive tribal jurisdiction. One of the most extensive constitutional critiques of the ICWA emerged in a California appellate court case, In re Bridget R. This case involved an Indian father and non-Indian mother domiciled off the reservation who voluntarily gave their child up for adoption to a non-Indian couple. The father had been counseled to conceal his Indian identity to facilitate the adoption, and therefore several statutory requirements of the ICWA were ignored, presumably invalidating the parental consent. At the request of the paternal grandmother, the tribe intervened to set aside the father’s relinquishment of parental rights.

The appellate court in the Bridget R. case found that under the Fifth, Tenth, and Fourteenth Amendments to the Constitution, the ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on the reservation, unless the child’s biological parent or parents are not only of American Indian descent but also maintain a significant social, cultural, or political relationship with their tribe. In other words, Indian parents who “assimilate” into the dominant culture forfeit the protection of “tribalism” in defining special rights for placement of their children.

The court’s decision was built upon a judicially-created exception to ICWA, the “existing Indian family doctrine,” which holds that ICWA is not applicable where the child is not being removed from an “existing Indian family” because in such a case, the statute’s purposes are not triggered. The court in the Bridget R. case, however, moved beyond this exception into an expanded constitutional critique of the ICWA, finding that the ICWA poses Due Process, Equal Protection, and Tenth Amendment problems to the extent that it is applied to persons who have given up their social and cultural status as “tribal” Indians.

The analysis used by the court in the Bridget R. case is reminiscent of Justice McLean’s argument for termination of “tribalism” by assimilation. Moreover, the court suggests that “detribalization” is an appropriate matter for a state court to adjudicate, and, bolstered by constitutional principle, serves as a limitation on federal power. Thus, the court argues that even enrolled tribal members are not “Indians”

137 Id. at 516.
138 See, e.g., In re Adoption of Crews, 825 P.2d 305 (Wash. 1992) (concerning the adoption of a child whose mother was not fully aware of her Indian heritage); In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) (holding that a boy who was less than half Indian and born to a non-Indian mother was not being taken from an Indian family).
139 49 Cal. Rptr. at 522-29.
for purposes of the ICWA to the extent that they have become "detri-
balized" and that Congress may not constitutionally treat them this
way.

2. Religious Freedom

Religious freedom is another area where Congress has had to en-
act special legislation to protect tribal rights. Thus, the American In-
dian Religious Freedom Act of 1978 specifies that it is "the policy of
the United States to protect and preserve for American Indians their
inherent right of freedom to believe, express, and exercise" their tra-
ditional religions. 140 Although this language suggests that Native re-
ligions should receive statutory as well as constitutional protection,
the Supreme Court has failed to accept this interpretation. Rather,
the Court has refused to protect Native religious practices such as pe-
yote rituals and access to sacred sites under the First Amendment,
and has also found that the AIRFA does not offer any legally enforce-
able protection for Native religious practices. 141 For example, in Lyng
v. Northwest Indian Cemetery Protective Association, the Supreme Court
found that the Free Exercise Clause did not prohibit the U.S. Forest
Service from constructing a road through a federally-owned wilderness
area that had traditionally been used for religious purposes by several
indigenous groups. 142 Despite a finding that the road con-
struction would virtually destroy the ability of the Indian people to
practice their religion, Justice O'Connor held that the First Amend-
ment must "apply to all citizens alike, and it can give none of them a
veto over public programs that do not prohibit the free exercise of
religion." 143 By treating the government's road project as a com-
pletely neutral administrative decision regarding use of federally-
owned land, the Court was able to circumvent use of the compelling
interest test altogether. Thus, as the dissenting justices noted, the
Court essentially held that "federal land-use decisions that render the
practice of a given religion impossible do not burden that religion in
a manner cognizable under the Free Exercise Clause." 144

The Lyng case supports a broad degree of autonomy on the part
of the federal government to act for the common interests of citizens,
even to the extent that this offends the spiritual beliefs of some citi-
zens. Justice O'Connor wrote that the "Constitution does not... of-

("Nowhere in the [AIRFA] is there so much as a hint of any intent to create a cause of action or
any judicially enforceable individual rights.").
143 Id. at 452.
144 Id. at 459 (Brennan, J., dissenting).
fer to reconcile the various competing demands on government" that arise from a pluralistic society. To do so in favor of the Indian plaintiffs in this case, she claimed, would be to require "de facto beneficial ownership of some rather spacious tracts of public property." In other words, the Court's position is that majority values and interests take precedence on "public lands" regardless of the competing values and interests of minority cultures. This isn't a constitutional issue, but a governance issue that facilitates decision-making in a pluralistic society.

Despite Justice O'Connor's protests to the contrary, the Lyng decision supported the Court's subsequent opinion in Employment Division, Department of Human Resources of Oregon v. Smith, which held that the Free Exercise Clause does not pose a bar to state prohibitions on sacramental peyote use by Native Americans. Justice Scalia, writing for the majority, declined to apply the compelling interest test to the "government's ability to enforce generally applicable prohibitions of socially harmful conduct" through its criminal laws. Scalia expressed concern that conditioning an individual's obligation to conform to such a law upon "the law's coincidence with his religious beliefs" would permit the individual to "become a law unto himself." Such a result, wrote Scalia, "contradicts both constitutional tradition and common sense."

Scalia's reading of "constitutional tradition" is majoritarian in focus. According to Scalia, any society using a compelling interest test as a means of measuring governmental authority to infringe upon an individual's religious interests would be "courting anarchy." Moreover, he claimed "that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." Although his analysis is framed in terms of liberal tolerance and equality, Scalia acknowledged that the accommodation of religious practices, once taken out of the constitutional interpretation of the courts, could only be addressed through the "political process." Scalia further admitted that this would disadvantage "religious practices that are not widely engaged in," but claimed "that unavoidable consequence of democratic government

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145 Id. at 452.
146 Id. at 453.
148 Id. at 885.
149 Id. (internal citations omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
150 Id.
151 Id. at 888.
152 Id.
153 Id. at 890.
must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."

The view of religious freedom that emerges from Smith and Lyng treats cultural pluralism as a matter of legislative "accommodation," rather than a constitutional requirement. By failing to consider tribal religious interests as analogous to individual free exercise claims, the Supreme Court facilitated the need for special legislation protecting Native American religious practice. Thus, Congress amended the AIRFA in 1994 to provide legal protection for Native Americans using peyote for "bona fide traditional ceremonial purposes." In 1996, President Clinton signed an executive order requiring federal agencies to "accommodate access to and ceremonial use of Indian sacred sites" by Native American practitioners "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions." Finally, the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) prohibits the trade, transport, or sale of Native American human remains and directs federal agencies and federally-funded museums and institutions to identify such remains and specific categories of cultural objects in their possession and repatriate them to the tribes. Currently, the NAGPRA is under attack in a federal district court case in which a group of scientists has challenged the authority of the Secretary of the Interior to return a set of ancient human remains, popularly known as "Kennewick Man," to a set of five tribes who claim this individual as their ancestor. The district court's recent opinion challenges the very foundation of the repatriation statute in its findings that this ancient set of human remains is not "Native American" and therefore, that NAGPRA does not govern the disposition of the remains. The court disregarded

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154 Id.
158 Bonnichsen v. United States Dep’t of the Army, 969 F. Supp. 628 (D. Or. 1997). After the Army Corps of Engineers determined that the remains were affiliated to the claimant tribes and should be returned, the court found that the Army Corps had not followed the requisite procedures and remanded the case for further findings and a factual determination on the affiliation of the remains to the claimant tribes. Id. On January 13, 2000, the Department of the Interior (DOI) announced its final determination that the remains of the "Kennewick Man" are "Native American" within the meaning of NAGPRA. Bonnichsen v. United States Dep’t of the Army, 217 F. Supp. 2d 1116, 1130 (D. Or. 2002). After completing an extensive set of studies, the DOI concluded that the remains were culturally affiliated to the claimant tribes and on September 25, 2000, the DOI issued its final decision awarding the remains to the five tribal claimants. Id. The plaintiffs then filed an amended complaint seeking review of these determinations. Id. at 1131.
159 Bonnichsen, 217 F. Supp. 2d at 1137.
the deference normally given to federal agency decision-making and ordered that the remains be made available to plaintiffs for scientific study. The opinion is being appealed by the DOI and by the claimant tribes. The ultimate resolution of this case will provide a powerful indication of the status of Native peoples in this country and the United States’ commitment to pluralism.

3. Civil Rights

Congress enacted the Indian Civil Rights Act in 1968 as a means to protect, by statute, certain fundamental rights of persons subject to tribal jurisdiction. As extraconstitutional entities, the Indian nations are not bound by Constitutional provisions, such as the Bill of Rights, that limit governmental power over individuals. In Santa Clara Pueblo v. Martinez, the Supreme Court held that there is no federal cause of action to enforce the provisions of the ICRA with the exception of the express remedy of habeas corpus. The Martinez case, which involved the tribe’s power to define its membership criteria in part on the basis of gender, inspired a heated controversy over whether the civil rights of individuals could be adequately protected without federal review, and whether the Court’s refusal to enforce the rights of a female tribal member to equal protection under tribal law constituted an exception to the American norm of nondiscrimination. For the most part, these criticisms were confined to a fairly active scholarly debate. Yet some recent federal decisions suggest a renewed effort on the part of the federal courts to intervene where circumstances indicate that the tribal government engaged in unfair or discriminatory treatment.

For example, in Poodry v. Tonawanda Band of Seneca Indians, the Second Circuit held that a tribe’s order banishing several tribal members from the reservation constituted a “criminal sanction” sufficient to support exercise of federal habeas corpus jurisdiction. According to the Court, the members had demonstrated a sufficiently severe restraint on liberty to establish that they were in “custody.” The dissenting judge criticized the majority’s expansive definition of

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160 Id.
162 See, e.g., Talton v. Mayes, 163 U.S. 376 (1896) (holding that the Fifth Amendment does not apply to limit the powers of the tribes).
164 For a discussion of these critiques and the responses to them, see Rebecca Tsosie, Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall’s Indian Law Jurisprudence, 26 ARIZ. ST. L.J. 495 (1994).
165 85 F.3d 874, 879 (2d Cir. 1996).
166 Id. at 894-98.
the ICRA's habeas clause, particularly in reference to a matter purely between tribal members. Yet it is clear that the majority was most concerned with the tribal members' rights as United States' citizens to be free of unwarranted intrusions upon their personal liberty, even to the extent that the Court's protection for these rights would conflict with the tribe's views on who might appropriately be ordered to leave the tribe.

4. Equal Protection

The area of equal protection jurisprudence is perhaps most problematic for courts trying to reconcile the rights of citizens in a constitutional democracy with the rights of tribes and their members to unique status and legal treatment.

A long history of treaty-making and an entire section of the United States Code are premised on the status of tribal governments as distinct political, rather than merely racial, entities. The Supreme Court has interpreted this special status as justifying the often disparate treatment of Indians from non-Indians. Moreover, the Court has interpreted such a "political" classification as meriting rational basis scrutiny, rather than the strict scrutiny given to racial classifications. The result of these interpretations has been to broadly uphold the federal government's power to implement special laws for tribes and their members against equal protection challenges from disgruntled parties: both Indian and non-Indian. The norm of equal protection still applies to legislation pertaining to Indian tribes, yet the Court must give increased deference to the federal government's unique obligation to protect Indian tribes. Thus, "tribalism" qualifies operation of a fundamental constitutional norm.

Yet, recent cases demonstrate the increasing discomfort of the federal courts with special rights for Native Americans, particularly to


168 See Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (holding that the Bureau of Indian Affairs' employment preference favoring Indians was directed toward Indians as a political group, rather than a racial group, and could be justified under a rational basis test).

169 The norm of equal protection applies to tribal action, as well, after the enactment of the Indian Civil Rights Act. See 25 U.S.C. § 1302(8) (2000) (providing that an Indian tribe may not "deny to any person within its jurisdiction the equal protection of its laws"). Significantly, however, the Supreme Court has ruled that this is an issue for tribal courts to determine, using their own cultural construction of equal protection. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978) (drawing upon the lower court's reasoning that such a determination should be made by the people of Santa Clara, "not only because they can best decide what values are important, but also because they must live with the decision every day") (quoting Martinez v. Romney, 402 F. Supp. 5, 18-19 (D.N.M. 1975)).
the extent that these are perceived to have negative consequences for nonmembers. For example, in *Williams v. Babbitt*, the Ninth Circuit held that an administrative agency’s interpretation of the Reindeer Industry Act as prohibiting reindeer herding by non-natives in Alaska raised grave constitutional problems under the Equal Protection Act. The court therefore interpreted the Act as permitting non-natives in Alaska to own and import reindeer for commercial purposes. To hold otherwise, ruled the court, would be to sanction a government program that benefitted one racial group at the expense of another. The court found that because reindeer are not indigenous to Alaska, there was no compelling interest in protecting cultural survival. The court instead read the preference as a sort of affirmative action program to improve the economic status of the Alaska Natives. Finally, the court queried whether the Supreme Court’s decision in *Adarand Constructors, Inc. v. Pena*, mandating strict scrutiny for any racial classification, whether beneficial or discriminatory, would undermine the political/racial distinction outlined in *Morton v. Mancari*.

The court’s analysis in the *Babbitt* case suggests a movement toward assimilation of Indian rights into the dominant norms of constitutionalism, which favor the political majority. Moreover, the *Babbitt* decision suggests that to the extent that Native activities are not tied to aboriginal customs or traditions, they should not merit special consideration as a means to facilitate tribalism. Nor is the reasoning in *Babbitt* limited to cases in which the court perceives non-Indian rights as being subordinated to Indian rights.

In *Duro v. Reina*, the Supreme Court held that an Indian tribe may not assert criminal jurisdiction over a nonmember Indian. The Court drew upon the analysis in *Oliphant*, yet was forced to acknowledge that the historical context for tribal jurisdiction over Indians differed from that of tribal jurisdiction over non-Indians. Justice Kennedy, writing for the majority, found that the analysis must take into account the petitioner’s current status as a U.S. citizen: “Indians like other citizens are embraced within our Nation’s ‘great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.’” The Court found that criminal trial and punishment constitutes a serious intrusion on the personal liberty of citizens, and that by submitting to the overriding authority of the U.S. government, tribes necessarily surrendered this power over all per-

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170 115 F.3d 657 (9th Cir. 1997).
173 Id. at 692.
sons except their own tribal members. The tribe's authority to criminally regulate its members is "but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members." Although Congress has since amended the Indian Civil Rights Act to confirm the fact that the retained sovereignty of the tribes justifies their exercise of criminal jurisdiction over all Indians, Justice Kennedy's opinion raised some question as to whether there were "constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right.” According to Kennedy, the statutory constraints of the Indian Civil Rights Act are not sufficient to protect the constitutional rights of American citizens.

The Duro case concerns the important intersection in federal Indian law jurisprudence between constitutional guarantees of equal protection and protection of basic civil rights. In Duro, the Court found that the only permissible distinction for purposes of equal protection would be one between tribal members and nonmembers, regardless of other ethnic characteristics. This also coincided with the Court's determination to protect the civil rights and liberties of American citizens, whether "Indian" or "non-Indian." Congress, however, in keeping with its tradition of treating all federally-recognized Indian nations as equally situated with respect to sovereignty and jurisdiction, confirmed the inherent sovereign power of Indian nations to criminally prosecute all Indian defendants. Although some litigants have argued that this statute is in fact a delegation of the federal government's power, rather than a confirmation of inherent tribal sovereignty, the legislation has thus far withstood such challenges.

This article will conclude by examining some of the broader theoretical challenges of pluralism and multiculturalism posed by this evaluation of the doctrinal case law.

174 Id. at 693.
175 Id.
177 Duro, 495 U.S. at 693.
178 Id.
179 The implications of this are important. If Congress delegated federal authority, then concurrent tribal and federal prosecutions would be barred by the double jeopardy doctrine. See Means v. N. Cheyenne Tribal Ct., 154 F.3d 941 (9th Cir. 1998); United States v. Weaselhead, 36 F. Supp. 2d 908 (D. Neb. 1997). In Enas, the Ninth Circuit held that the "Duro-fix" legislation was a confirmation of inherent sovereignty and not a delegation of federal power, and thus, there was no double jeopardy bar to a concurrent tribal/federal prosecution. United States v. Enas, 204 F.3d 915 (9th Cir. 2000). The Supreme Court denied certiorari in the Enas case. United States v. Enas, 534 U.S. 1115 (2002).
V. INDIGENOUS PEOPLES AND CIVIL SOCIETY: THE CHALLENGES OF PLURALISM AND MULTICULTURALISM

Indigenous peoples’ claims for self-determination might suggest an absence of identification with civil society. Although this would almost certainly be true of groups which seek to secede from the nation-state, it is not true of the vast majority of indigenous groups who seek to remain within the nation-state with recognition of their separate political status. In the United States, for example, Indian nations consistently refer to the “trust relationship” that they have with the federal government. They seek to affirm treaty promises of mutual protection, respect, and alliance. Similarly, in Quebec, the Cree people continue to resist Quebec’s effort to secede from Canada and incorporate them into a sovereign Quebec. Significantly, the Cree describe themselves as a “people bound to Canada by a treaty and the land itself,” and cite the right of self-determination in favor of the Crees’ “aspirations and our rights to share equally in the development of our country.”

As these statements demonstrate, many tribal members feel a dual allegiance that coincides, in some measure, with a concept of common citizenship. In the United States, for example, many Native people perceive themselves as members of their Indian nation and also as “Americans.” Images of this dual allegiance appear throughout history. For example, during World War II, the Navajo Code Talkers held strong ties to the Navajo Nation as well as to the United States, and they believed that their participation in the War was a matter of tribal honor as well as national honor. It may seem ironic that less than a century before World War II, Navajos were at war with the United States, while during World War II, Navajo men were some of the strongest patriots of the United States. Yet that is the legacy of the Navajo Nation’s Treaty of 1868, which pledges a relationship of respect, honor, and alliance between the two nations.

The notion of “treaty constitutionalism,” which is illustrated by the Cree and Navajo examples, is at the core of indigenous-European relations in the United States and Canada. And although the idea of simultaneous political communities may seem out of place with the republican ideal of citizens coming together as a unified political community, the American concept of “federalism” speaks to a different reality. Under the American Constitution, the states and the fed-

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181 Id.

182 It should be acknowledged that some Native people refuse to identify themselves as “Americans” and consider the blanket grant of United States citizenship upon American Indians in 1924 to be an illegitimate act.
eral government operate in distinct, although overlapping, spheres of political power. Indeed, American federalism is premised on the notion of a "dual, or divided sovereignty."183 "Legal sovereignty" is vested in the agents of the central government, while "political sovereignty" resides with the people.184 The often tumultuous struggles for political power between the states and the federal government are the result of this divided sovereignty. The separate political status of Indian nations, which is recognized by the Constitution, is consistent with the broader structure of American federalism.185

However, the analogy between states and tribes within the federal system fails with respect to the structural protections for sovereignty. State political existence has structural protection under the American Constitution. Moreover, the states defined the terms of the compact when they entered the Union. Thus, the regional cultural differences among non-Indian citizens have a structural framework for adjudication. The Indian nations, on the other hand, cling to tribalism as the only way to preserve their separate political identity. As the Mashpee case demonstrates, to the extent that they give up the social, political, or cultural aspects of tribalism, Native people risk a determination of "detribalization" and concomitant loss of all special rights.

Importantly, Indian nations represent distinct political and cultural groups. If the effort of civic republicanism is to provide a uniform "civil culture" for all citizens, this is likely to pose an obstacle for Native American participation in civil society. Such an effort would invoke the assimilationist rhetoric of "detribalization" and jeopardize the separate political status of Native peoples. In fact, the Supreme Court has already taken a step in this direction with respect to Native Hawaiian peoples. In its decision in Rice v. Cayetano, the Supreme Court struck down a Native Hawaiian voting preference for trustees in the Office of Hawaiian Affairs, finding that this was an illegitimate "racial" classification and was not a "political" classification.186 In making its decision, the Court emphasized that Native Hawaiians, like the Asian and European immigrants to Hawaii, are now all "American citizens" and the United States Constitution has become "the heritage of all the citizens of Hawaii."

Can tribal cultural and political identity be reconciled within the larger unitary construction of civil society and common citizenship? .

183 WILKINSON, supra note 2, at 54.
184 Id.
185 The Commerce Clause of the American Constitution, for example, recognizes the power of Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8. In setting the tribes apart from both foreign nations and the states, the Constitution recognizes the separate political status of the tribes.
As a starting point, I would suggest that we overcome the assumption that our political structure is enriched and strengthened by a federation of distinct groups, but that our civil structure will be harmed by the presence of separate groups. Of course, many would argue that it is precisely because of the multiplicity of groups in political life that we must construct a common basis for citizens to engage in mutual democratic governance. This appears to be the upshot of John Rawls' work in *Political Liberalism*, for example, which advocates a political conception of liberalism that can transcend individual cultural differences that might prove counterproductive to the enterprise of government in pluralistic societies.

Notably, however, Rawls' construction of political liberalism includes only those groups which possess "reasonable" comprehensive conceptions of the good. In other words, to the extent that a group's cultural beliefs are inconsistent with the "shared" construction of common citizenship which the other members of the society have adopted, it will lose its place in adjudicating the respective rights and position of each citizen within the society. This theory would presumably rule out political participation by Native American governments that are structured as theocracies, such as the Pueblos of the American Southwest.

Rawls' views are compatible with those of several liberal and communitarian theorists, who posit that we should not promote ethnic rights that will impede the final goal of "common citizenship." To the extent that political theory subordinates certain cultural groups to a uniform conception of citizenship which is premised, at least in part, on the belief that certain values should be excluded from the political process, this represents an assimilationist and paternalistic approach to pluralism that jeopardizes the claims of indigenous peoples. Adeno Addis rejects this paternalistic approach in...
favor of a robust notion of pluralism which he terms “critical pluralism.” According to Addis, “critical pluralism is about providing the necessary resources and institutional space for minority groups to articulate a positive identity while opening a dialogic process with other groups.” For native nations, the call of critical pluralism is even more compelling, due to the historical circumstances that have structured their separate political and cultural identity.

Secondly, I think that we must be cautious about our efforts to construct a “unitary” civil identity for groups which possess “dual identities,” because this may in fact preclude adjudication of important claims to address injustice. As Amy Gutmann observes in the context of African-American claims, for example, “[t]he divided sense of identity on the part of African-Americans is not simply a conventional signpost of a separate culture . . . [i]t is . . . a warning signal of social injustice.” Gutmann suggests that a system of political ethics which serves the reality of multiculturalism should be based on “deliberative universalism,” which she distinguishes from “comprehensive universalism.” Comprehensive universalism entails defining a set of substantive principles of justice that apply to all modern cultures. Rawls’ endeavor seems more clearly in line with “comprehensive universalism,” because he deliberately excludes cultural groups which do not possess “reasonable” comprehensive conceptions of the good. In comparison, “deliberative universalism” relies “partly upon a core of universal principles and partly upon publicly accountable deliberation to address fundamental conflicts concerning social justice.” In this respect, Gutmann’s theory is more consistent with Addis’ account of “critical pluralism.” Gutmann asserts that her theory can address even those cases where citizens have “fundamental moral disagreements,” such as the controversy over abortion.

Finally, I would argue that indigenous claims for self-determination should be construed as providing a common basis for

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194 Id. at 193.
195 Id.
196 Id. at 196.
197 Id. at 197. Gutmann, of course, also qualifies her theory as one that applies to “reasonable” disagreement. What is considered “reasonable” may differ depending upon the cultural context, but I will assume, for the sake of argument, that different groups could construct a universal concept that would apply in the majority of cases.
political dialogue between indigenous peoples and national governments. Moreover, it is worth exploring whether something like Gutman’s conception of deliberative universalism can provide a guiding set of political ethics to govern that dialogue. The concept of human rights, for example, which underlies indigenous claims for self-determination has a universalist quality that appeals to nation-states and indigenous peoples alike. Yet it also has a practical purpose in that it offers a structure to accommodate indigenous peoples’ claims for a separate political identity.

Contemporary indigenous groups are pressing for recognition of their separate cultural and political claims within the structure of the nation-state. Therefore, much of the dialogue that is entailed by indigenous claims will occur within the domestic arena. Should we assume that imposition of a universalist ideal of “citizenship” is a necessary prerequisite for this dialogue? I believe it is unlikely that most tribal members would be willing to assume a mantel of “universal citizenship” that, in some context, appears contrary to their fundamental sense of cultural identity. Nor, in good faith, can these groups be excluded from the political process by characterizing their views as “unreasonable.” This is one objection to Rawls’ theory that has been advanced by scholars such as Robert Lipkin, who argue that Rawls’ approach would impose a Western liberal conception of the good on vastly different nations and peoples, thus engaging in a sort of cultural hegemony.¹⁹⁸

Can cultural pluralism be reconciled with the notion of common citizenship that civic republicanism deems essential for the proper flourishing of a civil society? Richard Dagger advocates a conception of “republican liberalism” which he claims can support a rich notion of cultural pluralism.¹⁹⁹ Dagger acknowledges that his theory responds to a conception of the good, and that, in truth, republican liberalism could not be completely “neutral or agnostic with regard to competing conceptions of the good life.”²⁰⁰ However, Dagger’s version of “republican liberalism” hinges on “autonomy and solidarity—two goods, that any defensible version of cultural pluralism or ‘difference’ must also endorse.”²⁰¹ On this theory, there is a common basis for dialogue between members of distinctive cultural groups in a civil society.

There is, of course, active debate as to how much “difference” can be accommodated within liberal republicanism. Iris Marion Young

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¹⁹⁹ See RICHARD DAGGER, CIVIC VIRTUES 175 (Oxford University Press 1997).
²⁰⁰ Id.
²⁰¹ Id. at 176.
suggests that the ideal of the “civic public . . . excludes women and other groups defined as different,” and stresses the role of common citizenship as deliberation and adjudication of the “common good” based on free will and pure reason. Dagger argues that the “politics of difference” likewise rests upon some conception of the “common good,” and claims that his conception of republican liberalism meets Young’s challenge. First, he says, “a proper regard for autonomy . . . demands that we recognize the extent of our interdependence and our obligations to others who themselves have a right of autonomy.” Secondly, Dagger claims that republican liberals will “gladly respect difference” where this helps to “instill a sense of fair play and cooperation in people.” Dagger’s emphasis on autonomy is attractive from the perspective of indigenous peoples’ claims, so long as the group nature of these claims is perceived as consistent with the overall endeavor of civic society.

However, the emphasis on “solidarity” may be more problematic. Many theorists have posited that multiculturalism undermines social solidarity, and that, without “a deep feeling of solidarity, a political society will disintegrate into quarreling factions.” Joseph Raz agrees that “[c]ivic solidarity is essential to the existence of a well-ordered political society,” but he disagrees that “multiculturalism is inconsistent with the existence of a common culture.” Raz discusses how multiculturalism can foster the existence of a common culture founded upon “cultivation of mutual tolerance and respect.”

Raz’s discussion, however, posits the existence of relatively equal cultural groups that interact within the same economic and political environment. Indian nations will to some extent maintain separate political structures and economic systems, which will delineate them from other cultural groups. Indeed, separatism is likely to be a perpetual condition of indigenous peoples’ existence within the larger nation-state, and could be read as inconsistent with an ideal of “solidarity.” If “solidarity” means establishing a common basis for participatory governance by distinctive groups (e.g., in conjunction with an ethic of “mutual tolerance and respect”), this would be consistent with indigenous people’s ideals of self-determination. However, to the extent that “solidarity” implies a totalizing function which subordinates difference to “universal” identity, this would be more problematic.


See DAGGER, supra note 199, at 180.

Id. at 181.


Id.
Dagger also discusses Rawls' work and finds that classical republicanism (which Rawls supports as consistent with political liberalism) is bereft of the virtues necessary for responsive citizenship in the modern era—which involves efforts to justify cultural pluralism within the political order. For Dagger, citizenship should be based on autonomy, solidarity, deliberation and the ability to overcome naked self-interest and shoulder civic burdens for the common good. Citizens must be able to overcome "ties of race, blood, or religion" to engage in that common enterprise. Those ties, of course, are essential components of tribal existence, and are rooted deep within the Indian nations' struggle for cultural and political survival.

If indigenous peoples are to have a place in civil society, it is necessary to avoid imposing a choice between dual identities and citizenships and to promote the resolution of competing claims through a dialogical process founded upon mutual respect, trust, and recognition. The separate political and cultural status of indigenous peoples need not be inconsistent with tribal members' role within civil society. To the contrary, this separate status entails a sense of duties and responsibilities within, as well as between, the different spheres of government which could have productive effects on the broader system of governance. Moreover, if the nation-states ultimately agree to recognize a right of self-determination for indigenous peoples, this may alleviate some of the fears of assimilation and loss of tribal identity which currently inspire an unsatisfactory tension between indigenous peoples' dual citizenship roles.

CONCLUSION

The effort of Indian nations to define their political identity in the modern era corresponds to the international debates over tribalism, sovereignty, decolonization, and democratization. Globally, ethnic groups are mobilizing to define their own identity, and they are challenging the structures and institutions that have become the foundation of the international order. Thus, national efforts to define the place of Indian nations within American federalism are affected by global debates over tribalism and recognition of group identity within pluralistic societies.

\[^{209}\text{See Dagger, supra note 199, at 195-96.}\]
\[^{210}\text{Id. at 195.}\]
\[^{211}\text{On a similar point, Joseph Raz claims that the insecurity of existence within a multicultural society can make cultural groups "more repressive than they would be were they to exist in relative isolation." Raz, supra note 206, at 76. Thus, strengthening the respective position of the group within the larger society might obviate the need for overly restrictive controls on individual members.}\]
In 1987, Professor Wilkinson noted the "progressive" nature of the United States' Indian policy, when held to a global comparison. In 2002, the United States has assumed a position contrary to the position that many nations have taken recently with regard to indigenous rights. In New Zealand, Australia and Canada, the courts have turned to discuss the nature of aboriginal rights under the guidance of international human rights norms. In the United States, the Court has retreated behind the neutral language of constitutionalism to renew the historical attack against tribalism. Indian law jurisprudence in the future will likely be the product of the combined forces of domestic and international policy. At the domestic level, the arguments are likely to be framed according to the tension between tribalism and American constitutionalism. At the international level, the arguments will be influenced by the global debates over tribalism, cultural pluralism, and the "politics of recognition."

Relevant inquiries for the future will include whether the human rights focus of the international indigenous rights movement will facilitate tribal sovereignty or any level of governmental autonomy that transcends the "membership" model of "inherent tribal sovereignty" under United States federal Indian law. Moreover, can international human rights law provide a means to overcome the cultural racism at the core of United States Indian policy, or is contemporary international law also rooted in a view of the "other" as "less" than the dominant nation-states?

Finally, do our notions of "separatism" in Indian law conflict with contemporary movements for multicultural constitutionalism that speak of multiple political groups engaged in a dialogical relationship with one another? Are tribal efforts to retain "sovereignty" consistent or inconsistent with this emerging international order? These are the questions that will frame the debate over the future of Indian nations as political entities within American constitutionalism, and they require careful thought and consideration. With an appropriate commitment to pluralism, it is possible to reconcile the values underlying tribalism and constitutionalism within civil society.