A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered

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Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith.¹

I. INTRODUCTION

As a cure for what ails democracy in a pluralistic modern society, such as ours, Michael Sandel recommends “dispersing” sovereignty to a “multiplicity of [civic republican] communities—some more, some less extensive than nations.”² He intimates that doing this “may entail according greater cultural and political autonomy to subnational communities,” which, in turn might “ease the strife that arises when state sovereignty is an all-or-nothing affair, absolute and indivisible, the only meaningful form of self determination.”³ He sees in federalism not just a “theory of intergovernmental relations,” but a “political vision” that “self-government works best when sovereignty is dispersed and citizenship formed across multiple sites of civic engagement.”⁴ Although Sandel appears not to have had American Indian tribes in mind when he made these comments, his thoughts have interesting implications for tribes, whose members have retained separate cultural and political identities despite concerted efforts to assimilate them into American society.⁵

From first contact, Indian tribes have been in danger of being assimilated into American society, thereby losing their separate political and cultural identity. The only thing preventing this has been the tribes’ unextinguished⁶ claim to sovereignty—“the right [to be both] self-governing, [and] to exercise

³Id. at 345–46.
⁴Id. at 347.
⁵Sandel’s list includes Catalans, Kurds, Scots, and Quebecois. Id. at 345.
⁶By way of comparison, “Canadian law [has] traditionally viewed settlement and the assertion of British sovereignty as extinguishing [Indian tribal] sovereignty.” Patrick Macklem, Distributing Sovereignty: Indian Nations and Equality of Peoples, 45 STAN. L. REV. 1311, 1320 (1993). “While British policy towards the native population was based on respect for their right to occupy their traditional lands . . . there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.” R. v. Sparrow, [1990] S.C.R. 1075, 1103.
TRIBAL SOVEREIGNTY

The federal government’s failure to protect tribes’ unique status and communal identities has seriously eroded the tribes’ land base, and with it, their ability to self-govern. This has left tribes, which have resisted assimilation, outside our society—without the power to resist its intrusions, share in its benefits, or contribute to its evolution.

Federal Indian policy—beset from its beginning by recurring paradoxes, inconsistencies, and conflicting national and tribal objectives—reflects our ambivalence toward the concept of tribal sovereignty. At various times, Supreme Court jurisprudence in the field of Indian law provided some measure of protection for tribal sovereignty against the changing whims of Congressional policy. Yet, in recent years, the Court has seriously eroded even these modest protections.  

As a nation, we have never done the hard work of trying to incorporate the concept of tribes as distinct sovereigns into our federal structure of government. Tribal cultures remain strong in the face of powerfully negative political and jurisprudential forces, and tribes continue to gain influence in political spheres. Yet the current diminished status of tribal sovereignty is taking its toll on the ability of tribes to survive as unique cultural and political communities and is diminishing their contribution to the vitality of our country as a whole. While many Indian law scholars (and Indian activists) advocate reinvigorating tribal sovereignty as a panacea to tribal ailments, a coherent theoretical basis upon which to rebuild the jurisprudence of tribal sovereignty has yet to emerge.

8See generally David H. Getches, Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values, 86 MINN. L. REV. 267 (2001) [hereinafter Getches, Beyond Indian Law] (arguing that Court is “remaking Indian law and revising a political relationship between the nation and Indian tribes that was forged by the Framers of the Constitution and perpetuated by every Supreme Court until now”); David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CAL. L. REV. 1573 (1996) [hereinafter Getches, New Subjectivism] (observing that Court recently has considered and weighed cases to reach results aligned with Justices’ individual ideas of Indian jurisdictional situation).
9See Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 YALE L.J. 1, 4–5, 85 (1999) (describing challenge of fitting tribes in our federal system of government as “complex” and “anomalous” federalism problem, which if solved could solve federalism as well); see also Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope, and Limitations, 132 U. PA. L. REV. 195, 240 (1984) (admitting that although task of constructing constitutional framework that will protect tribal rights is difficult because of continuing persistence of nineteenth-century doctrines and attitudes, it is “essential”).
10See, e.g., C.E. Willoughby, Comment, Native American Sovereignty Takes a Back Seat to the “Pig in the Parlor:” The Redefining of Tribal Sovereignty in Traditional Property Law Terms, 19 S. ILL. U. L.J. 593, 596 (1995) (“[T]he sovereign power of Native American tribes can and must be reidentified.”).
11A parallel effort is underway in Canada as both scholars and the Canadian government examine ways in which enhanced sovereignty can be accorded to aboriginal peoples. See Ralph...
This Article uses Michael J. Sandel's twin concepts of a civic republican polity and dispersed sovereignty as a starting point for developing a theoretical justification for returning greater political and cultural autonomy to tribes. Republican thinking contains some very useful principles for the cause of enhanced tribal sovereignty. These principles should be persuasive because of the important role they played in the founding of this nation and their continuing relevance to theoreticians struggling to find a harmonic place for difference in our democratic society. However, there is a need to find a way to do this without destabilizing the country's capacity to govern or creating separate racial homelands for tribes. The Article suggests that granting tribes a constrained power to nullify laws and policies that diminish their sovereignty


In joining Sandel’s civic republican vision to the plight of Indian tribes, the author is attempting, however imperfectly, to respond to Frank Pommersheim’s suggestion that Indian law scholarship needs to broaden its “ken of concern to include matters of political theory and local civic action, to search across other disciplines and fields of study for sparks of insight and to help fan a native prairie fire of political renovation and renewal throughout Indian Country.” Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 445 (1999).


Republicanism, it seems clear in retrospect, was neither an ideological map to more than a small piece of experience, nor a paradigmatic language . . . . Neither was it a *tradition*—the term toward which many of its appropriators were tending by 1990 . . . . Its key terms—*virtue*, the *republic*, the *commonwealth*—were slippery and contested.

*Id.* at 37–38.
may offer a structural solution that assures the continuation not only of Indian tribes as vibrant, unique cultures, but also of the United States as a nation and as a robust, pluralistic, tolerant democratic society. "[T]he moral independence of local nomic communities is not a burden to be tolerated or overcome, but is, instead, an essential part of how we build personal integrity and moral freedom as rooted, situated, and well-constituted selves." In order to reach the Article's goal of proposing a new theoretical foundation upon which to build solutions to the problem of tribal sovereignty, much ground must be covered. Part II starts this journey by looking briefly at modern

14 Of necessity, this solution is limited to tribes which have a land base on which their members live and over which the tribes can exercise some measure of sovereignty.


16 By applying the terms problem and solution to the concept of tribal sovereignty, I realize that I run the risk of creating the perception that I agree with governmental policies that have approached Indians as though they were a problem to be solved by subjecting them to one failed solution after another. That is not my intent. To the extent that I think tribal sovereignty is a problem, it is a problem of our own making—a result of centuries of misguided federal policies and federal Indian law jurisprudence—not one which tribes created in their desire to exist. Rather, I use the term problem in the sense that the concept of tribal sovereignty has perplexed many who have tried to propose instrumentalist solutions that would neither fracture the union nor create such disharmony that conflicts between tribes and their neighbors would abound. Unless a successful solution is found, history has shown that tribes' attempt to reassert their sovereignty in opposition to the interests of the federal government and the states will continue to fail. The history of (and the various reasons for) this failure has been well documented. See generally T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002) (discussing plenary power doctrine and status of tribal sovereignty); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941) (discussing Indian law and its role in establishing tribal sovereignty); DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 395-458 (4th ed. 1998) (discussing status of tribal sovereignty); FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1995) (discussing Indian legal system and its role in establishing tribal sovereignty). Moreover, without a practical means for the implementation of a solution, the painful history of Indian tribes in this country may still end with their disappearance. See Joseph William Singer, Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism, 63 S. CAL. L. REV. 1821, 1838 (1990). "In adopting strategies for change, one must remember that no abstract theory of the relation between law and society can provide a blueprint for reform. Rather, we must attend to the actual working of structures of power in society." Singer goes on to note that "[w]hat has worked to improve conditions for American Indian[s] . . . [has been] a complex set of strategies for community empowerment and self-determination." Id.

17 Unlike Rebecca Tsosie, I do not seek to burden this proposed solution with the additional task of achieving group reconciliation for Indians, which—as she notes—is a complex but necessary step in the process of renegotiating a more principled and just relationship between Indians and non-Indians. See Rebecca Tsosie, Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights, 47 UCLA L. REV. 1615, 1658-70 (2000) (exploring process by which "notions of group reconciliation might be adjudicated within the discourse of treaty rights"). My goal is substantially more modest—namely, to explore theoretical and institutional ways to enhance tribal sovereignty within the federal structure of government.
conceptions of sovereignty to see whether granting tribes enhanced sovereignty within the United States would offend archetypical notions of sovereignty. Finding it would not, Part II concludes that there is much to be gained by tribes, if they were to succeed in their quest. Part III discusses the basic elements of tribal sovereignty, identifies its principal theoretical sources, and then briefly describes its status at the start of the fifth century of contact with non-Indians. Part III concludes that, despite centuries of ill-conceived federal policies and destructive Supreme Court decisions that have weakened the theoretical sources of tribal sovereignty, Indian tribes have retained sufficient core elements of what it means to be sovereign, as described in Part II, to qualify objectively as sovereign entities. Part IV acquaints the reader with classical and contemporary republican principles and discusses three such principles that provide particular support for a more robust tribal sovereignty than exists today, as well as one that might undermine it. Part IV of the Article shows that Indian tribes not only deserve and need enhanced self-governing authority to protect what is unique about their communities, it also demonstrates that, despite everything that has happened to them, the tribes have retained sufficient cultural, political, and even territorial separation to qualify as repositories of Sandel's downward dispersed sovereign authority. Part V acknowledges the problems that recognizing difference as a basis for separate sovereignty pose to our national norm of a blended society—as well as to any notion of territorial integrity. However, it argues that modern republican thinking, particularly Sandel's multiply-situated citizen and Michelman's dialogic deliberation, assures the survival of both.

It is not enough to establish a theoretical basis for reinvigorated tribal sovereignty. A practical means for its exercise must be found. Otherwise, the painful history of Indian tribes in this country may still end with their disappearance. Accordingly, Part VI examines various practical solutions to the problem of tribal sovereignty and finds each of them wanting in some aspect. The Article proposes that tribes be allowed to exercise a constrained power to nullify (or opt out of) laws that diminish their sovereignty. Part VI ends with a brief discussion of how the application of republican principles might make this result palatable to both Congress and the Court.

II. SOVEREIGNTY

The traditional notion of sovereignty as a single nation with complete authority over its territory and peoples, free from interference from other

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18 The author realizes that each tribe is unique, and generalities among tribes are difficult to draw, and thus suspect when drawn. Common tribal features are used here as an artifact to reach an abstract theoretical conclusion that might have practical favorable consequences for tribes in general.

states, is largely incompatible with any notion of tribal sovereignty. However, this traditional formulation is less true today than it was as short as a half century ago.\footnote{Sovereignty had, and still has, both an internal and external aspect. Ruth Lapidoth, \textit{Redefining Authority: The Past, Present, and Future of Sovereignty}, 17 \textit{Harv. Int'l Rev.} 8, 9 (1995). It can mean both undisputed territorial jurisdiction within the borders of a state and personal jurisdiction over a state's citizens (internal), and the power to have a foreign policy and diplomatic relations, the right to be a member of international organizations, and the right to use force within the limits allowed by international law (external). \textit{Id.}; see also Pommersheim, supra note 16, at 54 (defining sovereignty, outside context of foreign affairs, to be "ability to govern all individuals and property found within one's borders"); Hendrik Spruyt, \textit{Decline Reconsidered: The Complex Nature of Modern Sovereignty}, 17 \textit{Harv. Int'l Rev.} 36, 36 (1995); Macklem, \textit{supra} note 6, at 1346 (noting that "international law definitions [of sovereignty] do not exhaust [its] meaning" because "sovereignty can refer to political and legal authority within [a state]"). This Article concerns itself with sovereignty's internal features.} The content of the term "sovereignty" has always been "murky,"\footnote{Hannum attributes "[a]t least part of the difficulty in defining sovereignty [to] the fact that [the term] traces its historical roots to sovereigns, in whose hands 'absolute' spiritual and temporal power rested," and that this view can no longer be supported in a world in which the equality of states in an international legal regime implies that the "sovereign rights of each state are limited by the equally sovereign rights of others." \textit{Id.} at 15.} its contours highly "contested," and "its meaning[, as well as its] value a function of interpretative acts by those who possess it and those who seek it."\footnote{Hannum, \textit{supra} note 21, at 14 (internal quotation marks and citation omitted).}

[T]here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.\footnote{This is one of the more intriguing side effects of a uniting Europe: as national boundaries fade within the 15-member European Union, more political power flows to Brussels and more countries beg to join the group, local cultures and languages are reasserting their strength. And while a blanket of sameness has settled over consumer trends and styles in Europe, historians say that more people are interested in protecting minority languages and asserting local differences than at any other time in this century.} Countries are eliding economically, politically, and culturally at the international level. Yet, at the same time, they are fragmenting at the nation-state level in response to internal demands for self-determination\footnote{Hannum, \textit{supra} note 21, at 14 (internal quotation marks and citation omitted).} by
repressed minorities and ethnic groups. Schol... from the nation-state. This Part asks whether the strictures of sovereignty have loosened sufficiently for Indian tribes to serve, at least conceptually, as repositories of dispersed sovereignty, and—if they have—what Indians could gain from this status.

The classical notion of sovereignty as an autonomous, exclusive, absolute, monolithic, and hierarchical political authority within fixed territorial borders is quickly vanishing, and with it the notion of the state as a single repository of identity for its citizens.

[T]he old religious mystical concept of sovereignty as being something, which is ‘absolute, sacred and inviolable’ already has lost much of whatever relevance it once may have had . . . . The fact of


See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 75 (1996) (commenting that “values and related processes of decision [underlying or inextricably bound up in the concept of self-determination] can be seen as a stabilizing force in the international system”). Vine DeLoria and Clifford Lytle distinguish between “self-determination” and “self-government” even though the two terms “can describe the same social reality” albeit “in different contexts.” VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 244-45 (1984). “Self-government is basically a political idea [that] has been superceded in our generation by the demand for self-determination.” Id. at 264.

SANDEL, supra note 2, at 345.

The author has drawn liberally from an article by Ruth Lapidoth in the Harvard International Review for help in developing this analysis. See Lapidoth, supra note 20, at 8.

Sovereignty need not reside any longer within a single authority. Rather, as the American and Canadian experiences—and now the European Union, among others—show, sovereign authority can be wielded by a number of different entities. Lapidoth discusses other examples of the nonmonolithic, indivisible nature of modern sovereignty, including for example, “condominiums,” in which two or more states jointly exercise sovereignty over a territory. Lapidoth, supra note 20, at 11.

Id. at 8; see also Trachtman, supra note 22, at 406 (stating that territory has increasingly become inaccurate proxy for community and lacks coherency as concept).

Spruyt sees sovereignty, on the one hand, as being redescribed and reinvented in some parts of the world where states are pursuing integration and thus challenging the “spatial limits” of sovereignty, and, on the other, as being “challenged by alternative forms of political rule that base their legitimacy and the extent of their jurisdiction on non-spatial criteria” (such as tribalism, clan membership, and religious communities). Spruyt, supra note 20, at 38. He finds loyalty to the nation-state as a single locus of identity “eroding toward a multiplicity of loyalties to regions, clans and ethnic groups.” Id. at 38–39. But see David A. Martin, The Civic Republican Ideal for Citizenship, and for Our Common Life, 35 VA. J. INT’L. L. 301, 309–10 (1994) (stating that “[d]espite all the evils perpetrated in its name, the nation-state also provides the framework for important and benevolent functions that cannot yet be wholly entrusted to transnational institutions,” and, therefore, nation-state “will remain the central forum for political life” “for the foreseeable future” and beyond).
the matter is that sovereignty today... is an extraordinarily flexible, manipulative concept.\(^3^1\)

The turmoil around the concept of sovereignty seems to be particularly great at the present time; the content of the concept particularly fluid. According to Alan Ehrenhalt, "[s]omething odd is happening to government at the end of the 20th century: It is flying apart and coming together, all at the same time."\(^3^2\) Statehood is no longer a criterion of sovereignty.\(^3^3\) Big governments are under pressure to break up in response to ethnic, ideological, and/or economic pressures, even in this country.\(^3^4\) At the same time, trans-boundary and regional governing bodies are forming.\(^3^5\) Changes on the international scene,

\(^{3^1}\)HANNUM, supra note 21, at 26 (quoting Richard B. Lillich, Sovereignty and Humanity: Can They Converge, in THE SPIRIT OF UPPSALA 413 (Atle Grahl-Madsen & Jiri Toman eds., 1984)); see also Trachtman, supra note 22, at 400 (describing sovereignty "as an allocation of power [that] is never lost, but only reallocated," and calling this phenomenon "a law of conservation of sovereignty").


\(^{3^3}\)HANNUM, supra note 21, at 14–15 ("[F]or the practical purposes of the international lawyer sovereignty is not a metaphysical concept, nor is it part of the essence of statehood; it is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states." (internal quotation marks and citations omitted)). But see id. at 15 ("One principle upon which there seems to be universal agreement is that sovereignty is an attribute of statehood, and that only states can be sovereign."). Applying the "classic" definition of a state found in the 1933 Montevideo Convention on Rights and Duties of States, cited by Hannum, tribes meet three out of the four criteria. Tribes possess: "(a) a permanent population[,] (b) a defined territory[, and] (c) government." Montevideo Convention on Rights and Duties of States, Dec. 26, 1993, art. 1, 165 L.N.T.S. 19. They lack only the fourth, the "capacity to enter into relations with other States," if that is defined to be foreign nation-states. Id.

\(^{3^4}\)Isaias Afwerki attributes the intensity of these centrifugal trends to the history of empire or nation-formation, the nature of the assimilation process, the quality of governance, and the acuteness of underdevelopment and regional balance within the state. Isaias Afwerki, Challenge From Within: The Theory and Practice of Self-Determination, 17 HARV. INT'L REV. 18, 20 (1995). He says that these are all determinants that can either lessen internal tensions within a multiethnic society and eventually promote the evolution of core values, or make these tensions worse and "sow the seeds of permanent conflict." Id.

\(^{3^5}\)Ehrenhalt cites as an example of these transboundary or regional governing bodies the Alpine Diamond, which he calls a "fledgling regional government [cutting] across... France, Italy and Switzerland," which he sees as "essentially a re-creation of the medieval Kingdom of Savoy, without the monarch... It exists because the two million people who live in [it] decided that none of their existing governments—national, provincial or local—were capable of managing the region's economic development." Ehrenhalt, supra note 32. Ehrenhalt cites other examples of regionalism—"knitting" governments back together—including Georgia's creation of a "new powerful superagency to take control of transportation and land-use decisions in the entire Atlanta metropolitan region" encompassing multiple local governments, and the coming
particularly the appearance of international and regional governing institutions and international conventions, have meant less autonomy for national governments. Problems drift between different levels of government, from local to international, in search of the proper level for a solution.

Sandel sees the forces of globalization eroding national sovereignty from above, while "the resurgent aspirations of subnational groups for autonomy and self-rule" are challenging it from below. Like Ehrenhalt, he finds that "[c]itizens are essentially looking for two forms of public authority: intimate ones in their community that can deal with their needs in a humane way, and regional ones big enough to impose some order and stability on economic life." Sandel concludes that the "most promising alternative to the sovereign state is not a one-world community," as some seek, "but a multiplicity of communities and political bodies . . . among which sovereignty is diffused; together of "myriad small communities" surrounding the city of Pittsburgh, up until now known for their "quarrelsome and turf-conscious" behavior. Id.

 supra note 20, at 8; see also HANNUM, supra note 21, at 15 (stating that notion of "[s]overeignty" in its original sense of 'supreme power' is not merely an absurdity but an impossibility in a world of States which pride themselves upon their independence from each other and concede to each other a status of equality before the law" (quoting ARTHUR LARSON ET AL., SOVEREIGNTY WITHIN THE LAW 11 (1965))); Spruyt, supra note 20, at 37 ("One common view of a declining sovereignty is that global economic interactions have increasingly led to less autonomy for national governments.").

Ehrenhalt finds the most interesting examples of the downward migration of authority the "rise of micro-governments" in Europe and this country "to deal with practical issues at the level of the neighborhood, subdivision and even individual block." Ehrenhalt, supra note 32. He cites as examples of this phenomena municipal governments in the Netherlands, Denmark, and Germany "that have . . . ced[ed] authority to small-scale elected traffic control boards," which "have expanded their reach into land use and planning issues," and, in France, the revitalization of 2500 communes, what he calls "tiny vestiges of medieval life," sometimes with "fewer than 1,000 residents, . . . by new grants of law enforcement authority that include, in some situations, the power to make arrests." Id. In this country, examples include "business improvement districts . . . [that] begin by cleaning [up blocks and planting trees] and grow into crucial players in local politics[, and] homeowners' associations that govern life in thousands of new subdivisions." Id.

 supra note 2, at 344.

 Beset by the integrating tendencies of the global economy and the fragmenting tendencies of group identities, nation-states are increasingly unable to link identity and self-rule. Even the most powerful states cannot escape the imperatives of the global economy; even the smallest are too heterogeneous to give full expression to the communal identity of any one ethnic or national or religious group without oppressing others who live in their midst. Id. at 344–35. But see Spruyt, supra note 20, at 37–38 (positing that "globalization [may] actually enhance[] [a nation state's] authority" because "[a]ddressing global economic problems, migration . . ., and . . . environmental [concerns] puts a premium on the ability of [states] to interact with one another through international fora").

 supra note 32. Ehrenhalt adds that citizens realize that the "governments they have are [either] too remote and bureaucratic" to deal with their problems in a humane way, or "too small and weak" to impose the necessary "order and stability" for economic advancement. Id.
and within which citizens learn to function as "multiply situated selves." Like Lapidoth, Sandel believes "[t]he nation-state need not fade away, only cede its claim as sole repository of sovereign power and primary object of political allegiance." The bonds of what it has traditionally meant to be a sovereign, therefore, appear to have loosened sufficiently in the latter part of the twentieth century to allow, at least conceptually, for tribes to function as repositories of dispersed sovereignty, if they are otherwise qualified. This Article posits that they are, while acknowledging that granting tribes greater sovereignty over their lands and members challenges the territorial and cultural integrity of the United States.

One of sovereignty's less contested features is "that it creates a legal space within which a community can negotiate, construct, and protect a collective identity," a piece of ground where a community can be free from interference with its chosen way of life and the development of its foundational character. While basing sovereignty on an expression of "collective difference," presents problems, Macklem interprets sovereignty to "permit[...] the expression of collective difference," which "far from being a reason for refusing to grant or recognize a community's sovereignty, is in fact a precondition of sovereignty's existence." Indian demands for enhanced tribal sovereignty and for greater control over their individual and shared identities, are premised on notions of collective difference and the belief that Indians possess unique historical and cultural identities worth protecting from the assimilative tendencies of our society. In fact, according to Pommersheim,

40Sandel, supra note 2, at 345, 350; see also Macklem, supra note 6, at 1352 n.182 (discussing how countries like Belgium, which "grants differential rights to Dutch and French people in its constitution," are referred to as "'consociational democracies,' which attempt to preserve linguistic or cultural identities"); Simons, supra note 24 (quoting Breton novelist Michael Le Bris: "[w]e now accept that our identity can have several layers. . . . We can feel European and French and Breton all at once.").

41Sandel, supra note 2, at 345; see also Lapidoth, supra note 20, at 8 ("[A]bsolute [state] sovereignty has had to cede to various forms of relative sovereignty subject to international law and practically limited by the great interdependence of states and by their internal ethnic heterogeneity. New notions such as divided sovereignty and functional sovereignty have been developed to describe [this] reality.").

42See infra Part IV.C (discussing possibility of Indian tribes serving as dispersed centers of civic republican governance).

43Macklem, supra note 6, at 1348.

44See infra Part V (discussing problems posed by enhanced tribal sovereignty).

45Macklem, supra note 6, at 1348.

46Id. at 1349.


Underlying the use of human rights terminology or the framework of rights claims is a plea for recognition of a different way of life, a different idea of community, of politics, of spirituality, differences which have existed, in the view of Aboriginal peoples, since time immemorial, but which have been cast as differences to be repressed or transformed since colonization.
"pride of difference," "Indianness," is at the heart of Indian claims of tribal sovereignty.\textsuperscript{48}

Indian tribes need a "measured separatism" to survive as distinct societies; a space within which they can protect their collective identities and be free from the interference of outside alien cultures.\textsuperscript{49} To retain this separation they need the power to determine their own lives to function more as subnations. Sovereignty (undiminished authority) over lands and people gives tribes the space within which to continue to be different, to be Indian—an "arena of tribal choice in which to articulate legal values and establish normative tribal frames of reference."\textsuperscript{50}

What Indian tribes need—undiminished authority to determine their own lives—is an essential aspect of sovereignty. For tribes, "[a] fully 'decolonized' Indian law requires more than limits on federal power. It must secure self-determination in the deeper sense of protecting a tribe's authority to structure its form of government and to choose means to pursue tribally determined ends."\textsuperscript{51} Anaya suggests that "self-determination" has two normative strands, both of which might serve as a useful metric for judging the completeness of tribal sovereignty.\textsuperscript{52} The first of these strands is self-determination's "constitutive aspect," which "requires that the governing institutional order be

Turpel, supra note 11, at 33. Turpel goes on to note that European-based cultures have always reacted to difference with plans for civilization, sameness, domination, and control because they continue to view aboriginal cultures as "primitive, premodern, or inferior in the sense of being at lesser states of development than the dominant European culture," in other words, as "artifacts." Id. at 34. Dan Tarlock, who finds "equally problematic" cultural claims by "at risk communities" based on "cultural heritage or community values," calls such bases "legitimate" when raised by aboriginal peoples. A. Dan Tarlock, Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants, 31 ARIZ. ST. L.J. 539, 553 (1999).

\textsuperscript{48}POMMERSHEIM, supra note 16, at 103. According to Pommersheim, "[n]either the legal community nor the dominant community at large fully understands the pride of difference, which tests the vitality of the 'old promises' in a diverse society that professes a commitment to both equality and pluralism." Id.

\textsuperscript{49}CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987) (using this term to describe reservation system as "islands of tribalism largely free from interference by non-Indians or future state governments," which was "measured, rather than absolute, because it contemplates supervision and support by the United States"). Erik Jensen sees present federal Indian policy as trying "to protect traditional Indian societies as much as possible and ... to maintain their insulation from the majority society," and that while "[t]he separation is not complete ... [because] the tribes are subject to the ultimate power of the United States, ... the separation is substantial and is, if anything, becoming more entrenched." Erik M. Jensen, American Indian Tribes and Secession, 29 TULSA L.J. 385, 386 (1993). \textit{But see} Pommersheim, supra note 12, at 474 (advocating new era of "measured togetherness," under which tribes determine extent to which non-Indians can "participate in the public civic life of the tribe, to be of service" to tribe; "not to be Indian").

\textsuperscript{50}POMMERSHEIM, supra note 16, at 195.

\textsuperscript{51}ALENİKOFF, supra note 16, at 127; \textit{see also} Frickey, supra note 9, at 82 ("[E]conomic development in Indian country works best when tribes are capable of autonomous sovereignty . . .").

\textsuperscript{52}ANAYA, supra note 25, at 81.
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substantially the creation of processes guided by the will of the people, or peoples, [who are] governed” (consent of the governed and access to the political process). The second is self-determination’s “ongoing aspect,” which “requires that the governing institutional order, independent[] of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis” (liberty and political equality). Self-determination, in both its constitutive and ongoing sense, is therefore necessary if indigenous communities, like Indian tribes, are to maintain their distinctive cultures.

However, Indian tribes, unlike indigenous peoples in other countries, may not have retained sufficient separate identity to warrant their reconstitution as centers of dispersed sovereignty in which to practice self-determination, in either its constitutive or ongoing aspect, regardless of how crucial sovereignty is to their survival as tribes. Centuries of “fickle,” destructive federal Indian policies, and judicial decisions aimed at the destruction of tribes, may have indeed destroyed their capacity for a measured separatism. The next section of this Article describes those policies and their effect on tribal sovereignty.

III. TRIBAL SOVEREIGNTY

Indian tribes are “strange sovereigns” in a constitutional sense; their relationship to the United States is “an anomalous one, and of a complex character.” Tribes resemble foreign countries because they have dominion over their lands and members. But, unlike foreign nations, with which the federal government deals at arm’s length, they are subject to the paramount sovereignty of the federal government. And while tribes are clearly not states

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53Id. at 81–82.
54Id.
55Id. at 110.
56RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY, at viii (1980). Other Indian scholars use even stronger adjectives to describe these failed federal policies and judicial decisions. See infra Part III.B.3.
57Newton, supra note 9, at 197.
59Tribes do not own their lands, the federal government does. See United States v. Candelaria, 271 U.S. 432, 440 (1926) (holding that Nonintercourse Act imposes restrictions on all Indian lands and creates guardianship over that land that extends even to Pueblos, who own their land); United States v. Sandoval, 231 U.S. 28, 45–46 (1913) (holding that federal guardianship power permits statute outlawing sale of liquor to Pueblos). In the case of state-recognized tribes, like the Mattaponi and Pamunkey tribes of Virginia, and the Shinnecock and Poospatuck tribes of New York, tribal land is owned by the state. This raises interesting questions, which are beyond the scope of this article, as to whether and to what extent state ownership changes the jurisdictional prerogatives of the federal government over tribal land.
60Federal power over Indians “must exist in that government, because it has never existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied; and because it alone can enforce its laws on all the
that can claim protection against the intrusions of the federal government based on long-held doctrinal theories supporting states rights, they are just as clearly more than private associations, which can be regulated much more freely. As Chief Justice John Marshall acknowledged over a century and a half ago in Cherokee Nation v. Georgia, the relationship between the federal government and Indian tribes is "perhaps unlike that of any other two people in existence . . . marked by peculiar and cardinal distinctions which exist no where else." His words are still true today.

This Part of the Article tries to parse the confused doctrinal threads of federal Indian law in an effort to assess the extent to which tribes retain the power to self-govern after three centuries of interaction with federal and state sovereigns. The current status of tribal sovereignty is examined in light of Anaya's constitutive and ongoing aspects of self-determination. The Part starts with a discussion of the traditional rationales for tribal sovereignty—treaties and inherent sovereignty—and then examines the effectiveness of each in preserving sovereignty. Part III concludes that even the minimal protection these doctrinal shields once had for tribes has substantially eroded over time,

**Kagama**, 118 U.S. at 384–85 (upholding plenary authority of Congress over internal Indian affairs).

**Newton**, supra note 9, at 197.

**United States v. Mazurie**, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian Country' are a good deal more than 'private, voluntary organizations . . .'.") *But see* **ALENIKOFF**, supra note 16, at 98 ("Tribes are 'sovereign' over tribal land and tribe members, in much the same way that a private organization has property rights and can adopt rules governing its members' conduct and access to its property."); **Barsh**, supra note 11, at 56 (describing what remains of Indian sovereignty after various Supreme Court decisions as "'country club' doctrine of tribal jurisprudence"); **Frickey**, supra note 9, at 80 (explaining that "new harmonization of federal Indian" legal principles with mainstream areas of law may "jettison . . . well-established mediating method[s] rooted in congressional responsibility and judicial checks in favor of a one-sided imposition of colonial values" and reduce tribal sovereignty to point that "from the outside, [tribes] might appear to be little more than ethnocentric Elks Clubs"); *id.* at 82 ("At bottom, the Court needs a contemporary comfort level with the proposition that tribes are governments, not voluntary membership associations; it is surely discomfort with this conclusion that has led the Court to impose a creeping constitutionalism in federal Indian law."); **Singer**, supra note 19, at 6 (under Court's view that tribes cannot exercise powers over nonmembers, "tribes are merely voluntary associations which can act only in ways that affect their members, rather than sovereigns who can exercise governmental power over any persons who come within their territorial boundaries, including nonresidents").

**30 U.S. (5 Pet.) 1 (1831).**

**Id.** at 16.

**ALENIKOFF** criticizes the view of tribes as "anomalous" (their "in-betweenness") because they are neither a foreign or domestic state, and the fruitless search to find a perfect analogy between a tribe and some other political community, because this view ignores the fact that "indigenous peoples have a distinct set of rights and a distinct relationship with the states, in which they are located," that is sui generis to them. **ALENIKOFF**, supra note 16, at 141–42. He suggests that "[r]ather than seeking an analogy, we must come to terms with the sovereignty questions in their own right." *Id.*

**See supra** notes 52–54 and accompanying text (discussing Anaya's two aspects of self-determination).
particularly in recent years. As a result, if the concept of tribal sovereignty is to retain any vitality, a new, more persuasive theoretical rationale is needed. Part IV suggests that republican theory provides that rationale.\(^6\)

**A. Sources of Tribal Sovereignty**

There are two traditional theoretical foundations for tribal sovereignty. The first of these is premised on the various treaties negotiated between the tribes and the federal government; the second, on the tribes' inherent authority to self-govern.\(^6\)\(^7\) This Part of the Article examines both foundations to see whether either contains sufficient vitality to serve as a basis for a more robust vision of tribal sovereignty in the twenty-first century.

1. **Treaties**

   “Again, were we to inquire by what law or authority you set up a claim [to our land], I answer, none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations, and they are both against you.”\(^6\)\(^9\)

   For nearly three centuries, the British Crown and then the U.S. government\(^7\) recognized tribal sovereignty by negotiating treaties with the tribes as though they were separate sovereign nations.\(^7\)\(^1\) These solemn

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\(^6\)This Article does not argue that tribes fall within the Guarantee Clause of the Constitution because they are not states. See U.S. Const. art. IV, § 4 (guaranteeing to every state in Union republican form of government). Rather, the Article suggests that republicanism, as the base upon which the government of the United States was structured, might provide theoretical support for a more robust tribal sovereignty than we have today.

\(^7\)According to Wilkinson, the well-settled principle that the doctrine of inherent sovereignty is pre- and extraconstitutional, when coupled with the promise of a viable, evolving separatism in the treaties and treaty substitutes, “justif[ies] race-based tribal governments without political representation by nonmembers.” Wilkinson, supra note 49, at 117. See generally Talton v. Mayes, 163 U.S. 376 (1896) (affirming that tribal sovereign powers pre-existed Constitution and were not affected by dominant society’s general laws unless expressly limited by Congress).

\(^8\)PETER NABOKOV, NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492–1992, at 122–23 (rev. ed. 1999) (quoting George Corn Tassels, Cherokee, Address before United States Commissioners (July 1785)).

\(^7\)The Framers of the Constitution placed the “supreme and exclusive treaty power in Congress.” Barsh & Henderson, supra note 56, at 34. The states had ignored the language in the “Articles of Confederation authoriz[ing] Congress to ‘manage [Indian] affairs’” and had tried to assert power over Indians by entering into various treaties with the tribes within their borders, which resulted in conflict and bloodshed. Id. at 33. By vesting exclusive authority in Congress to make treaties and to regulate commerce with Indians tribes, the Framers intended to end this practice. Id. at 34.

\(^7\)There were approximately 175 treaties negotiated between Indian tribes and Britain and the British colonies from 1607 to 1775. See David A. Wilkins, Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal, 23 Okla. City U. L. Rev. 277, 292 (1998) (citing
bargained for exchanges secured for Indians their homelands and the right to be left alone. For Indian tribes, these treaties are foundational documents, which affirmed tribal sovereignty over their lands and members set the physical boundaries of their reservations and established their off-reservation fishing and hunting rights. Based on a "unique relationship of trust and

Dorothy Jones, British Colonial Indian Treaties, in 4 HISTORY OF INDIAN-WHITE RELATIONS 185–94 (Wilcomb E. Washburn ed., 1988)). These early treaties responded to the political, military, and economic needs of the European colonists and the various tribes. Colonial treaties were ratified by the Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (2000)), which was first enacted in 1790, and given the effect of federal law.

The Spanish and the French also entered into many treaties with the tribes to secure tribal cooperation and aid their survival in the New World.

The most practical manner, at least in North America, by which the Spanish and other European nations proceeded to secure the goodwill and consent of tribes for the establishment of peace and friendship, trade, military alliance, the delineation of territorial boundaries, land cessions, and to secure their foothold on the frontier against other European competitors, was through the negotiation of treaties.

Wilkins, supra, at 286. However, there the similarities between the three nations ended. "Spanish civilization crushed the Indian; English civilization scorned and neglected him; French civilization embraced and cherished him." Id. at 288 (citing Mason Wade, French Indian Policies, in 4 HISTORY OF INDIAN-WHITE RELATIONS, supra, at 20).

Treaties also frequently created "institutions . . . for resolving disputes" between Indians and non-Indians. BASH & HENDERSON, supra note 56, at 274. In an experiment that eventually failed, the treaties between the Five Civilized Tribes and the United States included a provision that the representatives of these tribes meet at an annual general assembly as a precursor to their land becoming a territory of the United States. DELORIA & LYTLE, supra note 25, at 24. "Congress appropriated funds to underwrite" the effort "and the grand council of the Indian Territory met annually until 1874 in an effort to adopt an organic document," which would both preserve "remnant of political and cultural autonomy" for tribes, since tribes no longer had political power to sustain their right to self-government.

Treaty-based fishing and hunting rights, however, may be abrogated if a congressionally approved cession agreement completely severs and extinguishes Indian title to the land. But, if a cession agreement expressly reserves these rights in areas ceded by the treaty,
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protection that the European sovereigns assumed toward Indian nations[,] . . . Indian treaty rights are sui romas generis, imparting a distinctive legal relationship [between the federal government and tribes] that is unparalleled in other areas of [U.S.] law."76 For some scholars, these treaties between sovereign nations provide the "primary doctrinal grounding" for the recognition of tribal sovereignty.77 This Subsection explores whether Indian treaties also provide a solid footing for the enhancement of tribal sovereignty.

For almost the entire treaty era, which ended in 1871, treaties served as necessary "political and legal adjustments between an expansionary, westward marching American society and established, staunchly resistant tribal societies."78 The policy of separating Indians from non-Indians, which culminated in the current reservation system, originated in the colonial period, when the British Crown viewed separation as the most expedient way to avoid costly wars, secure English economic interests in the Indian ruled interior, and protect the Crown's seaboard trade.79 When Indian presence became too much for the white settlers, the simplest, most practical solution for the Crown—succeeded by the federal government—was to move the nearest Indian tribe to

"but not retained within the borders of a reservation," the rights to hunt and fish "are reserved only until the ceded areas are required for settlement, or until Congressional or Presidential Act" requires the tribe to relinquish the use of the area. Shelley D. Turner, The Native Americans Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contract and the Continuing Fight to Observe a Way of Life, 19 N.M. L. REV. 377, 414 (1989); see also South Dakota v. Bourland, 508 U.S. 679, 684, 697 (1993) (holding that tribe could not regulate non-Indian hunting and fishing in area within reservation boundaries that Congress had appropriated to build dam, reservoir, and public recreation area).

76See T sosie, supra note 17, at 1623.

77POMMERSHEIM, supra note 16, at 40; see also Mc Clanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) (stating that in almost all cases, federal treaties and statutes define boundaries of federal jurisdiction); BARSH & HENDERSON, supra note 56, at 270 (stating that treaties are "a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States"); COHEN, supra note 16, at 33 ("The chief foundation [of federal power over Indian affairs] appears to have been the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made."); Tsosie, supra note 17, at 1621 ("Indian nations today employ the discourse of treaty rights . . . as a recognition of their legal rights and . . . of their status as distinct groups that possess political and cultural sovereignty and have a unique relationship to their traditional lands."). But see 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, 628-29 (1994) (stating that tribal sovereignty as legal construct all but disappeared except as temporarily useful artifact of treaty era); Robert A. Williams, Jr., Jefferson, the Norman Yoke, and American Indian Lands, 29 ARIZ. L. REV. 165, 185-86 (1987) (describing importance of Indians' right to alienate territories during colonial times but arguing that American legal theory changed after American Revolution such that vested title to Indian land could be passed "without the positive sanction of a European-derived sovereign entity" because Indians could simply be removed by military force to make way for white settlers.).

78POMMERSHEIM, supra note 16, at 16.

79Champagne, supra note 72, at 116; see also Williams, supra note 77, at 172 (describing mercantile goals of British government in period before Revolution).
a more remote location, and to solemnize by treaty the promises made to the Indians in exchange for the loss of their lands. To some extent, the settlers' goals coincided with the interests of Indians, who wanted protection from invading white settlers. Notwithstanding the lingering high-toned rhetoric of Indian treaties, once the country's military needs no longer served as a primary motivation for treaty making, the principal policy behind treaties shifted to making Indian lands available to non-Indians. After 1850, by which

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80See POMMERSHEIM, supra note 16, at 18; see also Williams, supra note 77, at 172. Discussing the extent to which present legal conceptions of Indian status and rights are grounded in a highly contingent set of historical circumstances and suppressed discourse, Williams notes: Rarely has the dynamic relationship of American racism and the dominant caste's economic interest been so clearly revealed within the normative fineries of national legal discourse as in the Revolutionary era debate on the status and rights of Indians in their lands. White interests and expediency, not the rule of law, ultimately informed and determined Revolutionary era legal discourse on the natural law rights and status of the Indian.

Id. at 184; see also Keith Bradsher, Michigan Pact Resolves Battle over Limits on Indian Fishing, N.Y. TIMES, Aug. 8, 2000, at A16 (describing how Grand Traverse Band of Ottawa and Chippewa Indians felt compelled to agree to pact ending fishing dispute with local white communities, which put Indian fishers far from their traditional and treaty-protected fishing grounds to avoid conflict with state's main recreational and fishing areas).

81POMMERSHEIM, supra note 16, at 18. For example, the Treaty between the United States of America and different Tribes of Sioux Indians, 15 Stat. 635 (1868), stated that reservations were to be "set apart for the absolute and undisturbed use and occupation of the Indians... and the United States now solemnly agrees that no person except those herein designated and authorized... shall ever be permitted to pass over, settle upon, or reside in the territory described in the article." Id. art. II.

82See Newton, supra note 9, at 200 (stating that President Washington and Secretary of War Knox "advocated a policy of respect for treat[ies]" that had been negotiated by British Crown, and that new series of treaties be entered into to acquire Indian land "by consent in an orderly fashion," which "would contain promises to protect Indian tribes and tribal land from white incursions in exchange for land cessions").

83The principal goal of this era, which began in 1800 and ended in 1815, was to move Indians beyond the Mississippi River. Johnson, supra note 11, at 655 (commenting on fact that many of early treaties with tribes in northeast were designed to gain allies in battles against first French, and later British); see also FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, 44-49 (1962) (describing how Indian tribes in northeast never agreed to be treated as conquered nations after Revolutionary War and how continued white encroachment into lands set aside for tribes threatened to undo existing treaties); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600–1800, at 20–21 (1997) (noting that in seventeenth and eighteenth centuries, European colonists learned that their "survival," let alone their ability to "flourish[" and "expan[d]" depended upon "cooperative relationships with surrounding Indian tribes rather than wars and conflict"); Newton, supra note 9, at 200 (noting that early America's precarious perch among sovereign nations meant it could ill-afford expense and strain of drawn-out Indian war); Letter from Thomas Jefferson, to Meriwether Lewis (Aug. 21, 1808), in A JEFFERSON PROFILE: AS REVEALED IN HIS LETTERS 173 (Saul K. Padover ed., 1956) [hereinafter A JEFFERSON PROFILE] (referring repeatedly to Sacs and Foxes tribe(s) as nation(s), and advocating commerce as "the great engine" with which to "coerce them" them into more compliant posture). John Locke's concept of property—something created by the application of labor—and his aversion to land left in a state of nature also justified taking land away from Indians. See JOHN LOCKE, THE
time most Indians had been removed from land that white settlers wanted, federal Indian policy reflected in treaties was to force tribes onto ever-smaller reservations. In 1871, the era of treating with Indian tribes abruptly ended with the assertion of language in an appropriation bill forbidding the federal government from entering into any more treaties with Indian tribes. By then, the official Indian policy was assimilation of Indians into the mainstream culture. Entering into treaties with Indian tribes, as though they were separate foreign nations, was seen as antithetical to achieving that goal.

The history of Indian treaties is not a pretty one, and the federal government's role in their negotiation and enforcement belies de Toqueville's

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SECOND TREATISE OF GOVERNMENT 23 (Thomas P. Peardon ed., 1956) ("I ask whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a thousand acres yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land do in Devonshire, where they are well cultivated.").

8See generally PATRICIA LIMERICK, THE LEGACY OF CONQUEST (1987) (describing process by which tribal lands were diminished); Johnson, supra note 11, at 649–50 (stating that "overriding, but rarely articulated policy" towards Indians was to "get them out of the way so their land could be settled and developed by whites"). Often multiple tribes were "consolidated on a single confederated reservation, including tribes with diverse cultures," sometimes with histories of "outright hostility towards each other." Id. at 650 n.23. This eroded "[t]raditional cultures, religions, and self-governance systems," and left Indians, as they are today, as "the poorest and smallest minority in both Canada and the United States." Id; see also Newton, supra note 9, at 224 (noting congressional authorization of consolidation of tribes with no ethnological ties—even tribes that were ancient enemies—and citing Shoshone Tribe v. United States, 299 U.S. 476, 489 (1937), where Congress authorized occupancy of Shoshone land by Arapahos, who were Shoshone's long-time enemies). See generally COHEN, supra note 16, at 5–7 (discussing definition and background of term "Indian Country").

Congress withdrew the President's authority to treat with Indians in 1871. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

The Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2000)). According to Cohen, after 1871, the federal government dealt with Indian tribes through agreements, statutes, and executive orders, which had the same legal weight as treaties. COHEN, supra note 16, at 105–07. By 1871, approximately 389 treaties had been negotiated between the United States and various Indian tribes, covering nearly ninety-five percent of the United States public domain lands. Johnson, supra note 11, at 648 n.18. While most tribal lands today are secured to Indians by treaty or some other form of federal agreement, Wilkinson notes that of the 52 million acres of trust land now held by tribes and individual Indians, only about 20 million were originally recognized by treaty. WILKINSON, supra note 49, at 8. Twenty-three million acres were set aside by executive orders between 1855 and 1919, and the remaining acreage by congressionally approved agreements or by federal statutes. Id.

See Newton, supra note 9, at 206 (noting that when treaty-making era came to end in 1871, "Indian law became more a matter of domestic law, with Indians regarded as subjects to be governed, rather than foreign nationals"); see also Tsosie, supra note 17, at 1669 (commenting that "treaties between the United States and Indian nations exemplif[ied] the commitment to tribalism and group-based separatism" that "conflict[ed] with the drive for [a] unitary, all-encompassing ideal of citizenship").
words, "[t]he conduct of the Americans of the United States towards the [Indian] is characterized . . . by a singular attachment to the formalities of law. . . . It is impossible to destroy men with more respect for the love of humanity." Despite the view of treaties as bargained for exchanges between the federal government and Indian tribes, treaties and other cessions of tribal lands were seldom concluded with willing tribes. Tribes knew that "they must either cede their lands and put their welfare and survival at the mercy of the federal government, or be pushed aside without even a small reservation to call home." However, tribes lacked the negotiating strength to protect their interests vigorously. Further, "[t]he federal government has a long and appalling history of breaking treaties with Indian nations," "repeatedly cast[ing] aside its solemn promises to [the tribes]," curtailing rights granted under those treaties, or "arrang[ing] for the seizure and dispersal of tribal property without paying just compensation." The history of the United States Government's repeated violations of faith with the Indians convicts us, as a nation, of having outraged the principles of justice, which are the basis of international law; and of having laid ourselves open to the accusation of both cruelty and perfidy . . . .  

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87 ALEXANDER DE TOQUEVILLE, DEMOCRACY IN AMERICA 360-61 (Henry Reeve trans., Longmans, Green & Co. 1889) (1838).
88 Johnson, supra note 11, at 713; see also id. at 649 (pointing out that despite high-toned rhetoric, rarely did government acquire land under these treaties by fair, arm's-length transactions. Rather, "[m]ost of the time, the government acquired lands by a combination of coercion, fraud, threat of force, or actual military force."); ALEINIKOFF, supra note 16, at 99–100 (commenting that while treaties solemnized agreements in which tribes ceded land to federal government in exchange for government's recognition of tribe's right to self-determination on their remaining lands, treaties could hardly be considered consensual exchanges among willing political equals); Michael L. Ferch, Indian Land Rights: An International Approach to Just Compensation, 2 TRANSNAT'L L. & CONTEMP. PROBS. 301, 317–18 (1992) (noting that Indian land holdings were often diminished by treaties accepted by indigenous parties because of ignorance or fraud).
89 See infra note 93 (providing sources regarding Indian canons); see also United States v. Michigan, 471 F. Supp. 192, 252 (W.D. Mich. 1979) (remarking that most Indian participants in treaty negotiations "had to rely on interpreters for an explanation of concepts, most of which were foreign to their culture," that discussions were limited to "general concepts," and that non-Indians drafted treaty provisions "behind closed doors").
90 Singer, supra note 19, at 2; see also Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 294 (1955) (holding that federal government may seize without compensation Indian land that it has refused to recognize by treaty or statute); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (upholding forced allotment of Indian lands and recognizing that no legal norm restricts "the legislative power [to] pass laws in conflict with treaties made with the Indians"); Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 WIS. L. REV. 219, 258–65 (explaining that throughout nineteenth and early twentieth centuries, Congress "unilaterally abrogated" numerous Indian treaties under plenary power doctrine).
91 HELEN HUNT JACKSON, A CENTURY OF DISHONOR 29 (1881); see also ALEINIKOFF, supra note 16, at 95–96 (stating that history of federal Indian policy is betrayal of almost every clause in Article III of the Northwest Ordinance of 1787, 1 Stat. 50, in which federal government promised "[t]he utmost good faith shall always be observed towards the Indians; their land and
Enshrinement in the Supremacy Clause of the Constitution has not protected the promises in Indian treaties, since Congress can unilaterally abrogate those treaties. Nor have protective prudential judicial canons prevented federal courts from the wholesale rewriting of Indian treaties.

property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded . . . unless in just and lawful wars authorized by Congress; [and that, from time to time,] laws founded in justice and humanity [will be enacted for preventing wrongs to Indians], and for preserving peace and friendship with them,” id. art. III, ch. VII, 1 Stat. at 52.). One of the more outrageous examples of the ease with which the federal government broke Indian treaties was the massacre of 133 Cheyenne and Arapaho people, most of whom were women and children, at Sand Creek. SIMON J. ORTIZ, FROM SAND CREEK: RISING IN THIS HEART WHICH IS OUR AMERICA 8 (1981); see also Patricia N. Limerick, Haunted America, in SWEET MEDICINE: SITES OF INDIAN MASSACRES, BATTLEFIELDS, AND TREATIES 119, 126–28 (1995) (describing same event). After the massacre, the Cheyenne and Arapaho, who had believed that they were protected by “a [United States] flag presented by President Lincoln to Black Kettle” “were removed from [the territory] despite the fact that they had treated [ies with the federal government] securing their possession of these lands.” Tsosie, supra note 17, at 1670–71.

See POMMERSHEIM, supra note 16, at 40 (“Despite the historical fact that treaties are grounded in the federal recognition of tribal nationhood and sovereignty, they have often been altered, ignored, or displaced.”); Singer, supra note 19, at 54 (commenting that United States Supreme Court, “by often failing to recognize treaties as either creating vested property rights or as describing reserved powers of sovereignty, . . . has perpetuated a system that grants less protection to [Indian] property rights . . . than to [those of non-Indians]”). The Supreme Court has consistently sustained acts of congressional abrogation when the abrogation is in the national interest. See, e.g., Lone Wolf, 187 U.S. at 566 (“The power exists to abrogate . . . an Indian Treaty . . . in the interest of the country.”); see also infra Part III.B.2.a (discussing plenary power doctrine). Newton points out that the Court (ironically) frequently uses the trust relationship between tribes and the federal government to interpret treaties. Newton, supra note 9, at 232 n.200; see, e.g., United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 509 (1913) (holding that breach of agreement was breach of trust wrongfully disposing of tribal property); Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) (stating that trust relationship “recognizes . . . such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection”).

For more about the Indian canons of construction, see Solem v. Bartlett, 465 U.S. 463, 472 (1984) (stating that “[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening” of those lands for non-Indian homesteading); Choate v. Trapp, 224 U.S. 665, 675 (1912) (advocating liberal construction of statutes when government deals with Indians); United States v. Winans, 198 U.S. 371, 380 (1905) (“W[e] will construe a treaty with the Indians as ‘that unlettered people’ understood it . . . .'”); Choctaw Nation, 119 U.S. at 28 (discussing that trust relationship with Indian tribes “recognizes . . . such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection”); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554 (1832) (adopting canons of interpretation that require clarity before courts may conclude that tribes have given up valuable rights); COHEN, supra note 16, at 221–24 (construing congressional power and limitations upon power of Indians to sell or make contracts respecting lands and timber allotted to them as Congress’s effort to prevent Indian landlessness); Frickey, supra note 9, at 8–9 (arguing that
Despite these problems, federal Indian treaties should not be dismissed too quickly as an inadequate theoretical foundation for a more robust form of tribal sovereignty. Treaties continue to define the contours of the legal relationship between tribes and the federal government. For many tribes, treaties are the “cornerstone” of their sovereignty and legal identity vis-à-vis the non-Indian world, the “charters by which Indian[s] gained] the right to rule themselves on their reserved [lands]” and to enter into a government-to-government relationship with the federal government. This treaty relationship

"ambiguities in federal statutes that might be read [to] invad[e] tribal authority are [to be] construed narrowly to protect tribal interests," and “treaties that might undercut tribal authority are also [to be] read narrowly” on assumption that “[t]he treaty transaction was a cession of rights by the tribe rather than a granting of rights by the United States, and [that] these cessions, along with all other treaty provisions, are to be interpreted as the Indians would have understood them”); Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows or Grass Grows upon the Earth”—How Long a Time Is That?, 63 CAL. L. REV. 601, 617 (1975) (likening three primary canons of construction applied to Indian treaties to those applied in context of “adhesion contracts”: “ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians”). As examples of how far courts are sometimes willing to go to resolve ambiguities in favor of Indians, see Arizona v. California, 373 U.S. 546, 601 (1963) (holding that tribe is entitled to sufficient water to irrigate all irrigable land on reservation); Winters v. United States, 207 U.S. 564, 576 (1908) (creating implied federal reserved water right in favor of Indian tribe); United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983) (holding that tribe is entitled to sufficient water to propagate fish, if that was tribe's goal). But see Chickasaw Nation v. United States, 534 U.S. 84, 91–95 (2001) (finding Indian interpretative canon subordinate to other more compelling interpretations of statute).

94POMMERSHEIM, supra note 16, at 213 n.18; see also Tsosie, supra note 17, at 1658 (“Indian treaties are a powerful symbol of tribal sovereignty and the preconstitutional political status of Indian nations.”). But see Getches, New Subjectivism, supra note 8, at 1583 (commenting that while treaties “remain a primary source of Indian rights[, they] also led to substantial diminution of tribal autonomy” because they “memorialized the ‘discovery’ principle by submitting the tribes’ external political affairs to the United States’s control” and because they were premised on the United States’ political domination of the tribes”).

95Williams, supra note 77, at 194; see also POMMERSHEIM, supra note 16, at 16 (“The concept of an Indian reservation is best defined as the concrete manifestation of a guarantee of a ‘measured separatism’ to [Indians] as the result of negotiated treaties and settlements reached between Indian tribes and the federal government.” (quoting WILKINSON, supra note 49, at 4)).

96POMMERSHEIM, supra note 16, at 40 (“[T]reaties recognize and embody tribal sovereignty as the basis for a government-to-government relationship...with other sovereigns, including states.”). According to Monette, one reason for treating tribes like states is that early treaty relationships contemplated this. Monette, supra note 77, at 633. Thus, treaties, in which tribes “pledged allegiance to the Union and sought its protection, support the notion that the resulting relationship was federative in nature,” and that tribal and state sovereignty do not overlap, but exist in the same plane and relate separately to the central government. Id. at 671–72. Monette also argues that like states, tribes “pre-existed the Union as international, independent entities...[and] relinquished some measure of...sovereignty” to the central government after creation of the Union; retained sovereignty was not relinquished after creation of the Union. Id. at 654. Thus, the movement of sovereignty was from the states (and tribes) to a central government. Id.; see also id. at 633 n.97 (“Both state and tribe contemplated giving up their independence and joining the newly proposed Union, and neither took the idea for
with the federal government gives Indian tribes an extra-constitutional status unlike any other ethnic or racial group in this country, and continues to distinguish Indian tribes from such groups.\textsuperscript{97}

To the extent that Indian treaties reflect a set of sovereign promises—a "sacred pledge made by one people to another [that] required no more than the integrity of each party for enforcement"\textsuperscript{98}—they create expectations about how the signatories will behave towards each other. And regardless of the motives that drove the parties to the table and their incommensurate bargaining strength, the practical effect of these treaties was that the tribes "ma[de] peace and cede[d] land . . . to the federal government in exchange for a cessation of hostilities, the provision of some services, and . . . the establishment and recognition of a homeland free from the incursion of [non-Indians]."\textsuperscript{99}

Additionally, the record of Indian treaty negotiations, ratifications, and proclamations—and the language of these treaties—also confirms the separate political status of Indian tribes in our nation's history.\textsuperscript{100} Underlying these

\textsuperscript{97}Wilkins, \textit{supra} note 71, at 299 ("The unique triumvirate of corporate (self-government), individual (eligibility for allotments, special reservations), and property (hunting, fishing, and gathering) rights articulated in treaties further distinguish[es] Indians in a fundamental way from all other groups and individuals in the United States.").

\textsuperscript{98}DELORIA & LYTLE, \textit{supra} note 25, at 8; \textit{see also} Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J. dissenting) ("Great nations, like great men, should keep their word."); POMMERSHEIM, \textit{supra} note 16, at 16-17 (viewing treaties as "bargained for exchange[s]," and stating that treaties have "helped create the enduring and special legal and moral relationship that exists between the federal government and Indian tribes"); WILKINSON, \textit{supra} note 49, at 120-22 (stating that treaties represent "[r]eal promises," which advance "fulfillment of the ultimate promise"—reservation as homeland and "island[] of Indianness within the larger society"); Newton, \textit{supra} note 9, at 262 ("Beyond cavil, one value 'basic in our system of jurisprudence' is that a deal is a deal."); Tsoie, \textit{supra} note 17, at 1617 ("The discourse of treaty rights that is being employed by Native American and Mexican American people speaks of each Treaty as a 'sacred text' that represents the moral obligations of the United States to racially and culturally distinct groups that have been treated unjustly by the dominant society."). But \textit{see} Turpel, \textit{supra} note 11, at 36 (commenting that treaties in Canada are "sacrosanct" to Aboriginal peoples, but are not so regarded by federal government, for which they are neither basis for "recognition of diverse [Indian] cultures" nor "international agreements between sovereign peoples or nations").

\textsuperscript{99}POMMERSHEIM, \textit{supra} note 16, at 17; \textit{see also} Monette, \textit{supra} note 77, at 632 (arguing that treaties brought tribes into federal structure by "caus[ing] the sovereign spheres of the tribes and the Union to overlap, resulting in a relationship of compact federalism resting on good faith," in which tribes "authorized or at least consented to the federative nature of the Union/tribe relationship." (emphasis added)).

\textsuperscript{100}Treaties referred to Indian tribes alternately as tribes and nations. For example, language in the 1814 Treaty of Ghent, ending hostilities with Great Britain, consistently referred to Indian tribes as "tribes" or "nations," even though the United States delegation feared that allowing the affected tribes to sign the treaty—and thus treating them as independent nations as the British wanted—might lead them to realign with the British. Wilkins, \textit{supra} note 71, at 307; \textit{see also} Tadd M. Johnson & James Hamilton, \textit{Self-Governance for Indian Tribes: From Paternalism to Empowerment}, 27 CONN. L. REV. 1251, 1256-57 (1995) (stating that end of treaty era, in 1871,
treaties was the working assumption that the tribes were in full possession of their sovereignty. In the words of Thomas Jefferson:

I consider our right of preemption of the Indian lands, not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy; that the Indians had the full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever.\[10\]

The words “treaty” and “nation,” Marshall wrote in *Worcester v. Georgia*,\[10\] “are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”\[103\] Just as

\[10\] 17 *The Writings of Thomas Jefferson* 340–41 (1903–04) (emphasis added); *see also* Mitchell v. United States, 34 U.S. (9 Pet.) 711, 745 (1835) (“[F]riendly Indians were protected in the possession of the lands they occupied, and were considered as owning them, by a perpetual right of possession, in the tribe or *nation* inhabiting them.”) (emphasis added)).

\[103\] Id. at 559–60. To some Indian law scholars, treaties indicate that tribes were historically perceived as nations that functioned on an international plane. See, e.g., Pommersheim, *supra* note 16, at 41 (stating that because business of tribes and United States—and before that colonies and Crown—was conducted through treaties, tribes historically were perceived of as nations that functioned on international plane); Monette, *supra* note 77, at 629 n.81 (noting that “the Continental Congress [had] three Indian departments” to carry on affairs between Indians and central government, “appointed a standing committee to ensure that the integrity of territorial boundaries between the colonies and the tribes be maintained,” “required visas and passports out of a state’s and into a tribe’s territory,” and “received tribal delegations as it did foreign delegations.”); id. (noting that “in 1776, when a colonial citizen was murdered in a tribe’s territory, the Congress determined whether the act constituted a ‘national act’ or an act of war, according to the prevailing law of nations”); Newton, *supra* note 9, at 200 (“In formulating federal policy toward Indian tribes in the early years of the Constitution, President Washington and Secretary of War Knox followed the policy promulgated by the British Crown . . . of dealing with Indian tribes as sovereign nations.”). Even before the British,

Francisco de Vitoria, a prominent Spanish Theologian, was asked in the 1530s by . . . the King of Spain [ ] to address what the rights of the Spanish were in the New World and . . . what rights, if any, the indigenous peoples retained in the face of Spanish colonialism. . . .

. . .

[Vitoria’s 1532 lecture] entitled *On the Indians Lately Discovered*, . . . confirmed not only that the indigenous peoples possessed natural rights, but also that as free people they were the ‘true owners’ of the land they inhabited.

Wilkins, *supra* note 71, at 285–86. Some Indian law scholars argue that tribes are *still* independent states on an international plane. *See, e.g.*, S. James Anaya, *The Rights of Indigenous
states have no jurisdiction in foreign nations, "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."\(^\text{104}\)

For all these reasons, Indian treaties offer the promise of something more with respect to the concept of tribal sovereignty. To Pommersheim, Indian treaties are "the closest thing to a (federal) constitutional benchmark from which to engage in a legal discourse about the nature of tribal sovereignty within a constitutional democracy."\(^\text{105}\) Barsh and Henderson view Indian treaties as equal to "political compacts," "irrevocably annexing tribes to the federal system in a status parallel to, but not identical with, that of the states."\(^\text{106}\) They argue that because "[t]reaties are a form of political

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\(^\text{105}\) POMMERSHEIM, supra note 16, at 40–41 (stating that treaties are "enshrined in the supremacy Clause" of U.S. Constitution). According to Pommersheim, federal Indian treaties impose "affirmative obligations on the [federal] government to provide specific services—usually in the areas of health, education, and social services—to Indians tribes." \(\text{Id.}\) The subsuming of these obligations into the trust relationship between the government and tribes has "erroneously" converted them into a question of "federal largesse," which he believes they are not. \(\text{Id.}\)

\(^\text{106}\) BARSH & HENDERSON, supra note 56, at 270; see also id. at 275 (implying that Marshall recognized that treaties were form of compact when he used phrase "domestic dependent nations" in Cherokee Nation to describe Indian tribes: "What made [tribes] domestic was their permanent inclusion within the national territory of the United States, and what made them dependent was their recognition by treaty of federal supremacy."); \(\text{id.}\) at 59 (interpreting Marshall's opinion as "treaty federalism, as opposed to constitutional federalism"); ALENIKOFF, supra note 16, at 140–49 (using treaties as negotiating paradigm for tribes, and suggesting that tribes should negotiate with federal or state government for greater share of sovereign authority and then enter into equivalent of interstate compacts); Alex Tallchief Skibine, Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination, 1995 UTAH L. REV. 1105, 1156 (advocating "return[] to a relationship based on consent" among tribes, states, and federal government, in which parties "negotiate [their respective] jurisdictional responsibilities"); Gould, supra note 7, at 815, 901 (commenting that "inherent sovereignty and trust responsibility have each failed the tribes," thus tribes "must search for solutions which offer promise of cultural accommodation and principled compromise" through "cooperative agreements with their traditional enemies, the states"). See generally Note, Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 HARV. L. REV. 922 (1999) (advocating expanded use of state-tribal compacts). However, any solution premised on negotiation, like treaties themselves, may be flawed from a tribal perspective because of the power imbalance between tribal and government negotiators, the consumption of scarce tribal resources by the negotiation process, the complexity of the negotiations (which may require separate but overlapping bargains being struck at the federal and state level), and because bargained-for solutions may be hard (and costly) to enforce.
recognition and a . . . consensual distribution of powers between tribes and the United States,” their existence creates “a presumption” of noninterference in tribal affairs.\textsuperscript{107} Tsosie sees treaties as embracing and giving legal imprimatur to the concept of multiculturalism.\textsuperscript{108}

However, treaties offer weak support for a more robust vision of tribal sovereignty because they have been drained of almost all substantive significance. Today, the unfortunate reality is that federal Indian treaties are little more than interesting historical records, ceremonial touchstones, or starting points for legal argumentation. Primarily a legal convenience to enable white settlers to take Indian land with minimal bloodshed, treaties lacked true legal or moral significance. This enabled the federal government to breach its nominal binding authority on the nontribal signatories easily—breaches that the Court would later justify.\textsuperscript{109} Even the most vigorous efforts by legal scholars cannot vest in federal Indian treaties a substantive significance that the federal government has consistently been unwilling to find. Thus, even though Indian treaties reflect the principle that tribes possess some measure of retained sovereign authority, the fact that this principle is set out in a federal treaty does little to strengthen the principle itself.

This Article now turns to a discussion of the doctrine of inherent sovereignty, and the Marshall Trilogy,\textsuperscript{110} the source of that doctrine—to see whether inherent sovereignty offers a more secure foundation on which to build a vision of enhanced tribal sovereignty.

This view of treaties as compacts is far from a modern construct, as is apparent from the following statement in 1869 from the Commission of Indian Affairs:

A Treaty involves the idea of a compact between two or more sovereign powers, each possessing sufficient authority and force to compel a compliance with the obligations incurred. The Indian tribes of the United States are not sovereign nations, capable of making treaties, as none of them have [sic] an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this character.


\textsuperscript{107}Barsh \& Henderson, \textit{supra} note 56, at 270; \textit{see also id.} at 274 (“Regardless of [the] original intent [of Indian treaties], they have resulted in a complete political and economic integration of tribes into the federal system,” making “[s]eparation of the two “practically impossible.”

\textsuperscript{108}Tsosie, \textit{supra} note 17, at 1623–25 (pointing out that “multicultural [feature of Indian] treaties . . . is acknowledged in the federal government’s trust relationship with [tribes], in the canons of construction [that recognize the language and cultural barriers inherent in treaty negotiations with tribes given their dependent status], and the Supreme Court’s jurisprudence relative to Indian treaty rights,” which treats legal rights granted under Indian treaties differently than rights under treaties with foreign nations).

\textsuperscript{109}See \textit{infra} Part II.B.2 (discussing effect of judicial doctrines on sovereignty).

\textsuperscript{110}See \textit{infra} notes 114–15 and accompanying text (discussing Marshall Trilogy).
2. Inherent Sovereignty

Most Indian law scholars posit that tribes possess inherent sovereignty that has never been extinguished. Considered one of the foundational doctrines of Indian law, inherent sovereignty holds that tribes may exercise powers free of the strictures of the Constitution unless limited by treaty or by Congress. These powers secure for tribes the essential rights of a separate, albeit limited sovereign, and place tribes in a unique, anomalous position in the federal structure, as they are neither states nor foreign nations. Fundamental to the doctrine of inherent sovereignty is the principle that tribal powers exist outside the Constitution, making these powers extra- or preconstitutional. Because

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111 See COHEN, supra note 16, at 122 (“Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe, are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”). According to Gould, this “statement, usually attributed to Cohen, first appeared in an opinion of Solicitor General Nathan R. Margold, Powers of Indian Tribes, 1 Op. Solic. Gen. 445, 447 (1934).” Gould, supra note 7, at 816 n.33; see also id. at 816 (“Fundamental to the doctrine of inherent sovereignty is the principle that tribal powers arise outside the Constitution—[u]nless ceded by treaty or limited by the Congress, these powers secure for tribes the essential rights of separate sovereigns.”); Garnett, supra note 15, at 443 (stating that concept of inherent sovereignty means that tribal sovereignty is “the preexisting given from which other sovereigns’ jurisdiction is subtracted . . . [I]t remains the baseline, [which only federal law can diminish, persisting residually and interstitially beneath and around the various federal and state encroachments.”).

112 See ALENIKOFF, supra note 16, at 97 (stating that “range of descriptions [of Indian sovereignty] in U.S. constitutional history . . . runs the gamut[ from being either] pre- or extraconstitutional, like foreign states[, ] limited[,] like states, or capable of “extinguishment, like territories”). Some scholars, however, insist that the Framers of the Constitution and the United States government, over a century after adopting the Constitution, viewed Indians as belonging to a separate sovereign nation. In supporting this argument, they point to the Indian Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, which gives Congress the exclusive power “[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes”; to the constitutional provision that Indians are not to be counted as part of the population for purposes of deciding state representation in Congress, U.S. CONST. art. 1, § 2, cl. 3; and to the Fourteenth Amendment’s denial of citizenship to Indians. U.S. CONST. amend. XIV, § 2. See, e.g., BARSH & HENDERSON, supra note 56, at 257–69 (arguing that tribal sovereignty should be protected as “fundamental” “political liberty,” or retained right of people under Ninth Amendment); Robert G. McCoy, The Doctrine of Tribal Sovereignty: Accommodating Tribal, State and Federal Interests, 13 HARV. C.R.-C.L. L. REV. 357, 358 n.8 (1978) (observing that Constitution has been interpreted as granting Congress plenary power over Indian tribes); Robert J. Miller, American Indian Influence on the United States Constitution and Its Framers, 18 AM. INDIAN L. REV. 133, 150 (1993) (observing that Framers and United States government viewed Indians as part of separate sovereign nation); Newton, supra note 9, at 261 (positing that protection of liberty under Fifth Amendment’s due process clause protection of liberty would be “a more secure, even if less logical repository for this right” (citing JOHN ELY, DEMOCRACY AND DISTRUST 34–41 (1980))). However, there is a “lack of suppleness” in the argument that the Commerce Clause, together with various Court holdings such as Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) (holding that tribes, like foreign nations, had sovereign immunity from suit); Talton v. Mayes, 163 U.S. 376 (1896) (holding that Bill of Rights does not apply to tribal governments); and Elk v. Wilkins, 112 U.S. 94 (1884) (affirming that Indians born
these inherent sovereign powers are external to the Constitution, the Supreme Court considers itself free to shape the doctrine’s contours, giving it the status of federal common law, and making it mutable over time.\textsuperscript{113} The effects of this are discussed in greater detail in Part III.B.

The commonly acknowledged sources of the doctrine of inherent tribal sovereignty (and—paradoxically—of the doctrines that undermine it) are three opinions authored by Chief Justice John Marshall during the Presidencies of John Quincy Adams and Andrew Jackson.\textsuperscript{114} Known as the Marshall Indian Law Trilogy,\textsuperscript{115} ("Trilogy") the Chief Justice used three cases to delineate the relationship between the tribes and the federal government, and, by implication, between the federal government and the states, on matters involving Indians.\textsuperscript{116} The three decisions collectively stand for the propositions that: (1) Indian tribes are "domestic dependent nations" whose right to occupy

within tribes were not citizens of United States under Fourteenth Amendment), means tribes are separate sovereign nations. The argument ignores the Court’s willingness to imply congressional power regardless of explicit textual references. Aleinikoff, The Elusive Goal of Tribal Sovereignty 51 (Mar. 2, 2000) (unpublished manuscript on file with author); see also ALEINIKOFF, supra note 16, at 124–26 (discussing flaws in textually based constitutional arguments that tribes are foreign states not subject to plenary power doctrine); Newton, supra note 9, at 239 (finding these arguments, though historically and textually appealing, unlikely to provide basis for limiting federal power over Indians).

\textsuperscript{113}McCoy, supra note 112, at 358 n.8 (stating that “tribal sovereignty doctrine is essentially a product of federal common law,” and “federal courts have [the] authority to create federal common law in an area in which a constitutional allocation of power has been made to the federal government”).

\textsuperscript{114}Worcester, 31 U.S. (6 Pet.) 515 (holding that laws of Georgia had no effect within Cherokee territory); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that tribes were “domestic dependent nations,” and not foreign nations, and finding Court without jurisdiction to enjoin application of Georgia’s laws on Cherokee reservation); Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that defendant’s title, granted by United States, was superior to plaintiff’s title, acquired from Indian tribe). Each of these opinions is discussed in greater detail in this Section of the Article.


\textsuperscript{116}See McCoy, supra note 112, at 359 (stating that Cherokee Nation and Worcester "establish that the tribes are independent political communities subject to the restraints of their protectorate relation with the federal government," and that these “concepts [originally] formulated by Marshall continue to be accepted as the basis of the tribal-federal relation").
their lands is subject to the “ultimate domain”\textsuperscript{117} of the federal government; (2) tribes and the federal government are in a “guardian-ward relationship”\textsuperscript{118}, and (3) tribes can “govern their [internal] affairs without interference from the states [or the federal government], except when limited by treaties or by acts of Congress.”\textsuperscript{119} Marshall based his theory of tribal sovereignty on the Cherokee Nation’s collective political right to self-govern—in other words, its inherent sovereignty. According to Marshall, although tribal sovereignty was subject to the ultimate paramountcy of the federal government, it was otherwise inviolate. These decisions have never been directly overruled,\textsuperscript{120} and the principles announced in them continue to have controlling effect in the field of Indian law, for both good and bad.

The first case in the Trilogy, \textit{Johnson v. \textit{M'Intosh}},\textsuperscript{121} involved a property dispute between two parties, both claiming title to the same tract of land. One claimant based his title on tribal grants “obtained . . . without the consent of the United States;” the other, on “subsequent federal land patents, issued after the [entire] area had been ceded to the United States by a tribal treaty.”\textsuperscript{122} The question facing the Court was whether it should respect interests in land that were not part of the Union when the putative owner acquired them and, therefore, were obtained “without the sanction . . . of federal laws.”\textsuperscript{123} Underlying this question was a more fundamental problem for Marshall: on what authority did the federal government acquire “these cessions of foreign

\textsuperscript{117} \textit{Worcester}, 31 U.S. (6 Pet.) at 580 (M'Lean, J., concurring).

\textsuperscript{118} \textit{See Gould, supra} note 7, at 810 n.6.

\textsuperscript{119} \textit{Id.} at 817.

\textsuperscript{120} \textit{But see} Nevada v. Hicks, 533 U.S. 353, 362 (2001) (“Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries.” (internal quotation marks and citations omitted) (alteration in original)).

\textsuperscript{121} 21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{122} BARSH & HENDERSON, \textit{supra} note 56, at 45. Commenting on \textit{M'Intosh}, Barsh and Henderson note that the Court reached the same issues on Indian title to land and tribal sovereignty in \textit{M'Intosh} that it had “finessed” in both \textit{New Jersey v. Wilson}, 11 U.S. (7 Cranch) 164 (1812), and \textit{Fletcher v. Peck}, 10 U.S. (6 Cranch) 87 (1810). BARSH & HENDERSON, \textit{supra} note 56, at 37–39. In \textit{Fletcher}, the Court held that the purchasers from the original patentee of land in Georgia had superior title to subsequent purchasers who got title from the state after revocation of the original patent. \textit{Id.} at 37. The Court ignored the fact that Indians occupied this land, and that there were no indications in that record that anyone, including the state, had bought the land from them. \textit{Id.} at 37–38. The authors also point out that in \textit{Fletcher}, Marshall “neither denied the state’s power to grant a fee simple estate in land it had not purchased, nor the tribe’s right to continue to occupy that land undisturbed until it chose to sell it.” \textit{Id.} at 38. In \textit{Wilson}, where the Court sustained tax-exempt status of land for subsequent purchasers of tribal property even though the state legislature had repealed the tax exemption after the sale, the Court, by basing its decision on the Contract Clause, “avoided any suggestion that the tribe might be exempt from taxation because [it was a sovereign nation] politically independent[1] from New Jersey.” \textit{Id.} at 39. In doing so, the Court implicitly accepted the state’s “pretension that, but for its grant of exemption, it could have taxed the tribe” like any other landowner. \textit{Id.}

\textsuperscript{123} \textit{Id.} at 45.
territory [from Indians], and then patent them out to [private] citizens?"124 Marshall was caught between two competing interests: the desire not to disturb previously settled expectations about land title and the desire not to dishonor the many treaties and proclamations protecting Indian property rights, and by implication, tribal sovereignty.125

Marshall resolved this dilemma by holding that Congress had the power "to purchase and reconvey tribal lands in the two-centuries-old convention among European nations that discovery vested in the discoverer an exclusive 'preemptive' entitlement to deal with the natives as against other European crowns."126 However, the "discovery doctrine" merely vested in the discovering nation the exclusive right to "treat for title."127 Marshall reconceptualized discovery to vest title in Indian lands in the discovering nation. He then created the fiction that Indians had been conquered from the fact that Indian tribes had continued to "coexist" peacefully with the United States.128 In doing all of this, Marshall ignored the dozens of international treaties signed by the United States (and before that, by the European colonizing nations) and Indian tribes, and the implied fact of tribal sovereignty.129

124 *Id.* at 47. Barsh and Henderson contend that both *Fletcher* and *Wilson*, at least, intimated "that the states could convey [fee title] in western lands without waiting for federal action." *Id.* at 47.

125 If the Court had ruled that Indians held fee simple title to their land, then Indians could have sold their land to anyone; such a ruling could divested landowners of certain lands acquired by grant from Britain, France, or Spain. It would have destroyed the ability of the fledgling central government "to control the disposition of newly acquired land outside the 13 original states." Newton, *supra* note 9, at 208 n.69; *see also* Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 686–87 (1982) (discussing how Indian rights in land complicated question of title to land in New York State and other New England colonies, and stating that "[a] second ambiguity related to the delicate question of Indian rights" and "whether a [crown] grant unaccompanied by an Indian deed was enough to defeat title based on cultivation and an Indian deed").

126 Barsh & Henderson, *supra* note 56, at 47; *see* M'Intosh, 21 U.S. (8 Wheat.) at 572–74 (1823) (discussing this practice). In *Fletcher*, the dissent opined:

> What then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed by the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits.

*Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., dissenting).


128 *Id.* The fiction of conquest was also useful to the British during the revolution, as British law allowed the automatic application of the laws of England only when the lands settled were unoccupied (*terra nullis*), not when settled as a result of conquest. This meant that the British could argue that the colonists did not enjoy all the rights of British citizens that the Americans claimed as a basis for the revolution. David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 485 (1993).

However extravagant the pretension of converting the discovery of an uninhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.\textsuperscript{130}

Marshall’s decision in \textit{M’Intosh} was the Chief Justice at his most pragmatic\textsuperscript{131} (and extravagant).\textsuperscript{132} Marshall’s deployment in \textit{M’Intosh} of an Americanized discovery doctrine, in which discovery became conquest, enabled him to protect the property rights of individuals who could trace their title to grants of land that the federal government acquired through treaties with Indian tribes, even though this meant extinguishing Indians’ fee claims to

\textsuperscript{130}\textit{M’Intosh}, 21 U.S. (8 Wheat.) at 591 (emphasis added). Under a more accurate understanding of the discovery doctrine, the United States was not an owner of Indian lands; rather it was a “protector of Indian interests in their lands and stood first in line should a tribe choose to sell any of its lands.” Wilkins, \textit{supra} note 71, at 308.

\textsuperscript{131}According to Eisgruber, Marshall’s preoccupation with showing the American public that the new government could, in fact, govern led him to make “practical arguments about likely results.” Eisgruber, \textit{supra} note 115, at 447. When Marshall’s arguments rested upon a “controversial empirical claim,” which invariably they did, Marshall would merely assert or imply the necessary facts; he “would spin out the implications of his premises rigorously and emphatically, but leave the premises themselves unjustified and sometimes unstated.” Id. at 447–48. The fact that Marshall’s decisions do not depend on any factual basis or historical support may explain their lasting effect: facts can change over time and historical support can be subject to criticism when the underlying assumptions and prejudices—which motivated the original chain of decisions—change.

\textsuperscript{132}Norgren accuses Marshall of engaging in a corrupt reading of history. For example, she points out the falsity of Marshall’s statements that, at the time that the Constitution was written, there was no reason for the Framers to think that Indians would seek redress in an American court of justice. Norgren, \textit{supra} note 115, at 72. In fact, since the mid-seventeenth century, Indians had been litigants in colonial and later state courts. Id. Williams, commenting upon the discovery doctrine, states that:

Principles and rules derived from the Doctrine and its related notions of Congressional plenary power in Indian affairs have legitimated numerous injustices and violations of Indian human rights. Uncompensated Congressional abrogations of Indian treaty rights, leading to takings of Indian lands and resources, involuntary sterilization of Indian women, violent suppression of traditional religions and governing structures, and all the other usual forms of genocide perpetrated upon Indian people by European-derived ‘civilization’ represent the historical detritus of this legal doctrine.

Williams, \textit{supra} note 77, at 168–69; see also Wilkins, \textit{supra} note 71, at 279 (discussing “Doctrine of Discovery”). “European and early American land policies . . . and early American treaties, United States congressional directives, and specific comments from American officials vividly show[] that the doctrine of discovery was merely an exclusive preemptive rule that limited the rights of discoverers [and] their successors and . . . [not] the preexisting land title of tribes.” Id. at 283. The discovery doctrine—defined as it was in \textit{M’Intosh} to mean that the federal government holds fee simple title to all Indian lands—“is a clear legal fiction that needs to be explicitly stricken from the federal government’s political and legal vocabulary.” Id. at 315.
that land. This affirmed the supremacy of the federal power to control acquisition of new land, relegated Indians to mere occupancy (or use) rights to treaty-protected aboriginal land, and divested tribes of the legal capacity to convey these lands, other than by treaty with the federal government.\footnote{Worcester, 31 U.S. (6 Pet.) at 559. Marshall’s reasoning paralleled the reasoning used by several of the former colonies, which had solved the question of Indian legal (“civil”) rights in land by assuming Indians had only a natural right to the soil; this became a right to occupy or use land, but not own it—later referred to as aboriginal title. Mensch, supra note 125, at 686. For example, “[i]n Massachusetts Bay [Colony,... [this] position was elaborately defended as an inevitable deduction from the fact that a civil (as opposed to natural) right to land could be based only upon cultivation, not mere hunting and fishing.” Id. “The first right was natural when men held the earth in common every man soweing and feeding where he pleased; and then as men and the cattle increased they appropriated certaine Pcells of ground by enclosing, and peculiar manurance, and this in Tyme gave themm a Civil right.” Mensch, supra note 125, at 687 n.221 (citing Eisenger, Puritan Justification for Taking Land, 84 ESSEX INST. HIST. COLLECTION 136 n.13); see also id. (“God admitteth it as a Principle of Nature, that in a vacant soyle, hee that taketh possession of it, and bestoweth culture and husbandry upon it, his Right it is.” (internal quotation marks and citations omitted)); PERRY MILLER, THE NEW ENGLAND MIND 398–431 (1963) (discussing how Puritans believed that unbridled natural liberties led to disruptive disputes over landownership).}

In reaching his decision, Marshall also employed an empirically unfounded view of Indians as “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”\footnote{M’Intosh, 21 U.S. (8 Wheat.) at 590. According to Burke, there are alternative explanations for Marshall’s choice of the word “savage.” First, the term may simply reflect the common verbiage of the time. The English referred to Indians as “uncivilized” and the French used the term “sauvage.” Second, and related to the first, under then-existing principles of international law, Europeans could exert their sovereignty over another people only if the target population was “uncivilized” (i.e., non-Christian). Marshall’s use of the term “savage” may have been part of an effort to provide a justification for his decision under international law. Finally, the phrase may have been an obligatory nod to the fears and biases of the other justices (and other interest groups) that Marshall was trying to persuade. See Joseph C. Burke, The Cherokee Cases: A Study of Law, Politics, and Morality, 21 STAN. L. REV. 500, 514–19 (1969). But see POMMERSHEIM, supra note 16, at 42 (commenting that formative opinions of Chief Justice Marshall bristle with “colonizing arrogance and are without anthropological support and moral justification”).} This view of Indians provided support for Marshall’s premise that leaving Indians in possession of the country “was to leave the country a wilderness,”\footnote{M’Intosh, 21 U.S. (8 Wheat.) at 590 (“To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.”).} and justified his decision to find superior title to Indian lands in the United States on the basis
of discovery alone. Marshall’s view of Indians as uncivilized savages has haunted the content of federal Indian jurisprudence since he fabricated it.

The two other cases in the Marshall Trilogy, Cherokee Nation v. Georgia and Worcester v. Georgia, also presented Marshall with politically challenging situations. In these cases, Marshall had to confront both a state openly hostile to the Cherokee Nation (Georgia) and an increasingly popular President (Andrew Jackson), who had no sympathy for Indian sovereignty. At the time Marshall wrote his Cherokee opinions, the country was experiencing a revival of democratic (Populist), agrarian, and states’ rights thinking, which in 1828 culminated in the election of Andrew Jackson to the White House and the defeat of John Quincy Adams, a leading advocate of

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136 BARSH & HENDERSON, supra note 56, at 48-49. Marshall would have been as aware of the role Indians played in helping early settlers in the Massachusetts Bay and Virginia colonies as we are today. As a contemporary of both Benjamin Franklin and George Washington, Marshall would have been familiar with the admiration that Franklin had for the Iroquois, and that Washington had for the Cherokee; he also would have been aware of the sophistication of the respective governance structures of these tribes.

137 Newton contends that, over time, “judicial misinterpretations of the [discovery] doctrine are in large part responsible for arguments in favor of virtually unreviewable federal power over Indian lands” (the so-called plenary power doctrine). Newton, supra note 9, at 209. According to Newton, the Marshall Court intended only to give the federal government “a preemptive right to purchase Indian land or confiscate it after a war,” a “glorified” first option; the “Indians . . . remained ‘the rightful occupants of the soil, with a legal as well as just claim to retain possession of it.’” Id. at 208–09 (citing M’Intosh, 21 U.S. (8 Wheat.) at 574.) However, Newton notes that later Supreme Court decisions described the federal government’s interest in land as a title interest and the tribal interest as [merely] a possessory one.” Id. at 209. “The more the government’s interest was characterized as an ownership interest, the more it became possible to regard the ownership of land alone as giving the government power to govern Indians.” Id.; see also Williams, supra note 77, at 169 (calling doctrine of discovery “the ‘separate but equal’ and Korematsu of United States race-oriented jurisprudence respecting [the] status and rights” of Indians).


140 Georgia[, in a rapid secession of laws,] set out to nullify all Cherokee law, to make Cherokees second class citizens of color under Gorgia Law, and to claim and redistribute [Cherokee lands] to Georgians,” as well as to “arrest any Cherokee official who tried to convene a meeting of the Cherokee government [or] any American living among the Cherokee who did not first swear an oath of allegiance to Georgia and its laws.” Norgren, supra note 115, at 67. “The Cherokee fought back in local Georgia courts . . . by appealing [three cases] to the Supreme Court of United States.” Id.; see Worcester, 31 U.S. (6 Pet.) 515; Cherokee Nation, 30 U.S. (5 Pet.) 1; State v. Corn Tassel, 1 Dud. 229 (Ga. 1830) (granting writ of error on December 19, 1830). These three cases came to be known as the “Cherokee cases.”

141 In fact, President Jackson was openly committed to a policy of removing Indians from their lands. See generally WILLIAM G. McLoughlin, CHEROKEE RENAISSANCE IN THE NEW REPUBLIC 424-50 (1986) (describing Jackson’s Indian removal efforts); PRUCHA, supra note 83, at 233–39 (same). Congress also favored removal of Indians from their homelands. See Indian Removal Act of 1830, 4 Stat. 411-12; see also McLoughlin, supra, at 435–37 (describing passage of Indian Removal Act of 1830).
Marshalls party, the Federalists. There was growing public distrust of both central government and the idea of a national economy—each of which the Federalists promoted—and increasing anger directed at the postwar nationalistic decisions of the Marshall Court.

In the first of these cases, the Cherokee Nation tried to invoke the Supreme Courts original jurisdiction to enjoin Georgia from enforcing Georgia laws on land reserved to the Cherokees under a treaty with the United States. Marshall extricated the Court from the rough seas of federal-

142 For more on the topic of President Jackson and the persistence of anti-federalism, see Richard E. Ellis, The Persistence of Antifederalism After 1789, in Beyond Confederation, supra note 115, at 295, 307-09.

143 See, e.g., Worcester, 31 U.S. (6 Pet.) 515 (holding that intercourse between United States and Indians vested in federal government and that interfering Georgia laws have no force); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (holding that Bank of United States articles of incorporation, enabling it to sue in federal court, were consistent with Constitution, and that because Ohio state law imposing tax on Bank was unconstitutional and void, circuit court correctly ordered defendants to repay money with interest); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (holding that Constitution embraced all contracts, including Virginia-Kentucky compact at issue, and that state had no more power to impair obligation into which it had entered than it did contracts between individuals); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (holding that Congress enacted Washington D.C.s lottery statute according to its exclusive legislative power over D.C., that Congress intended statute to be local legislation, and that, because lottery statute was not enacted as law of United States, it did not preempt state statutes); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that Marylands attempt to tax Bank of United States was unconstitutional because Maryland had no power to burden operations of constitutional laws enacted by Congress); Martin v. Hunters Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that appellate power of United States Supreme Court extends to cases pending in state courts and that Judiciary Act § 25, which authorizes exercise of this jurisdiction in specified cases by writ of error, is supported by Constitution); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (holding that Act of 1804 was unconstitutional under Contracts Clause of U.S. Constitution and finding that subject of original agreement between New Jersey and tribe was governmental purchase of extensive tribal claims, extinguishment of which would quiet title to large portion of province). Of these, Wilson, Biddle, and Worcester proved to be unenforceable and were successfully resisted or ignored by the states. See Ellis, supra note 142, at 307-08 (discussing cases). These unpopular decisions also provoked a series of [popular, although unsuccessful, efforts to amend] the Constitution. . to limit the powers of the federal judiciary. Id. at 307. Proposed amendments included: placing final authority over disputes between the states and the federal government in the states and making the Senate a final court of appeals for such disputes, a series of laws to increase the Court's size, requiring more than a bare majority decision by the Court to invalidate a state law, and repealing section 25 of the Judiciary Act. Id. at 307-08.


145 The case involved the arrest of George Corn Tassels, a Cherokee tribal leader, for the murder of another Cherokee on the reservation. Norgen, supra note 115, at 70. After the Supreme Court issued a writ of error, the state—in direct defiance of the Court—hanged Tassels, asserting that the Supreme Court had no jurisdiction over the matter. Id. Georgia did not appear before the Court for oral argument and refused to acknowledge any legal papers served on it. Id. at 72. The Supreme Court eventually denied the motion for an injunction on jurisdictional grounds. See Cherokee Nation, 30 U.S. (5 Pet.) at 20. As Marshall himself said about the case,
state politics by identifying for the Court's attention only the question of whether the Cherokee were entitled to invoke the Court's Article III jurisdiction. Viewing the Cherokee Nation as neither a state nor a foreign country enabled him to answer that question in the negative.

Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage[; t]heir relation to the United States resembles that of a ward to his guardian.

Although Marshall's decision in Cherokee Nation avoided a constitutional crisis and further attack on the Court from President Jackson and the supporters of states' rights, the opinion further damaged the cause of tribal sovereignty. Even though Marshall recognized a tribe's right to govern

"[i]f Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." Id. at 15.

146Norgren, supra note 115, at 72.

147Cherokee Nation, 30 U.S. (5 Pet.) at 15.

148Id. at 17 (emphasis added); see also Newton, supra note 9, at 207 ("From these two concepts—property interest and guardianship—the Court in the late nineteenth century gradually developed a guardianship over Indian tribes . . . ."). Justice Story concurred in Marshall's view of Indian nations as distinct, but dependent nations: "'Indians . . . were always treated, as distinct, though in some sort, as dependent nations. Their territorial rights and sovereignty were respected . . . . But their right of self-government was admitted; and they were allowed a national existence . . . .' " 2 THE FOUNDERS' CONSTITUTION 550 (Phillip B. Kurland & Ralph Lerner eds., 1987) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1094 (1833)). However, together with Justice Thompson, Justice Story dissented in Cherokee Nation; he argued, “the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia.” Cherokee Nation, 30 U.S. (5 Pet.) at 80. The story of the Story and Thompson dissent—the latter of whom authored the dissent—is quite interesting: neither Justice submitted an opinion to be published as part of the official Court record; they submitted the dissent only after Marshall, seeing the unbalanced nature of the public record, prevailed on them to do so. Norgren, supra note 115, at 74-75. Justice Thompson, a northerner, was a former legal apprentice to New York State jurist and legal scholar James Kent, who was well known for his support of Indian land rights. Id.

149Norgren, supra note 115, at 75; see also BARSH & HENDERSON, supra note 56, at 53 ("Deftly sidestepping a constitutional crisis, the Court disposed of the case on purely jurisdictional grounds.").
his designation of qualified nationhood for tribes (as "domestic dependent nations") placed tribes outside the scope of the Court's Article III jurisdiction. And while declaring tribes to be "domestic dependent nations" did not necessarily mean they were inherently inferior or had a status outside the scope of the law of nations, in the same breath, he stated Indians were in a "state of pupilage," and described the relationship between the United States and the tribes as that of a "ward to his guardian." Both the domestic dependent nation and guardianship concepts undercut any notion of independent, full sovereignty for tribes.

The third and final case of the Trilogy, *Worcester v. Georgia*, involved the arrest of several missionaries for violating a Georgia law that required non-Indians desiring to live in Cherokee country to get licenses from the state

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150 Barsh and Henderson, *supra* note 56, at 53; see also Williams, *supra* note 90, at 259–60 (seeing Marshall's opinion as clearly describing Cherokee Nation as capable of managing its own affairs and governing itself.).

151 As "domestic dependent nations," Barsh and Henderson, *supra* note 56, at 275, it was understood that tribes could not enter into treaties with foreign nations. *Id.* at 39. The ability of tribes to treat with foreign nations was contested during negotiations between the fledgling United States and Great Britain preceding the Treaty of Ghent in 1814. See *id.* at 40. In these negotiations, the British argued that the tribes, who possessed much of the disputed territory, were entitled to "territorial integrity" and would not be "abandon[ed] ... to their fate" by the British. *Id.* at 40–41. John Quincy Adams argued that such a decision would "inflict a vital injury on the United States" and that the new government would never take Indian land unless it did so "peaceably," and that Indians could never be considered an "independent Power." See Barsh and Henderson, *supra* note 56, at 41–43 (internal quotation marks and citations omitted).

Marshall's concept of "a domestic dependent nation" essentially established a protectorate status between the federal government and the tribes, which—in Marshall's era—did not extinguish the political character of the protected nation.

The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of self-government, and ceasing to be a state.

*Worcester*, 31 U.S. (6 Pet.) at 560–61; see also McCoy, *supra* note 112, at 366 (finding significance of Cherokee Nation as "Marshall's reasoning that the tribal-federal relation imposes inherent limitations on tribal political independence even in the absence of specific federal Indian legislation or a treaty provision"); Willoughby, *supra* note 10, at 597–98 n.18 (finding significant spelling of "dependent" in light of Marshall's explanation of term in text, and stating that "'[D]ependent' defines one's very existence as contingent upon another. However 'dependant' infers a [sic] status of need, of requiring support, and not affirmation from another." (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 354 (New College ed. 1979)). But see Barsh and Henderson, *supra* note 56, at 54–57 (suggesting that ambiguity of phrase *domestic dependent nation* and its contemporaneous use in English common law has "caused more problems than it solved").


Throwing political expediency to the wind, the Court overturned the convictions, holding that Georgia law had no force on Cherokee land established by treaty with the United States. The Court thus delivered a strong Federalist decision in an increasingly anti-federalist environment.

In Worcester, Marshall reworked the negative principles of federal Indian law that he had propounded in the two preceding cases of his Trilogy. Contradicting M'Intosh, Marshall now said that tribal sovereignty had nothing to do with theories of discovery, conquest, or fee ownership. Rather, it was a matter of inherent, collective political rights that Indians possessed no differently from anyone else. He returned the discovery doctrine to its original meaning and described as "extravagant and absurd" the notion that European discovery and settlement constituted conquest or conferred title to property under European common law. Directly repudiating M'Intosh's conquest theory, Marshall wrote that the tribes had never been conquered;

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154 Id. at 515.
155 The Court found Georgia's laws to be "repugnant to the constitution, laws, and treaties of the United States," and to violate the political rights of the Cherokee Republic. Id. at 562–63. The decision precipitated the first constitutional crisis provoked by the judicial branch, something that must have horrified Marshall. Norgren, supra note 115, at 79. Georgia was outraged by the Court's opinion. Id. Georgia Governor Lumpkin reportedly said to the Georgia Superior Court, in response to the Court's mandate, that if it reversed its decision and freed the missionaries, he would hang them rather than "submit to this decision made by a few superannuated life estate Judges." Id. (internal quotation marks and citations omitted). Rather than issue a new decree authorizing federal marshals to free the prisoners, the Supreme Court adjourned. Burke, supra note 134, at 525. For a full recounting of the denouement of the case, see Norgren, supra note 115, at 79–81.
156 It is interesting to speculate about why Marshall chose Indian tribes as the vehicle for his Federalist political agenda. The appropriate federal-state balance in the area of Indian affairs was a topic of serious debate during the Constitutional Convention. Marshall found the constitutional language conferring to Congress the authority to regulate Indian affairs to be a marked departure from the qualified federal authority that existed under the Articles of Confederation. See Worcester, 31 U.S. (6 Pet.) at 559 ("The shackles imposed on this power, in the confederation, are discarded."). Perhaps Marshall saw the Constitution's resolution of the Indian debate as a relatively easy first step in his broader federalist argument. However, a more practical reason might have been the need for a strong, centralized, armed response to the increasing conflicts between Indians and encroaching white settlers.
157 But see Getches, New Subjectivism, supra note 8, at 1578, 1582–83 (discussing Justice Marshall's impact on Indian law).
159 See id. at 544.
160 Id. at 543–46 (describing European colonial charters as "grants asserting a title against Europeans only...[that ] were considered as blank paper so far as the rights of the natives were concerned." ). Milner Ball argues that, although Marshall used language in M'Intosh that can be construed to mean that the concept of conquest applied to tribal-European/American relations, more persuasive language in Fletcher shows that the discovery doctrine had more to do with how Europeans dealt with one another as they asserted and defended territorial claims. Milner S. Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J. 27, 27.
161 Marshall overturned the basis for the holding in M'Intosh without ever mentioning the case by name. See Eisgruber, supra note 115, at 457–58 (discussing Marshall's practice of not mentioning cases by name in his opinions).
rather, the American experience with Indians had been "a continuous process of negotiation, alliances, reconciliation, and solicitude which had always respected tribal political integrity."\textsuperscript{162} While tribes had "compromised in matters of mutual economic interest, [as] exemplified by their agreeability to the doctrine of preemption [i.e. purchase] of their lands," they "had never voluntarily relinquished their internal political authority" to govern themselves.\textsuperscript{163}

The Cherokee nation, then, is a distinct community occupying its own territory, with the boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.\textsuperscript{164}

Marshall also expanded on the concept of "domestic dependent nation," stating that "Indian nations ha[ve] always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil . . . ."\textsuperscript{165} He declared that the relevant treaties explicitly acknowledged the Cherokee's right of self-government, guaranteed Cherokee lands, and imposed on the federal government the duty of protecting both Cherokee land and sovereignty rights from state intrusion.\textsuperscript{166} Neither the Indian Commerce Clause nor the Treaty power should be construed to authorize federal intervention in tribal affairs or "a surrender of self-government," which "would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put

\textsuperscript{162}Barsh & Henderson, supra note 56, at 57 (citing Worcester, 31 U.S. (6 Pet.) at 542–56); see also Mitchel v. United States, 34 U.S. (9 Pet.) 711, 749 (1835) ("By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve . . . ."). Because the United States had continued the policies of Great Britain, France, and Spain, entered into treaties with tribes, and thus renounced the right of conquest, it could not now assume that property right. \textit{Id.} at 754.

\textsuperscript{163}Barsh & Henderson, supra note 56, at 57 (interpreting Worcester).


\textsuperscript{165}\textit{Id.} at 559.

\textsuperscript{166}\textit{Id.} at 551–56. Worcester is often cited for the proposition that the Cherokee ceded land to the United States, and that the treaty described "the extent of that cession." \textit{Id.} at 553. All federal Indian legislation "manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States." \textit{Id.} at 557. "It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved." \textit{Id.} at 553; see also United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."). The language is also the basis for the preemption doctrine, discussed \textit{infra} at text accompanying notes 278–88.
Marshall made it clear that the tribes' relationship to the federal government was governed by consent and the concept of dependency as it was then understood in international law, not by any wardship or subordination arising out of Indians' nature or primitive condition. Worcester thus contradicted the Court's characterization of tribes in Cherokee Nation as inferior and unable to govern themselves, while leaving intact the ultimate supremacy of the federal government in tribal matters.

The Cherokee finally prevailed in Worcester, and proponents of tribal sovereignty consider the decision to be among the few high water marks in Indian law because it recognized and affirmed the existence of tribal sovereignty, albeit a sovereignty cabined by the greater authority of the federal government. Yet, it is the language of the earlier two cases and the doctrines they spawned—discovery, plenary power, federal trust, and preemption, never specifically overruled by Worcester—which unfortunately comprise much of Marshall's legacy to modern Indian law.

168 Id. at 542–43; see also id. at 559 ("America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.").
169 Worcester did not prevent the Cherokees from losing their homeland and demonstrated that Indian rights, however fundamental, were still vulnerable to violation by the Federal Government. See generally McCloughlin, supra note 141, at 411–47 (describing events leading up to removal of Cherokee from their lands); Prucha, supra note 83, at 191–242 (describing federal government's removal policy and its impact on southern tribes, including Cherokee). For a description of the reluctance of the Cherokee to give up their homeland after winning their case before the United States Supreme Court, see Justice Stephen Breyer, "For Their Own Good:"
170 See Getches, New Subjectivism, supra note 8, at 1582 ("Worcester lays the cornerstone for the legal system's continuing recognition of tribal sovereignty."). Indeed, to Singer, Worcester was a high-water mark in federal Indian law, from which the Supreme Court—and Congress—has been determinately "back-tracking." Singer, supra note 19, at 9. Singer argues that the Supreme Court has engaged in "extraordinary judicial activism" that flies in the face of Worcester. Id. at 9–10. In support of his argument, Singer cites Duro v. Reina, 495 U.S. 676 (1990) (holding that tribal governments may not exercise criminal jurisdiction over Indians who are not members of tribe), Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408 (1989) (holding that tribe had no power to zone fee property located within borders of reservation but owned by nonmembers), Montana v. United States, 450 U.S. 544 (1981) (holding that tribes cannot regulate hunting and fishing by non-Indians on fee lands within reservation, and adopting general rule that tribes can exercise regulatory authority when conduct on such lands "threatens or has some direct effect on political integrity, economic security, or health or welfare of the tribe"), and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes cannot exercise criminal authority over non-Indians, even for minor offenses). Id.

Norgren points out the harm could have been much greater if either Justice Henry Baldwin or William Johnson, both of whom voted with Marshall, had written the opinion in
Perhaps because Marshall never reconciled his different views of Indians—fierce savages without natural rights (*M'Intosh*) and dependent on the federal government for protection (*Cherokee Nation*), or organized tribes possessing the inherent political right to self-govern (*Worcester*)—later courts could use language from the earlier cases to justify infringing upon tribal sovereignty and could ignore Marshall’s later refinement of those concepts in *Worcester*. For example, Marshall attempted, in *Worcester*, to limit the circumstances in which Indian title could be extinguished to those involving conquest after just wars, in which Indians had been the aggressors. In *Tee-Hit-Ton Indians v. United States*, however, the Court construed this part of *Worcester* to mean that the federal government had conquered all Indian tribes and thereby gained title to all Indian land. The language and reasoning in

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*Worcester*. See Norgren, supra note 115, at 77–78. Justice Baldwin, a clear “Jacksonian in matters of Indian policy,” *id.* at 74, wrote in a separate concurring opinion in *Cherokee Nation* that Indian tribes were not “political communities of any kind,” *Cherokee Nation*, 30 U.S. (5 Pet.) at 49 (Baldwin, J., concurring), that “Georgia [had] full jurisdiction over the Cherokee, and fee simple title to their lands,” *id.*, and that the Court lacked the power to reverse these principles. *Id.* at 49. Justice Johnson said the following about the Cherokees in his concurrence: Their condition is something like that of the Israelites, when inhabiting the deserts . . .

... I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly . . . which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.

*Id.* at 27–28 (Johnson, J., concurring).


These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

*Id.* at 383–84; see also *Tee-Hit-Ton v. United States*, 348 U.S. 272, 289–90 (1955) (“Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”).

173 348 U.S. 272 (1955). Newton describes *Tee-Hit-Ton Indians* as a “paradigm of the plenary power era judicial style . . . in its slighting reference to native’s culture, and its repeated invocations of the political question doctrine as [reasons to tie] the hands of the [federal] judiciary.” Newton, supra note 9, at 248.

Oliphant v. Suquamish Indian Tribe, in which the Court held the arrest of two non-Indians on a reservation by tribal police to be an unwarranted assertion of tribal jurisdiction over the personal liberty of United States citizens, resonates with Marshall’s earlier depictions of Indians as “savages.” The Oliphant Court also found the doctrine of inherent sovereignty to be inconsistent with the tribes’ incorporation into the territory of the United States—a territory, the Court observed, in which the sole sovereigns are the federal government and the states.

Over the next two centuries, congressional policies would severely erode tribal sovereignty, and the Court would affirm many of those initiatives based on the principles enunciated in M’Intosh and Cherokee Nation. At the same time, the Court adopted a more limited view of Indian tribes as political entities on the American continent. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978), Oliphant involved the arrest of a non-Indian for assaulting a tribal officer. Id. at 194–95. Tribal authorities arrested a second non-Indian after a high-speed chase over reservation highways that ended when his car crashed into a tribal police vehicle. Id. Despite the fact that both these events occurred on reservation property, the Court held that, absent an affirmative congressional delegation of power, Indians do not have criminal jurisdiction over non-Indians. Id. at 208; see also Nevada v. Hicks, 533 U.S. 353, 357–66 (2001) (extending Oliphant to civil case, and holding that Navajo Nation lacked civil jurisdiction over non-Indian police officer accused by tribal member of damaging property during search of his house located on reservation). See generally Gould, supra note 7, at 842–48 (offering more complete discussion of Oliphant).

Marshall’s unfortunate comparison of tribal occupation of land to “medieval tenant farmers [who] occupied their lands at the sufferance of the ‘lords of the fee,’” BARSH & HENDERSON, supra note 56, at 49 (quoting M’Intosh, 21 U.S. (8 Wheat.) at 592), influenced not only the Oliphant Court, but “all subsequent thinking” about the relationship between Indian tribes and the federal government. Id.; see also Norgren, supra note 115, at 68 (“Although the depth of Marshall’s concern for the Cherokee remains open to question, there is no contesting the fact that, as Chief Justice, he used the Cherokee appeals to establish an American jurisprudence of United States-Native American relations.”). Marshall also likened the founding of the British nation on the conquest of the Normans to the founding of the United States on the conquest of Indians. BARSH & HENDERSON, supra note 56, at 49.

Oliphant, 435 U.S. at 209; see also id. at 210 (“By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a ‘want of fixed laws [and] of competent tribunals of justice’... It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.” (quoting H.R. REP. NO. 23-474, at 18 (1834)). Aleinikoff explains that the Court saw its decision in Oliphant as “the mirror image of Ex Parte Crow Dog.” ALEINIKOFF, supra note 16, at 107. In Ex parte Crow Dog, 109 U.S. 556 (1883), the Court denied federal jurisdiction over Indian-on-Indian crimes, saying that for a federal court to try Indian defendants would have been to subject them to trial “not by their peers, nor by the customs of their people... but by a different race, according to the law of a social state of which they have an imperfect conception”. Id. at 571. According to Aleinikoff, Oliphant reflected the same sense of unfairness that would be experienced if United States citizens were prosecuted in alien courts. ALEINIKOFF, supra note 16, at 107–09.

Oliphant, 435 U.S. at 211.

See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (sustaining application of Dawes Act to treaty protected reservation); United States v. Kagama, 118 U.S. 375 (1886)
time, Marshall’s more enlightened views of Indians and inherent tribal sovereignty, set out in *Worcester*, have neither been specifically overruled nor completely abandoned. Together with treaties protecting tribal lands, the principles articulated in *Worcester*\textsuperscript{181} should have enabled tribes to maintain the measured separatism\textsuperscript{182} needed to survive as discrete societies. However, they have not. Federally induced changes in reservation boundaries have diminished the ability of tribes to regulate activities on land once under their exclusive domain, while the Court’s use of other antitribal sovereignty principles from the Trilogy has justified significant congressional and state


\textsuperscript{181}See POMMERSHEIM, supra note 16, at 42 (listing concepts articulated in *M’Intosh*, *Cherokee Nation*, and *Worcester* as including “the doctrine of discovery, the guardian-ward relationship, and the description of Indian Tribes as ‘domestic dependent nations’ and ‘distinct independent political communities’” (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; *Worcester*, 31 U.S. (6 Pet.) at 519); see also Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 761 (1998) (Stevens, J., dissenting) (“An Indian tribe’s assertion of immunity in a state judicial proceeding is unique because it implicates the law of three different sovereigns: the tribe itself, the State, and the Federal Government.”); United States v. Quiver, 241 U.S. 602, 605-06 (1916) (holding that offense of adultery committed by one Sioux Indian against another member of same tribe on reservation is not punishable under general federal criminal code, and stating “the relations of Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise.”); Talton v. Mayes, 163 U.S. 376, 382-84 (1896) (holding that Constitution did not apply to grand jury indictment process adopted by Cherokee Nation to prosecute its members in tribal court, and noting that police powers of tribes were not “federal powers created by and springing from the constitution,” but instead “existed prior to the constitution” and amounted to retained, inherent sovereignty free from federal constitutional constraint); City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996) (basing Pueblo of Isleta’s authority to set water quality standards more stringent than those required by federal law on tribe’s inherent sovereign authority); Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under the Constitution*, 60 MONT. L. REV. 3, 9 (1999) (citing *Kiowa Tribe* as proof that “Supreme Court does not think that [tribal] sovereignty has disappeared”); McCoy, *supra* note 112, at 366-67 (explaining that Marshall’s vision of “tribal-federal relation[ship as] a protectorate, within which tribal political independence [is] largely preserved,” constrained only by treaties and federal statutes regulating relations with tribes and by nature of protectorate relation itself (characterized by Marshall as “guardian-ward” relationship), is still extant in modern Indian law, as is “the doctrine of equality among nations and the theory that political independence can be implied without full or formal diplomatic recognition”). Getches stresses that *United States v. Wheeler*, 435 U.S. 313, 322 (1978), reaffirmed the legal principle that tribes had “inherent powers of a limited sovereignty which has never been extinguished,” and draws similar comfort from language in *Santa Clara Pueblo v. Martinez*, 435 U.S. 49, 55-56 (1978), that gender distinctions drawn by tribal authorities do not implicate the Fourteenth Amendment precisely because “tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” Getches, *New Subjectivism, supra* note 8, at 1599. *But see* Nevada v. Hicks, 533 U.S. 353, 361 n.4 (2001) (demoting *Worcester* to historical anomaly of no precedential value).

\textsuperscript{182}See POMMERSHEIM, supra note 16, at 16 (“The concept of Indian reservation is best defined as the concrete manifestation of a guarantee of a ‘measured separatism’ to Indian people.” (quoting *WILKINSON, supra* note 49, at 4)).
TRIBAL SOVEREIGNTY

intrusion into tribal life. Much of this has occurred under the Rehnquist Court, which has accelerated the rate at which Marshall's doctrine of inherent sovereignty is eroding. This makes the task of resuscitating inherent sovereignty as an independent basis for enhanced tribal sovereignty even more daunting than before.

The Article now turns to a discussion of how these misguided federal policies and discrepant Supreme Court decisions have eroded, but not completely destroyed, Indian tribal sovereignty. It places particular emphasis on tribal dependence on a separate, coherent land base.

B. The "Shifting Tectonic Plates" of Tribal Sovereignty

Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have.184

Tribal sovereignty is composed of two legally and culturally intertwined elements: the power of a tribe to govern both its territory and its members. But the power to control land is the essential, constitutive element of sovereignty for tribes, and hence is the sole focus of this part of the Article. The fact that tribes occupy a separate land base poses particular problems for any proposal seeking to enhance tribal sovereignty and has been a continual source of friction with their surrounding states. This Section, therefore, first discusses why land is so important to tribes and how a tribe's relation to its homeland is at the core of what makes Indian society fundamentally different from non-Indian society. It then describes various federal policies and Court decisions

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183 Id. at 99–100 (describing tribal sovereignty as consisting of "shifting tectonic plates" along "fault line" created by "role differences' might play in tribal court jurisprudence"). The metaphor appears equally apt for any discussion of tribal sovereignty in general.

184 Ball, supra note 160, at 61.


186 See United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory... ."). For a slightly different view of tribal sovereignty, see POMMERSHEIM, supra note 16, at 100 (arguing that concept of sovereignty consists of two main components: "the recognition of a government's proper zones of authority free from intrusion by other sovereigns within the society, and the understanding that within these zones the sovereign may enact substantive rules that are potentially divergent or 'different' from that of other—even dominant—sovereigns within the system"). Tribal sovereignty does not include a third power commonly associated with the notion of sovereignty, the power to conclude treaties with foreign nations and the implicit power to declare war against a foreign state.

that have made that core porous, despite the putative protective barriers of federal treaties and the inherent sovereignty doctrine. Finally, this Section looks at whether tribal societies remain sufficiently discrete to warrant the resuscitation of tribal sovereignty to protect them, and whether they may serve as repositories for Sandel's dispersed sovereignty.

1. The Importance of Tribal Land

To lose the hunting ground was to a Cherokee like losing the Latin mass to a conservative Roman Catholic. A sacred, ancient, and apparently timeless tradition—something that God or the Great Spirit had written into the fundamental structure of things—was gone forever.\(^{188}\)

Land is the sine qua non of tribal sovereignty. Maintaining a separate land base is critical for tribes not only because of land's physical attributes and the legal consequences that flow from having a tribal homeland, but because it allows Indians to "remain[] indelibly Indian, proudly defining themselves as a people apart and resisting full incorporation into the dominant society around them",\(^{189}\)—a concept Wilkinson calls measured separatism.\(^{190}\)

Historically, and still today, tribal members rely on the wildlife and plants found on or near their reservations for subsistence, medicine, and traditional ceremonies. Tribes also lease their lands to energy companies for development of subsurface resources\(^{191}\) and disposal of waste material,\(^{192}\) and operate a variety of commercial enterprises like hotels, ski resorts, and gambling casinos.\(^{193}\) They depend upon the productivity of these lands to support multigenerational habitation as an important, enduring, and unique feature of Indian culture.\(^{194}\) Reservations also give tribes a separate, physical place that they can

\(^{188}\)McLOUGHLIN, supra note 141, at 92.


\(^{190}\)WILKINSON, supra note 49, at 14.


\(^{192}\)See, e.g., Valerie Taliman, Opponents Call Nuke Deal Environmental Racism, INDIAN COUNTRY TODAY, at www.indiancountry.com/content.cfm?id=1018189423 (Apr. 9, 2002).

\(^{193}\)See, e.g., Cate Montana, Tulalip Quil Ceda Village May Be Larger than Marysville, INDIAN COUNTRY TODAY, at www.indiancountry.com/content.cfm?id=2156 (Nov. 15, 2000).

\(^{194}\)Wood, supra note 189, at 133 ("A priority implicit in Indian land tenure is maintaining a homeland in which both present and future generations of the tribe may live in close harmony with the land and its resources.").
close to non-Indians—enabling them to remain free from the influence of white society and to retain the unique aspects of their cultures.\textsuperscript{195} Tribes without land find it more difficult to gain federal recognition and government-to-government status with the federal government.\textsuperscript{196} Nonrecognition means that tribes cannot assume primary regulatory authority under federal pollution control laws for activities that take place on their reservations.\textsuperscript{197} Nonrecognized tribes cannot develop casinos as a source of tribal income\textsuperscript{198} and are ineligible for much-needed financial and technical assistance under a host of federal programs.\textsuperscript{199} The reservation also performs an important legal function for tribes, as the Court considers the presence of tribal land to be a precondition for the exercise of tribal sovereignty.\textsuperscript{200} For example, on its reservation, with the exception of

\textsuperscript{195}Pommersheim notes that while the "attractions and connections [to the land] do not prevent people from leaving the reservation, . . . they do make leaving hard," and "most who leave return." \textit{Pommersheim, supra} note 16, at 15–16.

\textsuperscript{196}Having a land base helps a tribe meet federal criteria for recognition—such as the requirement that a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present,"—which entitles the tribe to government-to-government relations with the federal government. 25 C.F.R. § 83.7(b) (2004). For example, the federal government recently authorized the use of the Internet suffix \"gov\" by tribes as part of their e-mail addresses. \textit{Washington in Brief, Wash. Post, Apr. 27, 2002}, at A4. See generally \textit{Mark D. Myers, Federal Recognition of Indian Tribes in the United States}, 12 \textit{Stan. L. & Pol'y Rev.} 271, 279–83 (2001) (discussing procedures for tribal recognition).

\textsuperscript{197}See, e.g., \textit{Clean Water Act}, 33 U.S.C. § 1377(e) (2000) (treating tribes as states for purposes of administering law's standard setting and permitting provisions); \textit{id.} § 1377(h) (defining Indian tribe to mean "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation").


\textsuperscript{199}See \textit{United States v. Washington}, 520 F.2d 676, 692–93 (9th Cir. 1975) ("Nonrecognition of the tribe by the federal government . . . may result in the loss of statutory benefits, but can have no impact on vested treaty rights.").

\textsuperscript{200}See generally \textit{Strate v. A-1 Contractors}, 520 U.S. 438, 456–59 (1997) (holding that civil authority of Indian tribes and their courts with respect to non-Indian fee lands within boundaries of reservation does not extend to activities of non-tribal members); \textit{Montana v. United States}, 450 U.S. 544, 565–66 (1981) (holding that inherent sovereignty only authorizes tribe to "punish tribal offenders, . . . determine tribal membership, regulate domestic relations among members, . . . prescribe rules of inheritance for members," and "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on political integrity, economic security, or health or welfare of tribe," but does not extend to regulation of non-Indian hunting and fishing activities on non-Indian owned land within reservation boundaries). But see \textit{Nevada v. Hicks}, 533 U.S. 353, 360 (2001) (noting that existence of tribal land is not by itself sufficient to support regulatory jurisdiction over non-tribal members); \textit{Atkinson Trading Co. v. Shirley}, 532 U.S. 645, 659–60 (2001) (Souter, J., concurring) (stating that defining principle of inherent sovereignty is not Indian ownership of land, but whether activities in question involve non-Indians); \textit{Merrion v. Jicarilla Apache Tribe}, 455 U.S. 130, 137, 142 (1982) (upholding tribal "taxing authority over tribal lands leased by
certain crimes, a tribe exercises full jurisdiction over the activities of its members. But, the sovereign authority of a tribe over its members lessens as the member moves away from the reservation boundaries, and, on the reservation, the sovereign immunity disappears entirely over non-Indians on non-Indian inholdings. The loss of authority is discussed in greater detail in the next section of this Article.


See generally Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) (“Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a ‘full opportunity to determine its own jurisdiction.’” (quoting Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985)); Nat’l Farmers Union, 471 U.S. at 856–57 (holding that “whether a tribal court has exceeded the lawful limits of its jurisdiction” is question that must be answered by reference to federal law, including federal common law, but that federal court proceeding is proper only upon exhaustion of tribal court remedies); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978) (holding that Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (1976), does not authorize federal court to pass on validity of tribal ordinance denying membership to children of certain female tribal members); United States v. Wheeler, 435 U.S. 313, 328 (1978) (affirming tribal authority to punish offenses against tribal law committed by tribal members as part of “Navajos’ primeval sovereignty,” sovereignty that has never been taken away from them and that is in “no way attributable to any delegation to them of federal authority”); Williams v. Lee, 358 U.S. 217, 219–23 (1959) (affirming jurisdiction of tribal court over civil suit brought against Indians by non-Indians for action arising on reservation, stating that absent governing acts of Congress, state may not exercise jurisdiction if it would interfere with “right of reservation Indians to make their own laws and be ruled by them”). For a full discussion of the scope of tribal court civil jurisdiction, see Pommersheim, supra note 16, at 81–82.

See generally Atkinson Trading, 532 U.S. at 648, 659 (finding invalid Navajo Nation’s imposition of hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation); Montana v. United States, 450 U.S. at 557–67 (holding that while tribes could not regulate hunting and fishing on non-Indian fee land within boundaries of reservation, tribes retained authority over non-Indians “who enter consensual relationships with the tribe or its members” or whose activities otherwise “direct[ly] effect the political integrity, the economic security, or the health or welfare of the tribe”). Robert McCoy explains that:

The complexity of tribal-state and tribal-federal relations renders impracticable any effort to set forth a general set of rules which precisely define the scope of tribal self-government. Rather, determination of the extent to which tribal self-government is operative should be related to the tribal interests which arise in particular cases.
What is harder for non-Indians to understand, and less obvious to us given our more mobile, rootless way of life, is that tribes have a multi-generational, cultural bond to their land that makes that land unique and nonfungible. To a tribe, its reservation is its “cultural centerpiece”:

[It is the source of spiritual origins and sustaining myth, which in turn provide[s] a landscape of cultural and emotional meaning. . . . The reservation is home. It is a place where the land lives and stalks people; a place where the land looks after people and makes them live right; a place where the earth provides solace and nurture.

Pommersheim suggests that the reservation should be understood as “a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspiration of Indian people, their communities, and their tribes”—the

McCoy, supra note 112, at 389–90; see also infra Part III.B.2.c (discussing dimming of Worcester’s bright line). The extent to which the Court continues to think that the power to tax is a fundamental attribute of sovereignty that tribes retain (unless specifically divested of it by federal law, or by the “necessary implication of their dependent status”) has recently been thrown into some question. Compare Merrion, 455 U.S. at 147–48 (upholding tribal severance tax upon non-Indian lessees authorized to extract oil and gas from tribal land), with Atkinson Trading, 532 U.S. at 648, 659 (finding invalid Navajo Nation’s imposition of hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation). On the subject of dual taxation, see Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152–59 (1980) (affirming dual tribal/state authority to impose cigarette and sales taxes on sales made to non-member Indians on reservation); compare Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 167–69, 191–93 (1989) (allowing New Mexico to impose state severance tax on non-Indian corporation producing oil and gas on reservation, even though tribe also imposed severance tax).

See POMMERSHEIM, supra note 16, at 13–15 (“Land is basic to Indian people: they are part of it and it is part of them; it is their Mother.”). Pommersheim variously refers to land as a “cultural taproot,” id. at 24, and “as part of the ‘sacred text,’” id. at 34. He stated, “one of the results of over three centuries of contact has been nearly complete severing of this cultural taproot connecting Indian people to the land.” Id. at 14.

Id. at 14–15 (citations omitted). “Yet, paradoxically, it is also a place where the land has been wounded; a place where the sacred hoop has been broken; a place stained with violence and suffering. And this painful truth also stalks the people and their Mother.” Id. at 15; see also ANAYA, supra note 25, at 104–06 (acknowledging importance of land to cultural survival of indigenous peoples and that indigenous land claims are sui generis, distinct from land claims of other ethnic groups based on notions of property as an international human right); Tsosie, supra note 17, at 1640 (describing land as “constitutive of [tribal] cultural identity”). Tsosie further describes how “[m]any Indian tribes . . . identify their origin as a distinct people with a particular geographic [place],” how that “origin . . . becomes a central and defining feature of the tribe’s religio[us] and cultural world view”; she also notes how modern Indians base their “political claims . . . upon [their] distinctive cultural identity as the original inhabitants of lands” that were “forcibly” taken from them. Id. at 1639–40.

POMMERSHEIM, supra note 16, at 11 (“It is a place that marks the endurance of Indian communities against the onslaught of a marauding European society; it is also a place that holds the promise of fulfillment.”).
"irreducible touchstone of tribal posterity and well-being." Tribal land, therefore, is irreplaceable not simply because there are no longer other large consolidated tracts of land on which a tribe might sustain itself, but because of the strong spiritual and cultural attachment Indians have to their reservation.

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their *ancestral* home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

Therefore, to an Indian tribe, land is much more than the sum of its *physical* properties. In addition to the economic value that land holds for us all, Indian land performs unique legal, cultural, spiritual, and self-identification functions for its occupants. Without this land base, Indian tribes quite simply cease to exist as culturally distinct societies. Full, undiminished sovereignty over tribal lands and those who occupy or use those lands is thus essential to the continuation of Indian tribes in the United States.

2. Federal Policies that Have Diminished Tribal Authority over Tribal Lands and Members

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

For over two centuries, the federal government’s relationship with Indian tribes “has been marked... by... vacillation.” Federal Indian policies have

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207 Id. at 13. Pommersheim rests any hope that Indians might someday “transform [their] modern social, economic, and political conditions” and “redefine and redirect the political, legal, and social relationships [with] non-Indians” on non-Indians gaining a firmer understanding of the importance of tribal land. Id.


210 Christian M. Freitag, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 833 (1997). Pommersheim is even more vivid in his denunciation of
swung between the extremes of eradication, assimilation, and self-determination. Racism has also burdened these policies and has permeated almost the entire history of white contact with Indians.\textsuperscript{211} The self-claimed

these policies, calling them “schizophrenic . . . as either extensive and enduring or marginal and fleeting.” Pommersheim, supra note 16, at 44; see also Johnson, supra note 11, at 654 (discussing “President Nixon’s message to Congress transmitting recommendations for federal Indian policy,” and proclaiming that this policy “has oscillated between two equally harsh and unacceptable extremes,” “assimilation of tribes into the dominant culture, or promotion of self-determination and tribal identity” (citing H.R. Doc. No. 91-363, at 2 (1970))).

\textsuperscript{211}For example, John Quincy Adams stated in a 1802 speech on the anniversary of the landing at Plymouth:

\begin{quote}
There are moralists who have questioned the right of Europeans to intrude upon the possessions of the aborigines in any case and under any limitations whatsoever. But have they maturely considered the whole subject? The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation. Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtedly by the laws of nature theirs. But what is the right of a huntsman to the forest of a thousand miles over which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created? Shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring? Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? Shall he forbid the wilderness to blossom like the rose? Shall he forbid the oaks of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance? Shall he deom an immense region of the globe to perpetual desolation, and to hear the howlings of the tiger and the wolf silence forever the voice of human gladness? Shall the fields and the valleys which a beneficent God has framed to teem with the life of innumerable multitudes be condemned to everlasting barrenness? Shall the mighty rivers, poured out by the hands of nature as channels of communication between numerous nations, roll their waters in sullen silence and eternal solitude to the deep? Have hundreds of commodious harbors, a thousand leagues of coast, and a boundless ocean been spread in the front of this land, and shall every purpose of utility to which they could apply be prohibited by the tenant of the woods? No, generous philanthropists! Heaven has not been thus inconsistent in the works of its hands. Heaven has not thus placed at irreconcilable strife its moral laws with its physical creation.
\end{quote}

John Quincy Adams, Speech at Plymouth, Massachusetts (Dec. 22, 1802), reprinted in C. Royce, \textit{Indian Land Cessions in the United States, Bureau of American Ethnology, Eighteenth Annual Report, 1896–1897}, at 536–37 (1899). For other examples, see \textit{M’Intosh}, 21 U.S. (8 Wheat.) at 590 (referring to Indians as “fierce savages”); \textit{id.} at 573 (“[T]he character and religion of [Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency.”); Nancy Carol Carter, \textit{Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887–1924}, 4 AM. INDIAN L. REV. 197, 227 (1976) (“The undisguised contempt for the native culture was unrelieved by an open-minded assessment in any of the principal cases studied. Rather, the Indians were described as semi-barbarous, savage, primitive, degraded, and ignorant.”); Macklem, \textit{supra} note 6, at 1358 (“Given [the] obvious ethnocentrism and racism, the proposition of indigenous inferiority cannot stand as a relevant reason for excluding Indian nations from the distribution of sovereignty on the continent.”); Singer, \textit{supra} note 19, at 5 (commenting that early policies and judicial decisions involved “redistribution [of property rights] based on
intellectual and moral superiority of the white race justified policies that had as their intent the replacement of a passing race whose time was over and whose existence could no longer be justified.\textsuperscript{212}

The history of federal Indian relations largely defies generalization because federal-Indian policy has been so incoherent.\textsuperscript{213} However, it is not hard to conclude that as a consequence of these policies, tribal sovereignty is substantially less today than it once was, and that Indian culture finds itself on the verge of extinction in much of our country.\textsuperscript{214}

\textit{a) Ill-Conceived Congressional Policies}

The happiness which the Indians once enjoyed . . . in their primitive situation . . . was now poisoned by bad fruits of the civilized tree which was planted around them . . . overshadowed by the expanded branches of this tree [many tribes] dropped, withered and are no more . . . .\textsuperscript{215}

perceived racial hierarchies and transferred interests from the vulnerable to the powerful”); Williams, \textit{supra} note 77, at 166 (“[O]ur present legal conceptions of Indian status and rights are grounded in a highly contingent set of historical circumstances and suppressed discourses.”); id. at 184 (“Rarely has the dynamic relationship of American racism and the dominant caste’s economic interest been so clearly revealed within the normative fineries of national legal discourse as in the Revolutionary era debate on the status and rights of Indians in their lands.”).

\textsuperscript{212}See, e.g., \textit{Ex parte} Crow Dog, 109 U.S. 556, 571 (1883) (subjecting Indians to federal law, which “tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality”); United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) (“[T]he reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.”).

\textsuperscript{213}Robert A. Williams, Jr. blames the sad state of tribal sovereignty on this nation’s colonial past:

\textit{The} crisis confronting ‘Federal Indian Law’ today is the direct byproduct of a legal discourse which has little to do with the ‘Rule of Law,’ but is instead grounded in the peculiar but today irrelevant political history of the early Republic. The dominant paradigm of Federal Indian Law that subordinates Indian rights of self-determination to the expedient interests of non-Indians adequately responded to the legitimating and rationalizing needs of a colonizing Norman usurper.

Williams, \textit{supra} note 77, at 192.

\textsuperscript{214}Languages and whole histories have all but disappeared from many tribes. Tribes like the Mashantucket Pequots are making extraordinary efforts to try to recover their cultures. \textit{See} Kay Larson, \textit{Tribal Windfall: A Chance to Reopen History}, N.Y. TIMES, July 26, 1998, at A4.

\textsuperscript{215}McLOUGHLIN, \textit{supra} note 141, at 308 (internal quotation marks and citations omitted); \textit{see also} Williams v. Lee, 358 U.S. 217, 218 (1959) (“Originally the Indian tribes were separate nations within what is now the United States. Through conquests and treaties they were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.”).
During the colonial period, little attention was paid to the political, cultural, and societal structure of Indian tribes. The rival colonial governments relied on tribes—first as a source of food and a necessary component of the fledgling fur industry, and later as allies in their internecine struggles. However, after the colonial period—between 1783 and the end of the War of 1812—this laissez-faire attitude toward Indians gradually changed.

By the end of the first quarter of the nineteenth century, the federal government had consolidated control over the eastern part of the country, including its native inhabitants. The government then turned its attention to the Western tribes, where it embarked on a policy of actively “trying to reorder Indian political, cultural and economic institutions.” With the possible exception of a brief effort to create an Indian state in Oklahoma, then called Indian Territory, the goal of these policies was to force assimilation of tribes into white society, either by stripping Indians of their identity or by imposing upon them a Western political structure. Under them, federal “Indian agents assumed control of reservation institutions” and “discouraged the practice of Indian religious and social ceremonies and festivals.” They set up “quasi-governments” on Indian reservations “that in many cases ignored Indian

216 See generally Champagne, supra note 72, at 112–18 (discussing Native American political identity).
217 See generally PRUCHA, supra note 83, at 1–4 (describing how Indian tribes refusing treatment as conquered nations after Revolutionary War and white encroachment onto Indian lands in northeast unraveled treaties between Indian tribes and United States).
218 See Champagne, supra note 72, at 118–19 (referring to missionaries who proselytized relentlessly in attempt to reorder Indians in image of dominant culture, although allowing them to keep their “kin-based, local and tribal identities”); see also McLoughlin, supra note 141, at 428–47 (describing role of missionaries in Cherokee Nation Cases and in ultimate removal of Cherokee from their traditional lands); POMMERSHEIM, supra note 16, at 21 (describing boarding schools operated by Christian missionaries, which “took Indian children away from their families for substantial periods of time and specifically forbade the speaking of tribal languages in school”).
219 See Champagne, supra note 72, at 122. Smaller tribes that did not want to give up their political sovereignty to larger tribes and tribes that did not want to leave their homelands resisted these efforts. Id. Pressure to open up Indian Territory to white settlers and the railroads also helped defeat the concept. Id. Federal “policy then turned to settling Indians on reservations near their traditional homelands.” Id.
220 Jefferson was an early advocate of assimilating Indians into mainstream culture.

You know, my friend, the benevolent plan we were pursuing here for the happiness of the aboriginal inhabitants in our vicinities. We spared nothing to keep them at peace with one another, to teach them agriculture and the rudiments of the most necessary arts, and to encourage industry by establishing among them separate property. In this way they would have been enabled to subsist and multiply on a moderate scale of landed possession. They would have mixed their blood with ours, and been amalgamated and identified with us within no distant period of time.

Letter from Thomas Jefferson, to Alexander von Humboldt (Dec. 6, 1813), in A JEFFERSON PROFILE, supra note 83, at 224–25; see also Washington, supra note 104, at 956–60 (encouraging Cherokees to adopt practices and traditions of white colonists).
221 Champagne, supra note 72, at 123.
political forms." The use of Indian language was actively discouraged, and Indian youth were shipped off to boarding schools to learn Western traditions. "Indians were encouraged to become economically self-sustaining small landholders, who would disassociate themselves from tribal identities and activities and adopt" the "political identities and cultures" of white society.

The most destructive of these policies, in terms of its impact on tribal sovereignty vis-à-vis tribal land, was the Dawes Severalty Act of 1887 (also known as the Indian General Allotment Act). This law was designed to break up the structure of tribes by destroying the reservation system. Viewed charitably, the Act's purpose was to hasten the assimilation of Indians into contemporary American society; less charitably it was yet another attempt by non-Indians to gain control of Indian land and resources.

The Dawes Act authorized the partition of tribal lands among individual tribal members and the sale of unpartitioned land to white homesteaders. The Act's effect was to cut Indian homelands apart, to obliterate the boundary separating Indians from non-Indians, and to reduce substantially the land under tribal control. Allowing so many non-Indians to settle on what had been tribal lands "strained" traditional tribal cultural ways, and "undermined" "tribal institutions." Individual allotments fractionated tribal lands to a point of nonviability, and land formerly held in trust for tribal members under the Act

222Id. 223Id. 224Id. Turpel questions the "cultural authority" of dominant societies (in her case, Canada and the Canadian Charter of Rights and Freedoms) to impose their will on other cultures through law and legal language as a means of "resolv[ing] disputes involving other cultures." Turpel, supra note 11, at 4. She challenges the manner in which that authority explains (or fails to explain) and sustains its authority over different peoples. Id.


226President Theodore Roosevelt described the Dawes Act as "a mighty pulverizing engine to break up the tribal mass," which "acts directly upon the family and the individual." POMMERSHEIM, supra note 16, at 19; see also ALENIKOFF, supra note 16, at 100 (blaming federal allotment policy for "current conundrums" regarding Indian sovereignty because it introduced significant non–Indian settlement within "reservation boundaries"); WILKINSON, supra note 49, at 19–23 (calling Dawes Act, and policy of vigorous assimilation behind it, most devastating historical blow to tribalism and Indian life); Frickey, supra note 9, at 14 n.68 (stating that allotment era caused profound change in federal Indian law, which "has not been the same since," and is responsible for "Court's abandonment of undiluted principles of tribal sovereignty [in the case] of non-Indians in Indian country"); Judith V. Royster, The Legacy of Allotment, 27 ARIZ. ST. L.J. 1, 70–78 (1995) (discussing contemporary effects of allotment era).


228Id.

229Id. at 20. By 1934, when the policy was terminated, Indian land-holdings had been reduced from "138 million acres in 1887 to 52 million acres." Id.

230Id. at 19; see also Willoughby, supra note 10, at 619 ("By gradually removing from tribal control 'pockets' of jurisdiction within Indian country, and awarding control of those 'pockets' to the states, the longevity of tribal cultures are threatened.").
was sold or leased by the government to non-Indians. The infusion of so many non-Indians onto what had been exclusively Indian territory also became a stepping stone for Court decisions that stripped tribes of their sovereignty over allotted lands. This had the effect of making the entire reservation more porous to the influence of non-Indians and of easing the path to assimilation into white society for tribal members.

In 1934, Congress passed the Indian Reorganization Act (Wheeler-Howard Act of 1934) ("IRA"), which, on its surface, abandoned the prior policy of assimilation in favor of a policy that promoted tribal self-determination. The Act recognized tribal sovereignty as absolute, although subject to Congressional limitations and federal agency approval. While the Act ended the practice of allotting reservation land, it did nothing to reverse or change the existing patterns of allotment or return to tribes sovereignty over the non-Indian inholdings on their reservations. Indigenous governments had
been based on "customs, beliefs, and practices [that could] be traced to precontact times."\(^{238}\) The IRA interfered with, and in some cases destroyed, indigenous governments by requiring tribes to conduct tribal elections and to adopt constitutions and governmental institutions modeled after those of the federal government in order to establish government to government relations with the federal government and to gain access to federal funds.\(^{239}\)

In the 1950s, assimilation re-emerged briefly as the dominant federal Indian policy in what is known as the "termination period." During this phase, Congress "terminated the legal existence of more than one hundred tribes" and bands.\(^{240}\) The effects of termination were extensive and wide-ranging for those tribes that experienced it.\(^{241}\) "Termination ended the special federal-tribe relationship," as well as tribes' historic special status; it "transferred almost all responsibilities for, and powers over, [terminated tribes] to the states."\(^{242}\)

The Indian Civil Rights Act of 1968 ("ICRA")\(^{243}\) is another law that, despite its laudable intent, has been as destructive of tribal traditions, tribal society, and tribal sovereignty as the Dawes Act and the IRA.\(^{244}\) In enacting the ICRA, Congress intended to impose on tribal governments some of the more basic elements of the Bill of Rights.\(^{245}\) But, in doing this, the ICRA

and "restored unsold surplus lands to tribal ownership," it failed to reverse policies and consequences of Congress' allotment policy).

\(^{238}\) See DELORIA & LYTLE, supra note 25, at 18–19 ("It is crucial to realize at the start that these have not necessarily been the forms of government that the Indian people themselves have demanded or appreciated and are certainly not the kind of government that most Indians, given a truly free choice in the matter, would have adopted by themselves."); see also id. at 16–27 (describing how traditional governments have not disappeared entirely); POMMERSHEIM, supra note 16, at 22 (commenting on adverse effect of IRA on tribes); Barsh, supra note 11, at 60 (blaming "resurgence of racism in Indian country" on federal Indian policies establishing criteria for tribal recognition).

\(^{239}\) See generally, DELORIA & LYTLE, supra note 25, at 7, 140–53 (describing enactment of Indian Reorganization Act of 1934).

\(^{240}\) POMMERSHEIM, supra note 16, at 217 n.59.


\(^{242}\) Charles F. Wilkinson & Eric R. Biggs, The Evolution of the Termination Policy, 5 Am. Indian L. Rev. 139, 152 (1977); see also Champagne, supra note 72, at 124 (stating that termination policy spawned modern "pan-Indian" movement in effort to resist loss of Indian tribal treaty rights, "special status of Indians under the law or the Constitution," and Indian land).


\(^{244}\) DELORIA & LYTLE, supra note 25, at 212–13 (accusing ICRA of transforming inherent tribal sovereignty, as reflected in Talton v. Mayes, "by objectifying it in institutions designed by non-Indians"); see also POMMERSHEIM, supra note 16, at 73 ("[T]he notion of strong individual rights that could be enforced against the majority government was alien to the traditions and customs of many tribes, where the group, not the individual, is primary."); Robert T. Coulter, Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights, 3 Colum. Surv. Hum. Rts. L. 49, 49–50 (1970–71) (criticizing ICRA as another example of unilateral imposition of federal standards that abridged tribal sovereignty).

\(^{245}\) See ALEINIKOFF, supra note 16, at 53.
TRIBAL SOVEREIGNTY

transformed tribes. Before the ICRA, tribes had been social units of interconnecting, communal responsibilities and duties; after it, they changed into a system of individual rights directed against tribal governments. The ICRA also inserted tribal courts, with their formal rules and procedures, between tribal members and their responsibilities.

The most striking aspect of the 200-year history of federal policies towards Indians is the abruptness of the changes in those policies and their contradictory goals. Tribes have experienced alliance, extermination, removal, assimilation, termination, self-determination. Amazingly, they survived all of these mostly misguided and wrong-headed efforts by the federal government to solve the perceived problem of having alien cultures in our midst. If the Supreme Court had acted as a check on these policies, their effects would not have been so profound. But the Court did not, and its almost complete deference to Congress on matters of Indian policy deprived the tribes of any protection they might otherwise have had from these destructive policies. It is to the judiciary’s contribution toward the destruction of tribal sovereignty that this Article now turns.

2. Debilitating Judicial Doctrines

No act of interpretation and no elaboration of consent theory can explain federal exercise of power and dominion over Indian tribes. Materials about relations between the United States and Indian tribes undermine the central tenets of federal courts’ jurisprudence—that the Constitution is the beginning of the analysis for the exercise of all the powers of the federal government, and that, by constitutional interpretation, the federal powers are limited and constrained.248

246Id. at 53, 60–61.
247See DELORIA & LYTLE, supra note 25, at 213 (blaming ICRA and establishment of tribal courts for “eliminat[ion of] any sense of responsibility [individual Indians] might have felt for one another” because they no longer “had to confront one other before their community and resolve their problems; they only had to file suit in a tribal court”). But see Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987) (“Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development.”); POMMERSHEIM, supra note 14, at 57–59 (citing as indication of health of tribal sovereignty, increasingly important role of tribal courts, which applied tribal laws and customs, in adjudicating disputes arising on Indian reservations).
248Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. CHI. L. REV. 671, 697 (1989) (citations omitted); see also Pommersheim, supra note 12, at 439 (identifying as prime themes in field of Indian law, “colonialism astride constitutional democracy, pluralism pitted against assimilation and termination, and tribal sovereignty bristling against trust dependence and state encroachment”). See generally Newton, supra note 9, at 195–98 (blaming unbridled Congressional power over Indian affairs, particularly power to invade tribal property and sovereignty rights, on Court’s abdication of any role in defining unique status of Indian tribes in United States’ constitutional system).
While the Supreme Court has occasionally held that "Indian tribes [are] a separate people capable of regulating their own internal and social relations," more often its decisions have stripped tribes of their independent governing status and the protections tribes thought they had won when they ceded land to the federal government. The Court's decisions have also eroded the buffer between the tribes and the states that Marshall established in Worcester. The collective effect of the Court's Indian law decisions has left

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249McCoy, supra note 112, at 386. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Court found that a federal court was without jurisdiction to hear a complaint arising under the equal protection clause of the ICRA. Id. at 72. It held that providing a federal forum would interfere with tribal autonomy and self-government, and stated, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." . . . As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." Id. at 55–56 (quoting Worcester, 31 U.S. (6 Pet.) at 559). In United States v. Wheeler, 435 U.S. 313 (1978), the Court held that simultaneous prosecutions of a Navajo tribal member by the Navajo Tribe and the United States, for violations arising out of same incident, did not constitute double jeopardy. Id. at 329–30. It observed that the fact that

Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power. . . . It follows that when the Navajo tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328. The Court reasoned that to authorize federal preemption of Navajo Tribe's jurisdiction to punish its own members for infractions of tribal law would detract substantially from tribal self-government. Id. at 331; see also Jones v. Meehan, 175 U.S. 1, 32 (1899) (holding that tribal custom, not state law, controlled descendancy of land owned by deceased member of Chippewa Tribe); Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that Bill of Rights did not restrict Cherokee government in case involving indictment of Cherokee tribal member for murder of another tribal member, and saying tribal powers predate U.S. Constitution and therefore are not directly subject to its requirements); Kan. Indians, 72 U.S. (5 Wall.) 737, 755 (1866) ("If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.").

250See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning."); United States v. McBratney, 104 U.S. 621, 624 (1882) (holding that tribal courts do not have criminal jurisdiction over offenses committed by non-Indian against non-Indian in Indian country); see also Pommersheim, supra note 16, at 84 (stating that Lone Wolf and McBratney are prototypical of cases "evinc[ing] a view that the authority of Indian tribes ha[s] been severely eroded by the increased presence and dominance of non-Indian society and that tribal sovereignty must therefore be appropriately reduced"). Frickey observes that none of the cases in which these principles were articulated involved disputes between Indians and non-Indians; instead, they "were developed in [the context of] cases contesting the authority of tribes vis-à-vis the federal or state governments or the tribe's own members." Frickey, supra note 9 at 14. These cases contributed to the dilution of the principle of retained, inherent geographical tribal sovereignty. Id. Giving Indians citizenship in 1924 also "undermined the simple 'we/they' context of federal Indian policy". Id. at 16.

251Worcester, 31 U.S. (6 Pet.) at 561 ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia
tribes with a residual, contingent form of sovereignty—sovereignty by congressional sufferance—and left them vulnerable to state displacement.

Most Indian law scholars are highly critical of the Court's Indian law jurisprudence, especially its more recent decisions. Resnik finds the entire legal history of federal-tribal relations rooted in "a discourse of conquest, not consent," which produced virtually unlimited federal powers. Pommersheim criticizes the current Court's view of tribal sovereignty as "theoretically incoherent within a constitutional democracy that is premised on a central government of limited and enumerated powers." Duthu complains that the Court has reversed the "paradigm of paternalism in the context of Indian relations . . .; whereas government, as a normative matter, must justify its incursions into private individual spheres of autonomy, such justification is virtually presumed when the government acts in Indian affairs."

Much of the Court's jurisprudence has centered on its prudential plenary power and the federal trust doctrines. As the following discussion of these doctrines shows, there is certainly a basis for this criticism.

(a) The Plenary Power Doctrine and Unlimited Congressional Power

can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with acts of Congress.

Wheeler, 435 U.S. at 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.").

Pommersheim finds particular fault with recent Supreme Court rulings, calling them at best "ambivalen[tr]" "in the face of tribal assertions of authority on the reservation in such diverse matters as taxing, hunting and fishing, and zoning rights." POMMERSHEIM, supra note 16, at 51; see also ALEINIKOFF, supra note 16, at 107 (criticizing Court's Indian sovereignty jurisprudence for being "a muddle"); BARSH & HENDERSON, supra note 56, at 137 (criticizing federal courts for being "just as ambiguous as Congress and even less prepared to accept responsibility" for "defin[ing] the nature of tribal sovereignty"); Johnson, supra note 11, at 664–66 (discussing hostility of Court toward Indian sovereignty, and how it is "simultaneously whittling away at both tribal legislation and judicial jurisdiction"); Newton, supra note 9, at 195 (discussing how Court, following policy of "judicial deference [toward] federal legislation affecting Indians[,] . . . has sustained nearly every federal [law] . . . regulating Indian tribes, whether challenged as being beyond federal power or within that power but violating individual rights"). Some scholars, while joining in the criticism of the decisions of the Rehnquist Court, argue that Indian law has nevertheless been a powerful tool for tribes seeking enhanced sovereignty. See, e.g., WILKINSON, supra note 49, at 120–21 (explaining that reservation system provides measured noninterference); Getches, Beyond Indian Law, supra note 8, at 267 ("Until the mid-1980's, the Court's approach in Indian law was to continue laws in light of the nation's tradition of recognizing independent tribal powers to govern their territory and the people within it."); Getches, New Subjectivism, supra note 8, at 1573 ("For a century and a half, the Supreme Court was faithful to a set of foundation principles respecting Indian tribal sovereignty.").

POMMERSHEIM, supra note 16, at 54.

N. Bruce Duthu, Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance, 29 ARIZ. ST. L.J. 171, 180 (1997); see also Frickey, supra note 9, at 7 (commenting on how "least democratic branch has become [the] most enthusiastic colonial agent").
Legal scholars have identified many doctrinal villains as reasons for the contingent nature of tribal sovereignty today. However, there is almost universal agreement that the most “pernicious” of these is the plenary power doctrine. The doctrine was first explicitly enunciated at the turn of the last century in Lone Wolf v. Hitchcock. In that case, the Court held that Congress could unilaterally abrogate a treaty between the Kiowa and Comanche tribes and the federal government, because “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.” The Court effectively gave Congress unlimited power over Indian tribes that continues until this day.

The exact source of the plenary power doctrine is unclear. Williams believes the doctrine grew out of the fictive notion—first articulated by Marshall in Johnson v. M’Intosh—that upon discovery, legal title to Indian

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256For example, Williams blames the crisis confronting federal Indian law today on a “legal discourse which has little to do with the ‘Rule of Law,’ but is instead grounded in the peculiar but today irrelevant political history of the early Republic.” Williams, supra note 77, at 192. He goes on to state, “the great tradition in the English common law of viewing the fictive doctrine of conquest as a source of limitation on the superior sovereign rights has been preserved in American Federal Indian Law by the doctrine of still inherent though diminished tribal sovereignty.” Id. at 193 (citation omitted).

257For a scathing criticism of the doctrine and supporting bibliography, see Robert Clinton, Tribal Courts and the Federal Union, 26 WILLAMETTE L. REV. 841, 855 n.41 (1990); see also POMMERSHEIM, supra note 16, at 46–47 (calling plenary power doctrine major confounding factor in field of Indian law); Gould, supra note 7, at 811 (stating that because “tribal sovereignty exists only [when] Congress ha[s] not displaced it,” it has contingent, residuary status). Gould fuses the doctrines of plenary power and federal trust responsibility into a “unitary doctrine encompassing both Congress’s power over tribes and its duties toward them, because regardless of the application [of the plenary power doctrine, its] conceptual basis . . . (and its power to both benefit and bring harm to tribes) remains the same—an analogy by Chief Justice Marshall to a guardian-ward relationship between Congress and the tribes.” Id. at 810 n.6.

258187 U.S. 553, 565–66 (1903). The first articulation of what became the plenary power doctrine, as noted earlier, can be found in the Marshall Trilogy: M’Intosh, Cherokee Nation, and Worcester. See supra notes 111–70 and accompanying text (discussing tribes subject to superior power of federal government); see also infra notes 261–63 (discussing Williams’ elaboration of discovery doctrine).


260See, e.g., United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (stating that congressional policy decisions dealing with Indians are not open to question by judiciary).

26121 U.S. (8 Wheat.) 543, 573 (1823). Discovery, according to Marshall, “gave title to the government by whose subjects . . . it was made,” and vested in the discovering nation “sole right of acquiring the soil from the natives,” “with which right no [other nation] could interfere.” Id. at 573–74. Although Pommersheim believes that Marshall seemed genuinely troubled by viewing Indians as without natural rights, Marshall’s belief “in the superiority of white republican policy” and his recognition that doctrines like the discovery doctrine were indispensable to the settling of America, led Marshall to frame opinions that reflected a “despotic imperialism and
lands vested in the discovering European nation. Under Marshall's description of the discovery doctrine, according to Williams, the indigenous tribal nations inhabiting America were considered dependent, diminished sovereigns, whose rights and status in the land were first determined by European colonizers and later by the federal government. Newton finds no basis in the Constitution for the plenary power doctrine, and finds the doctrine highly suspect; she sees it "not so much [as a] justification[] for decisional outcomes" but as an "abdicat[ion by the Court of] any role in defining the unique status of Indian tribes in United States' constitutional system or accommodating their legitimate claims of tribal sovereignty and preservation of property."

Whatever its origins, the "unbridled exercise" of the plenary power doctrine has had a devastating effect on Indian tribes, and on the cause of tribal sovereignty. The doctrine has provided the basis for Congress's "unilateral abrogation" of treaties, as well as the ill- advised congressional policies described in the preceding section of this Article. The Court systematically sustained congressional actions diminishing tribal sovereignty relying on this doctrine. The doctrine remains today a major impediment to any resurrection of tribal sovereignty unless Congress acquiesces in that action.

See Williams, supra note 77, at 191 ("Today, under Chief Justice Marshall's opinion in Johnson v. McIntosh, Indian Nations find themselves operating within a legal system that denies them ultimate sovereignty and the right of self-determination in their lands. Under the Doctrine of Discovery, Congress retains ultimate sovereignty over Indian Nations, and can unilaterally strike down the exercise by tribes of even the most pedestrian forms of self-government.").

Newton, supra note 9, at 196. Newton also blames the Court's "frequent invocation" of the doctrine for what ails tribal sovereignty today. Id. But see Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (stating that Congress' plenary power was "drawn both explicitly and implicitly from the Constitution itself").

Pommersheim calls on Congress to curb its "extravagant uses" of the doctrine. See Pommersheim, supra note 16, at 47, 218 n.73.
(b) The Federal Trust Doctrine

The federal trust doctrine grew out of Cherokee Nation, in which Marshall described Indians as being "in a state of pupilage," and their "relation[ship] to the United States resemble[ing] that of a "ward to his guardian." Unlike the plenary power doctrine, the Court eventually found a constitutional basis for the federal trust doctrine in the Indian Commerce Clause and the Treaty Power.

The theory of a trust relationship between the federal government and the tribes, while on its face protective of tribal rights, directly contradicts any notion of tribal sovereignty. In a trust relationship, tribes occupy a completely dependent role, functioning as virtually voiceless beneficiaries of federal largess, for good or ill. Although the Court has occasionally used the federal trust doctrine to protect tribal interests, it has failed to develop a consistent standard of trust responsibility, and has never imposed such a standard on Congress (because of the plenary power doctrine) or granted relief when the Executive Branch has abused the trust. Congress, too, has frequently used the doctrine to diminish the sovereignty of tribes.

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268 Cherokee Nation, 30 U.S. (5 Pet.) at 17.
269 See United States v. Mazurie, 419 U.S. 544, 554 n.11 (1975) ("It is undisputed that the Wind River Tribes have not been emancipated from federal guardianship and control. There is thus no doubt that this case is properly analyzed in terms of Congress's exclusive constitutional authority to deal with Indian tribes."); Morton, 417 U.S. at 551–52 (finding explicit constitutional basis for doctrine of trust responsibility in Congress' power "to regulate Commerce . . . with the Indian Tribes" and in power of President to make treaties with Indian tribes upon advice and consent of Congress). But see Newton, supra note 9, at 207 (calling Court's "gradual[ly] develop[ment of] a guardianship power over Indian tribes" in late nineteenth century "extraconstitutional"). According to Newton, this finding, together with the Court's ruling in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83–84 (1973), that federal power over tribal property, although "‘rooted in the Constitution,' [can] be challenged when it infringes constitutional rights," was a "major breakthrough in federal Indian law for Indians. Newton, supra note 9 at 231 (quoting Del. Tribal, 430 U.S. at 83).
270 POMMERSHEIM, supra note 16, at 45.
271 See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296–300 (1942) (imposing "obligations of highest responsibility and trust" on government, which may have breached that duty by knowingly distributing appropriations to corrupt tribal council rather than to tribal members); Cramer v. United States, 261 U.S. 219, 229 (1923) (deciding against claim of land patentee because federal government should recognize Indian right to occupancy as part of "traditional American policy toward [its] dependent wards"); see also Gould, supra note 7, at 812 n.15 (listing IRA as example of Congress's use of federal trust doctrine to benefit tribes because Act ended allotment policy and promised tribes measure of self-determination).
273 Gould, supra note 7, at 834 ("[O]ver the course of more than 160 years after Cherokee Nation announced the relationship of guardian and ward [between the federal government and tribes], the only certainty about the congressional trust responsibility has been its continuing power to divest the tribes of sovereignty."); id. at 811–12 (citing Dawes Act and congressional termination policy as most infamous examples).
Despite the inherent flaws of the federal trust doctrine, Pommersheim advocates its “re-conceptualization” as key to the restoration of tribal sovereignty. He suggests an interpretation of the doctrine as one that “establish[es] more clearly [that] the relationship . . . [is] between equals.” However, if this is not done, he believes the doctrine should be abolished. Woods also argues for a reinvigorated federal trust doctrine, but one that incorporates clear standards that are actually protective of tribal sovereignty. Regardless of the doctrine’s ultimate fate, the question that concerns this Article is whether these prudential doctrines have eviscerated Indian tribes and their sovereignty to such an extent that not enough remains of either to serve as a repository for Sandel’s dispersed sovereignty. However, before this Article turns to that question, it briefly examines the Court’s role in attenuating the boundary between tribal reservations and state jurisdiction. It is here that the Court has made the most inroads into destroying the notion of tribal sovereignty.

(c) Dimming of Worcester’s Bright Line Between the States and Tribes

In *Worcester*, Marshall unequivocally rejected any role for states on tribal reservations in favor of an exclusive federal-tribal relationship, basing that decision, in part, on the tribes’ own internal sovereignty. The Court, however, gradually has allowed the states to intrude onto tribal lands, and, in doing so, has weakened the inherent sovereignty doctrine and tribal sovereignty. Just as troubling, the clarity of *Worcester* has been replaced with the “doctrinal incoherence” of much more subjective tests, in which courts either weigh and balance the competing interests of tribes and the intruding

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274 POMMERSHEIM, supra note 16, at 45.
275 Id.
276 Id. Pommersheim seems hesitant about the federal trust doctrine’s termination because, even though he views it as debilitating and having “erroneously subsumed” the federal government’s treaty-based legal obligations, he nonetheless worries that the federal government might then skip out of its affirmative obligations to protect tribal lands and natural resources and provide the tribes with social services. *Id.* at 41-45. However, if Indian treaties are legally enforceable, then the “affirmative” duties contained in them impose separate “legal obligation[s]” on the federal government, regardless of any notion of a trust relationship. *Id.* at 41 (emphasis in original).
277 Wood, supra note 189, at 111, 134 (advocating reinvigorated federal trust doctrine as means to protect tribal separatism and sovereignty, and offering “reconstituted doctrinal model” containing clearer standards for defining “best interests” of tribes than have been used historically).
278 Worcester, 31 U.S. (6 Pet.) at 557 (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”); see also N.Y. Indians, 72 U.S. (5 Wall.) 761, 770-72 (1867) (referring to Kansas cases regarding issue of state taxation of Indian land); Kan. Indians, 72 U.S. (5 Wall.) 737, 755–57 (1867) (finding Shawnee subject to exclusive jurisdiction of federal government and their land immune from state taxation).
state or try to determine if the federal government has preempted the state’s action. This incoherence is all the more alarming because of the increased interaction between the states and tribes in recent years, arising out of the activities of non-Indians within the boundaries of reservations.

The Court has become the arbiter of how much governing authority tribes may exercise, assuming a prerogative that it formerly conceded to the political branches of government. It now gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the minds of affected non-Indians.

A more recent test in which the Court focuses on the status of the actors, while sufficiently objective, may in the long run cause the most damage to the cause of tribal sovereignty.

In *Williams v. Lee*, the Court took its first small step away from the wall erected between the states and tribes. In *Williams*, a non-Indian storeowner on the Navajo Reservation sued a tribal member in state court for an unsatisfied debt that arose on the reservation. The Court could have summarily disposed of the suit and not even entertained the question presented,

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280 Getches, *New Subjectivism*, *supra* note 8, at 1575. Getches identifies three themes that mark what he calls the subjectivist era in Indian law: (1) the Court’s retreat from established protective canons of construction; (2) the inclination of some Justices to use “nineteenth-century policies of allotment and assimilation as the benchmark for defining appropriate limits on Indian autonomy;” and (3) the assumption of what had been a prerogative of the political branches of government—to “balanc[e] various non-Indian interests in order to prune tribal sovereignty to the Court’s own notion of what it ought to look like.” *Id.* at 1620.

281 See Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962) (“The general notion drawn from Chief Justice Marshall’s opinion in *Worcester v. Georgia* . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations.”); see also Pommerheim, *supra* note 16, at 146–47 (stating that brief clarity brought to tribal-state relations by Court’s decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), was quickly lost through inconsistent application). In *Bracker*, the Court found that “the Indian Commerce Clause” and “semi-independent position’ of Indian tribes [had] given rise to two independent but related barriers [federal preemption and unlawful infringement] to the assertion of state regulatory authority over tribal reservations and members.” *Bracker*, 448 U.S. at 142 (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)). But see Garnett, *supra* note 15, at 442 (noting that “tangled intricacies” of federal Indian law and federal criminal jurisdiction “should come as no surprise” because they are “the inevitable by-product of multiple sovereignties exercising multiple powers derived from multiple sources”); McCoy, *supra* note 112, at 384 (welcoming any movement from federal “pre-emption” analysis” toward analysis that examines extent of “infringement on tribal self-government [because the latter] incorporates the element of tribal political independence”).


283 *Id.* at 221–23.

284 *Id.* at 217–18.
by referencing the holding in *Worcester* barring any state jurisdiction on Indian lands. Instead, the Court said that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." It implicitly conceded the possibility of a legitimate role for states on those lands if there was no such infringement. Even though the Court found the state court without jurisdiction to entertain the suit, it opened the door to future Courts holding differently depending on the degree of infringement—admittedly a subjective test. Immediately after *Williams*, the Court used the "infringement" test to protect tribes from state regulation, but later cases used the same test to constrain tribal sovereignty in the face of competing assertions of state power.

In *Warren Trading Post Co. v. Arizona State Tax Commission*, the Court moved *Williams* another step away from *Worcester*'s clear line between the states and tribes, and another step away from the inherent sovereignty doctrine. There the Court held that since Congress possesses the legislative

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285 Id. at 219–20 (emphasis added).
286 Id.
287 See, e.g., *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468–69, 480–81 (1976) (holding that Montana lacked sufficient power over Flathead Tribe and its reservation to tax personal property of tribal members, license tribal businesses, and tax sales to tribal members by tribal merchants); *Fisher v. Dist. Ct.*, 424 U.S. 382, 387 (1976) (holding that Montana state courts lacked jurisdiction to determine custody of Indian child whose parents were both members of Northern Cheyenne Tribe who resided on reservation and stating "[s]tate court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court"); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 181 (1973) (holding that state could not tax income of Navajo tribal member living on reservation when income was earned from reservation sources); *see also* *McCoy*, *supra* note 112, at 383 (discussing these cases).
288 See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (holding that tribal court lacked jurisdiction to adjudicate claim between non-Indians arising out of accident on portion of state highway running across Indian reservation because opening tribal court for optional use of plaintiff "is not necessary to protect tribal self-government; and requiring [defendant] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the 'political integrity, the economic security, or the health or welfare of the [tribe]'" (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981))); *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408, 414, 432 (1989) (holding that Yakima Nation did not have exclusive authority to zone properties on fee lands within Yakima Reservation because County's exercise of its zoning authority did not "imperil any interest" of tribe); *Montana*, 450 U.S. at 564 (holding that tribe did not have inherent authority to regulate hunting and fishing by non-Indians on fee lands within its reservation, saying "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"). *Montana* weakened the protective benefit of the infringement test by placing extremely restrictive conditions on what constitutes infringement.
authority to regulate any matter arising in Indian Country, the appropriate test to evaluate the legitimacy of a state jurisdictional claim was not a question of infringement of tribal authority, but whether Congress had preempted the field the state sought to regulate. Acknowledging that a preemption analysis involving Indian tribes was different than that which might be conducted in other areas of the law, the Court, in a later case, explained how courts should determine whether a state’s intrusion into tribal matters was preempted. The court stated that any such inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

By making the analysis dependent upon a “particularized inquiry” into the various competing interests, the Court all but guaranteed more state intrusion into tribal matters, and, just as troubling, greater indeterminacy because of the ad hoc nature of the analysis. While the Court has occasionally applied the preemption test to protect tribes, it has not consistently forestalled state intrusions into tribal matters. Both the infringement and preemption tests

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293 See generally Pommersheim, supra note 16, at 144–53 (expressing concern that *Worcester’s* original certainty about exclusivity of federal-tribal relationship has been vastly diluted and made uncertain by Court’s application of doctrine of preemption, and attempting to bring doctrinal coherency to these cases by conceiving of them in terms of individual property rights).

294 See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218, 221–22 (1987) (finding that preemptive federal interest in helping tribes develop their economies precludes regulation by state); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983) (holding that New Mexico was preempted from exercising concurrent jurisdiction over hunting and fishing by nonmembers on tribal lands within Mescalero reservation because state regulation would disrupt federal and tribal management program and threaten congressional objective of “promoting tribal self-government and economic development”).

295 The intrusion of states into tribal matters is most apparent in the area of state taxation of reservations. See, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 166–68, 189 (1989) (allowing state to impose severance tax on non-Indian company producing oil and gas on Jicarilla Apache Reservation, even though company was already paying tax to tribe, noting that “burdensome consequence [of two taxes] is entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction”); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153–55 (1980) (upholding right of tribes to impose sales tax on tribal members on reservation, but rejecting tribes’ argument that tribal tax precluded state tax, finding that no theory of tribal authority would permit tribes to “market an exemption from state taxation to people who ordinarily would
moved the Court a substantial distance from *Worcester*'s reliance on the doctrine of inherent sovereignty as an absolute barrier against state intrusion into Indian affairs:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limit of state power.

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.  

A third step away from *Worcester*'s bright line separating tribes from states is reflected in a subtle, but devastating shift in focus in the Court's opinions from the status of the land in question to the status of the individual over whom tribal jurisdiction is sought. First, in *Oliphant*, the Court declared that tribes implicitly have been divested of the inherent power to prosecute non-Indians because the exercise of this power would be inconsistent with their posture as domestic dependent nations. Next, in *Duro v. Reina*, the

do their business elsewhere."); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1976) (rejecting state's attempt to impose certain taxes on Indian consumers and residents, but allowing state to compel tribe to collect state sales taxes from non-Indians because tax was levied only on non-Indians and would only minimally burden tribal sellers, and would not interfere with tribal government). See generally Gould, supra note 7, at 864–72 (opining that Court's tax decisions "establish[ed] pervasive state authority within tribal territory").

*McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973) (striking down state tax income tax applied to income earned by enrolled member of Navajo Tribe derived from work on reservation); *see also* Barsh, *infra* note 11, at 56 (observing that on present Court, this "backdrop [has] faded into mere shadow," as Court is basing its decisions on "the race of the parties and the judges own ad hoc ideas about federal Indian policy"). But see Getches et al., *infra* note 16, at 432 (asserting that *Worcester* is basis for federal preemption doctrine in Indian law and that it, in addition to tribes' inherent sovereignty, is ground for striking down operation of state law on Indian land).

*Oliphant*, 435 U.S. at 208. Gould says this shift in focus was first apparent in *Morton v. Mancari*, 417 U.S. 535 (1974), and that the *Mancari* Court's "focus on status, instead of territory, in defining tribal rights . . . won [for states] increasing power to regulate and tax non-Indians and nonmember Indians within reservations." Gould, *infra* note 7, at 813. *Mancari* sustained the Bureau of Indian Affairs hiring preferences because they were granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities. *Mancari*, 417 U.S. at 553–54. Gould also criticizes *Mancari* because it enabled the Court to use the "status-based distinction[]" rationale to limit the "equal protection rights of tribal members," and that *Mancari*, and Justice Thomas' footnote in *South Dakota v. Bourland*, 508 U.S. 679, 689 n.9 (1993) (finding that tribe had lost regulatory authority over hunting and fishing by non-Indians on tribal lands that had been "broadly opened to the public" or were not "pristine"), largely
Court extended the reach of *Oliphant* to *non-member Indians*, rejecting arguments that the tribe retains jurisdiction over Indians who commit crimes on the forum tribe’s reservation, but who are not members of the forum tribe. Then, in *Montana v. United States*, the Court held, as a general principle, that the “exercise of tribal power [over non-Indians] beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent [position] of tribes and so cannot survive without express congressional delegation.” Finally, in *Nevada v. Hicks*, the Court held that a Navajo tribal court had no jurisdiction to adjudicate a case brought by an Indian against a state law enforcement officer for the officer’s conduct in executing an *on-reservation* search warrant for an *off-reservation* crime committed by that Indian. By the last of these cases, the Court had closed the era of “inherent sovereignty,” which was replaced by a much more “crabbed version of sovereignty based upon consent.” Gould, supra note 7, at 813–14. But see United States v. Mazurie, 419 U.S. 544, 556–58 (1975) (rejecting consent-based sovereignty).

*Duro* has been the basis for much scholarly criticism. See, e.g., Robert N. Clinton, *Peyote and Judicial Political Activism: Neocolonialism and the Supreme Court’s New Indian Law*, 38 FED. B. NEWS & J. 92, 99–100 (1991) (speculating that *Duro* and other recent decisions stem from subconscious racism by Court, or worse, racism in subtle form of colonialism, and saying “far from being the protector of minorities which the framers envisioned . . . the Court has become a cheerleader for legal oppression of minority Indian interests and the major force in our political system currently bent on curtailing their authority and rights”); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 265 (1989) (arguing that Court’s decisions have deeper roots in ancient legacy of racist-imperial discourse).


> [T]o recognize that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence. Despite the reversed presumption, the plain language of *Montana* itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee lands, and, more particularly, may sensibly be read as recognizing inherent tribal authority to zone fee lands.

*Brendale*, 492 U.S. at 456 (Blackmun J., concurring in part and dissenting in part).

*But see* Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 554 (9th Cir. 2002) (holding that exercise of “search warrant against the Tribe and tribal property” interfered with right of reservation Indians to make their own laws and be ruled by them), vacated, 583 U.S. 701, 704 (2003) (discussing federal common law prescription that enables tribe to maintain action for declaratory and injunctive relief, establishing its sovereign right to be free from state criminal process).
elevated an individual’s status to a preeminent place in its analysis of when a state may intrude upon a tribe’s sovereignty and had obliterated the significance of land. Today, the law appears to be that “[a]bsent a congressional delegation of authority, federal preemption, or a finding of inherent civil jurisdiction, the sovereign rights of tribes are sufficient to prevail in disputes between tribes and tribal members only.”

Given centuries of assault on their way of life and their capacity to be islands of difference in our country, what remains of tribes and their capacity to exercise constitutive and/or ongoing self determination?

3. Tribal Sovereignty Today: “A Glass Half Full or Half Empty?”

The glass is half full or half empty. Tribal rights often exist, but not always. Tribes are entitled to some recognition, but not too much. Tribes have sovereignty, but not inconsistent with their dependent status. In light of this paradoxical inclusion and exclusion, parity and hierarchy, theoretical incoherence and destabilizing results predominate.

Tribes, which began their interaction with Europeans and the federal government “outside the republic, [have become involuntarily] absorbed ... into the republic, internal sovereigns of a limited kind” through policies of allotment, assimilation, and termination. These ill-conceived—and in some cases ill-intended—policies have constrained the ability of tribes to govern their lands and members, and stripped from them their economic, natural, and cultural resources base, making it more difficult for them to survive on what land remains theirs. Tribal efforts to assert treaty-based rights to water, fish, or

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304 Gould, supra note 7, at 814.
305 Id. The record on tribal sovereignty in the lower federal courts has been a little more encouraging for the tribes. See, e.g., Cardin v. De La Cruz, 671 F.2d 363, 364, 366–67 (9th Cir. 1982) (applying tribal health and safety regulations to non-Indian owners of grocery store on reservation); Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900, 902–03 (10th Cir. 1982) (authorizing tribe to zone non-Indian land on reservation to prevent land from being subdivided by private developers); Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen, 665 F.2d 951, 965 (9th Cir. 1982) (regulating riparian rights of non-Indian landowners on reservation); Governing Council of Pinoleville Indian Cmty. v. Mendocino County, 684 F. Supp. 1042, 1043, 1047 (N.D. Cal. 1988) (enjoining siting of asphalt and cement plant on non-Indian land within boundaries of reservation-like holding in California); Lummi Indian Tribe v. Hallauer, 9 Ind. L. Rep. 3025, 3028 (W.D. Wash. 1982) (requiring non-Indians to hook up to tribal sewer systems).
306 POMMERSHEIM, supra note 16, at 50–51.
307 See id. at 48–49 (calling this “involuntary annexation”); see also Clinton, supra note 257, at 847 (noting that in strictly “Lockean social compact terms, Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty”). But see Monette, supra note 77, at 632–33 (suggesting that tribes “consented” to become part of federal system of government when they entered into treaties with federal government).
land, as discussed previously, have met with only limited success in court and, in some cases, actually led to reductions in previously held rights. Non-legal initiatives by tribes to reclaim their heritage, protect their environment, strengthen what remains of their internal economies, and to exert political muscle only have drawn political ire.

As discussed in Part V.B, Congress and the Executive Branch have intruded, at will, into traditional tribal government and society. The Court has not only sustained these initiatives, but steadily eroded the tribes’ right to govern their lands. Under the Court’s prudential plenary power doctrine, Congress “can unilaterally strike down . . . even the most pedestrian” exercises of tribal governmental authority, leaving tribes subject to the unchecked power of the federal government. The doctrinal inconsistency and incoherence of the Court’s oscillating jurisprudence on the issue of the extent of state jurisdiction over tribal matters, and the destructive principles announced in its decisions, have left tribes without a coherent foundation on which to rest any defense to future state assaults on their sovereignty.


310 Williams, supra note 77, at 191.

311 Frickey, supra note 9, at 3–8, 13; see also id. at 4–5 (“Given the lack of guidance in positive law, the complexity of the issues, and the tangled normative questions surrounding the colonial displacement of indigenous peoples to construct a constitutional democracy, it is also not surprising that the resulting decisional law is as incoherent as it is complicated.”). Frickey goes on to show how the current Court’s decisions are rooted in doctrinal incoherence and in “normatively unattractive judicial colonial impulse[s],” id. at 7, and how the Court has displaced the “elegant formulation of Indian law principles” in favor of what he calls case-by-case common-lawmaking rooted in “felt necessities.” Id. at 27. Similarly, Aleinikoff notes that Indian law does not form a coherent whole. It is the product of more than two centuries of case law, over which time relations among the federal government, the states, and the tribes have changed dramatically. There is little doubt that cases now viewed as foundational might well be decided differently if they came before the Court for the first time today. But constitutional law is frequently more sediment than theory, and Indian law is no exception.

ALEINIKOFF, supra note 16, at 113 (citations omitted); see also POMMERSHEIM, supra note 16, at 8 (calling Indian law little more than “a variegated admixture of attitudes and doctrines, including constitutional shortcomings, a poverty of coherent theory, consistent exploitation, and only intermittent concern for human rights”); JOHN R. WUNDER, “RETRAINED BY THE PEOPLE:” A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 3–4 (1994) (“[T]he unique evolution of Native Americans in American law defies rational categorization. Historical periods from 1791 to 1991 are characterized by the frequent wholesale restructuring of that relationship. . . . Federal
Without question, Indian tribes today are substantially less secure in their land base and their ability to self-govern than when Chief Justice Marshall conceived of them "as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."\textsuperscript{312} But while \textit{Worcester} placed tribes outside state and national politics, \textit{M'Intosh} and \textit{Cherokee Nation} provided the foundation for cases subjecting tribes to the "plenary power" of Congress,\textsuperscript{313} and to the meddling influence of the states.\textsuperscript{314} The Court's ambivalence toward notions of inherent sovereignty and its doctrinal confusion over the ability of tribes to tax, prosecute criminal behavior, and to regulate hunting, fishing, and land use in the face of contradictory assertions of state power, have left tribes operating within a legal system that clouds the legitimacy of such actions.

Indian law scholars like Aleinikoff believe that the Court's Indian law jurisprudence has helped reduce tribes from their historic role as separate (if dependent) sovereigns to no more than aggregations of members, and has removed almost any semblance of tribal territorial sovereignty.\textsuperscript{315} Gould says these judicial holdings "manifest[] an almost callous disregard for congressional intent" reflected in the repeal of the Dawes Act\textsuperscript{316}, he calls tribal
sovereignty, as a result of these decisions, "sovereignty by consent." Pommersheim describes the doctrine of tribal sovereignty as "almost evanescent" in the face of federal hegemony, blaming its incorporeality on the "incompatibility of the treaty, trust relationship, and Plenary Power doctrines." Pommersheim also finds that the absence of a constitutionally based limit on the exercise of federal authority under the plenary power doctrine has made the situation worse, because it leaves the tribes unprotected in any conflict with states or the federal government. Without a clear constitutional or coherent doctrinal limitation on congressional erosion of tribal sovereignty, tribal sovereignty is a "destabilized sovereignty . . . literally oxymoronic and at odds with a national jurisprudence of integrity and stability."

Yet, while Indian tribal sovereignty has been severely diminished as a result of misguided federal policies and Supreme Court decisions, the reduction in tribal sovereignty has not been complete. "Indian Tribes remain distinct, albeit 'dependent,' sovereigns, and they retain inherent, though limited, powers of self-government" over their land and their members.

317 Id. at 853. Gould believes that tribes maintained their inherent tribal sovereignty during the historical period because "[v]ast areas of the country were unsettled, [which] facilitate[d] policies and treaties that separated Indians from non-Indians. As the pressure for land by whites increased, however, Congress ended the territorial separation of many tribes through the allotment policy. Although Congress repudiated this policy in the 1930s, it did not restore the territorial authority of tribes." Id. at 815. "[T]his failure, coupled with decisions in which the Court diminished the importance of the doctrine of inherent sovereignty" resulted in the current consent-based paradigm.

318 POMMERSHEIM, supra note 16, at 50. Pommersheim also criticizes the Court for its recent abandonment of foundational Indian law doctrines—which had been "grounded in some reasonable attempt to understand history and the unique position of the tribal sovereign in a constitutional democracy"—in favor of a "series of historically superficial and intellectually deficient . . . pronouncements" that have undermined tribal sovereignty over their homelands. Pommersheim, supra note 12, at 442–43.

319 POMMERSHEIM, supra note 16, at 39 (contrasting tribes with states, which have protection of Tenth Amendment, which plays "pivotal [role] in structuring the [federal-state] discourse on federal-state sovereignty," by providing "constitutional baseline" for any discourse on federal-state sovereignty); see also WILKINSON, supra note 49, at 117–18 (noting that Constitution does not provide baseline because federal-tribe relationship is arguably in part "preconstitutional" and in part "extraconstitutional"); Resnik, supra note 248, at 675 n.16, 679–80 (commenting on significance of federal-tribe relationship developing outside Constitution and thus beyond reach of formative dogma limiting and constraining federal powers). But see Monette, supra note 77, at 618–19 (arguing that tribes occupy "sovereign plane" as states in our federal system of government and, therefore, same restraints that govern federal government/state relationship and state/state relationship should govern relationships between federal government and tribes and states and tribes).


321 Garnett, supra note 15 at 434–35. Recognizing that the claims of tribal Indians are legally and politically distinct from other ethnic or minority groups is essential, because courts are unlikely to uphold tribal authority in contests with surrounding states if tribes are viewed, at most, as disadvantaged groups. See Frickey, supra note 115, at 424 n.180 ("Because the structural and constitutive bases for the [Indian Treaty] canon have become obscured, Native
The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty, which has never been extinguished."

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status.\footnote{United States v. Wheeler, 435 U.S. 313, 323, (1978) (quoting COHEN, supra note 16, at 122). Cohen said that Indian sovereignty adhered to "three fundamental principles" that:

1. A[n Indian tribe possesses, in the first instance, all the powers of any sovereign state;]
2. Conquest renders them subject to the legislative power of the United States and, in substance, terminates a tribe's external powers of sovereignty . . . ,
3. Its power to enter into treaties with foreign nations, but does not by itself affect its internal sovereignty [and] (3) [tribal] powers are subject to qualification by treaties and by express legislation of Congress . . . save [those actions] full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

COHEN, supra note 16, at 122–23. (emphasis added). Pommersheim rejects Cohen's third principle in part "because it recognizes the ability of Congress to extinguish tribal powers," "reflects the image of the benevolent colonizer, and [because] it is doctrinally insufficient to establish a more stable and enduring conception of tribal sovereignty." POMMERSHEIM, supra note 16, at 52–53; see also Newton, supra note 9, at 205 (noting that "integrity of tribal sovereignty rest[s] precariously on the whim of Congress owing . . . to the [Supreme] Court's extraordinary deference to the political branches' exercise of the foreign affairs power in their dealings with the Indians").}
lonely island of Alcatraz, there is something uniquely different about Indian people that sets them apart from other Americans.\textsuperscript{323}

Indian Country today consists of approximately 55 million acres, 314 reservations and approximately 1.9 million people, half of whom live on or near tribal land.\textsuperscript{324} While conditions on many of these reservations are shockingly bad—one third (perhaps as high as two thirds) of Indians living on reservations fall below the poverty level, unemployment rates are as high as sixty to seventy percent, life expectancy is below the national average, and infant mortality is above the national average—they are improving.\textsuperscript{325} Indian gaming, tourism, and other forms of economic development are beginning to end the downward economic spiral in some parts of Indian Country.\textsuperscript{326}

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\textsuperscript{323}JENNINGS C. WISE, THE RED MAN IN THE NEW WORLD DRAMA 399 (1971); see also D'ARCY MCNICKLE, THEY CAME HERE FIRST 283 (rev. ed. 1975) ("Indian societies did not disappear by assimilating to the dominate white culture, as predicted, but assimilated to themselves bits and pieces of the surrounding cultural environment. And they remained indubitably Indian, whether their constituents lived in a tight Indian community or commuted between the community and an urban job market."); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 393–94 (1984) ("Many ... urban Indians maintained tribal connections with the reservations, but second and third generations of Indians in cities often had no reservation experience at all. These city dwellers, for the most part, steadfastly maintained their identity as Indians."); Johnson, supra note 11, at 649 ("The study of Native American history teaches that the overriding, but rarely articulated, policy of Canada and the United States towards Aboriginals was to get them out of the way so that their land could be settled and developed by whites."); McCoy, supra note 112, at 357 ("Indian tribes have endured the hardships of such federal policies as removal from their native homelands, forced assimilation into the mainstream of American society, and complete termination of their relation with the federal government. Remarkably, they have maintained their separate identities."); Turpel, supra note 11, at 33 (arguing that "from early colonization until the present time, no government or monarch has ever genuinely recognized Aboriginal peoples as distinct Peoples with cultures different from, but not inferior to, their own. . . [their] ways of life should be tolerated or respected except in the most paternalistic and oppressive terms."); James Belich, Empire and Its Myths 8 (Apr. 27, 2000) (unpublished manuscript, on file with author) (stating that Indian tribes have endured as separate, distinct communities, and adoption to white ways should not be confused with adoption of white ways).\textsuperscript{324}These statistics, and those that follow, are drawn from GETCHES ET AL., supra note 16, at 7–26, unless otherwise noted.\textsuperscript{325}POMMERHEIM, supra note 16, at 7. "Per capita income for Native Indians was slightly more than $8,300, the lowest of all racial groups in the U.S. and less than half the level for the entire population." GETCHES ET AL., supra note 16, at 15; see also Timothy Egan, New Prosperity Brings New Conflict to Indian Country, N.Y. TIMES, March 8, 1998, at A1 (stating that unemployment in Indian Country is greater than thirty percent; nearly one third of the Indians who do have jobs earned less than $10,000 a year in 1995, last full year surveyed; and Indians have highest rate of alcoholism, suicide, and child abuse in country).\textsuperscript{326}Gambling alone generates over six billion dollars a year for tribes. Approximately a third of all tribes operate some form of gambling enterprise, and while the revenues are unevenly spread, they have brought newfound wealth to many tribes. Egan, supra note 325; see also William Claiborne, Oneidas Are Betting on Mexican Casinos, WASH. POST, Mar. 31, 2001, at A12 (describing agreement between "Oneida Indian Nation [and] Mexico to develop and manage Las Vegas style casinos in the Pacific coast resorts" of Acapulco and Mazaltan). Tribes
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outflow of young members from reservations may be slowing, and, in some situations, reversing itself. Many tribes appear to be going through a cultural renascence, in which they are rediscovering their traditions and roots, and affirmatively asserting their rights to land and natural resources. John Ecohawk, Executive Director of the Native American Rights Fund, describes this resurgence of tribal rights as “the civil rights movement for Native

own approximately one percent of the nation’s total commercial timber land as well as valuable mineral rights, which generated $142 million in revenues, in 1991, for tribes and individual Indians. GETCHES ET AL., supra note 16, at 22–24. Additionally, tribes own or operate several lucrative resorts and businesses, like the Cherokee’s electronics manufacturing plant in Oklahoma, the Choctaw’s greeting card company in Mississippi, the Blackfeet’s steel housing frame manufacturing company in Montana, and the Gila River Tribe’s office and industrial park in Arizona. Id. at 24.

According to Aleinikoff, reservation population increased by “18 percent (from 370,125 to 437,431 residents) between 1980 and 1990 (almost twice the rate of overall U.S. population growth),” and “the number of persons counted as Indian by the 1990 census was 43.4 percent greater than the number in the 1980 census (from 1.3 million to 1.9 million respondents) .... The 2000 census reported further sustained growth in the 1990s. Almost 2.4 million persons identified themselves as American Indian or Alaska Native, and a total of 4.1 million listed those categories either alone or in combination with other racial categories.” ALEINIKOFF, supra note 16, at 123.


See, e.g., Egan, supra note 325, (describing Skull Valley Band of Goshutes’s efforts to lease part of its land for temporary storage of high level civilian nuclear waste, use of internet by Coeur D’Alene Tribe to launch international on-line lottery, success of Assiniboine and Gros Ventre Tribe in stopping expansion of major gold mine by using their sovereign status to protect water and land bordering mine, and success of Isleta Pueblo tribe in forcing City of Albuquerque to spend $300 million to clean up Rio Grande before it flowed through Indian lands); Andrew Engelson, Tribes Fight to Clear the Roads for Salmon, 33 HIGH COUNTRY NEWS, July 2, 2001, at 5 (describing efforts by Puyallup Tribe to improve salmon runs and threatened tribal lawsuit based on state’s treaty-based obligation to maintain at harvestable levels salmon not listed under Endangered Species Act); Steven Lee Myers, Cold War Over, Air Force Must Compete for Space, N.Y. TIMES, July 16, 1998, at A24 (“To them this is all desolate—rocks and scrub land ... But to us this is our bible,” quoting Terry D. Gibson, a member of Shoshone-Paiute Tribal Council, protesting plans by Air Force to use tribe’s ancestral homelands for training flights); Michelle Nijhuis, Return of the Natives, 33 HIGH COUNTRY NEWS, Feb. 26, 2001, at 1 (describing Nez Perce Tribe’s efforts to reintroduce wolves into Idaho wilderness and at same time reinvent its political future). An interesting parallel movement is occurring among tribes in Canada, particularly in British Columbia, where tribes have asserted claims to land and resources based on prior occupation of those lands. See, e.g., Anthony DePalma, Canada and British Columbia’s Largest Indian Group Taking Steps to First Permanent Treaty, N.Y. TIMES INT’L, Mar. 11, 2001, at 14 (describing signing of Nuu-chah-nulth tribe’s first treaty with provincial and federal governments, “giving the Indians self-rule, a large cash payment, and shared control with non-Indians of ... old growth forests and other natural resources”); see also Anthony DePalma, Canada Pact Gives a Tribe Self-Rule for the First Time, N.Y. TIMES, Aug. 5, 1998, at A1 (giving west coast Indians control of land and legal rights to run their own nation).
Americans,” made possible by the fact that more tribes are finding the resources to hire their own lawyers to prosecute their rights. But history teaches—and the present bears witness to—the fact that success brings reactions from the majority culture, which fears displacement and loss of power. “People who have rarely given a second thought to the natives in their midst suddenly find there really are four major levels of government in America: Federal, state, local and tribal. Until recently, one of them was nearly always invisible.”

Thus, although federal policies and the Court’s Indian law jurisprudence have diminished tribe’s sovereign power over their lands and members, their power has not been extinguished. Nor has the unique cultural legacy of tribes been extinguished; in fact, that legacy is experiencing a revival today (albeit, in some cases, it may be recollected and reconstructed). Therefore, there is clearly something there to be saved. But the continued preservation of these societies requires more help than the traditional doctrinal support for tribal sovereignty can provide.

Except for brief periods, the traditional foundations for Indian sovereignty discussed in this Part of the article have largely failed the tribes. Hence, there is an urgent need to find a more solid theoretical purpose for tribal sovereignty to reverse the downward trend for tribal self-governance and to protect burgeoning tribal economies and societies. In the abstract, enhanced sovereignty might rest on a theory of federalism. But a federalism conversation, which proceeds under the twin assumptions of consent of the governed and limited central authority, is not (and never has been) the

\[\text{330} \text{Egan, supra note 325 (quoting John Ecohawk); see also Johnson, supra note 11, at 676–78 (opining that one of greatest factors contributing to survival of Indian race has been American legal profession, which, once used as tool against Indians and tribes, is now increasingly being used in tribe’s favor to protect tribal rights and concerns and to further tribal autonomy).}
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\[\text{331} \text{Egan, supra note 325; see also id. (quoting former Rep. Merrill Cook of Utah, referring to new tribal gaming and nuclear storage proposals, as saying “I don’t think this is what the Founding Fathers had in mind. It’s just not right, this use of sovereignty. The implications are frightening for us as a nation.”); POMMERSHEIM, supra note 16, at 179–83 (commenting on backlash against Indian gaming). A letter to the editor of the Ridgefield Press in Connecticut expressed this concern:}
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> I have a problem with a group of people, who, because of their ethnicity, can move to within one mile of my home and be exempt from the taxes that I must pay.

> It should not be a legal right that Native Americans can get any land, and do as they please, because of tribal recognition. Especially when so many are against it.

> What is to keep them from taking over the entire state? This will not improve their lot. Only a select few will benefit. Do you really believe that real Native Americans will get the money?

> I don’t believe that Native Americans should be able to purchase land and build a casino. How did it come to be that Native Americans are exempt from the law of the land?


\[\text{332} \text{See Tarlock, supra note 47, at 560–61 (questioning extent to which today’s tribes are postmodern constructs rather than legitimate subcultures, citing as example tribes that eliminated blood quantum as requirement for membership).} \]
paradigm for federal-tribe, or state-tribe relations. In reality, tribal relations with the federal government and the states are governed by a "very different paradigm . . . , one rooted in a discourse of conquest, not consent," which has resulted in "virtually unlimited . . . governmental power[]" over Indian affairs. A federalism discourse that does not recognize "Indian tribes as participant sovereigns" has "enervate[d] [the concept of] tribal sovereignty" and left it without a secure place in our federal structure of government.

"Tribal aspirations for political and economic self-governance, state desires for exclusive regulatory control within their borders, and federal efforts to maintain a preeminent role in Indian affairs are factors that still frame the current debates on [tribal sovereignty]." This Article now turns to the question of whether republican theory might do a better job of protecting what remains of tribal sovereignty than the traditional doctrines of treaty-based and inherent sovereignty, or than some version of federalism. The next Part asks whether republican theory offers a more compelling rationale for enhancing tribal sovereignty that would allow these vibrant subcultures to survive. To answer this question, Part IV examines three strands of republican thinking that support enhancing tribal sovereignty and one that is problematic. It explores the extent to which tribes might qualify as dispersed centers of civic republican governance.

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334Duthu, supra note 255, at 179 (emphasis added); see also Resnik, supra note 248, at 696 ("Instead of the expected (if complex) references to consent and to a federal government of limited powers, other, often unspoken rationales—conquest, violence, force—are the primary sources of the power exercised by the federal government over Indian tribes."); Singer, supra note 19, at 8 ("Court’s attack on American Indian property and sovereignty constitutes a continuing conquest of American Indian nations.").
335Duthu, supra note 255, at 179 n.43.
336Id. at 199 (noting conflicting pressures in context of gambling in Indian Country); see also McCoy, supra note 112, at 423 ("Tribal political independence is dependent on the ability of tribes to assert their powers of self-government over their members and territory. The exercise of tribal powers inevitably produces some conflict with state and federal interests. But the tribal sovereignty doctrine, if properly applied, can accommodate these competing interests and at the same time permit tribes to maintain their political independence.").
337Eric Posner suggests two other rationales for transferring greater sovereignty to tribes: (1) "transferring resources" to "groups [who] are sufficiently cohesive . . . and pursue goals that are consistent with the state's" "is a more efficient method for obtaining [these] goals than conventional regulation of individual action"; and (2) external regulation can undermine a group's own ability to self-regulate, discussing antidiscrimination laws as an example. Eric A. Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 U. CHI. L. REV. 133, 136–37 (1996). However, since tribes do not necessarily replicate the state's norms, Posner's rationale may be inapposite.
IV. SOME HELPFUL AND TROUBLESOME ELEMENTS OF REPUBLICAN THEORY

The gift of republicanism, as an explanatory concept, lay [and continues to lie] in its ability to do so much disparate interpretative work.\textsuperscript{338}

Modern republican scholars draw from the republican thinking that animated the founding of this country to respond to perceived ills in modern American society.\textsuperscript{339} The goal of this Part is to identify those strands of republican theory that might be used to reanimate tribal sovereignty. The author is aware of the historiographic criticisms of republicanism\textsuperscript{340} and of the term's indeterminacy, but nonetheless proceeds out of a belief that even a rudimentary recitation of republicanism's principles, particularly as brought up to date by Sandel and others, might be illuminating for purposes of reconceiving and reenergizing Indian tribal sovereignty in the twenty-first century.

The author's hypothesis is that republicanism, a doctrinal cornerstone of this country's emergence as a nation,\textsuperscript{341} offers the strongest theoretical basis for the concept of tribal sovereignty. This Section extracts several principles from republican thinking that seem particularly well suited to providing a rationale for a more robust tribal sovereignty than either of the traditional bases discussed in Part V. These principles are: (1) a government based on the

\textsuperscript{338}Rodgers, supra note 13, at 38. But see Linda K. Kerber, Making Republicanism Useful, 97 YALE L.J. 1663, 1663 (1988) (quoting John Adams: "There is not a single more unintelligible word in the English language than republicanism.").

\textsuperscript{339}See, e.g., SANDEL, supra note 2, at 6 ("And yet, for all its episodes of darkness, the republican tradition, with its emphasis on community and self-government, may offer a corrective to our impoverished civic life."); see also Kerber, supra note 338, at 1664 (referring to modern republicanism as "civic humanism"); Frank Michelman, Law's Republic, 97 YALE L.J. 1493 (1988) (defending "republican revival" and its modern "civic republican strain"); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1539 (1988) (declaring "founders [to be] liberal republicans" and defending liberal republicanism against its detractors).

\textsuperscript{340}See, e.g., Kerber, supra note 338, at 1666, 1671–72 (commenting that "classical republican discourse was a language of political nostalgia in the 1790's," in tension with liberal thought even then, taking Michelman and Sunstein to task for seeking a nonexistent, "nuanced republicanism, [i.e.] participation without exclusion, virtue without elitism," listing some of classical republicanism's less attractive features, and noting that "[i]t was not the civic humanists to whom women, blacks, Jews, and the marginalized groups of modern times have . . . turn[ed] for solutions"); Rodgers, supra note 13, at 38 (criticizing historians who overemphasize influence of republicanism on this country's emergence as nation).

\textsuperscript{341}See THE FEDERALIST No. 39, at 242–43 (James Madison) (Edward Mead Earle ed., 1937) (defining distinctive characteristics of republican form of government); see also Sunstein, supra note 339, at 1558 ("[E]lements of both pluralist and republican thought played a role during the period of the constitutional framing."). But see BEYOND CONFEDERATION, supra note 115, at 9 (noting that concerns of framers of Constitution—"the restraint of the ceaselessly aggressive tendencies of power, the maintenance of the public virtue, and the filtration of talent"—were "peculiar to a world that is now very distant from our own," and current concerns involve "modern notions of democracy, nationalism, and pluralism").
consent of the governed; (2) individuals who are capable of self-government, willing to be civically engaged, and do not act out of their self-interest; and (3) individuals who have ties to a particular place and/or community, in which they can practice citizenship. In addition, to the extent modern republicanism now embraces diversity as a virtue, difference has been added as a fourth principle. This Part proceeds in three sections. First, in Part IV.A, the three principles mentioned above are described in greater detail. Part IV.B. then briefly explains how these republican principles contribute to a more coherent theoretical solution to the problem of tribal sovereignty. Finally, in light of these principles, Part IV.C. analyzes whether tribes are themselves communities that could qualify as Sandel’s dispersed centers of republican governance.

A. Formative Republican Principles

1. Government Based on the Consent of the Governed

Under republican theory, since each individual is a source of sovereignty, and polities have a natural right to self-define and self-determine their existence, the concept of citizens sharing in the act of governing occupies a central position in both classical and modern republican thinking. This idea of self-government, “that governance [is] the collective responsibility of the people who are governed,” is the most universal concept in republican

Each writer on republicanism selects her own list of features. For example, Sunstein lists “deliberation in government,” “political equality,” “universality, or agreement as a regulative ideal,” and “citizenship” as aspects of classical republicanism worthy of contemporary support. Sunstein, supra note 339, at 1539. Paul Brest selects “citizenship, political equality, and deliberative decisionmaking.” Paul Brest, Further Beyond the Republican Revival: Toward Radical Republicanism, 97 Yale L.J. 1623, 1623 (1988). The author has selected other features, drawn from Sandel’s Democracy’s Discontent, because of their particular relevance to the question of enhanced tribal sovereignty. See Sandel, supra note 2, at 6–7 (listing, among other attributes of republicanism, its “emphasis on community and self-government,” and “civic engagement”).

See generally, 1, 3 Aristotle, The Politics 1–32, 92–137 (Ernest Barker trans., 1946) (commenting on civic virtue and political participation as intrinsic to liberty, and stating that we are free only insofar as we exercise our capacity to deliberate about common good and actively participate in public life of free republic).

See Sunstein, supra note 339, at 1556 (“Republican[s] . . . place a high premium on citizenship and participation, and thus seek mechanisms both for citizen control of national institutions and for decentralization [of] local control, and local self-determination.”); see also Anaya, supra note 25, at 75 (calling self-determination “principle of highest order” “within the contemporary international system,” noting that United Nations Charter and other major international legal instruments have affirmed that principle, and that it is now “widely acknowledged to be a principle of customary international law” even to have force of “peremptory norm,” to be “jus cogens”); Sandel, supra note 2, at 117 (“According to [the republican] tradition, liberty depends on self-government, and self-government depends on the members of a political community’s identifying with the role of citizen and acknowledging the obligations that citizenship entails.”).
Madison considered "essential" to a government based on republican thinking that it "be derived from the great body of society," and that "all its powers [come] directly or indirectly from the . . . people." Jefferson said "[c]ivil government being the sole object of forming societies, its administration must be conducted by common consent," and defined a government as being more or less republican depending on the element of popular election. Acting collectively to self-govern is so basic to republican

\[\text{345 See Richard A. Epstein, Modern Republicanism—Or the Flight from Substance, 97 YALE L.J. 1633, 1634 (1988) ("With only a little loss of accuracy, [republicanism] could be said to have embraced all those thinkers who thought that political power should be exercised by the people or their representatives, and not by a single individual with royal prerogative power."); see also Letter from Thomas Jefferson, to Joseph C. Cabell (Feb. 2, 1816) [hereinafter Jefferson Letter], reprinted in A JEFFERSON PROFILE, supra note 83, at 262 ("And I do believe that if the Almighty has not decreed that man shall never be free, (and it is a blasphemy to believe it) that the secret will be found to be in the making himself the depository of the powers respecting himself, so far as he is competent to them, and delegating only what is beyond his competence by a synthetical process, to higher and higher orders of functionaries, so as to trust fewer and fewer powers in proportion as the trustees become more and more oligarchical."). The belief that the purpose of the Constitution was to enable the people to govern themselves well was also central to the thinking of Chief Justice Marshall. See Eisgruber, supra note 115, at 472 (observing that this foundational belief led Marshall to conclude that Constitution should be interpreted insofar as possible in ways that were "conducive to the happiness of the American people," and that "[h]is rhetorical strategy attempted to show that Constitution was work of American people by showing that it was conducive to [their] happiness"). Eisgruber also says that Marshall recognized that these "twinned perspectives" gave rise to two interconnected Constitutional defects, concessions to state sovereignty and slavery, which he could not correct, but which had to wait for the Reconstruction Congress. Eisgruber refers to these defects as America’s “flawed founding,” and notes that “one cannot demonstrate the goodness of a profoundly defective Constitution.” Id. at 473.

\[\text{346 The FEDERALIST No. 39, supra note 341, at 243–44. James Madison went on to say that this government “is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.” Id. The Framers established what they called a “confederate republic,” “an assemblage of societies,” or an association of two or more states into one state.” THE FEDERALIST No. 9, supra note 341, at 52 (Alexander Hamilton). Hamilton heralded the fact that the proposed Constitution “so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power.” Id. Hamilton gently criticized Montesquieu for selecting Lycia as the “model of an excellent Confederate Republic” because the Lycian “common council . . . appoint[ed] . . . all the judges and magistrates of the . . . cities” in the confederation, something—he is at pains to point out—that the Framers did not do in the Constitution. Id. at 53.

\[\text{347 Thomas Jefferson, Notes of the State of Virginia 84 (William Peden ed., 1955).}

\[\text{348 Letter from Thomas Jefferson, to John Taylor (May 28, 1816), in A JEFFERSON PROFILE, supra note 83, at 278–80. For this reason, Jefferson considered the House of Representatives to have “the purest republican feature[s]” of the three branches. Id. At the same time, Jefferson complained to John Adams that “what the term might, or should, mean beyond a kingless government, over how many political and social arrangements its 'mantle' could be distended, . . . was permanently in conflict.” Rodgers, supra note 13, at 38 (citations omitted).}
thinking that it is considered by some to be a *formative concept*, such that liberty, itself, is best understood as a consequence of self-government.

Political deliberation is a critical part of self-governing. In republican thought, most rights are either the precondition for, or the outcome of, an undistorted deliberative process, but they are never "natural or prepolitical." For believers in republicanism, political conversation "moralizes" [and externalizes] the process of government by requiring citizens and their representatives to formulate conceptions of the common good in the course of justifying their claims,"—"induc[ing] us to assume the ‘moral point of view’ that lies at the heart of most ethical-political systems."353

2. Committed Individuals Imbued with Civic Virtue

While the republican tradition vests self-government with many virtues, it also imposes responsibilities on citizens and their representatives, and it requires politics that cultivate the quality of character that self-government requires. Indeed, to the that extent liberty, in republican thinking, depends upon the capacity of citizens to govern themselves, only citizens possessing a

349See, e.g., Michelman, *supra* note 339, at 1503 ("In the strongest versions of republicanism, citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person."); see also *Sandel, supra* note 2, at 348 (describing American civil rights movement as "moment of empowerment, an instance of the civic strand of freedom" and noting that these struggles "displayed a higher, republican freedom—the freedom that consists in acting collectively to shape the public world."); Michelman, *supra* note 339, at 1529–32 (describing "emergent social presence and self-emancipatory activity of Black Americans" as a quintessentially republican moment).

350See *Sandel, supra* note 2, at 26 (stating that personal liberty requires being "member of a political community that controls its own fate[] and participat[ing] in the decisions that govern its affairs").

351See *Sunstein, supra* note 339, at 1548 (noting that "the belief in political deliberation[,] which] cover[s both] ends as well as means," "is a distinctly American contribution to republican thought").

352See id. at 1549–51 ("Republicans are . . . unlikely to take existing preferences and entitlements as fixed" and consider "[b]oth [to be] permissible objects of political deliberation," thus they are not "hostile to redistribution . . . of wealth and entitlements" and "the republican emphasis on the social conditions for republican deliberation, . . . point powerfully [toward] equalizing political influence").

353Brest, *supra* note 342, at 1624; see also *Sandel, supra* note 2, at 5 ("According to republican political theory . . . sharing in self-rule . . . means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community.").

354*Sandel, supra* note 2, at 6–7; see also H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1710–11 (1988) (criticizing Sunstein's republican revival for failing to offer "credible theory of social transformation," which is necessary to make plausible his optimistic conclusion that "untransformed persons . . . will be capable of conducting a deliberative and transformative politics" (internal quotation marks and citations omitted)).
sense of civic virtue have that capacity.\textsuperscript{355} In the Virginia Ratifying Convention, Madison stated:

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.\textsuperscript{356}

Therefore, "self-government[,] in a republican polity[,] depends on the members of a political community . . . acknowledging the obligations that citizenship entails."\textsuperscript{357} "More than a legal condition, [republican] citizenship requires certain habits and dispositions, a concern for the whole, an orientation to the common good," and "active engagement in the life of the polity."\textsuperscript{358}

[R]epublican theory interprets rights in the light of a particular conception of the good society—the self-governing republic. In

\textsuperscript{355}SANDEL, supra note 2, at 126, (quoting John Adams, "[P]ublic virtue is the only foundation of republics. . . . There must be a positive passion for the public good, the public interest, honour, power and glory, established in the minds of the people, or there can be no republican government, nor any real liberty." (alteration in original)); see also Letter from Thomas Jefferson, to James Madison (Dec. 20, 1787), in A JEFFERSON PROFILE, supra note 83, at 56, 60 (commenting to Madison from Paris on what he liked (and did not like) about new government that they were forming, and saying that citizens, who are educated to see that "preserve[ation] of peace and order" is in their interest, are "the only sure reliance for the preservation of our liberty.").

\textsuperscript{356}3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536-37 (1888)); see also id. at 1561 (finding even more remarkable that "Madison suggested that republican government calls for more virtue from the citizenry than 'any other form'" (quoting THE FEDERALIST No. 55, supra note 341, at 365 (James Madison). But see FEDERALIST No. 51, supra note 341, at 337 (James Madison) ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

\textsuperscript{357}SANDEL, supra note 2, at 117.

\textsuperscript{358}Id. (stating that these conditions "require constant cultivation" or practice, and that "public life that fails to nurture these practices or is indifferent to their fate fails to cultivate the virtues essential to self-government as the republican condition conveys it"); see also Martin, supra note 30, at 302 (making point similar to Sandel's regarding "committed engagement in the life of the polity" and "willing commitment to the common good"). Madison also believed that the common, or "public good," was derived through a deliberative process carried out in government institutions, insulated from the immediate pressures of self-interested politics. See generally THE FEDERALIST NO. 10, supra note 341, at 53–62 (James Madison) (commenting on advantages of republican form of government).
contrast to the liberal claim that the right is prior to the good, republicanism thus affirms a politics of the common good. But the common good it affirms does not correspond to the utilitarian notion of aggregating individual preferences. . . . whatever they may be, and try to satisfy them. It seeks instead to cultivate in citizens the qualities of character necessary to the common good of self-government. Insofar as certain dispositions, attachments, and commitments are essential to the realization of self-government, republican politics regards moral character as a public, not merely private, concern. In this sense, it attends to the identity, not just the interests, of its citizens.359

In republican thought, only by being actively engaged in political life can citizens acquire “a sense of civic virtue that transcends narrow self-interest and impels a certain type of political involvement.”360 “Cultivating in citizens the virtue, independence, and [cultural] understandings such civic engagement requires,” therefore, “is a central aim of republican politics.”361 Indeed, Sandel calls such an aim a “formative ambition” of a republican form of government.362 A republican government, he says, “cannot be neutral toward the moral character of its citizens or the ends they pursue. Rather, it must undertake to form their character and ends in order to foster the public concerns on which liberty depends.”363

3. A Place (or Community) Within Which to Practice the Art of Citizenship

In republican thinking, key to achieving good citizens, in other words, individuals who are committed to the idea of the public good through civic engagement, is having a community within which individuals can practice their citizenship—a locality in which citizens can “practice” the art of citizenship and be engaged in the political process. Such involvement helps “to educate

359Sandel, supra note 2, at 25 (emphasis added).
360Martin, supra note 30, at 310; see also Brest, supra note 342, at 1623 (arguing for “decentralization and democratization . . . of constitutional discourse and decisionmaking”).
361Sandel, supra note 2, at 274.
362Id. (emphasis added). Unlike Sandel, who relies entirely on the political process and public institutions to make sense of popular conversation and to inculcate in people the habit of attending to public things, Michelman and Sunstein rely on the courts. See generally Michelman, supra note 339, at 1493–94 (discussing Bowers v. Hardwick, 478 U.S. 186 (1986), to show how republican constitutional theory can lead to stronger judicial protection of individual rights); Sunstein, supra note 339, at 1576–85 (discussing how “contemporary controversies look quite different if viewed through the lens of the republican tradition,” how “[s]ome of these controversies involve public law doctrine in the courts,” and how courts’ “rationality review [of statutes] recalls republican themes” because it requires “an element of deliberation in politics”).
363Sandel, supra note 2, at 127; see also id. (quoting John Adams, “[I]t is the part of a great politician to make the character of his people, to extinguish among them follies and vices that he sees and to create in them the virtues and abilities which he sees wanting”).
people in the exercise of citizenship by cultivating the habits of membership [and by] orienting people to common goods beyond their private ends." Republicanism, therefore, "promotes self-identification with and whole-hearted participation in that society that is functionally one's own." The republican tradition teaches that to be free is to share in governing a political community that controls its own fate, and emphasizes the need to cultivate citizenship through particular ties and attachments to an individual's community. Statelessness is a disaster from a republican viewpoint, because it "precludes engagement in the life of any polity," and thus inhibits the promotion of civic virtue and achievement of the public good.

Since self-government in a republican polity requires both political communities that control the destinies of their citizens and citizens who identify sufficiently with those communities to think and act with a view toward the common good, there must be a community, a place with which citizens can identify, to have a successful republican government.

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364Id. at 117.
365Martin, supra note 30, at 318.
366See SANDEL, supra note 2, at 350 ("Since the days of Aristotle's polis, the republican tradition has viewed self-government as an activity rooted in a particular place, carried out by citizens loyal to that place and the way of life it embodies."); see also ROBERT BOOTH FOWLER, THE DANCE WITH COMMUNITY: THE CONTEMPORARY DEBATE IN MODERN AMERICAN POLITICAL THOUGHT 63 (1991) (describing community from republican viewpoint as being polity where "common good rules and public concerns triumph over the goals of the self-interested individual. The ideal is a place where citizens are united in public action and public spiritedness, reinforced by a rough equality, common respect, and basic human virtues, above all where 'disinterested regard for the welfare of the whole . . . civil virtue;' holds sway.""); SANDEL, supra note 2, at 202 ("[S]elf-government requires political communities that control their destinies, and citizens who identify sufficiently with those communities to think and act with a view to the common good."); William W. Fisher III, Stories About Property, 94 MICH. L. REV. 1776, 1789–90 (1996) (reviewing CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994) and commending Rose's view "that classical republicanism was just one variant of a general outlook toward politics, society, and property widely held by Western Europeans prior to the late eighteenth century" that "placed much stock in 'long-standing ways of doing things,'" was "[h]ostile toward centraliz[ed] power and to the equalization of individuals' fortunes and 'privileges,'" and which "championed 'local particularism' — [the] preservation of the . . . many social and political organizations that lay outside the control of the increasingly powerful European monarchs"); Tarlock, supra note 47, at 555 (stating that "the core meaning" of communitarianism is to view "community [as] an abstraction for the 'common good'"). For a discussion of the republican conception of community, see generally FOWLER, supra note 366, at 63–79.
367Martin, supra note 30, at 310–11.
368See SANDEL, supra note 2, at 347 ("Practicing self-government in small spheres . . . impels citizens to larger spheres of political activity." (citing DE TOQUEVILLE, supra note 87, at 68)). The environmental mantra "think globally, act locally" is the inverse of this approach, as global thinking is to impel local action. Both approaches, regardless of the direction of the energy flow, emphasize the importance of acting at the local level.
Communities provide the “shared historical, cultural, political, and, ultimately, normative context,” in which the discussion of political alternatives can take place.369 “Americans have traditionally exercised self-government as members of decentralized communities,” and these communities were, in turn, the source of American democracy.370 Jefferson, remarking on the effectiveness of local government, said:

How powerfully did we not feel the energy of this organization [local government] in case of the embargo? I felt the foundations of the government shaken under my feet by the New England townships. There was not an individual in their States whose body was not thrown with all its momentum into action; and although the whole of the other States were known to be in favor of the measure, yet the organization of this little selfish minority enabled it to overrule the union.371

Modern republican thinkers realize that this participation can take place in a wide variety of private as well as public institutions outside the formal

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370 SANDEL, supra note 2, at 205. This strong tradition of political localism is one of the many areas where strands of republican thought from the founding has had a profound influence on American culture throughout our history to the present. See Garnett, supra note 15, at 433–34, 433 n.5 (describing United States v. Lopez, 514 U.S. 549 (1995), as “reflect[ing] a new appreciation for the ‘first principles’ of federalism, subsidiarity, and localism,” noting that “[l]ocalism reflects a conviction, widely shared by the Framers, that ‘those closest to the matters to be dealt with best knew what ought to be done,’” and quoting Justice Black in *Powell v. Texas*, 392 U.S. 514 (1968), who said that “experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.” *Id.* at 548 (Black, J., concurring)); see also SANDEL, supra note 2, at 208 (discussing JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927,) regarding importance of communities).
371 Jefferson Letter, supra note 345. Jefferson also argued that local government held the key to preventing power from being “concentrat[ed] . . . in the hands of the one, the few, the well born or the many,” and urged that counties be divided into wards so that “every man is a sharer in the direction of his ward-republic . . . and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day.” *Id.; see also JEFFERSON, supra* note 347, at 93 (comparing “savage Americans,” who had “no law,” with “civilized Europeans,” who had “too much law,” and commenting “that great societies cannot exist without government. The Savages therefore break them into small ones.”); ROBERT F. KENNEDY, *TO SEEK A NEWER WORLD* 55–62 (1967) (calling Bedford-Stuyvesant “an experiment in politics, an experiment in self-government” and “a chance to bring government back to the people of the neighborhood,” and lauding community development corporations and other neighborhood bodies, when “given sufficient responsibilities and support,” “as a way of translating Jefferson’s vision” of “dividing the country into small political districts” and “to regenerate civic virtue” in modern era); Woodrow Wilson, Speech at Sioux City, Iowa (Sept. 17, 1912) (“If America discourages the locality, the community, the self-contained town, she will kill the nation.”), reprinted in SANDEL, supra note 2, at 216.
channels of electoral and legislative politics, and can be as unstructured as "talk among citizens." Michelman comments that

much of the country’s normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics . . . . [It occurs] in the encounters and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools . . . ; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life.

These “arenas” of citizenship should “be counted among the sources and channels of republican self-government and jurisgenerative politics.” He sees this “non-state centered notion of republican citizenship . . . both [as] historically [very] American and [as] congenial to a characteristic strain in contemporary civic revivalism.”

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372 Sunstein, supra note 339, at 1551; see also SANDEL, supra note 2, at 348, 350 (stating that citizens must constantly practice citizenship qualities in their families, neighborhoods, places of worship, trade unions, political movements, or local government; noting that “[s]elf-government . . . today requires a politics that plays itself out in a multiplicity of settings, from neighborhoods to nations to the world as a whole”; and labeling as “civic virtue distinctive to our time the capacity to negotiate our way among the sometimes overlapping, sometimes conflicting obligations that claim us, and to live with the tension to which multiple loyalties give rise”); Brest, supra note 342, at 1624–25 (“Political discourse—including legal and constitutional discourse—takes place in a wide variety of institutions, including conventionally ‘private’ organizations like the family, corporation, union, and civic association as well as in referenda, elections, conventions, school boards, city councils, legislatures, and courts.”); Michelman, supra note 339, at 1531 (stating that place where this “normative[] consequential dialogue occurs [is most often] outside major, formal channels of electoral and legislative politics”); Kathleen M. Sullivan, Rainbow Republicanism, 97 YALE L.J. 1713, 1714 (1988) (noting how “[n]ormative pluralism . . . envisions an ongoing and desirable role for groups that are social but not public—groups intermediate between individuals and the state” (emphasis added)). But see Sunstein, supra note 339, at 1574–75 (complaining that elevating importance of intermediate organizations undervalues distinctive capacities of state and ignores fact that private power wielded by intermediate organizations can be oppressive).

373 Brest, supra note 342, at 1625.

374 Michelman, supra note 339, at 1531. But see Sullivan, supra note 372, at 1719 (taking issue with “short shrift” both Michelman and Sunstein give to involuntary groups, despite their embrace of voluntary groups, and noting that while they have both “thrown militarism, fraternity, and misogyny overboard, [they] have not abandoned the [republican] tradition” on issue of “voluntary associations”). Michelman borrowed the term “jurisgenerative” from Robert Cover. See Michelman, supra note 339, at 1502; see also Robert Cover, Nomos and Narrative, 97 HARV. L. REV. 4, 15 (1983) (“Thus it is that the very act of constituting tight communities about common ritual and law is jurisgenerative by a process of juridical mitosis. New law is constantly created through the sectarian separation of communities. The ‘Torah’ becomes two, three, many Torahs as surely as there are teachers to teach or students to study.”).

375 Michelman, supra note 339, at 1531 (citations omitted).

376 Id. (citations omitted).
4. Embracing Difference—A Solution to the Problem of Homogeneity

There is one serious potential problem with relying on republicanism as a theoretical basis for enhancing tribal sovereignty: the perceived importance of homogeneity and exclusivity to the theory. The "incommensurable" values of self-contained, culturally nomic communities, like tribes, could make it difficult, even impossible, to achieve the core republican enterprise in the larger society—the deliberative (or dialogic) search for the universal good (a single, public-regarding point of view) Further, incorporating the concept of social pluralism (in other words, diversity) into republicanism's "national conversation"—as this article suggests should be done—creates a multi-perspective conversation that "bristle[s] with [the] danger of faction[s] and . . . [individual] preferences . . . [the very things] republican[s] most condemn[]." Tribes offer differences in perspective based on culture and

377Neither homogeneity nor exclusivity is achievable today in this country because of the heterogeneity of modern American society and the enduring strong populist strand in our system of core beliefs. See Sunstein, supra note 339, at 1565 (commenting that political theory that is "comfortable with firm social hierarchies, [emphasizes] the role of tradition," and is dependent on "organic conceptions of the state that [finds] common interests among members of different social classes" is totally "incompatible with modern beliefs" and exists "awkwardly" with republicanism's "commitment to political equality"). The importance of exclusivity, and its dependence on homogeneity, in republican thinking, is a principal target of its critics. See, e.g., Abrams, supra note 369, at 1603 (wondering "whether it is possible to re-animate the broadly participatory strain of republican thought without triggering the danger of popular coercion" and criticizing both Michelman and Sunstein's use of republicanism to address tradition questions of legal theory); Derrick Bell & Preeta Bansal, The Republican Revival and Racial Politics, 97 YALE L.J. 1609, 1612–13 (1988) (questioning whether revival of republican notions of common good and active citizenship is good for blacks given "oppressive roots" of these notions). Sullivan exposes this problem in her critique of Michelman's Law's Republic and Sunstein's Reviving Republicanism. See Sullivan, supra note 372, at 1709, 1720–21 (suggesting instead "normative pluralism," which rejects both republicanism's "pursu[it of a] shared normative understanding and a single common good" and "do[es] not mind keeping communal life fractionated and outside the state," and pluralism's vision of politics as "a struggle among persons who are autonomous bundles of presocial wants" (emphasis added)); see also Epstein, supra note 345, at 1633 (favoring "Lockean emphasis on limited government and private property" over modern republicanism for "offer[ing] a superior response to the pluralist nightmare" of unguided decision making); Michael A. Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 YALE L.J. 1651, 1652 (1988) (questioning "whether, given the state of twentieth-century American political institutions, the republican ideal of deliberative decisionmaking may be in tension with other republican goals, such as equality, participation, reflective innovation, and universalism"); Jonathan R. Macey, The Missing Element in the Republican Revival, 97 YALE L.J. 1673, 1673 (1988) (criticizing republican revival for not appreciating sufficiently, as pluralists do, "frightening power of man to subvert the offices of government for . . . evil ends"); Powell, supra note 354, at 1708, 1710 (finding republican notion of deliberative democracy "flawed," and expressing concern with its underlying premise "that free and equal deliberation among political equals will lead to 'uniquely correct' political decisions" in absence of "character formation," given "modern West's atomistic individual[s]").

379Sullivan, supra note 372, at 1717.
ethnicity that may be too pronounced and difficult to overcome in many cases, which is why the classical republican model was exclusive and homogenous.

However, Michelman and Sunstein, perhaps in their desire to show the relevance of republican principles to our times, embrace diversity as part of that tradition. They call diversity a republican virtue, not a vice, which contributes to all-important political dialogue and does not detract from or threaten that conversation. While expanding the circle of citizens to encompass genuine diversity "greatly complicates republican thinking," by making more difficult the achievement of a "normative consensus," the two scholars take pains to show how that is no longer the single aim of republican thinking. Indeed, according to Sunstein, "republicans see disagreement as a creative and productive force, highly congenial to and even an indispensable part of the basic republican faith in political dialogue. Discussion and deliberation depend for their legitimacy and efficacy on the existence of conflicting views." Therefore, Sunstein says "[m]odern republicanism is . . .

380 See Michelman, supra note 339, at 1504 ("In republican thought, the normative character of politics depends [not only] on the independence of mind and judgment, [and] the authenticity of voice, [but,] in some versions of republicanism[, on] the diversity or 'plurality' of views that citizens bring to 'the debate of the commonwealth.'"); see also Sunstein, supra note 339, at 1571 ("[B]asic republican commitments will tend in the direction of guarantees of political deliberation, including the basic rights of political participation; the republican beliefs in political equality and citizenship will generate strong antidiscrimination norms . . . and republican approaches will attempt to promote deliberation among multiple voices in the political process.").

381 See Michelman, supra note 339, at 1554 ("For if republican jurisprudence depends on jurisgenerative politics, jurisgenerative politics in turn seems to depend on the existence of a normative consensus that can hardly survive the diversification of the political community by the inclusion of persons of widely and deeply differing experiences and outlooks."); see also Sunstein, supra, note 339, at 1554–55 (defining "republican commitment to universalism" as "a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue" to achieve, where possible, "substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals").

382 Michelman, supra note 339, at 1506, 1527; see also Sunstein, supra note 339, at 1555 (contrasting republicanism with pluralism and extolling republicanism's ability to serve common good). But see Abrams, supra note 369, at 1603, 1608 (worrying that Michelman's and Sunstein's attempt to "[r]ecover[] the popular strain in republican theory" may trigger popular coercion); Epstein, supra note 345, at 1636 (stating that neither scholar seeks "refinement of classical doctrine," rather each has proposed "new theory which borrows selectively, and seductively, from the past" (emphasis added)); Sullivan, supra note 372, at 1722 (agreeing with Epstein that diversity cannot be incorporated into republicanism without fatally "undermin[ing] the republican model," but praising both scholars for trying valiantly to find place in republican thought for diversity and "rainbow republicanism that would incorporate perspectival differences of various hues.").

383 Sunstein, supra note 339, at 1575–76. Sunstein notes the "irony" in "invok[ing] republicanism as a basis for rejecting [exclusionary] practices," but overcomes this by saying "[t]he use of the republican aspiration [of political equality] counteract[s the] republican practice" of exclusivity; this is just an illustration of a common practice—using "cultural [or traditional] commitments . . . to revise cultural practices." Id. at 1581. Thus, republicans do not quarrel with pluralism's search for diversity, but disagree with the pluralist view of politics as a
not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work.\textsuperscript{384}

Michelman echoes this thought when he says that the republican dialogic process no longer requires a "final dissolution of difference," such that everyone agrees—rather "validation [can] occur[] when participants . . . come to ‘hold the same commitments in a new way.’"\textsuperscript{385} This "capacity[y] for dialogic self-modulation," coming to the same commitments in a new way, is a "process of personal self-revision [taking place as a result of] social-dialogic stimulation," and requires an individual who can be "reflexively critical [about] the ends and commitments" that she has already made.\textsuperscript{386} To be such a person requires the perspective of individuals who are different from oneself. In this way, Sunstein and Michelman’s conception of self and political freedom makes a virtue of plurality.

[O]ur embodied identity and the narrative history that constitutes our selfhood give us each a perspective on the world, which can only be revealed in a community of interaction with others . . . . A common, shared perspective is one that we create insofar as in acting with others we discover our difference and identity, our distinctiveness from, and unity with, others. The emergence of such unity-in-difference comes through a process of self-transformation and collective action . . . .

Through such processes we learn to exercise political and moral judgment. We develop the ability to see the world as it appears from perspectives different from ours. Such judgment is not merely applying a given rule to a given content, . . . it means learning to recognize a given content, and identifying it properly. This can only be achieved insofar as we respect the dignity of the generalized other, who is our equal, by combining it with our awareness of his or her

\textsuperscript{384}Id. at 1576. For modern republicans, the challenge is how to maintain a “belief in universal[ truth]” revealed through robust discussion among citizens with “different conceptions of the good life,” and not to slide into the “failings of [interest group] pluralism.” See id. at 1554–55 (noting that “compromises [may be] necessary” when “differently situated individuals and groups [cannot] resolve their disagreements through conversation,” accepting that there may be “political [winners and] losers,” and suggesting that topics like religion “should be entirely off-limits to politics”).

\textsuperscript{385}Michelman, \textit{supra} note 339, at 1527 (quoting H. Pitkin, \textit{Fortune Is A Woman: Gender and Politics in the Thought of Niccolo Machiavelli} 279 (1984)); see also Sunstein, \textit{supra} note 339, at 1555 (“[D]ifferently situated individuals and groups will frequently be unable to resolve their disagreements through conversation,” and “[i]t would be fanciful to suggest that different conceptions of the good life can or should always be mediated through politics.”).

\textsuperscript{386}Michelman, \textit{supra} note 339, at 1527–28.
concrete otherness. What we call content and context in human affairs is constituted by the perspectives of those engaged in it.\textsuperscript{387}

In fact, to both Sunstein and Michelman, modern republican deliberation requires participation specifically by people who are at the margins of the political process—those who may actually seek to disrupt the conversation, not those at the center.\textsuperscript{388} Similarly, the pursuit of political freedom through law requires the inclusion, not exclusion, of hitherto excluded absent voices of emergent, self-conscious groups.\textsuperscript{389} In this version of republicanism, differences and disagreements do not disappear from republican political life—they are they very mainstay on which it is built.

Government based on the interlocking concepts of self-determination and consent of the governed, individuals committed both to the common good and active engagement in the life of their community, and a place within which one can practice and perfect the civic virtues that guarantee liberty: these are three major strands of republican thought that remain robust today. Michelman’s and Sunstein’s reformulation of traditional republican principles to incorporate diversity as a necessary, transformative part of the political dialogue—particularly including in the national conversation groups at the margin of political life—overcomes one of the major weaknesses of the theory if it is to be used to support the concept of enhanced tribal sovereignty. The next two sections of Part IV explore how these principles contribute to a more coherent theoretical solution to the problem of tribal sovereignty and how their application to tribes is essential if they are to survive as discrete centers of norm generation and dispersal in our society.

\textbf{B. What Republicanism Has to Offer on the Question of Enhanced Tribal Sovereignty}

According to republican theory, the elements described above are essential to legitimate government. As a corollary, the presence of these

\textsuperscript{387}SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA 348-49 (1985).
\textsuperscript{388}Sunstein, \textit{supra} note 339, at 1576; see also Michelman, \textit{supra} note 339, at 1507 (positing theory that pluralism is essential part of “constitutionalist practice”).
\textsuperscript{389}See Michelman, \textit{supra} note 339, at 1529-30 (calling “transformative” “the primary and crucial role of . . . the emergent social presence and self-emancipatory activity of Black America[,]” its “oppositional understandings of [its] situation,” and “its relation to [the] . . . Constitution”). Sunstein notes that republicans could dismiss proportional voting because it depends on seeing “the political process as a self-interested struggle . . . for scarce social resources, that discourage[s] political actors from assuming and understanding the perspectives of others, and . . . downplays the deliberative and transformative features of politics.” Sunstein, \textit{supra} note 339, at 1585-89. However, republicanism could also support the concept because it improves the deliberative process by giving each group a “piece of the action[,] and] . . . increase[s] the likelihood that political outcomes will incorporate some understanding of the perspective of all those affected[,] . . . [and] recognize[es] the creative functions of disagreement and multiple perspectives for the governmental process.” \textit{Id}. 
elements—consent of the governed achieved through political deliberation, individuals committed to the common good who are civically engaged, a sense of place and/or community where that dialogic engagement takes place, and the modern republican virtue of diversity—could be seen as a prerequisite to enhanced sovereignty. In fact, notions of self-determination and consent of the governed, central to arguments in favor of tribes possessing greater sovereignty, are very republican. Indeed, self-determination today is an aspirational norm of indigenous peoples around the world—a *foundational principle*, not only in our political system, but also in the contemporary international legal system as reflected in the United Nations Charter and other major international legal instruments. Yet, Indian tribes never willingly consented to anyone else governing them, nor to having anyone else rule their land.

Citizen empowerment through political deliberation and action is at the heart of both traditional and modern republican thought. In contradistinction, we have consistently subjected tribes to “the antonym of deliberation”—“the imposition of outcomes” by others, particularly by Congress and the Court. We have denied tribes what we claim for ourselves—the basic republican right of self-determination through deliberation, which, in turn, has denied them liberty. We have even taken away from tribes the space within which they can practice citizenship free from outside interference and cultivate the civic virtues among their members that such engagement requires.

By denying tribes their sovereignty, and thus excluding them from meaningful political deliberations about their future, we have not only deprived tribes of their liberty and their right to determine their own futures, but have enervated our national conversation by keeping from it different perspectives, which are critical to our collective search for the universal, common good. Worse, we have deprived our deliberations of their “legitimacy and efficacy”

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390 *ANAYA, supra* note 25, at 75; see also *id.* at 109 (“The international community recognize[s that] classical colonial institutions of government [are] contrary to self-government because they subject[s] people to ‘alien subjugation, domination and exploitation.’” (quoting Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. GAOR, 15th Sess., Supp. No. 16, ¶ 1, U.N. Doc. A/4684 (1961))). Self-government is considered a norm of “self-determination”; even though the exact content of what constitutes self-government may vary from nation to nation, at its core, it is the notion “that government [should] function according to the will of the people governed,” making “[s]elf-government stand[] in opposition to institutions that disproportionately or unjustly concentrate power.” *Id.* at 109–12 (stating that ability of peoples to define themselves through exercise of political power and self government is also aspirational norm of modern sovereignty).

391 *ALEINIKOFF, supra* note 16, at 121 (stating that meaningful self-determination for tribes means “right to choose [its own] goals and means within a set of community values”). To Aleinikoff, Indian citizenship should be empowering; in his view, however, the Court has wielded “citizenship as a sword [to] cut[] down what it views as undemocratic, race-based, rights-denying assertions of tribal power over nonmembers.” *Id.* Aleinikoff finds his vision of tribal self-determination “[m]ore republican than liberal” because “it stresses public deliberation about the kind of community citizens want to create, maintain and pass on.” *Id.*

because we have kept from them conflicting views. A governing process that subordinates politically weak groups, like tribes, or limits their participation in the political process by requiring them to be like the rest of us, contradicts the basic republican principle of citizenship, which "manifest[s] itself in [notions of political equality and] broadly guaranteed rights of participation" in the deliberative process.

Republican principles may also be better than liberal principles when it comes to protecting the "cultural otherness" of distinct communities—like tribes—because republicanism acknowledges the importance of cultural interests to the development of a more vital relationship between rights and responsibilities. By asserting the a priori rights of the individual and imposing duties upon everybody else (including the state) to respect those rights, liberalism has marginalized tribal conceptions of justice and property, which are manifested as communal obligations. Liberalism's disregard of tribal communal rights and emphasis on private rights has resulted in a "disruption in cultural, linguistic, and family values of Native Peoples, a breakdown in relations between Native communities, and ultimately, a threat to a distinct Native way of life."

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[393] *Id.* at 1575–76.

[394] *Id.* at 1541. Sunstein argues that the republican norm of political equality, which he aligns closely to his other three republican principles—"faith in deliberation," "citizenship," and "universalism"—acts to prevent both the exclusion of particular groups from the deliberative process and outcomes from that process that act to "subordinate politically weak groups." *Id.* at 1557. Our treatment of tribes has violated this norm and has caused both the exclusion and subordination of tribes.

[395] See *id.* at 1571 (arguing that all four of basic republican commitments fit within liberal tradition, and that basic "republican beliefs in political equality and citizenship will[, among other desirable outcomes,] generate strong antidiscrimination norms . . . [and] promote deliberation among multiple voices in the political process"); see also Will Kymlicka, *Two Models of Pluralism and Toleration*, in *TOLERATION* 81, 95 (David Heyd ed., 1996) (arguing that liberal society cannot be intolerant of insulated minorities—like tribes—who reject ideal of individual autonomy, and advocating right to revise or deviate from norm).

[396] See, e.g., Leon E. Trakman, *Native Cultures in a Rights Empire Ending the Dominion*, 45 *Buff. L. Rev.* 189, 203–05, 209 (1997) (noting how "liberal" preference for individual rights and individual ownership has displaced native concepts of communal stewardship). Trakman, however, does not argue for the displacement of Western liberal rights, as Sandel might, but for "the incorporation of different systems of values within them," such as native conceptions of communal interests in land. *Id.* at 211–12. According to Kymlicka, while "any form of group rights that restricts the civil rights of group members[, such as the Pueblo theocracy, may be] inconsistent with liberal principles of freedom and equality," this does not give liberals license "to impose [these] principles on groups that do not share them." Kymlicka, *supra* note 395, at 95. Many factors must be considered before any such decision is made, "including the severity of rights violations within the minority community, the degree of consensus in the community on the legitimacy of restricting individual rights, the ability of dissenting group members to leave the community . . . , the existence of historical agreements" like treaties, which guarantee minority communities freedom from interference, and "the nature of the proposed intervention." *Id.* at 95–96.

Leon Trakman argues that "shifting from [the liberal] conception of rights [that is] limited only externally by the rights of others to a conception of rights [that is] limited internally by responsibilities that inhere in the values underlying those rights," will better encompass Native American interests. He argues that the interests of those who need to benefit from these responsibilities are not sufficiently acknowledged in law, and the "liberty of society as a whole," will be diminished if these interests are not protected.

A rights culture is more accommodating when it imposes responsibilities upon those who exercise rights not to undermine the cultural interests of others upon whom those rights impact. It is more reconciliatory when those rights are not only self-regarding, but also regarding of others. It is more vital when relating rights to responsibilities advances the interests of a plural society itself. These goals are satisfied within a revitalized rights regime in which cultural values and interests occupy central legal stage, in place of lasting subordination.

Liberty, according to Trakman, is "most just," when it recognizes the impact of individual rights "upon the traditions, customs and practices of cultural communities." Trakman’s proposals fit squarely within the republican tradition, and like Sandel, he believes that granting culturally distinct communities this level of respect may require granting them additional political rights.

The concept of subsidiarity (or localism) reflects republican principles and contains norms that also support enhancing tribal sovereignty in this country. Subsidiarity, like republicanism, advocates granting greater autonomy to local units of government while not abandoning completely "the importance of [a] strong, centralized political authority" to assure that local action is compatible with the overriding objectives of the central state. Like

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398 Id. at 219–20.
399 Id. at 240.
400 Id. at 239.
401 Id.
402 Id. at 238 ("[R] espect for the autonomy of the members of minority cultures requires respect for their cultural structure, and that in turn may require special linguistic, educational and even political rights for minority cultures.").
republicanism, subsidiarity also protects the "internal lawgiving structures within local communities." Robust local government "promotes both individual and community self-determination and accountability," and "allow[s] a community to express its norms [and] define itself through its aspirations and prohibitions." In this way, local communities preserve their unique identities, which, in turn, promote diversity of expression among distinct communities. Subsidiarity, with its reliance on the republican principle of governing in small places and its celebration of cultural diversity, therefore provides additional support for dispersing greater sovereignty to tribes.

Thus, republican principles support tribal claims for enhanced sovereignty. If tribes are strong enough in their self-identity to determine their future as tribes, despite centuries of assaults on their sovereignty and culture, and if their members are capable of engaging in that process, then the republican principles that animated the formation of this country—and still animate political life today—entitle them to greater autonomy.

The final section of this Part looks at whether tribes qualify for the application of republican principles. To assist in making this determination, the Article returns to three of the previously identified strands of republican thought: government as the collective responsibility of the governed (consent of the governed), committed citizens imbued with a sense of civic virtue (civic engagement), and a place within which to practice citizenship (community). As state governance based on [the states'] capacities as 'laboratories' generative of new rights or of educational and participatory opportunities, as enablers of affiliations to governments born from proximity, as useful or limited competitors, as autonomous centers of governance that provide at least some choice of . . . rules, [and] as co-conversationalists in norm development."). But see ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS 94–95 (1997) (worrying that republicanism's purely "local" view of community that celebrates small, insular groups clinging to traditional bonds, is "a prescription not for harmony but for balkanization[, intolerance,] and conflict").

Id. Like subsidiarity, cultural pluralism esteems and "promote[s] the integrity of diverse cultures[, particularly indigenous cultures] within existing state[s]." ANAYA, supra note 25, at 110. Cultural pluralism joins the idea of a republican-democracy—a government that governs as close to the people being governed as possible—with the preservation of cultural integrity. Id. It supports granting greater "spheres of governmental or administrative autonomy for indigenous communities, while seeking to ensure [their] participation ... in all decisions affecting them." Id.; see also id. (stating that "any diminishment [of this] authority or alteration[,] ... [in] indigenous institutions of autonomous governance," conflicts with international instruments, which "uphold[] the right of indigenous peoples to 'retain their own customs and institutions.'" (quoting Convention (No. 169) Concerning Indigenous and Tribal peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382)). Like subsidiarity, cultural pluralism advocates the republican principles of dispersed sovereignty and civic engagement, and finds these things essential for preservation of indigenous cultures.

See Garnett, supra note 15, at 480 (discussing value of subsidiarity principle for "rejuvenat[ing] . . . Tribes as political communities").

See id. at 440 (pointing out that allowing federal government to second-guess tribal communities' acts of self-expression through tribal laws is "unavoidably[ ] paternalistic and ... inconsistent with a robust understanding of self-determination").
they are for most Americans, these principles are formative, foundational norms for tribes.

**C. Indian Tribes as Centers of Civic Republican Governance**

Tribes historically functioned as centers of republican governance until federal Indian policies made serious inroads into that structure. Tribes practiced (and continue to practice) government by consent, required (and still require) their members to be civically engaged, and depended (and still depend) upon a place within which to practice the art of citizenship to maintain their societies.408

Observers of Indian tribal government in the late eighteenth and early nineteenth century described it as both democratic and republican.409 Well before first contact, "[t]he Iroquois had created a system of government that provided for checks and balances to prevent the concentration of individual power, and also maintained a wide range of personal freedoms."410 "The Iroquois’ unwritten constitution, the Great Law of Peace, separated military and civilian affairs and provided for freedom of religion, women’s suffrage, referendum, veto, and recall,"411 and provided that a peace chief could not be a

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408 Of course, those tribes who have lost their homelands and no longer have land that they can claim as their own are disadvantaged in this respect, although the memory of those lands may be just as important to those tribes as the actual land is to reservation Indians. See JACK CAMPI, THE MASHPEE INDIANS 158 (1991) (describing struggle of Mashpees to retain their identity as tribe in face of imposition of different forms of government, “adoption of English as [their] principal language,” and loss of their land, and listing “attachment to ancestral land; even though it is no longer theirs to control,” as important part of what it means to be Mashpee); see also Frank Clifford, Exploiters or Stewards Of Nature?, L.A. TIMES, Jan. 10, 1998, at A1 (noting tension in some Native American communities between conservationists and business interests); Stephanie Strom, Indians Fight to Regain Lands Lost to Railroad, N.Y. TIMES, Dec. 25, 2002, at A18 (describing one Native American’s attempt to reclaim land that had fallen into hands of private ownership); Don Van Natta, Jr., Where Tribe Saw Promise, Democrats Saw Pledge, N.Y. TIMES, Aug. 12, 1997, at A1 (discussing Oklahoma tribe’s failed attempt to reacquire valuable land).

409 See Monette, supra note 77, at 657-58 (explaining how application of “republican democracy” shows that “trib[al] sovereignty, including the power to hold and convey territory, arose and existed from within, independent of Europe, the Union, the states or their people”).

410 Miller, supra note 112, at 143.

411 Id. The Iroquois tribe was not alone on giving women the right to vote. The Shawnee of Ohio and Pennsylvania, the Virginian Algonquians, the Delawares and the Ottawa and Miami tribes of Ohio all allowed women to vote and participate in tribal decisions. 15 SMITHSONIAN HANDBOOK OF NORTH AMERICAN INDIANS: NORTHEAST 216, 261, 627, 684, 782 (William Sturtevant & Bruce G. Trigger eds., 1978) [hereinafter SMITHSONIAN HANDBOOK]. The Potawatoni women signed several of the tribe’s treaties with the United States, id. at 617, and a female chief of the Powhatan Nation signed the 1677 Treaty at Middle Plantation with representatives of the British Crown. HELEN ROUNTREE, POCAHONTAS’S PEOPLE 100 (1990). Iroquois women also “selected new chiefs,” “had the power to recall [and] replace an unsatisfactory chief,” and the “power to stop war parties.” Miller, supra note 112, at 143.
war chief. Their Constitution called for a "yearly council of all tribal chiefs, during which [Iroquois] Confederacy policies were [deliberated and] determined by unanimous vote." Storing, commenting on the influence of the Iroquois Nation on the Framers, described it as "genuinely democratic," because "[w]ith [Indians,] the whole authority of government is vested in the whole tribe." Another early scholar saw the Iroquois as "an absolute Republick by itself."

The Iroquois were not the only tribe that employed republican principles in its government. John Kinzie, in an 1818 letter to Lewis Cass, Governor of Michigan Territory, noted that "[a]ll Potowatomi Indians voted, making the tribe ‘perfectly republican.’" In most tribes, a council or senate made decisions, and "most tribes allowed any tribal member to be heard on an issue." Thomas Jefferson, who studied the traditions, languages, and governance structures of the Virginia Indian tribes, said of those tribes:

But it is said, that they are averse to society and a social life. Can anything be more inapplicable than this to a people who always live in towns or clans? Or can they be said to have no “republique,” who conduct all their affairs in national councils, who pride themselves in their national character, who consider an insult or injury done to an individual by a stranger as done to the whole, and who resent it accordingly. In short, this picture is not applicable to any nation of Indians I have ever known or heard of in North America.

Miller, supra note 112, at 143; Id. (citing SMITHSONIAN HANDBOOK, supra note 411, at 429).

Id. "The Iroquois confederacy was comprised of [first] five, and later six, [chiefs from] different Indian nations . . . ." The confederacy "formed during the fifteenth and sixteenth centuries and was fully developed . . . in 1630," at the time of first contact with French explorers. Id. at 142–43.


SMITHSONIAN HANDBOOK, supra note 411, at 732 (quoting Letter from John Kinzie, to Lewis Cass, Governor of Michigan Territory (May 14, 1818) (internal quotation marks omitted)).

MILLER, supra note 112, at 145. "The Delaware established councils of up to 200 voters." Id. at 145 n.95. "The Cherokee also used large councils as advisors to their chiefs," in which "every tribal member voted . . . and had a voice." Id. "At Cherokee town councils, the entire population could speak and decisions needed unanimous votes." Id. Tribal, or town councils, also governed the Creek and the Chickasaw. Id.; see also JEFFERSON, supra note 347, at 202–07 (describing tribal governments of several Virginia tribes).

JEFFERSON, supra 3457, at 202; see also Miller, supra note 112, at 148–49 (stating that Jefferson praised tribes for having "no law but that of nature," being able to "enjoy[ ] peace, justice, liberty, and equality," and for adopting republican form of government). According to Robert Miller, the fact that Indians, who were in a "state of nature," "adopted a republican form of government . . . reinforced Jefferson’s belief that republican government was natural to mankind." Id.
TRIBAL SOVEREIGNTY

The republican principle of having a place within which to practice the art of being a good citizen is (and always has been) central to tribal society. Indian tribes have always had a concept of territory and boundaries. Most tribes assigned hunting territories to villages or lineages, which other tribes and tribal members knew of and respected. Tribes also recognized (and still recognize) territory through mythical or sacred claims, and the burial sites of lineages and clans marked territory for many tribes.

Today, a tribe's traditional homeland is the "centerpiece of contemporary Indian life." Tribal lands and their resources are not only sustaining for the tribe, but are the tribe's cultural and spiritual base—where ancestors are buried, and spirits live—and the very topography can provide cleansing and rebirth.

You cannot understand how the Indian thinks of himself in relation to the world around him unless you understand his conception of what is appropriate; particularly what is morally appropriate within the context of that relationship. The native American ethic with respect to the physical world is a matter of reciprocal appropriation: appropriations in which man invests himself in the landscape, and at the same time incorporates the landscape into his own most fundamental experience.

The commitment to these lands "undergirds all . . . legal struggles in Indian Country about land, water, natural resources and jurisdiction." Indeed, Wilkinson, affirming the value of different perspectives in the national

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419Champagne, supra note 72, at 114–15 (describing how, for Creek Indians, villages served as primary political unit, and individual members of Creek society identified with village ceremonial square of mother’s “matrikin”). See also William Cronon, Changes in the Land 58–66 (1983) (describing how hunting territories were assigned and protected); Champagne, supra note 72, at 116 (describing how, during colonial period, Western concepts of fee title ignored and superseded tribal systems of assigning and protecting territories).

420Champagne, supra note 72, at 116.

421Pommersheim, supra note 16, at 7; see also Getches, New Subjectivism, supra note 8, at 1593 (stating that “tribal land ownership grew by sixteen million acres from 1972 to 1992,” and that number of Indians “under tribal governing authority” has also substantially increased since middle of twentieth century).

422Deloria and Lytle note that while Indians may have “surrendered the physical occupation and ownership of their ancestral lands [through bargained for exchanges or treaties], they did not abandon the spiritual possession [of those lands, which] had been a part of them.” DeLoria & Lytle, supra note 25, at 11. This strong attachment to tribal ancestral home land has led Indians—like the Cherokee, who sued to prevent the construction of the Tellico Dam and the flooding of the Little Tennessee River where their ancestral town was originally located—to resist actions that might degrade those lands, even if no longer “geographical[ly] proximat[e]” to them. Id.


424Pommersheim, supra note 16, at 8.
conversation, suggests that we have much to learn from this tribal reverence for place:

We need to develop... an ethic of place. It respects equally the people of a region and the land, animals, vegetation, water, and air. An ethic of place recognizes both that western people revere their physical surroundings and that they need and deserve a stable, productive economy that is accessible to those of modest incomes. An ethic of place ought to be a shared community value and ought to manifest itself in a dogged determination of the society-at-large to treat the environment and its people as equals, to recognize both as sacred, and to insure that all members of the community not only search for, but insist upon, solutions that fulfill the ethic.425

Thus, the reality of the reservation reflects the principle of dispersing government to a place small enough for citizens to practice citizenship and be transformed by that experience.

Although Indians have been partially assimilated into modern American society, the existence of a tribal community remains an important defining feature for most Indians, even those who live in urban areas.426 The “ethnic boundaries” of what it is to be Indian are “tribal in nature,” and “tribal membership is at the core of Indian personal identity, [making tribal membership] much more than a shifting political value choice or voluntary association."427 Tribes are homogeneous communities, in which ancestors, history, tradition, and rituals are shared, and where individual tribal members acquire a “homogeneity of purpose and outlook” simply by being born and maturing within a tribal community.428 As a result, tribal Indians have as a

425Charles F. Wilkinson, Law and the American West: The Search for an Ethic of Place, 59 U. COLO. L. REV. 401, 405 (1988) (emphasis added); see also id. at 407 (observing that Indians “possess individuality as people and self-rule as governments, but they are also an inseparable part of the larger community, a proud and valuable constituent group that must be extended the full measure of respect mandated by an ethic of place”).
426See Newton, supra note 9, at 244 (stating that “overwhelming majority of Indians... seek to remain ‘tribal members,’” and citing DARCY MCNICKLE, NATIVE AMERICAN TRIBALISM 7 (1973), for proposition that Indians who do not live on reservations “form distinct Indian communities to preserve, as much as possible, the core of a native tribal style of life”).
427Id. (“The Tribe is a projection of the autonomous individual Indian.”). Tarlock, however, argues that tribal culture has become a post-modern construct because of the “fluidity” of tribal membership. Tarlock, supra note 47, at 562. Such fluidity allows Indians to enter and exit from tribes and to revive and reinvent their identity with ease, and creates the “theoretical possibility [that] new cultural minorities [might]... form through self-construction, just as traditional minorities can seek to ‘deconstruct’ their inherited identities.” Id.
428DELORIA & LYTLE, supra note 25, at 18. Deloria and Lytle find homogeneity within Indian tribes to be a distinguishing feature when compared with the American experience. Id. at 17-18 (“Customs, rituals, and traditions are a natural part of life, and individuals grow into an acceptance of them, eliminating the need for formal articulation of the rules of Indian tribal society.”).
“world view[] a warm, deep and lasting communal bond among all things in
nature in a common vision of their proper relationship,” which cements a
“collective culture.”  Jefferson pointed to tribes, “whose ‘only controls are
their manners, and the moral sense of right and wrong,’” as proof “that citizens
could act [out of] a spirit of public virtue in a democracy.”

As land is key to the survival of tribes as distinct peoples in the twenty-
first century, so is the survival of tribalism. But it is tribalism, with its
communal features, that has repelled many Americans.

Tribalism is not an association of interest but a form of
consciousness which faithfully reflects the experience of Indians. It is
a normative system. The entire history of the federal relationship
with tribes is a history of attempts to subvert this consciousness and
replace it with the naked, alienated individualism and formal equality
of contemporary American society.

Yet it is tribalism that makes tribes particularly suited to fit within the
republican construct. Tribalism is the polar opposite of the “naked, alienated
individualism” that modern republican thinkers believe is destroying modern
American society. Indian tribes are model republican communities because
of—not in spite of—their communal existence.

The fact that the federal government unilaterally made all Indians United
States citizens early last century could be seen as confusing the issue of

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429 BARSH & HENDERSON, supra note 56, at vii.
430 Miller, supra note 112, at 149 (quoting BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS
108–14 (1982)); see also JEFFERSON, supra note 3457, at 93 (expressing reservation that Indian
society with its redeeming virtues might not be possible for large numbers of people).
431 BARSH & HENDERSON, supra note 56, at viii. The authors remind us that, for Indians,
tribes are their only “consensual government” and that the entire history of “tribal-federal
relationship” has been premised on evolution of Indians from “primitive” tribalism to ‘civilized
society.’ Id.; see also Carter, supra note 211, at 227 (“To the white observer, the lack of
proprietary interest generally displayed by tribal members was repulsive and backward.
Removing the ‘herd’ instinct was deemed by some to be the key to civilizing the Indian.”);
Newton, supra note 9, at 240 (complaining that “entire history of Indian law [is] marked by
judicial deference to congressional will[,] . . . [which] has resulted in the imposition of policies
undermining Indian [tribal] identity”).
432 See, e.g., SANDEL, supra note 2, at 24 (criticizing liberal democracy, and procedural
republic that is its manifestation, “because it cannot, sustain the kind of political community and
civic engagement that liberty requires”).
(making all Indians “born within the territorial limits of the United States” citizens); see also
Tsosie, supra note 17, at 1622 (stating that when United States originally treated with Indian
tribes, it had no intention of incorporating them into Union as citizens, and since Indians born on
reservation were deemed not to have been born in the United States, they were excluded from
basic birthright citizenship rights under Fourteenth Amendment); see also id. at 1634–35 (“[T]he
Constitutional relationship of Indian people to the United States rests upon their membership in
sovereign governments and not upon their identity as citizens of the United States.”); Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that Fourteenth Amendment did not make Indians
whether Indians have retained citizenship in their sovereign tribe or, by law, have shifted their political loyalties to the federal government. To the extent Indians owe no civic allegiance to their tribes, then under republican dogma, tribes might not be qualified to be centers of dispersed governance. However, there is no evidence of any lessening in tribal loyalty or tribal self-identity by individual Indians. In fact, the converse is true. Political loyalties among modern Indians, while varying from tribe to tribe, are for the most part still given to "local family, clan, religious, village, or regional groupings." These identities continue to operate within (and despite) the legal, cultural, and political constraints and institutions that the dominant society has imposed on the tribes.

The result is that tribal Indians today are citizens of "independent" and "overlapping sovereigns"—the United States and their tribe—and possess "the attendant rights [of,] and responsibilities" toward, each. As citizens of more than one polity, members of Indian tribes have done what Sandel feared might be difficult for non-Indians—functioned as "multiply-situated selves" in an increasingly complex, multi-layered political world. They have shown that they are capable of traversing the multiple civic loyalties that call upon them for allegiance, and of governing themselves simultaneously in the small sphere of their tribe without losing their capacity to engage in political activity at a higher governmental level.

citizens). Federal Indian policy has allowed the tribes to "determin[e] their own membership, and, in some cases, citizenship," when the two were different. DeLoria & Lytle, supra note 25, at 18. But see Campisi, supra note 409, at 19, 153–54 (describing failed efforts of Mashpee to self-define and gain federal recognition).

For Monette, the concept "of dual citizenship for tribal members is not troubling . . . because the respective governments exercise separate, [albeit] overlapping spheres of authority." Tsosie, supra note 17, at 1622; see also Monette, supra note 77, at 619, 631–32 (seeing dual citizenship as form of "compact federalism" and possible solution to problem of diminished tribal sovereignty because it justifies treating tribes on "same plane" as states with same protections, like equal footing and preemption doctrines). But see Tsosie, supra note 17, at 1622–23 (noting Porter's belief that "1924 Citizenship Act [was] genocidal," and that resultant "split identification of citizenship . . . [was] designed to ensure the ultimate destruction of distinctive tribal political identities" (citing Robert B. Porter, The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples, 15 Harv. BlackLetter L.J. 107, 166–68 (1999))).

Champagne, supra note 72, at 111 (noting that historically, pan-Indian organizations or confederations, like Iroquois and Tecumseh, "did not supersede tribal and subtribal identities," but were formed in response to common threat or goal).

Id. at 112.

Monette, supra note 77, at 630 n.83; see also McCoy, supra note 112, at 367 n.49 (noting that "concept of 'dual sovereignty,'" which "suggests that one group of people can be subject to the control of more than one government," also "supports Marshall's views of the tribal-federal relation" as protectorate that does not diminish political rights of weaker nation).

See Sandel, supra note 2, at 350 (discussing difficulty of citizens having to sustain capacity to "think and act as multiply-situated selves" because "it is easier to live with the plurality between persons than within them").
Assertions of strengthened tribal sovereignty, therefore, are well grounded in traditional republican thinking, and tribes are well placed in the modern civic republican world. In fact, the survival of Indian tribes as discrete, nomic communities depends on the application of these principles to the tribes. However, strengthened tribal sovereignty challenges not only the territorial integrity of the United States and the coherency of our federal structure, but also our vision of ourselves. The Article will now address these challenges.

V. PROBLEMS POSED BY ENHANCED TRIBAL SOVEREIGNTY

It is a delicate balance, being in, but not fully of, the United States.\textsuperscript{439}

This Article has shown that the republican notion of dispersing government to a small enough place for citizens to practice citizenship and be transformed by that experience fits well with the reality of Indian reservations. It has further shown that the communal features of tribalism resonate with republicanism’s concept of a committed citizenry imbued with civic virtue. However, tribalism’s communal features repel many Americans, and the tribes’ need for a separate land base greatly complicates the task of granting tribes greater sovereignty. The question is how to strike a dynamic, nurturing balance between a more robust vision of tribal sovereignty—which would preserve Indian communities as cultures of difference in American society—and the majority’s need to retain and protect an identity of shared values and expectations.\textsuperscript{440}

Indians have been committed through time to remaining “indelibly Indian,” proudly defining themselves as a people apart and resisting incorporation into mainstream culture.\textsuperscript{441} “[A] pivotal ingredient [in realizing tribal sovereignty in our country] is understanding and implement[ing] an

\textsuperscript{439}Matthew Purdy, Our Town, to Senecas, Casinos Cut Deep and Opened Old Wounds, N.Y. TIMES, July 29, 2001, at A23.

\textsuperscript{440}The legal claims raised by these newer concerns can be seen as efforts to redefine the implications of equal citizenship, to expand the meanings that define the American civic culture. The creation of these new meanings does not imply either a group’s secession from the national community or an individual’s separation from a smaller community founded on race or religion or ethnicity. Rather it implies a more inclusive reconstitution of our national community of meaning.

Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution 212–13 (1989) (citation omitted). Tarlock points out how “the western experience with cultural minorities has been the practice of tolerat[ing them]” and how “[t]oleration has taken the form of either exemption from uniform laws or allowing (or [in the case of Indians,] requiring) groups to isolate themselves from the dominant culture.” Tarlock, supra note 47, at 556.

\textsuperscript{441}Pommersheim, supra note 16, at 13.
indigenous vision that [is allowed to] develop free from interference in its local settings."\textsuperscript{442} Recognizing and protecting cultural differences

"involves recognizing that the entire perceptual and conceptual apparatus one has previously relied on for knowledge about the world may be faulty. It involves remaking the map of the world one carries about in one's head so that the gaps appear, generating the recognition that they need to be filled. And since it is in relation to this interior map that one locates and identifies oneself, it involves being ready to meet some unfamiliar and sometimes unwelcome images of oneself."\textsuperscript{443}

But tribes offer a very different normative vision of life in the United States, which makes their sovereignty claims threatening to mainstream America.\textsuperscript{444} By offering a competing nationalism, they make the political integrity of our country "contestable."\textsuperscript{445} Not surprisingly, these claims have triggered, and continue to trigger, repressive reactions. These reactions have included war, genocide, removal, bans on ceremonial practices and the use of native languages, and similar misguided efforts to eradicate tribalism and assimilate tribal Indians into mainstream society.

Further, as this Article has stated several times, the survival of Indian tribes as distinct communities "depends[, in large part, upo]n a separate land base[, in] which tribal governments, economies, and cultures may flourish."\textsuperscript{446}

\textsuperscript{442}Id. at 2. Getches sees "[t]he Court's [new] subjectivism [as] creat[ing] a treacherous undertow, pulling tribes into the societal mainstream and straining the indigenous cultural bonds that hold them together as societies." Getches, New Subjectivism, supra note 8, at 1595.

\textsuperscript{443}Turpel, supra note 11, at 40 n.88 (quoting Clare Dalton, The Faithful Liberal and the Question of Diversity, 12 HARV. WOMEN'S L.J. 1, 1-2 (1989)).

\textsuperscript{444}One of the fundamental differences between Indian tribes and the dominant society involves group rights—as opposed to individual rights—in land. The ability of at-risk groups, like Indian tribes, "to maintain their distinct cultures [is] undermined by individual property rights that disrupt traditional patterns of resource use and social organization." Tarlock, supra note 47, at 566–67. Richard White observed that "[t]he greatest losers in the capitalist transformation of the West were those who tried to maintain existing communal economies . . . . Many Indian economies quickly buckled under this assault . . . all Spanish and Mexican land grants in California were valid, [but] . . . by the time the commissioners and courts validated the grants, squatters, moneylenders, and the very attorneys whom the rancheros had hired had drained the rancheros of their resources." RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 237–38 (1991).

\textsuperscript{445}Walker Connor, The Politics of Ethnonationalism, 27(1) J. INT'L. AFF. 1, 10–12 (1973). But see Pommersheim, supra note 12, at 450 (stating that struggle of Indian tribes for self-realization and sovereignty is occurring within, not without, parameters of dominant system, as pursuit of "reasoned independence" and equality, not "the consistent rejection of the dominant way of law or policy")

\textsuperscript{446}Wood, supra note 189, at 111; see also id. (advocating use of trust doctrine to protect tribal land because those lands are equivalent to beneficial interest); ANAYA, supra note 25, at 97 (identifying lands and their resources as norm of self-determination for indigenous peoples); Oren Lyons, Law, Principle, and Realty, 20 N.Y.U. REV. L. & SOC. CHANGE 209, 212 (1992)
Depending on how it is done, restoring a more robust sovereignty to tribes over their land and their members might threaten the territorial integrity of the states in which they are located—even the integrity of the federal union. Unless these newly strengthened tribal governments are integrated into the federal framework, there is also a risk they will become isolated, self-governing islands of difference—what Williams calls “special racial preserves”—challenging our national vision of a blended society. Empowering these reserves more might act to intensify conflicts between Indians and non-Indians, and further complicate the difficult business of governing this diverse and fractured country.

Even if one accepts that the Constitution protects cultural diversity, such protection need not, and cannot, be equated with a right to self-government for all diverse groups. To argue that the concept of liberty can be extended so far would encourage anarchy under the guise of pluralism. . . . Thus, the Constitution’s allocation of powers recognizes that self-government is a precious and limited resource that must not be unduly fragmented.

([After two hundred years of federal process to disenfranchise our people from our language, from our culture, from our nations, and finally from our lands, we are now in danger of losing it all. Our title is absolute. We are sovereign. As long as we stand and proclaim title, the U.S. has a problem. Because we have title.”]; Robert A. Williams, Jr., Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World, 96 W. VA. L. REV. 1133, 1153 (1994) (“Without the land . . . there is no tribe.”); Mary Christina Wood, Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance, 25 ENVTL. L. 733, 740 (1995) (“Without an ecologically viable land base and an adequate supply of corollary resources to support a tribal community and economy, . . . true autonomy is beyond the grasp of the native nations.”).)

For example, enhancing tribal sovereignty would undermine the view of the tribal-state relationship that the current Supreme Court holds. See Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (“Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.” (internal citations and quotation marks omitted)).

See David C. Williams, The Borders of the Equal Protection Clause: Indians as Peoples, 38 UCLA L. REV. 759, 774 (1991) (“If Indian law . . . rest[s] on racial distinctions, . . . and reservations are [seen as] special racial preserves, their existence poses a challenge to the vision of an individualist, integrated American polity.”); see also ALENIKOFF, supra note 16, at 118 (positing that for current Court, idea that Indian sovereignty represents “devolution” to racial or ethnic group “undercuts an individualistic, non race-based constitutionalism that lies at the heart of much of the current Court’s work”).

See ALENIKOFF, supra note 16, at 119–21 (noting that modern version of this conflict can be found in phrase “special rights,” used by opponents of Indian treaty-based fishing and hunting rights and gambling, who argue that Indians are more equal than other citizens); see also Afwerki, supra note 34, at 20 (stating that “[p]olitics of segregation, neglect, and exclusiveness only fuel the attitudes of alienation, provoking aspirations to self-rule in the aggrieved parties,” and often cause eruption of “bloody conflicts”); Payne, supra note 331 (complaining about these special rights).

Newton, supra note 9, at 264. Newton argues further that while “[n]either the morality of promise keeping nor the value of cultural diversity can create an absolute right to tribal
But strong centers of difference are important to a vibrant society. While a pluralistic society may contain the seeds of its own destruction, only such a society presents an "other" against which to test and ultimately reify dominant values.

In a fundamental sense, indigenous peoples preserve and embody alternate life-styles that may provide models, inspiration, guidance in the essential work of world order redesign, an undertaking now primarily associated with overcoming self-destructive tendencies in the behaviour of modern societies. Societal diversity enhances the quality of life, by enriching our experience and expanding cultural resources. In essence, protecting the Aboriginal viewpoint is not a paternalistic undertaking; it is increasingly recognized to be an expression of overall enlightened self-interest.

The challenge for a pluralistic society is finding a way to preserve the autonomy of difference without destroying the capacity to form consensus that enables government to function—what Chantal Mouffe refers to as the "tension between the logic of identity and the logic of difference." Indian tribes offer such an "other," but the fact that their normative vision is so different from that of the majority of Americans makes reaching consensus very difficult.

The central government defines the political space within which sovereignty claims, like those that tribes put forth, are made. The way in

sovereignty[,] . . . these values can be raised to urge the courts to scrutinize strictly any attempt to dilute tribal sovereignty over tribal land and members." Id. at 265.

See Kymlicka, supra note 395, at 103 n.26 (referring to Rawls’ conclusion that "religious and ethnic conflicts [based on different conceptions of good are] divisive and destabilizing” because they are backed by "high degree of self-identification and the potential for some kind of organizational and leadership structure,” and commenting that task of identifying most feasible “model[] of tolerance” is of particular importance).

CHANTAL MOUFFE, THE RETURN OF THE POLITICAL 152 (1993); see also Sunstein, supra note 339, at 1575 (extolling diversity and disagreement as "creative and productive").

Richard Falk, The Rights of Peoples (In Particular Indigenous Peoples), in RIGHTS OF PEOPLES, supra note 32, at 23. Unfortunately, Indians are subjected to extensive stereotyping, which has facilitated their oppression and exclusion from American society. See Tsosie, supra note 17, at 1660 (saying that media’s portrayal of American Indians both as “noble savages” and as “bloodthirsty savages” has “had negative impacts”).

MOUFFE, supra note 452, at 133; see also Martha Minow, Justice Engendered, 101 HARV. L. REV. 10, 12 (1987) (recognizing that both acknowledgment and denial of difference can perpetuate inequality); Tarlock, supra note 47, at 555 (stating that cultural claims are based on distinctiveness and existence of another culture, either in form of other groups or mainstream culture).

See Garnett, supra note 15, at 439 (“Ever since Worcester, the Indian Tribes’ precarious status as sovereign nations has been measured by . . . their ability to resist the jurisdictional encroachments of rival state and federal sovereigns.”).
which the central government institutionalizes the national culture determines whether there is space for different cultures to survive and flourish. “A particular state’s policy toward” cultural difference, whether it sets the stage for strife or secession, or provides an arena in which cultural difference is supported, is vital. A state’s constitution and legal system have a proactive, dominant role in defining and mediating issues of cultural difference. The fact that the United States Constitution and legal system are descended linearly from a specific and well-articulated legal and philosophical tradition, however, makes it difficult to open that system to new concepts that arise from quite different, even alien, traditions, like those practiced by Indians, without destroying the country’s foundational principles.

From the perspective of the dominant society, the question is how much “subversion” and “invention” should be tolerated and encouraged. . . . The United States has often made claims about the richness of its pluralist society—made claims that the loss of state or tribal identity would not only be a loss to states and tribes, but would also harm all citizens because of the benefit of living in a country in which not all are required to follow the same norms. Some deep-seated emotional respect for group governance may be at work here, some sense that these self-contained communities are “jurisgenerative” . . . and that their traditions and customs must sometimes be respected and preserved. In the tribes, cities, states and regions of the country, one can find not only individuals, but also individuals as part of a community—a community that has had continuity over time. In these communities there are social ties, there is a shared history, there is a network of relatedness. In contrast, the federal system appears to some as individualistic and atomistic. We are attracted by these smaller institutions, these subsets, these multiple sovereignties; we like the scale, the sense of history, the intimacy.

This country’s national culture, however, “is not [and never has been] constituted by a single ethnic background or a narrowly understood genealogical history.” It coexists with many other agendas, cultural practices, and beliefs. Michelman and Sunstein’s incorporation of diversity

456 Levin, supra note 22, at 172–73.
457 See id. at 173.
458 See id. at 171–78.
459 Resnik, supra note 248, at 750–51; see also Sandel, supra note 2, at 347–48 (citing de Toqueville and Jefferson as favoring local government). See generally Levin, supra note 22, at 171–78 (arguing that nation-state should recognize cultural difference and ethnic diversity in order to foster “national reinvention” and avoid “fatal rigidity”).
460 Martin, supra note 31, at 304.
461 Id.
into traditional republican thinking is recognition of this fact of American life. But, coexistence is a far cry from granting discrete subcultures, like tribes, the right to disassociate themselves from the national enterprise by allowing them to follow fundamentally different legal and constitutional norms on their own separate land. Even Sandel, in Democracy’s Discontent, does not suggest how this might be done. Allowing tribes to operate outside the political and geographic compact that otherwise binds us as a society while preserving an “other” for the majority to define itself against, challenges our capacity to maintain a territorially cohesive, coherent, and integrated national government.

[...]Indigenous peoples, to the extent that they centre their grievances around encroachments upon their collective identity, represent a competing nationalism within the boundaries of the State. Such claims, posited in a variety of forms, challenge two fundamental statist notions—that of territorial sovereignty, and that of a unified ‘nationality’ juridically administered by governmental organs.462

Trachtman argues that “territory is an increasingly inaccurate proxy for community . . . [because] society is increasingly varied and plural, existing at many vertical levels and in many functional sectors, . . . with increasing disregard for national boundaries.”463 Enhancing tribal sovereignty should cause almost no impact to the territorial integrity of the United States, because Indian tribes already have a discrete land base that has been withdrawn from the public domain, or reserved for exclusive Indian use under treaties or executive orders.464 Nonetheless, allowing 314 reservations and nearly two million citizens to drop out of the United States by restoring to tribes full sovereignty over their lands, resources, and members, is not insignificant.465

[Territorial] self-government is a highly explosive issue. States are reluctant to allow territorial self-government, for it transforms an amorphous group of people whose claims were hitherto domestic matters into a visibly separate national identity, into a nation or the

462Falk, supra note 453, at 18 (emphasis added). Falk recognizes that granting indigenous peoples sovereignty over their persons and lands challenges the “sense of settled rights of existing sovereign States, threaten[s] a reduction of control by the central government, or even the dismemberment of the State, [and causes] conflicts between indigenous peoples and post-indigenous developments.” Id. at 33–34. But see McCoy, supra note 112, at 392 (“The existence of . . . reservations minimizes the impact that recognition of tribal [political rights will have] on the territorial integrity of United States.”).

463Trachtman, supra note 22, at 406 (citations omitted).

464See McCoy, supra note 112, at 391–92; see also United States v. Mazurie, 419 U.S. 544, 557 (1975) (“Indian tribes . . . are a good deal more than ‘private, voluntary organizations.’” (citations omitted)).

465These statistics are drawn from GETCHES ET AL., supra note 16, at 8–14, and are based on 1990 census data. The Navajo Reservation, which is the largest reservation, contains over 15 million acres, spans four states, and is home to over 219,000 people. Id.
seeds of a nation; and this group of people would be more able to invoke the principle of self-determination, to extend its claims and even take them to an international forum. It would appear that self-determination and territorial stability were incompatible principles.\textsuperscript{466}

The application of republican principles to this problem means that notions of national territoriality cannot defeat a subculture's legitimate request for self-determination.

The principle of territorial stability cannot invalidate that of self-determination, as self-determination is the ultimate governing principle, whereas territorial stability is not so much a principle as an institutional reality of international law. We could say that compliance with the principle of self-determination is the essence, the real legitimacy of a \textit{status quo}, while territorial stability stands for formal, institutionalized legitimacy.\textsuperscript{467}

But, republican principles also advise that granting enhanced political rights to groups with radically different normative visions will make governing at the national level difficult—perhaps beyond even Michelman's and Sunstein's alchemy—because these differences will undermine, not enhance, the transformative search for the common good or regulative ideal.\textsuperscript{468} There are basic, constitutive differences between the core systems of beliefs held by tribes and those held by most United States citizens.\textsuperscript{469} As noted previously, most tribes reject the ideas of individual rights and autonomy in favor of group rights, communal obligations, and communal interests in land.\textsuperscript{470} Ironically,
what makes Indian tribes ideal republican communities—the fact that tribal members see themselves as part of an interconnected web of responsibilities and duties—also separates them from fundamental, majority beliefs in individualism and individual rights. As tribes have no parallel social or legal construct to the concepts of individual rights, individual autonomy, and private property, the two worldviews are simply incompatible.

At another, even more troubling level, the idea of Wilkinson’s measured separatism contradicts deeply held beliefs in this country that favor assimilation and reject separation by race or ethnicity. Enhancing tribal sovereignty runs the risk of creating separate, racial (or ethnic) subnations—the “nightmare of racial homelands.” Eisgruber says using segregation to “enhance [and preserve] ethical [or normative] diversity” only “harms political unity [and] encourages people to distrust . . . their fellow citizens” who may

social organization); Turpel, supra note 11, at 29 (commenting on how group property rights directly contradict dominant ethic of individual property rights). But see Kymlicka, supra note 395, at 89–94 (exploring two models of tolerance, one based on idea of individual freedom, and other based on group rights). This is not to say that tribes never assert group rights against the government. “[L]and claims [by tribes, as well as assertions of separate] language rights, [requests for] representation in political institutions, [and even for] veto power over certain kinds of policies,” are typical of group rights that can be (and in many cases are) made “against the larger society.” Kymlicka, supra note 395, at 98 n.4.

See Epstein, supra note 345, at 1633 (criticizing Michelman and Sunstein for failing to take account of theories that have “Lockean emphasis on limited government and private property,” which “offer a superior response to the pluralist nightmare” that both scholars describe).

Turpel, supra note 11, at 30; see also Jensen, supra note 49, at 388 (“[T]raditional Indian societies . . . reflect political philosophies that are much more communitarian than the political philosophy guiding the rest of the American population.”); Macklem, supra note 6, at 1337 (“[C]ultural incommensurability should be reflected . . . in the design of government institutions.”). To the extent that a tribe might believe it necessary to teach its members values that will prepare them for life in tribal society as opposed to preparing them for life off the reservation, as a way of maintaining its cultural heritage, a stage is set for conflict with the dominant culture. Kymlicka uses the example of Canadian Mennonites and Hutterites—who object to public school teaching materials because they “promote an ideal of citizenship that is in conflict with their religious ideals of person and society—to illustrate the conflict that can occur between values of discrete subcultures based on religious beliefs or ethnicity”. Kymlicka, supra note 395, at 102 n.23.

Williams, supra note 448, at 822. But see BARSH & HENDERSON, supra note 56, at 246 (“The mere fact that a political unit has a racial characteristic does not render it racist.”). Eisgruber sees this dilemma as quintessentially a republican one, because republicans value “dissident sub-communities” as sources of dissent in a reflective, constitutional scheme. Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 COLUM. L. REV. 87, 90–91 (1996) (citing examples of “regrettable [fact] that the young women [in Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994), must] grow up in a starkly sexist culture,” and “that the Amish children in [Wisconsin v. Yoder, 406 U.S. 205 (1972),] will [have trouble becom[ing] astronomers and lawyers”). Republicans “respect[ these] sincere efforts to pursue a [separate] vision of the good”—which might turn out to be correct—but because the majority embraces a particular conception of the good, they “regret[] the extent to which dissident sub-communities deviate from that conception.” Id.
look different or maintain a different way of life.\textsuperscript{474} When the government endorses such efforts, for example, by creating a separate homeland or reservation, it assumes that its citizens cannot overcome (or at a minimum come to tolerate) their differences (through dialogic self-modulation)\textsuperscript{475}—impugning the ideal of political unity and foundational republican principles.

While republican thinking offers useful theoretical support for a more robust form of tribal sovereignty than currently exists, it also reveals the enormity of the practical problems associated with enhancing tribal sovereignty when the differences between tribes and the rest of society are so great. Republican thinking only creates an imperative for strengthening tribal sovereignty to enable tribes to survive as discrete centers of norm generation and dispersal, and enrich our national conversation by their presence; it does not resolve the question of how this may be done. A very large question remains as to how the role of tribes in our federal system can be strengthened without destabilizing that system through conflict or by creating separate racial nation-states within our boundaries. Part VI proposes to work its way through these problems first by confronting what it might mean to separate the tribes from the territorial boundaries of the United States, and then by examining other institutional solutions that might permit tribes to remain within the United States without plunging our country into internal strife.

VI. SOME INSTITUTIONAL INNOVATION TO SOLVE THE PROBLEM OF TRIBAL SOVEREIGNTY

Modern republicanism is . . . not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work. As we shall see, this understanding will call for institutional innovations.\textsuperscript{476}

To survive as discrete and unique cultures, Indian tribes need sufficient independent sovereign authority over their members, lands, resources, legal and social institutions, practices, and mores to stay separate from (and resist) the demands and incursions of other, alien cultures. The tribes' placement in our federal structure as "domestic dependent nations"—protected only by the interpretative tropes and preemptive tenets of atrophying legal doctrines, and by the limited moral and legal suasion of treaties and notions of trust—has left them vulnerable to assimilative pressures and other forms of cultural assault. It

\textsuperscript{474}Eisgruber, \textit{supra} note 473, at 95. \textit{But see} Falk, \textit{supra} note 453, at 33 ("Indigenous peoples increasingly resist integration and assimilation and seek above all to re-establish connections with their traditional lands and traditional ways of life, [which makes them unprepared] to accept the paternalistic judgment of the dominant civilization that what is important is to enable them to participate equally in and gain access to the modern world.").

\textsuperscript{475}Michelman, \textit{supra} note 339, at 1527–28.

\textsuperscript{476}Sunstein, \textit{supra} note 338, at 1576.
is no exaggeration to say that tribes today run the risk of becoming little more than quaint curiosities, remnants of our collective historical memory.

This Article suggests that while federal policies and the Court’s Indian law jurisprudence have diminished tribal sovereignty, that sovereignty has not been entirely lost, nor have tribes disappeared into American society. This Article further posits that what is required to protect and enhance what remains of tribal sovereignty is its reinvigoration under the same republican theories of governance that flourished at our founding and are today animating proponents of devolution, like Sandel. The question is how to strengthen the presence of tribes in our federal system without destabilizing that system through conflict or by creating separate, race-based nation-states within our boundaries.477

Tribes, as separate centers of sovereignty, have never fit easily into the bipolar allocation of power between the states and the federal government.478 Ceding additional sovereignty back to tribes can create problems, as doing this not only confers “special political rights” on culturally (and racially) distinct peoples, but also allows the potential resolution of governance and social issues in ways that conflict with non-Indian norms.479 While some destabilization of our structure of governance may be warranted to preserve tribes as diverse, nomic communities and thus to gain the benefits of Michelman and Sunstein’s heterogeneous republican society, too much could slide our governing system into chaos, and our land into a patchwork of separate nations.480

477 See Eisgruber, supra note 473, at 88 (“Th[e] public debate requires the presence, preservation, and generation of diverse views, but such views must be integrated into the public arena rather than marginalized into protected enclaves.”); see also Robert W. McGee, The Theory of Secession and Emerging Democracies: A Constitutional Solution, 28 STAN. J. INT’L L. 451, 471 (1992) (recognizing that problem with applying theory of secession is protecting “the rights of minorities who remain within the borders of either the former parent state or the new independent state”).

478 See Garnett, supra note 15, at 478 (“The Indian Tribes are in many ways an anomaly in this system; it is not quite clear how they ‘fit in’ to our Constitution’s scheme.”). But see generally Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77 TEX. L. REV. 1129, 1132–33 (1999) (arguing in favor of “geographical constitutional nonconformity” as method to preserve community self-governance, and citing tribal courts as places where this is achieved).

479 Macklem, supra note 6, at 1354–55; see also Jensen, supra note 49, at 389–90 (agreeing that “immunity of tribes from constitutional limitations is not a problem of constitutional dimension,” but questioning system in which tribal members, are subject to “unconstrained,” “constitutionally recognized entities—the tribes”—and finding point of tension between principles enunciated in Brown v. Board of Education, 347 U.S. 483 (1954), and sovereignty based on race).

480 But see Robert W. McGee, A Third Liberal Theory of Secession, 14 LIVERPOOL L. REV. 45, 63 (1992) (challenging seriousness of problem of nation states (or enclaves) within nations by pointing to Vatican City, which successfully seceded from Italy and is surrounded by Rome). One way to address this challenge might be to see the dilemma as a partial reallocation of sovereignty to tribes, not a reduction in the central government’s authority. Trachtman calls this the “law of conservation of sovereignty,” in which the existing “allocation of power and responsibility [of a state] is never lost, but only reallocated.” Trachtman, supra note 22, at 400.
There have been many proposals for enhancing tribal sovereignty. Some say the only solution for tribes is to withdraw from the territorial United States. Others suggest ways of doing this within our existing system, making tribes more like states. Still others suggest the application of constitutional doctrine to redress the imbalances created by the plenary power doctrine. This Article suggests that each of these proposals is flawed in some way that either over- or undercorrects the problem. Giving tribes a limited power to nullify laws that imperil their continued separate existence, by recognizing that they have that right, however, does no violence to our federal structure. Doing this also stops well short of territorial balkanization and does not threaten majority-held beliefs. Although such a proposal introduces some additional complexity into our political system, it will not make that system any less stable. But, gaining and maintaining this power requires the accession of Congress and the Supreme Court. This may be possible through the application to tribes of republican principles.

A. Secession

Treaties, despite their diminished legal status in the United States, provide a normative basis for tribes to claim the right to withdraw from the territorial United States. Secession by Indian tribes is theoretically impossible because, unlike the southern states, they are not part of the Union; however, restoring tribes to their full, precolonial nation-state status could be considered the equivalent of secession, as tribes would, in effect, take their lands with them.

In the international forum, this reallocation is referred to as “pooling of sovereignty,” in which states, for example in the European Union, “giv[e] up [some measure of] national sovereignty [so that] member states may increase the scope of their influence, both within the European Union and in external relations.” Id. However, the situation with tribes is the obverse from that facing the member states of the European Union as it is the Union, not the member states, that would be ceding authority back to the tribes to enable them to function independently of the Union.

See Tsosie, supra note 17, at 1636 (viewing Indian treaties and Treaty of Guadalupe Hidalgo as instruments of “intercultural justice,” under which “claimants are seeking to establish the moral obligation of the United States to honor its treaty promise[] to respect the land and cultural rights of the distinct ethnic groups that it has incorporated through conquest”).

See Macklem, supra note 6, at 1359–60 (worrying that “recognizing [sub]units of [government] based on indigenous difference [conflicts with the concept of] territorial . . . federalism,” and could as easily lead to rejection of dual citizenship and shared loyalties and move toward separation or secession); see also Murray N. Rothbard, THE ETHICS OF LIBERTY, Humanities Press 181 (1982) (“Once admit any right of secession whatever, and there is no logical stopping-point short of the right of individual secession, which logically entails anarchism, since then individuals may secede and patronize their own defense agencies, and the State has crumbled.”). But see Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 YALE J. INT’L. L. 177, 184 (1991) (“The only countervailing principle, that of the territorial integrity of existing states, suffers from a suspect historical association with monarchy and feudalism.”).
Several Indian law scholars support this result. This author does not, for the reasons developed below.

According to Brilmayer, only separatist claims that are based on claims to territory have any legitimacy, given the competing norm of territorial integrity. To the extent that Indian treaties are seen as being premised on the illegitimate conquest of tribal lands, they provide a normative basis for tribes to claim a return to full sovereignty over those lands (in other words, separation). The fact that, over time, that land base has dwindled even further as a result of federal policies and judicial decisions undermining and in some cases abrogating these treaties only adds to the normative legitimacy of treaty-based claims to separation.

However, even morally and factually sound historical claims to territory may not justify altering the status quo to rectify past wrongs. Brilmayer

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484 See Brilmayer, supra note 482, at 178–79 (stating that normative force behind self-determination claims does not derive from distinctiveness of group, but from group’s right to specific land; to be persuasive, separatist argument must also present territorial claim); see also Falkowski, supra note 483, at 209 n.2 (noting International Commission of Jurists opinion that once people choose to join as state, “that choice is a final exercise of the right to self-determination and they lose the right to secede “under the principle of the right to self-determination” (internal quotation marks and citations omitted)); id. at 210 n.5 (“If self-determination refers to ‘the freedom of a people to choose their own government and institutions and to control their own resources,’ there seems to be a striking contradiction between the right of ‘all peoples’ to self-determination and the right of a state to its ‘territorial integrity’ the latter precluding secession.” (quoting Ved. P. Nanda, Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan), 66 AM. J. INT’L L. 321, 326 (1972))); Garth Nettheim, ‘Peoples’ and ‘Populations’—Indigenous Peoples and the Rights of Peoples, in RIGHTS OF PEOPLES, supra note 32, at 125 (observing that indigenous peoples’ claims, deriving from dispossession of their lands and consequent destruction of their culture, distinguishes them from other peoples, and that for indigenous peoples, land “is the issue”)).

485 See McGee, supra note 480, at 65–66 (listing as Anthony H. Birch’s first justification for secession situation where “region [has been] included in [a] state by force and its people have displayed a continuing refusal to give full consent to the union” (citing Anthony H. Birch, Another Liberal Theory of Secession, 32 POL. STUD. 596, 599–600 (1984)). The other reasons Birch lists as justifying secession—where “[t]he national government has failed . . . to protect the basic rights and security of the citizens of the region;” where “[t]he democratic system has failed to safeguard the legitimate political and economic interests of the region;” and where “[t]he national government has ignored . . . [a] bargain between sections that was entered into as a way of preserving the essential interests of a section that might find itself outvoted by a national majority”—also resonate with the cause of tribal sovereignty. Id.

486 Brilmayer, supra note 482, at 177–78 (noting conflict between “principle of self-determination [entitling] every ‘people’ . . . to its own nation-state” and equally venerable
suggests a more thorough examination of the claims to be sure that they do not rest on earlier historical wrongs or other factors, justifying a defense of adverse possession. Given the length of time that has passed since the wrongs against the tribes occurred and the fact that non-Indians have largely resettled what once were tribal lands—making some Indians numerical minorities even on their own reservations—a defense of adverse possession to such claims may well be appropriate. Allowing tribes to separate would create other inequities and problems not mentioned by Brilmayer. For example, allowing reservation tribes to withdraw from the territorial United States because they have land claims would disfavor urban tribes who lost all of their land as a result of the same iniquitous federal policies that diminished the sovereignty of the landed tribes. Small landed tribes would have a much harder time surviving without the protection and economic support of the United States than would tribes with larger reservations. Additionally, allowing tribes with large reservations to withdraw could have a devastating impact on the territorial integrity of the states within which they are located, and could make governing at the state (and national) level a nightmare. Therefore, the cost of secession, regardless of its normative and emotional appeal, is too high—especially for the tribes—for it to be an institutional solution to the problem of tribal sovereignty.

"principle of international law, which upholds the territorial integrity of existing states"). Brilmayer, however, says that "consent of the governed does not necessarily encompass a right" of dissatisfied people to secede from a given political unit; rather "[i]t only requires that within [an] existing political system, a right to participate through electoral processes be available" to those individuals. Id. at 185. He also notes that "tacit consent can be attributed to a state’s inhabitant’s [sic] only when the state has legitimate power over its territory." Id. at 187. Brilmayer worries that the “rhetoric of consent obscures the importance of territorial claims.” Id. at 189. But see Eisgruber, supra note 473, at 95 (listing conformity to religious law as principled reason entitling group to separate).

Brilmayer, supra note 482, at 199–201.

See id. at 200 (noting that new settlers tend to legitimize status quo). But see id. at 201 (stating that use of force—“naked conquest”—does not justify an adverse possession defense). This means that tribes, who lost much of their land through conquest, may well be able to claim a moral or legitimate right to separate despite the resulting inequities to non-Indian landholders.

Economic survival would be a major problem for most tribes that secede, regardless of their size. For small tribes, holding little (or no) territory, “full nationhood [would be] implausible;” for large tribes, excluding the successful gaming tribes, without “substantial severance payments [from the government], secession . . . would mean economic disaster.” Jensen, supra note 49, at 396. Tribes might have to enter into a series of bilateral agreements with the United States (or other countries), to offset the economic and security advantages they now enjoy as part of the United States. The success with which tribes did this would depend on their size and bargaining power—meaning that only the largest, wealthiest tribes could entertain this possibility.

For example, if tribes were able to withdraw, they could enter into their own trade agreements with foreign nations—perhaps even establishing trade barriers that disfavor the United States—as well as arrangements with other countries that could create security threats on our own shores, of no little concern in this post-9/11 world. Some reservations contain critically important supplies of energy and mineral resources, which could be sold to other countries, and thus lost to this country, or returned only at an exorbitant cost.
B. Federalism

The high costs of allowing tribes to secede from the territorial United States warrants an examination of alternative ways in which they can practice what Buchanan calls "internal rights of self-determination"—political rights that are exercised within the state. In other words, if space can be found for a more robust tribal sovereignty within our system of government, tribes need not withdraw into independent nation-states to gain the benefits of self-determination. Perhaps federalism, with its separate but partially overlapping legal orders, offers the space within which these different normative systems can coexist and interrelate without the disruption and inequities created by secession.

While it is a basic tenet of our constitutional democracy that citizens relinquish some of their liberties in exchange for protection against the chaos that would result if there were no rules, this does not necessarily result in a single source of legal authority, nor does it force harmonization of different legal cultures. Neither the republican nor the democrat seeks "to empower the dominated with the voice of the dominant, but to open up the dominant discourse to the transformative voice of the dominated.

491 Buchanan, supra note 483, at 54. Buchanan acknowledges that exploring alternative forms of self-determination for groups within a state, "rather than assuming that self-determination means 'replicating' states" (what he refers to as "multiplication of states"), "may . . . transform our conception of political authority—and ultimately the state itself—much more radically than any [solution] that may result from merely fragmenting [or multiplying] states." Id. at 55.

492 The following discussion of federalism does not envision creating another horizontal level of government for tribes, which seems both politically unlikely and impractical, given the multiplicity, diversity, and scattered locations of tribal land. Rather, federalism is examined to see if the concept might be expanded to accommodate tribes as stronger sovereigns. Federalism, however, offers a solution only for tribes with land, not for landless tribes whose members have intermixed with other groups. See generally id. at 55 (discussing federalism as "plausible alternative" to secession, but suggesting two "theses" that should "temper enthusiasm for federalism").

493 See ALEINIKOFF, supra note 16, at 33 (noting that Horace Kallen "challenged the idea of the melting pot, arguing that America . . . was becoming a great republic consisting of a federation or commonwealth of nationalities" (citing Horace Kallen, Democracy Versus the Melting Pot, 100 NATION, Feb. 18 & 25, 1915, at 190 & 217)); see also GETCHES ET AL., supra note 16, at 29 ("Should the role of the law be to homogenize society? Or should it be flexible enough to preserve difference and diversity?"). But see Newton, supra note 9, at 264 ("[T]he Constitution[] . . . recognizes that self-government is a precious and limited resource that must not be unduly fragmented.").

494 Allan C. Hutchinson, The Three 'Rs': Reading/Rorty/Radically, 103 HARV. L. REV. 555, 565–66 (1989) (book review); Turpel, supra note 11, at 34 (discussing Michelman and Sunstein's belief that republican deliberation requires participation by those at margin of political process). This tolerant view of cultural differences is quite different from the reaction to tribal departures from the dominant cultural norm, which is characterized by "domination and
as republican ideals are contested. Republicans realize that to maintain political stability, these different ideals and perspectives must be attended to so that groups with different legal norms and moral habits are preserved as a source of contesting legal and social norms.

Federalism accepts the Sandelian idea of overlapping citizen identities and the sharing of governmental power among different levels of government. It is also malleable enough to have accepted, over time, an...
array of different economic and political institutions—*quasi* governing arrangements—by actors both within and out of government, in response to both new and old problems.\(^4\) Resnik celebrates these arrangements—calling them collectively “inventive federalism”\(^5\)—and sees in them proof of the permeability of federalism’s boundaries.\(^6\) She finds in their emergence an expansion of governing options beyond the bipolar choice of federal-state to include an array of nondichotomous, noncentralized alternatives.\(^7\) Resnik is afraid, however, that the ongoing political dialogue between the state and federal systems is too narrowly conceived, and is missing many other arrangements and alternative loci of government, like tribes.\(^8\)

However, the problem is not lack of recognition of tribes as an alternative locus of government in a federal system, as Resnik fears. Rather, it is that tribal sovereignty is insufficiently privileged in the political dialogue with the federal government and states. It is, in fact, a dialogue that is largely preemptive of tribal sovereignty, and none of the examples of *inventive federalism* that Resnik lists offers a sufficient shield by itself from a preemptive sovereign.

\(^{498}\) Resnik, *supra* note 403, at 467, 473–74 (noting that “allocation of authority” between federal government and states “is one [that is] constantly being reworked,” and calling this approach to federalism “noncategorical”); *see also id.* at 477–78 (listing as examples “[inter]state compacts, ad hoc regulatory arrangements . . . , mechanisms to adopt uniform laws, [and] the creation of new [multi-state] organizations to affect national political and legal life”); André-Jean Arnaud, *Legal Pluralism and the Building of Europe*, in *LEGAL POLYCENTRICITY*, *supra* note 496, at 162–63 (suggesting devolving certain regulatory powers to local communities as one way of preserving differences, and noting that local, state, regional, even international decision makers, “will have to manage through complexity” and what he calls “necessary recursivities from one level to another” (emphasis in original)); *see also id.* at 163–64 (suggesting ad hoc use of “legal transplants,” in which one legal system borrows from another as way of reconciling differences between systems).

\(^{499}\) Resnik, *supra* note 403, at 479.

\(^{500}\) Resnik and Macklem see the boundaries between different levels of government and cultures as porous, a web of interconnections and potential transformative moments. See Macklem, *supra* note 6, at 1344 (commenting that cultural boundaries “are more porous than cultural relativism presupposes”); Resnik, *supra* note 403, at 473 (“‘State’ and ‘federal’ interests are not fixed sets, but are interactive and interdependent conceptions that vary over time.”); *see also id.* at 479, 492 (citing as example of “permeable boundaries of [federalism]” fact that people “participat[e] as residents and citizens of different types in several states [simultaneously,] and [need to] be accorded a range of legal statuses to reflect [various] degrees of relatedness” to those states).

\(^{501}\) Resnik, *supra* note 403, at 478.


\(^{503}\) *Id.* at 478; *see also* Garnett, *supra* note 15, at 433–34 (noting that while “Constitution . . . presumes and protects splintered and diffused, yet balanced, sovereignty and power” as means to secure civic liberties, tribes are “often ignored in discussions of constitutional federalism” (citing New York v. United States, 505 U.S. 144, 181 (1992) (Blackmun J., dissenting)). *But see* Monette, *supra* note 77, at 618) (noting “that tribes share the same sovereign plane” with states in our republican democracy and federal system).
An even greater problem with relying on a federalism solution to ethnic (or racial) conflict is that it may be a surrogate for what Buchanan calls socio-economic apartheid—internal secession—a way of walling off the worst problems and abandoning a commitment to the redistributive state, leaving the disenfranchised groups worse off than they were before. Therefore, there is a danger that any solution that relies on decentralized governance institutions, such as Resnik proposes, will not only tend to undermine a shared sense of identity, but will also weaken a sense of obligation to aid the less fortunate members of society.

It is difficult to see how reconceiving tribes as nondichotomous, noncentralized loci of alternative governments in a federal structure will end the preemptive dialogue between tribes and the federal government and avoid Buchanan’s internal secession. Therefore, it appears that a federalism solution will not benefit tribes.

C. Substantive Equality and Heightened Scrutiny (Nonstructural Solutions)

Instead of insisting that tribes have “formal equality” with federal or state governments, which effectively places them in the position they would have been in before their sovereignty was forcibly reduced, Macklem suggests that they be accorded “substantive equality”—in other words, that the government commit to eliminate the economic and social disadvantages under which tribes have labored. Under a policy of substantive equality, tribes would qualify for

504 See Buchanan, supra note 483, at 61–62. Buchanan states that this process replaces “commitment to the redistributive state . . . [with a] tacit endorsement . . . of the state as a mere association among optimal trading partners,” legitimizing “the next . . . step in a multi-dimensional process. . . that has already been at work for some time in many countries.” Id. In the United States, this is illustrated by the “migration of whites and prosperous businesses away from impoverished inner cities, the worsening lack of access to higher education and health care [for] the poor . . ., and the widening gap between those who possess the skills . . . to thrive in a global economy . . . and those who do not”. Id. But see Thomas Christiano, Secession, Democracy and Distributive Justice, 37 Ariz. L. Rev. 65 (1995) (taking issue with Buchanan’s use of discriminatory redistribution as criterion for invoking presumption against international recognition of secession or federalist decentralization and instead favoring robust representative democracy criterion because it is backed by broad international consensus, provides forum for discussion of alternative conceptions of justice, is authoritative method of collective decisionmaking, and is relatively easy to ascertain).

505 Such a result would strike at the heart of republican principles, which support “redistribution . . . of wealth and entitlements” and point powerfully toward “equalizing political influence.” Sunstein, supra note 339, at 1551; see also id. at 1552 (discussing “high premium” that republican writers place on “political equality,” “understood . . . [to be] access [by all individuals] to the political process” and who look with disfavor on “large disparities in political influence”); Buchanan, supra note 483, at 62 (suggesting scrutinizing rules that govern both representation and voting, “to see whether they afford opportunities for the better off to block initiatives for redistribution,” or “whether the mechanisms of decentralization provide unacceptable opportunities for the better off to thwart redistributive policies by impeding their effective implementation at the local level”).

506 See Macklem, supra note 6, at 1360–64.
special resources and assistance, and "improving [their] material circumstances" would receive "preferential weight, . . . as [compared to] measures which further empower advantaged groups."^507

While improving the tribes’ socio-economic conditions may enhance their ability to resist cultural destruction, Macklem concedes the policy does nothing to enhance the tribes’ legal authority to resist this destruction, or to reverse—let alone remedy the effects of—the denial of formal equality.^508 Substantive equality does not require parity with non-Indians and is too dependent on the largesse of federal and state governments to provide much solace for tribes. Given both governments’ history of indifference toward, and denial of, tribal needs, and the inability of either government to resist the self-regarding impulse to exercise authority over tribes in derogation of tribal interests, it is difficult to see how the application of such a policy could help tribes.

Newton suggests that the solution lies in federal courts giving heightened scrutiny to laws that are insensitive to the values of cultural diversity and preexisting sovereignty.^510 She stitches together constitutional protections under the Fifth Amendment’s takings and due process clauses and the equal protection component of the Fifth Amendment’s due process clause to provide a basis for courts undertaking heightened review of suspect laws.^511

Newton acknowledges, however, that “constructing a constitutional framework that will protect tribal rights [faces] formidable barrier[s].”^512 She identifies as one “barrier” the “legacy of the plenary power era,” during which the courts “justif[ied] extraordinary federal power over . . . tribal property and sovereignty[,] and thus creat[ed] powerful precedents” that still impede

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^507 Id. at 1360–61. Although such a preference might be suspect in a non-Indian situation, it is likely to survive constitutional challenge under the equal protection principles of the Fifth Amendment when applied to Indians. See Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (upholding Indian hiring preferences by Bureau of Indian Affairs, and noting that preference at issue is political in nature, not racial).

^508 Macklem, supra note 6, at 1363–64. Macklem goes on to note that “[u]nder principles of [both] formal and substantive equality . . . Indian nations have [a] clearer and more immediate claim[] for a degree of sovereignty over their own affairs than do other racial and cultural groups in North America.” Id. at 1365.

^509 Id. at 1360.

^510 See Newton, supra note 9, at 198 (arguing for greater use of equal protection and due process arguments to silence plenary power era); see also Manuel Del Valle, Puerto Rico Before the United States Supreme Court, 19 REV. JUR. U.P.R. 13, 15 (1984) (praising United States Supreme Court’s “doctrine[] of judicial autonomy” implemented through rule of local deference, under which tribunals reviewing decisions coming from Puerto Rico defer to interpretations of insular courts on matters of “local law and practice”); Johnson, supra note 11, at 695 (suggesting that United States courts could benefit from study of Canadian jurisprudence, which employs careful scrutiny); Wells, supra note 11, at 1131–32 (arguing in favor of courts’ use of strict scrutiny when reviewing laws that infringe on core tribal rights).

^511 Newton, supra note 9, at 243.

^512 Id. at 240.
"judicial scrutiny of federal actions affecting tribal claims."\textsuperscript{513} Newton also admits she is urging tribal advocates to advance arguments whose time "may not yet be ripe" for acceptance, even though she remains optimistic that "persistent efforts and arguments [may yet] convince the courts of the [need to end] total deference to congressional power" over Indians.\textsuperscript{514} Her optimism, however, seems unwarranted given the Court's current resistance to a more robust tribal sovereignty.

Therefore, placing the future of tribes in the hands of either the federal or state governments or the courts, without more, seems decidedly unwise. Secession, federalism, substantive equality, and heightened scrutiny all fall short of protecting the space within which tribes can be different, and of guaranteeing to them the right to Anaya's constitutive and ongoing self-determination. Either the the cost of achieving that goal is too high, as in secession, or the result inadequate, problematic, or unlikely, as with the others.

\textbf{D. Nullification}

There may, however, be a solution that enables tribes to claim for themselves a republican right to self-determination short of full nationhood. That solution is to grant tribes a constrained power to nullify—to exempt themselves from the application of—laws and policies that infringe on tribal authority. Nullification would allow tribes to continue to share in some of the benefits of their continuing association with both federal and state governments. While stopping short of providing formal equality with states or the federal government, nullification could offer more than substantive equality or the benefits of heightened scrutiny.

This section proposes that tribes be authorized to nullify, or opt out of the application of, federal and state laws and regulations that diminish tribal sovereignty, specifically those laws or regulations that lessen a tribe's identity as "Indian."\textsuperscript{515} This authority could come as an affirmative, legislative grant of

\begin{itemize}
  \item \textsuperscript{513}Id. at 240; see also Mancari, 417 U.S. at 555 ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").
  \item \textsuperscript{514}Newton, \textit{supra} note 9, at 288. Johnson recommends a frontal assault on the plenary power doctrine. Johnson, \textit{supra} note 11, at 714–15. He suggests that the Court should overturn \textit{Lone Wolf} and subject both federal and state legislation that adversely affects Indians to the equivalent of "equal protection" strict scrutiny. \textit{Id.} at 714. He looks with favor on the Supreme Court of Canada's ruling in \textit{Sparrow v. The Queen}, [1990] S.C.R. 1075, which interpreted a 1982 amendment to the Canadian Constitution codifying aboriginal rights of indigenous peoples. \textit{Sparrow} held that the Canadian federal government may not infringe aboriginal or treaty rights without strong justification, and that "legislation adversely impacting Native Americans" must be subjected to strict scrutiny to be sure it meets the Crown's duties towards its aboriginal peoples. Johnson, \textit{supra} note 11, at 714–15; see also Wells, \textit{supra} note 11, at 1133 (using \textit{Sparrow}'s principles to guide his legislative proposal).
  \item \textsuperscript{515}This proposal is not as far-fetched as it may seem in the twenty-first century. \textit{See}, e.g., Tarlock, \textit{supra} note 47, at 556–67 (discussing "toleration" as basis for allowing cultural
a nullification power, a legislative acknowledgment "reinstating" a power that tribes have always held, a law helping to guide legislative decisionmaking affecting tribes, or a shift in the Court's Indian law jurisprudence that would allow appropriate uses of this power. This proposal is conceptual only, and leaves to others the hard work of developing its details. At least in theory, nullification presents a promising way of enhancing tribal sovereignty without fracturing the union or creating racial homelands.

Allowing tribes to invalidate or exempt themselves from the application of offending laws would preserve for tribes the space that they need to maintain a measured separatism within which they can continue to be vibrantly different. However, this solution is not without problems. Although tribes are unlikely to abuse the power, nullification has a dark history in this country that must be addressed. In addition, in order to implement a tribal nullification power, Congress must be persuaded to give up some of its longstanding—albeit unfounded—preemptive authority over tribes, and/or the Court must be convinced of the correctness of supporting some instances of tribal resistance to assertions of federal and state jurisdiction over tribal matters. Because nullification places the burden on tribes to exercise this power, tribal inaction may validate otherwise suspect laws, and smaller tribes may not have the resources to challenge every ill-conceived law or policy. Other culturally and normatively distinct communities may seek similar powers, and granting tribes this power may not only separate them too far from the values of the communities that surround them, but could also inflict harms on those communities.

Allowing tribes to fend off the application of offensive laws—like the Dawes Act or the Major Crimes Act—by invalidating the laws' application to minorities to either "exempt themselves from [uniform] laws... that threaten... [their] status quo" or to isolate themselves from "dominant culture, and [exercise a] greater degree of self-governance within the existing political structures").

State nullification of unappealing laws is hardly a novel concept in this country. Its abuse led to a civil war. States in the eighteenth and nineteenth centuries nullified a variety of federal laws that they considered unconstitutional, or simply objectionable. See H. Newcomb Morse, The Foundations and Meaning of Secession, 15 STETSON L. REv. 419, 421–22, nn.9–10, 11, 14–17, 20–21, 23–24 (1986) (citing these federal laws). Senator John C. Calhoun equated nullification with "declaring null an unconstitutional act of the General Government, as far as the State is concerned." WENDELL HOLMES STEPHENSON, A BASIC HISTORY OF THE OLD SOUTH 167 (1959). Although tribes are not the equivalent of states in our federal structure, they nonetheless share features with states of relevance to this discussion of nullification. For example, tribes, like states, have the "inherent, autonomous... capacity... [to] enact [and enforce] laws, regulate [activities on their lands], and raise and spend money without having to secure authority from any other level of government." See Richard Briffault, "What About the 'Ism?'" Normative and Formal Concerns in Contemporary Federalism, 47 VAND. L. REv. 1303, 1304, 1306 (1994) (describing what he considers to be "essential [state] features"). Their reservations give tribes "territorial integrity," like states, and tribes—even more than states—function as a critical component of their members' "political, economic, and cultural [identity]." Id. at 1306.
them because those laws invade rights preserved to Indians by their tribe’s sovereignty, is comparable to what some scholars believe the Ninth Amendment preserves for individuals under the Constitution—unenumerated fundamental liberty rights created or preserved in state constitutions.  

Like unenumerated fundamental individual rights preserved by the Ninth Amendment through state constitutions, Indians have fundamental collective rights that should be preserved to them by their tribe’s sovereignty. These include, for example, the right to engage in tribal ceremonies and customs, practice a religion, speak a language, manage tribal natural resources, and be subject to tribal laws. Like “citizens in our federal system[, who are] free to articulate, through their autonomous state governments, the values of human liberty they particularly cherish” and to have those rights protected from an invasive central government, so Indians should have protected the rights they particularly cherish.

However, tribal nullification is at odds with Congress’ exercise of plenary power over tribes. It will only emerge as a solution if Congress can either be persuaded to partially rescind an authority it usurped centuries ago or affirmatively authorize tribes to use this power. Republican thinking might be helpful in reaching that end.

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518 See Calvin R. Massey, The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law, 1990 Wis. L. Rev. 1229, 1232 (arguing that Ninth Amendment gives citizens “the power, through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers”). Massey goes on to argue that “[j]ust as the fifth amendment prevents Congress from using its delegated powers” in violation of some right enumerated in the Bill of Rights, “the ninth amendment prevents Congress from” doing this in violation of some “unenumerated federal right contained within a state constitution.” Id. at 1232–33. Massey calls this “a form of reverse preemption.” Id. at 1233.

519 Interestingly, the Ninth Amendment has been advanced by various members of the Court as a possible textual home for the right to privacy, see Griswold v. Connecticut, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring), and to uphold a right of press access to criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n. 15 (1980).

520 Massey, supra note 518, at 1265–66.

521 Wells suggests Congress might pass a law that “recognizes and protects” core tribal rights. Wells, supra note 11, at 1132. Such a law might include “internal procedural guidelines for Congress to follow when considering future legislation that may infringe [those] core rights,” such as special “rules governing floor consideration of legislation [affecting] core rights, [or] mandatory committee reports considering the impact[s] of... legislation” on core rights. Id. at 1133–35. Laws might also include “rules of construction for judicial interpretation of statutes” that may conflict with core rights, which rules require such legislation to be construed narrowly; a law waiving the United States’ sovereign immunity from money damages; and allowing compensation for infringement of certain core rights. Id. at 1132–35. But see id. at 1136–37 (admitting that legislative proposal provides limited protection for tribes because future Congresses can repeal any portion of it at any time, and would be less than likely to identify circumstances in which its own breaches of trust might be remedied).

522 Some might argue that Congress should do this because it is the honorable thing for it to do. See Newton, supra note 9, at 262–63 (discussing “morality of promise-keeping” and importance of keeping the nation’s word in the international sphere (quoting HARRY H. WELLINGTON, LABOR AND THE LEGAL PROCESS 189 (1968)); Wells, supra note 11, at 1132 (“[T]he nation’s honor is at stake when the government deals with Native Americans.”).
Michelman sees in “legislative politics[, as well as in] constitutional adjudication[, a] form[ of self-revisionary normative dialogue through which personal moral freedom is . . . achieved.” 523 Ackerman calls this a “‘transformative’ moment of civicly aroused popular politics.” 524 The aim of republican deliberation “is not just to aggregate private preferences, or to achieve an equilibrium among contending social forces,” rather it is the attainment of a normative public good. 525 According to Sunstein, the “republican belief in deliberation counsels political actors to achieve a measure of critical distance from prevailing desires and practices, subjecting [them] to scrutiny and review.” 526 “[B]ecause a true[ , open-ended dialogue, in which many points of view are considered,] presumes that arguments will be listened to and answered, there is less likely to be a bias [in favor of] the status quo.” 527 Republican dialogue, therefore, should “lead to, or be associated with, greater equality, participation, innovation, and universality.” 528 For these reasons, republicans, as noted previously, are not hostile to the redistribution of wealth and entitlements and are skeptical of classifications based on race, ethnicity, gender or poverty because they are the product of social power. 529

If Congress’ deliberations are viewed through a republican lens, then the capacity exists for Congress to have a transformative moment on the topic of tribal sovereignty. This would occur when it acts as an other-regarding—not self-regarding—institution, and allows alternative perspectives to revise its

523Michelman, supra note 339, at 1494.
524Id. at 1523 (referring to Bruce Ackerman, Transformative Appointments, 101 HARV. L. REV. 1164 (1988)). While Michelman goes on to call Ackerman’s constitutional theory the “most deeply popularist and genuinely republican,” he criticizes it “as authoritarian constitutional jurisprudence.” Id. at 1520.
525Sunstein, supra note 339, at 1548.
526Id. at 1548–49; see also id. at 1549 (“Existing desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information.”).
527Fitts, supra note 378, at 1655.
528Id. “[R]epublicans [understand] that deliberative processes [can be] undermined by intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, . . . [and] disparities in political influence,” but these are overcome by “the republican beliefs in equality and universalism” as well as civic virtue—that “citizens and representatives,” in “their capacity as political actors, . . . [are to ask] what will best serve the community in general.” Sunstein, supra note 339, at 1550–51 (commenting that for “modern republicans[,] . . . civic virtue [is invoked] primarily in order to promote deliberation in the service of social justice, not to elevate the character of the citizenry” as it is in traditional republican thought).
529See Sunstein, supra note 339, at 1551, 1581 (citing “republican emphasis on the social construction of property rights” as reason “republicans are hardly hostile to redistribution or to collective efforts to reassess the existing distribution of wealth and entitlements.”). While “[r]epublican thought has traditionally been allied with exclusionary practices[,] . . . the premises of republican thought [the beliefs in political equality and deliberation—may actually] furnish an aspiration that turns out to provide the basis for criticism of [exclusionary] republican traditions.” Id.
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prior policies. Michelman calls this "jurisgenerative" politics—"the mobilization, formation, and expression of a public-regarding, popular determination to legislate a 'decisive break with the country's constitutional past.'"

Assuming Congress can be persuaded to have a jurisgenerative moment and limit its plenary power over tribes, granting one government the power to nullify laws enacted by another is potentially very destabilizing, and could cause unwanted spillover effects, such as environmental harms, on innocent parties living in adjacent states. Further, if such a power is improvidently granted to tribes, then other culturally distinct groups, like the Amish, Mormons, or Hasidic Jews, might seek comparable authority. Therefore, this power should be narrowly drawn to avoid these problems that undermine basic aspects of our constitutionalism.

Rosen writes about the need to encourage "[g]eographic constitutional nonuniformity . . . to enable idiosyncratic but valuable discrete communities [(including tribes)] to endure" and engage in the "norm-generation" essential for their survival. He proposes relieving those communities of the effect of otherwise applicable constitutional norms, and suggests the application of two criteria for identifying these communities. First, the community in question must be both "valuable" to the society as a whole and have "distinct[] needs whose well-being [is] threatened [by the application of] ordinary constitutional doctrines." Second, there must be "relatively bright-line boundaries that demarcate the operation of ordinary doctrines from the nonuniform," allowing for easy application of the concept.

Admittedly, Rosen's analysis is not completely apposite to the tribes' situation, because tribes generally need protection from the Court's Indian law jurisprudence and federal Indian policies, not from constitutional doctrine. Nonetheless, Rosen's criteria are useful for distinguishing tribes from other culturally distinct communities that might otherwise be entitled to nullify

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530 See Fitts, supra note 378, at 1651 (describing modern civic republicans as articulating "vision of public decisionmaking . . . [] in which decisions are made in the legislative process through [neutral decisionmaking,] principled deliberation and reasoned dialogue"). But see Sunstein, supra note 339, at 1579 (suggesting heightened judicial scrutiny of legislative deliberations may be necessary to ensure that legislators do not reflexively follow their constituents' interests).
531 Michelman, supra note 339, at 1520 (quoting Ackerman, supra note 524, at 1172.)
532 See, e.g., Tarlock, supra note 47, at 550-52 (finding legitimacy in cultural claims of some at risk Western communities).
533 Rosen, supra note 478, at 1192-93.
534 Rosen identifies tribes as qualifying idiosyncratic communities. Id. at 1193.
535 See id. at 1169.
536 Id. Rosen notes that the case law applying geographic constitutional nonconformity typically suggests the presence of two preconditions: (1) "nonuniformity . . . to permit the creation or preservation of the norms that constitute the particular community"; and (2) strong societal interest "in the particular community's existence." Id. at 1149.
537 Id. at 1194.
threatening laws. With regard to the first criterion, this Article has argued that the ability of tribes to continue as a source of unique cultural norms is severely threatened by the current Court, and that the survival of tribes as discrete, healthy centers of norm generation and dispersion has value for society as a whole. Although other culturally distinct groups might also qualify under this first prong, only tribes with reservations can qualify under the second, because they occupy land with distinct boundaries separating them from the general society. Therefore, not only are reservation tribes arguably entitled to the relief that Rosen suggests, but for the more limited purposes of this Article, his second criterion substantially constrains the potential spillover effect to non-Indian groups of granting tribes the power to nullify threatening laws.\footnote{See Gould, supra note 7, at 897 ("What distinguishes tribal Indians from other groups is the claim of sovereignty—the right not simply to be self-governing, but to exercise dominion over land."); McCoy, supra note 112, at 392 ("An important distinction between tribes and ‘amorphous’ groups is that tribes have historically been associated with designated land in the form of reservations.").}

Further limitation of this authority may also be necessary. Tribes should not be able to invalidate any law they do not like, only those that threaten their continued existence as discrete centers of norm development and dispersion—Rosen’s first prong. Like Rosen found, there needs to be a way to distinguish, in this case, not between potentially qualifying communities, but between laws that threaten the continued existence of tribes and those that do not.\footnote{Massey also writes about the need to “identify[] fundamental rights in a principled fashion” and suggests that the way to go about doing this is to test the right against “history and tradition.” Massey, supra note 518, at 1258–59.}

The standard used in Montana v. United States\footnote{540 U.S. 544 (1981).} to determine when it should accede to an exercise of tribal sovereignty—a matter that would have a direct, negative effect on a tribe’s political integrity, economic security or its health and welfare—\footnote{Id. at 566.}is too narrow for our purposes here because it may not reach laws that interfere with tribal cultural life and identity. Canadian courts, however, apply a broader standard when evaluating whether a federal or provincial law runs afoul of constitutional protections for native peoples. They ask whether the suspect law touches matters at the core of the individual or collective identities of Aboriginal peoples as tribal Indians—“their ‘Indianness’”—or “affect[es] the essential characteristics of a people as Indian people,”\footnote{Id. (quoting JACK WOODWARD, NATIVE LAW 121 (1989); see also Bruce Ryder, The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations, 36 McGill L.J. 308, 368–69 (1991) (citing language from Canadian Supreme Court decisions, which have held invalid otherwise valid provincial laws “if their application would ‘impair the status or capacity’ of Indians, ‘regulate Indians qua Indians,’ or touch on matters that are ‘inherently Indian’ or closely related to the ‘Indian way of life’” (emphasis added) (citations omitted)); Wells, supra note 11, at 1134 n.115 (drawing upon} not just the political and economic survival of tribes. If the
answer is "yes," then the law is invalidated. Because the Canadian standard protects what it is to be Indian—what makes tribes "discrete" nomic communities—it does a better job of protecting tribes from inroads into their sovereignty than Montana does.\[^{544}\]

However, neither the Montana nor Canadian standard addresses the situation in which an exercise of this power interferes with some other enumerated fundamental liberty right or causes adverse unwanted effects on an adjacent jurisdiction. Massey recognizes that granting individuals the right to prevent the application of federal law to some practice protected by their state constitutions because it is an unenumerated "liberty-bearing right[,]"\[^{545}\] may be at odds with enumerated federal constitutional rights or other federal mandates.\[^{546}\] He concedes, in those situations, that the Constitution (or other federal mandate) would preempt the unenumerated right, no matter how fundamental; but, only after a searching review by a court to be sure that the right is "implicit in ordered liberty" (in other words, one that is "essential to a free people"), and that the practice is part of "the most specific tradition available."\[^{547}\]

A similar test could be applied to any exercise by a tribe of the nullification power: does it meet some version of a Montana-Sparrow standard set out above, and is it one founded on the tribe’s traditional practices? Thus, for example, in the case of a tribe’s use of a hallucigen like peyote as part of its religious practices, a court might find that the practice is based both upon a fundamental right—the right to practice one’s religion—and one that has a long tradition within the tribe.\[^{548}\]

Nor would Massey allow the Ninth Amendment to be used to preserve unenumerated rights, no matter how fundamental, if they diminish the fundamental rights of others or allow a state to "game the system" by capturing for its citizen certain benefits, the costs of which are paid by out-of-staters.\[^{549}\] He would first ask if the right being infringed upon was fundamental, and if it was, whether the infringement was substantial.\[^{550}\] This test might also be useful

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\[^{544}\]See Newton, supra note 9, at 286–87 (advocating educating Court about significance of tribe and tribal membership to Indian’s concept of dignity and personhood, and importance of land and sovereignty to identity of Indians as people, to enable Court to do better job of accommodating tribal interests with those of larger political community).

\[^{545}\]Massey, supra note 518, at 1257 (internal quotation marks omitted).

\[^{546}\]Id. at 1254–56.

\[^{547}\]Id. at 1259–60 (internal quotation marks and citations omitted).

\[^{548}\]Application of Massey’s test might have resulted in a different outcome in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990) (sustaining Oregon’s denial of unemployment compensation for two employees who were dismissed for ingesting peyote for ceremonial purposes).

\[^{549}\]See Massey, supra note 518, at 1257.

\[^{550}\]Id. at 1262–63.
in situations arising on a reservation. For example, barring a county sheriff from searching tribal governmental offices in order to enforce possible acts of welfare fraud against individual members, while infringing upon the county’s fundamental interest in preserving law and order, is not a substantial infringement of that right when there are other ways of achieving that objective, such as working cooperatively with the tribe to enforce against the individuals. 551

There is also the potential problem of undesired spillover impacts on adjacent communities when a tribe resists the application of an outside norm. In some of these situations, for example restricting its use of peyote, the effects would be limited to the reservation. But, in others, such as resisting the application of stringent pollution controls to some tribal activity or allowing certain activities—like clear-cutting reservation trees, diverting a river, allowing the disposal of hazardous or radioactive wastes on the reservation, or pumping an underground aquifer—the effect might not be contained. In those situations, however, the answer is not to limit the tribe’s power to exempt itself from the application of a constraining federal or state law, 552 but to expect that the tribe will learn to adjust its activities so that they are not harmful to residents of neighboring states, just as the states learned that they engaged in such activities at their peril. 553

551 See Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 554 (9th. Cir. 2002) (holding that exercise of search warrant against Tribe on tribal property interfered with right of reservation Indians to make and be governed by their own laws), vacated and remanded sub nom. Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 712 (2003) (remanding on issue of what federal common law prescription, if any, enables tribe to maintain action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal process).

552 Massey would say that in such circumstances, the state-preserved individual right would not rise to the level of Ninth Amendment protection. See Massey, supra note 518, at 1256.

553 See, e.g., Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (“When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.”). More specifically, if the polluting tribe is exercising delegated authority under one of the federal pollution control statutes, the U.S. Environmental Protection Agency, which retains oversight over the administration of those programs, could be expected to intercede to correct any problems that might arise under its delegated authority. Alternatively, the tribe could be sued in federal court under the citizen suit provisions in those laws. See, e.g., Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1100–01 (8th Cir. 1989) (holding that Resource Conservation and Recovery Act abrogates tribal sovereign immunity from liability for cleaning up dump sites located on reservation lands, and that tribe, along with Bureau of Indian Affairs and Indian Health Service, was responsible for cleanup). Tribal sovereign immunity will shield the tribe from claims under laws without citizen suit provisions or from common law nuisance claims. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978). That immunity extends to tribal agencies. See, e.g., Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670 (8th Cir. 1986) (stating that “tribal housing authority possesses attributes of tribal sovereignty”). However, a tribe is not immune from suit by the United States. United States v. Yakima Tribal Ct., 806 F.2d 853, 861 (8th Cir. 1986). Nor does the tribe’s immunity protect tribal officers. Santa Clara Pueblo, 436 U.S. at 59. Prospective
Concededly, it will be difficult to persuade Congress to have a jurisgenerative moment and relinquish the plenary power over tribes that it has aggregated to itself for centuries. It could do this by affirmatively granting legislative power to nullify certain types of laws, enacting a law that would guide legislative decisionmaking affecting tribes (such as Wells suggests)\textsuperscript{554}, or legislatively acknowledging that Congress is “reinstating” a power tribes have always had.

Alternatively, the Court could have its own jurisgenerative moment and recognize the value of having discrete nomic communities—like Indian tribes—in our pluralistic, heterogenous country. One way that the Court could do this is to exercise restraint when it reviews tribal resistance to culturally destructive laws or policies. This may not be as far-fetched as it sounds, as the Court has exercised restraint in at least one similar situation, for reasons that seem equally compelling for tribes. In \textit{Fornaris v. Ridge Tool Co.},\textsuperscript{555} the Court explained why it exercises restraint when reviewing Puerto Rican laws:

\begin{quote}
The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could said to be “inescapably wrong.”\textsuperscript{556}
\end{quote}

In \textit{Fornaris} the Court said that courts should not construe laws from a different culture in a way that ignores the uniqueness of that culture; here, the Court is being asked to allow a unique culture to ignore laws that leave little room for it to survive. The basic principle remains the same—the Court needs to exercise judicial restraint when faced with legal actions arising from cultural differences.

The Court should also approach any law that a tribe nullifies with the presumption that it is suspect and should not survive review absent a compelling countervailing need—much like Randy Barnett suggests with

\textsuperscript{554}Wells, \textit{supra} note 11 at 1132–33.
\textsuperscript{555}400 U.S. 41 (1970).
\textsuperscript{556}Id. at 42–43 (citing Bonet v. Texas Co., 308 U.S. 463, 471 (1940)).
respect to protecting fundamental rights under the Ninth Amendment.\textsuperscript{557} Barnett argues that the Ninth Amendment creates a “general constitutional presumption in favor of individual liberty” and would place the burden on the government to justify the intrusion.\textsuperscript{558} Borrowing from Fornaris, the defender of a suspect law might have to show that it would be inescapably wrong to allow nullification because the national or state law advances an important constitutional norm, which tribal nullification would threaten,\textsuperscript{559} or that the tribe’s actions would cause severe, unremediable effects on adjacent jurisdictions—\textsuperscript{560} the two situations that Massey identified as trumping an unenumerated state constitutional right protected by the Ninth Amendment.\textsuperscript{561} The proposal also borrows from Sparrow the idea that the federal government assumes the burden of justifying any action that would negatively affect aboriginal rights protected by section 35(l) of the 1982 Constitution Act.\textsuperscript{562}

\textsuperscript{557}See Randy E. Barnett, Reconceiving the Ninth Amendment, 74 CORNELL L. REV. 1 (1988).

\textsuperscript{558}Barnett, supra note 557 at 35; see also Del Valle, supra note 510, at 48 (stating that Court in Fornaris placed affirmative burden on party seeking to overturn Puerto Rican court decision to show court’s construction of local law was “inescapably wrong”).

\textsuperscript{559}Johnson proposes a slightly different standard when he suggests that state laws apply on a reservation “[w]here an Indian and non-Indian are involved . . . even though Congress has never so legislated,” if the tribal interest is “modest” and the state interest “great.” Johnson, supra note 11, at 697. However, Briffault suggests that federal courts take a structural approach to federalism questions, under which courts evaluate whether “national action” “threatens the formal protections and powers of the states” or in some way diminishes their “capacity to be independent lawmakers and alternative power centers within the federal framework, rather than” an approach that calls for the courts to weigh implications of national actions for values said to be advanced by that structure, because the latter “require[s courts to] assess[] . . . empirical data” and engage in intensely political value judgments. Briffault, supra note 517, at 1322, 1350–53.

\textsuperscript{560}See Sparrow v. The Queen, [1990] S.C.R. 1075, 1099, 1111 (holding that legislation affecting exercise of aboriginal rights is valid only if court determines it meets test for “justifying” interference with right “recognized and affirmed” under 1982 Constitution Act, placing burden of justifying legislation that has any negative effect on any aboriginal right protected under Act on law’s proponent, and making any legislation that interferes with aboriginal right prima facie infringement of Act). Under Sparrow, to find a prima facie case, a court must determine whether (1) the “limitation is unreasonable,” (2) the “regulation impose[s] undue hardship,” and (3) the “regulation denies holders [of the right] their preferred means of exercising [it].” Johnson, supra note 11, at 691. If there is a valid legislative objective behind the interference, such as conserving and managing a natural resource, the objective will probably be considered valid. Id. If there is a valid legislative objective, the court then turns to an examination of “whether ‘the honour of the Crown’ has been upheld” (in other words, whether the Crown has upheld its trust duty toward aboriginal peoples). Id. A Canadian court must also look at whether there has been the least infringement possible, whether fair compensation is available if an expropriation is involved, and whether the aboriginal group has been consulted with respect to the conservation measures. Id. at 691–92. Johnson goes on to note the similarities between the so-called Sparrow rule and equal protection jurisprudence in this country, especially strict scrutiny. Id. at 693–95.

\textsuperscript{561}See supra notes 518–22 and accompanying text.

\textsuperscript{562}Constitutional Act of 1982, pt. II, § 35(1) (“The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”), quoted in Wells, supra note 11, at 1128.
[F]ederal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with . . . the concept of holding the Crown to a high standard of honourable dealing.  

Rather than relying on Congress to take affirmative action to return to tribes a portion of the authority usurped from them, the Court could take these steps on its own by adopting a less deferential attitude toward congressional power over tribes and a more protective attitude toward tribal sovereignty, as Newton suggests. Indeed, courts are uniquely suited to perform this function because, according to Michelman, they have the particular capacity "to conduct a sympathetic inquiry into how . . . the readings of history," upon which the "voices from the margin" "base their complaint[s,] can count as interpretation of that history—interpretations which, however re-collective or even transformative, remain true to that history’s informing commitment to the pursuit of political freedom through jurisgenerative politics."  

However, given the Court’s steadfast reluctance to engage in jurisgenerative politics on matters of tribal sovereignty, culture, or property, and its unwillingness to preserve tribes as discrete centers of norm creation and dispersion in this country, "Congress may now be the preferred forum," despite the potential obstacles to a legislative approach. The growing political power of tribes may make congressional action more likely today than it might have been even a decade ago. However, there is risk that pursuing nullification (or any other enhancement of tribal sovereignty) through self-interested political action, in which "preferences are formed against the [shifting] backdrop of disparities in power" which may (or may not) favor the tribes at any given moment, would contradict the republican’s search for the common good or civic virtue. Tribal invocation of transcendent republican principles provides a foundation for political (or judicial) action that avoids this risk and, thus, better withstands the test of time.

VII. CONCLUSION

It may seem that reason and persuasion are too slow. Let us grant, said Jefferson, that they require patience; but "the ground of liberty is to be gained by inches . . . we must be contented to secure what we can get, from time to time, and eternally press forward for what is yet to come."
to get. It takes time to persuade men to do even what is for their own good."

It is ironic that Jefferson’s observation of Indians “led [him] to [his] theories of inherent rights in all men,” when, two centuries later, Indians have yet to share in that vision. This Article has recounted how a nation built on recognizing tribal dominion over land so that it could be transferred by treaty or sale, first to the Crown and then to the federal government, has, over time, conveniently put this construct aside to advance a different political and economic agenda. Republican notions of self-determination and self-government that animated the founding of this country were briefly applied to tribes so long as they served the mercantile interests of colonizing Europeans. Later, in the face of westward pushing settlers’ insatiable appetite for land, republican ideals gave way to broken promises and force. Unchecked, ill-conceived, and destructive federal policies tore at the fabric of Indian society. At the same time, the Court dismantled notions of independent tribal sovereignty. Yet, through it all, Indian tribes persevered. Today, tribes are fully capable of functioning as centers of dispersed sovereign authority, provided a coherent and persuasive theory to support that result can be developed, and an institutional place found for tribes within our federal structure.

This Article finds that theory in republicanism. Republican principles show why tribes are deserving of a more robust sovereignty than they have at present. This Article shows how those principles might be applied to return political and cultural autonomy to tribes. Alternatively, if this does not happen, tribes may disappear as discrete centers of norm development and dispersion because of the failure of traditional doctrines to protect them from incessant assimilative pressure. Like Michelman and Sunstein, this Article has engaged in a little “normative tinkering” with republican principles to show that while enhancing tribal sovereignty risks the perils of factionalism and self-interested political decision making, it also makes tribes stronger participants in the political and economic life of this country. Doing this, in turn, strengthens the overall deliberative political process. Although resuscitating tribal sovereignty invites conflict with federal and state interests and with some

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569 Falkowski, supra note 483, at 213 n.28 (citing ABRAHAM S. EISENSTADT, AMERICAN HISTORY: RECENT INTERPRETATIONS 17–19 (1969)).
570 Michelman uses the phrase “normative tinkering” to describe “the ongoing revision of the normative histories that make political communities sources of contestable value[s] and self-direction for their members,” and the need to recognize and reconceive “those histories” so that the political community can be extended to persons who do not have a stake “in ‘our’ past because they had no access to it.” Michelman, supra note 339, at 1495; see also Rodgers, supra note 13, at 38 (attributing republicanism’s “paradigmatic success,” in light of its “ontological fragility,” to responsiveness of interpretative disciplines, such as history and law, “not to evidence[,] . . . but to their interpretative problematics,” and saying that “gift of republicanism, as an explanatory concept, lay in its ability to do so much disparate interpretative work”).
basic norms, like individual rights, modern republican thinking folds these different perspectives into a deliberative process. It believes the resulting conversation will not only transform the participants into other-regarding, civically-engaged citizens, but will also result in a better regulative idea for us all.

This Article has suggested a somewhat surprising institutional innovation to help tribes move from the margins of that conversation closer to its center and to give meaningful, yet manageable content to Wilkinson's measured separatism. This solution calls for the Court to allow tribes to exercise a limited authority to nullify laws and policies that would otherwise diminish their sovereignty. However, this requires the invocation of republican principles once again. Congress must be other-regarding in its willingness either to concede tribes have had this power all along or to refrain from exercising its plenary power to block its use, and the Court must be willing to engage in Michelman's jurisgenerative thinking when asked to review the power's use. We can help these two institutions reach that end, if we can be other-regarding, civically engaged citizens for a long enough period of time to recognize that our country's treatment of Indian tribes has been (and continues to be) an anomaly in our republic. If we can do this, then the sorry state of tribal sovereignty today should tell us that as a country, we are ready for a "refounding"—what Michelman refers to as a "decisive break with [our] constitutional-legal past,"—in which, speaking as a "mobilized constitutional majority," we "authorize a sharp [legislative and] judicial departure from prior . . . understanding[s]" about our history.

In this way, the republican concept of dispersed sovereignty could provide a theoretical solution for the problem of tribal sovereignty without undermining our national identity or destabilizing our capacity to govern. Similarly, nullification could provide the institutional means to enable tribes to function as meaningful sovereigns within our federal system.

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571 Michelman, supra note 336, at 1520 (quoting Ackerman, supra note 524, at 1172).
572 Id. (quoting Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1053, 1070–71 (1984)).