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RACIAL EQUALITY: OLD AND NEW STRAINS AND AMERICAN INDIANS

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PROLOGUE

After the American Indian male renounced allegiance to his tribe, shot his last arrow, and accepted the plow, the federal official said: "This act means that you have chosen to live the life of the white man—and the white man lives by work. From the earth we must all get our living . . . . Only by work do we gain a right to the land . . . ."[1]

After the American Indian female renounced allegiance to her tribe, accepted the work bag and purse, the federal official said: "This means you have chosen the life of the white woman—and the white woman loves her home. The family and home are the foundation of our civilization."[2]

INTRODUCTION: AMERICAN INDIAN SOVEREIGNS ARE MORE THAN RACE ONLY

The usual constitutional concepts of racial equality, and the older concepts of race as well as the evolving definitions, do not adequately encompass the political and legal status of American Indians. Unique equality issues arise from their indigenous status as tribal sovereigns. The individual rights focus of race does not fit the collective political right of American Indians. Constitutional law development in the

1 OFFICE OF THE SECRETARY, DEP'T OF THE INTERIOR, DOC. 89.94.04b, ATTORNEYS AND AGENTS, COMPETENT INDIANS 5–6 (Central Classified File 1936–1937). Until 1924 American Indians were not automatically citizens of the United States.

2 *Id.* The naturalization ceremony for American Indian individuals to make them citizens of the United States had "his" and "her" versions. *See also* 4 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 233 fig.1 (1988) (explaining a typical ritual of admission to citizenship); *infra* Part II.B.

United States has used race and gender as the core for discretely identifiable groups with an individual rights basis for equal protection.[3] American Indian/Native American[4] nations are a political entity sui generis in the Constitution. They are neither states nor foreign nations, nor another racially distinct minority.[5] Since American Indians are also racially distinct for some laws, any legal exploration involves considering "when race is not race."[6] Thus, the unique collective right that tribal sovereigns insist on retaining does not fit the usual constitutional conversation about the individualized "who" and "what" activities shall be cognizable and protected.

Indian law cases such as *Santa Clara Pueblo v. Martinez*[7] clearly expose the tension between constitutional individual rights conceived in an abstract sense and the tribe's right as a cultural and political community with distinct consensual values. In *Martinez*, an individual member charged her Pueblo with gender discrimination under the Pueblo's ordinance on membership qualifications.[8] When a female member sought declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who married outside the tribe—while extending membership to children of male members who married outside the

3 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (deferring for another time the question of "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

4 Either term is used by the indigenous peoples of the United States. For style purposes, this Article will primarily use American Indian and Indian.

5 This statement on American Indian status does not aim to diminish the legitimacy of ethnic and racially distinct groups nor their grievances arising from having been historically disfavored in the United States. The political status as sovereign remains primary for indigenous peoples in the United States and outside the United States in international law. As individuals and in specific contexts, American Indians are treated as racial or ethnic minorities and entitled to rights and protections, e.g., inclusion in the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to h-6 (2000), and the federal Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973bb1 (2000).

6 When American Indian/Native American law is not law about race is a subject of scholars' discourse and disagreement. *See, e.g.*, Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169 (1991); David Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. REV. 191 (1991) [hereinafter Williams, *Sometimes Suspect*]; David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991) [hereinafter Williams, *Indians as Peoples*].

7 436 U.S. 49 (1978). For discussion of this case, see *supra* Part V.

8 *Santa Clara Pueblo*, 436 U.S. at 51.

tribe—the tribe's sovereign immunity and the Indian Civil Rights Act barred the suit.[9]

Undoubtedly, American Indians create dilemmas for advocates of equal protection to all individuals who may also affirm the right of American Indian tribes to their culturally based form of government. The contemporary situation of many tribes with the nation's highest rates of poverty and least provided for in education, housing, and employment opportunities provokes empathic concern.[10] Carol E. Goldberg points out the difficulties when individual rights "can trump the interests of others, the good of society, and the will of the majority because they are understood to derive from moral principles independent of any social conceptions of the good."[11] Goldberg succinctly states the difficulty for American Indians: "[G]rounding what is essentially a group rights claim on the rights of individual group members commits one to an individual rights critique of the group itself, a result that may tear at tribal cultures which do not privilege individual rights in the same way United States law does."[12] Knowledgeable discourse about "rights" in the Indian context requires that discussants not familiar with Indian law understand the legal and historical context in which that law was generated.

Two conditions have affected the quality of American Indian context since the first European contacts, and these continue into Euro-American constitutionalism. First, the indigenous nations are the original sovereigns within the United States' borders. As "preconstitutional" and "extraconstitutional" governments,[13] not arms of the state or federal governments, the tribal sovereigns do not conform to the popular expectation of how federalism is configured. Second, especially for purposes of this symposium on racial equality, the tribal governments also have responsibility to protect the rights of individuals, members and non-members, who are subject to tribal law. These two conditions place American Indians in their collective power as sover-

9 *Id.* at 59, 72.

10 U.S. CENSUS BUREAU, SUMMARY FILE 3 (2000) (noting the average poverty rate from 1998 to 2000 for Native Americans was 25.9%, the highest of any racial subgroup).

11 Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 889–90 (2003). Goldberg provides an insightful analysis of how individual rights standards can affect or defeat federal laws to revitalize tribal governments. She considers whether individual rights must be protected in order for tribal governments to secure economic growth, respect from non-Indian governments, and protection from congressional attacks on tribal sovereignty and culture.

12 *Id.*

13 CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 112 (1987).

eigns and as individuals outside the usual constitutional discourse represented in constitutional law casebooks.[14]

Indigenous nations have the only collective right expressed in the Constitution. The Article I authority for Congress to "regulate commerce . . . with the Indian tribes"[15] and the Article II power of the President to make treaties[16] anchor the federal recognition of the tribal sovereigns.[17] Indian law,[18] as the law made by the federal legislature and executive, clearly involves a tension, if not explicit conflict in specific instances, between the collective political interest of a tribe in contest with the constitutional framework of individual rights. Consequently, in contemporary constructs of racial equality, American Indians do not fit neatly into historical views on race and equality. Nor have constitutional scholars and critical race theorists dealt adequately with the incongruity of Indian status in the federalism or constitutional context because they form a type of "race plus."

First, I will set the colonial context for equality that was anchored in a narrow white male model as the principal civic actor. Second, the discussion proceeds to the political status of American Indians, the basis for the nation-to-nation relations that secured in treaties the lands and resources that benefited non-Indians. Historically, this political relationship meant the individual rights in the constitutional foundation did not include the indigenous peoples of the United States who, until 1924, were a non-citizen "other." Third, this Article explores the cultural difference between indigenous and constitutional visions of individual rights and community. Fourth, is a description of the efforts to remake Indians into a race and assimilate their

14 *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004).

15 U.S. CONST. art. I, § 8, cl. 3.

16 *Id.* art. II, § 2, cl. 2.

17 Other applicable constitutional provisions include: "Indians not taxed" to be excluded from those counted for representation in Congress or apportioning direct taxes, *id.* art. I, § 2, cl. 3; *id.* amend. XIV, § 2 (reinstating the exclusion of "Indians not taxed"); the war power, *id.* art. I, § 8, cl. 11; and power over federal property, *id.* art. IV, § 3, cl. 2. The Indian Commerce and the Treaty Clauses have continuously been the most relevant for the foundational law of Indian law in the Supreme Court and Congress.

18 "Indian law" is distinct from the laws made by tribes to govern themselves, which represents an expanding area of activity, as tribal governments formalize their laws, establish judicial structures, and publish their laws (providing material for scholars). See the *University of New Mexico School of Law Tribal Law Journal*, at http://tlj.unm.edu, the only online journal that focuses on law made within indigenous nations in the United States and internationally.

governments into federalism. The Indian Civil Rights Act (ICRA)[19] is the key congressional tool to impose a general constitutional standard for individual rights and how tribes govern under their laws. Fifth, this Article discusses the *Santa Clara Pueblo v. Martinez* case, which demonstrates the cultural disparity between the individual rights model of the ICRA and the political right of the tribe to self-determination. This Part includes some of the viewpoints in disagreement with the Supreme Court's holding as permissible the Pueblo's different treatment of female members who "outmarry," that is, marry nonmembers. The presumptions and risks when outsiders judge the authenticity of indigenous cultures that created internal law are briefly discussed in this fifth Part.

The conclusion affirms that the retained power of tribal sovereigns for self-governance and self-determination is the most important right for American Indians. Though American Indians are now citizens entitled to equal protection and due process, this individualistic theory is limited in force to protect culturally distinct governments built on values of consensual relations.

I. THE COLONIAL MALE MODEL OF EQUALITY

In the colonial model of citizenship and equality, the persons worthy of civic participation and rights were Anglo-American males privileged because of their education and wealth. Not included, even in the post-constitutional period, were all women, African slaves (only three-fifths of a person), and American Indians who had not renounced their allegiance to their tribal nations. One can appreciate the degrees with which constitutional law has moved away from the colonial view of equal protection and racial equality if we put aside the misleading visions from nostalgia and mythology about the founding of the new American republic.

The pre- and post-constitutional dialogues in the formation of the republic continued this limited conception of equality as the privileged "white" male. Civic leadership could not be entrusted to the unruly "masses" of Anglo-American unprivileged males, lacking sufficient education and property. The "unprivileged" males became a real and present danger in insurrections such as Shays's Rebellion of 1786 in Massachusetts.[20] The Shaysites were debt-pressed farmers and

19 25 U.S.C. §§ 1301–1303 (2000).

20 THE ALMANAC OF AMERICAN HISTORY 141–42 (Arthur M. Schlesinger, Jr. ed., 1983). Shays began his armed challenge to the state when his band of insurgents confronted the Massachusetts militia sent to protect the State Supreme Court in September 1786. Shays's band forced the court to adjourn. Then, with another insur-

others who took up arms to prevent creditors from exercising their contractual rights,[21] and similar Shaysite actions spread to other states.[22] The dysfunction of the states was a primary cause of the weakened central government that was unable to raise taxes or regulate the interstate squabbles that impeded the national economic development.

Thus, spreading social disorder doomed the national system of the Articles of Confederation and Perpetual Union and forced exigent action to save the republic. Paul Johnson has summarized the situation:

> [I]ndividual states carried out all kinds of sovereign acts which logically belong to a central authority—they broke foreign treaties and federal law, made war on Indians, built their own navies, and sometimes did not trouble themselves to send representatives to Congress. They taxed each other's trade while failing to pay what they had promised to the Congressional coffers. That, of course, was at the root of the collapse of credit and the runaway inflation. All agreed: things could not go on this way.[23]

The leading historian of this period, Gordon S. Wood, noted that the "anarchical excesses of the period seemed to be backfiring, resulting in evils even worse than licentiousness."[24] According to Wood, the

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gent leader, Luke Day, in December 1786, he assembled a rebel force of 1200 men who outnumbered the state militia. The Governor had to call for a short-term mobilization to assemble 4400 men to deal with the insurrection, which unsuccessfully attacked the federal arsenal in Springfield. It took until the end of February 1787 for the uprising to be suppressed.

21 PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 177 (1983) (reporting that James Wilson of Pennsylvania stated that Shays's Rebellion revealed "on what a perilous tenure we hold our freedom and independence"). *See generally* DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 19 (1980) (describing the historical and political forces of Shays's Rebellion); CURTIS P. NETTLES, THE EMERGENCE OF A NATIONAL ECONOMY, 1775–1815, at 97 (1962) (locating the cause of Shays's Rebellion in the heavy land and poll taxes states enacted after the Revolution).

22 ONUF, *supra* note 21, at 178–79; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 325–26 (1969) (noting the discontent of people throughout the states).

23 PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 183 (1997).

24 WOOD, *supra* note 22, at 465. For the history of tribal relations with the national and state governments, including the impact of the anarchy on the constitutional processes and decision to exclude states from relations with the tribes, see Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations From Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003), and Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1064–98 (1995), on pre- and post-revolutionary dealings between American In-

Federalists feared the uneducated, greedy, lesser men who had plunged the states and the union into a depression aggravated by violence and anarchy.[25]

A new Constitution was the remedy, and the political dialogues for its formation favored leadership of the Anglo-American male elite. Nonetheless, the new social contract, the Constitution, constrained even the voting power of the elite by denying a direct vote for Senators (later amended)[26] and for the President.[27] Contract law was sanctified and became constitutionally protected to prevent the abuses from state governments that capitulated to the Shaysite demands to alter the contract rights of creditors.[28] Federalists articulated the characteristics for the elite who should form the leadership of the new constitutional republic: social superiority based on education, experience, wealth and connections, demonstrating eligibility for political leadership.[29] Being a white male mattered, but alone did not suffice for civil participation.

For much of our national experience the constitutional republic has used the male and individual rights as the benchmarks for how the political space will protect others. Individual rights and equality have expanded by degrees, sometimes idiosyncratically, to protect African Americans as full persons, women, all ethnic minorities, and persons with disabilities through the Americans with Disabilities Act. The question of 2004 to guide us as we resolve questions of individual inequalities is: *as the benchmark moved to an able-bodied Anglo-American heterosexual male, how does any person claiming rights fit this measure?*

The retreat from laws that affirmatively protect historically disfavored ethnic minorities and women is one response to long-held privileges now threatened. The status of tribes as political entities is ensnared in the regressive response to law regimes to create equality.

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dians and the Euro-Americans, including the tension between states' rights versus central government monopoly in relationships with Indians.

25 WOOD, *supra* note 22, at 476.

26 U.S. CONST. art. I, § 3 (providing for two Senators per state, "chosen by the Legislature thereof"), *superseded by id.* amend. XVII (providing for direct election "by the people").

27 *Id.* art. II, § 1 (providing for the electoral college system).

28 *Id.* art. I, § 10 ("No State shall . . . make any . . . law impairing the Obligation of Contracts.").

29 WOOD, *supra* note 22, at 479–80 (describing the Federalists' difficulty in persuading others that these leadership qualifications would not duplicate British elitism based on wealth, social rank, and titles of nobility).

II. American Indians, the Political Collective, and Individuals

A. *Contemporary Tribal Sovereigns*

American Indians differ from the other minorities in having collective political rights. The twenty-first century involves some 562 tribal sovereigns, the political actors in the nation-to-nation relationship with the federal government[30] that was affirmed in the early Marshall Court decisions. The issues most germane to racial equality will be discussed in this Article and should not be considered a full scholarly discussion of the issues and doctrines that form the complexity of Indian law.[31] As constructed by the first Supreme Court, the political relationship was exclusively federal-tribal because of the federal monopoly in the Constitution.[32] The Constitution was designed to prevent the states from endangering national interests through their idiosyncratic state relations and wars with Indians, which had endangered the union during the Articles of Confederacy period.[33]

In the foundational cases in Indian law, the Supreme Court held that the Cherokee Nation was a "domestic dependent nation."[34] The Cherokee Nation constituted a distinct political community, with its own territory in which Cherokee laws applied, and where laws of the

30 The list of tribes in this political relationship is published annually. For the latest, see Indian Entities Recognized and Eligible to Receive Services, 68 Fed. Reg. 68,180 (U.S. Bureau of Indian Affairs Dec. 5, 2003).

31 See generally Robert N. Clinton et al., American Indian Law: Native Nations and the Federal System, Cases and Materials (4th ed. 2003); David H. Getches et al., Cases and Materials on Federal Indian Law (4th ed. 1998) for a fuller exploration of the doctrines and issues comprising Indian law.

32 *See* Worcester v. Georgia, 31 U.S. (4 Pet.) 515, 561 (1832); Johnson v. M'Intosh, 21 U.S. (7 Wheat.) 543, 587–88 (1823). Justice Marshall also construed the British relationships with the American Indians, interpreted as "conquest," thus creating a successor's monopoly for the federal government to acquire lands from American Indians. *Johnson*, 21 U.S. at 583–84. All other acquisitions or titles, by states or individuals, were invalid. *Id.* at 604–05. For the constitutional process and decision to exclude states from relations with the tribes because of the conflicts over the western lands, see Valencia-Weber, *supra* note 24, at 405.

33 Valencia-Weber, *supra* note 24, at 438–53. The Articles of Confederation reflected the dominance of state power and restricted the national government to the powers expressly delegated to the United States in Congress. Arts. of Confederation art. II (1781). On relations with the American Indians, the provision reflected the states' unwillingness to exclude a state role. Congress had the sole and exclusive power to "regulat[e] the trade and manag[ement] of all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." *Id.* art. IX; *see also* Clinton, *supra* note 24, at 1103–47 (discussing extensively the struggles with states as Congress attempted to implement a national policy).

34 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

state had no force.[35] These early cases, for good and bad from the point of view of the indigenous peoples of the United States, provided the concepts in federal common law that continuously inform contemporary Indian law decisions.[36] Counterfactual claims that the Euro-Americans or British conquered the tribes are stated as law facts and conclusion, although no tribe has surrendered its sovereignty to any European or Anglo-American power. For a variety of reasons, some pragmatic and some from international law, the initial Europeans and then the United States engaged in political relationships with the tribes and made treaties to secure land and peaceful relationships.[37] Since the Supreme Court decisions in the early constitutional period, Indian law has vacillated between two national policy approaches: to respect the political autonomy of tribes and their right to self-determination and to assimilate Indians into the presumed homogenous mainstream.[38]

Continuously, two law theories have informed the laws on tribal autonomy and assimilation made by Congress and the Supreme Court. The earliest theory held that tribal sovereignty was to be recognized and self-determination enabled through acts like the Indian Country statute.[39] Subsequently and collaterally crafted was the federal trust theory, an imposed relationship from federal common law

35 *Worcester*, 31 U.S. at 560.

36 In constructing the immense federal common law on American Indians, the Court developed special canons of construction: 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 constructed in favor of the Indians. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 608–19 (1975); *see also* United States v. Winans, 198 U.S. 371, 380 (1905) (construing a treaty as the "unlettered people" understood it). The Supreme Court in the latter part of the twentieth century began to deviate from these special canons as the Court started reconstructing state power.

37 *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 58–74 (1982) (covering the nation-to-nation relations and treaties between the Indian tribes and the emerging U.S. republic in the Revolutionary War period and the early constitutional period).

38 The cycles are summarized in CLINTON ET AL., *supra* note 31, at 18–50.

39 Indian Country as defined in 18 U.S.C. § 1151 includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments,

that makes the "dependent" Indians the beneficiary of the federal trustee's power over tribal resources, the res or corpus.[40] As the basis for lawmaking, both of these theories have produced law, rarely with tribal consent, that controls the scope of tribal sovereignty. The "plenary power" of Congress in Indian affairs broadly extends to the authority to terminate tribes, according to the Supreme Court.[41] Sustaining these theories and the derivative policies are the Constitution, treaties until 1871,[42] agreements, statutes, and tribal-federal contracts. Thus, Title 25 of the U.S. Code and Code of Federal Regulations focus on American Indians, manifesting the unique political relationship between tribes and the national government.

The sovereignty and trust theories include the cultural imperialism and subordination intrinsic in the history of racial and gender inequality. With American Indians the cultural superiority is explicit as law, as cases early in the republic's foundation from the Marshall Court continue to serve as the generative source in Indian law. For example, in *Johnson v. M'Intosh*, the Supreme Court proclaimed European "discovery" and "conquest" of indigenous peoples accompanied by the bestowing on them benefits of "civilization and Christianity."[43] The Court justified denying the American Indians full fee title to their lands, as

> the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as distinct people was impossible, because they were as brave and as high spirited as

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the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000). The Indian Country statute was passed in 1948 to resolve tribal jurisdictional issues. Act of June 25, 1948, ch. 645, 62 Stat. 683, 757. The Allotment Policy of 1887 opened Indian lands to non-Indian settlers. General Allotment Act of 1887, ch. 119, 24 Stat. 388. The resulting "checkerboard" of non-Indian fee land, carved out of former tribal lands yet adjacent to retained tribal lands, has produced problems as to which government—tribal, state, or federal—has jurisdiction. The Indian Country Statute, § 1151, has never been amended.

40 United States v. Mitchell, 463 U.S. 206, 219–28 (1983).

41 In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903), the Supreme Court forcefully declared that congressional plenary power, without express constitutional roots, allowed Congress to unilaterally abrogate treaties for the benefit of the Indians who objected to the violation of treaty provisions.

42 *See* 25 U.S.C. § 71 (2000) (ending the making of treaties). While the United States can no longer make treaties with Indians, however, many of the subsequent agreements and relevant statutes were effectively in the form of treaties.

43 21 U.S. (7 Wheat.) 543, 572–73 (1823).

> they were fierce, and were ready to repel by arms every attempt on their independence.[44]

Reflective of the cultural superiority in the federal law, in Indian law the Supreme Court, especially recently, has eviscerated the jurisdictional authority inherent for any sovereign to govern the actors and events within its territory. The Court has shifted from the geographical jurisdiction in the early Marshall decisions to a racialized and crazy-quilt configuration of tribal, state, and federal jurisdiction.[45] The result is that no non-Indian (i.e., "white" individual) in his or her person or property shall be subject to tribal laws and courts, except in certain narrow exceptions.[46] Justice Rehnquist made "racializing" explicit in *Oliphant v. Suquamish Indian Tribe* when the Court introduced an assumption that tribes had no criminal jurisdiction over non-Indians.[47] The Major Crimes Act of 1885 had already removed criminal jurisdiction for major felonies from both the tribes and the states.[48] Absent any substantive sources for the assumption, the *Oliphant* Court held that the exercise of criminal jurisdiction over non-Indians charged with misdemeanor crimes on the reservation was inconsistent

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44 *Id.* at 590.

45 *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 180–81, 224–26 (4th ed. 2004) (offering helpful charts on the crazy-quilt of criminal and civil jurisdiction).

46 The Court began in *Montana v. United States*, 450 U.S. 544, 564–65 (1981), to remove tribal jurisdiction over non-Indians hunting on non-Indian fee lands within tribal reservation boundaries. The Court used the terms "nonmembers" and "non-Indians" in this case and has not been consistent in its terminology. *Id.* at 550–51. In *Montana*, the Court ignored the earlier Indian law derived from the early Marshall Court and reverted to a presumption against tribal jurisdiction unless two exceptional circumstances existed. *Id.* at 564–65. A tribe can regulate (1) activities of nonmembers who enter consensual relationships through commercial dealings, and (2) a tribe can 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 the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565–66. Thus, a shift occurred from geographically based jurisdiction to focus on tribal membership and land tenure. *Montana* was then used to build the subsequent decisions removing civil and regulatory jurisdiction from tribes in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), and *Nevada v. Hicks*, 533 U.S. 353 (2001).

47 435 U.S. 191, 195 (1978).

48 18 U.S.C. § 1153 (2000). Subsequently, in *United States v. Kagama*, 118 U.S. 375, 384 (1886), the Court had upheld the Major Crimes Act to deny jurisdiction to the states because of the dependent status of the tribes as wards of the federal government who needed protection from the states. "They [Indians] 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." *Id.* at 384.

with the dependent status of tribes.[49] The tribes' jurisdiction has been diminished so that only authority over members seems unquestioned. The Court had created "zones of lawlessness" where no sovereign had jurisdiction over misdemeanors committed on the reservation by nonmember Indians, but Congress responded with a statute to restore tribal jurisdiction over such individuals.[50] Thus, the Court has cumulatively removed from tribes the ability to protect all persons within their jurisdictional borders, which any responsible sovereign should do. The Supreme Court has been reconstructing federalism to reserve and enlarge the power of the states, which removes authority from the federal government as well as tribes.[51] The result is a force-fitting of the tribes within state jurisdiction in accord with the Rehnquist Court's view of federalism.

The federal trust theory disregards the sovereign right of tribes, as it reflects the dominant cultural superiority combined with a land grab unsurpassed among Western nations. Trust theory is seeded in the Marshall Court's dicta that tribes were "wards" in relationship with the federal guardian.[52] Subsequent development is premised on the presumption that American Indians, as polities and individuals, are incapable of protecting their lands and resources. Both tribes and Indian individuals are subject to the trust conditions imposed in federal law, Title 25 of the U.S. Code and Code of Federal Regulations.[53] Given the aggressive acts of early colonies and then successor states with their greed for Indian lands, a protective role for the federal government makes sense at various historical times. Because states and non-Indians abused the rights of Indians, obtaining federal protection was the subject of numerous treaties between tribes and the federal government. The federal protection was important as an inducement

49 *Oliphant*, 435 U.S. at 208; *see also* Judith V. Royster, Oliphant *and its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59 (2003) (describing and criticizing *Oliphant* and its impacts).

50 *See* Duro v. Reina, 495 U.S. 676, 685 (1990) (holding that tribes do not have criminal jurisdiction over nonmember Indians on a reservation). The statute overturning *Reina* stated that the tribal powers of self-government included "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (2000). The Supreme Court upheld a challenge to the statute overturning *Reina* in *United States v. Lara*, 124 S. Ct. 1628, 1639 (2004), holding that tribal power to prosecute and punish a nonmember Indian is inherent tribal sovereignty, not delegated federal authority, and therefore double jeopardy is not a bar.

51 See *infra* note 116.

52 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

53 *See* Cobell v. Norton, 334 F.3d 1128, 1133 (D.C. Cir. 2003).

for tribes to "remove" themselves from lands coveted by non-Indians.[54] The protection promised was not honored as the federal trustee repeatedly took tribal lands for national needs (i.e., for Anglo-Americans), most notably in the Allotment Act of 1887.[55] This Act resulted in the forced breakup of communally held tribal lands into individual member fee allotments, with the sale of so-called "surplus" lands for land-hungry non-Indian settlers. Altruism also motivated this Act in the advocacy of the "Friends of American Indians" who sought to remedy the poverty of Indians.[56] Called "the most disastrous piece of Indian legislation in the United States history,"[57] the Indian-held land was reduced from 138 million acres in 1887 to forty-eight million in 1934, when the Indian Reorganization Act (IRA) ended allotment.[58] The IRA restored the tribal governments and communal land holding and included authority for the federal government to reacquire land for tribes to be placed in trust.[59]

In mainstream society, American Indians often are not perceived as distinguished by their legal status and are caught in the backlash movements experienced by racial minorities, women, and others. The tribal governance power and immunity from some state laws (e.g., some taxes) results in the American Indians being charged with unjustifiably demanding "special rights." However, in the historical law dialog involving American Indians this term has legal content arising from the unique political relationship with the national government. Despite the terms in treaties that bind the United States to tribes in critical matters like land, water, and natural resources, unhappy non-Indians demand that tribal rights be terminated to theoret-

54 *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 465 (1995) (citing the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, U.S.-Choctaw Nation, art. IV, 7 Stat. 333, 334, that promised "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws"). Instead of understanding the context of the treaty and using the Indian canons of construction, the Court applied general tax law. *Id.* at 466–67.

55 Dawes Act of 1887, ch. 119, § 5, 24 Stat. 388, 389–90 (codified as amended at 25 U.S.C. § 348 (2000)).

56 *See* ANGIE DEBO, AND STILL THE WATERS RUN 20–22 (1966) (describing the Friends of American Indians and the moral crusade to enact and enforce allotment).

57 CANBY, *supra* note 45, at 21.

58 Id. at 22. *See generally* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1559–71, 1603–23 (2001) (arguing that the failure of allotment rested on more than the notion that Native Americans were used to a common ownership system).

59 *See* CLINTON ET AL., *supra* note 31, at 299 (discussing the Indian Reorganization Act and tribal constitutions). See generally COHEN, *supra* note 37, at 144, on the legislative history and enforcement history of the IRA.

ically equalize everyone.[60] Gaming on tribal trust lands has provoked animus with demands to economically and legally disadvantage Indians. Concurrently, tribes acting as culturally-based governments are sometimes in disaccord with the liberal vision holding constitutional individual rights as the standard every government must meet to merit respect. Yet, in constitutional structure and history, individual Indians committed to membership in their tribes and to a cultural way of life were outside the citizen status and protected rights of non-Indians.

B. Indians as Individuals: The Noncitizen "Other" in the Constitution

Individual tribal members were the constitutionally constructed "other" because they were not citizens of the states or of the federal political entity. They had to rely upon their tribes to protect their interests through their tribe's relations with the national government, primarily through treaty-making. The primary relationship tool was treaty-making. However, the political relationship in the early republic was consolidated in the Department of War (1789–1849).[61] The First Indian agents were in the charge of the War Department. Not until 1849 was the Bureau of Indian Affairs transferred to the newly created Department of the Interior.[62] As "Indians not taxed," the individual members were not counted in the apportionment for congressional districts.[63] In *Ex parte Crow Dog* in 1883, the Supreme Court described the indigenous people as

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60 *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (construing the treaty terms in favor of the tribes' understanding of their proportion of fish, where the state refused to comply with treaty terms for seven tribes' right to fish on equal protection grounds of discrimination against non-Indians); *see also* Puyallup Tribe, Inc. v. Dep't of Game (Puyallup III), 433 U.S. 165 (1977) (concluding that neither the Puyallup Tribe nor its members had an exclusive right under a treaty to take fish passing through the reservation); Dep't of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973) (holding, inter alia, that the fishing rights of the Indian tribe, as protected by the treaty, foreclosed the Washington state ban on net fishing of steelhead trout); Puyallup Tribe v. Dep't of Game (Puyallup I), 391 U.S. 392 (1968) (determining that the treaty between the United States and the Puyallup Tribe protected the right to take fish in common with all citizens, but did not prohibit the state from regulating certain aspects of fishing, provided that the regulation meets the appropriate standards and does not discriminate against the tribe).

61 CANBY, *supra* note 45, at 13; COHEN, *supra* note 37, at 119–20 (describing the continuing debate on whether Indians should be transferred back to the Department of War).

62 COHEN, *supra* note 37, at 119–20.

63 U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

> subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of laws.[64]

The non-citizen "other" status of Indians was continued in the Fourteenth Amendment that expressly excluded Indians from "all persons born or naturalized in the United States and subject to the jurisdiction thereof."[65] In 1884, in *Elk v. Wilkins* the Supreme Court held that an Indian living in Omaha, Nebraska, apart from his tribe, was not made a citizen for the Fourteenth Amendment.[66] However, the non-Indian world viewed assimilation as the solution to the "problem" of the Indians who refused to disappear,[67] so the door of naturalization and civic status was created.

From 1884 to 1924, the Indian individual seeking naturalization was required to prove that he or she had become "civilized." Varied devices existed for meeting this standard. Under the Allotment Act, the Indian who took up residence apart from any tribe and adopted the habits of civilization would receive an allotment.[68] Generally, the individual's allotment was held in trust for twenty-five years, allowing him to learn to manage his land and affairs.[69] Under the Act, upon

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64 *Ex parte* Crow Dog, 109 U.S. 556, 568–69 (1883).

65 U.S. CONST. amend. XIV, § 2.

66 Elk v. Wilkins, 112 U.S. 94, 109 (1884).

67 Outside of naturalization, the policy of assimilation was carried out by the federal trustee. *See, e.g.*, Allison M. Duissias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 670–688 (1999) (describing the Dawes/Allotment Act and the Field Matron Program to train Indian women in their proper homemaker roles); Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 334 (1986) (discussing the remaking of the Indian family, where women trainers were sent to reservations to teach Indian women the Anglo-American model of homemaking).

68 25 U.S.C. § 349 (2000).

69 *Id.* § 348. In 1906 the Burke Act amended the Dawes Act to allow the Federal Government to shorten the trust period for any Indian allotee "who is competent and capable of managing his or her own affairs." *See id.* § 349. There was federal preference for males, using the male "head of household" notion. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 252 (1970). Debo described the cultural confusion during the forced allotment of tribal lands under the Allotment Act Commission scheme that allocated 160 acres for a male "head of a family," with smaller amounts to unmarried men and children. *Id.*

> The Indians expressed so much opposition to this alien 'head of a family' concept—in their society married women and children had property rights—that in 1891 the [Allotment] act was amended to provide equal

completion of the trust period, the allotee received a fee title, thereafter subject to state law, and U.S. citizenship. In a form of race privileging, Indian women who married non-Indian men were made citizens.[70] Some treaties provided for means for a specific tribe's members, more likely the male head of family, to become citizens.[71] Generally the processes required a renunciation of tribal culture and traditions and behaving within the norms of the dominant society. A statute enabling individual Indians to naturalize required the eligible persons to abandon their tribal relations, adopt the habits of civilized life, become self-supporting, and learn to read and write the English language.[72]

The individual Indians who could qualify for U.S. citizenship by demonstrating they were "civilized" renounced tribal allegiance in a special naturalization ceremony. Advancing the policy to assimilate Indians into the mainstream agricultural world, there was a male and female version of the ceremony and oath.[73] In the male ceremony he shot his last arrow, which meant he was no longer to live the life of an Indian. He took a "white" name, and grasped the handles of the plow. After accepting the plow, he was told by the official administering the oath:

> This act means that you have chosen to live the life of the white man—and the white man lives by work. From the earth we must all get our living, and the earth does not yield unless man pours upon it the sweat of his brow. Only by work do we gain a right to the land or to the enjoyment of life.[74]

The female ceremony was shorter and she was presented a work bag and purse to hold. The official then said:

> This means that you have chosen the life of the white woman—and the white woman loves her home. The family and the home are the foundation of our civilization. Upon the character and industry of the mother and home maker largely depends the future of our Nation. The purse will always say to you that the money you gain from your labor must be wisely kept. The wise woman saves her money,

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shares to all—80 acres of agricultural, 160 acres of grazing land. These amounts were subsequently modified in agreements made with later tribes. *Id.*

70 25 U.S.C. § 182.

71 GETCHES ET AL., *supra* note 31, at 164.

72 *Id.* Also, successful completion of an education at the Carlisle School for Indians resulted in a competency certificate and basis for citizenship.

73 4 SMITHSONIAN INST., *supra* note 2, at 233 (including historical photos of the ceremony).

74 OFFICE OF THE SECRETARY, *supra* note 1.

> so that when the sun does not smile and the grass does not grow, she and her children will not starve.[75]

The "his" and "her" versions for individual Indians to naturalize adhered to the white male benchmark of the dominant society of the time. The male Indian agreed to reconstruct his life as a rational self-maximizing white farmer, the "model" citizen of an agricultural economy. The woman agreed to serve in the model white family as a mother and homemaker. These oaths are distinct from the general naturalization commitment made by immigrants from other countries who became citizens, presumably free to not become farmers or homemakers. However, there were no other options in the view of the dominant society if Indian individuals were to be accepted as co-citizens.

Not until the Citizenship Act of 1924 were all Indians born within the United States declared to be native-born citizens.[76] Thus, indigenous individuals became citizens by statute, a vulnerable basis as compared to the Constitutional mandate enjoyed by other persons born in the United States. Theoretically, under Congress's plenary power over Indian matters this citizenship status could be altered. Now, Indians are entitled to the constitutional level of individual rights and remain the only native-born citizens of three sovereigns within the United States' borders.[77] The Constitution does not specify how individual rights should to be protected for indigenous people.

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75 *Id.* Data on how many American Indians were naturalized in such ceremonies was not obtainable.

76 *See* 8 U.S.C. § 1401(b) (2000).

77 Border-crossing tribes continue to face difficulties because their communities span the borders of the United States with Canada and Mexico. The Jay Treaty of 1794 aids tribes that span both the United States and Canada. Treaty of Amity, Commerce, and Navigation, Nov. 19, 1974, U.S.-Gr. Brit., art. III, 8 Stat. 116. At the southern border, tribes have experienced difficulties with efforts to impose immigration procedures on tribes for their daily life activities. In the past the Immigration and Naturalization Service, now in the Department of Homeland Security, has tried to make border crossing tribes use immigration authorization documents. Since September 11, 2001, the complications have increased. The Tohono O'odham Nation of Tucson, Arizona, has sought a congressional act to mandate recognition of their citizenship status and border crossing rights. *See* C.J. Karamargin, *Citizenship Sought for All O'odham*, ARIZ. DAILY STAR (Tucson), Feb. 13, 2003, at B2 (describing Tohono O'Odham Citizenship Act of 2003, H.R. 731, 108th Cong.). United States Representative Raul Grijalva introduced the bill that would recognize tribal membership documents to be the legal equivalent of certificate of citizenship for all federal purposes.

III. Constitutional and Indigenous Visions of Rights, Contract, and Community

The old boundaries of race and gender have limits in guiding how to guarantee treatment as an equal to each person, what Dworkin called the heart of the Equal Protection Clause.[78] The Supreme Court decision in *Lawrence v. Texas*[79] protecting the privacy rights of homosexuals in intimate relationships of consenting adults extended the measure of equality. As a society we struggle with how to construct equal protection for all individuals. The increasingly proclaimed identity of persons of mixed racial heritage, affirmed in the accommodative methods of the national census, further renders less choate for some purposes the race classification of equal protection law.

Individual rights constitute the heart of equality as well as the requisite for consent to the social contract for a constitutional republic, though this explanation does not fit the facts of American Indians in the republic. The Supreme Court decisions in the voting rights area, for instance, theoretically aim to equalize all voters in the electoral districts to which they were apportioned. In *Baker v. Carr*,[80] the Court overcame previous barriers, especially the political question doctrine, so that the Court could decide that all voters are due a relatively equal ability to consent to who will represent their interests and make the laws governing the voters' lives. In the pre-*Baker* districts some rural voters had greater voice in the legislatures because of unequally populated districts. This weakened the consenting ability of other voters, for instance, the urban citizens who formed the majority of the population in their states.

Theories of equality and consent, such as that of John Rawls,[81] typify the vision that constitutionalism engenders. The ability to consent as an individual to the laws that control everyday life has been a common theme since the breakaway of the colonies from Britain. The Supreme Court has used the lack of consent from non-Indians and nonmembers to tribal jurisdiction to rule that tribes lack governing authority.[82] Because non-members are excluded from the po-

78 Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & Educ. 3, 10 (1977) (responding to commentaries that *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided by social science, not law).

79 539 U.S. 558 (2003).

80 369 U.S. 186 (1962).

81 *See* John Rawls, A Theory of Justice (1971).

82 *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (holding that a tribe, absent a statute or treaty, has no authority to govern non-members on a federal highway over reservation territory); Duro v. Reina, 495 U.S. 676, 693 (1990) (holding that a tribe lacks criminal jurisdiction over non-members); Montana v. United States,

litical rights of voting and holding office within tribal governments,[83] the Court has restricted the tribes' jurisdiction, though such arguments have not restricted the authority of state or the federal government over non-citizen actors within their borders.[84] Because Rawls has much influenced the contemporary development of the liberal theory of individual rights, he offers a contrastive vision to the indigenous view. His work is considered here with appreciation of its importance for how we understand the social contract.[85]

In Rawls's theory of justice as fairness,[86] he offers two principles to guide the construction of the social contract:

> First: each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others. Second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[87]

Rawls insists that the two principles are serially ordered so that the first is always given primacy and the second may never be used to justify compromising the first.[88]

His principles "distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities."[89] The social contract for Rawls consists of the principles of justice initially agreed upon by individuals engaged in social cooperation. The subse-

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450 U.S. 544, 563–64 (1981) (holding that the Crow Tribe cannot regulate hunting by non-members on non-Indian lands); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193–94 (1978) (holding that non-Indian residents are not subject to the criminal jurisdiction of the tribe).

83 *See Strate*, 520 U.S. at 445–46; *Duro*, 495 U.S. at 688.

84 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that the ability of a state to exert personal jurisdiction over a non-resident depends on whether the non-resident had sufficient contacts with the state).

85 Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147 (2000), provides an insightful analysis of why liberal theory, exemplified by John Rawls, is inapplicable and injurious to the tribes' exercise of sovereignty.

86 RAWLS, *supra* note 81, at 11–12.

> [T]he name 'justice as fairness': it conveys the idea that the principles of justice are agreed to in an initial situation that is fair. . . . [T]hose who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits.

Id.

87 *Id.* at 60–61.

88 *Id.* at 61, 63.

89 *Id.* at 61.

quent constitutions and a legislature-enacted laws, in accord with the principles, become the general system of rules.[90]

It is critical to recognize that there are some important assumptions in Rawls's proposition. The first assumption is that a culture values individual choice making to the extent Rawls states. While this is true for many Western populations and cultures, one cannot assume this for many non-Western cultures.[91] Within the borders of the United States, one cannot assume this for indigenous peoples who in continuity with their ancestors value a communally-based system of decisionmaking. In Rawls's world, individual choice making is the means to obtain personal happiness. In contrast, individually based power is not the source for indigenous communities who seek to live in harmony and balance with other human beings as well as the natural world.

Second, in Rawls's scheme a justice system should be built around a fair distribution of primary social goods—such as income and wealth, opportunities, and rights and liberties—in order to promote happiness. To secure happiness, individuals will want to maximize their access to goods, services, and power. According to Rawls, one can dichotomize key aspects of society into those that secure equal liberty and those that protect against economic and social inequality. His priority is Western, perhaps distinctly American.[92] It enables a materialistic measure of success, and each individual's measure of acquisitive success is critical. Presumably, when some critical mass of individuals are satisfied with their respective situations, then the larger society can be described as successful and worthy of respect from within and from outsiders' evaluations.

In real life, it is often impossible to take advantage of personal liberties without some minimum measure of physical and economic security. Besides the numerous disadvantaged populations within the United States, in the international human rights context or the situations of less developed nations, personal and economic security are a priority. From the point of view of people struggling in base poverty as well as some of their governments, personal liberties such as free speech are luxuries. Pointing this out does not mean the author subscribes to the idea that the authoritarian denial of liberties is justifiable because of pressing economic needs. But, we are left with questions lacking obvious answers. For instance, how are the women in Afghanistan and Iraq to obtain and exercise their individual

90 *Id.* at 13.

91 Tweedy, *supra* note 85, at 203.

92 *Id.* at 201–02.

choices about marriage, education, and working in the full world of occupations without some security about their physical safety? In addition, the existence of some form of economic safety net for themselves individually as well as for their children, partners, families, and community is essential. The abstract boundaries and priority that Rawls sets encounter barriers, including culture, which limit the guiding force of individual rights concepts.

Rawls is explicit that his proposal for a system of justice as fairness asks us to think abstractly, not in reality terms. "In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of social contract."[93] The "original position" is not thought of as an actual historical state of affairs nor a primitive condition of culture.

> It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.[94]

Ann Tweedy argues that this abstract imagining engenders a Westernized and white position in the world:

> Indeed, people of color might well feel that, without their ethnicity, they lack the necessary reference point to make such a decision in the initial situation. This circumstance suggests that the principles of justice propounded by Rawls are in effect Western or white—although Rawls and fellow white readers are unlikely to realize this fact. . . . Rawls' social contract theory is a Westernized white construct in that it is only feasible for whites to believe that they can abstract themselves beyond race as is necessary to imagine oneself in the initial situation. As Ian Haney López has pointed out, the identities of people of color tend to be inextricably linked to their race or ethnicity.[95]

The Rawlsian approach is also an origin story that shapes the principles that establish standards for establishing and protecting indi-

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93 Rawls, *supra* note 81, at 12.

94 *Id.*

95 Tweedy, *supra* note 85, at 202 (citing STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 13 (1996) (noting that "the characteristics of the privilege group define the societal norm" and that white privilege remains largely invisible to whites)); *see also* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 157, 179 (1996) (noting that the tendency of whites to remain blind to the racialized aspects of their identity is omnipresent, and arguing for race consciousness to alter social beliefs).

vidual rights. Indigenous peoples have different origin stories based on a consensual foundation. Thus, in Rawls's philosophy a cultural barrier exists when non-Indians encounter the indigenous peoples' choice of consensual, not individualistic, principles for their societies.

American Indian cultures present an alternative world view, one that values harmonious and balanced relationships with the universe and all elements within it. The prime value is for interdependence rather than individual rights obtained through a social contract theory. Individual rights and entitlements do exist, but as a result of the relational commitment to a community—a commitment that also imposes responsibilities for the members who obtain benefits. What an individual is entitled to stems from the context of "all my relations." It is not an abstract entitlement that precedes the individual's embarking on some activity in the American Indian community. Rather, it is from the community context that the individual roles, entitlements, and responsibilities are derived. The indigenous world values consensual decisionmaking, not a democratic "the majority wins" system.[96] The decisionmaking involves a full consideration by the participants, including what will be due to individuals, families, clans, ceremonial societies, officials, and their appropriate responsibilities. The participants can be the entire tribe or one's extended family, officials or persons designated to act for others such as the heads of clans. However, all are expected to act with due regard to subject matter, context, and relations at stake.

Non-Indians also advocate for a communitarian or relational approach to the principles for making just and lawful societies. Martha Minow has reminded that rights are not neutral.[97] "With them we pick from among a variety of possible legal consequences for human relationships and thereby influence the pattern of existing and future relationships."[98] Rather than arming each individual with his or her abstractly conceived rights, she advocates:

> Interpreting rights as features of relationships, contingent upon renegotiations within a community committed to this mode of problem solving, pins law not on some force beyond human control but on human responsibility for the patterns of relationships promoted or hindered by this process. In this way the notion of rights as tools

96 Numerous tribes have incorporated elective methods for secular officers, but not for the leadership in cultural knowledge, what non-Indians often call religion.

97 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 308 (1990).

98 *Id.*

> in continuing, communal discourse helps to locate responsibility in human beings for legal action and inaction.[99]

Minow rejects the view that relational choices are inconsistent with rights.[100] Rather, "[a]n emphasis on connections between people, as well as between theory and practice, can synthesize what is important in rights with what rights miss."[101] Minow's view is akin to the American Indian view that considers rights in the community context. What is ultimately due the individual is dependent on who and what subject matter are affected. Contemporary tribes regularly demonstrate that they can accommodate modern issues with decisions sustained by customary principles.[102]

Recently Peter Singer has addressed the often stated view that "all humans are equal" and offered a utilitarian view of ethics that includes interests beyond the individual's. We must go beyond "a personal or sectional point of view and take into account the interests of all those affected."[103] He propounds "a basic principle of equality: the principle of equal consideration of interests."[104] The essence of this principle "is that we give equal weight in our moral deliberations to the like interests of all those affected by our actions."[105] Here "like" means interests of similar centrality and weight, not views that are identical. Singer finds as insufficient the Rawlsian view of contract as the means to obtain justice. "The contract tradition sees ethics as a kind of mutually beneficial agreement—roughly, 'Don't hit me and I won't hit you.'"[106] Singer analyzes the individual privileges or entitlements some claim because of superior intelligence, race, and gen-

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99 *Id.* at 309.

100 *Id.* at 382.

101 *Id.*

102 *See, e.g.*, Navajo Nation v. Murphy, 6 Navajo Rptr. 10 (1988). When the Navajo Supreme Court considered the marital privilege rule, it acknowledged borrowing the rule from the federal system. However, the court rejected one of the historical Anglo-American principles for the marital rule: that the wife had no separate legal existence from her husband because a marital unit was one legal party and "the husband was the one." *Id.* at 12. This justification has no support in Navajo custom, which the court called "Navajo tradition and culture." *Id.* at 12–13. The Navajo world is a matrilineal and matrilocal society in which the woman's role is revered. Important matters in Navajo society, including individual status, identity, and some rights to property and productive sheep herds, derive from the mother and her clan. The Navajo Supreme Court then found cultural accord with the Anglo-American principle to preserve the harmony and sanctity of the marriage relationship and denied the marital privilege in this case. *Id.* at 13–14.

103 PETER SINGER, PRACTICAL ETHICS 21 (2d ed. 1993).

104 *Id.* at 21.

105 *Id.*

106 *Id.* at 18.

der.[107] Inequalities based on race and gender "produce a divided society with a sense of superiority on the one side and a sense of inferiority on the other."[108] Singer directs our attention to the larger context of all who are affected and should have a consideration of their interests. This kind of equality works in the long term for a collaborative society.

While state governments do vary in their design choices, only tribes have used their self-determination to construct collaborative governments outside the dominant models. This non-contract choice subjects the tribes to continuing efforts to "remake" them in forms approved by non-Indians.

IV. Making Indians into Race and Assimilated Governments

A. Pushing Tribes into the "Race" Box

The continuing desires of outsiders for land, resources, and benefits reserved for Indians has fueled litigation and legislative proposals to push Indians into the "race box." Presumably, then non-Indians can prevail under arguments based on equal protection or that state governments can have more authority over tribes. Undeniably, tribal membership is both biologically and culturally based. To view "Indianness" only as a racial category denies the centuries of values that created distinct cultures, with customs and practices. While individual tribes are distinct in how their values are lived in everyday life, there is a shared perspective that interdependent relationships are the foundation for a community.

The design of tribal government, the laws and tribal court system, language retention, and ceremonial obligations are derived from beliefs and behaviors that define the indigenous culture. Ideally, individuals are protected through duties that community members owe to each other and that maintain the social, economical, governmental, and sacred culture that are the fabric of each tribe. Retaining the customary values, that is, the guides to behavior in the "ought-to do" and "ought-not-to do" sense, is challenging work for the tribal sovereigns as contemporary governments.[109] Like all governments, they strive to provide the basic services and protections for their citizens and others within their jurisdiction.

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107 *Id.* at 20–22.

108 *Id.* at 44.

109 See the *University of New Mexico School of Law Tribal Law Journal*, at http://tlj.unm.edu, the only on-line journal that focuses on law made within indigenous nations in the United States and internationally.

Tribes insist that their law systems should be distinct from states and not be subordinate to the state in matters internal to their reservations. In *Williams v. Lee*, in 1959, the Supreme Court established an Indian law principle 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 governed by them."[110] In *Williams*, a non-Indian sued an Indian for a transaction occurring on the Navajo reservation. In rejecting the state claim for jurisdiction, the Court stated: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in the Court have consistently guarded the authority of Indian governments over their reservations."[111]

In contrast to *Williams*, recurring in American Indian legal history are the challenges in Congress and the Courts that would make American Indians into a racial, not political, category, assimilated into state and federal law regimes. The continuing attacks from some members of Congress and anti-Indian advocates focus on proposals to make Indians a race, terminate tribal sovereignty, terminate the tribes' sovereign immunity, terminate all treaty rights or make tribes' municipal-type governments subordinate to the state.[112]

In 1974, the Supreme Court rejected the race-based attack on Indian status in *Morton v. Mancari*, where it held that individual Indians enjoy their rights not as a race, but as members of a political entity: a

110 358 U.S. 217, 220 (1959) (holding unanimously that state courts had no jurisdiction over a civil claim by a non-Indian against an Indian for a transaction arising on the Navajo reservation).

111 *Id.* at 223.

112 An example is the American Indian Equal Justice Act, S. 1619, 105th Cong. § 2 (1998), introduced by Senator Slade Gorton, which would have waived the sovereign immunity of Indian tribes to suit in federal courts for alleged Indian Civil Rights Act violations, permitted states to sue tribes in federal courts to collect taxes on the sale of goods or services to nonmembers, and subjected tribes to state court jurisdiction for torts and contract actions. Senator Gorton continuously pursued bills to terminate authority or rights that tribes have under the federal common law and treaties. For other Gorton-proposed bills, see Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 488–89 (1998). Senator Gorton's proposed acts were a continuation of the type of legislation introduced on behalf of persons discontent with the status and authority of tribes. Also, the proposed Native Americans Equal Opportunity Act, H.R. 13329, 95th Cong. (2d Sess. 1978), in order to fully subject Indians to state jurisdiction, would have directed the President to abrogate within a year all treaties with Indians and would not have provided compensation for loss of the property or sovereignty resulting from the loss of treaty rights terminated under the bill.

federally recognized tribe.[113] In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) unsuccessfully challenged as impermissible discrimination the Indian preference in hiring and promotions enacted in the IRA of 1934.[114] Since the *Williams* and *Mancari* decisions, as tribes exercise governmental authority to regulate non-Indians on tribal lands and establish tax-exempt enterprises, individuals and some state and local governments as non-Indians have challenged these regulations as racially impermissible "special rights." Prolific scholarship continues to question and, in some instances, argue for overruling, *Mancari* and other cases as impermissible racial discrimination.[115]

The historical effort to "force fit" the American Indian governments and their members into the state and federal scheme have intensified in the current Supreme Court's efforts to expand state power and protect the interests of states.[116] In realigning the state and federal powers under the Constitution, the Court has also removed power from Congress, notably under restrictive interpretations of the

113 417 U.S. 535 (1974).

114 *Id.* at 555.

115 Williams, in *Indians as Peoples*, *supra* note 6, at 776, analyzes the Supreme Court's treatment of Indians and states that the Court has not adequately explained how Indian law raises no serious issues under equal protection when the Indian is partially racial. Goldberg-Ambrose, *supra* note 6, at 173, however, while acknowledging that Williams raises genuine problems of congressional and judicial discomfort with the special status of Indians, finds that Williams's approach underemphasizes that Indians are uniquely entitled to special federal measures. See Williams, *Sometimes Suspect*, *supra* note 6, at 192, for the response to Goldberg-Ambrose's critique of *Indians as Peoples*.

116 See *United States v. Lopez*, 514 U.S. 549, 567–68 (1995), which opened the series of cases where the Supreme Court found that Congress lacked the authority to pass expansive acts—in *Lopez* the Gun-Free School Zones Act of 1990. Then followed *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996), which held that the Indian Gaming Regulatory Act was constitutionally invalid because the Eleventh Amendment prohibits tribes from suing states in federal court without their consent. In subsequent cases the Court found that Congress acted outside its power under the non-Indian commerce clauses and Section 5 of the Fourteenth Amendment. *See* Fed. Mar. Comm'n v. S.C. Port Auth., 535 U.S. 743, 747–48 (2002) (holding that the Federal Maritime Commission cannot adjudicate private party complaints against the state because of the Eleventh Amendment); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that the Americans With Disabilities Act exceeded Congress's authority under Section 5 of Fourteenth Amendment, and therefore cannot abrogate states' immunity); United States v. Morrison, 529 U.S. 598, 602 (2000) (holding that provisions in the Violence Against Women Act exceeded Congressional authority under the Interstate Commerce Clause and violated the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 65–66 (2000) (holding, similar to *Garrett*, that the Age Discrimination in Employment Act cannot abrogate states' immunity).

Interstate Commerce Clause. The enlarged state jurisdiction in this Court's vision of federalism has invaded tribal boundaries and subject matter.[117] Because tribes and their members insist on a distinct cultural way of life, they are also disfavored by two other decisional orientations of the contemporary Supreme Court. First, the Court insists on "color-blind" law so that affirmative laws protecting racial minorities are disfavored.[118] Second, the Court's use of Anglo-American "tradition" as the means "of aligning norms of constitutional interpretation with mainstream values" have reduced protection for nonmajority groups, for instance, in First Amendment rights.[119] The *Lawrence* case invokes some of the elements involved in how American Indians are treated by the dominant society and the Court. The *Lawrence* case has saliency because gays and lesbians insist that their distinctness be acknowledged and protected in the law.[120] Thus, in *Lawrence* the Court had to overrule *Bowers v. Hardwick*, where the Court deferred to what it viewed as mainstream traditional values hos-

117 Culminating the cases eviscerating tribal jurisdiction are the especially destructive decisions in *Nevada v. Hicks*, 533 U.S. 353, 374–75 (2001) (holding that a tribal court lacked jurisdiction to adjudicate a civil rights tort action claim involving a state official's execution of a search warrant on reservation land to search for evidence of an off-reservation poaching crime), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649 (2001) (holding that a tribe lacked authority to impose a tax on a nonmember guest). *See also* 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, 273 (2001) (analyzing the Rehnquist Court's apathy towards Indian Law); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1179 (2001) (describing the Supreme Court's use of narrow rulings to rule against tribes); Valencia-Weber, *supra* note 24, at 467–80 (exploring the consequences of this expanded state power on Indian law).

118 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 203 (1995).

119 Getches, *supra* note 117, at 321; *see also* Dept. of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (denying protection to the use of peyote in a Native American church and reducing the standard of review where a generally applicable law burdens religion); Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (holding that the application of Air Force dress code to prevent an Orthodox Jew from wearing a yarmulke as required by his religion was constitutional under a more deferential standard of review in military cases).

120 It matters that despite the vociferous animus towards homosexuality, the Court affirmed a constitutional principle protecting privacy in intimate adult relationships. While intimate relationships of Indians are not an issue of this Article, those relationships were a focus of past federal law regimes that punished behaviors deemed morally unacceptable under federal law when those activities were not generally part of federal enforcement for non-Indians. *See* United States v. Clapox, 35 F. 575 (D. Or. 1888) (holding that the Secretary of the Interior has authority to issue regulations that punish an Umatilla woman for living and cohabiting with a man not her husband).

tile to the equality of homosexuals.[121] When American Indians challenge state jurisdiction over tribal governing power, tribes face non-Indian litigants who challenge Indians' rights as "special rights" violating equal protection. Treaty-based rights are ignored or denied as binding in such challenges. As long as American Indians insist on maintaining their cultural way of life with traditions that sharply contrast with those of the mainstream, they face disfavor in the Court's reconstruction of federalism.

Efforts to assimilate Indians into state governmental regimes overlap with a push to hold operative tribal governments to the constitutional constraints to which states agreed, but not the tribes. This is another form of assimilation for the American Indians in their governmental capacity.

B. Making Tribes into Constitutional Governments: The Indian Civil Rights Act

The push to make tribal governments into generic Euro-American polities, subject to the same constitutional constraints as non-Indian governments, resulted in the Indian Civil Rights Act (ICRA) of 1968.[122] The Act has the dual purpose of protecting "persons" subject to the authority of tribal governments with most of the usual constitutional rights and of protecting the autonomy of tribes to exercise authority in culturally-based governments.[123] While the Act included most of the Constitution's Bill of Rights, it excluded some that would interfere with the culturally-based governance or would burden the limited financial resources of tribes. The exclusion of the Establishment Clause of the First Amendment is an explicit recognition that tribes are theocratic.[124] In opposing the ICRA, tribes, especially the

121 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

122 25 U.S.C. §§ 1301–1303 (2000). A helpful and complete analysis of this act is Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972).

123 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978).

124 *Id.*; Burnett, *supra* note 122, at 591–92. Omitted are the First Amendment provision for the establishment of religion, the Seventh Amendment requirement for jury trials in civil cases, the Sixth Amendment requirement of appointment of counsel for indigents in criminal cases, the Second Amendment on bearing arms and a well regulated militia, and the Third Amendment on quartering soldiers in private homes. Modifications include the § 1302(8) guarantee of equal protection of the tribal laws, not "the laws" in Section 1 of the Fourteenth Amendment; no Fifth Amendment requirement of a grand jury indictment for a tribal criminal prosecution (while most of this Amendment's protections were retained); and § 1302(7), which invokes the Eighth Amendment by prohibiting cruel and unusual punishment and excessive bails, but sets a limit of six months imprisonment and $500 fine on tribally imposed penal-

Pueblos of New Mexico, insisted that their customary governments were successful functioning models not in need of improvement by foreign values and structures.[125]

Before and after the ICRA, tribes have adopted constitutions.[126] The IRA as implemented policy generated a boiler plate model of a constitution that many tribes adopted.[127] In the twentieth century, many tribes replaced the generic IRA constitutions. Tribes continue to evolve as responsive governments facing modern needs. Some have incorporated the ICRA protections into tribal law to complement the indigenous forms of protection for the individual.[128] A tribe adopting the ICRA internally because of its compatibility is significantly different from the law being externally imposed.

The cultural disparity inherent in the imposition of the ICRA generated *Santa Clara Pueblo v. Martinez* in 1978, when the Supreme Court upheld the Pueblo's law on membership qualifications over an individual rights claim.[129] Julia Martinez, a tribal member, charged her tribe with violating her right to equal protection in the ICRA because of gender discrimination in the tribe's membership ordinance.[130] The 1934 IRA is the companion in contradiction with individual rights as it revitalized the tribal power to set internal standards for membership and for the control and allocation of tribal land and resources. The litigation revisited what had been historical problems at Santa Clara Pueblo: individual claims to the communal land, often by non-members, in challenge to the tribal government's cultural system to protect resources for the community.

Martinez is the only construction of the ICRA by the Supreme Court. The case remains controversial and is among the most cited cases in American law.[131] The *Martinez* facts present concretely the theoretical claims of constitutional individual rights, invoking equal protection from gender-based discrimination, in conflict with the collective political right of the Santa Clara Pueblo. As a sovereign, it argued for its interest in a culturally-based system of law, expressed in its

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ties. 25 U.S.C. § 1302 (2000). These limits were subsequently amended to sentences not exceeding one year's imprisonment, a $5000 fine or both. *Id.*

125 Burnett, *supra* note 122, at 589, 601, 614.

126 CLINTON ET AL., *supra* note 31, at 309–14 (discussing the IRA and tribal constitutions).

127 CANBY, *supra* note 45, at 24–25, 62–65.

128 CLINTON ET AL., *supra* note 31, at 309–14; McCarthy, *supra* note 112, at 488–89.

129 *Martinez*, 436 U.S. at 49.

130 *Id.* at 51.

131 It has been cited in some twenty Supreme Court decisions, over 460 federal court cases, and over 450 law review articles. Search of WESTLAW, Keycite Service (Sept. 16, 2004).

constitution and ordinance enabled by the IRA. The response to *Martinez* in 1978 and since roils in the criticism of mainstream feminists, scholars of the Constitution and federal courts, advocates who want to make tribes conform to the federal standard for all constitutional rights, and supporters of tribal sovereignty who want to reconcile the political right with a federal remedy for individuals caught in distressing conditions such as those in the *Martinez* case. The case illustrates the tension between the status of tribes as political actors, governing the lives of members and others within their reach, and the liberal striving for core individual rights to be universally guaranteed.

V. *SANTA CLARA PUEBLO V. MARTINEZ*: TESTING CULTURAL DISPARITY

A. The Supreme Court Constructs the ICRA to Protect Culturally-Distinct Governments

Santa Clara Pueblo v. Martinez captures the cultural tension in the ICRA's dual purposes to protect individual members with constitutionally modeled individual rights while protecting the tribes' right to culturally-distinct systems of government.[132] Julia Martinez charged the Santa Clara Pueblo with gender discrimination because its 1939 ordinance denied Pueblo membership to the children of female members who married outside the tribe, but not to similarly situated children of male members who married non-members.[133] The plain-

132 *See* Rita Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y (forthcoming 2004); Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty-Five Years of Disparate Cultural Visions: An Essay Introducing the Case for Re-argument Before the American Indian Nations Supreme Court*, 14 KAN J.L. & PUB. POL'Y (forthcoming 2004). These articles result from initial research and are part of a long-term project by the two authors to study the *Martinez* case. Research will use internal Santa Clara viewpoints and materials as well as external materials not addressed in other law reviews. The materials studied include the transcript of the Federal District Court trial as well as the historical background of the Pueblos in New Mexico, including the documents of the Spanish, Mexican, and American territorial periods in New Mexico. Publication in the *University of Kansas Journal of Law and Public Policy* arises from the Tribal Law and Governance Conference held at the University of Kansas on October 11, 2003.

133 *Martinez*, 436 U.S. at 52. The ordinance is as follows:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
>
> 1. All Children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
> 2. All Children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

tiffs, Julia and her daughter Audrey, claimed, under the ICRA, the loss of equal protection and deprivation of property without due process of law.[134] The ordinance restricted Julia's "land use rights and other material benefits and rights which she could give to her children if they were recognized as members."[135] The affected children would be denied political rights; material benefits, especially land use rights; and other entitlements.[136]

The case invoked issues surrounding tribal sovereignty, sovereign immunity, and constitutional standards for equal protection and due process. The district court held that the Pueblo's sovereign immunity had been waived by Congress in the ICRA. On the merits, the District Court decided for the Pueblo, finding that criteria for membership was traditionally used by Santa Clara and did not violate the ICRA. The Tenth Circuit Court of Appeals reversed on the merits because the ordinance violated the equal protection of the ICRA.[137] While the Tenth Circuit found it unnecessary to apply the Fourteenth Amendment standard with full force, the court found that if the equal protection clause of the ICRA was to "have any consequence, it must operate to ban invidious discrimination of the kind present in this case."[138] The Santa Clara Pueblo offered insufficient facts to establish a compelling interest: namely the Pueblo and its cultural survival would suffer absent the ordinance. The "relatively recent origin" of the discriminatory ordinance did not merit being considered as "venerable tradition."[139]

The Supreme Court's decision, by Justice Marshall affirming tribal sovereignty, set the framework for the ICRA where the well-established federal "policy of furthering Indian self-government" could outweigh the objective of strengthening the position of individual members vis-á-vis the tribe. Only a limited use of habeas corpus could

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3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.

4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Id. at 52 n.2. The *Martinez* mother and daughter challenged parts 2 and 3. Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1041 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

134 They sued as individuals and on behalf of the class of individuals affected in their situation as mother and child. *Martinez*, 436 U.S. at 51 n.3.

135 Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 15 (D.N.M. 1975).

136 *Id.* at 14.

137 *Martinez*, 540 F.2d at 1048.

138 *Id.*

139 *Id.*

intrude on the Pueblo's culturally-based self-governance.[140] The Pueblo could set the rules for its own membership, even if the children of a Pueblo mother and a father from outside the Pueblo were denied the benefits of membership. The Court's affirmation of tribal sovereignty is important because the analysis connected the statutory design to a respect for indigenous custom and tradition that underlie the tribal law. Individual rights could not trump customary rules. If federal courts adjudicate these civil actions, then the federal judiciary "may substantively interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."[141]

The affirmance of tribal sovereignty, sovereign immunity, and the narrow role in habeas for federal court review strengthened the sources critical for the development of modern tribes. Besides the ICRA there are other statutes and Supreme Court decisions that limit the tribe's sovereignty. For instance, in criminal law, the Major Crimes Act removed jurisdiction over felonies committed on the reservation from tribes and states.[142] Nonetheless, *Martinez* is a law arsenal for tribes holding off attacks from parties and states who would destroy their governance and self-determination.[143]

B. Some Non-Indian Responses to the Martinez *Decision*

The Court's perspective on culturally-based governance was welcomed by tribes, but not by some vociferous external viewpoints. The *Martinez* decision was criticized and denounced by voices spanning the political landscape from feminists to interest groups who had long advocated the termination of tribal sovereignty. A sampling reveals

140 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–72 (1978) (noting that the ICRA was intended to protect tribal sovereignty from "undue interference").

141 *Id.* at 72.

142 18 U.S.C. § 1153 (2000). States can obtain criminal jurisdiction if Congress has expressly permitted, as in 18 U.S.C. §§ 1161–1162 (2000), 25 U.S.C. §§ 1321–1322 (2000), and 28 U.S.C. § 1360 (2000), which provide designated states with civil and criminal jurisdiction. States who obtained civil and criminal jurisdiction under these provisions are commonly called "PL 280" states, after Public Law 83-280, 67 Stat. 588 (1953), authorizing the state authority.

143 In attempting to remove the destructive impact of cumulative decisions from the Supreme Court, especially after *Nevada v. Hicks*, 533 U.S. 353 (2002), the tribes have had to reconsider whether they can compromise the *Martinez* protections for their governments in order to obtain restored jurisdiction in their territories. NATIONAL CONGRESS OF AMERICAN INDIANS & NATIVE AMERICAN RIGHTS FUND, 2003 LEGISLATIVE PROPOSAL ON TRIBAL GOVERNANCE AND ECONOMIC ENHANCEMENT (2002), *available at* http://ncai.org/main/pages/issues/governance/documents/tspi_concept_paper_7-25-02.pdf.

the nature of the critics' concerns as well as the gap between Pueblo culture and the external worldview.

Especially noteworthy is the response of Catherine MacKinnon, a leading feminist scholar in law, who found *Martinez* "a difficult case."[144] "Why is excluding women always an option for solving problems men create between men? I want to suggest that cultural survival is as contingent upon equality between women and men as it is upon equality among peoples."[145] MacKinnon's "essentialism" approach to feminism provoked its own criticism for its narrowness that ignores cultural and racial experiences that are inseparable in the lives of ethnic minority women.[146]

The voices of American Indian feminists have generally not been invoked in analyzing *Martinez*.[147] Rayna Green, a Cherokee feminist, articulates a commonly shared viewpoint among Indian feminists:

> For Indian feminists, every women's issue is framed in the larger context of Native American people. The concerns which characterize debate in Indian country, tribal sovereignty and self-determination, for example, put Native American tribes on a collision path with regulations like Title 9 and with Equal Opportunity and Affirmative Action. Tribes insist that treaty-based sovereignty supersedes any other federal mandate.[148]

While American Indian feminists acknowledge that contemporary Indian life includes inequities for males and females, and between males and females, they anchor the resolution process within the tribe and its own cultural practices.[149] It is not impossible for external authority and means to be helpful, but it is a tribal community's choice about their value in the constructing of culturally-congruent problem solving.

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144 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 66 (1987).

145 *Id.* at 68.

146 *E.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 593 (1990). Harris's article in turn provoked a critique of the MacKinnon and Harris viewpoints by an Indian law scholar. *See* Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307, 315–18 (1992).

147 *But see* Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 88–96 (1995) (presenting Indian feminist voices).

148 Rayna Green, *Native American Women*, 6 SIGNS 248, 264 (1988); *see also* Rayna Green, *The Pocahontas Perplex: The Image of Indian Women in American Culture*, 16 MASS. L. REV. 698 (1975) (describing how the image and stereotypes of Indian women have been shaped through time).

149 See the comments from Indian feminists in Valencia-Weber & Zuni, *supra* note 147, at 92–93, discussing contemporary Pueblo changes in women's roles.

Other outsiders showed little hesitation about their ability to understand and interpret the Santa Clara's culture and history. Some joined MacKinnon's view that the ordinance could not be the result of the enduring culture of the Santa Clara people, but of the infectious ideology of patriarchy with which Euro-Americans had corrupted the customary law of the Pueblo. Judith Resnik raised thoughtful discussion about the federal system's capacity to tolerate the differences in cultural governments of the tribes.[150] The recurring questions remain: how much difference will be tolerated within the federal and state system? How much similarity to the Anglo-American forms of government will defeat the claim to cultural distinction? How can federalism accommodate the indigenous need to remain independent of state and federal regimes?[151] Resnik, however, questioned whether the Santa Clara Pueblo could be considered a culturally and politically distinct entity given the extensive history of federal influence on tribal governments. "The 'Santa Clara Rule' is intertwined with United States' rules and culture."[152] She concluded that the discrimination against women historically built into federal law made it easier for the Supreme Court to validate the Santa Clara government's choice.[153]

Other critics would have the tribes held to one constitutional standard of equal protection promised to all American citizens. For instance, Robert C. Jeffrey invokes a natural rights theory of constitutional rights and concludes that in

> denying a remedy to Julia Martinez and her daughter, for denying it for the reason it did, on the basis of cultural and tribal distinction, the [Supreme] Court itself became guilty of that 'ancestral discrimination,' in direct contradiction to the founding principle of human equality in the Declaration of Independence.[154]

Some critics of *Martinez* are supportive of tribal sovereignty, but unable to accept the result in *Martinez*. Indian law scholars debate ways, such as a proposed ICRA amendment, to provide a remedy for the Martinez family while preserving the sovereignty of tribes to govern over their members and territory. Robert Laurence, for instance,

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150 *E.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 701–02 (1989).

151 *Id.* at 750.

152 *Id.* at 726–27.

153 *Id.* at 727.

154 Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the* Martinez *Decision: A Reconsideration*, 35 S.D. L. REV. 355, 371 (1990); *see also* Lucy A. Curry, *A Close Look at* Santa Clara Pueblo v. Martinez*: Membership by Sex, by Race, and by Tribal Tradition*, 16 WIS. WOMEN'S L.J. 162 (2001) (urging tribes to reject sexist and racist criteria for membership and identity).

advocates that Congress overrule *Martinez* in a congressional act that would protect tribal authority.[155] He acknowledges tribal sovereignty has been historically damaged and requires a correction, so that tribes can function as successful modern governments.[156] However, plaintiffs like Mrs. Martinez would then have a real individual right to equal protection and a remedy, as promised in the ICRA. Laurence would require limits in the legislation that are sensitive to tribal concerns and would limit the outside impact on government processes and resources. Laurence would prescribe that an ICRA plaintiff must exhaust tribal remedies; a meaningful amount in controversy should be required; sovereign immunity should protect the tribe against money damages, though an *Ex parte Young*-type remedy could apply.[157] Moreover, federal court review should be on the tribal court record if possible, and the political question doctrine should be applied liberally.[158]

C. Presumptions and Omissions When Outsiders Judged Santa Clara Culture

Significant presumptions mark the critiques that ignore the legal history of Indians in the republic and specifically of Santa Clara Pueblo. Among the most disturbing are:

1. The Presumption that All Tribes Have Similar Laws so that the Ordinance of Santa Clara Warrants a Substantive Federal Statute to Prevent Gender Discrimination[159]

Tribes use their sovereignty in ways as varied as the tribes. For example, the law of the Onondaga Tribe of New York treats male members who marry non-members like Santa Clara Pueblo does the female members.[160] A child's identity and entitlements, including an allocation of land from the communal holdings, derive from the mother's clan. After Onondaga students entered the non-Indian high

155 Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 427–31 (1988).

156 *Id.* at 427–38.

157 *See generally* Markus G. Pruder & John A. Veil, *The Discrete Charm of Cooperative Federalism: Environmental Citizen Suits in the Balance*, 27 VT. L. REV. 81, 89–90 (2002) (analyzing an appellate court's decision that state sovereign immunity provided shielding power from federal court jurisdiction).

158 Laurence, *supra* note 155, at 434–36.

159 Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 170–71 (1991).

160 *See* The Winds of Change: A Matter of Promises (PBS Video 1990) (providing an informative presentation on this Onondaga law and presenting two other tribes and their form of cultural governance).

school in town, "outmarriages" increased. On March 26, 1974, the governing Council of Faith Keepers affirmed customary unwritten law to pass the tribal law.[161] In the Onondaga tribe, governing authority is shared by women and men and is vested in a clan system. Clan Mothers appoint the individual male Faith Keepers who serve on the governing council. If the Faith Keeper fails to properly serve the interests of the community, the Clan Mother can remove him. The 1974 law on outmarriage is still in effect, as it aimed to strengthen the clan system where women are the key.[162]

Onondaga governance challenges the presumptions that underlie the contemporary theory of individual consent to government power. Recall MacKinnon's statement about males settling their disputes by disadvantaging females. In the Onondaga tribe, an all male council passed the law disadvantaging the male members who married outside the tribe. The commitment to retaining a viable culturally-based system of law and life motivated the Faith Keeper Council and its constituents. In this age where the democratic model with elections is pushed in international policy by the U.S. government, it is worth pointing out that the Onondaga chose to live otherwise. No one votes for the Clan Mothers nor for the Faith Keepers who serve on the governing council that enacts the laws. The Onondaga have insisted on their independence from federal control and accept no federal grants or programs.[163] To educate its children in customary beliefs and practices, the tribe operates its members-only school from kindergarten until eighth grade so that its youth are prepared before entering external mainstream schools. Onondaga law on membership is inseparable from the culture that guides the governance.

The objections to any gender preference, whether the Santa Clara's or the Onondaga's, intrinsically involves a denial of the indigenous right to a culturally-distinct form of governance. The toleration of diverse ways of defining a community and its member entitlements tests the majority society in ways not foreseen. Since the earliest Supreme Court decisions, the mainstream world has harbored expectations that tribes as distinct societies would disappear.[164] It is not known how many tribes favor male and female lineage in membership

161 *Id.*; Telephone Interview with Wendy Gonyea, Communications Officer, Onondaga Nation (Oct. 7, 2003) [hereinafter Gonyea Interview].

162 Gonyea Interview, *supra* note 161; *see also* Valencia-Weber, *supra* note 132.

163 Gonyea Interview, *supra* note 161.

164 *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 468 (1984) ("Consistent with prevailing wisdom, Members of Congress . . . believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.").

requirements, but that is not the critical concern regardless of what data could reveal. The primary concern here is whether individual members can maintain or alter a gender-based rule for their distinct polity, despite the displeasure this causes the external world. Protection of this political right is the subject of numerous treaties, statutes, and agreements between tribes and the national government. Promises, formalized in law, were made to Indians to secure their lands and resources for non-Indians. The United States cannot claim to be a society of laws and justice if the protection of tribal governments were to disappear because non-Indians now have the lands and resources obtained through legal relationships.

2. The Presumption that Outsiders Can Determine Some Historical Set-Point at Which a Tribe's Culture Can Be Authenticated for Evaluating What Deviates from the Customary

This view ignores the history of indigenous peoples who have continuity because they engaged in conservation of custom and innovation that responds to changed circumstances.[165] The presumption is that concepts from Western societies, like patriarchy and matriarchy, can validly be used to analyze and understand any indigenous culture. In the *Martinez* case at the district court trial, the views of established scholars on Pueblo culture and their respected scholarship, such as Alfonso Ortiz (a member of San Juan Pueblo)[166] and Edward P. Dozier (also a member of Santa Clara Pueblo),[167] were muted. They describe a world organized around six moieties (societies), not on parental lineage.[168] A "bilateral" or "dual organization" world was structured around "Winter People" and "Summer People"

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165 *See* Peter Iverson, *Taking Care of the Earth and Sky, in* AMERICA IN 1492, at 85, 107 (Alvin M. Josephy, Jr. ed., 1992).

> They had to balance the duty to live in the proper way and conserve the good of the past with the need to incorporate changes that could ensure the continuity of one's people. If they borrowed certain elements from other societies, they could make such additions their own over time. And over a still more extended period these innovations could become well enough embedded in the culture to be considered traditional.

Id.; *see also* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 256–61 (1994) (discussing the use of conservation and innovation).

166 *See* ALFONSO ORTIZ, THE TEWA WORLD (1969).

167 *See* EDWARD P. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA (1970).

168 ORTIZ, *supra* note 166, at 3–11.

who had designated duties to the community.[169] Nonetheless, a dominant voice in the trial was that of Dr. Florence Hawley Ellis, a noted non-Indian anthropologist who disagreed with the analysis and direct knowledge of Ortiz and Dozier.[170] Dr. Ellis testified that Santa Clara was patrilineal and that women played a minor role in the Pueblo's religious ceremonies—the responsibility of the moieties.[171] The trial transcript reveals recurring instances where the Pueblo witnesses as well as outsiders could not make legal or anthropological categories fit the testimony describing everyday life among the Santa Clara. Caution is certainly warranted when selecting expert sources (Indian and non-Indian) on indigenous cultures.

3. The Presumption that an Outsider's Presumption Is Valid Even When Formed Without Historical Information

The Santa Clara Pueblo, since the arrival of the Spanish in the sixteenth century, has suffered losses of communal land to outsiders who used various devices (including marriage to Pueblo women) to extract fee title parcels for themselves. For indigenous peoples, land is not real estate; it is the primary source for the specific features of culture and the identity as a Pueblo member. An ordinance to protect the land base, arguably, is intrinsically cultural. Both the Santa Clara and Onondaga laws determine who is allocated the use and possession of land. This is not a fee title, though it includes other rights of property such as leasing and inheriting.

Various theories were offered under the regimes of Spain, then Mexico, and the United States sovereign, for extracting land from the Pueblo communal lands.[172] Non-Indian citizens of the three sovereigns at various times proffered that they had obtained Pueblo membership through marriage to a Santa Clara member, then sought

169 *Id.* at xii ("[T]he basic feature of the Tewa social organization was a division into 'Summer People' and 'Winter People' and a further tendency to fit various aspects of Tewa culture into this dual pattern."); *see also* Swentzell, *supra* note 132.

170 At the *Martinez* district court trial, Ortiz refused to testify for either side and Dozier had died about three years before the trial. Hill acknowledged her disagreement with Ortiz and Dozier on this matter. *See* Tim Vollmann, *Revisiting* Santa Clara Pueblo v. Martinez*: What Can We Learn Thirty Years Later?*, 29 FED. BAR ASS'N INDIAN L. CONF. 65 (2004). Vollmann was one of the attorneys representing Julia Martinez at the district court trial thirty years earlier. *See also* Valencia-Weber, *supra* note 132 (discussing testimony at the trial).

171 Vollman, *supra* note 170, at 67.

172 *See generally* JOE SANDO, PUEBLO NATIONS 104–22 (1992) (describing the "habitual trickery" that severed land from the New Mexico Pueblos, including invalid land claims and counterfeit official documents).

emancipation from Pueblo membership and governance with an accompanying fee title for the land worked within the communal land holding.[173] Historically there were always nonmembers (many non-Indians or "Anglos") occupying Pueblo land without Santa Clara consent.[174] Then, to the appropriate outsider sovereign (Spain, Mexico, or the United States), these persons would invoke adverse possession as the basis for their claim for individual fee property to be extracted from the communal land base. Adverse possession was the theoretical basis for the 1924 Pueblo Lands Act, passed by Congress to resolve long standing claims by non-Indians.[175] This history of struggle is missing from the federal court decisions and the criticisms of the *Martinez* decision. However, understanding the experiences behind the 1939 ordinance, even if one disagrees with the rule, is essential in acknowledging the inherent cultural connection to land for the Santa Clara Pueblo.

4. The Presumption that the Universal Value of Individual Rights Transcends Any Experience and Worldview that Indigenous People Have Used to Construct Their Societies

A constitutional model of equal protection that insists that males and females must be treated exactly the same is incompatible with the complementary roles for men and women that tribes have constructed. Many Indian women have political power as heads of governments that is unmatched in the non-Indian world, such as the Clan Mothers in Onondaga. This presumption also ignores the indigenous nations' pattern of conserving customary values while innovating to meet changed circumstances and needs.

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173 See the case of Roque Conjuebes, who in 1744 petitioned the Spanish Government to emancipate him from the obligations imposed by the Santa Clara Pueblo on members and to award Conjuebes a fee title to the lands he had worked and possessed within the communal lands. Em Hall, *Land Litigation and the Idea of New Mexico Progress*, *in* SPANISH AND MEXICAN LAND GRANTS AND THE LAW 48 (Malcolm Ebright ed., 1988); *see also* EDWARD P. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 21, 106–14 (1970) (describing the Conjuebes case and the land problem in New Mexico generally).

174 SANDO, *supra* note 172, at 114 ("[A]n investigation by the Sixty-seventh Congress . . . disclosed that there were approximately three thousand non-Indian claimants to lands within the boundaries of the pueblo grants, aggregating about twelve thousand persons.").

175 Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636 (repealed 2000); SANDO, *supra* note 172, at 114–22 (describing the proposals for the Pueblo Lands Act and adjudications of claims by the Pueblo Lands Board (1925–1938), in whose work the Pueblo Indians "came out losers").

In accord with cultural values, many tribes have entrusted women to be the head of their nations, something that the United States has not managed to do. Wilma Mankiller, past Principal Chief of the Cherokee Nation of Oklahoma, is only one of the many executives found among the over 550 federally recognized tribes.[176] Moreover, some Pueblos of New Mexico, often described as the most traditional and conservative of the indigenous societies in the United States, have also changed their governance rules. The Nambé Pueblo and Isleta Pueblo have elected women Governors, Lela Kaskalla and Verna Teller, respectively.[177] Laguna Pueblo has changed its requirements for offices and women can now hold some leadership positions.[178] In making the changes to their system of government, these Pueblos have reached to their cultural principles for guidance and used internal processes, rather than external theories and forums like federal courts.

In responding to its community, the Santa Clara Pueblo tribe has a committee studying the membership ordinance and its impact.[179] The members of this committee include one of the original defendants and children of Santa Clara women who were directly affected and disqualified from formal membership by the *Martinez* decision. The Santa Clara Pueblo, along with other indigenous nations of the United States, continues to practice conservation and innovation so that it can be a successful twenty-first century government.

CONCLUSION

The political status of American Indian tribes as sovereigns cannot encompass them in the usual constitutional dialogue about individual rights. The history of the nation-to-nation relationship in which tribal nations made treaties with the federal government remains the starting point with viability in contemporary law. Cases built on treaty rights are part of the twenty-first century law in the United States.

Moreover, the historical treatment of American Indian individuals as the non-citizen "other" still affects their everyday lives. No other

176 *See* Valencia-Weber & Zuni, *supra* note 147, at 91–94.

177 *Female Pueblo Leaders Honored*, ALBUQUERQUE J., Mar. 13, 2004, at E3 (describing ceremony to honor Lela Kaskalla, past Governor of Nambé Pueblo and Verna Teller, past Governor of Isleta Pueblo by the New Mexico Commission on the Status of Women and the Indian Pueblo Cultural Center).

178 Vincent Knight, Past and Present: Women and the Leadership Positions in the Pueblo of Laguna (2003) (unpublished manuscript) (on file with the *Notre Dame Law Review*).

179 *See* Swentzell, *supra* note 132.

discretely identified set of citizens has the body of law in Title 25 of the federal statutes and regulations that control personal and collective lives. Thus, American Indians pose a dilemma for those who seek to achieve a liberal vision of constitutional individual rights exercised as a universal standard. Yet, many individual rights advocates would also seek to collaterally support the collective right of American Indians to sovereignty and self-determination.

To the extent these two streams of rights can be reconciled, this effort must start with an accurate perception of the status of American Indians who are more than "race" in the constitutional dialogue.

In numerous settings tribal governments are collaborative partners with the state and federal governments on matters of common concern. There are hundreds of compacts and agreements on public safety, protecting natural resources, protecting children, and many types of subject matter where geographically contiguous sovereigns share responsibility for the benefit of many. These mutually beneficial arrangements are some of the ways that the rights of individuals are acknowledged and protected. Yet such relationships require respecting rather than interfering with the culturally-based laws in tribal self-governance. The cultural differences demand much from Indians and non-Indians if they are to achieve their espoused goal of providing fair and just government to all who are affected.

Given the unique status of American Indians, it is not possible for individually-based rights of tribal members to adequately protect and maintain the critical right of tribal sovereignty and self-determination. Certainly, it is critical that individual members enjoy rights as citizens, voters, and as persons protected by state and federal laws against invidious discrimination in education, employment, and the arenas in which all citizens are participants. However, the electoral power of American Indians[180] is insufficient for what is at stake for tribes. Polit-

180 According to the 2000 Census, American Indian and Alaska Native Persons, self-identified as one race, are 2,475,956 (0.9%) of the total 281,421,906 person population. When combination with another race is counted, the American Indian and Alaska Native population rises to 4,119,301 (1.5%) of the total population. U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS, 2000, tbl. DP-1 at 1 (2001). Voting rights of American Indians do matter. The electoral role of American Indians in specific states is very important; e.g., the election of Senator Tim Johnson has been attributed to the votes of American Indians in South Dakota. *See* Adam Cohen, *Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. TIMES, June 21, 2004, at A18. The elections for Governor in New Mexico have clearly been affected by the American Indian vote. Governor Gary Johnson was elected when Democrats ignored the Indian interest in gaming and tax issues. Current Governor Bill Richardson has intensely maintained cooperative relationships with the nineteen Pueblos and three non-Pueblo tribes in New Mexico.

ical voice alone cannot protect against the evisceration of tribal sovereignty that the Congress and the Court have authorized.

Non-Indians, especially those in public office where policies and laws are made that affect the "first" Americans within our borders, must more accurately view American Indian nations and their members. This involves more than acknowledgement of the historical experience. It means discarding mythical accounts of European conquest and refocusing on the past and present political role of tribes in the United States. American Indian nations, through treaties, contributed their lands and resources to the construction of the American republic. Indians are contributors to the productivity of the national society while they maintain their cultural identity. The success of tribes as contemporary governments needs non-Indians to develop an overdue recognition that American Indians are a distinct and valuable part of the republic.