



April 2014

## Post-Lecture Discussion

Sharon O'Brien

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

### Recommended Citation

Sharon O'Brien, *Post-Lecture Discussion*, 66 Notre Dame L. Rev. 1529 (1991).

Available at: <http://scholarship.law.nd.edu/ndlr/vol66/iss5/15>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## Post-Lecture Discussion

**SPEAKER:** SHARON O'BRIEN  
**MODERATOR:** THOMAS SHAFFER  
**SPEECH:** "TRIBES AND INDIANS: WITH WHOM DOES THE UNITED STATES MAINTAIN A RELATIONSHIP?"  
**DATE:** MARCH 2, 1991

*Professor Shaffer:* I would like to begin by picking up on your last point, Sharon. If the legal solution is to be found by regarding American Indians as separate peoples, with criteria such as those developing on the international level, then would some Indian societies in the United States be unable to meet those criteria? How many of these American sub-cultures can demonstrate self-regulation, continuation, and geographical separation? A culture on the border between your international model and assimilation might serve as an illustration.

*Professor O'Brien:* One of the problems is that the United States has decided which cultures are on the border. A series of court cases essentially address the extent to which Indians are assimilated. If they are overly assimilated, then they are no longer Indians. In fact, that was the policy used by the government to get rid of Indians. The answer is found by going back to what the ILO has proposed and what indigenous people themselves propose: this is not an issue for the dominant government to decide. This is a self-identification question, and the root definition has to start with the indigenous populations themselves. This does not mean that I do not recognize that there is a host of problems in defining who would be an Indian.

*Participant:* I am speaking for some local, native Hawaiians. We are still struggling over what constitutes the best strategy. There are factions and differences of opinion, but some of us feel that there are dangers in giving up the political approach and going for the cultural approach. When you take the cultural approach, you are really asserting "need rights"—people need certain protections and provisions in order to reproduce a culture. On the other hand, the political approach would be to assert "power rights," meaning more traditional quasi-state claims.

Now, if one could be confident that need rights would be fully respected, then this distinction is formalistic and is not that important. But the truth of the matter is that we have to count on the goodwill of the surrounding state and trust that they would recognize these needs. So we have come to the conclusion that we

ought to, at the very least, use the power rights as a stick with which to clobber the other party to extract need rights. Instead of removing the political right to secession—as I think was suggested yesterday—the first thing we should grant is a secession right because then we can talk about not exercising it, not using the stick, and let these other need rights flow in. But if you give up that political stance, you are really at the mercy of the goodwill of the other party for the so called need rights. What would be your response to that?

*Professor O'Brien:* I would envision the “need rights” as a broader category, and political rights, or the “power rights,” would not be an exception or an addition or an alternative, but an aspect of the need rights. If tribes or native Hawaiians could effectively argue that they indeed have treaty rights with the United States, which they do, and could exercise political rights, this would simply give them two avenues. One avenue does not have to be to the exclusion of the other, because some tribes do not want to have a political relationship with the United States. They do not have any desire to be federally recognized. In fact, they see the federal recognition process as an acknowledgment that they are under the United States’ power, and they have never recognized the sovereignty of the United States over them.

The history of American Indian affairs shows that the political relationship has only worked when the United States has allowed it to work. Throughout history, the pendulum has swung back and forth between the United States honoring tribal status and rights at one end and extinguishing tribal rights and status at the other. Even today the courts maintain that Congress has clear control over Indians. There has been only one instance where the courts have found any limitation on legislation pertaining to American Indians. Therefore, you need something in addition to political rights, which is why I favor something more in line with the international definitions. I find it ironic that the United States initially appeared to be at the “forefront” of indigenous rights protection in comparison to some other countries, because in fact—and this is the reason I wanted to do this analysis—there are such loopholes existing in the United States that the tribes are left open to enormous deprivations of their rights.

*Participant:* Is the political thrust by part of the Native Americans towards more self-determination inherently useful for the Native

Americans? Is it your view that maximum bargaining for resources is inherently good from the Native American perspective and gives them more power and opportunity? Or, in terms of the preservation of culture and a lot of the ideas which underlie self-determination, do you think it will correlate with a reinvigoration or vigorous development of the Native American culture?

*Professor O'Brien:* So, whether or not increased tribal self-determination will protect the culture?

*Participant:* Yes.

*Professor O'Brien:* Increased self-determination is the only route. The problem is that there is self-determination, and then there is self-determination. The IRA legislation of 1934 that I mentioned allowed tribes to have constitutions; or, I should say, gave them constitutions. This legislation was viewed by many people as assisting tribes to strengthen their governments. Well, the fact of the matter is that this legislation in essence further assimilated the tribes into the dominant society. The legislation did not allow tribes to resuscitate their traditional government. The consequence is especially evident in the legal field. In 1968, Congress passed legislation, the Indian Civil Rights Act, to provide individual Indians with some protections from their governments given the lack of application of the United States' Bill of Rights to Indians on the reservation. It resulted, however, in Indians forgoing their traditional mediation system of justice and adapting to an adversarial system of justice. In many reservations this has proved destructive. So, very often when the government is claiming that it is providing more self-determination to tribes, it is actually doing it with such a heavy hand that it is forcing tribes to integrate themselves into the dominant society in order to exercise this authority.

When I am asked whether or not I think tribes will survive, I guess my answer basically depends on whether I am in a pessimistic or cynical mood; whether the glass is half full or half empty. But, given that tribes have continued to exist with their authority despite 500 years of determined effort to deprive them of it, I have a great deal of confidence that no matter what program they are given by the United States, they will use it to good benefits. My current concern is on the legal front with the courts' recent analysis in that tribes can no longer exercise powers that are in-

consistent with their dependent status. What does that mean? In the future, any time the government wants to begin retracting tribal rights, the courts can declare the tribal authority in question to be inconsistent with their status as a dependent nation. Tribes remain unprotected from the whimsy of the federal government.

*Participant:* When you say that we have been entering the new era of self-determination since 1975, self-determination seems to be defined in terms of federal statutes and court decisions. Given the efforts on the part of the world community, and given the momentum generated by the human rights revolution across the board, what will be the demands on the part of tribes when they invoke this doctrine of self-determination? What do they actually demand? Do they want the right of secession, autonomy, or another special protection? And also, to what degree do different tribes unite in making their demands?

*Professor O'Brien:* It varies tremendously from tribe to tribe. The Onondaga's in New York take no federal monies and absolutely refuse to recognize the United States' sovereignty over them. The St. Regis Mohawk reservation, which straddles the Canadian-United States border, is a case in point. At various stages in the last ten to fifteen years, the Mohawks have been in a virtual state of civil war because there is a faction that wants to maintain its identity with the traditional government, and there is another faction that is very closely aligned with the state government and is much more assimilative in character. This particular tribe has had a seriously difficult problem trying to determine what its definition of self-determination is.

So, it varies considerably across the country. Some tribes would be very interested in total independence. Other tribes are much more reliant on the federal government. Because of their small numbers and because of their lack of resources, they are much more interested in working out accommodations with the state and federal governments. As to what tribes want today—it is concern over resource development and economic development, and what that means for their people in an economic sense and a cultural sense. They also want to maintain power over their reservations—and it is very difficult to exercise jurisdiction over a reservation. The situation becomes even more complicated because of the allotment act in the 1880s. The government, as another method of getting rid of the Indians, simply took the majority of reser-

vations and allotted the land. They divided the reservation into parcels, giving every individual 80 or 160 acres and selling off the surplus. A lot of that land has now passed into white ownership. In several crucial areas, the state has jurisdiction over white-owned land within the reservation boundaries. If you look at criminal law, it depends on whether the victim and the person charged with the crime is Indian or white. There are bizarre situations where, for example, a white person who lives on a reservation and has a burglar in her house has to wait for the state police from the outside to come even though the nearest police are the tribal police. The tribal police have no jurisdiction unless they are cross-deputized. These are serious, day to day, practical issues, and tribes would simply like to be allowed to provide for the safety and welfare of the people on the reservation and for their people who leave the reservation as well.

*Participant:* From an international law point of view, have there been any serious attempts by American courts to justify why these treaties concluded between Indian nations and the United States no longer apply?

*Professor O'Brien:* Actually, I wrote a dissertation on that topic. Chief Justice John Marshall was faced with a very interesting situation in which Georgia had extended her laws over the Cherokee nation in part due to the discovery of gold on Cherokee land. Georgia simply stated that after a certain date, Cherokee land would be incorporated into Georgian counties. Indian people were not even allowed to testify in court against the seizure of their lands. The Cherokees hired the former Attorney General William Wirt, took the case to the United States Supreme Court, and argued that as a foreign nation, they could not be ruled by Georgia. John Marshall had a serious political problem on his hands because Andrew Jackson was President at the time, and Andrew Jackson was elected on the platform to move all of the Indians from the east to the west. Jackson let it be known to Marshall that if he decided this case in favor of American Indians, he would not enforce the decision.

In 1830, the Supreme Court's future was very uncertain. Marshall decided to get out of this political problem by looking to the United States Constitution. Article 3 of the Constitution states that Congress has the right to regulate commerce with foreign nations and Indian tribes in the states. John Marshall ruled that because

foreign nations and Indian tribes are mentioned separately, Indian tribes could not be international sovereigns. (It is a bit difficult to look to domestic law to decide an issue of international law.) At the end of the decision, Marshall basically said, "Look, I want to help, but bring me a case I can deal with!"

So a second case was brought before Marshall that argued that there was no basis for the states' authority over tribes; that the relationship existed between the federal government and the Indian tribes. This time, interestingly, Marshall virtually lifted the dissenting decision in the first case, which declared tribes to be international sovereigns, and put it into this decision. Marshall stated that the Indian nations are "nations," we have treaties with them, and we use these words in the same manner in which we use them with France and Great Britain. However, Marshall also stated that the tribes, by coming under federal protection in these treaties, had provided the federal government with an obligation to protect the tribes. This, in turn, had relegated tribes to the status of "domestic dependent nations." This is interesting because the Cherokees at that time had treaties with Spain and England. They were not under the protection of the United States. So Marshall left the tribes with the protection of a "domestic dependent nation." Courts later began to chip away at this protection. That is how the courts, in essence, "de-internationalized" or "domesticized" tribal status.

The court also included the argument that because the Indians were heathens and were nomads—which was erroneous because all of the eastern tribes were agriculturalists—they did not have ownership rights in the land. So the United States also began to chip away at the sovereignty of the American Indians through the reduction of their rights to own land.

Therefore, today we have the very inconsistent conclusion that the American Indians are quasi-sovereigns over which the United States has plenary control.

*Professor Shaffer.* There is a parallel opinion by Chief Justice Marshall, *Johnson v. McIntosh*, that is included in most of the beginning property casebooks used in American law schools: one party traced ownership from an Indian tribe through a treaty, and the other traced it to white ownership. Marshall spent a long time on that issue, but what the case really stands for is the white culture's successful assertion that, "We stole it fair and square."

*Participant:* As a matter of curiosity, is there any circumstance under which an Indian living on a federally recognized reservation could vindicate the federal Constitutional rights against final authority?

*Professor O'Brien:* Do you mean from the Bill of Rights? No, the issue would come under the Indian Civil Rights Act.

*Participant:* What about a non-Indian living on a reservation?

*Professor O'Brien:* No, again that would be covered by the Indian Civil Rights Act. And let me add that a number of tribal constitutions have their own bill of rights, and many of them simply duplicate the federal Bill of Rights. But there was a case in 1978, in which an Indian was arrested for rape on a Navajo reservation, and was charged in federal court for rape. He was also arrested by the tribal court for disorderly conduct and whatever else the tribal police could throw at him. He took the case to the Supreme Court claiming double jeopardy. He had already been tried in federal court for the crime; he couldn't be tried again in tribal court. However, the Supreme Court said this was not double jeopardy because he had violated the laws of two sovereigns.

*Participant:* I have a couple of questions. Do you believe it to be important, even desirable, that native American cultures should have institutional capacity to engage the dominant culture? If that is what you believe, what sort of institutions should we have? I was intrigued by the dichotomy that was drawn earlier between political rights and needs. I believe in multiple strategies of the world, but it assumes that only the oppressed would be able to appropriate as to what strategy would be useful at a given moment of time. Do you see that changing; that those multiple strategies might in fact be slightly advantageous to the people of that tribe?

*Professor O'Brien:* In response to your first question as to the types of institutions, one area or one solution that has been proposed today is that since the federal government is unwilling to make treaties with tribes, tribes negotiate trust agreements with tribes. The federal government also has a trust relationship with tribes. Tribes could guarantee more equality in their relationship by negotiating a trust agreement with the federal government. I think this is a very appropriate solution because the problem is that the

federal government simply redescribes and redefines trust relationship whenever it wants to, just as it redefines tribal status. That would be one avenue of recognizing the group rights of the tribe and building on the political status as well as the needs status. The problem with multiple strategies is that no matter what kinds of protections are put in place by legislation or by the courts for tribes, they are undone whenever the demands of the country dictate otherwise. This is why I go back to calling on the international standards and developments, because if you leave it simply to the protections afforded to tribes by American courts, they could disappear tomorrow. The United States has got to find a way around this, or I should say Indian people have got to find a way around this, and there is no way within domestic law to do it. Their fate is sealed domestically, so there has to be an appeal to the international level.