2006

Liberalism and Republicanism: in Federal Indian Law

Bethany Berger
University of Connecticut School of Law

Liberalism and Republicanism in Federal Indian Law

BETHANY R. BERGER*

I. INTRODUCTION

This essay begins to define, and invites others to define, where federal Indian law fits into American democratic political theory. More particularly, it attempts to discover where the claims of tribes fit into the two dominant strains of that theory, liberalism and republicanism.

This question may seem overly abstract, even blindly so, for a symposium dedicated to a treatise first created by Felix Cohen. Cohen, impatient with abstract legal and ethical concepts, wrote long before he ever met a tribal leader that "law must be valued in terms of what it *does* in our social order, in terms of its effects upon human lives."[1] But Cohen was not only a lawyer but also a philosopher by training, and was keenly aware of the impact of theory on human welfare.[2] I believe the seemingly poor fit between modern tribal claims and democratic theory has very real effects on Indian lives and in the courts hearing those claims.

In this essay, I first discuss the apparent contradictions between tribal interests and a liberal philosophical framework, and its impact upon the modern Supreme Court. I then show that when properly understood, most tribal claims do fit within classical liberal theory. I acknowledge that some tribal claims are distinctly those of groups or peoples, and so cannot be adequately understood in an individualist framework. Drawing on the work of John Rawls, however, I show that even these claims fit within a liberal theory of the rights of peoples. Despite this, liberalism, with its neutrality towards conceptions of the good and its emphasis on formal

---

* Assistant Professor, Wayne State University Law School, Associate Professor designate, University of Connecticut School of Law. B.A. Wesleyan University, J.D. Yale Law School. Thanks to Paul Berman, Laura Dickinson, Philip Frickey, Sarah Krakoff, Jeremy Paul, Christopher J. Peters and John Rothchild for suggestions and encouragement.

[1] Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 48 (1934).

[2] *See, e.g.*, Felix S. Cohen, *Judicial Ethics*, 12 OHIO ST. L.J. 3, 13 (1951) ("All of us who face the obligations that our democracy attaches to the study and the practice of law have a responsibility . . . for deepening public consciousness of the hopes, the ideals, and the values that are written into our constitution and our laws.").

equality, may still fall short in capturing the nuances of tribal legal claims. I argue that the second dominant strain of American political philosophy, the communitarian or republican strain, may better capture these elements of tribal claims to justice. I conclude by proposing an approach that combines these two strands of American democratic theory and discussing several Supreme Court decisions that utilized this approach.

II. LIBERALISM AND TRIBAL INTERESTS: APPARENT MISMATCH AND FUNDAMENTAL FIT

I began thinking about how tribal claims fit into American liberal theory as part of that perennial occupation of law professors, the effort to understand the behavior of the current members of the Supreme Court. This is perhaps a more difficult task for Indian law scholars than it is for academics specializing in other areas. It is relatively easy for us to explain why the more conservative members of the Court typically vote against tribal interests, which are, after all, specific minority rights that frequently clash with state interests. But, as the other contributions to this symposium demonstrate, we also have to explain why core members of the so-called liberal wing—Justices Ginsburg, Stevens, and particularly Souter—not only join, but often lead the charge against tribal interests.[3] Indeed, in contrast with the 5–4 or 6–3 splits familiar from other areas, many of the Court's most devastating recent decisions against Indian tribes have been unanimous.[4] Even worse, liberal Justices on the current Court have written many of the opinions expressing the most disdain for and suspicion of tribal interests in the modern era. Justice Stevens dissented passionately from decisions upholding tribal rights to tax non-Indian business activity,[5] assert sovereign immunity,[6] and conduct gaming on their reservations.[7] Justice

---

[3] *See* Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631 (2006) (criticizing Justice Souter's proposed revisions to established Indian law); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006) (criticizing Justice Ginsburg's reasoning in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. ___, 125 S. Ct. 1478 (2005)).

[4] *See* Nevada v. Hicks, 533 U.S. 353, 364 (2001) (holding that a tribal court could not exercise jurisdiction over action against state officials for unlawful search of a tribal member's home); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) (holding that a tribe could not impose taxes on non-Indian guests at a reservation hotel located on land owned by a nonmember); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 114–15 (1998) (holding that the county could tax reservation land owned in fee simple by tribal members); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 534 (1998) (holding that the land held by Alaska Native villages under the Alaska Native Claims Settlement Act was not "Indian country" within which Indian law jurisdictional principles applied); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998) (finding reservation diminished by act allotting land within the Yankton Sioux reservation); Strate v. A–1 Contractors, 520 U.S. 438, 459 (1997) (holding that a tribal court, in a personal injury action stemming from an accident occurring on a public highway running through a reservation, could not exercise civil jurisdiction over a non-Indian).

[5] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 160 (1982) (Stevens, J., dissenting).

[6] Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998) (Stevens, J.,

Ginsburg has not only—until the decision last December in *Wagnon v. Prairie Band of Potawatomi Nation*[8]—joined in each of the Court's rulings against tribes, but has written two of the most devastating opinions against tribal interests. Her opinion in *Strate v. A-1 Contractors* significantly expanded the limits on tribal courts by denying them jurisdiction over personal injury suits brought against non-Indians arising from accidents occurring on state highways on reservations.[9] Her 2005 opinion in *City of Sherrill v. Oneida Indian Nation of New York* ignored established precedent to hold that a tribe was not free from taxation on land it owned within a reservation that had never been legally disestablished.[10] In a series of opinions, Justice Souter has not only joined decisions limiting tribal jurisdiction over nonmembers but has urged the Supreme Court to go further still, stripping it all away.[11] In 2004 in *United States v. Lara*, a rare decision upholding such jurisdiction, Souter authored a dissent that only Justice Scalia joined—a strange and frightening alliance on the modern Court.[12]

I think that to understand this phenomenon, we cannot simply say that these Justices just don't like or understand tribes, but must take seriously the ways that their liberal commitments may undergird their opinions. Let me define what I mean by "liberal" in this context. "Liberal" here does not mean "not conservative." Rather it refers to a particular form of political theory, one with such an impact on American thought that no politician, liberal or conservative, can wholly disavow its precepts. This theory begins with the idea that individuals are free and equal, and equally entitled to pursue their disparate ideas of the good life.[13] Beginning with this premise, liberalism focuses on two central goals: first, liberty, or protecting individual liberties from undue state interference; and second, equality, ensuring equal treatment and equal opportunity to individuals in pursuing

---

dissenting). Justice Stevens's dissent was joined by Justices Thomas and Ginsburg, one of many examples of the strange bedfellows created by federal Indian law.

[7] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 222 (1987) (Stevens, J., dissenting).

[8] 546 U.S. ___, 126 S. Ct. 676 (2005).

[9] 520 U.S. 438, 459 (1997).

[10] 544 U.S. ___, 125 S. Ct. 1478, 1494 (2005).

[11] United States v. Lara, 541 U.S. 193, 226–31 (2004) (Souter, J., dissenting); Nevada v. Hicks, 533 U.S. 353, 375 (2001) (Souter, J., concurring); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659–60 (2001) (Souter, J., concurring); *see also City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1494 (urging the Court to go further on the issue of tax immunity and hold that the tribe was barred by laches from pursuing its land claims at all).

[12] *Lara*, 541 U.S. at 226–31 (Souter, J., dissenting).

[13] There is no better evidence of the American adoption of the ideal than the Declaration of Independence, which proclaims: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For more modern descriptions of this philosophy as liberalism, see, for example, JOHN RAWLS, POLITICAL LIBERALISM 3–10 (1996); Ronald Dworkin, *Liberalism*, *in* LIBERALISM AND ITS CRITICS 60, 60–66 (Michael J. Sandel ed., 1984); Michael J. Sandel, *Introduction* to LIBERALISM AND ITS CRITICS, *supra*, 1, 1–4.

their separate conceptions of the good.[14] There is a continuing tension between these two values, between the extent to which individuals are to be free from restriction so long as they do not interfere with the freedom of others, and the extent to which we may be required to give up a measure of liberty to further equality. We see this tension in a number of current debates, including those over affirmative action, payment of taxes and prayer in schools. But the majority of Americans, whether designated liberal or conservative in common parlance, ascribe in some measure to both of these values.[15]

Measured against a liberal framework, tribal interests may be perceived as special interests, inconsistent with the principle of equal treatment. See, for example, the 1983 objection by then-Associate White House counsel, now-Chief Justice John Roberts to taking land into trust for the Las Vegas Paiute Tribe because it "essentially does nothing more than take money from you, me, and everyone else and give it to 143 people in Nevada . . . , simply because they want it."[16] As he perceived it, the bill treated people unequally and was therefore unfair. Similarly, public outcry against treaty fishing rights, or more recently, rights to casino gaming, may be based in part on the sense that vesting these special rights in Indian tribes is contrary to the American ideal of fairness. (Of course the lack of objection when non-Indian companies are granted special fishing licenses, or when Donald Trump dominates Atlantic City with his casinos, suggests that these protests are not demands for complete equality.)[17]

The liberal objection to tribal interests is even stronger when the vindication of those interests appears to conflict with individual rights. We see a stark example of this in Justice Souter's objections to tribal jurisdiction over nonmembers on the grounds that tribal courts need not follow constitutional precedent "jot-for-jot."[18] This objection is also apparent in Justice Stevens's concern for non-Indian oil and gas producers subject to tribal taxes,[19] and in Justice Ginsburg's concerns for property

---

[14] *See, e.g.*, RAWLS, *supra* note 13, at 6–7, 23–24; ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 124–27 (1969); Dworkin, *supra* note 13, at 61–62.

[15] The rhetoric of the modern conservative movement, for example, supports public education despite the limitation on liberty that financial support for such education implies.

[16] Memorandum from John G. Roberts to Fred F. Fielding on Enrolled Bill H.R. 3765—Las Vegas Paiute Trust Lands (Nov. 30, 1983) (on file with the *Connecticut Law Review*).

[17] *See* Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. REV. 169, 171 (1991).

[18] Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1998)). I begin to address these concerns with respect to tribal courts in Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

[19] In his dissent in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), Justice Stevens declared:

> If the Court is willing to ignore the risk of such unfair treatment of a local contractor

owners and cities whose property adjoined tribal land immune from local taxation[20] and non-Indian tortfeasors in "unfamiliar" tribal courts.[21] These opinions are rife with the implication that tribal rights are unequal, unfair, and contrary to liberal ideas.

But much of this perception is inaccurate, the result of ignorance of history and short-sighted, even illiberal, failure of perception. It overlooks the ways that native people have long suffered from the unequal treatment that liberalism abhors and the ways in which the modern struggle for tribal rights is a response to that treatment. Felix Cohen, the great advocate of tribal sovereignty, was also a pioneer in fighting for classic liberal rights for Indian people, bringing some of the first cases establishing the Indian right to vote and receive public welfare and social security benefits.[22] Native people, caught between federal failures of appropriation and state denials of responsibility, still receive services inferior to those received by other ethnic groups.[23] The federal policy supporting tribal self-determination is in part an acknowledgment of the fact that non-tribal governments have never provided native people with access to equal services.[24]

More classical tribal interests can also be understood in liberal terms. Take for example tribal rights to treaty land. The Ottawa and Chippewa peoples of Michigan were some of the first tribes to sign allotment treaties, which divided tribal lands among individual heads of tribal households.[25] The classic story that Indian law professors tell of such allotment treaties is that these were bad because tribal property was held in common, and so

---

> or a local doctor because the Secretary of the Interior has the power to veto a tribal tax, it must equate the unbridled discretion of a political appointee with the protection afforded by rules of law. That equation is unacceptable to me. Neither wealth, political opportunity, nor past transgressions can justify denying any person the protection of the law.

Id. at 190 (Stevens, J., dissenting).

[20] Justice Ginsburg's opinion in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. ___, 125 S. Ct. 1478, 1483, 1490 n.9, 1491, 1493 (2005), emphasizes this, calling the tax immunity sought by the tribe "disruptive" not once but four times.

[21] Strate v. A–1 Contractors, 520 U.S. 438, 459 (1997).

[22] *See* Ariz. State Bd. of Pub. Welfare v. Hobby, 221 F.2d 498 (D.C. Cir. 1954) (holding that the Social Security Administration properly refused to approve an Arizona plan that failed to provide for reservation Indians); Acosta v. San Diego County, 272 P.2d 92 (Cal. Dist. Ct. App. 1954) (holding that a reservation Indian was eligible for county welfare relief); Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (holding that Indians had the right to vote in Arizona); *see also* FELIX S. COHEN, *Indians Are Citizens!*, *in* THE LEGAL CONSCIENCE 253 (Lucy Kramer Cohen ed., 1960).

[23] *See* U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2003), *available at* http://www.usccr.gov/pubs/na0703/na0731.pdf.

[24] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 22.01[1] (Nell Newton et al. eds., 2005 ed.).

[25] *See* Treaty with the Ottawas and Chippewas, July 31, 1855, art. I, § 8, 11 Stat. 621. For other treaties providing for allotment, see Treaty with the Winnebagoes, Feb. 27, 1855, 10 Stat. 1172; Treaty with the Chippewas, Feb. 22, 1855, 10 Stat. 1165; Treaty with the Wyandotts, Jan. 31, 1855, 10 Stat. 1159; Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109; Treaty with the Kickapoos, May 18, 1854, 10 Stat. 1078; Treaty with the Sacs & Foxes, May 18, 1854, 10 Stat. 1074; Treaty with the Delawares, May 6, 1854, 10 Stat. 1048; Treaty with the Ottoes and Missourias, Mar. 15, 1854, 10 Stat. 1038.

individual ownership of property violated tribal rights.[26] As we too often tell it, the problem was that tribes needed special treatment, not equal treatment.

But the treaty negotiations fail to reveal any tribal objections on these grounds. The tribal representatives were concerned instead with equal treatment, with a right to land that would receive the same respect as the title accorded to white men. As one representative stated: "We wish that you would give us titles—good titles to these lands. That these papers will be so good as to prevent any white man, or anybody else from touching these lands."[27] They were delighted when Commissioner George Manypenny assured them that was what the treaty provided—a land title that, in contrast to what they had experienced since 1794, would not be stripped away from them whenever the federal government decided it needed the land.[28]

Of course that's not what they got. Land-speculating vultures had started circling even before the allotments were assigned, and the Indian holders were defrauded off their land, had it sold out from under them to pay illegally imposed taxes, and saw it assigned to non-Indians after false claims that the Indians had abandoned their land.[29] In one case, after the government prevented foreclosure because taxes could not be imposed on the land, a white land speculator—accompanied by the local sheriff—walked through the Ottawa town of Cheboygan dousing its buildings with kerosene and then burning them to the ground.[30]

Situations in which Indian tribes are simply asking for equal treatment are not only found in history books. Many recent tribal claims can be understood as claims to vindicate liberal rights to equal treatment. The Dann sisters of the Western Shoshone tribe have been litigating for years to prevent the federal government from taking the land their family has been ranching on for generations.[31] The federal government claimed that they had lost any rights to the land when other representatives of the tribe won a

---

[26] *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1562 (2001) (recounting and challenging the classic story of Indian property ownership).

[27] Transcript of Proceedings of a Council with the Chippeways [sic] and Ottawas of Michigan Held at the City of Detroit, at 28 (July 25, 1855) (statement of Wah-be-geeg) (on file with the *Connecticut Law Review*).

[28] *Id.* at 27. The tribes had at this point made repeated treaties with the United States, in each one making further land cessions in hopes of preventing encroachments on the land that remained. The 1836 Treaty, in which the tribes had reserved fourteen substantial reservations, was amended in the Senate to provide they would last for only five years, "and no longer." CHARLES E. CLELAND, RITES OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN'S NATIVE AMERICANS 228 (1992) (discussing Treaty with the Ottawas and Chippewas, Mar. 28, 1836, art. 2, 7 Stat. 450, 451).

[29] *See* CLELAND, *supra* note 28, at 237; Bethany R. Berger, *American Indian Law*, *in* 1 MICHIGAN LAW AND PRACTICE ENCYCLOPEDIA 375, 383–84 (2d ed. 2005).

[30] JAMES M. MCCLURKEN, GAH-BAEH-JHAGWAH-BUK: THE WAY IT HAPPENED 80–81 (1991); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 26–27 (2005).

[31] *See* United States v. Dann, 470 U.S. 39, 41–42 (1985).

monetary judgment for unlawful taking of Western Shoshone land, although the sisters maintained possession of their land before and after the judgment, had never been notified of the claim, and had not received any part of the compensation for the taking. After losing before the Supreme Court, the sisters brought a claim before the Inter-American Court of Human Rights. The international tribunal held that the United States had unlawfully deprived the sisters of their property rights, including by denying them rights accorded to all other property owners under U.S. law:

> The record before the Commission indicates that under prevailing common law in the United States, including the Fifth Amendment to the U.S. Constitution, the taking of property by the government ordinarily requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review. In the present case, however, the Commission cannot find the same prerequisites have been extended to the Danns in regard to the determination of their property claims to the Western Shoshone ancestral lands, and no proper justification for the distinction in their treatment has been established by the State.[32]

Unmoved, the Department of the Interior responded by confiscating and slaughtering the 225 head of cattle on the land.[33]

Sometimes the Supreme Court can see the way that tribal claims are claims to equal, liberal rights. *Cherokee Nation of Oklahoma v. Leavitt*, for example, concerned tribal contracts to perform health care services for the federal Indian Health Service.[34] In making these contracts, the Department of Health and Human Services (HHS) agreed to pay the tribes a certain amount in contract support costs—the administrative costs incurred in administering the contracts.[35] When Congress failed to appropriate the amount HHS requested for contract support costs, HHS refused to pay the contract amount, even though it had uncommitted funds available.[36] In a rare win, the tribes were able to show the Court that simple equal treatment demanded that they be paid. Ruling in favor of the tribes, the Court emphasized the government's admission that "*were these contracts ordinary procurement contracts*, its promises to pay would be legally binding."[37] The tribes' lawyers were able to make the Court see that if the

---

[32] Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 144 (2002), *available at* http://www.indianlaw.org/WS_Dann_case_IACHR_final.pdf (footnotes omitted).

[33] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 294 (5th ed. 2005).

[34] 543 U.S. 631 (2005).

[35] *Id.* at 636.

[36] *Id.* at 636–67.

[37] *Id.* at 636.

government could not break its contractual payment obligations to Halliburton, neither could it break them with an Indian tribe.

Other times tribes cannot make the Court see the ways that tribal demands are claims to equal treatment. Professor Singer's contribution to this symposium shows that the Oneida Indian Nation was long denied an equal right to vindicate its land claims, and only in the 1960s obtained the access to the courts guaranteed to all litigants under liberal theory.[38] During the long process of litigating for its land, the tribe began to buy land within its historic reservation on the open market. It claimed that this land was entitled to the same tax immunity enjoyed by all other reservation land.[39] In 2005, the Supreme Court ignored the long history of inequality and focused instead on the rights of the surrounding towns that would be denied tax revenue if the tribe succeeded.[40] The Court applied laches (ironically a doctrine intended to achieve equity)[41] to defeat the tribe's attempt to remedy over a century of inequality.[42]

Similarly, in *Nevada v. Hicks*, the Court held that a tribal court could not exercise jurisdiction over a claim for unlawful search and seizure against state officials arising from their search of his reservation home.[43] Justice Souter concurred, passionately arguing that "at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers," and using the "special nature of [Indian] tribunals" and the "overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty'" to justify this presumption.[44] Overlooked in this paean to personal liberty is the fact thatMr. Hicks was in fact seeking to protect his personal liberty by challenging government invasion of his home. Incongruously, the Justices' concern for "intrusions on . . . personal liberty" led the Court to deny Mr. Hicks a local forum to challenge alleged intrusions on his own liberty rights.

In each of these cases in which tribal rights are denied as special treatment inconsistent with the ideals of fairness of our liberal political philosophy, closer examination reveals them to be demands instead for equal treatment, correction of long-standing injustices, or equal rights to own property and pursue ideas of the good life. The perceived mismatch becomes instead a problem of ill-perception, not illiberalism. There are,

---

[38] *See* Singer, *supra* note 3, at 620.

[39] City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. ___, 125 S. Ct. 1478, 1480 (2005).

[40] *See id.* at 1483, 1490 n.9, 1491, 1493 (repeatedly referring to the "disruptive" nature of the remedy sought).

[41] *See* Singel & Fletcher, *supra* note 30, at 36–37, 49–50 (describing equitable purposes of laches doctrine and the inappropriateness of using it to defeat Indian land claims).

[42] *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1494.

[43] 533 U.S. 353, 374 (2001).

[44] *Id.* at 376–77, 383–84 (Souter, J., concurring) (quoting Duro v. Reina, 495 U.S. 676, 693 (1990) and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

however, some fundamental tribal claims that do not so easily yield to this analysis. I discuss these next.

III. TRIBES AS PEOPLES: LIBERALISM AND TRIBAL GOVERNMENTAL RIGHTS

Not all tribal rights can be easily analogized to liberal *individual* rights. Felix Cohen amply recognized this, when, in an essay called *Indians Are Citizens!*, he wrote that "by and large the rights that are important to Indians are not rights of citizenship, that is to say, rights accorded to all citizens and denied to non-citizens, but are either human rights or tribal rights."[45] Think of some of the core rights that tribes have been fighting for: the right to exercise civil jurisdiction,[46] to impose criminal punishment,[47] and to tax and prevent others from taxing activities in their territories.[48] Individuals may *claim* these rights—I may claim the right to imprison all that do not bow before me—but it is hard to imagine that a liberal theory could vindicate them.

Liberal theory may not recognize these rights in individuals, but it does recognize them in self-governing peoples.[49] Although the focus of liberal theory has often been on the rights of individuals with respect to their governments, it can also speak to the rights of governments with respect to each other.[50] Perfecting the relationship between an individual and the state means nothing if another state may destroy that government; for the same reason, state intervention on behalf of individuals belonging to different states raises different questions than intervention to protect the rights of a state's own members. Rather than describe all liberal theories of relationships between separate societies, I will discuss just one: that of John Rawls, the central figure in modern American liberal theory.

In *The Law of Peoples*, the last book he published before his death, Rawls extended his liberal conception of justice as fairness to relations between peoples. Rawls proposed that in recognition of the rights of

---

[45] COHEN, *supra* note 22, at 257.

[46] *E.g.*, Strate v. A–1 Contractors, 520 U.S. 438 (1997).

[47] *E.g.*, *Oliphant*, 435 U.S. 191.

[48] *E.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164 (1973).

[49] Immanuel Kant, the father of modern rights-focused liberalism, founded this movement in his last work by extending the social contract idea to relationships between governments. IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch*, *in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107, 115 (Ted Humphrey trans., Hackett Publ'g Co. 1983) (1795).

[50] In fact, the liberal theory of the relationships between peoples began with Franciscus de Victoria's theories of the rights of the indigenous peoples of Latin America with respect to colonizing Europeans. *See* FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 127–28 (Ernest Nys ed., John Pawley Bate trans., William S. Hein & Co. 1995) (1557); *see also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 96–97 (1990) (discussing de Victoria's influence on international law).

individuals to a stable state, liberalism demanded that governments meeting certain conditions should deal with each other according to a principle of mutual respect. Under this principle, each people would respect the freedom and independence of the other and deal with the other equally in treaties and agreements.[51] In the same way that liberalism does not demand that all individuals share a single conception of the good, so Rawls did not demand that all peoples deserving of mutual respect be organized along liberal lines. Rather, he wrote, this respect should be afforded not only to liberal constitutional democracies but also to what he called "decent peoples."[52] While Rawls did not fully flesh out the concept of "decency," it does not require that peoples accord full equality to all of their members. It does, however, require that governments not violate fundamental human rights, such as rights to liberty and bodily integrity.[53]

If we understand tribal claims as claims of peoples, they are easy to justify on liberal grounds. It seems a matter of simple equality to demand that tribes have jurisdiction over those committing torts on their highways, or power to tax those engaged in economic activity on their reservations and to prevent other sovereigns from taxing those same activities. Also, understood as agreements made with peoples, it becomes much easier to understand the ways in which courts have historically interpreted Indian treaties: not as contracts requiring specification of each term, but as documents protecting peoplehood, not to be interpreted, absent explicit statement, to remove the prerequisites of sovereignty.[54]

Similarly, recasting the claims of Indian tribes as claims of peoples provides a powerful response to those who would deny tribes jurisdiction because their governmental institutions may not accord the full panoply of American constitutional rights.[55] No one could legitimately claim that Germany should be denied jurisdiction over those in its territory because it provides less protection for freedom of harmful speech than is accorded by the United States Constitution, or because the right to a jury trial is almost nonexistent. These differences are respected because they do not violate the fundamental rights that we all agree should be granted to human beings, whatever the society, but instead represent valid choices about how best to balance community and individual rights.

Adding the requirement of decency also helps us to draw lines between

---

[51] JOHN RAWLS, THE LAW OF PEOPLES 37, 62 (1999).

[52] *Id.* at 59–61.

[53] *See id.* at 64–66, 83.

[54] Professor Philip Frickey develops this theory in explaining Chief Justice John Marshall's role in the development of federal Indian law. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 406–10 (1993).

[55] *See* Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (noting that tribal courts have leeway to depart from Supreme Court precedent on the scope of individual liberties).

the individual rights that tribes may restrict without outside intervention and those that they may not. Take as an example *Santa Clara Pueblo v. Martinez*, in which the Supreme Court held that there was no federal jurisdiction over a suit challenging a tribal ordinance that accorded membership to children of Santa Claran men with non-Santa Claran women, but not to children of Santa Claran women with non-Santa Claran men.[56] One could legitimately argue under a liberal theory of the rights of peoples that a tribal decision to enforce such an ordinance should be upheld, but a decision that more fundamentally violated human rights—such as one expelling all nonmember children from the reservation—would not. And it would be easy to draw philosophically defensible lines (as liberal colleagues occasionally ask me to do) between the *Santa Clara Pueblo* decision and a decision stating that peoples can intervene to prevent women from being stoned for adultery.

Recast in this light, the claims of tribes, while perhaps not quite like the claims of U.S. states, are nothing strange, nothing illiberal. They are simply the claims to mutual respect and equality that all peoples are entitled to demand of each other in a truly liberal society of peoples.

IV. A REPUBLICAN PERSPECTIVE ON FEDERAL INDIAN LAW

Still there is something dissatisfying or incomplete in understanding Indian law solely through a liberal framework of mutual respect for peoples. Pragmatically, claims to sovereignty of other peoples do almost as badly with the Supreme Court as tribal claims do.[57] Theoretically, moreover, Indian tribes often do not look much like the independent peoples Rawls surely had in mind. Tribal communities are often geographically, economically, and culturally deeply intermixed with non-Indian communities.[58] Claims that American ideas of a liberal constitutional

[56] 436 U.S. 49, 51–52 (1978).

[57] Indeed, my claims that we do not deny Germany jurisdiction over the non-citizens in its midst because of the different procedural protections in its courts may be accurate, but the threats of United States policymakers to storm the Hague with the intent to repatriate any American citizen tried by the International Court of Criminal Justice suggests that Americans are not willing to tolerate procedural differences in some contexts. *See* American Servicemembers' Protection Act of 2002, 22 U.S.C.A. § 7427 (West, Westlaw through Pub. L. 109–69) (authorizing the President to use "all means necessary and appropriate" to secure the release of United States citizens and others from ICC detention); *see also* Noah Novogrodsky, *Challenging Impunity*, NEW INTERNATIONALIST, Dec. 1, 2005, *available at* http://www.newint.org/issue385/challenging-impunity.htm (noting that the American Servicemembers' Protection Act was nicknamed the "Hague Invasion Act").

[58] I discuss this with respect to the Navajo Nation in Berger, *supra* note 18, at 1101–05. One can see the impact of the geographic and demographic integration of tribes in many judicial decisions. *See, e.g.*, Duro v. Reina, 495 U.S. 676 (1990) (concerning tribal jurisdiction over a nonmember Indian who lived with a tribal member, worked for the tribe, and shot another nonmember Indian residing on the reservation); Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408 (1989) (concerning the Yakima's right to zone land in areas of mixed Indian and non-Indian owned land on the Yakima reservation); Montana v. United States, 450 U.S. 544 (1981) (concerning the Crows's

democracy should prevail may be more compelling in this situation than they would be with respect to a wholly separate nation like Turkey, or even with respect to bordering nations like Mexico and Canada.

I think a full theoretical framework for understanding Indian law demands that we move from a solely liberal theory, with its emphasis on individual choice and neutrality, to a republican or communitarian theory. A republican perspective rejects the idea of the individual as separable from the community, embracing instead the importance of the community in creating and providing the site for sovereign actualization of the individual.[59] Such a conception of the relationship between individual and society has been a significant, although lesser, undercurrent in American political theory since the founding.[60] This understanding, moving the focus from either the sovereign individual or—as in Rawls's *The Law of Peoples*—from the sovereign people, is an important complement in understanding tribal claims.[61]

Even more than for most individuals, one cannot understand claims by Indian tribes if one accepts the liberal premise that what separates us is in some important sense prior to what connects us—epistemologically prior as well as morally prior. As Michael Sandel succinctly describes it, liberal theory begins with the assumption that "[w]e are distinct individuals first, and then we form relationships and engage in co-operative arrangements with others"; hence the "priority of plurality over unity."[62] This is precisely the opposite of the vision of the self held by many native people. Among the Navajo people, for example, a proper introduction includes not only one's name, but the clans of one's mother, father, and grandparents—a simultaneous acknowledgment both of individual and relational identity.[63] The quest of tribes is not only to maintain political sovereignty

---

jurisdiction to regulate hunting and fishing by non-Indians on non-Indian owned fee land within Crow reservation); Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) (concerning Navajo jurisdiction over a Sioux Indian who had battered the Omaha father of his Navajo wife).

[59] The modern strains of this theory find their origins in the work of Jean Jacques Rousseau and perhaps are most famously set up as a critique of contemporary liberalism in MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 59–65 (1982).

[60] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 53–65 (1969) provides the preeminent historical examination of the tension between republican and liberal political philosophy during this time.

[61] *See, e.g.*, RAWLS, *supra* note 51, at 27. Another recent article advocates a communitarian understanding of tribal claims. *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443.

[62] SANDEL, *supra* note 59, at 53. Rawls vehemently denies this or any epistemological vision of the self, *see* RAWLS, *supra* note 13, at 27, but his and other social contract theories do conceive of the basis of political organization as fair cooperation between individuals, regardless of whether those individuals use their freedoms to develop other fundamental associations between themselves, and seeks to accommodate those individual desires to enter into associations instead of taking them as a fundamental organizing principle, *id.* at 29–33.

[63] *See* Claudeen Bates Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L.J. 21 (2002). To

as a bulwark against colonial oppression or means of maintaining tribal property. It is also importantly a struggle to protect the tribal self that can only be realized in the context of a distinct tribal community.[64] It is a quest for things that are meaningless unless they are shared. Indian tribes thus cannot be understood as collections of individuals made up solely of individual rights and needs, but instead must be seen also as communities, for whom the conditions to function effectively is a fundamental good not only for tribes but their individual members.

I believe that a more republican perspective helps to explain why Justice Sandra Day O'Connor, the famous swing voter of the Rehnquist Court, was not a swing voter in the area of Indian law. As noted early on in her career, O'Connor's jurisprudence, and her swing voter status, can be explained in part by the fact that her concern for individuals was often mediated through her concern for communities.[65] She was less concerned with classically liberal invasions of individual rights, such as governmental searches and seizures, than with actions that harm individuals' relationships to each other, creating divisive lines between individuals and the communities in which they participate.[66] This belief characterized her opinions issued in the last weeks of the 2004 term: Taking private property is bad when it destroys a long-established community in order to further generalized economic interests,[67] just as government affiliation with particular religious beliefs is bad when it divides a community by marking "nonadherents as outsiders."[68] We can see this as well in her concurrence in *Lawrence v. Texas*, in which she disagreed that the Texas law

---

introduce her remarks, Bates Arthur provided her clan (which is also her mother's clan), and the clans of her father and grandparents, saying: "That is who I really am." *Id.* at 21. The importance of these traditional ties is reflected in a Navajo saying condemning the behavior of an individual: "He acts as if he had no relatives." Ariz. Pub. Serv. Co. v. Office of Navajo Labor Relations, 6 Navajo Rptr. 246, 264 (1990).

[64] In an influential essay, Wallace Coffey and Rebecca Tsosie call this struggle the quest for "cultural sovereignty." Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 209 (1999). They quote a statement by Muscogee (Creek) writer Joy Harjo that beautifully captures the relationship between the tribal community and the tribal self: "I have lost my way many times in this world, only to return to these rounded, shimmering hills and see myself recreated more beautiful than I could ever believe." *Id.* at 196.

[65] *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592–604 (1986) (characterizing O'Connor's jurisprudence as distinctly feminine and communitarian). While Justice Ginsburg's tenure has demonstrated that female justices do not necessarily judge with what Sherry called a feminine voice, I believe her description of O'Connor's jurisprudence as communitarian remains accurate.

[66] *See id.* at 601–04 (contrasting Justice O'Connor's willingness to grant judicial relief to aggrieved insular communities with her "obvious hostility to the rights of criminal defendants").

[67] *See* Kelo v. City of New London, 545 U.S. ___, 125 S. Ct. 2655, 2671 (2005) (O'Connor J., dissenting) (emphasizing the length of residence and the family connections of the displaced homeowners).

[68] McCreary County v. ACLU of Ky., 545 U.S. ___, 125 S. Ct. 2722, 2747 (2005) (O'Connor, J., concurring).

prohibiting same-sex sodomy should be invalidated as violating a protected zone of individual privacy, and urged that it should be struck down on equal protection grounds because it made homosexuals "unequal in the eyes of the law."[69]

Justice O'Connor's appreciation of community and the tribal struggle to preserve the cohesion of their communities has led her to be one of the strongest voices for the preservation of tribal rights on the Court since the departure of Justices Blackmun, Brennan, and Marshall.[70] Her opinions, however, also point to the limitations of a communitarian approach to Indian law.

While liberalism, at least theoretically, does not prefer any particular concept of the good, republicanism recognizes that communities are bound in part by their conceptions of the good, and that political theory may justly prefer one such conception over another. But any theory that permits choices between communities will surely favor communities that look more familiar to the judges. We see this phenomenon in Justice O'Connor's decisions. In particular, when tribal rights are posed against rights of other communities, she has been willing to prefer those non-Indian communities over what the law would otherwise demand. For example, Justice O'Connor authored opinions shrinking the territory of the Ute[71] and Yankton Sioux[72] tribes that I believe can only be explained by her concern for the non-Indian communities residing within their borders. Each decision ignored strong arguments based on precedent and the Indian canons of construction that the reservation boundaries had not been diminished in the face of evidence that non-Indian communities existed within those reservation borders.[73]

Justice O'Connor also joined two opinions by Justice Stevens that advocated protection for recognizable communities over tribal interests. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, Justice O'Connor joined in Justice Stevens's plurality opinion holding that the tribes had zoning jurisdiction over non-Indian owned lands in an area dedicated to ceremonies, hunting, and gathering berries because the tribe "continue[d] to maintain the . . . area as a separate community," but not over lands in an area in which time had "produced an integrated community that

---

[69] 539 U.S. 558, 581 (2003) (O'Connor, J., concurring).

[70] *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 96 (2001) (O'Connor, J., dissenting) (employing canons of statutory construction to argue that excise taxes could not be levied on tribal gaming activities); Nevada v. Hicks, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring) (calling most of the majority opinion "unmoored from our precedents"); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175–76 (1999) (O'Connor, J.) (holding that the Chippewa retain rights under an 1837 treaty notwithstanding subsequent historical developments).

[71] Hagen v. Utah, 510 U.S. 399 (1994).

[72] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[73] *See Yankton Sioux*, 522 U.S. at 348–49; *Hagen*, 510 U.S. at 423–26 (Blackmun, J., dissenting).

is not economically or culturally delimited by reservation boundaries."[74] She also joined his dissent in *California v. Cabazon Band of Mission Indians*, warning that if tribes were free to conduct gaming on their reservations free from state law, the surrounding communities would soon find themselves plagued with "cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises."[75]

The point is not that tattoo parlors should flourish throughout Indian country,[76] but that a communitarian theorist is particularly vulnerable to falling victim to what Cohen called "the egocentric predicament."[77] It is all very well to say we must respect the communitarian claims of Indian tribes, but another thing altogether when those claims clash with the claims of other communities that look more like our own, or are made on behalf of tribal communities that do not resemble the non-Indian conceit of the tribe.

V. REPUBLICANISM, LIBERALISM AND INDIAN TRIBES REVISITED

The way out of this egocentric predicament is to combine the insights of both republicanism and liberalism in evaluating the claims of American Indian nations. Such a combination would take seriously the needs of tribes to exist as functioning communities, would accord tribes the mutual respect owed to all peoples, and would acknowledge the inequalities suffered by tribes and the obligation to afford them an equal opportunity to define themselves to redress those inequalities. In short, I am advocating a republican respect for community tempered by a liberal respect for equality between peoples as well as individuals.

One could understandably complain that I am picking what I want from each theory and respecting the purity of neither. But this is not inconsistent with modern political theory, which tends to recognize that neither a liberal individual-focused perspective nor a republican communitarian perspective can tell the whole story. Nor is it inconsistent with a distinctly American political theory which, since the debates between Jefferson and Madison, has incorporated bits of each perspective, often as though there were no conflict between them.[78]

---

[74] 492 U.S. 408, 437, 444 (1989).

[75] 480 U.S. 202, 222 (1987) (Stevens, J., dissenting).

[76] Indeed, as far as I am aware, Justice Stevens's entire parade of horribles reflected more on the furniture of his own mind than the proposed money-making schemes of Indian nations.

[77] Cohen, *supra* note 2, at 10.

[78] For example, constitutional historian Linda Kerber, commenting on Frank Michelman's and Cass Sunstein's view of republicanism, wrote:

> Like Sunstein and Michelman, American dissenters typically want liberalism *with* their republicanism . . . .
>
> . . . .
>
> . . . Whenever the competitive individualism of bourgeois liberalism has appeared to be the central problem, American dissenters have turned to republican themes. . . . This resilient republican language fused with major liberal elements has continued to

One could also accurately quibble that this is all somewhat utopian, and unlikely to be fully realized by what Chief Justice John Marshall long ago called "the Courts of the conqueror."[79] But shifting the theoretical paradigm employed by those courts may lead to results that are more consistent with American notions of justice. To make this more concrete, I will discuss three decisions from three very different eras that I believe made these interpretive moves. Each of these decisions combined both a liberal perspective on the claims for equal treatment by tribes and their members and a recognition of what the maintenance of community rights meant to the tribes involved.

The first opinion is *Worcester v. Georgia*.[80] In 1832, Chief Justice John Marshall began his historic opinion rebuffing Georgia's assertion of jurisdiction over Cherokee land with an account of tribal claims to equality as peoples. He first emphasized that before colonization, America's inhabitants were "a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[81] He then highlighted the fact that colonization of these people violated liberal principles: "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied . . . ."[82] While Chief Justice Marshall has been criticized for not undoing that illegal colonization, this historic injustice colors his subsequent discussion of the positive law at issue, in particular the treaties between the Cherokee Nation and the United States—promises of mutual respect by one people to another. These treaties, moreover, are not only to be honored according to the principle of equality, but also to be honored according to the needs of the tribal community making them. They are not interpreted as contracts with an individual or group of individuals, but rather as agreements with "the several Indian nations as distinct political communities,"[83] and against assumptions that those communities would authorize the United States to "manag[e] all their affairs, as they think proper," or reserve to themselves mere "hunting grounds" rather than sovereign territories.[84] It is through

---

be central to American political discourse, especially of the Left.

Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1671–72 (1988); *see also* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970 (1997) (discussing the dialectic between liberal–capitalist and republican–communal perspectives on property throughout American history).

[79] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

[80] 31 U.S. (6 Pet.) 515 (1832).

[81] *Id.* at 542–43.

[82] *Id.* at 543.

[83] *Id.* at 557. This point of course was first and best made by Philip Frickey. *See supra* note 54 and accompanying text.

[84] *Worcester*, 31 U.S. at 553–54 (construing the text of the Treaty of Hopewell, U.S.-Cherokee

these lenses of history, inequality, and community that the Cherokee treaties, which nowhere mentioned state jurisdiction, were determined to make Georgia's authority on Cherokee soil "repugnant to the constitution, laws, and treaties of the United States."[85]

Fast forward 127 years, and we find the same strategies in Justice Hugo Black's opinion in *Williams v. Lee*.[86] *Williams*, like *Worcester*, can be criticized from a tribal perspective, particularly for accepting the advances that state jurisdiction had made into Indian affairs in the intervening period.[87] But it employs understandings of history, equality, and community similar to those in *Worcester* to set up a vibrant barrier against that jurisdiction, denying Arizona state courts the right to adjudicate a contract claim between non-Indian Hugh Lee and Navajos Paul and Lorena Williams. The Justices fully understood that the decision was one enforcing the liberal ideals of equality. Professor Frickey reports that Justice Frankfurter sent Justice Black a note on *Williams v. Lee* stating that he was "pleased to concur in this indirect affirmation of *Brown v. Board of Education*."[88]

Like *Worcester*, *Williams v. Lee* begins with the original status of Indian tribes as independent nations, the conquest that induced them to give up their independence, and the protection promised in return.[89] It emphasizes the illiberal history of prosecution tied to the Navajo treaty, stating that when it was signed, "the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man."[90] This history places force behind the promise of mutual respect implied in the treaty, that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[91] Next, to interpret this promise as denying a non-Indian the right to bring an action in state court, the Court brings to bear a sensitive understanding of the ways in which the actions of individuals affect community cohesion: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[92] In other words, this simple contract case involved not

---

Indians, Nov. 28, 1785, *reprinted in Worcester*, 31 U.S. at 574–75).

[85] *Id.* at 536.

[86] 358 U.S. 217 (1959).

[87] *Id.* at 219–20 (describing the incursions on the principle of no state jurisdiction laid out in *Worcester*).

[88] Philip P. Frickey, *A Common Law for Our Age of Colonialism: Judicial Divestiture of Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 29 n.140 (1999).

[89] *Williams*, 358 U.S. at 218.

[90] *Id.* at 221.

[91] *Id.* at 221–22.

[92] *Id.* at 223.

just the rights of the plaintiff and defendants, but the social and political fabric the treaty promised the tribe it could maintain.

The third opinion is the one most condemned by liberal critics of federal Indian law, *Santa Clara Pueblo v. Martinez*.[93] The opinion was written by Justice Thurgood Marshall, perhaps the Court's staunchest advocate for liberal rights. In an apparent departure from liberal principles, *Martinez* held that federal courts had no jurisdiction to review claimed violations of the Indian Civil Rights Act (ICRA) other than as part of a habeas review of tribal custody.[94] This meant that a Santa Claran woman could not sue in federal court to challenge an ordinance that made her children ineligible for membership in the Pueblo because her husband was not Santa Claran, although children of a similarly situated Santa Claran man would be eligible.[95] Examination of the opinion reveals that this apparently illiberal denial of access to federal court was actually fully consistent with Justice Marshall's commitment to equality and community.

The opinion, in a now familiar move, began with the Santa Clara Pueblo's claims to mutual respect as an independent people: "Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years."[96] The opinion also touches on the vast and illiberal power the United States exercised over such peoples. After describing the Pueblo's continuing sovereignty, the Court declared that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[97] Tribal claims to respect as peoples and vulnerability of those claims to federal power both weighed against implying a federal remedy to ICRA violations: "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[98] As in *Williams*, the opinion also dwelled on communitarian concerns, in this case the importance of defining community membership and disruptive impact of having foreign fora resolve such public disputes.[99] The opinion thus recognizes the tribe's claim to independent peoplehood, its members' need for a stable community, and the congressional power to wipe both out, and comes down on the side of tribal rights.

The result is neither an abdication of liberal ideals nor an affirmation of the challenged membership rule. It is instead an expression of Rawls' principle:

---

[93] 436 U.S. 49 (1978).
[94] *Id.* at 72 (construing 25 U.S.C. §§ 1301–03).
[95] *Id.* at 51.
[96] *Id.*
[97] *Id.* at 56.
[98] *Id.* at 60.
[99] *Id.*

> Liberal peoples should not suppose that decent societies are unable to reform themselves in their own way. By recognizing these societies as *bona fide* members of the Society of Peoples, liberal peoples encourage this change. They do not in any case stifle such change, as withholding respect from decent peoples might well do.[100]

Rawls's words find an echo in those of Rina Swentzell, a Santa Claran woman whose own children are barred from membership by the ordinance:

> I thought long and hard about the *Martinez* case. I wanted my children to be members of Santa Clara, although I had married a non-Indian who I met in college. If the case favored the Martinez family . . . I felt that Santa Clara would loose any remnants of itself as a vital, self-determining community. I was relieved to hear the decision. Santa Clara was to retain the on-going conversation about who is a recognized member of the community. But, more importantly, the Western world was acknowledging a way of life which traditionally honored nurturing and feminine qualities.[101]

The decision, seen through her eyes, becomes a testament to the ideals of American democracy, the recognition of the demands for liberty, equality, and community by a long oppressed people. To end as I began with Felix Cohen, this recognition is not foreign to the animating ideals of American democracy, but instead is a partial attempt to be true to those ideals, a measure of "the rise and fall in our democratic faith."[102]

---

[100] RAWLS, *supra* note 51, at 61.

[101] Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97, 98–99 (2004).

[102] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).