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INDIGENOUS SELF-GOVERNMENT AND JUSTICE IN NORTH AMERICA: THE CHANGING NORMATIVE PARADIGMS OF INDIGENOUS AUTONOMY IN THE CONSTITUTIONAL FRAMEWORKS OF THE UNITED STATES AND CANADA

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Abstract

European colonisation on the 'New World' had profound detrimental impacts on its prior inhabitants. Indigenous peoples were often deprived of their lands and means of government. In world that has exchanged colonialism for decolonisation and self-determination, there remain serious questions about the justice of constitutional frameworks in settler societies where decolonisation is not possible. This paper identifies the broad normative paradigms of justice relating to indigenous autonomy that have existed in Canada and the United States over the last 200 years, namely sovereign recognition, assimilation and self-determination. These paradigms show different ways of thinking about the justice of constitutional frameworks that recognise and encourage indigenous autonomy. Furthermore, this paper examines the current tension between indigenous autonomy's perceived tribalism and the civic republican liberalism's emphasis on equal citizenship and unified political community, and shows that reconciliation of indigenous autonomy and liberalism is possible and necessary if we are to achieve just constitutional frameworks.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 15, 400 words.

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I would like to thank Sir Geoffrey Palmer for his supervision, my family for their support and Sarah for her tolerance.

I INTRODUCTION

This paper begins with the context in which it was written. In New Zealand's contemporary political and social debate, there is much political capital made from arguing that a modern liberal democracy such as our own should not treat one class of citizens differently than any other. The political parties on the right argue for an end to 'special' Maori rights, such as Treaty of Waitangi rights and guaranteed Parliamentary seats. The notion that 'one standard of citizenship' should prevail is popular, perhaps because of its simplicity and its conformity with some conceptions of the liberal ideal. However, to adequately debate the justice or injustice of differentiated rights and citizenship for Maori in New Zealand, there must be some comparison with the ideas of justice and the treatment of indigenous rights in other similar liberal democratic settler societies. There must also be reference to overarching theories of the justice of 'special' indigenous rights and indigenous autonomy. However, it is clear that such philosophical and comparative analysis is not a part of the current public discourse of Maori rights, despite some excellent comparative publications.[1]

With these observations in mind, this paper analyses the changing normative paradigms[2] of the justice of indigenous autonomy within the constitutional systems of two of the most philosophically influential liberal democratic colonial societies – the United States and Canada. The United States is regarded by many as the epitome of liberal democracy, and New Zealand has already borrowed significantly from the Canadian conception of liberal democracy embodied in their Charter of Rights and Freedoms.[3] Apart from the

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[1] See Ken S Coates and P G McHugh (eds) *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millenium* (Victoria University Press, Wellington, 1998); William Renwick *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991).

[2] 'Paradigm' is used in its (controversial) more recent usage as "A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline": Joseph P Pickett et al *The American Heritage Dictionary of the English Language* (4 ed, Houghton Mifflin Company, Boston, 2000) On-line edition at < www.bartleby.com/61> 'paradigm'. 'Normative paradigm' thus refers to the set of assumptions concepts, values and practices that constitute the way of viewing justice in any given society.

[3] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

utility of identifying and comparing the shifting paradigms of indigenous autonomy, it is hoped that this paper can be a catalyst for a thorough analysis of the justice of Maori rights and aspirations in comparison with the justice of indigenous autonomy found in these two North American examples.

Felix Cohen's often quoted metaphor views Indians as the miner's canary in the mine of the United States' democratic faith.[4] In this paper, indigenous autonomy is the miner's canary that reflects the rise and fall of different strands of liberal philosophy and ideology, culminating in the present debates about constitutionally differentiated group rights and common citizenship. This paper seeks to analyse the development and content of the changing paradigms of the justice of indigenous autonomy, and to compare their development in these two very close (geographically and ideologically) neighbours. It also seeks to identify the underlying tensions that exist in the current paradigms, and argues that constitutional and political theory should not ignore social and historical imperatives, and should continue the development of the paradigms of indigenous autonomy with a clear view of social reality.[5] Importantly, the paradigms identified are not strictly chronologically distinct and separate, for the legal and judicial contents of a paradigm may arise in one era but lie effectively dormant in the face of contrary government policy, and inevitably all eras and societies will contain varied ideas of justice.

1 Method

This paper seeks to identify normative paradigms of indigenous justice in constitutional law and arrangements. Constitutional law is "an enterprise that actively distributes power, primarily in the form of rights and jurisdiction,

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[4] The famous quote reads: "It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." Felix S Cohen "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy" (1953) 62 Yale LJ 348, 390.

[5] See Patrick Macklem *Indigenous Rights and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 24-25 for a discussion of ahistorical and acontextual normative constitutional theory.

among a variety of legal actors, including individuals, groups, institutions and governments."[6] The recognition of the justice of indigenous autonomy concerns the distribution of power of jurisdiction to indigenous groups and institutions within the wider state. Shifts in constitutional distributions of power will often result in changes in the material circumstances of individuals,[7] which is one reason why this topic is so important today.

The object of inquiry and argument for this paper (normative paradigms of indigenous autonomy) points to a classification into external legal argument.[8] To this end, this paper seeks to explain the social meaning implicit in different paradigms of constitutional law, and it does so by examining the legislative, judicial and executive actions that have impacted on the constitutional position of First Nations and Native American tribes and individuals. This paper is primarily an examination shifting normative paradigms, but it does contain arguments for the development of future paradigms. Furthermore, it examines the significance of this knowledge for New Zealand society.

2 *Structure*

This paper is structured so as to give a clear picture of the meaning of indigenous autonomy and the changing paradigms of justice that have existed regarding this concept in the United States and Canada. The first substantive section introduces the concepts of 'autonomy' and 'indigenous autonomy'. With this background established, the second section examines the first paradigm of indigenous autonomy – recognition of sovereignty. Section three examines the second paradigm – assimilation. Section four introduces the current paradigms that exist in the United States and Canada – self-determination and self-government. Section five develops the analysis of the self-determination and self-government paradigms by examining the tensions between their recognition

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[6] Patrick Macklem *Indigenous Rights and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 21.
[7] Macklem, above, 21.
[8] Macklem, above, 26; H L A Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) 86-88.

of the justice of indigenous autonomy and the fundamental tenets of political liberalism.

II INDIGENOUS AUTONOMY

1 Autonomy

Yash Ghai observes that "[t]here is no developed or reliable theory of autonomy; modern but contested justifications revolve around the notion of identity."[9] In practice, autonomy is a device to allow groups with a distinct identity to exercise direct control over affairs that specially affect them, while allowing the state to control affairs concerning the general interest.[10] The operation of autonomy is contingent on several important factors including history, traditions of governance, the size of territory, the size and number of communities, and internal and external pressures.[11] This has led to many legal and political models being used to regulate autonomy, including federalism, regional autonomy, regionalism and decentralisation.[12] In the modern era, governments around the world have turned to autonomy in response to their becoming aware of the ethnic conflict and extreme cultural difference within their societies.[13] In this context, "autonomy seems to provide the path to maintaining unity of a kind while conceding claims for self-government."[14]

2 Indigenous Autonomy

Many indigenous groups around the world have demanded recognition of autonomy from the states that now exercise sovereignty over them.[15]

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[9] Yash Ghai "Ethnicity and Autonomy: A Framework for Analysis" in Yash Ghai (ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge, Cambridge University Press, 2000) 4.
[10] Ghai, above, 8.
[11] Ghai, above, 4.
[12] Ghai, above, 8-9.
[13] Ghai, above, 1.
[14] Ghai, above, 1.
[15] For a general examination of indigenous claims for autonomy and self-government see Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and P G McHugh (eds) *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millenium* (Victoria University Press, Wellington, 1998) 59-67.

Indigenous peoples in the United States and Canada often base their demands for autonomy on their inherent sovereignty and jurisdiction according to the natural law of the Creator.[16] Some tribes can point to treaties and agreements that uphold their natural rights to govern themselves and their lands as further justification of the recognition of autonomy or self-government.[17] Indigenous peoples have been reluctant to compromise on phrasing their demands for 'sovereignty', as they wish to retain language that recognises the continuity of their claims from time immemorial.[18]

In some philosophical circles, forms of indigenous autonomy have often been supported by the liberal goal of distinct cultural survival for indigenous peoples, which has been widely accepted in Western liberal democratic states.[19] The indigenous right to 'self-determination' is more contested, for states want to ensure that this will not include a right to secession under international law.[20] However, most demands for indigenous autonomy do not extend to secession.[21] In most cases both the indigenous and non-indigenous peoples view autonomy rights as critical in preserving indigenous peoples' culture and status as distinct peoples.[22]

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[16] Frank Cassidy and Robert L Bish *Indian Government: Its Meaning in Practice* (Oolichan Books and the Institute for Research on Public Policy, Lantzville and Halifax, 1989) 32-33; Oren Lyons "Traditional Native Philosophies Relating to Aboriginal Rights" in Menno Boldt and J Anthony Long (eds) *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) 19-23.

[17] Cassidy and Bish, above, 34-35.

[18] Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and P G McHugh (eds) *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millenium* (Victoria University Press, Wellington, 1998) 75.

[19] Douglas Sanders "We Intend to Live Here Forever": A Primer on the Nisga'a Treaty" (1999) 33 UBC L Rev 103, 119.

[20] See Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) and Erica-Irene A Daes "The Right of Indigenous Peoples to "Self-Determination" in the Contemporary World Order" in Donald Clark and Robert Williamson (eds) *Self-Determination: International Perspectives* (MacMillan Press Ltd, London, 1996) 47.

[21] See Sharon H Venne "Self-Determination Issues in Canada: A First Person's Overview" in Donald Clark and Robert Williamson (eds) *Self-Determination: International Perspectives* (MacMillan Press Ltd, London, 1996) 292.

[22] Alexandra Kersey "The Nunavut Agreement: A Model for Preserving Indigenous Rights" (1994) 11 Ariz J Int'l & Comp L 429, 452.

The models of autonomy that indigenous peoples aspire to or already operate differ greatly,[23] influenced by the variables listed above. Practical problems arise where indigenous autonomy is sought by indigenous peoples that have been dispossessed of their traditional territorial land base.[24] Almost all these regimes do not extend to complete independence, and thus presume extensive relationships between the indigenous institutions and government institutions, and between indigenous and non-indigenous people.[25] The relationship between the indigenous government and the state require "complex governance framework, often embodied in a formal agreement or in constitutional or legislative provisions".[26]

In sum, indigenous autonomy is often an aspirational goal, but practical models do exist in many parts of the world. The goals of indigenous autonomy are similar to general autonomy arrangements, but the historical and social contexts and justifications are different. Indigenous autonomy requires governments to allow and support indigenous institutions and self-government within the wider state. This discussion gives a background conception of the ideal of indigenous autonomy for the examination of the changing normative paradigms discussed below.

III SOVEREIGN RECOGNITION

This section discusses the development of the sovereign recognition paradigm that arose out of judicial recognition of the historical relationship between Native American tribes and the United States federal and state governments. Although in early relationships this paradigm was respected by

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[23] Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Int'l L & Pol 189, 224-225.

[24] See P G McHugh "Aboriginal Identity and Relations in North America and Australasia" in P G McHugh and Ken S Coates *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 142-143; 172-174, and Paul L A H Chartrand "Self-Determination without a Discrete Territorial Base?" Donald Clark and Robert Williamson (eds) *Self-Determination: International Perspectives* (MacMillan Press Ltd, London, 1996) 302.

[25] Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Int'l L & Pol 189, 225.

[26] Kingsbury, above, 225.

the executive and legislature, it was the judiciary that cemented its place in federal Indian law, in which the paradigm plays an important role today.

A Early Colonial Legal Doctrine

Some of the key principles of United States and Canadian 'Indian law' predate the revolutionary division of North America, descending from centuries of European jurisprudence.[27] On discovery of the 'New World', the earliest legal questions Europeans asked were questions about the scope and nature of the inhabitants' territorial rights.[28] It was relatively well settled that the first Christian state to discover uninhabited lands acquired sovereignty over them.[29] European states acted on this authority to seize any territory not already claimed by other Christian states, regardless of the wished of the indigenous inhabitants.[30]

However, this early international law did sometimes recognise minimal legal rights of Native peoples to their lands, property, and systems of government, despite the rights of the European monarchs and their status as "infidels."[31] The 'discovery doctrine' stated that the title in vacant land vested in the discoverer,[32] but this doctrine was harder to apply to inhabited lands. To ensure European control, the discovery doctrine was developed further to vest title in the more civilised Europeans, subject to the rights of the indigenous peoples to undisturbed possession until they wanted to sell to the discoverer.[33] The Royal Proclamation of 1763, drafted in the aftermath of Indian uprisings against the British, provided the foundation for US and Canadian Indian

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[27] David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnesota, 1993) 41. For an excellent and broad discussion of colonial legal doctrine in the 'New World' see L C Green and Olive P Dickason *The Law of Nations and the New World* (The University of Alberta Press, Edmonton, 1989).
[28] Getches. Wilkinson and Williams, above, 41.
[29] Getches. Wilkinson and Williams, above, 43.
[30] L C Green "Claims to Territory in Colonial America" in L C Green and Olive P Dickason *The Law of Nations and the New World* (The University of Alberta Press, Edmonton, 1989) 4.
[31] Steven Paul McSloy "Back to the Future: Native American Sovereignty in the 21st Century" (1997) 20 NYU Rev L & Soc Change 217, 228.
[32] McSloy, above, 230.
[33] McSloy, above, 231.

policies.[34] The proclamation is seen as the Magna Carta of Aboriginal rights in Canada, but also applied to the American colonies.[35] The proclamation recognised Indian tribes as nations[36] and guaranteed the possession of unsurrendered lands.[37] These foundational principles of Indian law were often violated, but are the earliest expression of government recognition of indigenous autonomy in North America.

The significance of early colonial legal doctrine is two-edged. First, the colonial legal doctrine was completely effective against other European colonial powers, and in this sense it is an important factor in the contemporary shape of North America. However, the second edge is that the colonial legal doctrine did not totally deny indigenous land and autonomy rights, and indeed could not in light of the military power and independence that many indigenous North American tribes enjoyed vis-à-vis the European power in the early years of colonisation.

B Early Sovereign Recognition and the Indeterminate Constitutional Framework

In the early colonial era tribes were significant military forces.[38] They often conducted wars against the US,[39] and thus government-tribal relations were conducted mostly by 'treaty-making'. This method implied recognition of tribes as independent governments, because the terms of the treaties usually reinforced the implication of sovereignty with promises of independence.[40] However, after 1815, the military status and threat of tribes was relatively

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[34] Roger L Nichols *Indians in the United States and Canada: A Comparative History* (University of Nebraska Press, Lincoln, 1998) 129.
[35] Bradford Morse "Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States" (1997) 10 STTLR 115, 117.
[36] See also *R v Sioui* [1990] SCR 1025, 1053 (Canada) and *Worcester v Georgia* (1832) 31 US (6 Pet) 515 (SC).
[37] Bradford Morse "Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States" (1997) 10 STTLR 115, 117.
[38] *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 549 (SC); Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 655.
[39] For late eighteenth century examples see Roger L Nichols *Indians in the United States and Canada: A Comparative History* (University of Nebraska Press, Lincoln, 1998) 138-141.
[40] David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnesota, 1993) 83.

weaker and, the US government began a removal policy that displaced Native Americans from their traditional territories.[41] Notwithstanding the removal policy, the historical sovereignty of Native American tribes would play a central part in the judicial recognition of tribal sovereignty.

Early on in US constitutional history actions were taken to limit the power of state governments over Indian affairs "by requiring a nationally directed diplomacy with Indian nations".[42] Certainly some delegates to the Constitutional Convention were concertedly thinking about Indian issues when they participated.[43] However, the text of the United State Constitution does not definitively situate tribes within the federal system,[44] with only a few references to Indians.[45] The most important empowering reference is the 'Indian Commerce Clause',[46] which allows the federal government jurisdiction "to regulate commerce with foreign Nations and among the several states and with the Indian tribes."[47] The Treaty Clause[48] and the Property Clause[49] are seen as further sources of federal authority over Native Americans. More recently, the Supreme Court has used the Indian commerce clause as the primary constitutional provision supporting federal power over Native Americans.[50]

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[41] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643 655

[42] Jill Norgren *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw Hill Inc., New York, 1996) 30, citing the Articles of Confederation (1777), Article IX.

[43] John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 19.

[44] See *United States v Kagama* (1886) 118 US 375, 378: "The constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders."

[45] US Constitution art I 8 cl 3 (the 'Indian Commerce Clause); US Constitution art I 2 cl 3 (excluding 'Indians' from taxation).

[46] US Constitution art I 8 cl 3. For an excellent discussion of the history and effect of the Indian Commerce Clause see Steven Paul McSloy "Back to the Future: Native American Sovereignty in the 21st Century" (1997) 20 NYU Rev L & Soc Change 217, 256-265.

[47] *United States v Kagama* (1886) 118 US 375, 378-79 held that the reference did not extend federal power past commerce-related matters. The Supreme Court has recently used the Indian commerce clause as the primary constitutional provision supporting federal power over Indians: Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 209; *McLanahan v Arizona State Tax Commission* (1973) 411 US 164, 172.

[48] US Constitution, art II 2 cl 2; see *Cohen*, above, 207, and *Morton v Mancari* (1974) 417 US 535, 551-552.

[49] US Constitution, art IV 3 cl 2; *Cohen*, above, 209.

[50] *Cohen*, above, 209; *McLanahan v Arizona State Tax Commissioner* (1977) 411 US 164, 172 n 7.

Despite the empowering references and their subsequent interpretation by the Supreme Court, the Constitution is fundamentally indeterminate with regards the relationships of Native American tribes with the federal state. This indeterminacy is the key constitutional feature that has allowed the Supreme Court to fluctuate in its recognition of Indian autonomy from the sovereign recognition era to the gradual diminution of territorial sovereignty down to 'self-government'. This fundamental indeterminacy means that the decisions of the Supreme Court in respect of Native American sovereignty can be interpreted as reflecting the dominant moral and political conceptions of justice in each era, applying to some extent a realist approach.[51] Patrick Macklem, discussing the Canadian constitution, argues that judicial interpretations of the constitution "has a unique way of infiltrating and shaping inquiries into the justice of certain constitutional arrangements", and that the courts' decisions are central to citizens' perceptions of a just constitutional order.[52]

The federal government acted consistently with the Indian commerce clause by enacting the 'trade and intercourse' Acts,[53] which regulated all aspects of trade and intercourse with Indians.[54] These matters included the licensing of people trading with Indian, exclusive land acquisition for the federal government, the regulation of crimes and trespasses against natives, and the establishment of procedure for punishing non-Indians who committed offences against Indians.[55] The trade and intercourse Acts were successful in some respects, especially in regulating land acquisition.[56] However, some states chose

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[51] The aspect of legal realism that is drawn upon is the idea that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious" have a definite part to play in the result of legal judgement: Oliver Wendell Holmes *The Common Law* quoted in Brian Bix *Jurisprudence: Theory and Context* (Sweet and Maxwell, London, 1999) 165.

[52] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 20. Macklem later acknowledges that "[j]udicial rulings at best are contributions to an ongoing debate concerning constitutional justice." Macklem, above, 20.

[53] Trade and Intercourse Act 25 USC§ 263 (1834). See Felix Cohen 212-213.

[54] David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnesota, 1993), 99.

[55] Jean M Silveri "A Comparative Analysis of the History of United States and Canadian Federal Policies Regarding Self-Government" (1993) 16 SFKTLR 618, 624.

[56] David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnesota, 1993) 103.

to ignore this federal pre-emption of land acquisition, and negotiated their own treaties with tribes.[57]

C The Marshall Trilogy and Sovereign Immunity: Tribal Sovereignty as Justice

In the courts, the recognition of sovereignty paradigm begins with 'The Marshall Trilogy': *Johnson v McIntosh*,[58] *Cherokee Nation v Georgia*,[59] and *Worcester v Georgia*.[60] In these cases, Chief Justice John Marshall delineated the constitutional status of Indians and Indian tribes without the help of any express constitutional guidance.[61] In this situation of indeterminacy, there were many political pressures upon Marshall, and the desire for a strong federal government may have swayed his thinking as much as respect for Indian sovereignty and autonomy.[62] But the judgements do display a respect for the historical sovereignty and territorial ownership of Native Americans, and disdain for theories that ignore or subvert this history.

Johnson v McIntosh[63] advanced the 'discovery doctrine', which gave "the exclusive right of the discoverer to appropriate the lands occupied by the Indians."[64] While Indians had legal claims to possession and use, their rights to independent sovereignty were diminished.[65] The importance of this case is the fundamental exposition of the doctrine of aboriginal title, and Marshall's

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[57] David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnesota, 1993) 103.
[58] *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543 (SC).
[59] *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1 (SC).
[60] *Worcester v Georgia* (1832) 31 US (6 Pet) 515 (SC).
[61] For a good overview of the basic model of tribal sovereignty laid down by the Marshall trilogy see Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 232-235; Philip P Frickey "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-Members" (1999) 109 Yale L J 1, 8-11.
[62] See Stephen Paul McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future" 37 New Engl L R 733, 735.
[63] *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543 (SC).
[64] *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543, 584 (SC).
[65] *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543, 574 (SC).

obvious reluctance to apply the doctrine, due its unjust impact on Native American property rights.[66]

In *Cherokee Nation v Georgia*,[67] the Cherokee sought an injunction barring state jurisdiction over them, because they were a foreign nation.[68] Marshall CJ found that concluded that the Cherokee Nation was not a foreign nation for these purposes because it was distinctly delineated as different from a foreign nation in the Indian Commerce Clause.[69] Although the Cherokee lost the case, Marshall CJ characterised Indian nations as 'domestic dependent' nations – "[t]heir relation to the United States resembles that of a ward to his guardian."[70] This decision lays the groundwork for later recognition of the United States' plenary power.

The third and most influential decision was *Worcester v Georgia*,[71] in which Marshall laid down the enduring rule on Indian sovereignty. Indian nations had "always been considered as distinct, independent political communities".[72] The treaty signed by the Cherokee was not a relinquishment of their national character, but one nation seeking protection from another.[73] Marshall found that "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force [and therefore the] acts of Georgia are repugnant to the constitution, laws, and treaties of the United States"[74] However, as in *Cherokee Nation*, the tribe was not fully sovereign.[75]

The Marshall trilogy left an enduring legacy for federal Indian law, with the *Worcester* decision remaining one of the most often cited in American

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[66] *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543, 591-592 (SC). See also *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 543 (SC).
[67] *Cherokee Nation* v Georgia (1831) 30 US (5 Pet) 1 (SC).
[68] Jill Norgren *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw Hill Inc., New York, 1996) 99.
[69] *Cherokee Nation v Georgia* (1831) 30 US 1, 16-17 (SC).
[70] *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1, 17 (SC).
[71] *Worcester v Georgia* (1832) 31 US (6 Pet) 515 (SC).
[72] *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 559 (SC).
[73] *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 555 (SC).
[74] *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 561 (SC).
[75] *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 557 (SC).

constitutional law.[76] Jill Norgren highlights the importance of the Supreme Court's decision, stating that instead of merely patriotically denying Native American sovereignty, "the Court attempted to forge a compromise that would permit the United States to view itself as a nation under the rule of law while continuing its quest to control the continent."[77] However, it is important to note the possibility that the decision was based on the struggle of federalism.[78]

D Qualifying Recognition: Federal and State Limitations on Tribal Sovereignty

1 Federal control

Despite the absence of a broad constitutional empowerment of the federal government and the recognition of tribal sovereignty in the Marshall trilogy, the Supreme Court quickly recognised that Congress had almost unlimited power to legislate for Indians and their tribes. *United States v Kagama*[79] founded the plenary power doctrine in the subordination of Indian tribes within the United States constitutional system.[80] The plenary legislative authority did not flow from express constitutional empowerment, but the United States government's exclusive sovereignty within its territory.[81] The Supreme Court reasoned that tribes were "wards of the nation', and that the federal government had a duty of protection, which came as a corollary of the plenary power.[82]

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[76] John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 27.
[77] Jill Norgren *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw Hill Inc., New York, 1996) 6.
[78] Stephen Paul McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future" 37 New Engl L R 733, 735.
[79] *United States v Kagama* (1886) 118 US 375 (SC).
[80] *United States v Kagama* (1886) 118 US 375, 379-380 (SC): "But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States."
[81] *United States v Kagama* (1886) 118 US 375, 380 (SC): "the power of Congress arises "from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else."
[82] *United States v Kagama* (1886) 118 US 375, 383-384 (SC). See also *Lone Wolf v Hitchcock* (1903) 187 US 553, 565 (SC).

The plenary power doctrine was developed further in *Lone Wolf v Hitchcock*.[83] In this case, the Supreme Court used the plenary power doctrine to uphold Congress's power to dispose of tribal lands in abrogation of a treaty.[84] The court boldly held that plenary authority over tribes had been exercised by Congress 'from the beginning'.[85] Furthermore, plenary power had always been deemed 'a political one', and thus was not subject to judicial review.[86] However, the plenary power is limited by the Constitution.[87] Congress is liable under the Fifth Amendment for taking Indian land for non-Indian use.[88] Two more recent cases, *Delaware Tribal Business Committee v Weeks*[89] and *United States v Sioux Nation of Indians*,[90] indicate that Congressional action in Indian affairs is subject to judicial review, in accordance with the rational basis test;[91] thus, 'plenary' power is not synonymous with "absolute" or "total" power."[92]

Federal control also brings federal responsibilities. The United States government has a fiduciary relationship with Indians and their tribes, based on their dependence on the government,[93] and the 'Trust Doctrine'. The Trust Doctrine stems from the fundamental Indian law decisions in *Cherokee Nation v Georgia*,[94] *Worcester v Georgia*,[95] and *United States v Kagama*,[96] which all affirmed the guardian-ward relationship that gives rise to the fiduciary

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[83] *Lone Wolf v Hitchcock* (1903) 187 US 553 (SC).
[84] *Lone Wolf v Hitchcock* (1903) 187 US 553, 564 (SC). McSloy cites evidence that the case was a 'sham' case that the Bureau of Indian Affairs wanted to lose in order to provoke outrage and to secure the application of federal criminal law to Indian crimes – Stephen Paul McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future" 37 New Engl L R 733, 735-736.
[85] *Lone Wolf v Hitchcock* (1903) 187 US 553, 565 (SC).
[86] *Lone Wolf v Hitchcock* (1903) 187 US 553, 565 (SC). The idea that federal exercise of plenary powers are not amenable to judicial review has been refuted by *Delaware Tribal Business Committee v Weeks* (1977) 430 US 73 (SC), and *United States v Sioux Nation of Indians* (1980) 448 US 371 (SC).
[87] See generally Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 217-220.
[88] *Shoshone Tribe v United States* (1937) 299 US 476 (SC).
[89] *Delaware Tribal Business Committee v Weeks* (1977) 430 US 73 (SC).
[90] *United States v Sioux Nation of Indians* (1980) 448 US 371 (SC).
[91] The rational basis test asks whether the legislation challenged was "tied rationally to the fulfilment of Congress' unique obligation towards Indians.": *Morton v Mancari* (1974) 417 US 535 (SC).
[92] *Cohen*, above, 219.
[93] *United States v Mitchell* (1983) 463 US 206, 225 (SC).
[94] *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1 (SC).
[95] *Worcester v Georgia* (1832) 31 US (6 Pet) 515 (SC).
[96] *United States v Kagama* (1886) 118 US 375 (SC).

relationship. This fiduciary relationship is fundamental to ensuring that Indians benefit from lands and resources they no longer have control over.[97]

2 *State control*

States historically had no jurisdiction or executive power over tribal reservations, because tribes were held to be semi-sovereign and under federal protection.[98] This bar to state jurisdiction was weakened in 1881 by *United States v McBratney*,[99] which held that an offence committed by a non-Indian against a non-Indian on a reservation fell under the jurisdiction of state courts and state criminal codes. However, the *Worcester* principle of non-interference has survived to the modern era. In *Williams v Lee*[100] the Supreme Court held that the rule in *Worcester* remained, and that without Congress' approval a state could not infringe a tribe's right to make their own laws and be ruled by them on reservation.[101] Later, the Supreme Court ruled that a state income tax could not apply to an Indian on reservation, as the law was "totally within the sphere" that federal treaties and statutes had left to Indians.[102] However, it will be shown later that this position has been modified in the self-determination era.

E Sovereign Recognition in Canada

First Nations were as significant a military threat in Canada as Native Americans were in the United States.[103] As in the United States, treaty-making recognised the equality and independence of First Nations tribes.[104] However, as

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[97] Mary Christina Wood "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited" (1994) Utah L Rev 1471, 1475-1476.
[98] *Worcester v Georgia* (1832) 31 US (6 Pet) 515 (SC); See Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) 259-261.
[99] *United States v. McBratney* (1881) 104 US 621 (SC).
[100] *Williams v Lee* (1959) 358 US 217 (SC).
[101] *Williams v Lee* (1959) 358 US 217, 220 (SC). This has been affirmed in *McClanahan v Arizona State Tax Commission* (1973) 411 US 164, 171-172 (SC), and *New Mexico v Mescalero Apache Tribe* (1983) 462 US 324, 332 (SC).
[102] *McLanahan v Arizona State Tax Commission* (1973) 411 US 164, 179-180 (SC).
[103] Roger L Nichols *Indians in the United States and Canada: A Comparative History* (University of Nebraska Press, Lincoln, 1998) 141-143.
[104] James Tully "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 41.

Patrick Macklem observes, the constitutional principles set out in the Constitution Act 1867 made no constitutional acknowledgement of prior aboriginal sovereignty – the fact that "prior to European contact, Aboriginal peoples belonged to nations structured by ancient forms of government exercising sovereign authority over persons and territory".[105] The drafters of the constitution did not doubt that sovereignty vested in the Crown,[106] for the law of nations of the time gave rights to the first discoverer of unoccupied territory, which North America was (incorrectly) treated as.[107]

This historical legal doctrine means that nowhere in the Canadian constitutional jurisprudence that deals with the distribution of sovereignty is there "any sustained examination of the assertion of Canadian sovereignty over Aboriginal people in Canada."[108] Thus, the jurisdictional disputes that occur in matters pertaining to Aboriginal people concern the relative competence of the federal and provincial legislatures, rather than whether the Canadian state has the authority to regulate Aboriginal people or whether Aboriginal people have the authority to regulate themselves.[109]

F Recognition of Sovereignty as a Normative Paradigm

The paradigm of judicial recognition of inherent dependent sovereignty was enumerated in the 'Marshall trilogy' is a unique categorisation of indigenous status. It defines indigenous peoples in their proper historical situation – as prior 'sovereigns' (if not as militarily powerful, technologically developed and politically organised as the colonising powers) of their homelands.[110] This sovereignty was held to be impaired, to reflect the nations' dependency on the US government.[111] State governments had no authority over these autonomous nations that resided in their territory; only the federal

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[105] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 107-108.
[106] *R v Sparrow* [1990] 1 SCR 1075, 1103 (SCC).
[107] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 113-114. See above section III A.
[108] Macklem, above, 115.
[109] Macklem, above, 117.
[110] See *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 549 (SC).
[111] *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1, 17 (SC).

government, empowered by the Commerce Clause, had power over Indians.[112] The view that federalism drives this and other United States Supreme Court Indian law decisions does not diminish the paradigm's significance.[113]

It is clear that the Supreme Court's view of indigenous autonomy was not shared by the State of Georgia, which proceeded with the removal of the Cherokee, or the President, who supported removal.[114] The anomaly in the Court's recognition of sovereignty paradigm is that it was not popularly supported in the society that the court presided over. In both the removal and allotment eras, the doctrine of the recognition of Indian sovereignty was ignored with impunity.[115] Both federal and state policy towards Indian autonomy in this period derived from a 'removal' policy that made a mockery of the 'sovereignty' notion of indigenous autonomy by alienating Indian lands and forced them to move across the Mississippi against their will. The background to this removal policy was a racist assumption that Native Americans should make way for European settlers, so that the vast lands they traditionally held could be put to good use. However, the recognition of sovereignty paradigm has managed to survive turbulent policy shifts to remain a powerful source of indigenous autonomy in the US today. This will be analysed further below.

IV ASSIMILATION

Assimilation has been the most enduring paradigm in the US and Canada over the last 150 years, and has had a highly destructive impact on indigenous autonomy in the two countries. This is entirely consistent with Will Kymlicka's observation that assimilation was the foremost paradigm of ethnic justice the 19th century – the view that assimilation benefited both the minority

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[112] *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 559 (SC).
[113] Stephen McSloy argues that federalism drives Indian law decisions: "Justices Rehnquist, Brennan, and Scalia all have (or had) their miner's headlamps on, dragging the canary hither and yon in search of doctrine, testing the boundaries of the federal/state relationship and the interrelationships among the three branches, including their own. The usual result, however, is that the bird dies." Stephen Paul McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future" 37 New Engl L R 733, 738.
[114] Jill Norgren *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw-Hill, Inc., New York, 1996) 122-130.
[115] Norgren, above, 146.

and the majority cultures and nations "was shared by virtually all theorists in the nineteenth century, on both the right and left."[116] In both Canada and the United States the assimilation of indigenous peoples into mainstream society was seen as beneficial for all – indigenous peoples would benefit from civilisation, and mainstream society would be free from a demanding and sometimes threatening outside problem. Assimilative policies have has many detrimental effects on indigenous peoples in the two countries, resulting in loss of traditional lands, languages and culture. This section examines the legislative, judicial and executive actions that were conducted in the name of assimilation.

A Assimilation in Canada

1 Federal and state control

The instruments of the assimilation paradigm in Canada are federal and state control over First Nations government, which were imposed under orthodox British constitutional law. This section will show how legislative and judicial action has placed First Nations firmly under non-Indian control, which allows the Canadian government to formulate Indian policy with little or no constitutional limitations.

(a) Federal control

As seen above, Canada has no comparison to the US sovereign recognition paradigm.[117] Exclusive federal power was conferred by section 91(24) of the Constitution Act 1867 regarding "all matters" coming within the subject "Indians" and Lands reserved for Indians."[118] The federal jurisdiction over Indians conferred by s 91(24) was held in *Re Kane* to extend to "all matters

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[116] Will Kymlicka "Introduction" in Will Kymlicka (ed) *The Rights of Minority Cultures* (Oxford University Press, Oxford 1995) 5-6

[117] See above section III E. See also *R. v Sparrow* [1990] 1 SCR 1075, 1103 (SCC); Patrick Macklem "Distributing Sovereignty: Indian Nations and Equality of Peoples" 45 STNLR 1311, 1320.

[118] Jack Woodward *Native Law* (Carswell, Toronto, 1990) 88, quoting *Derrickson v Derrickson* [1986] 1 SCR 285 (SCC).

affecting their welfare and civil rights".[119] By the authority of section 91(24), the federal government has assumed the power to define Indian status,[120] property and civil rights,[121] and power over Indian governments.[122] The most powerful and enduring use of this legislative power is the Indian Act.[123] The first version of the Indian Act was first passed in 1850,[124] and is extremely broad in its regulation of Indian affairs. It has been described as an oppressive and racist law,[125] and as establishing federal machinery "for an all-out attack on tribal and band government."[126] This is because it subjected tribal governments to extremely pervasive federal control and supervision.

(b) State control

State control is not absolutely pre-empted by this federal constitutional empowerment. First Nations tribes and governments exist within the bounds of provincial territory. The theory that reserves are 'enclaves' protected from provincial jurisdiction has been advanced,[127] but the view that provinces can legislate for Indians has found favour in the Supreme Court, in the judgement in *R v Dick*.[128] Thus, Indian reserves are not 'enclaves' immune from federal jurisdiction.[129] The general rule is that provincial rules apply,[130] with the courts establishing that a province can make its laws applicable to Indians so long as the laws are in relation to a matter coming within a provincial head of power.[131]

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[119] Jack Woodward *Native Law* (Carswell, Toronto, 1990) 90.
[120] Woodward, above, 90; *AG of Canada v Canard* (1975) 52 DLR (3d) 548, 575 (SCC).
[121] Woodward, above, 92.
[122] Woodward, above, 92.
[123] Indian Act RSC 1985, c I-5.
[124] J R Miller *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (3 ed, University of Toronto Press, Toronto, 2000) 135.
[125] Sharon H Venne "Self-Determination Issues in Canada: A First Person's Overview" in Donald Clark and Robert Williamson (eds) *Self-Determination: International Perspectives* (MacMillan Press Ltd, London, 1996) 293.
[126] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 225
[127] See Jack Woodward *Native Law* (Carswell, Toronto, 1990) 119-120.
[128] *R v Dick* (1985) 23 DLR (4th) 33 (SCC).
[129] *Cardinal v A.G.Alta* [1974] SCR 695 (SCC).
[130] *R v Hill* (1907) 15 OLR 406 (CA); see also Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Scarborough, Ontario, 1997) 678.
[131] Hogg, above, 679. See also Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 116-117.

However, there are broad exceptions to this general rule.[132] Provincial laws must not single out Indians for special treatment.[133] They must not affect Indian rights,[134] or any Indian interest in land.[135] Indeed, the 1982 Constitution prevents provincial and federal governments from passing laws that infringe aboriginal rights or treaty rights.[136] Federal paramountcy doctrine means that they must not be inconsistent with any federal law or will be rendered inoperative.[137] Furthermore, in the past a provincial law that affected 'Indianness' ("an integral part of primary federal jurisdiction over Indians and lands reserved for Indians") would be inapplicable to Indians and lands reserved for Indians, even though it was a law of general application.[138]

The 'Indianness' rule ("an integral part of primary federal jurisdiction over Indians and lands reserved for Indians" [139] or "status and capacity" [140]) has been altered by section 88 of the Indian Act 1951.[141] *R v Dick*[142] made it clear that that "provincial laws affecting Indianness, which do not apply to Indians of

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[132] Provincial laws must not single out Indians for special treatment, affects Indian rights or interests in land, or be inconsistent with federal laws (including band by-laws under the Indian Act): Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Scarborough, Ontario, 1997) 680-681, Jack Woodward *Native Law* (Carswell, Toronto, 1990) 121.

[133] *R v Sutherland* [1980] 2 SCR 451 (SCC), *R v Dick* (1985) 23 DLR (4th) 33 (SCC); Hogg, above, 680.

[134] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (SCC); see Kent McNeil "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask L Rev 431, 448.

[135] *Derrickson v Derrickson* (1985) 26 DLR (4th) 175, 184 (SCC); A province has no power to extinguish or accept surrender of aboriginal title *Delgammuukw v British Columbia* [1997] 3 SCR 1010 (SCC).

[136] Constitution Act 1982, s 35(1) (Canada Act 1982 (UK), sch B). See *R v Sparrow* [1990] 1 SCR 1075 (SCC).

[137] Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Scarborough, Ontario, 1997) 681.

[138] *Four B Manufacturing v. United Garment Workers of America* [1980] 1 SCR 1031, 1047 (SCC). Hogg, above, 680.

[139] *Four B Manufacturing v. United Garment Workers of America* [1980] 1 SCR 1031, 1047 (SCC). Hogg, above, 680.

[140] *R v Dick* (1985) 23 DLR (4th) 33, 57 (SCC); *Kruger and Manuel v The Queen* [1978] 1 SCR 104, 110 (SCC).

[141] Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Scarborough, Ontario, 1997) 684. Section 88 explicitly denies application of provincial laws in four areas: laws that are inconsistent with the Indian Act, or by-laws made under the Indian Act; laws inconsistent with the terms of any Treaty; laws inconsistent with any other Act of Parliament; and laws with a subject that is provided for under the Indian Act or regulations under the Indian Act RSC 1985 c I-5 s 88. See also *Derrickson v Derrickson* [1986] 1 SCR 285 (SCC) and *R v Francis* [1988] 1 SCR 1025 (SCC).

[142] *R v Dick* (1985) 23 DLR (4th) 33 (SCC).

their own force, are made applicable by s. 88."[143] This interpretation has been affirmed by *Derrickson v Derrickson*[144] and *R v Francis*.[145] It must be noted that section 88 explicitly denies application of provincial laws in four areas: laws that are inconsistent with the Indian Act, or by-laws made under the Indian Act,[146] laws inconsistent with the terms of any Treaty,[147] laws inconsistent with any other Act of Parliament,[148] and laws with a subject that is provided for under the Indian Act or regulations under the Indian Act.[149]

The federal and state governments clearly have the tools and constitutional authority to implement assimilation policy, by themselves or in concert. In the last 150 years the assimilation paradigm has been dominant for the greatest duration.

2 Assimilation in Indian policy

Early on Canada has conducted a policy of treaty-making and reserve establishment, with the government leaving Indians to themselves on reserves.[150] However, Canada has a relatively uniform Indian policy of neglect and tentative attempts at assimilation,[151] combined with some instances of 'removal'.[152] The general policy of assimilation that existed from the 1830s was given legislative force by the Civilization of Indian Tribes Act of 1857. The Act sought to end tribal culture by destroying tribal units through the incorporation

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[143] Hogg, above, 684.
[144] *Derrickson v Derrickson* [1986] 1 SCR 285 (SCC).
[145] *R v Francis* [1988] 1 SCR 1025 (SCC).
[146] Indian Act RSC 1985 c I-5, s 88.
[147] See *R v Dick* (1985) 23 DLR (4th) 33 (SCC). *R v Sioui* [1990] 1 SCR 1025 (SCC).
[148] Indian Act RSC 1985 c I-5, s 88.
[149] Indian Act RSC 1985 c I-5, s 88.
[150] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 234.
[151] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 234. Franks states that "Canada's Indian policies and programs evolved in a steady manner and a uniform direction, continuing for the most part the pre-Confederation policies of treaty-making, relocation of Indian on reserves, opening up of Indian lands for settlers, and modest programs for government support of on-reservation Indians." Johnson sees the policy more like 'civilising the Indians' - Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 666.
[152] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998)

of individuals into mainstream society,[153] and by enfranchising those who were 'sufficiently advanced'.[154] Duncan Scott's tenure in the Department of Indian Affairs (DIA) in the early 20th century corresponded to more concerted policies of assimilation, consistent with Scott's belief that "the happiest future for the Indian race is absorption into the general populace.[155] The manifestations of this policy were the separation of Indian children from their families through residential schooling[156] and unilateral enfranchisement for individual Indians.[157] First Nations religious ceremonies were also disrupted and restricted.[158]

The 1966 Hawthorn Report, commissioned by the federal government, reported that Canadian Indian policy had instigated a shift from self-sufficiency to dependency, and that a communal rather than individualistic approach to Indian affairs should be taken.[159] The federal government did not listen. Its 1969 *White Paper* proposed the termination of all special treatment for Indians, arguing that equality and non-discrimination were the keys to solving Indian problems, and that special rights and status had been the cause.[160] The federal Indian bureaucracy would be terminated, and responsibility for Indians would be transferred to the provinces. Franks notes that this termination proposal came just about the time the US was proposing to end its termination policies.[161]

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[153] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 199.
[154] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 666-668; Nichols, above, 199.
[155] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 237.Scott also made his mission to wanted to "get rid of the Indian problem... [o]ur objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is not Indian question, and no Indian department."
[156] Franks, above 237; the actual effect of this schooling was disastrous for the children involved, and included the epidemic spread of tuberculosis.
[157] Franks, above, 237-238; enfranchisement was automatic on joining the armed forces, joined a profession, received a degree or were deemed fit by the DIA.
[158] Roger L Nichols *Indians in the United States and Canada: A Comparative History* (University of Nebraska Press, Lincoln, 1998) 275.
[159] Franks, above, 242; See also Nichols, above, 296.
[160] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 242.
[161] Franks, above, 243.

Importantly, the *White Paper* was a failure, because the resistance to its proposals was so strong that none were ever implemented.[162]

Ultimately, the federal control over First Nations tribes led to a concerted effort to destroy their traditional governance structures, their language, and their religion and culture. The ultimate goal was the complete assimilation of First Nations peoples into mainstream Canadian society, so that they would in effect no longer exist and require special relationships with the Canadian state.

B Assimilation in the United States

1 Federal and state legal control

As discussed above,[163] the federal government gained constitutional control over Native American tribes by assertion of plenary powers. *Lone Wolf* had removed any constitutional protection that tribes may have found in treaty promises.[164] In the allotment and termination eras the federal government used this authority to change their relationships with Indian tribes without their consent.[165] State control was furthered in the termination era when, in 1953, Congress enacted Public Law 280 (PL 280).[166] PL 280 advanced the termination of federal responsibility by allowing limited extensions of state jurisdiction onto Indian lands without tribal consent in five states,[167] and providing for further assumptions of jurisdiction by all other states.[168] The courts enforced the limited nature of the jurisdictional extension, ruling that PL 280 extended civil and

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[162] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 243.
[163] See above section III D 1.
[164] John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 40.
[165] See below section IV B 2.
[166] Public Law 280 18 USC§ 1162(a) (1953).
[167] Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 175.
[168] *Cohen*, above, 176.

criminal adjudication jurisdiction, but not broad regulatory jurisdiction.[169] Reservations were still immune to state taxes, or state or local regulatory laws, such as zoning.[170] Furthermore, PL 280 explicitly denied states jurisdiction over Indian hunting, fishing, and water rights.[171]

A further federal encroachment on to Native American jurisdiction was the Indian Civil Rights Act (ICRA). The Indian Civil Rights Act is the common name for the Indian Bill of Rights[172] included in the Civil Rights Act of 1968.[173] This federal legislation extended most of the rights contained in the Bill of Rights and the Fourteenth Amendment to Native Americans living on tribal reserves, and was a clear step away from the sovereign recognition paradigm.[174] In early cases, the federal courts found that they had jurisdiction because the ICRA had created a cause of action against tribes that waived the tribal sovereign immunity.[175] Thus, the federal judiciary joined the legislature in intervening in tribal civil rights. This judicial scrutiny was soon ended, as will be discussed below,[176] but the ICRA ensured that tribal sovereignty would be subject to similar civil rights guaranteed in the Bill of Rights and fourteenth amendment, justiciable by tribal court.[177]

2 *Allotment and termination legislation and policy*

There had always been a strong assimilationist policy lobby in the United States - in 1789, President George Washington had announced

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[169] *Bryan v Itasca County* (1976) 426 US 373 (SC); *Santa Rosa Band of Indians v Kings County* (1977) 429 US 1038 (SC).
[170] *Santa Rosa Band of Indians v Kings County* (1977) 429 US 1038 (SC).
[171] Public Law 280 18 USC§ 1162(b) (1988); 28 USC§ 1360(b) (1988).
[172] Indian Civil Rights Act 25 USC§§ 1301-1341 (1968).
[173] For a history of the origins of the Indian Civil Rights Act see John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 132-140.
[174] Wunder, above, 137-138.
[175] *Dodge v Nakai* (1969) 298 F Supp 26, 31-32 (D Ariz); *Wounded Head v Tribal Council of Oglala Sioux Tribe* (1975) 507 F 2d 1079, 1082-84 (8th Cir) (voting rights); *Brown v United States* (1973) 486 F 2d 658 (8th Cir) (apportionment); *Slattery v Arapahoe Tribal Council* (1971) 453 F 2d 278 (10th Cir) (tribal membership). See Robert J Mccarthy "Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years" (1998) 34 Idaho L Rev 465, 472.
[176] See section V B 3 b, discussing *Santa Clara Pueblo v Martinez* (1978) 436 US 49 (SC).
[177] P G McHugh "Aboriginal Identity and Relations in North America and Australasia" in P G McHugh and Ken S Coates *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 122.

acculturation and eventual assimilation of Indians as the Indian policy of the United States.[178] By 1815 the military threat that Native American posed the United States had diminished significantly. This diminishment was symbolised by the 1849 movement of the Bureau of Indian Affairs, created in 1824, from the Department of War to the Department of the Interior.[179] With the new ability to control Native Americans, the United States supported the acculturation by missionaries.[180] From this time until the 1930s, assimilation through acculturation was the dominant paradigm in respect of indigenous autonomy.[181]

The allotment era of Indian policy traditionally began with the end of treaty-making with Indian tribes,[182] which has been seen both as a political decision based on Congress' desire for more control over Indians and their lands,[183] and as the result of difficulties in fulfilling the terms of the myriad of treaties entered into in the 1860s.[184] The process of allotment was thought to be part of civilising Indians for their own welfare – to assimilate them into mainstream American life and destroy the 'savagery' of tribal autonomy.[185] The Dawes Act (or General Allotment Act) of 1887,[186] broke up tribal land bases into individual holdings with the Secretary of the Interior allotting title to individuals,[187] with 'surplus' lands being sold to settlers.[188] Despite the moderate intent of the Act,[189] its effect was detrimental as many Indians had to

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[178] Jill Norgren *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw Hill Inc., New York, 1996) 76. For general discussion of the allotment and termination eras see Getches 168-214 and 229-251.
[179] John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 28
[180] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 168-171.
[181] Nichols, above, 279.
[182] Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 127.
[183] *Cohen*, above, 127.
[184] John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 29-31.
[185] *Cohen*, above, 128-129.
[186] The Indian General Allotment (Dawes) Act (1887) 25 USC§§ 331-34, 339, 341- 42, 348-49, 354, 381 (2000) (repealed 1934)).
[187] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 659. See also Nichols, above, 252-253.
[188] Franks 227-228. See also Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 252-253.
[189] Congressman Dawes angrily opposed some US Congressmen's arguments that the natural extermination of Native Americans would be best for all: John R Wunder *"Retained by the*

sell their lots to survive, and thereby (along with 'surplus' land sales) Indian land ownership dropped from 138 million acres in 1887 to forty-eight million acres by 1934.[190] The assimilative goal was aided by the establishment of the Bureau of Indian Affairs (BIA),[191] and the Citizenship Act of 1924 that bestowed US citizenship on non-citizen Indians born on US territory.[192] Education was a further tool in this process, targeted at the Indian youth.[193]

During the intervening Reorganisation era,[194] the general assimilative intent had remained strong, if not dominant. From the late 1930s there had been much congressional criticism of the IRA and surrounding policies.[195] These feelings crystallised in 1953 into a policy of rapid assimilation through 'termination' of the special relationship between Indian tribes and the federal government.[196] In practice, only a few tribes had their relationship terminated, but overall tribes had many aspects of their relationships transferred from the BIA to other federal agencies and the states.[197]

C *Assimilation as a Paradigm in the US and Canada*

The evidence above points to a strong normative force, influential on all organs of government, which argues that justice for indigenous peoples rests on assimilation into wider society. The legislative and policy initiatives in both the US and Canada include the termination of the federal relationship with tribes and individuals, and state/province jurisdiction over Indians on reservation. The assimilation paradigm is diametrically opposed to indigenous people remaining in their traditional tribal groups and under their own

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People": A History of American Indians and the Bill of Rights (Oxford University Press, New York, 1994) 32.

[190] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 660.

[191] Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 141.

[192] Citizenship Act 1924, 8 USC§ 1401 (2002). *Cohen*, above, 143.

[193] *Cohen*, above, 140. See also Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 247-249.

[194] See below section V B 1 .

[195] *Cohen*, above, 152.

[196] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 292; see also *Cohen*, above, 152.

[197] *Cohen*, above, 152-153.

differentiated government, whereas the fundamental conceptions of indigenous autonomy see tribal groups governing themselves as they have always done, distinct from the government of mainstream society. Nevertheless, the assimilation paradigm of indigenous autonomy will always flourish in societies that value liberalism and constitutionalism, as will be discussed below.[198] Indeed, despite official government policy that rejects it, Nathan Glazer argues that assimilation is "still the most powerful force affecting ethnic and racial elements of the United States."[199]

V SELF-GOVERNMENT

In the last 30 years both the United States and Canada have moved away from the assimilation paradigm and towards the fundamental conception of indigenous autonomy. The paradigm of self-government acknowledges that liberal states should accommodate indigenous autonomy in order to secure justice and wellbeing for indigenous peoples. This is not to say that the assimilation paradigm is extinct, for many people still believe that assimilation would constitute progress and justice for indigenous peoples. However, currently both countries are currently working within paradigms that support tribal government and development, recognise the importance of traditional culture and do not seek to end special federal-tribal relationships. This section will outline the fundamental features of the current paradigms in the US and Canada, and this foundation will be built on in the next section, which will examine the self-government paradigm in light of their conflict with some conceptions of the overarching dominant paradigm in the Western democracies, political liberalism.

A Canada – Self-Government Rights

1 The Reversal in Indian policy

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[198] See below section V.

[199] Nathan Glazer *We Are All Multiculturalists Now* (Harvard University Press, Cambridge, Mass., 1997) 97.

The Canadian government policy on self-government arose out of the ashes of the 1969 *White Paper*, and was fanned by the decision in *Calder* that acknowledged common-law aboriginal title.[200] In 1982, the new Constitution Act constitutionally protected aboriginal and treaty rights.[201] The 1983 'Penner Report'[202] and the 1996 Royal Commission on Aboriginal Peoples[203] both recommended First Nation self-government as a 'third order' of government within the Canadian federation, and that the right of self-government should be added to the constitution.[204] Three models of self-government were envisaged: within comprehensive land claim settlements, agreements for bands already with lands, and Indian Act band government.[205]

Influenced by these reports, the current dominant Canadian paradigm of indigenous autonomy is 'self-government', which places an almost inviolable value on the accommodation and encouragement of indigenous autonomy. In 1995, the federal government recognised the "inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982"[206] In this way, provincial and federal governments have based this recognition on the continued existence of First Nation self-government that has existed since time

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[200] *Calder v British Columbia (AG)* [1973] SCR 313 (SCC).
[201] See Constitution Act 1982, s 35(1) (Canada Act 1982 (UK), sch B).
[202] Special Committee on Indian Self-Government *Indian Self-Government in* Canada (Canadian House of Commons, Ottawa, 1983). See J R Miller *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (3 ed, University of Toronto Press, Toronto, 2000) 352; Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 314.
[203] For an excellent discussion of the findings of the Royal Commission on Aboriginal Peoples see Alan C Cairns *Citizens Plus: Aboriginal Peoples and the Canadian State* (UBC Press, Vancouver, 2000) 116-152. See also Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 320-321; Miller, above, 384-387.
[204] Special Committee on Indian Self-Government *Indian Self-Government in* Canada (Canadian House of Commons, Ottawa, 1983) 57; Nichols, above, 314.
[205] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 249-250.
[206] Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995).

immemorial.[207] This may be part of a general recognition that self-government is the most appropriate vehicle for First Nations economic development.[208]

Despite the frequent provisions that state that the constitution of Canada is not changed by self-government agreements, it is clear that these agreements do fundamentally change the constitutional order of Canada. Canada has, at every step, made it clear that the sovereignty and the current constitutional framework would not being changed – aboriginal self-government would interact with the current institutions of government.[209]

2 *The Changed Legal Landscape: Aboriginal Rights and duties*

In the last 30 years there have been enormous changes in the legal regime governing First Nations and their rights. In 1973, the Supreme Court's decision in *Calder v British Columbia (AG)*[210] finally recognised First Nations rights to their lands in the form of the common law doctrine of aboriginal title. The next major development was contained within Canada's new constitution,[211] which indicated that First Nations peoples have a unique constitutional relationship with the Canadian State.[212] Section 35(1) states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[213] Section 25 falls within the Charter of

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[207] British Columbia Treaty Commission *The Changing Landscape: British Columbia Treat Commission Annual Report 2002* (British Columbia Treaty Commission, Vancouver, 2002) 15 and 19.

[208] Compare with Stephen Cornell and Joseph P Kalt *Sovereignty and Nation-Building: the Development Challenge in Indian Country Today* (Harvard Project on American Indian Economic Development, 2001).

[209] Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995).

[210] *Calder v British Columbia (AG)* [1973] SCR 313 (SCC).

[211] Constitution Act 1982, ss 25 and 35(1) (Canada Act 1982 (UK), sch B). For the political history of the inclusion of these provisions in the Constitution see Douglas Sanders "The Indian Lobby" in Keith G Banting and Richard Simeon *And No One Cheered: Federalism, Democracy and the Constitution Act* (Methuen, Toronto, 1983) and Roy Romanow "Aboriginal Rights in the Constitutional Process" in Menno Boldt and J Anthony Long (eds) *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985).

[212] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 13.

[213] Constitution Act 1982, s 35(1), (Canada Act 1982 (UK), sch B). For discussion see Douglas Sanders "The Rights of the Aboriginal Peoples of Canada" [1983] 61 Can Bar Rev 314, 328-333.

Rights and Freedoms in the Constitution Act 1982,[214] and guarantees that the Charter shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights that pertain to the aboriginal peoples of Canada.[215] Section 25 protects aboriginal rights and differential treatment from egalitarian provisions of the Charter, such as section 15.[216]

The third major legal development was the recognition of the Crown having a "general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands"[217] The pre-eminent contemporary judgement is *Guerin v The Queen*,[218] in which the Supreme Court held that the Crown had a fiduciary obligation to deal with the land for the benefit of the Indians[219] that arose because Indians could only alienate land to the Crown.[220] When an Indian band surrenders a land interest to the Crown, a fiduciary obligation arises to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.[221] Furthermore, the fiduciary duty has been incorporated into the test for constitutional infringement of aboriginal and treaty rights, and legislation that infringes these rights must be consistent with this duty to be valid.[222]

3 *Constitutional Frameworks that Enable Self-Government*

(a) Comprehensive claims: Nisga'a

Comprehensive land claims agreements are increasingly being negotiated with tribes. These agreements are used to negotiate frameworks that

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[214] See generally Peter W Hogg *Constitutional Law of Canada* (3 ed, Carswell, Ontario, 1992) 693-694.
[215] Canadian Charter of Rights and Freedoms, s 25, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).
[216] Canadian Charter of Rights and Freedoms, s 15, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B); Douglas Sanders "The Rights of the Aboriginal Peoples of Canada" [1983] 61 Can Bar Rev 314, 324-326.
[217] Jack Woodward *Native Law* (Carswell, Toronto, 1990) 116.
[218] *Guerin v The Queen* [1984] 2 SCR 335.
[219] *Guerin v The Queen* [1984] 2 SCR 335, 384 (SCC).
[220] *Guerin v The Queen* [1984] 2 SCR 335, 383-384 (SCC).
[221] *Guerin v The Queen* [1984] 2 SCR 335, 383-384 (SCC).
[222] *R v Sparrow* [1990] 1 SCR 1075, 1113-1119 (SCC).

allow First Nations to exercise their inherent right of self-government off the newly-returned land base. The pre-eminent example is the Nisga'a Treaty in British Columbia.[223] Under the Nisga'a Treaty, the Nisga'a government is vested with around 2000 square kilometres of land, which is about 8 per cent of their customary land base.[224] The government of British Columbia publicised the idea that the Nisga'a government was comparable to a municipal government, but Douglas Sanders points out that the government has some roles and powers that are not comparable to municipal (nor provincial or federal) government.[225]

Self-government jurisdiction is ensured by removing Nisga'a lands from federal jurisdiction over "Lands Reserved for the Indians," and removing the application of the Indian Act.[226] However, general government programs will still be accessible by Nisga'a citizens.[227] The final agreement sets out areas in which the Nisga'a can legislate, and sets out whether Nisga'a legislation or federal and provincial legislation will prevail in the event of an inconsistency.[228] Federal and provincial laws still apply on Nisga'a land and citizens, but a regime is established to decide which laws prevail in the event of a conflict.[229] In the areas of government, citizenship, culture, language, lands and assets, Nisga'a government has principal authority, and its laws prevail.[230] In other areas, Nisga'a laws must, at minimum, meet federal or provincial standards to be valid.[231]

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[223] The text of the Nisga'a Final Agreement [NFA] is contained in the (British Columbia) Nisga'a Final Agreement Act, SBC 1999, c C-2. The Nisga'a Final Agreement Act, 2000 c C-7, s 4(1) gave the NFA legal force.

[224] Douglas Sanders "We Intend to Live Here Forever": A Primer on the Nisga'a Treaty (1999) 33 UBCLR 103, 109-110.

[225] Douglas Sanders "We Intend to Live Here Forever": A Primer on the Nisga'a Treaty (1999) 33 UBCLR 103, 115.

[226] See Nisga'a Final Agreement Act RSC 2000 c C-7 s 16. Nisga'a Final Agreement Act RSBC 1999, c C-2 schedule ch 2, art 10. See Sanders 110.

[227] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 2, arts 15 and 16.

[228] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 2, arts 32-109. A good summary of Nisga'a legislative and executive power is contained in *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333 (BCSC).

[229] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 2, art 23.

[230] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 11, art 33.

[231] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 20 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf> 20.2; For an example see Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 2, arts 100 and 89.

The Nisga'a have no legislative authority over areas not mentioned in the agreement, such as criminal law,[232] defence, international treaties, immigration, banks, and intellectual property.[233] In the area of taxation, the removal of the Indian Act exemption[234] means that, after a transition period, Nisga'a citizens are subject to state and federal taxation.[235] In addition, Nisga'a government can tax Nisga'a citizens to raise revenue.[236] The Nisga'a Final Agreement (NFA) does not alter or become part of the Constitution of Canada,[237] and the Charter of Rights and Freedoms applies to Nisga'a government actions.[238] Importantly, it is clearly stated that the Nisga'a government is amenable to suit.[239]

There are over 50 nations currently in the process of negotiation,[240] and the agreement process is the clear federal policy for First Nations self-government.[241] This process will take a long time, and in the meantime the Indian Act band government provisions (or the proposed amendments) will continue to be the main avenue for indigenous autonomy in Canada.

(b) Band Government

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[232] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 11, art 61. However, the Nisga'a Government can impose penalties of fines and imprisonment for breach of Nisga'a laws within the limits for summary conviction offences: Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 11, art 128.

[233] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 20 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf>, 20.3.

[234] See Nisga'a Final Agreement Act RSC 2000 c C-7, s 16.

[235] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 24 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf>, 24.1

[236] Nisga'a Final Agreement Act RSBC 1999 c C-2 ch 16, art 1.

[237] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 6 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf>, 6.2.

[238] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 6 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf>, 6.2.

[239] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 11 art 5; Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 19 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf>, 19.4.

[240] British Columbia Treaty Commission *The Changing Landscape: British Columbia Treat Commission Annual Report 2002* (British Columbia Treaty Commission, Vancouver, 2002) 6.

[241] This is the clear policy articulated by the federal government in Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995).

As the incumbent form of self-government, Indian Act band government is currently the most prevalent form of First Nations autonomy in Canada. Indian Act band government establishes governments with powers approximate to municipal governments.[242] Band councils can be constituted in two ways – members and the chief can be selected by custom or can be elected pursuant to section 74 of the Indian Act.[243] The Indian Act does not set out band council powers in intricate detail, and thus the courts are left to determine the scope of the power of the councils.[244] Some authorities hold that band councils have limited powers based on the statutory grant from Parliament in the Indian Act.[245] In contrast *Joe v Findlay*[246] held that a band could bring an action for ejectment from reserve lands, despite no power existing in the Indian Act.[247] This illustrates the view that band councils have powers, founded in their status as governments, necessary to carry out their duties.

Band councils can enact by-laws of three kinds.[248] Section 81 of the Indian Act allows general by-laws relating to subjects such as health, traffic, law and order, trespass, building construction and various other general subjects, and these by-laws are subject to the Minister's veto for 40 days.[249] Taxation and licensing by-laws must be passed under section 83, and must have the approval of the Minister to come into effect.[250] The third by-laws are those dealing with intoxicants, and do not need to be approved by the Minister.[251] These by-laws have the force of federal regulation, and thus render provincial legislation invalid to the extent that it conflicts with the by-law.[252] Predictably, these by-laws are only effective on reserve.[253]

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[242] Jack Woodward *Native Law* (Carswell, Toronto, 1990) 152.2; *Re Stacey and Montour* [1982] 3 CNLR 158.
[243] Woodward, above, 165.
[244] Woodward, above, 167.
[245] *Paul Band v R* [1984] 2 WWR 540.
[246] *Joe v Findlay* (1987) 12 BCLR (2d) 166.
[247] *Joe v Findlay* (1987) 12 BCLR (2d) 166, 172.
[248] Jack Woodward *Native Law* (Carswell, Toronto, 1990) 183.
[249] Indian Act RSC 1985 c C-32, s 15, s 81(1)
[250] Indian Act RSC 1985 c C-32 s 83. Jack Woodward *Native Law* (Carswell, Toronto, 1990) 183.
[251] Indian Act RSC 1985 c C-32, s 85.1
[252] Woodward, above, 183, citing *S (EG) v Spallumcheen Band Council* (1988) 2 CNLR 318 (BCSC).
[253] Woodward, above, 189, citing *R v Alfred* (1993) 3 CNLR 88 (BCSC).

Despite the by-law system giving band councils the ability to pre-empt state laws in areas that are central to their wellbeing and survival, there are significant federal restraints on councils.[254] Furthermore, Indian Act government can be seen as weak because Indian band councils "have trivial legislative authority [... t]he only real legislative powers of municipal-level governments and Indian band councils are over land use and motor vehicles."[255] Significantly, band governments have been found to be amenable to suit.[256] Thus the Indian Act band government does not conform to self-government demanded by First Nations. One purported step towards improved band government is the First Nations Governance Bill (FNGA).

The First Nations Governance Bill proposes to update the Indian Act in order give First Nations the "tools they need to exercise effective governance or to foster economic growth and development."[257] The Canadian federal government states that the FNGA would withdraw Ministerial control in local self-government,[258] as a part of generally significantly reducing "the power of the Minister and the federal government as a whole over the lives of First Nations citizens."[259] Furthermore, it would strengthen First Nations governments by giving them better law-making authority.[260]

In contrast to the government position, many First Nations peoples and groups see the FNGA as a negative piece of legislation. The Assembly of First Nations (AFN) rejects the FNGA as an entrenchment of the Indian Act.[261] It sees the FNGA as a 'one size fits all' approach to self-government, and argues against its removal of traditional leadership, and its definition of the band legal

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[254] The Governor in Council and the Minister of Indian Affairs and Northern Development have significant powers over band governments. See Woodward, above, 153-159.
[255] Douglas Sanders "The Constitution, the Provinces, and Aboriginal Peoples" in J Anthony Long and Menno Boldt (eds) *Governments in Conflict?: Provinces and Indian Nations in Canada* (University of Toronto Press, Toronto, 1988) 153.
[256] *Springhill Lumber Ltd v Lake St Martin Indian Band* [1986] 2 CNLR 179 (Man QB); *Clow Darling Ltd v Big Trout Lake Band of Indians* [1990] 4 CNLR 7 (Ont Dist Ct);
[257] Indian and Northern Affairs Canada *Communities First: First Nations Governance* <http://www.ainc-inac.gc.ca/nr/prs/j-a2001/01136bk_e.html> last accessed 30 September 2003.
[258] Canada <http://www.fng-gpn.gc.ca/QA1a_e.html#bottom1> last accessed 30 September 2003.
[259] Canada <http://www.fng-gpn.gc.ca/QA1a_e.html#bottom1>
[260] Canada <http://www.fng-gpn.gc.ca/QA1a_e.html#bottom1>
[261] Assembly of First Nations (AFN) *Bill C-7- First Nations Governance Act* (available at <http://www.afn.ca/Legislation%20Info/billc7.htm> last accessed 30 September 2003)

capacity to that of a natural person, rather than a nation.[262] The AFN argues for nation-building to be carried out that gives genuine self-rule over First Nations affairs on reserves, culturally appropriate governance institutions and long-term vision of the place of First Nations in Canada.[263]

On its face, the proposed legislation matches the government's description. The preamble to the proposed legislation makes it clear that it does not alter the inherent right of self-government.[264] The legislation itself clearly purports not to change the legal of the bands.[265] The arguments against the FNGA put forward by First Nations seem to be based on the legacy of distrust of the Canadian government and the operation of the Indian Act, for the proposed legislation does seem to give First Nations better tools to conduct their government.

(d) Public government – Nunavut territory

The final, and least prevalent, form of self-government is the public government model. After over 20 years of negotiation,[266] the territory of Nunavut was created by partitioning the Northwestern Territories on 1 April 1999.[267] It has a public and democratic system of government, which combined with the demographics of an 85 per cent Inuit population, gives self-government to the indigenous citizens.[268] The territory contains about one fifth of Canada's land mass, roughly two million square kilometres.[269] Territories are primarily

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[262] AFN *Bill C-7- First Nations Governance Act* <http://www.afn.ca/Legislation%20Info/billc7.htm> last accessed 30 September 2003.
[263] AFN *Bill C-7- First Nations Governance Act* <http://www.afn.ca/Legislation%20Info/billc7.htm>
[264] Bill C-7 First Nations Governance Act, preamble "Whereas neither the *Indian Act* nor this Act is intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation".
[265] Bill C-7 First Nations Governance Act, s 15(3).
[266] Alexandra Kersey "The Nunavut Agreement: A Model for Preserving Indigenous Rights" (1994) 11 Ariz J Int'l & Comp L 429, 435-441.
[267] Charles J Marecic "Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance" (2000) 24 AMINDLR 275 279; Nunavut needed two acts, the Nunavut Land Claims Agreement Act RSC 1992 c C-29 and the Nunavut Act RSC 1993 c C-28 to bring the territory into force.
[268] Charles J Marecic "Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance" (2000) 24 AMINDLR 275, 279.
[269] Charles J Marecic "Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance" (2000) 24 AMINDLR 275, 277.

controlled by and under the jurisdiction of the federal government, but can be delegated authority. Nunavut will has a legislature with a mix of municipal-type and provincial-type powers[270] include the administration of justice, taxation, property rights, language,[271] but the legislature is not delegated any more powers than the provinces.[272] The Nunavut Court of Justice and the Court of Appeal of Nunavut have also been established.[273]

The public government model will only be useful in areas where First Nations people form the majority. However, the self-government that it allows Inuit is significant, approaching powers of a province.

B United States – Self-Determination

1 Self-determination policy

The philosophical forerunner to the present era of self-determination was the era of reorganisation.[274] In the late 1920s there was a departure from many of the assimilative goals of the allotment era, with some tolerance, and even respect for the traditional aspects of Indian culture.[275] John Collier, the new Commissioner of Indian Affairs, quickly ended the issuing of fee patents, the sale of traditional lands and the allotment process.[276] Indian Reorganisation Act (IRA) of 1934[277] advanced Collier's goals of economic development, self-determination and tribalism by encouraging tribes to organize – to adopt

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[270] Jeffrey Wutzke "Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims" (1998) 22 AMINDLR 509, 538.
[271] Nunavut Act 1993, c C-28, s 23(1).
[272] Nunavut Act 1993, c C-28, s 23(2).
[273] Nunavut Act 1993, c C-28, s 31(1).
[274] For general discussions of the reorganisation era see Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 144-152 and David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnessota, 1993) 215-228.
[275] *Cohen*, above, 144-145. See also Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 280-281.
[276] *Cohen*, above, 146.
[277] Indian Reorganisation Act 1934 25 USC§§ 461-479 See *Cohen* 147.

constitutions and by-laws for their common welfare.[278] However, while the Act gave tribes a measure of self-government, it was not an overall success, as it was much watered-down and misused to serve government interests.[279] Furthermore, many Native Americans were suspicious of the new governance structures, and were reluctant to make use of the IRA.[280] The advent of World War Two stifled the budgeted spending on Indian governments,[281] but the reorganisation policy was a watershed in Indian-federal relations, and would return to dominance several decades later.[282]

The Termination policy that succeeded the Reorganisation era was formally renounced in 1970 when President Nixon, faced with "hostility among the Indian population and with clear evidence that termination not only did not work but was a disaster",[283] announced a policy of self-determination.[284] The militant self-determination movements from the 1960s onward were also a constant pressure for change.[285] This militancy, along with other currents of social reform, saw Congress respond with legislation.[286] Under self-determination policies moved towards acknowledging and promoting cultural pluralism, community and collectivism.[287]

2 *Legislative initiatives – funding self-determination*

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[278] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 231.
[279] Franks, above, 231.
[280] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 280.
[281] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 662.
[282] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 279.
[283] C E S Franks "Indian Policy: Canada and the United States Compared" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 233.
[284] For general discussion of the self-determination era see Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 180-206 and David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnessota, 1993) 251-285.
[285] See Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 300-302.
[286] Nichols, above, 308.
[287] Franks, above, 233.

In the self-determination era there has been consistent congressional and presidential support of the policy, with statutes affirming and delegating power to tribal governments, the support of tribal courts and the affirmation of the government-to-government relationship.[288] An early manifestation of self-determination policy was the 1968 legislation establishing a tribal consent provision, so that no state could acquire PL 280 jurisdiction unless tribes agreed.[289] The Indian Self-Determination and Educational Assistance Act[290] put in place significant support for the principle of self-determination through Indian involvement, participation, and direction of educational and service programs.[291] The legislation provided funds to improve Native American educational facilities, and gave Indian leaders and communities the power to participate in planning and delivery.[292] The Tribal Self Governance Act[293] further supports self-determination, by instigating a process "by which resources dedicated to administering and implementing Indian programs are removed from Bureau of Indian Affairs (BIA) personnel and placed directly into the hands of tribal governments."[294] The most important part of this Act is a section on funding agreements, which basically allows tribes more funding to carry out programmes and the BIA less.[295] Tribes can also take control over non-BIA programmes.[296] Tribes are also empowered to redesign programs to suit their tribal tradition, customs, and circumstances.[297]

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[288] Joseph William Singer "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty" (2003) 37 New Eng L Rev 641, 648.
[289] Indian Civil Rights Act (1968) 25 USC § 1326; see David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnessota, 1993) 482.
[290] Indian Self-Determination and Educational Assistance Act (1975) 25 USC 14, sch II §§ 450-458; the Act's statement of findings acknowledges the goal of self-determination – "The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination": 25 USC 14, sch II §§ 450a(a).
[291] The Indian Self-Determination and Educational Assistance Act (1975) 25 USC 14, sch II § 450a; Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 309.
[292] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 309.
[293] Indian Self Determination Act (1994) 25 USC § 458aa.
[294] Tadd M Johnson and James Hamilton "Self-governance for Indian Tribes: From Paternalism to Empowerment" (1995) 27 CTLR 1251, 1251.
[295] Johnson and Hamilton, above, 1270-1271.
[296] Johnson and Hamilton, above, 1271.
[297] Johnson and Hamilton, above, 1272.

3 *Indigenous autonomy in the courts: self-determination as self-government*

(a) Tribal sovereignty

As seen above, there is recognition of tribal sovereignty within the US constitutional system.[298] Tribal sovereignty is not sourced in the US Constitution, but is inherent,[299] and tribes retain all aspects of sovereignty that are not (explicitly or implicitly) withdrawn by treaty or statute, and not withdrawn by implication as a necessary result of their dependent status.[300] Moreover, Indian tribes are, in some circumstances, protected by the doctrine of sovereign immunity.[301] Therefore, they can not be sued without the consent of Congress.[302]

In terms of substantive self-government powers, tribes have inherent powers to provide for the punishment of offences by their members (but not non-Indians[303]) on the reservation.[304] Tribes have the power to legislate on areas where tribes have traditionally exercised legislative power are domestic relations (marriages, divorces, guardianship) and descent of property.[305] Importantly, tribes can legislate to impose taxes on their members and non-members holding property or conducting activities on their reservation.[306] Tribes have broad powers to utilise reservation property,[307] and can exclude people from their reserves.[308] Tribes have the power to administer justice on

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[298] See above section III.
[299] See *White Mountain Apache Tribe v Bracker* (1980) 448 US 136, 142 (SC) - "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"; *Merrion v Jicarilla Apache Tribe* (1982) 455 US 130, 159 (SC).
[300] *Bottomly v Passamaquoddy Tribe* (1979) 599 F 2d 1061; *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191; *Montana v United States* (1981) 450 US 544 (SC).
[301] *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe* (1991) 498 US 505, 509-510 (SC).
[302] *Long v Chemehuevi Indian Reservation* (1981) 454 US 831 (SC).
[303] *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191, 195 (SC).
[304] Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 248. *Iron Crow v Oglala Sioux Tribe* (1956) 231 F2d 89, 99 (8th Cir).
[305] *Cohen*, above, 249.
[306] *Cohen*, above, 249-250. But note the recent cases mentioned below that curtail taxation over non-members, such as *Atkinson Trading Co, Inc. v Shirley* (2001) 531 US 1009 (SC).
[307] *Cohen*, above, 250.
[308] *Cohen*, above, 252.

reservation, based on their fundamental sovereignty,[309] unless this power has been removed by explicit legislation or has been given up by the tribe, either expressly or as a part of it coming under the jurisdiction of the United States.[310] Most tribes operate their own tribal courts, with the structure and procedure mostly determined by their members.[311] The Indian Gaming Regulatory Act[312] allows gaming on reservation to the extent that it is permitted in the wider state.

(b) From sovereignty to self-government

In the self-determination era, the US judiciary has moved away from the *Worcester* conception of tribal sovereignty, and the *Kagama* conception of exclusive federal control over tribes, toward diminished tribal sovereignty and increasing state control.[313] Philip Frickey notes that non-Indian ownership of reservation lands means that they are no longer geographical enclaves.[314] The *Worcester* state-tribe relationship that was based on tribal sovereignty has been changed to a 'pre-emption' basis for immunity from state jurisdiction.[315] In *McClanahan v State Tax Commission*[316] the Supreme Court decided that immunity from state law no longer depends on "sovereignty," but now depends on "pre-emption" analysis.[317] The pre-emption analysis denies state jurisdiction where the federal government "has so fully occupied the field of law that there is no room left for state action."[318] If the dispute in question is between Indians only, federal preemption will not be hard for the Court to find.[319] If the dispute

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[309] Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) 249 citing *Ex Parte Crow Dog* (1883) 109 US 556, 568 (SC).
[310] *Cohen*, above, 250, citing *United States v Wheeler* (1978) 435 US 313 (SC).
[311] *Cohen*, above, 251.
[312] Indian Gaming Regulatory Act (2000) 25 USC §§ 2701-2721.
[313] David E Wilkins *American Indian Sovereignty and the US Supreme Court: The Masking of Justice* (University of Texas Press, Austin, 1997) 276-279.
[314] Philip P Frickey "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-Members" (1999) 109 Yale L J 1, 15-16.
[315] Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [*Cohen*] 269-275.
[316] *McClanahan v State Tax Commission* (1973) 411 US 164, 172 (SC).
[317] See *Cohen*, above, 272-279 for analysis of state pre-emption in Indian law.
[318] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 696.
[319] Johnson, above, 697; *White Mountain Apache Tribe v Bracker* (1980) 448 US 136 (SC), *Nevada v Hicks* (2001) 533 US 353 (SC).

is between non-Indians, the court will have difficulty finding preemption.[320] There is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.[321]

In 1978, *Oliphant v Suquamish Indian Tribe*[322] the Supreme Court deprived tribes of any power to impose criminal penalties on non-Indians on the tribes' own reservations.[323] Then in 1981, *Montana v United States*[324] extended this to civil jurisdiction, and held that tribes can not exercise power over non-members beyond what is necessary to protect tribal self-government or to control internal relations without express congressional delegation, because such power is inconsistent with the dependent status of the tribes.[325] The court limited its finding to regulation of non-Indian conduct on reservation lands owned by non-Indians,[326] and also that regulation could occur if the non-Indian had a consensual relationship with the tribe, or the conduct threatened the political integrity or welfare of the tribe.[327]

Since the decision in *Montana*, the Supreme Court has not given full effect to its two limitations. It has effectively taken away tribal jurisdiction over non-members on non-member land, even if substantial tribal interests are involved.[328] Tribes cannot apply zoning laws to non-members on non-member lands,[329] cannot apply tort laws to lawsuits between non-Indians for car crashes

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[320] Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 WALR 643, 697.
[321] *White Mountain Apache Tribe v Bracker* (1980) 448 US 136, 142 (SC).
[322] *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191 (SC). For an extremely detailed discussion of this case and its implications see David E Wilkins *American Indian Sovereignty and the US Supreme Court: The Masking of Justice* (University of Texas Press, Austin, 1997) 189-215.
[323] *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191, 195 (SC).
[324] *Montana v United States* (1981) 450 US 544 (SC).
[325] *Montana v United States* (1981) 450 US 544, 565 (SC). L Scott Gould states bluntly that "*Montana* has replaced *Worcester* as the paradigm of tribal sovereignty." L Scott Gould "Tough Love for Tribes: Rethinking Sovereignty after Atkinson and Hicks" (2003) 37 New Eng L Rev 669, 692.
[326] *Montana v United States* (1981) 450 US 544, 563-565 (SC).
[327] *Montana v United States* (1981) 450 US 544, 566 (SC); See Joseph William Singer "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty" (2003) 37 NELR 641, 650-651.
[328] Joseph William Singer "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty" (2003) 37 NELR 641, 652.
[329] *Brendale v Confederated Tribes and Bands of Yakima Indian Nation* (1989) 492 US 408 (SC).

on state roads,[330] and cannot impose taxes on non-Indian owners of reservation lands.[331] More recently the Supreme Court has ruled, in *Nevada v Hicks*,[332] that states have an inherent jurisdiction on reservations,[333] and that generally a tribe's sovereign powers do not extend to the activities of non-members of the tribe except to the extent necessary to protect tribal self-government or to control internal relations.[334] In the same year the Court held that a non-member with a consensual relationship with an Indian tribe in one area does not trigger tribal civil authority over the non-member in another area.[335] One commentator argues that these two decisions "effectively discard what little may have remained of territorial sovereignty."[336] These decisions seem to affirm Stephen McSloy's argument that Native Americans should "stay out of the mine" of the Supreme Court and look to other ways to affirm their sovereignty and self-government.[337]

However, as mentioned above, the Supreme Court's historical recognition of sovereignty still allows tribes sovereign immunity,[338] and tribes can only be sued if Congress has allowed the suit or the tribe has unequivocally waived immunity.[339] The strong presumption is against a waiver of immunity,[340] but the Supreme Court has held that an agreement to arbitrate disputes under a contract is sufficient to waive sovereign immunity[341] The application of the Indian Civil Rights Act (ICRA) is tied-in with sovereign immunity.[342] Soon

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[330] *Strate v A-1 Contractors* (1997) 520 US 438 (SC).
[331] *Atkinson Trading Co. v Shirley* (2001) 532 US 645 (SC).
[332] *Nevada v Hicks* (2001) 533 US 353 (SC).
[333] *Nevada v Hicks* (2001) 533 US 353, 365 (SC).
[334] *Nevada v Hicks* (2001) 533 US 353, 359 (SC). For a severely critical commentary on the case see Gloria Valencia-Weber "The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets" (2003) 5 U Pa J Const L 405, 409-411.
[335] *Atkinson Trading Co, Inc. v Shirley* (2001) 531 US 1009 (SC).
[336] L Scott Gould "Tough Love for Tribes: Rethinking Sovereignty after Atkinson and Hicks" (2003) 37 NELR 669, 670.
[337] Stephen Paul McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future" 37 New Engl L R 733, 741.
[338] *Santa Clara Pueblo v Martinez* (1978) 436 US 49, 58 (SC).
[339] *Kiowa Tribe v Manufacturing Technologies, Inc.* (1998) 523 US 757 (SC).
[340] *Demontiney v US* (2001) 255 F 3d 801 (9th Cir).
[341] *C&L Enterprises, Inc. v Citizen Band Potawatomi Tribe of Oklahoma* (2001) 532 US 411 (SC); See Gabriel S Galanda "Reservations of Right: A Practitioner's Guide to Indian Law" (2002) 32-FALL Brief 64.
[342] See generally Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, Virginia, 1982) [Cohen] 666-670.

after the ICRA's enactment, the federal courts began intervening in matters of tribal self-regulation by applying the due process, equal protection and bill of attainder clauses to the tribes.[343] The federal courts argued that the ICRA had created a cause of action against tribes that waived the tribal sovereign immunity.[344] However, in *Santa Clara Pueblo v Martinez*[345] the Supreme Court ruled, consistent with the *Worcester* conception of tribal sovereignty, that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[346] The ICRA had not expressly created a waiver of sovereign immunity.

C *Self-Government as a Normative Paradigm*

The United States policy of self-determination has two sources – the fundamental situation of Indian tribes in the constitutional system in *Worcester*, and the federal economic legislation of the last 30 years that has given tribes control over funding, allowing them to provide services for their citizens and develop their economies. The US has not legislated very much to make tribal jurisdiction definite, but has let the Supreme Court elucidate the position. The few jurisdictional laws passed have reversed policies of state control and restored jurisdiction over non-member Indians.[347]

In contrast, the Canadian federal and provincial governments have been active in legislating for First Nations self-government. With no sovereign recognition paradigm to utilise, First Nations jurisdiction has been negotiated and legislated for in fine detail. Because of this, First Nations self-government may be seen as a possible end to the US Supreme Court's gradual curtailment of

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[343] P G McHugh "Aboriginal Identity and Relations in North America and Australasia" in P G McHugh and Ken S Coates *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 154.

[344] *Dodge v Nakai* (1969) 298 F Supp 26, 31-32 (D Ariz.), *Wounded Head v Tribal Council of Oglala Sioux Tribe* (1975) 507 F 2d 1079, 1082-84 (8th Cir), *Brown v United States* (1973) 486 F 2d 658 (8th Cir); *Slattery v Arapahoe Tribal Council* (1971) 453 F 2d 278 (10th Cir). See Robert J Mccarthy "Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years" (1998) 34 Idaho L Rev 465, 472.

[345] *Santa Clara Pueblo v Martinez* (1978) 436 US 49 (SC).

[346] *Santa Clara Pueblo v Martinez* (1978) 436 US 49, 58 (SC).

[347] See *Duro v Reina* (1990) 495 US 676, 679 (SC); The Criminal Jurisdiction Over Indians Act (1991) 25 USC § 1301(2) affirmed the "inherent power of Indian tribes ... to exercise criminal jurisdiction over all Indians."

Native American sovereignty. Put another way, Canada has legislated to give the maximum indigenous autonomy that is consistent with many conceptions of liberalism, and the United States is slowly pulling Native American sovereignty down to that level.

In light of this, despite nominal and historical differences, the basic paradigm of indigenous autonomy embodied by these governmental policies is the same. It is a paradigm that acknowledges the justice in indigenous demands for autonomy, and seeks to reconcile these demands with the liberal paradigm of justice that generally dominates in these two countries. Both governments see indigenous autonomy as an essential aspect of the economic and cultural wellbeing of their citizens.[348] This may be seen as part of a new 'pluralism' paradigm in liberal politics.[349]

VII INDIGENOUS AUTONOMY AND LIBERALISM

There is a fundamental tension in the contemporary paradigms of indigenous autonomy between tribalism[350] and constitutionalism (also known as civic republicanism)[351]. The Western conception of justice that exists in most democracies is dominated by liberalism. Justice is embodied in equal individual rights and individual autonomy.[352] With the dominance of liberalism has come unease with notions of community responsibility, tribalism and group rights.[353] Indeed, some commentators have attacked the separate and autonomous status

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[348] Tsosie suggests that the notion of overlapping spheres of power is consistent with the political power divisions in the American (and by implication, Canadian) federal systems: Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 398.

[349] Dalia Tsuk argues that historical federal Indian law exhibited a high degree of legal pluralism, and that much of it was aimed at establishing a plural polity: Dalia Tsuk "The New Deal Origins of American Legal Pluralism" 2001 29 Fla St U L R 189, 189-199.

[350] Tsosie defines 'tribalism' as "the efforts of indigenous groups to define their political and cultural identity as separate from that of the larger nation- state" Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 359.

[351] Tsosie defines 'constitutionalism' as the process whereby "nation-states that possess a constitutional democracy [define] the terms under which citizens relate to one another within an overall "civil society."" Tsosie, above, 359.

[352] Rebecca Tsosie "Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence" (1994) 26 Ariz St LJ 495, 530.

[353] Tsosie, above, 530.

of tribes as defeating civil rights by rejecting "the teaching on natural rights which lies at the heart of the American regime."[354] "Many non-Indians, instructed from childhood that "all Americans are equal," view the unique right of tribes to govern their reservations as clear evidence that Indians have "more rights" than non-Indians."[355] This section furthers the analysis of the previous section by examining the relationship between indigenous autonomy and liberalism. This section identifies arguments for and against indigenous autonomy and differentiated rights in liberal philosophy. It then examines in detail the judicial examinations of indigenous autonomy that many have argued are greatly influenced by liberal philosophy.

A Liberal Political Philosophy and Indigenous Autonomy

Liberal political theory is generally concerned with abstract theories of just constitutional orders that do not address social and historical imperatives such as indigenous difference.[356] The key concern for the liberal critique of indigenous autonomy is citizenship, which has taken on prime importance in liberal theory partly because of the multicultural citizenship debates.[357] The liberal concern about citizenship and indigenous autonomy can be shaped into two main themes – the general liberal concern for equal rights and obligations and the civic republican concern that citizens should have a shared political identity and community.

1 Equal rights and obligations

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[354] Robert C Jeffrey, Jr "The Indian Civil Rights Act and the Martinez Decision: A Reconsideration" (1990) 35 SD L Rev 355, 370; quoted in Tsosie, above, 531.
[355] David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West Publishing Co., St Paul, Minnesota, 1993) 459. For examples of the extreme actions some citizens take when they believe that equal rights are being compromised, see Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 316-317.
[356] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 24-25.
[357] Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 5.

Orthodox liberal citizenship is characterised by equality of individual rights.[358] No group or individual should have special cultural rights, because rights are non-discriminatory, universal and negative.[359] The US Constitution's 'equal protection' clause is an example of this ideal of equality.[360] Thus, liberal-democrats see indigenous autonomy and self-government rights as a loss of equal citizenship status,[361] and this view promotes assimilation of Indians' rights with the rights of other citizens.[362] Indigenous autonomy and other rights usually involve differentiated citizenship, granting membership or rights that are not available to other citizens.[363] Some people regard any form of differentiated rights as detrimental to citizenship.[364] The concept of 'citizenship' is generally regarded as implying a universality of citizenship "in the sense that citizenship status transcends particularity and difference."[365]

2 *Shared political community*

The liberal ideal of a shared moral and political community is associated with a form of liberalism labelled as civic republicanism (or sometimes constitutionalism). Under civic republicanism, a nation is seen as a collection of individual citizens that have a sense of belonging to a single political community.[366] The United States is thus seen as single political community based on shared goals ideals and universal principles: liberty,

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[358] Andrew Vincent *Nationality and Particularity* (Cambridge University Press, Cambridge, 2002) 85; Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 31.

[359] Andrew Vincent *Nationalism and Particularity* (Cambridge University Press, Cambridge, 2002) 173.

[360] US Constitution, amendment XIV § 1: "... no state shall ... deny any person within its jurisdiction the equal protection of the laws."

[361] Kymlicka and Norman, above, 31.

[362] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 359. See also Patrick Macklem "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 STNLR 1311.

[363] Kymlicka and Norman, above, 31.

[364] Kymlicka and Norman, above, 31.

[365] Iris Marion Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in Roland Beiner (ed) *Theorizing Citizenship* (State University of New York Press, Albany, New York, 1995) 175

[366] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 367.

equality and republicanism.[367] This notion in turn strengthens national citizenship identity.[368] In the last fifteen years a 'culture war' has been fought against the diversity of multiculturalism.[369] Nathan Glazer exemplifies the opposition to multiculturalism.[370] Glazer argues that ethnic and racial bases should not divide the common culture, that ethnic and racial affiliation should be voluntary and separate from state and public authority, and that United States citizens should accept American identity as central and ethnic identity as peripheral.[371] Furthermore, the liberty of these individual citizens and the community is dependent on the maintenance of appropriate virtues of citizenship.[372] There is a general view that virtues and identities of citizens are important and independent factors of democratic government.[373] These virtues must be fostered by the political community. The common moral and political community sustains civil society.[374] Civic republicanism insists that citizenship identity should be each individual's primary identity.[375] Therefore, civic republicans regret every social division, and seek a common community that shares a goal of a common future.[376]

B Indigenous Autonomy at the Limits of Liberalism

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[367] Nathan Glazer *We Are All Multiculturalists Now* (Harvard University Press, Cambridge, Mass., 1997) 99-100.

[368] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 367.

[369] Robert Schmuhl "America and Multiculturalism" in Michael Dunne and Tiziano Bonazzi *Citizenship and Rights in Multicultural Societies* (Keele University Press, Keele, Staffordshire, 1995) 141-143.

[370] Glazer argues that multiculturalism in the United States "is the price America is paying for its inability or unwillingness to incorporate into its society African Americans". Nathan Glazer *We Are All Multiculturalists Now* (Harvard University Press, Cambridge, Mass., 1997) 147.

[371] Glazer, above, 159.

[372] Barry Hindess 'Multiculturalism and Citizenship' in Chandran Kukathas (ed) *Multicultural Citizens: The Philosophy and Politics of Identity* (The Centre for Independent Studies, St Leonards, 1993) 35; Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 6.

[373] Kymlicka and Norman, 7.

[374] Barry Hindess 'Multiculturalism and Citizenship' in Chandran Kukathas (ed) *Multicultural Citizens: The Philosophy and Politics of Identity* (The Centre for Independent Studies, St Leonards, 1993) 36: civil society is "a sphere of social interaction, not directly controlled by government, in which citizens engage with others and discuss matters of general concern".

[375] Kymlicka and Norman 34.

[376] Iris Marion Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in Roland Beiner (ed) *Theorizing Citizenship* (State University of New York Press, Albany, New York, 1995) 182.

This section highlights various arguments that visions of liberalism have guided the US Supreme Court's decisions in cases that involved tribal sovereignty and individual liberty and citizenship. In contrast to the large literature surrounding this issue in the United States, there is a relative dearth of material discussing the situation in Canada. This section will try to fill in the gap somewhat.

1 United States

As seen above,[377] the current paradigm of indigenous autonomy in the United States has seen the gradual diminishment of tribal sovereignty to a level characterised by the courts as 'self-government'. This diminishment has taken place in a situation of constitutional indeterminacy, and, as such, scholars have strongly argued that liberal ideals have influenced the court's decisions.[378] There are four clear areas of concern for the courts:[379] democratic deficit of tribal governments, the ethno-racial basis of tribal membership, the importance of citizenship, and lack of consent to jurisdiction. There is, however, one significant source of reconciliation of tribalism and liberalism in the characterisation of tribes as political entities rather than racial groupings.

(a) Democratic deficit

Thomas Aleinikoff identifies a perceived democratic deficit in that large numbers of non-Indians live on tribal reservations, but are not eligible to

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[377] See section V B.

[378] Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002); Ann Tweedy "The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty" (2000) 18 Buff Pub Int L J 147; Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357.

[379] Aleinikoff states that "[f]or the Court, Indian sovereignty represents devolution to a racial or ethnic group; it is multiculturalism with political power. As such, it undercuts an individualistic, non-race-based constitutionalism that lies at the heart of much of the current Court's work – a core concept of which… is citizenship. Citizenship provides a nonethnic, nonracial basis for commonality, and it suggests the possession of individual rights and a guarantee of equality before the law." – Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002) 118.

vote in tribal elections, run for tribal office or serve on tribal juries.[380] He uses the Supreme Court's analysis in *Duro v Reina*[381] to support this argument, citing the Court's observations that non-members could not become a member of the tribe, vote, hold office, or serve on a jury.[382] Permanent disenfranchisement of members is the central problem, especially when this is contrasted with the immediate enfranchisement of citizens who move into new states.[383] To Aleinikoff, "[t]he idea of a class of residents permanently excluded from political participation is clearly of concern to the Court."[384] In contrast Aleinikoff notes that such membership rules are consistent with views of tribes as nations.[385] The Courts conceptualisation seems to be that tribes are voluntary organizations whose power over members rests on consent.[386]

(b) Ethno-racial basis of tribal membership

Tribal membership rules are primarily blood-based.[387] This ethno-racial basis for membership has no parallel in sub-national political communities in the United States.[388] Aleinikoff argues that the Supreme Court sees Indian sovereignty as a devolution of power to an ethnic or racial group that undercuts non-racial and non-ethnic citizenship.[389] Although the Courts have not recently objected to these issues (as this would indict much federal Indian law), Aleinikoff has suggested that culture-based arguments against tribal jurisdiction in *Duro v Reina* are evidence of this approach.[390] Tweedy observes that the formal equality aspect of liberalism embodied in the equal protection clause "equates racial preferences for subordinated groups with racist

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[380] Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002) 115. See also Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 380.
[381] *Duro v Reina* (1990) 495 US 676 (SC).
[382] *Duro v Reina* (1990) 495 US 676, 688 (SC).
[383] Aleinikoff, above, 116, citing US Constitution, amendment XIV.
[384] Aleinikoff, above, 116.
[385] Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002) 116.
[386] Aleinikoff, above, 116 citing *Duro v Reina* (1990) 495 US 676, 693 (SC).
[387] Aleinikoff, above, 117.
[388] Aleinikoff, above, 117.
[389] Aleinikoff, above, 118.
[390] Aleinikoff, above, 117-118.

actions perpetrated by members of the dominant group."[391] She argues against applying this reasoning to Indian tribes, because tribes are not racial groups but political entities.[392]

(c) Importance of citizenship and citizenship rights

Equal rights and a unified political community are embodied in identical citizenship in civic republican liberalism. The third concern of the Supreme Court identified by Aleinikoff is the importance of citizenship;[393] similarly, Tsosie notes that notions of citizenship are an important part of the liberal critique of indigenous autonomy.[394] Furthermore, Tsosie argues that the Supreme Court's recent incursions into tribal sovereignty are based on safeguarding non-Indian rights.[395]Aleinikoff again uses *Duro v Reina* to make his argument, citing the Court's concern that "Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States."[396] Aleinikoff argues that because Duro was a citizen, he was protected against "unwarranted intrusions" on his personal liberty, and criminal trial and punishment was "so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[397] Aleinikoff also argues that the democratic deficit undercuts the ideal of equal

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[391] Ann Tweedy "The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty" (2000) 18 Buff Pub Int LJ 147, 212.
[392] Ann Tweedy, above, 212; see also *Morton v Mancari* (1974) 417 US 535 (SC).
[393] Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002) 118.
[394] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357 359. ""dual citizenship" justifies certain "special" rights, which distinguish indigenous people from citizens belonging to other cultural groups. This engenders resentment among non-Indian citizens, who associate such rights with "affirmative action" and argue that all citizens should have the same rights as "equals" under the Constitution".
[395] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 383. See also the similar arguments in Ann Tweedy "The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty" (2000) 18 Buff Pub Int LJ 147, 210-216.
[396] *Duro v Reina* (1990) 495 US 676, 692 (SC); see also Robert N Clinton "There is No Federal Supremacy Clause for Indian Tribes (2002) 34 Ariz St L J 113, 223-224.
[397] Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002) 119, citng *Duro v Reina* (1990) 495 US 676, 692-693 (SC).

citizenship.[398] The Court's reluctance to grant tribal jurisdiction may be underscored by the fact that tribal court decisions are not generally subject to federal review.[399]

(d) Non-member consent

Tsosie notes that one of the objections to tribal jurisdiction is that "they never consented to such governance merely by accepting homestead rights under the federal government's public land policies."[400] The Supreme Court's decision in *Strate v A-1 Contractors*[401] gives legal affirmation to these objections. The Court looked for actual consent to jurisdiction in the governing contract,[402] and Ann Tweedy points out the importance of consent in the decision many other jurisdictional decisions involving Native American governments and non-Indians.[403] Tweedy criticises the Supreme Court's search for actual consent to be bound because this is impossible to reconcile with the social contract theory that the Court is applying, and because actual consent is "a much more stringent requirement than the Court is willing to impose on our own state and federal governments in determining the reach of their jurisdiction."[404]

(e) Political communities

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[398] Thomas Alexander Aleinikoff *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, Cambridge, Massachusetts, 2002) 119.
[399] *Santa Clara Pueblo v Martinez* (1978) 436 US 49 (SC); see above section V B 3 b.
[400] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 380.
[401] *Strate v A-1 Contractors* (1997) 520 US 438 (SC).
[402] *Strate v A-1 Contractors* (1997) 520 US 438, 457 (SC).
[403] Ann Tweedy "The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty" (2000) 18 Buff Pub Int LJ 147, 208: citing *Montana v United States* (1981) 450 US 544, 566 (SC); *Brendale v Confederated Tribes and Bands of Yakima Indian Nation* (1989) 492 US 408, 445 (SC); *Duro v Reina* (1990) 495 US 676, 679 and 688 (SC); *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191, 193-94 (SC).
[404] Ann Tweedy "The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty" (2000) 18 Buff Pub Int LJ 147, 208. Tweedy continues by stating that it is "unfair for the Court to enforce a more stringent conception of Western justice on Indian tribes than it is willing to enforce upon the rest of the nation.": Tweedy, above, 208.

'Equal protection' is an area where difficulties arise in reconciling the constitutional rights of citizens and the right of tribes and their members.[405] One way that the Courts have been able to reconcile differential treatment of Native Americans is through characterizing the term 'Indians' as signifying a historical category applied to relations between political units (the government and tribes) instead of a racial category.[406] The history of treaty-making and much legislation is predicated on the "status of tribal governments as distinct political, rather than merely racial, entities."[407] In *United States v Antelope*[408] the Supreme Court interpreted this special status as justifying the differential treatment of Indians from non- Indians.[409] *Morton v Mancari*[410] applied the rational basis scrutiny to these political classifications, rather applying the more strict scrutiny given to racial classifications.[411] These interpretations allow the federal government's to continue to make special laws for tribes and their members without violating the Constitution's equal protection limitations.[412]

2 *Canada: Applying the United States Arguments*

The literature that discusses US liberal concerns with indigenous autonomy is not replicated in Canadian journals. However, the recent cases concerning self-government do provide examples from which similar concerns can be seen.

(a) Political concerns about self-government

There has been much political concern about the signing of self-government agreements and the instituting of First Nations governments. Many

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[405] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 394.
[406] P G McHugh "Aboriginal Identity and Relations in North America and Australasia" in P G McHugh and Ken S Coates *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 150.
[407] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 394.
[408] *United States v Antelope*, (1977) 430 US 641 (SC).
[409] *United States v Antelope*, (1977) 430 US 641, 647-49 (SC).
[410] *Morton v Mancari* (1974) 417 US 535 (SC).
[411] *Morton v Mancari* (1974) 417 US 535, 553 n 24 (SC).
[412] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 394.

of the arguments mirror those identified above in relation to Native American government. In the mid-1980s, Sally Weaver argued that the Canadian government's resistance to aboriginal rights demands was its "steadfast commitment to liberal democratic ideology", that stressed formal equality, individualism and freedom from discrimination.[413] Indigenous rights are generally seen as discriminatory against non-indigenous Canadians.[414] Opinion pieces in newspapers also emphasise the illiberal nature of self-government agreements. A Calgary Herald reporter saw Nisga'a-style self-government as creating "privileged franchises for self-defined ethnic groups with questionable provenance who already get excessive and unjustifiable special entitlements out of the public purse."[415] Thus, the concerns of any liberal democratic Canadian government with Aboriginal rights are differentiated legal and administrative regimes based on special status, collective rights and cultural uniqueness.[416]

(b) Self-government in the Courts

Despite the Canadian federal government's acknowledgement of the inherent right of self-government in the 1995 Federal Policy guide,[417] the Canadian judiciary has not found a right to general self-government. In *R v Pamajewon*[418] the Supreme Court found that the Eagle Lake First Nation did not have the broad right to self-government, including the regulation of economic conduct and gambling.[419] Lamer CJ assumed, but did not decide, that self-government claims fall within section 35(1) of the Constitution Act, 1982.[420] He

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[413] Sally Weaver "Federal Difficulties with Aboriginal Rights Demands" in Menno Boldt and J Anthony Long *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) 142.

[414] See Robert Spaulding "Peoples as National Minorities: A Review of Will Kymlicka's Arguments For Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U Toronto L J 35, 44 n 66.

[415] Diane Francis "Rip up the Nisga deal before it's too late" Calgary Herald, December 12 1999, E5.

[416] Weaver, above, 142.

[417] Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995).

[418] *R v Pamajewon* [1996] 2 SCR 821 (SCC).

[419] *R v Pamajewon* [1996] 2 SCR 821 (SCC); see Kent McNeil "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" 5 Tulsa J Comp & Int'l L 253, 281; Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 173.

[420] *R v Pamajewon* [1996] 2 SCR 821, 832 (SCC).

stated that these claims were no different than other rights claimed under section 35 (such as hunting, fishing, and land rights), and thus must be proved under the same standard, the *Van Der Peet* test.[421] This test defined Aboriginal rights as "an element of a custom, practice or tradition integral to the distinctive culture of an Aboriginal nation."[422] The Court rejected the broad self-government categorisation of the right claimed, and formulated the claim as "the right to participate in, and to regulate, high stakes gambling activities on the reservation."[423]

Subsequently, in *Delgamuukw v British Columbia*[424] the Supreme Court found that the trial judge's errors made judgement on self-government rights impossible.[425] Lamer CJ found that the complexity of the issues and the lack of adequate submissions on them meant that this was not "the right case for the Court to lay down the legal principles to guide future litigation" on self-government.[426] However, Patrick Macklem sees *Delgamuukw* as furthering the possibilities for judicial recognition of self-government rights, because it contemplates self-government over economic regulation that is unrelated to traditional land use.[427]

In *Campbell v British Columbia (Attorney General)*[428] the opposition leader in British Columbia challenged the legality of the Nisga'a self-government agreement. In his argument, he included a reference to the Charter right to vote in legislative elections.[429] The British Columbia Supreme Court countered these arguments with other examples where citizens cannot vote for the institution that enacts laws applicable to them.[430] The British Columbia

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[421] *R v Pamajewon* [1996] 2 SCR 821, 832-833 (SCC).
[422] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 173.
[423] *R v Pamajewon* [1996] 2 SCR 821, 833 (SCC).
[424] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (SCC).
[425] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1114 (SCC).
[426] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1114 (SCC).
[427] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 174.
[428] *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333.
[429] *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333 para 12 (SCC)
[430] *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333 para 159-160 (SCC).

Supreme Court held, that the aboriginal right to self-government was extant.[431] It is interesting that the 'Marshall trilogy' was discussed,[432] and the Court concluded that the discussion of self-government must take into account the recognition of political communities with diminished powers.[433]

The Canadian judiciary has taken a conservative approach to indigenous autonomy in the form of self-government rights under section 35(1) of the Canadian constitution.[434] There is clearly indeterminacy in these constitutional rights, and it is clearly not the court's intention to jump boldly into constitutional deliberations that would give First Nations self-government rights that would invalidate the application of federal and provincial laws.

(c) Guarantees of Citizenship Rights in Self-Government Agreements

The Canadian federal government has taken steps at every stage to ensure that indigenous autonomy complies with liberalism, given the accusations that self-government agreements are undemocratic, institute race-based governments, and infringe equality by giving First Nations special rights.[435] Therefore, all the three areas of concern identified by Aleinikoff – democratic deficit, ethno-racial basis of membership and importance of citizenship – are also of concern to the Canadian government, and this is reflected in the terms of the self-government agreements. The Federal Policy Guide on Self-government of 1995 states that the Canadian government "committed to the principle that the Canadian Charter of Rights and Freedoms should bind all governments in Canada".[436] Self-government agreements have

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[431] *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333 para 137 (SCC).
[432] *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333 para 88-96 (SCC).
[433] *Campbell v British Columbia (Attorney General)* [2000] 189 DLR (4th) 333 para 95 (SCC).
[434] Constitution Act 1982, s 35(1) (Canada Act 1982 (UK), sch B).
[435] Mary C Hurley *The Nisga'a Final Agreement* (Parliamentary Research Branch, Ottawa, 2001) available at <http://www.parl.gc.ca/information/library/PRBpubs/prb992-e.htm>
[436] Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995): "The Government is committed to the principle that the Canadian Charter of Rights and Freedoms

to provide that the Charter applies to all First Nations government actions.[437] The British Columbia Treaty Commission Annual Report 2002[438] is sensitive to these issues. It points out that full Nisga'a control over laws is limited to areas that affect non-members very minimally, and that Nisga'a control over areas that do impact on non-members is subject to minimum standards.[439] The fact that Nisga'a government must be democratic is stressed at length.[440] Also stressed are the rights of residents of lands that are strongly protected by the Nisga'a treaty.[441] The Federal Policy Guide states that if non-members are to be regulated, then measures must be put in place for their input into decisions, as well as rights of redress.[442] Further, it makes it clear that the Charter of Rights and Freedoms applies to First Nations governments and their actions.[443] This is exemplified by the Nisga'a Final Agreement, which stipulates that the Charter will apply to the Nisga'a government.[444]

There has been debate about applying the Charter to self-governments, with the Royal Commission on Aboriginal Peoples identifying the liberal concern that "it would be highly anomalous if Canadian citizens enjoyed the protection of the Charter in their relations with every government in Canada

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should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter.".

[437] Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995).

[438] British Columbia Treaty Commission (BCTC) *Annual Report 2002:The Changing Landscape* (British Columbia Treaty Commission, Vancouver, 2002).

[439] BCTC Annual Report 2002, above, 20.

[440] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 19 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf> : "In summary, Nisga'a Government will be a democratic government which, despite its character as an aboriginal government, will be quite recognizable as a local government compatible with other local governments in Canada."

[441] Indian and Northern Affairs Canada *Nisga'a Final Agreement Issue Paper* No 19 (available at <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf> 19.3.

[442] Canada *Federal Policy Guide: Aboriginal Self-Government The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995).: "Where the exercise of Aboriginal jurisdiction or authority over non-members is contemplated, agreements must provide for the establishment of mechanisms through which non-members may have input into decisions that will affect their rights and interests, and must provide for rights of redress."

[443] British Columbia Treaty Commission (BCTC) *Annual Report 2002:The Changing Landscape* (British Columbia Treaty Commission, Vancouver, 2002) 21.

[444] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 2 art 9. Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 201.

except for Aboriginal Governments."[445] The Royal Commission also noted the converse view that "some Charter provisions [...] could hamper and even stifle the efforts of Aboriginal nations to revive and strengthen their cultures and traditions. As such, the Charter might operate as the unwitting servant of the forces of assimilation and domination."[446] Additionally, Patrick Macklem identifies the argument that "the Charter, premised on liberal values of individual autonomy and freedom, threatens Aboriginal forms of social organization premised on collective values of community and responsibility."[447]

The citizenship-right issue of trying non-members in the courts of indigenous governments is clearly of concern in Canada. The Nisga'a treaty provides that where a person may receive a sentence of imprisonment under Nisga'a law, they may elect to be tried in the British Columbian courts.[448] Furthermore, Nisga'a courts cannot impose a penalty different in nature from those imposed in the provincial and federal courts on a non-citizen without their consent.[449] Appeals of Nisga'a court decisions can also be taken to the Supreme Court of British Columbia.[450]

Another example of the primacy placed on uniform citizenship rights is seen in the proposed First Nations Governance Act (FNGA). Section 42 would repeal section 67 of the Canadian Human Rights Act, which currently exempts the decisions of band councils made pursuant to provisions of the Indian Act from the application.[451] The FNGA attempts to soften this by providing that "the needs and aspirations of the aboriginal community affected by the complaint, to

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[445] C E S Franks "Rights and Self-government for Canada's Aboriginal Peoples" in *Aboriginal Rights and Self-government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, Montreal & Kingston, 2000) 121.
[446] Franks, above, 121-122.
[447] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 194. Macklem himself concludes that "the Charter does pose a risk to the continued vitality of indigenous difference. The Charter enables litigants to constitutionally interrogate the rich complexity of Aboriginal societies according to a rigid analytical grid of individual right and state obligation. It authorizes the judicial reorganization of Aboriginal societies according to non-Aboriginal values." Macklem, above, 195.
[448] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 12 art 43.
[449] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 12 art 44.
[450] Nisga'a Final Agreement Act RSBC 1999 c C-2, ch 12 art 45-48.
[451] First Nations Governance Bill, Bill C-7 2nd Session, 37th Parliament, 51 Elizabeth II, 2002, section 42.

the extent consistent with principles of gender equality, shall be taken into account" in interpreting and applying the Canadian Human Rights Act.[452]

(d) The Charlottetown accord

The Charlottetown Accord emerged out of a series of constitutional conferences between aboriginal leaders and first ministers of the provinces,[453] and proposed major changes to the relationships between aboriginal peoples and the provincial and federal governments. A statement that Aboriginal peoples have "the inherent right to self-government within Canada" would have been added to section 35 of the Constitution Act.[454] A 'third order' aboriginal jurisdiction for Canada would sit alongside the provincial and federal orders of Canadian government.[455]

Disappointingly for First Nations groups, the Accord was defeated by the nation-wide constitutional referendum[456] that was part of the arduous amendment provisions of the constitution, which required agreement of all ten provincial legislatures as well as the federal Parliament.[457] The referendum defeat shows that the majority of Canadian citizens do not support the constitutional recognition and protection of the inherent right of self-government for First Nations peoples.

C Reconciling Indigenous Autonomy with Liberalism

Rebecca Tsosie recently asked whether indigenous political identity can be reconciled with the civic republican unitary construction of civil society

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[452] First Nations Governance Bill, s 41.
[453] Alan C Cairns *Citizens Plus: Aboriginal Peoples and the Canadian State* (University of British Columbia Press, Vancouver, 2000) 80-81.
[454] C E S Franks "Rights and Self-government for Canada's Aboriginal Peoples" in *Aboriginal Rights and Self-government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, Montreal & Kingston, 2000) 116.
[455] Patrick Macklem *Indigenous Difference and the Constitution* (University of Toronto Press, Toronto, 2001) 178.
[456] Franks, above, 116.
[457] C E S Franks "Rights and Self-government for Canada's Aboriginal Peoples" in *Aboriginal Rights and Self-government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, Montreal & Kingston, 2000) 118.

and common citizenship.[458] Similarly, in recent years many liberal theorists have grappled with the justice of indigenous rights and autonomy. Some have concluded that indigenous rights and autonomy must be recognised in any coherent liberal theory of justice concerning multicultural societies. This reconciliation of indigenous rights and autonomy and liberalism takes three main forms – personal autonomy-based equality, rejection of civic republicanism, and recourse to the 'means of incorporation'. It is acknowledged that indigenous peoples often present arguments for autonomy that do not seek to reconcile their demands with liberalism, but this paper's scope demands a focus on liberal arguments, for it is these arguments that will be most persuasive in liberal discourse.

1 Indigenous autonomy and liberal equality

Indigenous autonomy seems to defeat the liberal ideal of equal citizenship by applying different laws, rights, and governance regimes to indigenous people. Will Kymlicka rejects these arguments in a way that is of critical importance in the indigenous rights debate occurring in liberal democracies.[459] On a practical level, Kymlicka see the view that minority rights conflicts with the concept of citizenship as untenable, as virtually every democracy recognises some form of group-differentiated citizenship.[460]

Kymlicka's philosophical argument, contra civic republican conceptions of 'special' indigenous rights but consistent with his liberal approach, is based on equality. The concept of equality identified is 'equal

[458] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 398.
[459] See Richard Spaulding "Peoples as National Minorities: A Review of Will Kymlicka's Arguments For Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U Toronto L J 35, 36. One reason for this is that "Kymlicka is a listener and bridge-builder in a discourse in which cultural dissonance can be sharp, and in which the imbalance of power between the interests involved invites an oppositional dynamic." Spaulding, above, 36-37. This article is an excellent analysis of the potency of Kymlicka's liberal arguments against orthodox liberal attacks on indigenous autonomy and rights.
[460] Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 31; Examples of this are tribal sovereignty and affirmative action programmes in the United States, indigenous self-government and French language policy in Canada, and Maori Parliamentary representation and Treaty rights in New Zealand.

concern and respect' rather than equal treatment in every case.[461] Kymlicka sets out two major claims that underlie a liberal defence of minority rights: "that individual freedom is tied in some important way to membership in one's national group; and that group-specific rights can promote equality between the minority and the majority."[462]

Kymlicka sees indigenous peoples are 'national minorities' that should be able to maintain themselves as a distinct culture, if they so choose.[463] The liberal 'good' of cultural membership should thus be equally protected and supported by the government for all 'national minority' groups within a country.[464] In democracies, the majority has the legislative power to protect its own cultural interests, and national minorities should have the same opportunity to protect their cultures.[465] Group differentiated self-government rights allow indigenous peoples to remedy their 'systemic disadvantage in the cultural marketplace', in order to achieve true equality,[466] and to prevent ongoing stigmatisation and disadvantages.[467] Patrick Macklem has indicated support for this comprehensive theory of justice in multicultural societies that requires the state to allow people to choose their own plan and concept of the good life: these choices occur in the context of a person's culture.[468] He states that "[c]onstitutional recognition of the value of Aboriginal cultural difference

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[461] Richard Spaulding "Peoples as National Minorities: A Review of Will Kymlicka's Arguments For Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U Toronto L J 35, 38

[462] Will Kymlicka *Multicultural Citizenship* (Oxford University Press, Oxford, 1995) 52.

[463] Kymlicka, above, 49 and 113.

[464] Kymlicka 113. This view of culture as necessary for meaningful individual choice is supported by Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 71.

[465] Kymlicka, above, 113.

[466] "Hence group-differentiated self-government rights compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural marketplace, regardless of their personal choices in life. This is one of many areas in which true equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs." Kymlicka, above, 113.

[467] Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 33.

[468] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 72.

furthers equality by distributing protection of cultural interests to those who otherwise lack the resources necessary for cultural reproduction."[469]

Kymlicka's equality argument is the most complete foil to the discrimination charge against indigenous autonomy rights, as it enlists individual equality in its cause: "Kymlicka assures Canadians that they need not choose between support for equality and Aboriginal rights because both sets of rights represent the same basic principle of liberal justice."[470] In this way, Kymlicka offers liberal democracies a liberal philosophical basis for indigenous autonomy arrangements.

2 *Indigenous autonomy and civic republicanism*

Indigenous autonomy seems to conflict with civic republicanism, as it is directly concerned with legitimising cultural identities that are distinct from common citizenship identities.[471] However, Tsosie questions the assumption that states' civil structures are harmed by the presence of separate groups, and that thus states should not promote ethnic rights, as they impede the goal of common citizenship.[472] By legitimising indigenous cultural identity amongst groups comprising around 1 to 3 per cent of the population (in the case of the United States and Canada),[473] there is still an overwhelming majority that can belong more fully to the wider political community. Furthermore, indigenous self-government may be the best way for the state to compromise and accommodate the aspirations of alienated indigenous groups, and in this way encourage them to identify with the state, and thus enhance common citizenship

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[469] Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 74.
[470] Richard Spaulding "Peoples as National Minorities: A Review of Will Kymlicka's Arguments For Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U Toronto L J 35, 45.
[471] Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 35.
[472] Rebecca Tsosie "Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society" (2003) 5 U Pa J Const L 357, 399.
[473] Roger L Nichols *Indians in the United States and Canada* (University of Nebraska Press, Lincoln & London, 1998) 323.

identity.[474] In this vein, James Tully argues that Aboriginal self-government is not incompatible with civic republican individual equality and rights.[475]

The virtue of civic republicanism has also been questioned. Tully argues that the notion that the unity of political association requires uniformity of culture as an anachronism.[476] Iris Marion Young argues that that public life should not encourage the abandonment of particular group identities, because this desire for unity "does not eliminate differences and tends to exclude some perspectives from the public."[477] Instead of universal citizenship, societies must have group-differentiated citizenship in order to ensure that existing inequality and group oppression can be ameliorated through recognition and representation of oppressed groups.[478] Political principles cannot be developed from the assumption of a just society, but must start from the actual social and historic context.[479] Theories of citizenship must start from the assumption of differentiated humanity, with actual or potential group oppression or disadvantage.[480]

In contrast, Richard Dagger, an advocate of civic republicanism, criticises Young on two counts – that it is difficult to identify 'oppressed

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[474] Will Kymlicka and Wayne Norman 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 37.

[475] James Tully "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government* (McGill-Queens University Press, Montreal, 2000) 69. "the mutual recognition of and respect for Aboriginal and non-Aboriginal peoples as equal, coexisting and self-governing peoples provides the conditions for equality of civic participation and individual freedom in a culturally diverse society."

[476] Tully, above, 69.

[477] Iris Marion Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in Roland Beiner (ed) *Theorizing Citizenship* (State University of New York Press, Albany, New York, 1995) 184. For Young's general critique of universality and impartiality see Iris Marion Young *Justice and the Politics of Difference* (Princeton University Press, Princeton (NJ), 1990) 96-121.

[478] Iris Marion Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in Roland Beiner (ed) *Theorizing Citizenship* (State University of New York Press, Albany, New York, 1995) 185.

[479] Young, above, 188; Patrick Macklem also argues that "the conditions of a just constitutional order cannot be determined without paying close attention to aspects of social reality – in particular … indigenous difference." Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 25.

[480] Iris Marion Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in Roland Beiner (ed) *Theorizing Citizenship* (State University of New York Press, Albany, New York, 1995) 188.

groups' and that Young's approach stalls decision-making and personal autonomy.[481] However, in many important cases the oppressed groups are relatively simple to identify, and Dagger's objections do not outweigh the benefit that Young's approach brings in the relief of oppression. The questioning of the value of civic republican liberalism in multicultural societies is necessary where they have a history of oppression or where historic events provide a normative guide for constitutional frameworks. A common example of the latter point is the 'means of incorporation', which is discussed below.

3 *Indigenous autonomy and the means of incorporation*

Will Kymlicka also discusses an argument for indigenous autonomy based on the historical method of incorporation of national minorities into the wider state. Indigenous peoples have been incorporated into the state in many ways, most commonly military conquest or agreement of protection. Many liberal theorist s argue that it is illiberal for governments to do what outdated and unprincipled agreements require, instead of what equality and justice now require.[482] Kymlicka's answer is that "[t]he equality argument assumes that the state must treat its citizens with equal respect. But there is a prior question of determining which citizens should be governed by which states."[483] This prior question is resolved by examining the means of incorporation. The method of incorporation will often give rise to certain group-differentiated rights, often spelled out in the historical agreements that mandated incorporation.[484] The historical incorporation argument asks "what are the terms under which two or more peoples decided to become partners."[485] Kymlicka views the respect of historical incorporation agreements as important in ensuring that citizens trust the government.[486]

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[481] Richard Dagger *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press, Oxford, 1997) 177-180.
[482] Dale Turner "Liberalism's Last Stand: Aboriginal Sovereignty and Minority Rights" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queens University Press, Montreal & Kingston, 2000) 145.
[483] Turner, above, 145.
[484] Will Kymlicka *Multicultural Citizenship* (Oxford University Press, Oxford, 1995) 117.
[485] Kymlicka, above, 118.
[486] Kymlicka, above, 119.

Dale Turner has supported Kymlicka's incorporation arguments, with the reservation of substantial further developments that seek government acknowledgement of indigenous conceptions of sovereignty. Turner emphasises that indigenous peoples are not merely minorities needing respect through minority-rights liberal theory,[487] and this dislike of minority categorisation is evident among many First Nations people.[488] While acknowledging the view of Kymlicka that liberal arguments must be used to persuade liberal governments, Turner argues that indigenous explanations of political sovereignty must be understood by non-indigenous citizens as one way of "renewing a just relationship, and, more importantly, of renewing hope in Indian Country".[489] Turner advises liberals to go beyond the national minority argument and emphasise the process of incorporation within the state.[490] The contemporary liberal theory of rights, in the context of aboriginal peoples, "functions ahistorically: it begins from a rationally constructed theory of distributive justice that bestows a set of fundamental rights on all individuals and, as a consequence, a set of special rights to individuals who belong to minority cultures."[491] Turner emphasises the unjust and incomplete incorporation of most First Nations into the Canadian state.[492] Constitutional debate must examine "how governments can come to recognize the legitimacy of Aboriginal sovereignty in order to renew the political relationship on more just foundations."[493]

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[487] Dale Turner "Liberalism's Last Stand: Aboriginal Sovereignty and Minority Rights" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queens University Press, Montreal & Kingston, 2000) 135.

[488] Richard Spaulding "Peoples as National Minorities: A Review of Will Kymlicka's Arguments For Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U Toronto L J 35, 67-68.

[489] Turner, above, 137

[490] Turner, above, 144; Patrick Macklem joins with Turner in criticising Kymlicka for characterizing Aboriginal nations as 'previously self-governing', as this presupposes the legitimacy of the incorporation - Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 73.

[491] Turner, above, 145.

[492] Dale Turner "Liberalism's Last Stand: Aboriginal Sovereignty and Minority Rights" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queens University Press, Montreal & Kingston, 2000) 146.

[493] Turner, above, 146.

VIII CONCLUSION

A Changing Paradigms of Indigenous Autonomy

This paper has shown that the normative paradigms of indigenous autonomy in the US and Canada have changed significantly in the last 150 years. The decisions of the judiciary and the legislature that have considered and affected indigenous autonomy during this time are evidence that allows the theoretical framework, or paradigm, within which the courts and legislatures act to be identified.

The recognition of sovereignty paradigm is based on an acknowledgement of the historical sovereignty and military strength of tribes, and acknowledges that tribes were often incorporated into the state by means which guaranteed or suggested continuing internal sovereignty. Thus, this paradigm conforms to the notion, shared by Macklem, Young, Turner and Kymlicka, that just constitutional frameworks must be devised with reference to historical and social contexts. It must be remembered that even at the time that the Supreme Court was legally recognising this paradigm, it was subverted by President Jackson, and the issue was never seriously addressed in Canada. However, it does provide the basic foundation for current paradigms.

The assimilation paradigm was influential for a significant period of time in both the US and Canada, buoyed by the general assimilatory assumptions that dominated the 18th and 19th centuries. Assimilation drew together ideas about converting indigenous peoples into civilised citizens of mainstream society, of ending differentiated rights and citizenship, and of freeing societies from the 'problem' of indigenous peoples. In this paradigm, indigenous autonomy was something to be destroyed, rather than something that deserved affirmation and protection. Although this paradigm has lost favour in recent times there is still a strong vein of liberal political philosophy that still favours this view.

The self-government paradigm that dominates in the US and Canada presently can be seen as some sort of return for respect of indigenous autonomy based on the recognition of the needs indigenous peoples have for traditional forms of governance, and the rights they never gave up when they were incorporated into the wider state. Both the United States and Canada acknowledge the importance of indigenous autonomy to indigenous peoples. The constitutional histories of the two countries influences the means by which the affirmation of indigenous autonomy is achieved, with Canada making treaties that carve out new First Nations jurisdictions and specify legislative powers and limitations in great detail. In contrast, the United States the Courts have been most influential in sculpting the current jurisdictional form of indigenous autonomy, with the legislature providing funding and making some corrections to judicial limitation of tribal jurisdiction.

B Reconciling Tribalism and Liberalism

The penultimate section showed that the executive, legislative and judicial organs of government in Canada and the United States have significant and determinative concerns about the perceived illiberalism of indigenous autonomy. Both governments have taken steps to limit the jurisdiction of indigenous governments over non-indigenous citizens. The Canadian government has sought to limit the powers of all First Nations governments by ensuring the application of the Charter of Rights and Freedoms, and has limited First Nations legislative power so that it impinges as little as possible on non-First Nations rights. The United States judiciary has limited the civil and criminal jurisdiction of Native American governments over non-Indian citizens, based on arguments related to the exclusion of non-Indians from government and the importance of liberal citizenship rights. These examples make it clear that the ideology of political liberalism contains features that are antithetical to the full exercise of indigenous autonomy.

However the philosophical tension between tribalism and liberalism may not be incommensurable, and reconciliation is possible and necessary. Indeed, much depends on the particular strain of liberalism that is promoted.

The proponents of the civic republican and constitutionalist version of political liberalism may continue to see tribalism as an assault on common citizenship and a sense of belonging to a single political community. But there are grave doubts about the necessity, or even possibility, of a single shared political community, especially in light of the recent 'unification' of Europe – states and unions can function satisfactorily even where differences in cultural and political communities exist.

Furthermore, political liberalism may not be as blind or intolerant to differentiated citizenship and 'special rights' for indigenous peoples as commonly thought. The arguments of Kymlicka (and other liberals supportive of indigenous rights) outline plausible visions of liberal justice that take into account the importance of culture as a prerequisite for individual autonomy. Without government support for self-government and other rights that guarantee the existence of culture, indigenous peoples cannot exercise individual autonomy. These liberal arguments have been developed by Turner and Macklem, who argue that the way that previously sovereign indigenous peoples were incorporated into the wider states systems is necessary to understand the justice of differentiated rights and self-government. Citizens must be treated with equal respect, which includes examining and rectifying the consequences of unjust incorporation. The United States Supreme Court has provided examples of this process by characterising Native American tribes as 'political entities' with historical and ongoing relationships with the federal government. Furthermore, Young and Macklem present arguments for premising constitutional frameworks on the historical and social realities of any given society. This approach further emphasises the examination of the means of incorporation of indigenous peoples and their historical oppression by the state.

C The North American Paradigms and New Zealand

This paper has the primary focus of comparing the changing paradigms of indigenous autonomy that have existed in the United States and Canada since early colonial history, and examining the current constitutional tension between tribalism and liberalism. However, throughout its research and writing, the

insights gained and presented in this paper have stimulated further comparison with our own society, and this section will set out the simple conclusions reached in this respect.

Many scholars have observed and detailed the relevant differences between indigenous-government relations in New Zealand and North America.[494] For the purposes of this discussion, the two key differences are geographical and demographical. Geographically, North America is full of wide open spaces, which it one reason that Indian reserves were possible. This leads to the second, demographic, difference, for the existence of reserves meant that many indigenous North Americans could remain on their geographically-defined reservations.[495] These two key differences are usually determinate in arguments against territorial-based forms of self-government/autonomy and separate criminal justice systems.[496]

Despite these differences effectively precluding North American-style indigenous autonomy in New Zealand, the paradigms of indigenous autonomy examined in this paper are vitally important in our society's current debates about liberal citizenship and indigenous rights. The ideals of 'civic republican' liberal citizenship that argue against any 'special rights' for Maori that result in differentiated citizenship are based on centuries-old British liberalism. Not only must New Zealand society examine new liberal theories that justify indigenous autonomy, but we must also look to the practice of two huge and highly-respected liberal-democratic societies for examples of alternate paradigms of indigenous autonomy. When we debate the justice of separate Maori seats in Parliament, treaty-rights, and claims of native title, we cannot merely measure justice against 'civic republican' liberalism's fundamental tenets of equal individual citizenship. It is necessary to examine the practice of states that do

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[494] See Matthew Palmer "International Law/Intercultural Relations" (2000) 1 Chi. J. Int'l L. 159, 161-162 and P G McHugh "Aboriginal Identity and Relations in North America and Australasia" in P G McHugh and Ken S Coates *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 142-143; 172-174.

[495] Palmer, above, 161-162.

[496] McHugh, above, 142-143; 172-174.

recognise indigenous difference and autonomy to decide whether such practices are viable or necessary here.

In particular, it is vital for New Zealand to acknowledge that Maori rights are political, based on the historical relationship that Maori tribes forged with the British colonials. Without this acknowledgement, New Zealand society and government will be ignoring history, for the Treaty of Waitangi was signed and understood by Maori as a reaffirmation of their political structures (and, as often argued, their political independence). New Zealand's paradigm of indigenous autonomy should seek to accord with the fundamental recognition of independent political status found in the Cherokee cases, and the current Canadian policy of recognising the prior sovereignty of First Nations Canadians through the facilitation of self-government. In an era that has seen the fall of colonialism and the rise of self-determination, the justice of constitutional frameworks for indigenous autonomy in states where colonisation cannot be reversed is one of the most important normative concerns of our time.

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