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Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench

*Erik M. Jensen**

I. INTRODUCTION

In December 1987, Monroe G. McKay completed his first decade on the United States Court of Appeals for the Tenth Circuit. The McKay years have seen a revitalization of that court. From a staid, unimaginative body, the Tenth Circuit has become a vigorous center of intellectual activity,¹ and its opinions are now read nationally with new respect.

Judge McKay is not solely responsible for the enhanced reputation of the court, but his role has been significant. Combining a scholar's interest in theory with an experienced litigator's ability² to cut quickly to the heart of a complex legal problem, the

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The author wishes to express his appreciation to the library staff at the Case Western Reserve University School of Law, particularly Patricia J. Harris and Mary Ledoux, who provided substantial assistance in the preparation of this article.

1. Although the number of filed dissents is hardly a perfect measure of a court's intellectual vigor, it is a relevant statistic. In the 1976-77 term (July-June) of the Tenth Circuit, before Judge McKay joined the court, only 16 dissents were filed by all judges. In his first seven months on the bench (December 1977-June 1978), Judge McKay alone filed seven dissents, and he added 13 in the next 12-month period. He has had as many as 17 dissents in one term (1985-86).

The average number of dissents filed during this ten-year period by other judges also has risen. For example, in 1985-86 a total of 20 non-McKay dissents came down. This increase in open doctrinal disputes appears not to have been accompanied by rancor; the court remains, at least to outward appearances, an extraordinarily congenial body.

2. Following a clerkship with the Honorable Jesse A. Udall of the Arizona Supreme Court in 1961, Judge McKay practiced with the renowned Phoenix, Arizona law firm of Lewis & Roca from 1961 to 1966 and from 1968 to 1974. During the intervening years, Judge McKay served as Peace Corps Director in Malawi. In 1974, he joined the faculty of the new J. Reuben Clark Law School, Brigham Young University, and remained there until 1977, when he was appointed to the United States Court of Appeals for the Tenth Circuit. See *Monroe G. McKay*, in 2 ALMANAC OF THE FEDERAL JUDICIARY (1987).

Judge has been a leader on the court in many areas of the law and has become a jurist of national prominence.

A tenth anniversary is a customary time for tributes and commentaries, and Judge McKay will not escape. Too many unabashed admirers, including this author, want to participate in the celebration. To honor the Judge, this article takes the form of a contribution to a *Festschrift*.³ Rather than providing gushing praise and little else,⁴ it examines one of the areas of the law in which the Judge has been most prominent: American Indian law. By being occasionally critical—indeed, by questioning the philosophical foundation for Indian law and policy—the author in no way intends to diminish the Judge's accomplishments. This article's premise is the proposition that a scholar-teacher-judge⁵ can receive no higher tribute than to have his work publicly (and maybe painfully) dissected.⁶

No forum could be more appropriate than this Law Review to honor Judge McKay.⁷ He was a full-time faculty member of the J. Reuben Clark Law School from 1974 until his appointment to the court by President Carter in 1977. Judge McKay has retained close contacts with the school, and he remains an ardent supporter.

3. The author hopes the *Festschrift*—an essay in honor of, but not entirely about, Judge McKay—does not give the Judge short shrift.

4. The author will be delighted to gush, but only in a less formal setting.

5. That the Judge is seen as a scholar-teacher by those who appear before him can be discerned from the "Lawyers' Comments" collected in *Monroe G. McKay, supra* note 2:

Courteous, liberal, intelligent, professorial, attentive to both sides, works hard, writes well. . . . "Professorial, scholarly, listens well, has the respect of the other judges." "Still a bit too much the teacher. Sometimes lectures lawyers." "Should not treat lawyers as students." "Very diligent, well prepared. His opinions are well reasoned." "Professorial, a good writer."

The commentator intended "too much the teacher" to be critical, but it is in fact high praise. What more could anyone ask than to be called "professorial" not once, but several times?

6. If there can be a higher tribute, consider it given. A great judge's work stimulates thought, but Judge McKay of course cannot be held responsible for the strange directions that stimulated thought may take.

7. In its brief history, this *Law Review* has published a number of significant contributions to the Indian law literature. See, e.g., Grimsrud, *Doing Business on an Indian Reservation: Can the Non-Indian Enforce His Contract with the Tribe?*, 1981 B.Y.U. L. REV. 319; Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639; Comment, *Federal Preemption of State Authority to Tax Non-Indian Mineral Development on Indian Lands*, 1982 B.Y.U. L. REV. 919; Comment, *Tribal Sovereignty and the Supreme Court's 1977-1978 Term*, 1978 B.Y.U. L. REV. 911.

Indian law—the jurisprudence “defining and implementing the relationship among the United States, Indian tribes and individuals, and the states”⁸—is a particularly appropriate subject for a tribute to Judge McKay.⁹ This is an area in which he has written a great deal¹⁰ and about which he cares deeply. Although all McKay opinions reflect thoughtfulness and concern for craft, in this area they evidence refined, informed passion as well.¹¹

The passion comes from the importance of the cases. If traditional legal scholars and the general populace have any view of Indian law, it is that the subject has an impact only at society’s periphery.¹² Most Indian litigation directly affects a small percentage of the population,¹³ and it is not glamorous: one sym-

8. FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1 (R. Strickland ed. 1982) [hereinafter 1982 COHEN HANDBOOK]. The term “Indian law” as commonly used does not include the study of tribal dispute resolution systems, except insofar as those systems affect the tribes’ relationships with federal and state governments. The study of such systems has itself become an area of scholarly interest. See, e.g., E. HOEBEL, *THE LAW OF PRIMITIVE MAN* (1979); K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941); R. STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975). Because of jurisdictional disputes, modern tribal court systems, which are in many ways modelled after the United States court system, are often implicated in Indian law. See generally S. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS* (1978) (recommending abolition of tribal court systems); V. DELORIA JR. & C. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 110-38 (1983) (describing Indian courts); see also Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987).

9. In a ten-year span the Judge has authored opinions in so many areas that a comprehensive examination of his jurisprudence must await a fuller study, perhaps to commemorate the close of his second decade on the court. The Judge’s work in conspiracy theory and double jeopardy doctrine should certainly be examined at length. The Judge has published a dissertation on the latter subject in a nonjudicial (but judicious) setting. See McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1 (1983); See also McKay, Book Review, 81 MICH. L. REV. 811 (1983) (reviewing book on judicial reform).

10. See *infra* notes 145-49 for a list of the McKay Indian law opinions. Because of the tribal concentrations within its six-state area, the Tenth Circuit is rivaled only by the Ninth Circuit as an important Indian law jurisdiction.

11. Cf. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 71 (1987) (“Civilization or, to say the same thing, education is the taming or domestication of the soul’s raw passions—not suppressing or excising them, which would deprive the soul of its energy—but forming and informing them as art.”).

12. In contrast, in the early days of the republic, relations with the Indian tribes indisputably constituted a central issue of public policy. The First Congress enacted four laws dealing with Indian affairs in its first five weeks of existence. See C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 13 (1987).

13. “Indian affairs are only an eddy within national policy.” *Id.* at 25 (footnote omitted). If the 1980 census figure of 1,418,195 American Indians is accurate, Indians comprise only about 5% of the total United States population. However, that percentage may be too high because it represents an implausible increase of almost 79% over the 1970 census figure of 792,730. The census now relies on self-identification, and it may

pathetic Supreme Court justice publicly referred to Indian cases as "crud."¹⁴ But even if the stakes in some cases seem trivial (something that could be said about any area of the law),¹⁵ the body of Indian law has a higher meaning. This nation defines itself, at least in part, by its treatment of insular minorities.¹⁶

currently be "profitable, fashionable, or simply self-fulfilling" to identify oneself as an Indian. D. GETCHES & C. WILKINSON, *FEDERAL INDIAN LAW* 6 (2d ed. 1986).

Whatever number is accepted, it is, in absolute terms, small. However, Indians do comprise more than 5% of the population in a number of states—Hawaii (18.90%), Alaska (15.94%), New Mexico (8.04%), South Dakota (6.53%), Arizona (5.62%), and Oklahoma (5.60%). *Id.* at 7.

Indian land comprises only 2.4% of all land in the United States, but concentrations are substantial in some western states: Arizona (26.99%), South Dakota (9.70%), New Mexico (8.80%). In addition, under the terms of the Alaska Native Claims Settlement Act, Alaska Natives (a category that includes Eskimos and Aleuts as well as Indians) will eventually own about 12% of Alaskan land, nearly doubling the percentage of United States land owned by tribes and Indian individuals. *Id.* at 13.

Indian land is important to the general public because some of it has great potential for development. For example, 10% of the country's coal and oil resources and 1.5% percent of the nation's commercial timber are estimated to be on Indian lands. Wilkinson, *Shall the Islands Be Preserved?*, 16 AM. WEST, May-June 1979, at 32-34, quoted in Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 717-18 (1986).

14. In discussing Supreme Court opinion-writing assignments, Justice Blackmun commented that

[i]f one's in the doghouse with the Chief [Justice], he gets the crud. . . . He gets the tax cases, and some of the Indian cases, which I like but I've had a lot of them.

You know, . . . there are cases that are fun to write. And there are cases that are not.

Taylor, *Reading the Tea Leaves of a New Term*, N.Y. Times, Dec. 22, 1986, at B-14, col. 3. Even without the glamour, and to the consternation of some justices (*see, e.g.*, *Washington v. Confederated Tribes*, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting) ("well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area [scope of Indian immunity from state taxation]"), the Supreme Court has heard a substantial number of Indian law cases in recent years—more, for example, than it has heard in the securities and bankruptcy areas. The Court decided 12 Indian law cases in the 1960s, 35 in the 1970s, and, through the end of the 1985 term, 32 in the 1980s. C. WILKINSON, *supra* note 12, at 2, 123-32. In the 1986 term alone the Court decided cases dealing with riparian rights, *United States v. Cherokee Nation*, 107 S. Ct. 1487 (1987); state regulation of bingo games on an Indian reservation, *California v. Cabazon Band*, 107 S. Ct. 1083 (1987); exhaustion of tribal court remedies, *Iowa Mut. Ins. Co. v. LaPlante*, 107 S. Ct. 971 (1987); the extent of the Interior Secretary's obligation to determine whether Alaskan oil leases would affect Alaska Natives' subsistence rights and culture, *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396 (1987); and the Indian Land Consolidation Act of 1983, *Hodel v. Irving*, 107 S. Ct. 2076 (1987).

15. Judge McKay would not necessarily agree with this notion.

16. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that a "more searching judicial inquiry" than presumption of constitutionality may be called for with respect to "prejudice against discrete and insular minorities").

Indian relations are, it has been said, our national "morality play":¹⁷ "The 'Indian problem' . . . challenges the most precious assumptions about what this country stands for—cultural pluralism, equity and justice, the integrity of the individual, freedom of conscience and action, and the pursuit of happiness."¹⁸ Indian law affects us all, Indian and non-Indian alike.¹⁹

This article begins, in part II, with a rumination on the difficulty of justifying a separatist policy for the American Indian. This part attempts to show that such a concern should underlie any evaluation of Indian law. The argument in part II is certainly not Judge McKay's, but he is responsible for sparking the author's interest.²⁰ In part III, the article examines the McKay Indian law opinions, singling one out for special attention.²¹ Finally, part IV discusses the McKay opinions and the issue of separation.²²

17. SPECIAL SUBCOMM. ON INDIAN EDUCATION, SENATE COMM. ON LABOR AND PUBLIC WELFARE, *INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE*, S. REP. NO. 501, 91st Cong., 2d Sess. 10 (1969).

18. *Id.*

19. The foremost scholar of Indian law, the philosopher Felix S. Cohen, penned what is perhaps the most vivid statement of the Indian's importance: "Like the miner's canary, the Indian marks the shift 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." Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 390 (1953); see F. FRANKFURTER, *Felix S. Cohen*, in *OF LAW AND LIFE & OTHER THINGS THAT MATTER* 143, 143 (P. Kurland ed. 1967) (Cohen was "unrivalled authority" within field of Indian law; his *HANDBOOK*, see *infra* note 25, "was an acknowledged guide for the Supreme Court"); *Felix S. Cohen*, 9 *RUTGERS L. REV.* 345 (1954) (biography and bibliography of Cohen), reprinted in *FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW VII* (1971 ed. Univ. of New Mexico Press); Feldman, *Felix S. Cohen and His Jurisprudence: Reflections on Federal Indian Law*, 35 *BUFFALO L. REV.* 479 (1986) (discussing relationship between Cohen's writings in legal philosophy and his writings on Indian law); see also R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982) (discussing America's dominant philosophy of law, "pragmatic instrumentalism," of which Cohen was a sophisticated adherent).

20. See *infra* notes 23-144 and accompanying text. The exquisite pleasure of working for Judge McKay comes in part from his willingness to participate in wide-ranging, passionate discussions of fundamental issues, sometimes relating to pending cases, sometimes not. Disagreements are common, particularly if the Judge is surrounded by "Republican clerks," as he occasionally is. However, the disagreements indicate no lack of admiration and respect on either side. To the contrary, the Judge welcomes, even demands, disagreement. Both the intensity of the discussion and the later intra-office reconciliation evidence profound mutual admiration and respect. See *supra* note 6.

21. See *infra* notes 145-227 and accompanying text.

22. See *infra* notes 228-30 and accompanying text.

II. INDIAN LAW AND SEPARATION

The human beings who are scattered over this space [the American continent] do not form, as in Europe, so many branches of the same stock. Three races, naturally distinct, and, I might almost say, hostile to each other, are discoverable among them at the first glance. Almost insurmountable barriers had been raised between them by education and law, as well as by their origin and outward characteristics; but fortune has brought them together on the same soil, where, although they are mixed, they do not amalgamate, and each race fulfills its destiny apart. [Alexis-Henri-Charles-Maurice Clerel, Comte de Tocqueville (1835)]²³

"Indian law" exists because the American Indian is treated differently from other American citizens.²⁴ One would rightly scoff at the notion of "Irish-American law" or "Italo-American law," but "American Indian law" has become a recognized legal subject.²⁵ The primary sources of Indian law are vast and often

23. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 332 (P. Bradley ed. Alfred A. Knopf 1945).

24. All American Indians "born within the territorial limits of the United States" are citizens of the United States, regardless of their wishes, as a result of a 1924 statute. Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1982)). Prior to that time, with some exceptions (see 1982 COHEN HANDBOOK, *supra* note 8, at 142-43), many Indians could become citizens only through naturalization, even if they had severed all ties with their tribes. The fourteenth amendment had provided in 1868 that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. The amendment made every black person born in the United States a citizen. Indians were not subject to United States jurisdiction, however, and therefore were not covered by the amendment. See W. BERNIS, *TAKING THE CONSTITUTION SERIOUSLY* 35-36 (1987).

25. Felix S. Cohen, *see supra* note 19, can be said to have created the discipline of Indian law with the publication, under the auspices of the United States Department of the Interior, of his *HANDBOOK OF FEDERAL INDIAN LAW* in 1942. (The 1942 edition was reprinted in 1971 by the University of New Mexico Press [hereinafter 1942 COHEN HANDBOOK].) In 1958 the Interior Department, with a clear assimilationist goal in mind, undertook a revision of the *HANDBOOK*. The revision, however, is generally discredited both as a reference volume and as a reflection of Cohen's work. The 1982 version of the *HANDBOOK*, *supra* note 8, is the handiwork of a distinguished group of scholars, headed by Rennard Strickland and Charles Wilkinson, who sought to update the original volume, making it once again a useful reference work, while retaining the spirit and wisdom of Felix Cohen.

Indian law has become recognized as a field of academic study. Two commercially published law school casebooks exist and both are in second editions. D. GETCHES & C. WILKINSON, *supra* note 13; M. PRICE & R. CLINTON, *LAW AND THE AMERICAN INDIAN* (2d ed. 1983). A study aid exists as well, prepared by a prominent scholar and jurist. W. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (1981).

distinctive, including treaties,²⁶ federal statutes,²⁷ judicial decisions,²⁸ and the Constitution.²⁹ Rather than being a subset of civil rights law,³⁰ Indian law is *sui generis*.³¹

26. Until 1871, the usual way for the federal government to deal with the tribes was by treaty (when the government was trying to be something other than merely oppressive). Although not "foreign" states, the tribes were "nations" ("domestic dependent nations"). *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Through a rider to the Indian Appropriations Act, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1982)), the use of treaties ended, not so much because of any perceived diminution in the legal status of the tribes (although there had, of course, been a marked diminution in the quality of the tribes' existence), but because the House of Representatives insisted on participating in the formation of Indian policy. The treaty process, because it required the "advice and consent" of the Senate only, effectively excluded the House. See C. WILKINSON, *supra* note 12, at 8, 138 n.3.

27. These statutes have been enacted throughout United States' history. They remain on the books from periods when the governing federal policy was much different from what it is today, making the already difficult task of interpreting ancient statutes even more difficult. See generally C. WILKINSON, *supra* note 12 (effect of passage of time on interpretation). Many, but not all, of the provisions have been codified in Title 25 of the United States Code.

28. There is an enormous body of judicial decisions starting with the Marshall Court. The Marshall "trilogy" of Indian law cases remains significant authority. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (tribes possess inherent sovereignty; "Cherokee Nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (although tribes are "nations," tribes have status "resembl[ing] that of a ward to his guardian," not a "foreign" state; tribe therefore could not bring original action in Supreme Court); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (Indians hold right of occupancy to ancestral lands but subject to defeasance by federal government; federal approval therefore required to alienate Indian title of aboriginal lands).

Since 1970, *Worcester*, the foundation for the development of jurisdictional law in this area, has been cited by state and federal courts more than all but three other pre-World War opinions. C. WILKINSON, *supra* note 12, at 158 n.126.

29. See *infra* note 93 and accompanying text.

30. To prevent invidious discrimination, any statute directed at Indians as a racially defined class should be subject to the same strict scrutiny that applies to a law directed at any other minority group. See *United States v. Antelope*, 523 F.2d 400, 403-06 (9th Cir. 1975) (strict scrutiny is appropriate when statute disadvantages Indians based on their race), *rev'd on other grounds*, 430 U.S. 641, 645 (1977) (Major Crimes Act, 18 U.S.C. § 1153 (1982), was "not based upon impermissible racial classifications"); *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 500-01 (1979) (while federal government may single out tribal Indians for special legislation, "[s]tates do not enjoy this same unique relationship with Indians"); 1982 COHEN HANDBOOK, *supra* note 8, at 300-04; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1017-18 (1978); see also *Craig v. Boren*, 429 U.S. 190, 209 n.22 (1976) (dictum: "unfairness and questionable constitutionality of singling out groups [including Indians] to bear the brunt of alcohol regulation"). But see *Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 282-84 (1984) (cases generally do not treat Indian classification as based on race).

Although this country has established an extensive network of civil rights laws to protect racial minorities in general, those statutes have special application to Indians

The distinctive status of the Indian,³² in American law and life, is reflected in the now dominant federal policy of separation. Separatist and assimilationist philosophies have vied for dominance over the years, with each enjoying several periods of ascendancy.³³ After successful tribal resistance to the last push for assimilation during the early Eisenhower years, the dominant governing policy is now one of separation:³⁴ the ideal is distinct

and Indian tribes. For example, the Equal Employment Opportunity Act of 1972, which generally prohibits discrimination in employment, expressly provides that Indian tribes are not "employers" covered by the Act. 42 U.S.C. § 2000e(b)(1) (1982). Hence, a tribe may discriminate in favor of its members. *See, e.g.,* Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980) (McKay, J.) (tribe entitled to fire non-member chief of police, with 17 years of exemplary experience, to fill position with tribal member); *cf.* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (upholding Bureau of Indian Affairs employment preference for qualified Indians from federally recognized tribe; since other Indians not entitled to preference, policy is not racial discrimination and *a fortiori* not invidious racial discrimination).

31. *See* Newton, *supra* note 30, at 196-98; Washburn, *The Historical Context of American Indian Legal Problems*, in AMERICAN INDIANS AND THE LAW 12, 12 (L. Rosen ed. 1976).

32. This article often refers to American Indians as if they constituted a single, homogeneous ethnic group. While that proposition will serve for present purposes, it is a gross simplification and for many purposes a falsification. *See* Strickland, *supra* note 13, at 736 ("We must learn what the friends of the Indian never learned, that there is no single Indian culture, that no one policy is capable of working effectively for all Indian people.").

33. "Inevitably, Indian policy has been cyclic. . . . [F]ederal Indian policy has always been the product of the tension between two conflicting forces—separatism and assimilation—and Congress has never made a final choice as to which of the two it will pursue." C. WILKINSON, *supra* note 12, at 13.

34. The history is reviewed in many general sources, *e.g.*, A. JOSEPHY, JR., *THE INDIAN HERITAGE OF AMERICA* 348-56 (1966); M. PRICE & R. CLINTON, *supra* note 25, at 68-90, as well as in the monumental studies, *e.g.*, F. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984). Federal Indian policy is usually divided into several discrete historical periods, including the following:

1. Reservation policy (until about 1887). Reservations were created in the mid-nineteenth century to keep newly defeated tribes separate from the white man. Reservations were often not on the tribes' traditional lands, and, without traditional sources of sustenance, reservation life could be particularly squalid. *See* S. TYLER, *A HISTORY OF INDIAN POLICY* 71-94 (1973).

2. Allotment period (1887-1934). The General Allotment Act of 1887 (the "Dawes Act"), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-42, 348-49, 354, 381 (1982)), was, in general, intended to parcel out reservation lands to individual Indians, who, it was hoped, would become industrious farmers and gradually become assimilated into the United States population. Although enacted in a good faith attempt to help the Indian, the primary effect of the Act was to speed the transfer of land out of Indian hands. (In 1887 about 138 million acres were held by Indians; by 1932 about 90 million of those acres had passed to whites.) A. JOSEPHY, *supra*, at 350-51; *see generally* F. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

3. Emphasis on tribal self-government (1934-1953). The conditions under which the

tribal governments exercising dominion (subject to ultimate federal control) over distinct tribal lands.

Today there is little serious discussion of any alternative to separation,³⁵ but it should be apparent how peculiar that policy

Indian population lived in the 1920s were a national disgrace, as the Meriam Report chronicled. INSTITUTE FOR GOVERNMENT RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* (1928). One response to the Report, the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1982)), slowed the assimilationist trend of Indian policy, ending the division of land by allotment and encouraging the creation of tribal governments with substantial power. The terms and conditions of self-government are generally subject to federal veto, however. See S. TYLER, *supra*, at 125-50.

4. Termination (1953-1958). In 1953, assimilation once again became the official policy. For example, "Public Law 280" authorized state governments, if they so elected, to exert authority, without tribal approval, over criminal and civil matters on specified portions of Indian country. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. See Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975). Moreover, a resolution declared Congress' intent to "terminate" relations with the tribes as quickly as possible. H.R. Con. Res. 108, 67 Stat. B132 (1953). Under this policy, a number of tribes, including the Menominees (see *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (discussing effect of termination on treaty hunting and fishing rights)), ended their status as self-governing bodies, in some cases with disastrous economic results. See S. TYLER, *supra*, at 180-81.

5. Return to separation and self-determination (1958 to present). In the latter part of the Eisenhower administration, the prevailing assimilationist view changed (see *id.* at 179-80 (1958 speech by Interior Secretary Seaton)), although termination was not officially repudiated until the Nixon years. See Indian Self-Determination Act and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n (1982)) (allowing federal government to contract with tribal governments to operate programs previously administered by federal departments); President's Message to Congress Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. 1 (1970), reprinted in PUB. PAPERS: RICHARD NIXON 564, 565 (1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.") [hereinafter "1970 Nixon Message," with citations to PUB. PAPERS]; Handrick, *A Chippewa Case: Resource Control and Self-Determination*, 11 CULTURAL SURVIVAL Q. No. 2, at 39 (1987); see also W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* (1966) (Report of the Commission on the Rights, Liberties and Responsibilities of the American Indian, funded by The Fund for the Republic, urging reemphasis of tribal values, but with ultimate assimilationist goal).

35. Legislation is occasionally introduced that would return Indian policy to an avowed assimilationist goal, but in recent years none has survived the initial stages of the legislative process. See R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 291 (1980).

If there is discussion in the literature about alternatives to separation, it is about extending the policy, by removing or further limiting federal power over the Indian. *E.g.*, *id.* at 279-82 (urging constitutional amendment to realize "treaty federalism," with tribes generally having powers of states (if they wish), but able to define their own membership); D. McNICKLE, *THEY CAME HERE FIRST* 285 (rev. ed. 1975) ("Return the right of decision to the tribes—restore their power to hold the dominant society at arm's

is. Heightened interest in the Indian "problem" was attributable in part to the black civil rights protests of the late 1950s and 1960s and the resulting general recognition and celebration of ethnic diversity in this country.³⁶ Certainly the "rise in temper" of the Indian protest was fueled by the civil rights movement.³⁷ However, the mainstream civil rights movement has been, if not amalgamationist in emphasis, decidedly integrationist.³⁸ The Indian movement has taken an entirely different path.

A fundamental issue of American political philosophy therefore underlies Indian jurisprudence: Should the principles governing the rest of a pluralist society be inapplicable to the Indian? In particular, should a society that has committed itself to the idea, an idea with constitutional underpinnings, that "separate is not equal"³⁹ countenance a policy of *de jure* separation with respect to the Indian? Americans no longer view as inevita-

length"); Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 409 (1986) (lamenting centennial of *United States v. Kagama*, 118 U.S. 375 (1886), which held "that Indian tribes could no longer resist congressional laws simply by rejecting them," and urging rectification). Justification for further separation has been found in the right to self-determination recognized under international law. See Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983); Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 586-602 (1987).

36. The end of the belief in the "melting pot" as the metaphor for American society coincided with social scientists' recognition that ethnicity makes a political difference (something the man on the street, and the ward committeeman, had always known). See generally AMERICAN ETHNIC POLITICS (L. Fuchs ed. 1968); ETHNIC GROUP POLITICS (H. Bailey, Jr. & E. Katz eds. 1969); N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT (2d ed. 1970); M. GORDON, ASSIMILATION IN AMERICAN LIFE (1964); THE ETHNIC FACTOR IN AMERICAN POLITICS (B. Hawkins & R. Lorinskas eds. 1970).

37. D. McNICKLE, *supra* note 35, at 274. Concern for ethnic diversity and aboriginal rights is, however, not peculiar to the United States. See, e.g., M. ASCH, HOME AND NATIVE LAND: ABORIGINAL RIGHTS AND THE CANADIAN CONSTITUTION (1984); THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS (M. Boldt & J. Long eds. 1985). For an extraordinary judicial discussion of aboriginal rights, in a 154-page opinion that draws on the learning and decisions of many countries, see *Milirrpum v. Nabalco Pty. Ltd.*, 17 F.L.R. 141 (Sup. Ct. N. Terr. of Austr. 1971) (aborigines unsuccessfully claimed that ancestral rights in land had been unlawfully invaded by Australia's grant of leases to mining company).

38. See Storing, *Introduction*, in WHAT COUNTRY HAVE I?: POLITICAL WRITINGS BY BLACK AMERICANS 1, 4-5 (H. Storing ed. 1970).

39. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."). Such a concern is not knee-jerk liberalism, although it has been implicitly characterized as such. See R. BARSH & J. HENDERSON, *supra* note 35, at 241: "In the generation following *Brown*[,] . . . political liberals and a liberal judiciary have labored for racial assimilation. Advocacy of racial equality has become synonymous with, and essential to, liberal political identity. In this context reservations are immediately assumed to be pernicious outposts of ghettoization."

ble Tocqueville's division of the North American population into hostile races, with distinct destinies—or do they?

This article briefly grapples with the issue of separation, contrasting the political-legal status of Indians and blacks at both the nation's founding and today. As discussed in section A, under the traditional view, the view of the founders,⁴⁰ there was a sufficient similarity between blacks and Indians that one might have predicted similar futures for the two groups. Today, however, their statuses are radically different. The uneasy justifications offered for maintaining this difference are examined in section B.

A. *The Nation's Founding and Equality: The Original Case for Separation*

The American tradition has been assimilationist in the sense that, to be Americanized—and, in principle, anyone could be Americanized—a person needed only to accept and recognize the natural rights of man,⁴¹ the rights with which men were “endowed by their Creator.”⁴² By doing so, Allan Bloom has argued,

men found a fundamental basis of unity and sameness. Class, race, religion, national origin or culture all disappear or become dim when bathed in the light of natural rights, which give men common interests and make them truly brothers. The immi-

40. The word “founders” refers to those men who were present at the constitutional convention in 1787 and to other prominent statesmen of the time, such as Thomas Jefferson. The positions attributed to the founders will, *in general*, be accurate. However, no founder would necessarily have agreed with all of the propositions, and some would have strongly disagreed with certain statements.

41. To be “Americanized” thus meant something: to pledge allegiance to “Americanism,” an idea that has no counterpart in other western societies. *See* W. BERNS, *supra* note 24, at 21-22; *see also* A. MANN, *THE ONE AND THE MANY: REFLECTIONS ON THE AMERICAN IDENTITY* 177, 179 (1979) (candidate for naturalization becomes citizen of United States by “identifying with the Constitutional principles of the Republic”; “[f]ew other multiethnic countries live by a transcending creed that the members of their constituent tribes or nationalities have willingly chosen.”). This view of America's uniqueness is not simple jingoism, although many will take it as such. “Americanism” exists—as “Frenchism,” for example, does not—in that this nation “was deliberately brought into being at a particular moment of time and for a specific purpose.” W. BERNS, *supra* note 24, at 22.

42. Once known to every American schoolchild, the full passage from the Declaration of Independence reads:

We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .

The Declaration of Independence para. 2 (U.S. 1776).

grant had to put behind him the claims of the Old World in favor of a new and easily acquired education. This did not necessarily mean abandoning old daily habits or religions, but it did mean subordinating them to new principles.⁴³

The polity could be, necessarily would be, pluralist—with a variety of interests, even factions—but with a common philosophical core. The population would be united by something more than the historical accident that found diverse peoples within a common geographical boundary.

At the time of the founding, despite the eloquent language of the Declaration of Independence,⁴⁴ the American population was not united. In particular, blacks and Indians were not entitled to be Americanized.⁴⁵ Even if blacks had not been enslaved, it is unlikely that the white population would have accepted them as potentially full participants in the body politic. They were seen as too different, decidedly inferior in important abilities.⁴⁶

Indians, in contrast, generally had not been enslaved.⁴⁷ Many founders saw the Indian as a degraded form of the white man, and therefore possibly assimilable in a way that blacks were not.⁴⁸ Nevertheless, Indians, like blacks, were denied participation in the American republic. That “Indians were fit to be citizens” probably did not even occur to the founders⁴⁹ because Indians were thought to be barbarous, having no experience with law (as distinguished from force) or government.⁵⁰ Accordingly,

43. A. BLOOM, *supra* note 11, at 27; see A. MANN, *supra* note 41, at 178. A proper government would secure these rights:

A person had only to be willing to give up his natural freedom—or his natural right to govern himself—and to assume the obligations attendant upon his new condition as a member of the “social state” formed by the compact. Any rational person could do that and could appreciate the advantages of doing that: only in this way could his rights be secured in fact.

W. BERNS, *supra* note 24, at 30-31.

44. See *supra* note 42.

45. Other persons who were entitled to be Americanized, the Tories, decided against it. See W. BERNS, *supra* note 24, at 32-34.

46. See *infra* notes 52, 71-72 and accompanying text.

47. See *infra* notes 87-91 and accompanying text.

48. See W. JORDAN, *WHITE OVER BLACK* 477-81 (1968) (comparing Jefferson’s views of blacks and Indians).

49. W. BERNS, *supra* note 24, at 38.

50. *Id.* While enslaved blacks were also seen as deficient in the capacity to participate in American government, western law and government were not entirely foreign to them. Through their close (albeit involuntary) relationship to whites, they saw the law in action; and, while generally denied civil rights, they were subject to the criminal laws and

until Indians developed the necessary faculties, and subdued their uninformed passions—if that was possible—prudence dictated that Indians should not be part of the American people.⁵¹

Does the divergence between the Declaration's principle of equality and the practice of the founders demonstrate simple hypocrisy? Certainly reading the founders' descriptions of Indians and blacks can be painful; the descriptions of perceived intellectual deficiencies, for example, are particularly harsh to modern ears.⁵² Moreover, as one evaluates the writings of the founders, it is difficult to put aside the subsequent, often catastrophic history of black-white and Indian-white relations in this country. Nevertheless, although the modern tendency is to castigate the founders for their prejudices or, equally damning, to suggest that they were *merely* the products of their time,⁵³ the founders' prejudices were surprisingly limited.

Most of the founders saw no difference whatsoever among whites, blacks, and Indians in one critical respect. Although In-

were, in some cases, entitled to the protection of those laws. See Storing, *Slavery and the Moral Foundations of the American Republic*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 313, 316 (R. Horwitz 3d ed. 1986).

51. W. BERNIS, *supra* note 24, at 38-39.

52. E.g., T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, query xiv, *reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 256-62 (A. Koch & W. Peden eds. 1944) [hereinafter *SELECTED WRITINGS*]. Jefferson, as a good scientist, described the state of Indians and blacks as he saw it. Measured in terms of western European culture and values, both groups were found to be wanting, although the Indian was seen as having more potential to achieve parity with the white man. See W. JORDAN, *supra* note 48, at 477-81.

Jefferson was nevertheless not a simple racist. As a good scientist, he also realized the limitations of his observations: the apparent inferior status of other peoples was not inevitable. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, queries vi, xiv, *reprinted in SELECTED WRITINGS, supra*, at 212 ("Before we condemn the Indians of this continent as wanting genius, we must consider that letters have not yet been introduced among them."), 260-61 ("Whether further observation will or will not verify the conjecture, that nature has been less bountiful to [blacks] in the endowments of the head, I believe that in those of the heart she will be found to have done them justice."); Letter from Thomas Jefferson to Benjamin Banneker (Aug. 30, 1791), *reprinted in SELECTED WRITINGS, supra*, at 508 ("Nobody wishes more than I do to see such proofs . . . that nature has given to our black brethren, talents equal to those of the other colors of men, and that the appearance of a want of them is owing merely to the degraded condition of their existence."); Letter from Thomas Jefferson to Henri Gregoire (Feb. 25, 1809), *reprinted in SELECTED WRITINGS, supra*, at 594 (to same effect).

53. *But see* Storing, *supra* note 50, at 330 (emphasis in original):

Prejudice—arbitrary liking and trust and, of course, also disliking and mistrust—is inherent in political life, and its role is greater as the polity is more democratic. To criticize a Jefferson or a Lincoln for yielding to, even sharing in, white prejudice is equivalent to demanding either that he get out of politics altogether—and leave it to the *merely* prejudiced—or that he become a despot.

dians were thought unfit for United States citizenship, they were understood to have the rights of men,⁵⁴ just as enslaved blacks were understood by the founding generation (always with exceptions, of course) as having the rights of men.⁵⁵ The three races had many differences, but no man,⁵⁶ whatever his color, was thought to be without natural rights.

The hard case, the case that may appear inconsistent with the proposition that the founders accepted equality of rights, was black slavery. In fact, however, there was no inconsistency. Even most of those founders who had slaves believed slavery to be unjust, an abomination, contrary to nature and therefore contrary to natural right.⁵⁷ In the Constitution, the founders compromised on the issue of slavery,⁵⁸ but not because of any belief

54. See, e.g., Jefferson, Second Inaugural Address (March 4, 1805), reprinted in *SELECTED WRITINGS*, *supra* note 52, at 339, 341 ("aboriginal inhabitants" of land included in the Louisiana Purchase were "[e]ndowed with the faculties and the rights of men").

55. See Storing, *supra* note 50, at 316; see also Letter from Thomas Jefferson to Henri Gregoire (Feb. 25, 1809), reprinted in *SELECTED WRITINGS*, *supra* note 52, at 594, 595 ("Whatever be their degree of talent it is no measure of their rights. Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others.").

56. In this article the terms "man" and "men" (and their associated pronouns) should be understood to include both men and women.

57. The founders could, consistent with natural right, refuse to live together in the same nation with blacks. "What they did not have a right to do, however, was to exclude the blacks from their society—along with the Indians and the Tories—while continuing to govern them. This was a violation of natural right, and, what is more, they knew it. Indeed, they acknowledged it." W. BERNS, *supra* note 24, at 41. For example, Patrick Henry asked rhetorically, "Is it not amazing that at a time, when the Rights of Humanity are defined & understood with precision, in a Country above all others fond of Liberty, that in such an Age, & such a Country we find Men . . . adopting a Principle as repugnant to humanity." Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), reprinted in W. BERNS, *supra* note 24, at 41.

Slavery was to Jefferson a "great political and moral evil," T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, query viii, reprinted in *SELECTED WRITINGS*, *supra* note 52, at 219, with debilitating effects on both master and slave. "I tremble for my country when I reflect that God is just; that his justice cannot sleep forever. . . . The Almighty has no attribute which can take side with us in such a contest [between masters and slaves]." T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, query xviii, reprinted in *SELECTED WRITINGS*, *supra* note 52, at 279. See G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 228, 306 (1978).

58. Slavery was not eradicated, but the term "slavery" or "slave" is not used in the Constitution, and all of the constitutional provisions relating to slaves refer to them as "persons." U.S. CONST. art I, § 2, cl. 3 ("Three fifths of all other Persons" counted for purposes of apportionment); art. I, § 9, cl. 1 (postponement of power to prohibit "Migration or Importation of such Persons"); art. IV, § 2, cl. 3 (relating to "Person[s] held to Service or Labour in one state" who are fugitives in other states). Neither was slavery intended to be propped up. Each of the three constitutional provisions, while certainly compromises with evil, represents a narrow accommodation when compared to alterna-

in its rightness or inevitability. Rather, the founders agreed that the formation of the union was necessary and that there would be no union without some temporary accommodation with slavery. Furthermore, it was not clear how slavery could be simply and immediately abolished.⁵⁹

The founders were not immune from hypocrisy, of course, and grand prose may in some cases have hidden purely selfish motives. Viewed in the abstract, without regard to the felt necessities of the time, professing antislavery sentiments while maintaining slaves, as many did, appears to be the height of hypocrisy. But political life is not lived in the abstract. If they were to be statesmen,⁶⁰ the founders, including those without slaves, could not simply ignore factors they deemed unpleasant, such as fears about the aftermath of immediate abolition. They could at best hope to establish the antislavery principle, which they did, while providing minimal support to the abhorrent practice. No one could reasonably have thought, if the constitutional convention were to collapse over the issue, that slavery would be brought to its knees.

Perhaps the compromises made with slavery were too generous—hindsight suggests that slavery may have received more support than was intended—but they were not made without a great deal of thought and soul-searching. The view that the founders considered blacks and Indians to be nonpersons without the rights of men—a view that has been given legitimacy by

tive possibilities. See Storing, *supra* note 50, at 320-24 (discussing constitutional treatment of slavery).

59. Blacks constituted a large percentage of the population in the southern states. See A. MANN, *supra* note 41, at 86 (all but 50,000 of the 500,000 bound blacks in the United States in 1776 were in the South, and blacks constituted at least half of the population in many southern states). Physical safety of whites was therefore a concern. As Jefferson saw it, “[W]e have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.” Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820) reprinted in *SELECTED WRITINGS*, *supra* note 52, at 698. Moreover, blacks were in fact living in a degraded condition, unprepared, it was thought, to suddenly fend for themselves. See Roche, *Equality in America*, in *AMERICAN POLITICAL THOUGHT* 140, 146 (J. Roche ed. 1967) (emphasis in original) (“Any individual or group which urged emancipation had perforce to come to terms with the Negro. . . . What becomes of the Negroes after they have been released from slavery?”). Certainly individual manumission, if encouraged, would have led to significant suffering; the aged and infirm would have been the first to be freed. See G. WILLS, *supra* note 57, at 296-97.

60. Professor Jaffa described “the task of statesmanship”: “to know what is good or right, to know how much of that good is attainable, and to act to secure that much good but not to abandon the attainable good by grasping for more.” H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 371 (Washington paperbacks ed. 1973).

recent well-reported speeches of prominent jurists,⁶¹ including Supreme Court Justice Thurgood Marshall⁶²—is contrary to substantial evidence. This view fails to account for the anguish in many of the founders' writings and speeches⁶³ and, more important, it fails to account for the language of the Declaration and the Constitution.⁶⁴ Essentially, this revisionist history is fundamentally, dreadfully wrong.⁶⁵ Justice Marshall's reading

61. See Martin, *Blacks and Constitution are the Focus of a Panel*, N.Y. Times, May 31, 1987, § 1, at 44, col. 1 (quoting Third Circuit Judge A. Leon Higginbotham: "Under the original Constitution, blacks were not people.").

62. In a speech on May 6, 1987, Justice Marshall challenged the bicentennial celebration of the Constitution, characterizing the constitutional scheme as "defective from the start." Kamen, *Marshall Blasts Celebration of Constitution Bicentennial: Justice Calls Document 'Defective From Start'*, Wash. Post, May 7, 1987, at 1, col. 1; Savage, *Marshall on Constitution: 'Defective from Start'*, L. A. Times, May 7, 1987, pt. I, at 4, col. 1. It took the Civil War and the fourteenth amendment to, in effect, replace the Constitution: "While the Union survived the Civil War, the Constitution did not." Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987) (reprint of speech) [hereinafter "Marshall Speech"]. Moreover, Marshall did not "find the wisdom, foresight and sense of justice exhibited by the framers particularly profound." *Id.* at 2. Although some objections to slavery were raised, the founders "eventually consented to a document which laid a foundation for the tragic events that were to follow." *Id.* at 3.

63. Professed anguish may be part of rationalization, but rationalizations are reasons that can be evaluated on their own terms. Why should the founders have bothered with mere rationalization if they were comfortable with the idea of slavery? Justice Thurgood Marshall noted that the "use of the words 'slaves' and 'slavery' was carefully avoided in the original document [the Constitution]." Marshall Speech, *supra* note 62 at 2; see *supra* note 58. Why did the founders bother to be so careful?

Anguish was not limited to the founding period. In the antebellum South, "nothing was more common than Southern judges giving public utterance to the excruciating agony of trying to reconcile the law that protected slavery with the principle of justice that condemns it." Storing, *supra* note 50, at 317 (discussing *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829), which held that a master cannot commit illegal battery on a slave since the slave has no appeal from the master, but the judge added, "I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it.").

64. See *supra* notes 42, 58. Justice Marshall went so far as to say that the constitutional compromise with slavery was adopted "with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought," the "self evident" truths of the Declaration. Marshall Speech, *supra* note 62, at 2. In fact, the critical explanation was that the union had to be formed. See *supra* notes 58-59 and accompanying text. If Justice Marshall meant that the founders did not prepare lengthy treatises reconciling the principles of slavery with the principles of the Revolution, he was correct: the founders understood that slavery was fundamentally wrong.

65. It is dreadfully wrong in that a system of laws, including the Constitution, needs veneration, even unthinking veneration, if it is to have any moral effect. See A. LINCOLN, *The Perpetuation of Our Political Institutions*, in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 108 (R. Basler ed. 1953) [hereinafter COLLECTED WORKS] (urging that "reverence for the Constitution and laws" become America's "political religion"); see also H. JAFFA, *supra* note 60, at 227-32 (analyzing Lincoln's "Perpetuation" speech). Unfounded,

implies that Chief Justice Taney's opinion in *Dred Scott v. Sandford*,⁶⁶ the most disastrous judicial opinion in American history, was correct.⁶⁷ Abraham Lincoln⁶⁸ and Frederick Douglass⁶⁹ knew better.

but superficially plausible, denigration destroys that veneration.

66. 60 U.S. (19 How.) 393 (1857).

67. Justice Marshall found support for Taney's conclusion in the debates of the constitutional convention, citing language from the Taney opinion that "reaffirmed the prevailing opinion of the framers": "[Blacks] had for more than a century before been regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect." Marshall Speech, *supra* note 62, at 4 (quoting 60 U.S. at 407). *But see* Storing, *supra* note 50, at 313-14; *supra* notes 53-59 and accompanying text; *infra* notes 68-69. As horrible as Taney's opinion was, Justice Marshall managed to do even it an injustice. He referred to the opinion as evidence of the founders' deficient views about several groups of people, including women. Taney, however, specifically considered the status of white women, who, even though not entitled to vote, were citizens, therefore not at all like the black man. 60 U.S. at 422. Taney also discussed Indians, who were potentially entitled to all the rights of citizenship through naturalization, *id.* at 403-04, even though "Indian Governments were regarded . . . as foreign Governments, as much so as if an ocean had separated the red man from the white." *Id.* at 404.

68. For example, consider Lincoln's argument from his debate with Stephen A. Douglas at Alton, Illinois in 1858:

At Galesburg the other day, I said in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term "all men." I re-assert it to-day. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a matter of great astonishment to me if they shall be able to find that one human being three years ago had ever uttered the astounding sentiment that the term "all men" in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, *denied the truth of it*. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouths of some Southern men for a period of years . . . that the Declaration of Independence was in that respect "a self-evident lie," rather than a self-evident truth. But I say . . . that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it and then asserting it did not include the negro. I believe the first man who ever said it was Chief Justice Taney in the *Dred Scott* case, and the next to him was our friend Stephen A. Douglas.

3 COLLECTED WORKS, *supra* note 65, at 301-02, *reprinted in* H. JAFFA, *supra* note 60, at 313-14 (emphasis in original).

69. I hold that the Federal Government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered. It was purposely so framed as to give no claim, no sanction to the claim, of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed.

F. DOUGLASS, *Address for the Promotion of Colored Enlistments*, in 3 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 361, 365 (P. Foner ed. 1952), *reprinted in* Storing,

A belief in equality of political rights does not necessarily translate into a multiracial society, however, and here the founders' vision can be faulted. They had severe doubts about the desirability, and even the possibility, of a multiracial society.⁷⁰ Equality of rights does not connote equality of abilities, and differences in abilities exacerbate the practical difficulties⁷¹—difficulties that exist so long as real racial prejudices remain⁷²—in creating and maintaining a society consisting of several races.

Principle, the equality of rights, and practicality, the difficulty of dealing with racial differences and prejudices, may appear irreconcilable, but many of the founders did not believe so. A reconciliation that was simple theoretically was available: separate nations. As Herbert Storing has explained, "To concede the Negro's [and here we can add the Indian's] right to freedom is not to concede his right to United States citizenship."⁷³ Fully consistent with the principles of the Declaration, blacks and Indians could secure their natural rights in polities that they controlled themselves.⁷⁴ Indeed, colonization of blacks (in Liberia,

supra note 50, at 320.

70. See Storing, *supra* note 50, at 327-29 (difficulties of multiracial society).

71. Jefferson discussed Indians and blacks from the perspective of a scientist in his *Notes on the State of Virginia*, see *supra* note 52, and he found them lacking many fundamental skills. "Jefferson did conclude that this inferiority was an obstacle to Negro emancipation; but the reason was not that it makes Negroes less entitled to liberty than whites. . . . Negro inferiority hindered emancipation . . . because it increased the difficulty of knowing how to deal with Negroes, once freed." Storing, *supra* note 50, at 220. Perceived inferiority in no way justified black slavery. Differences in abilities exist among members of the same racial group, and, as Lincoln saw only too well, if a man of superior ability may justly enslave a man of inferior ability, there is nothing in principle to prevent the enslavement of whites by whites. See 2 COLLECTED WORKS, *supra* note 65, at 222, 223 reprinted in H. JAFFA, *supra* note 60, at 336 (emphasis in original) ("You mean the whites are *intellectually* the superiors of the blacks, and, therefore have the right to enslave them? Take care. . . . By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.").

72. There is a natural prejudice that prompts men to despise whoever has been their inferior long after he has become their equal; and the real inequality that is produced by fortune or by law is always succeeded by an imaginary inequality that is implanted in the manners of the people.

1 A. DE TOCQUEVILLE, *supra* note 23, at 357.

73. Storing, *supra* note 50, at 328. "There is nothing contradictory in arguing that while the Negroes have a human right to be free, they do not have a human right to be citizens of the United States." *Id.* at 328-29; see *supra* note 57. But see J. FRANKLIN, RACIAL EQUALITY IN AMERICA 24 (1976).

74. "Unless there was to be a permanent class of underlings, Negro emancipation had to imply either political and social equality of the races in the United States or separation of the races into distinct polities." Storing, *supra* note 50, at 329.

for example) was seen by many whites, and by many blacks, as the only solution⁷⁵ when full political and social equality in a single nation seemed impossible.⁷⁶

For the Indian population, which was already segregated into distinct nations, the answer that paralleled colonization of blacks was maintaining their segregated status.⁷⁷ When Indian nations impinged upon the American states within which they were located—and impingement was all but inevitable⁷⁸—the re-

75. The American Colonization Society, founded in 1817 to further deportation of blacks to Liberia, had among its adherents John Marshall, James Madison, and James Monroe. S. ELKINS, *SLAVERY* 178 (2d ed. 1968). Whether colonization was ever a practical concept is doubtful, given the large number of blacks within the United States. See W. JORDAN, *supra* note 48, at 566-69. The Liberian colonization effort at its height involved a minuscule number of former slaves.

76. Jefferson wished for the emancipation of blacks, but coupled with their expatriation.

Why not retain and incorporate the blacks into the State . . . ? Deep-rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions, which will probably never end but in the extermination of the one or the other race.

Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture.

T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, query xiv, reprinted in *SELECTED WRITINGS*, *supra* note 52, at 256, 262. Furthermore, Jefferson thought that an emphasis on manumission of slaves could distract attention from the real concern, deportation. See G. WILLS, *supra* note 57, at 297.

The belief that colonization was necessary was common. It was held as well by Lincoln, at least through the early years of the Civil War. See *Current, Introduction*, in *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* xvi, xxvi (R. Current ed. 1967); A. MANN, *supra* note 41, at 88. Lincoln's only audience as President with a black delegation was held, in 1862, to urge emigration. The meeting followed the enactment of statutes that freed slaves both in the District of Columbia and within the Union Army and that appropriated funds for resettlement. See *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN*, *supra*, at 207 (reprinting N.Y. Tribune, August 15, 1862, report of the meeting).

77. Although Jefferson spoke and wrote in favor of removing the Indian tribes beyond the western boundaries of the United States, he preferred that Indians become farmers and ultimately mix with the white population. He had no such wishes for the black population. See W. JORDAN, *supra* note 48, at 480-81.

Another possibility was extinction, and some commentators thought extinction of the Indian inevitable. See 1 A. DE TOCQUEVILLE, *supra* note 23, at 25 ("Their implacable prejudices, their uncontrolled passions, their vices, and still more, perhaps, their savage virtues, consigned them to inevitable destruction."), 342 ("I believe that the Indian nations of North America are doomed to perish, and that whenever the Europeans shall be established on the shores of the Pacific Ocean, that race of men will have ceased to exist.").

78. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593-94 (1832) (McLean, J.,

sponse was removal⁷⁹ of the Indians to areas where, at least in theory, they could continue to rule themselves in a manner consistent with their rights as men.⁸⁰

Thus, the original understanding was that separate can be equal: members of distinct racial groups are equal because they share natural rights, but complete separation of the groups may be necessary for everyone to secure his rights.⁸¹ A late eighteenth century commentator might well have seen the political futures of blacks and Indians, if there were to be futures,⁸² proceeding along similar paths.⁸³ Blacks would control their own destinies in commonwealths outside United States boundaries; Indians would maintain their traditional tribal structures also outside the United States.

B. Why the Different Paths of Blacks and Indians?

In 1787, neither the black man nor the Indian was part of

concurring):

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary.

At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.

79. See, e.g., A. DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* 49-57 (2d ed. 1961) (describing removal of Choctaws beyond the Mississippi River); R. SATZ, *AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA* 1-125 (1975) (describing removal of eastern Indians beyond the Mississippi); B. SHEEHAN, *SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN* 243-75 (1973) (discussing removal).

80. [W]e cannot err in anticipating a progressive diminution of their numbers, and their eventual extinction, *unless our border should become stationary, and they be removed beyond it*, or unless some radical change should take place in the principles of our intercourse with them, which it is easier to hope for than to expect.

1 A. DE TOCQUEVILLE, *supra* note 23, at 342 n.9 (quoting a Mr. Cass) (emphasis added).

81. See G. WILLS, *supra* note 57, at 306.

82. See *supra* notes 77, 80 (possibility of extinction).

83. Cf. 1 A. DE TOCQUEVILLE, *supra* note 23, at 332:

These two unhappy races have nothing in common, neither birth, nor features, nor language, nor habits. Their only resemblance lies in their misfortunes. Both of them occupy an equally inferior position in the country they inhabit; both suffer from tyranny; and if their wrongs are not the same, they originate from the same authors [the white race].

“the People” engaged in forming “a more perfect Union.”⁸⁴ Although neither was given the opportunity to participate in the new regime, most of the founders hoped that eventually each would be able to secure his natural rights in his own society. In 1987, both blacks and Indians are citizens of the American republic, and yet their legal status is markedly different. Due to the civil rights movement, which fought for the full application of American principles to the black man,⁸⁵ the fear that a multi-racial society is impossible has been officially discarded, and the premises on which that fear was based have been repudiated. Although the results have been imperfect, we are openly and proudly a multiracial society—without the full participation of the Indian.

Providing justifications for an equal rights policy that in general treats the American Indian differently from other American citizens is not an easy theoretical task, and it has enormous practical consequences: one of the arguable costs of separation has been the degraded condition in which many Indians have lived on reservations.⁸⁶ Several overlapping rationales for the different treatment will be examined: the different historical experiences of the Indian and the black and the resulting special legal status of Indian tribes, the modern allure of cultural relativism, the elevation of pluralism from a descriptive to a normative concept, and prudence.

1. *History and legal status of tribes*

Indians and blacks have had diametric histories in this country.

84. U.S. CONST. preamble.

85. Rather than rejecting the principles of the Declaration and the Constitution, the movement generally accepted them and insisted on their extension to all Americans. See Storing, *supra* note 38, at 4-5.

86. “The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.” 1970 Nixon Message, *supra* note 34, at 564. According to the 1980 census, over 25% of the Indian population was living below the poverty level, compared with 12.4% for the non-Indian population. See Strickland, *supra* note 13, at 717. Although conditions are improving, particularly in health care and education, see D. GETCHES & C. WILKINSON, *supra* note 13, at 9-11, the disparity between Indian and non-Indian populations remains significant. See also S. BRAKEL, *supra* note 8, at 12-15 (description of reservation life); A. SORKIN, AMERICAN INDIANS AND FEDERAL AID 1 (1971) (“An Indian reservation can be characterized as an open-air slum.”).

Indians started with everything and have gradually lost much of what they had to an advancing alien civilization. Other minorities have had no separate governmental institutions. Their goal primarily has been and continues to be to make the existing system involve them and work for them. Indian tribes have always been separate political entities interested in maintaining their own institutions and beliefs. Their goal has been to prevent the dismantling of their own systems. So while other minorities have sought integration into the larger society, much of Indian society is motivated to retain its political and cultural separateness.⁸⁷

Indians originally were able to maintain their separateness because attempts to enslave them were largely unsuccessful. Historians have provided many explanations for this somewhat surprising fact: Indian pride, which made death seem preferable even to mingling with western Europeans;⁸⁸ the Indian's lack of an agrarian tradition, which left him "physically and psychologically incapable of adjusting to plantation life";⁸⁹ the ease with which an enslaved Indian could escape into familiar country and friendly hands; the self-preservation need of white settlers to maintain friendly relations with surrounding Indian populations;⁹⁰ and the insufficient number of Indians to meet a large demand for labor.⁹¹ Perhaps reflecting practicality more than

87. U.S. COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 32-33 (1981).

88. See 1 A. DE TOCQUEVILLE, *supra* note 23, at 334-36. Whether that broad proposition is true or not, it certainly is true that Indians proved "extremely recalcitrant" to westernization. See W. JORDAN, *supra* note 48, at 89-90; Tannenbaum, *Toward an Appreciation of Latin America*, in THE UNITED STATES AND LATIN AMERICA 46-53 (H. Matthews 2d ed. 1963), excerpted as *Slavery, the Negro, and Racial Prejudice*, in SLAVERY IN THE NEW WORLD 3-7 (L. Foner & E. Genovese eds. 1969); see also Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (emphasis added):

The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a *people with whom it was impossible to mix*, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

89. "That life was so utterly strange and foreign to him that there was literally nothing in it to sustain his will to live." S. ELKINS, *supra* note 75, at 94 n.17; W. JORDAN, *supra* note 48, at 89; R. UNDERHILL, RED MAN'S AMERICA: A HISTORY OF INDIANS IN THE UNITED STATES 67, 87 (1953).

90. K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 23-24 (1963).

91. The international black slave trade was a readier and more plentiful source of laborers. R. SANDERS, LOST TRIBES AND PROMISED LANDS: THE ORIGINS OF AMERICAN RACISM 357 (1978).

principle, early laws prohibited enslavement of Indians but not other non-white individuals.⁹²

Because they were separate and because they were seen as nations (as blacks, uprooted from their past, could not be), Indians have occupied a special place in American law from the founding. The tribes are granted an exalted constitutional position that is denied other segments of the American population (in the Indian Commerce Clause),⁹³ they have consistently been viewed as retaining elements of sovereignty,⁹⁴ and they were accordingly often dealt with by treaty.⁹⁵ The relationship of the

92. K. STAMPP, *supra* note 90, at 23-24.

93. Congress is given power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3 (emphasis added). Madison understood the clause as clarifying the primacy of the federal government over Indian lands and thus eliminating the problems caused by state claims of jurisdiction. Article IX of the Articles of Confederation had provided to Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION, art. ix (U.S. 1777).

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. . . . What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

THE FEDERALIST No. 42, at 306 (J. Madison) (B. Wright ed. 1961); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (M. Farrand ed. 1927) (Madison notes on June 19 that, under Articles, transactions with Indians "appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them.").

Indians are also specifically mentioned at two other points in the Constitution. For purposes of calculating state representation in the United States House of Representatives and for apportioning direct taxes, "Indians not taxed" are excluded. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2. Clinton argues that this exclusion from enumeration is further evidence of Indians' "legal and political autonomy . . . exempt from federal and state control over their internal affairs." Clinton, Book Review, 47 U. CHI. L. REV. 846, 851 (1980).

94. *See infra* notes 171-77 and accompanying text.

95. *See supra* note 26. "The Indian tribes were recognized as powers capable of making treaties before the United States was." 1942 COHEN HANDBOOK, *supra* note 25, at 274, *quoted in* Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 549 (10th Cir. 1980) (McKay, J., concurring), *aff'd*, 455 U.S. 130 (1982).

These treaties continue to have force. The 1871 Act ending treaty-making specifically provided that treaties then in force were not to be impaired. Indian Appropriations

United States with the tribes has approximated that of governments dealing with one another,⁹⁶ rather than that of government and constituent racial group. Preferential legal treatment of Indians⁹⁷ therefore generally avoids the potential constitutional and statutory infirmities associated with racial discrimination, although that treatment appears in many respects to be contrary to the spirit of the nation's civil rights policy.⁹⁸

The Indians' historical and legal separation has colored the way the rest of the population views them. The history of United States black-white relations has not been a happy one, but there have been positive aspects to this country's facing a problem that much of the rest of the world has been able either to ignore or to treat as a purely abstract proposition.⁹⁹ The black American essayist James Baldwin eloquently contrasted his always uneasy presence in a Swiss village, where he spent several winters, with his experience in the United States:

[T]he interracial drama acted out on the American continent

Act, ch. 120, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 71 (1982)); see *supra* note 26.

96. Although one of the governments was far more powerful than the others, the relationship resembling that of a guardian to his wards, "a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), quoted in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 549 (10th Cir. 1980) (McKay, J., concurring), *aff'd*, 455 U.S. 130 (1982).

97. See, e.g., *supra* note 30 (describing Equal Employment Opportunity Act's inapplicability to Indian tribes).

98. Felix Cohen, see *supra* note 19, most vigorously promoted the proposition that the differential treatment of Indians is based not on race, but on their constitutionally protected tribal status. See Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 186 (1940). Vieira, however, has demonstrated that many older Indian cases and statutes were, in fact, racially based. Nevertheless, for a number of reasons, including the "attitudes of white supremacy" reflected in such cases, he urged that the preferential precedents not be extended to other minority racial groups. See Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1577-82 (1969).

99. It [the question of the black man's humanity and thus his rights] is an argument which Europe has never had, and hence Europe quite sincerely fails to understand how or why the argument arose in the first place, why its effects are so frequently disastrous and always so unpredictable, why it refuses until today to be entirely settled. Europe's black possessions remained . . . in Europe's colonies, at which remove they represented no threat whatever to European identity. If they posed any problem at all for the European conscience, it was a problem which remained comfortingly abstract: in effect, the black man, as a man, did not exist for Europe.

J. BALDWIN, *Stranger in the Village*, in NOTES OF A NATIVE SON 159, 170 (1955) (emphasis in original).

has not only created a new black man, it has created a new white man, too. No road whatever will lead Americans back to the simplicity of this European village where white men still have the luxury of looking on me as a stranger. I am not, really, a stranger any longer for any American alive. One of the things that distinguishes Americans from other people is that no other people has ever been so deeply involved in the lives of black men, and vice versa. This fact faced, with all its implications, it can be seen that the history of the American Negro problem is not merely shameful, it is also something of an achievement. For even when the worst has been said, it must also be added that the perpetual challenge posed by this problem was always, some how, perpetually met.¹⁰⁰

The American experience, tense and fitful as it has been, proved Tocqueville wrong, at least in part.

While nineteenth and twentieth century white Americans have inevitably had to deal with the presence of the black man, most have been able to ignore the Indian. It was not that they had no image of the Indian; indeed, the images of the noble savage and the warlike savage were pervasive,¹⁰¹ as well as contradictory. Nor was it because white Americans were necessarily hostile. Rather, it was that those images were purely abstract. White Americans for the most part had no occasion to develop any impression of the Indian based on experience¹⁰² because the

100. *Id.* at 175. Originally published in 1953, the words are those of a young and relatively optimistic James Baldwin. Unfortunately the optimism had largely disappeared in the Introduction to a new edition of the essays. See J. BALDWIN, *Introduction to the New Edition*, in NOTES OF A NATIVE SON ix, xvi (Beacon paperback 1984) ("No promise was kept with [my ancestors], no promise was kept with me, nor can I counsel those coming after me, nor my global kinsmen, to believe a word uttered by my morally bankrupt and desperately dishonest countrymen.").

101. See M. KAMMEN, *PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION* 255-56 (1972); 1 F. PRUCHA, *supra* note 34, at 6-9; see generally R. BERKHOFER, *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (1978); R. SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860* (1973). "There is a tendency in our literature to make the Indian-in-general an enemy but the Indian-in-particular a noble savage." R. BARTLETT, *THE NEW COUNTRY: A SOCIAL HISTORY OF THE AMERICAN FRONTIER, 1776-1890*, at 19 (1974) (citing Cooper's Chingachgook and the Lone Ranger's Tonto as examples of the "Indian-in-particular"); see also Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 93 (1983) (tracing role of Indian in legal thought to "medievally derived conceptions of the propriety and necessity of assimilating alien, non-Christian civilizations to idealized European normative conceptions of social, political, and cultural organizations").

102. Whites in towns bordering on Indian reservations are exceptions. They have developed impressions of Indians, often hostile. See, e.g., Johnson, *Indian Hunting*

Indian was physically separated,¹⁰³ a separation encouraged by law, and whites therefore could continue to treat the Indian as a "stranger in the village," a curiosity.

History and the law arising from that history thus help explain why Indians and blacks have assumed different positions in American society. Yet, neither history nor the Constitution can fully justify the difference.¹⁰⁴ Much of modern civil rights policy is an attempt to redress the effects of history, not to glorify them.¹⁰⁵ Moreover, the question about differential treatment of Indians and other minorities is not just a technical legal one. If differential treatment is to exist, it must, of course, conform to legal requirements, including the dictates of the Constitution. However, even if the special constitutional position of the Indian provides a sufficient *legal* basis for the present policy of separation—and there appears to be little doubt on that score¹⁰⁶—the

Rights Ignite a Wisconsin Dispute, N.Y. Times, May 16, 1987, at 8, col. 1 (describing ill feeling between whites and Indians after federal judge ruled, on basis of 1837 treaty, that Chippewa tribe had hunting and fishing rights extending beyond the reservation); cf. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [Indians] are found are often their deadliest enemies.").

103. The textual statement is a gross generalization, of course. Many Indians have been fully assimilated over the years, and others, in time honored immigrant fashion, have formed enclaves within American cities. Moreover, there are substantial tribal concentrations near population centers, such as Phoenix, Seattle, and Miami. C. WILKINSON, *supra* note 12, at 25.

104. Hoxie sees the experiences of blacks in the Harlem renaissance, Jews in the urban ghetto, and Catholics responding to the "nativist hysteria of the 1920s" as models for the Indian. "Rejection and exclusion—confinement in their 'proper station' in the social hierarchy—bred self-consciousness, resourcefulness, and aggressive pride." F. HOXIE, *supra* note 34, at 244. But those groups, while they did "carry on their war with homogeneity," *id.*, were also asking to become part of the larger society, not to separate from it.

105. The Supreme Court, in *Morton v. Mancari*, 417 U.S. 535 (1974), upheld the policy of the Bureau of Indian Affairs to give preference in hiring to members of recognized tribes, by stating that, "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Id.* at 552. Barsh and Henderson respond: "It should be kept in mind that the magnitude of an unconstitutional abuse of power is no justification of its continuance." R. BARSH & J. HENDERSON, *supra* note 35, at 242; see also *infra* text accompanying notes 173-79 (questioning whether one group should be legally disadvantaged with respect to another group because of history).

106. See *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes . . .' permits the Federal Government to enact legislation singling out tribal Indians[.]" (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))); *United States v. Antelope*, 430 U.S. 641 (1977) (federal regulation of Indians not based on race); *Fisher v. District Court*, 424 U.S. 382 (1976) (denying access to state court to tribal members not impermissible racial discrimination; exclusive jurisdiction of tribal court derives from quasi-sovereign status of tribes); *supra*

broader moral question remains: Can separate really be equal, as the Supreme Court in *Brown v. Board of Education*¹⁰⁷ understood equality?¹⁰⁸ With a policy of separation, are the principles, if not the legal requirements, of *Brown* violated?

Separation as it now exists certainly does not secure the equality contemplated by the founders.¹⁰⁹ A separatist policy grounded in preemptive federal power—the controlling image, in its most extreme form, is that of a federal guardian and an Indian ward¹¹⁰—stresses dependency and raises “the specter of maintaining a sort of federally sanctioned serfdom in the face of a broad based expansion of civil rights.”¹¹¹ Moreover, it is probably too late in the day to seriously consider complete separation coupled with real tribal power.¹¹² Tribal power that is not subject to ultimate federal control would come closer to the original understanding of equality; but, even if politically possible, such separation would condemn the members of those tribes without substantial resources to perpetual poverty.

Reconciliation of separation and equality as understood by the Supreme Court may be even more difficult. If a way out of this impasse exists—and that is not a given—it may be provided by the implications of the social science research cited in footnote 11 of *Brown*.¹¹³ If neither the American Indian nor any

notes 93-98 and accompanying text; see also Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 530-50 (1973) (concluding that creation of separate Indian school districts is legally permissible).

107. 347 U.S. 483 (1954).

108. See *supra* note 39. The Court concluded that “[s]eparate educational facilities are inherently unequal.” 347 U.S. at 495. Moreover, *Brown* stressed the fundamental importance, and the traditional civilizing role, of education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. In the Court’s view, training for citizenship in a pluralist society thus seems to require education in common values, but with as diverse a student body as possible.

109. See *supra* notes 41-83 and accompanying text.

110. The image dates to Justice Marshall’s opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and is now often reiterated to justify federal stewardship.

111. C. WILKINSON, *supra* note 12, at 25.

112. But see *supra* note 35 and the materials cited therein.

113. Footnote 11 of *Brown* cited psychological and sociological authority in support

other segment of the population has developed a feeling of inferiority from the policy of separation, then the policy may be consistent with the moral and legal result in *Brown*.¹¹⁴ If the potentially stigmatized party, the Indian, does not object, perhaps others should also refrain.¹¹⁵

Unfortunately, the "no stigma" rationale is not entirely persuasive. For one thing, it would curiously make separation more defensible as it becomes more complete;¹¹⁶ awareness of inequality and any resulting feeling of inferiority are lessened as separation increases.¹¹⁷ In addition, like any other legal or quasi-legal theory, the limits of the "no stigma" rationale should be tested in the way Judge McKay tests a litigant's theory in his court: by questioning the theory's application to other factual situations. So tested, as the following example demonstrates, the "no stigma" theory has severe flaws.

Suppose that a group of black Americans decides to withdraw from American society, rejecting the prevailing integrationist rhetoric, and to form a self-governing community, Newtown, in an isolated area of the United States. The group cannot altogether escape the larger society unless it leaves the country because it will remain subject to the laws of the United States and of its home state.¹¹⁸ Nevertheless, the creation of a single-race

of the proposition that "[t]o separate [black elementary and high school children from white children] of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

114. Cf. Rosenfelt, *supra* note 107, at 548 ("While historically Indians have suffered their share of discrimination, the federal policy of tribal independence, coupled with demands from the Indian community, provides a nondiscriminatory basis for the creation of Indian school districts.").

Focusing on perceptions of inequality is more than a little perverse. See H. JAFFA, *supra* note 60, at 11 ("the opinion of the court [in *Brown*] was most unwise, because it gave credit to the opinion that the *feeling* of equality was identical to equality itself") (emphasis in original).

115. See A. JOSEPHY, JR., *supra* note 34, at 347:

[D]ifference, to most non-Indians in the United States[,] implies being inferior, and most people with a guilt complex about Indians wish they would stop being inferior so the guilt complex would go away! To the Indian, the concept that being different means being inferior remains—as it has been for almost five hundred years—one of the principal obstacles to his survival. But, ironically, he now views it increasingly . . . as a concept which the white man must soon shed if he, the white man, expects to survive.

116. It would be more defensible if the separation were accompanied by full self-rule. See *supra* notes 41-83 and accompanying text.

117. Cf. *supra* text accompanying note 100.

118. No attempt is made here to reconsider whether a right of secession exists.

enclave by itself should not threaten the values of *Brown*. Many American small towns are racially homogeneous, black or white, and that fact implicates no necessarily reprehensible principle. Moreover, if the Newtown government plausibly announces that its original racial composition is a reflection of individual choice, not of any belief in an inherent racial hierarchy, the case for the larger society's indifference is even stronger.

But now suppose that Newtown openly adopts racially defined admissions criteria, either by ordinance or by a pattern of practice. Should the rest of the American polity indicate its approval of such an exclusionary policy?¹¹⁹ If that question is answered in the negative—and, whether or not a stigmatized plaintiff exists, it should be¹²⁰—then those who would justify a policy of separation for the American Indian must find a principled basis to distinguish the two cases. The fact of separation is one thing. The federal government's legitimation of racially based separation,¹²¹ even when no stigma is apparently involved, is quite another.¹²² The separatist policy of American Indian law receives the government's imprimatur; the exclusionary policy of Newtown would not and should not.

119. To make the issue as stark as possible, assume that all of the residents are adults who participated knowingly in the formation of the community. This assumption is intended to eliminate some issues that could not be eliminated in the real world, such as "the effect of separation on the unknowing—for example, a child who, because of his isolation from the larger society, is unable to evaluate the alternatives that would otherwise have been available to him. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 242-43 (1972) (Douglas, J., dissenting in part) (since desires of parents and children may diverge, it is necessary to take into account rights of both groups in determining whether state can require compulsory school attendance of Amish children).

120. The answer should be negative if three decades of civil rights activity are not to be repudiated, and it should be negative even if there is currently no complainant to challenge the policy. The issue raised here is not standing to sue, but rather whether the federal government should be indicating its approval of such a racially defined policy in a case in which none of the traditional justifications for affirmative action is present. In fact, the separatist policy is the antithesis of affirmative action.

121. Whether or not the cases view a tribe's determination of its membership as potentially racial in character, it requires little imagination to see it as precisely that. Cf. *C. WILKINSON*, *supra* note 12, at 6 ("how can the United States . . . allow race-based Indian tribes to govern the non-Indians who have lawfully entered those [reservation] lands . . .?"). To be sure, a tribe will exclude other Indians as well as whites and blacks from its membership, *see supra* note 30 (description of *Morton v. Mancari*, 417 U. S. 535 (1974)), but that fact does not lessen the fundamentally racial nature of the classification. Whites-only country clubs exclude whites as well as blacks, and they are no less racially discriminatory for that reason.

122. The question, to reiterate, is not whether the federal government can *legally* distinguish between the black and the Indian populations. The question is whether such a distinction is consistent with the underlying moral principles of *Brown*.

History serves many functions, but it cannot provide the distinguishing principle for these two cases. If on the basis of history Indians, but not blacks, are permitted to adopt an exclusionary policy that is racial in nature, black Americans are implicitly accorded a lower status solely because their history was torn from them.¹²³ Prior deprivation should not be used to legitimize a currently discriminatory policy.

2. *Cultural relativism*

An additional justification that is often provided for separation is cultural relativism, a concept that has been derived (uncritically) from the research of anthropologists. From the unquestionable premise that other cultures are very different from our own, inferences are drawn about our society: either that it is nothing special or, equivalently, that every culture is equally special. The study of other societies thus shows only that there are no values of overriding importance.¹²⁴ If other cultures are no better or worse than our own—if everything is “relative”—there is no reasoned basis for expecting any cultural group, including the Indian, to subordinate any of its values to the shared goals of a larger society.

This argument, which necessarily rejects natural rights,¹²⁵ is not the theory of the founders. They believed they were creating something demonstrably superior to that which existed elsewhere. Nor is it the theory of the Constitution, except in the minds of those who believe that document to be infinitely malle-

123. See *infra* text accompanying note 179 (quotation from McKay opinion on effect of adverse history on rights).

124. *E.g.*, R. STRICKLAND, *supra* note 8, at xiv (“[W]e cannot judge the laws of a people by the standards of the people of another time and another place. To do so does violence to the very nature of the concept of law as a living institution.”); Deloria, *Minorities and the Social Contract*, 20 GA. L. REV. 917, 920 (1986) (“Self-evident truths are generally limited to the era in history in which they are accepted with minimal critical examination.”).

125. See A. BLOOM, *supra* note 11, at 27:

The recent education of openness . . . pays no attention to natural rights or the historical origins of our regime, which are now thought to have been essentially flawed and regressive. . . . It does not demand fundamental agreement or the abandonment of old or new beliefs in favor of the natural ones. It is open to all kinds of men, all kinds of life-styles, all ideologies. There is no enemy other than the man who is not open to everything. But when there are no shared goals or vision of the public good, is the social contract any longer possible?

able. Certainly the existence of different cultures does not prove the rightness of cultural relativism. As Leo Strauss explained:

[B]y proving that there is no principle of justice that has not been denied somewhere or at some time, one has not yet proved that any given denial was justified or reasonable. Furthermore, it has always been known that different notions of justice obtain at different times and in different nations. It is absurd to claim that the discovery of a still greater number of such notions by modern students has in any way affected the fundamental issue.¹²⁶

A nation, particularly this nation, must have shared values to unify its constituent parts. For better or for worse, some values are so fundamental that their denial (even though they have been denied elsewhere) is a repudiation of the American regime.¹²⁷ The moral principles of *Brown* are arguably among those superior values;¹²⁸ governmentally supported separation, as a general matter, creates a fissure in the nation's philosophical foundation. Are Americans prepared, in the name of cultural relativism, to permit any group successfully to repudiate the principles of *Brown*?¹²⁹

In denying the force of cultural relativism, the assertion made here is not that distinct cultural attributes must disappear from the American polity. America has never been homogeneous, and it certainly cannot be so now. The argument is only that values inconsistent with core values are less deserving of

126. L. STRAUSS, *NATURAL RIGHT AND HISTORY* 9-10 (1953).

127. That a person may be able to repudiate the principles in speech or print without adverse legal consequences is beside the point. The question is whether the position of the repudiator can prevail without changing the fundamental nature of the regime. For example, even if a speaker may escape prosecution for advocating the elimination of free speech, his advocacy cannot be successful within the existing constitutional structure.

128. Cf. Dworkin, *The Bork Nomination*, 34 N.Y. REV. BOOKS, Aug. 13, 1987, at 3, 3: [Brown] has . . . become so firmly accepted, and so widely hailed as a paradigm of constitutional statesmanship, that it acts as an informal test of constitutional theories. No theory seems acceptable that condemns that decision as a mistake. (I doubt that any Supreme Court nominee would be confirmed if he now said that he thought it wrongly decided.).

129. Another, rather bizarre perspective on cultural relativism is provided in Bryan, *Cultural Relativism—Power in Service of Interests: The Particular Case of Native American Education*, 32 BUFFALO L. REV. 643 (1983). "The story of relativism," Bryan emotes, "is a story of power; power disguised as tolerance, disguised as neutrality, disguised as respect for other perspectives." *Id.* at 645. "Under the guise of neutrality, relativist doctrine has been used for the purpose of westernizing non-Western peoples, visiting 'progress' on the world." *Id.* at 693.

preservation;¹³⁰ one cannot logically infer from the fact that various persons adhere to a particular principle that the principle is a worthy one. If that proposition seems excessively ethnocentric, and therefore contrary to the openness of cultural relativism, so be it. The proposition is, however, in accord with the teachings of anthropology. Despite differences in cultures, most (all?) share ethnocentric traits. In accepting a certain level of American ethnocentrism, this nation's ties with the rest of humanity are reinforced.¹³¹

3. *Pluralism*

Pluralist theory, as advanced in one branch of modern political science, suggests another justification for the distinctive status of the Indian. Called by one critic "interest-group liberalism,"¹³² the theory purports not only to describe the operation of American politics, but also to rationalize the polity's division into a multitude of self-interested groups.

Under pluralist theory, which is grounded in cultural relativism, groups are the building blocks of the polity. Groups may be formed on economic, regional, ethnic, or any other self-interested ground, and public policy results from group interplay and conflict.¹³³ With power divided among the groups, the idealized pluralist regime has two salutary effects: protection against excessive accumulations of power in a central government and preservation of the power of the individual within the groups of which he is a member.

Preservation of "Indianness" (or the characteristics of any other racial or ethnic group) may seem to fit neatly into the overall pluralist scheme, but the fit is illusory. Pluralist theory has never viewed America as a collection of discrete groups.

130. See *supra* note 125.

131. "For it is out of a deep feeling of respect toward cultures other than our own that the doctrine of cultural relativism was evolved; and it now appears that this doctrine is deemed unacceptable by the very people on whose behalf it was upheld." Levi-Strauss, *The Disappearance of Man*, 7 N.Y. REV. BOOKS, July 28, 1966, at 6, 7, quoted in Bryan, *supra* note 129, at 664 n.54.

132. T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 50-61 (2d ed. 1979); Lowi, *The Public Philosophy: Interest-Group Liberalism*, 61 AM. POL. SCI. REV. 5 (1967); Lowi, *American Business, Public Policy, Case-Studies, and Political Theory* (Book Review), 16 WORLD POL. 677 (1964).

133. In pluralism's most extreme form, government becomes merely "an interest group itself," A. BENTLEY, *THE PROCESS OF GOVERNMENT* 219 (1908), quoted in D. TRUMAN, *THE GOVERNMENTAL PROCESS* 51 (1951), or a "potential interest group." D. TRUMAN, *supra*, at 51.

Groups are overlapping, constantly changing, as Arthur Mann has noted:

America is not merely a collection of ethnic groups. Nor was it so in the past. There exists now as previously a complex of political, occupational, religious, civic, and neighborhood associations. They sometimes overlap with the ethnic, but the boundaries for the most part are fluid rather than fixed. Neither in practice nor in theory has America's *historic* pluralism consisted of isolated fortresses.¹³⁴

The Indian tribal group is precisely the isolated fortress that does not fit within the pluralist framework.

Indian tribes thus do not mesh with pluralism's descriptive model, and the model, which celebrates difference for the sake of difference, is also defective as prescription. The founders recognized the inevitability of factionalism in a free society—THE FEDERALIST No. 10 is Madison's great statement on that subject¹³⁵—and it is easy to move, as the pluralist theorists have done, from the inevitability of faction to its veneration. However, that was decidedly not the Madisonian position. The effects of faction were to be controlled, to prevent the success of the "schemes of oppression" that those with narrow interests might seek to implement.¹³⁶ Theodore Lowi has explained: "Modern pluralism turned the Madisonian position from negative to positive; that is, government is good because many factions do compete for its favor. . . . In contemporary pluralism . . . [g]roups become virtuous; they must be accommodated, not regulated."¹³⁷

The pluralist framework subordinates principle to the con-

134. A. MANN, *supra* note 41, at 177 (emphasis in original).

135. A faction is "a number of citizens, whether amounting to a majority or minority of the whole who are united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.*" THE FEDERALIST No. 10, at 130 (J. Madison) (B. Wright ed. 1961) (emphasis added).

136. *Id.* at 81; see A. BLOOM, *supra* note 11, at 31:

For the Founders, minorities are in general bad things, mostly identical to factions, selfish groups who have no concern as such for the common good. Unlike older political thinkers, they entertained no hopes of suppressing factions and educating a united or homogeneous citizenry. Instead they constructed an elaborate machinery to contain factions in such a way that they would cancel one another and allow for the pursuit of the common good. The good is still the guiding consideration in their thought, although it is arrived at, less directly than in classical political thought, by tolerating faction.

137. T. Lowi, *supra* note 132, at 35, 36.

frontation of interest groups, and, as a prescriptive model, should be rejected on that ground alone. With no concern for the public interest, government is relegated to a secondary position (another group in the logrolling arena).¹³⁸ But pluralism's celebration of groups has an additional defect because it ignores the often antidemocratic nature of the groups themselves.¹³⁹ If the national political process consists primarily of group interactions and the groups do not preserve democratic values within their own political houses, where is the protection in pluralist theory for those values?

4. Prudence

Neither history, cultural relativism, nor pluralism provides a satisfactory justification for separation. Simple prudence is also not fully satisfying, but it may come closer than the others. Some form of Indian separation has existed throughout the nation's history. Separation is largely taken for granted, and its proponents are now motivated by good intentions. Furthermore, the dislocations from implementing any alternative might well be worse than the current state of affairs. Making the best of things as they are, while not the sort of idea that causes men to move mountains, has much to commend it.

Prudence may explain the Supreme Court's decision in *Wisconsin v. Yoder*.¹⁴⁰ The Court concluded that Wisconsin could not compel Old Order Amish children to attend public schools beyond the eighth grade. The reasoning in many ways seems

138. See A. BENTLEY, *supra* note 133. "Modern political science usage took [Madison's definition of faction, *see supra* note 135] and cut the quotation just before the emphasized part." T. LOWI, *supra* note 132, at 55 (citing D. TRUMAN, *supra* note 134, at 4).

139. See G. McCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* 119-54 (1966) (discussing myth of democracy in labor unions).

The concern is a real one. The Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301-41 (1982)), was enacted in large part out of concern that tribal governments were able to limit the civil rights of tribal members, and, because the Constitution's Bill of Rights and various civil rights laws were inapplicable to tribes, *see supra* note 30; *infra* note 172, those members had no recourse under federal law. See SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON JUDICIARY, 89TH CONG., 2D SESS., *CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN* 3-7 (Comm. Print 1965). The Act has not entirely solved the problem; however, tribal courts often must resolve claims of abuse by tribal authorities. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (federal court may not pass on validity under Indian Civil Rights Act (ICRA) of tribal ordinance denying tribal membership to children of certain female tribal members; ICRA did not explicitly confer federal jurisdiction).

140. 406 U.S. 205 (1972).

dramatically wrong, an undercutting of *Brown's* principles,¹⁴¹ but *Yoder* provides a result that seems absolutely right: the Amish—good, decent people—should not be disturbed. Not disturbing people, letting them remain in their isolated fortresses, is not a principle this country ordinarily implements or should implement. In certain special cases, however—the Amish among them—the preservation of “idiosyncratic separateness”¹⁴² is an understandable goal.

As *Yoder* demonstrates, it is difficult to articulate a separatist justification while using the language, and the precedents, of equality. The language of the general principle is trampled in the attempt to fit the idiosyncratic case within an analytical structure not designed for it. Maybe we should give up the theoretical effort and simply extend the Amish principle—peculiar, nongeneralizable though it may be—to the Indian.¹⁴³ The justification for a separate body of Indian law may be uneasy,¹⁴⁴ but separation has prudence on its side.

III. THE MCKAY OPINIONS

A. *The Judge's General Perspective*

Judge McKay's Indian law opinions can be divided roughly into five categories: (1) limitations on state jurisdiction on tribal

141. *Brown* had stressed the importance of education in establishing shared values, see *supra* note 108, and *Yoder* is a retreat from that understanding. See *Wisconsin v. Yoder*, 406 U.S. at 225-26; *id.* at 238 (White, J., concurring) (quoting *Brown* language to emphasize state's interest in compulsory education). Education is intended to, and does, change people. But see SPECIAL SUBCOMM. ON INDIAN EDUCATION, *supra* note 17, at 10 (“The goal, from the beginning of attempts at formal education of the American Indian, has been not so much to educate him as to change him.”); Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195, 1204 (1978) (discussing Special Subcommittee report, which awakened political leaders “to the critical link between education and political control”).

142. *Wisconsin v. Yoder*, 406 U.S. at 226.

It is hard to imagine why the state of Wisconsin felt compelled to prosecute this case. If nothing else, *Yoder* demonstrates that not all social issues are amenable to judicial resolution.

143. Because of their shared peculiarities, the two groups are often treated together for analytical purposes. See, e.g., A. MANN, *supra* note 41, at 161-62; Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1029-36 (1983).

144. With apologies to W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953). Professors Blum and Kalven were two of Judge McKay's teachers in law school, and rumor has it that the Judge's best grades came in Professor Blum's tax courses. Rumor even has it that Blum tried to convince the Judge to become a tax lawyer. Good sense prevailed. See *supra* note 14 (Justice Blackmun's comments).

lands;¹⁴⁵ (2) disputes involving Indian lands (including Indian claims cases);¹⁴⁶ (3) federal court jurisdiction to hear Indian law cases (including issues of tribal sovereign immunity);¹⁴⁷ (4) federal court review of administrative decisions and the power of administrative agencies to interfere in tribal affairs;¹⁴⁸ and (5) civil rights claims by non-Indians against tribes.¹⁴⁹ These categories are not mutually exclusive; some cases partake of a wide variety of issues.

Each of the categories could easily justify a separate article; mercifully, each will not get one. To provide the maximum opportunity to let the Judge's language speak for itself, the discussion in section B focuses on a single McKay opinion of substantial scope, the relatively early decision in *Mescalero Apache Tribe v. New Mexico*¹⁵⁰ (a category 1 case).

Several themes permeate the Judge's work. He believes that outside forces, the state and federal governments, should interfere minimally with the prerogatives of tribal self-government; he wishes to facilitate Indian self-determination.¹⁵¹ Accordingly,

145. *Iowa Tribe v. Kansas*, 787 F.2d 1434 (10th Cir. 1986); *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *decision on remand*, 677 F.2d 55 (10th Cir. 1982) (reinstating previous opinion), *aff'd*, 462 U.S. 324 (1983); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 549 (10th Cir. 1980) (concurring opinion), *aff'd*, 455 U.S. 130 (1982); *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 981 (10th Cir. 1980) (dissenting opinion), *cert. denied*, 450 U.S. 959 (1981).

146. *Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987); *Millsap v. Andrus*, 717 F.2d 1326 (10th Cir. 1983); *Oklahoma Gas & Elec. Co. v. United States*, 609 F.2d 1365 (10th Cir. 1979); *Whiskers v. United States*, 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *United States v. City of McAlester*, 604 F.2d 42, 57 (10th Cir. 1979) (concurring in part and dissenting in part); *Armstrong v. Maple Leaf Apartments*, 622 F.2d 466, 474 (10th Cir. 1979) (dissenting opinion), *cert. denied*, 449 U.S. 901 (1980).

147. *Brooks v. Nance*, 801 F.2d 1237 (10th Cir. 1986); *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 576 (10th Cir. 1984) (concurring opinion); *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982); *Alamo Navajo School Bd. v. Andrus*, 664 F.2d 229 (10th Cir. 1981), *cert. denied*, 456 U.S. 963 (1982); *Glover Constr. Co. v. Andrus*, 591 F.2d 554, 562 (10th Cir. 1979) (dissenting opinion), *aff'd*, 446 U.S. 608 (1980).

148. *Wheeler v. Department of Interior*, 811 F.2d 549 (10th Cir. 1987); *Pueblo de San Felipe v. Hodel*, 770 F.2d 915 (10th Cir. 1985); *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383 (10th Cir. 1982).

149. *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980).

150. 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *decision on remand*, 677 F.2d 55 (10th Cir. 1982) (reinstating previous opinion), *aff'd*, 462 U.S. 324 (1983).

151. Congress "recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1982). "Self-determination" may require federal aid and intervention, however. For example, in a McKay opinion, the Tenth Circuit held that the Superintendent of the Bureau of Indian Affairs was fulfilling his trust responsibility in rejecting, on purely eco-

Judge McKay takes an expansive view of tribal sovereignty,¹⁵² the powers a tribe derives from its traditional status as a nation, and he meticulously combs any applicable treaties, statutes, and regulations searching for sources and reaffirmations of tribal powers.¹⁵³ Moreover, the Judge resolves ambiguities in the language of a statute or treaty in favor of the tribes.¹⁵⁴ Consistent with the theory of tribal self-determination, he is hesitant about interfering with tribal decision-making bodies.¹⁵⁵ He prefers to let the tribes make their own decisions, recognizing that some of the decisions may not meet the standards he would apply to federal or state governmental institutions.

Although the Judge's perspective is overwhelmingly sympathetic to tribal interests, this is not to say that a tribal or individual Indian litigant necessarily prevails before a panel with Judge McKay. As a careful participant in the judicial process, the Judge adheres to precedent, and he has authored some major opinions adverse to tribal interests.¹⁵⁶

conomic grounds, communitization agreements that would have extended certain oil and gas leases on Indian lands beyond their original 10-year terms. *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383 (10th Cir. 1982); see also *Glover Constr. Co. v. Andrus*, 591 F.2d 554, 566 n.10 (10th Cir. 1979) (McKay, J., dissenting) ("The policy of the Buy Indian Act is to encourage Indian economic development by shielding Indian economic enterprises from the full rigors of market pressure."), *aff'd*, 446 U.S. 608 (1980); cf. *Pueblo de San Felipe v. Hodel*, 770 F.2d 915, 917 (10th Cir. 1985) (Interior Secretary's "fiduciary duty" to tribes).

152. The Judge also views tribes' immunity from suit broadly, and he scrutinizes any suit against a tribe's officials or an entity incorporated by a tribe to insure that the suit is not an attempt to circumvent sovereign immunity. For example, in his concurring opinion in *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 576 (10th Cir. 1984), the Judge noted that "every suit that seeks to enjoin an officer acting in his representative capacity raises the question of whether relief granted against the officer will not in effect grant relief against the sovereign," and he suggested that the trial court carefully consider the immunity issue on remand. See also *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 318-21 (10th Cir. 1982) (holding that sovereign immunity bars suit arising under construction contract against tribe even though tribe had not raised the issue before an earlier appeal; waiver of immunity must be express to be recognized).

153. *E.g.*, *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 731-32 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *decision on remand*, 677 F.2d 55 (10th Cir. 1982) (reinstating previous opinion), *aff'd*, 462 U.S. 324 (1983); *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 983-87 (10th Cir. 1980) (dissenting opinion), *cert. denied*, 450 U.S. 959 (1981).

154. *E.g.*, *Oklahoma Gas & Elec. Co. v. United States*, 609 F.2d 1365, 1367 (10th Cir. 1979).

155. *E.g.*, *Wheeler v. Department of Interior*, 811 F.2d 549, 553 (10th Cir. 1987) (refusing to order Interior Department to intervene in tribal election; "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government").

156. *E.g.*, *Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987) (tribe's claim

*B. Limits on State Jurisdiction Within Indian Lands:
Mescalero Apache Tribe v. New Mexico*

In the late 1970s and early 1980s the Tenth Circuit heard a number of cases arising from the Mescalero Apache Tribe's¹⁵⁷ successful attempts to develop tourism on its New Mexico reservation. Among other things, the Tribe constructed a major resort complex, the Inn of the Mountain Gods, and established its own hunting and fishing regulatory system. Both led to litigation. The state of New Mexico sought to impose its hunting and fishing laws within the reservation and also to tax the gross receipts of the non-Indian contractors constructing the Inn.¹⁵⁸

*Mescalero Apache Tribe v. New Mexico*¹⁵⁹ is a significant case considering the extent to which states may impose their game laws within reservation boundaries, and, because of its scope, it is a particularly good case to illustrate the McKay analysis. The case endured a tortuous procedural history. The Tenth Circuit, in a lengthy opinion written by Judge McKay, originally ruled for the Tribe in 1980, affirming the district court's holding that New Mexico could not enforce its game laws against non-Indians for acts done on the tribal reservation.¹⁶⁰ The Supreme Court, however, vacated the decision and remanded *Mescalero* for reconsideration¹⁶¹ in light of another recent Supreme Court

to unallotted lands within executive order reservation cognizable only under Indian Claims Compensation Act; action therefore dismissed); *Iowa Tribe v. Kansas*, 787 F.2d 1434 (10th Cir. 1986) (Kansas held to have jurisdiction under Kansas Act, 18 U.S.C. § 3243 (1982), over sale of "pull-tab cards" in connection with bingo games on reservations within the state).

157. The Mescaleros, one of the branches of the Apaches, were historically hunters and gatherers. Their name came "from the Apache custom of gathering and roasting the heads of mescal, or agave, plants." A. JOSEPHY, *supra* note 34, at 170. The mescal plant should not be confused with peyote. See A. DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 199 n.5 (1974).

158. The state prevailed in the tax case, before the Tenth Circuit sitting *en banc*, but over a vigorous McKay dissent. *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). A panel including Judge McKay also heard cases involving contract issues arising from the construction project. See *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982); *Ramey Constr. Co. v. Apache Tribe*, 616 F.2d 464 (10th Cir. 1980).

159. 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *decision on remand*, 677 F.2d 55 (10th Cir. 1982) (reinstating previous opinion), *aff'd*, 462 U.S. 324 (1983). *Mescalero* was listed as one of Judge McKay's two most "Noteworthy Rulings" in *Monroe G. McKay*, *supra* note 2, and the facts of *Mescalero* are quoted from the McKay opinion for pedagogical purposes in M. PRICE & R. CLINTON, *supra* note 25, at 342-43.

160. 630 F.2d at 724. Judge Doyle joined in the opinion of the court, but the third member of the panel, Judge Breitenstein, merely concurred in the result.

161. 450 U.S. 1036 (1981).

decision, *United States v. Montana*.¹⁶² On remand, the Tenth Circuit, in a brief McKay opinion, held to its original position,¹⁶³ which the Supreme Court affirmed in 1983.¹⁶⁴

An extensive tribal regulatory system was developed in 1977. Some of the regulations clearly (and probably intentionally)¹⁶⁵ conflicted with state laws; for example, the Tribe did not require a sportsman hunting on the reservation to obtain a state license.¹⁶⁶ The state did not challenge the Tribe's authority to impose regulations to supplement the state's. Indeed, the state conceded that tribal conservation efforts were fully consistent with accepted management procedures.¹⁶⁷ The state simply claimed the right to enforce its laws against nonmembers of the

162. 450 U.S. 544 (1981). *Montana* dealt with "the sources and scope of the power of [the Crow] Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." *Id.* at 547.

163. 677 F.2d 55 (10th Cir. 1982), *aff'd*, 462 U.S. 324 (1983). The Tenth Circuit distinguished *Montana*, *see supra* note 162, in that the Mescaleros owned and controlled nearly all of the land within their reservation (of the 460,000 acres, only about 185 were held in fee by non-Indians), while on the Crow reservation only 17% of the land was held in trust for the Tribe, and 28% was held in fee by non-Indians. 677 F.2d at 56-57 & n.1.

164. 462 U.S. 324 (1983). The Supreme Court decision has generated commentary in a number of academic law reviews. *See, e.g.*, Woodbury, *New Mexico v. Mescalero Apache Tribe: When Can a State Concurrently Regulate Hunting and Fishing by Non-members on Reservation Land*, 14 N.M.L. REV. 349 (1984); Case Note, 1984 ARIZ. ST. L.J. 191; Note, *Whose Wildlife Is It Anyway? Conflicts Between State and Tribal Regulation of Non-Indian Hunting and Fishing After New Mexico v. Mescalero Apache Tribe*, 3 VA. J. NAT. RESOURCES L. 315 (1984); *see also* Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C.L. REV. 743 (1984) (discussing *Mescalero* and other cases). Similar, although not identical, jurisdictional controversies may arise in other countries. *See, e.g.*, Ginn, *Indian Hunting Rights: Dick v. R., Jack and Charlie v. R. and Simon v. R.*, 31 MCGILL L. J. 527 (1986) (discussing three Supreme Court of Canada decisions involving provincial regulation of Indian hunting rights).

165. The Tenth Circuit held that the intention to create a jurisdictional dispute was, if anything, "an element in the Tribe's favor." 630 F.2d at 726 n.3.

166. 630 F.2d at 726. Other conflicts existed as well. For example, the Tribe permitted elk and antelope hunters to purchase permits in consecutive years, while state law did not. Hunting seasons and bag limits also differed. "By obeying the more restrictive of the regulations, a non-member hunter on the reservation could conform his behavior to the dictates of both Tribe and State. His doing so, however, would render much of the tribal regulatory scheme a nullity." *Id.*

167. *Id.* at 726-27. An interesting polemic decrying the effect tribal victories can have in cases with environmental overtones is C. WILLIAMS & W. NEUBRECH, *INDIAN TREATIES: AMERICAN NIGHTMARE* (1976); *see* Shabecoff, *Killing of a Panther: Indian Treaty Rights vs. Law on Wildlife*, N.Y. Times, Apr. 15, 1987, at A1, col. 1. (U.S. Department of Justice charges chairman of Seminole Indian tribe with killing panther in violation of Endangered Species Act; defense is that killing panthers is part of tribal religious and cultural tradition and is therefore protected by the Constitution and by treaty).

Tribe on the reservation.¹⁶⁸ The Tribe sued to enjoin the state's enforcement efforts.

A jurisdictional case of this sort requires treatment of a broad range of issues and provides the opportunity for an expansive treatment of fundamental questions. *Mescalero* was particularly significant because it involved an issue, hunting and fishing, that many tribes consider to be a crucial link to their past. Judge McKay took full advantage of this opportunity. Following Supreme Court precedent, as much as is possible,¹⁶⁹ the Judge's opinion in *Mescalero*¹⁷⁰ weaved together a number of overlapping analytical perspectives. It considered the extent of federal preemption in the area (which required analysis of the Tribe's retained sovereignty as well as the applicable treaties, statutes, and regulations), and, as a potentially independent bar to state jurisdiction, it considered the extent to which state regulation would infringe upon tribal self-government.

1. Tribal sovereignty and preemption

The Tenth Circuit was required to "determine whether the applicable treaty and federal statutes, read against the 'backdrop' of Indian sovereignty, preempt exercises of state power."¹⁷¹ Sovereignty is an elusive concept, and it is particularly difficult to apply in the case of Indian tribes, which were once fully sovereign nations,¹⁷² but are today something less than that.¹⁷³ Nev-

168. On appeal, the state conceded its lack of jurisdiction over tribal members on the reservation. 630 F.2d at 726.

169. Many of the cases have been so fact-dependent and the governing legal principles have been stated with such varying language, *see, e.g., infra* note 192 (importance of sovereignty), that a judge has great scope for creativity and great potential for reversal.

170. 630 F.2d at 724. The analysis will focus on Judge McKay's first opinion in *Mescalero*. The second is quite short and reinstates the prior opinion.

171. *Id.* at 728 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690-91 (1965)).

172. That is not to say, however, that sovereignty was a concept familiar to the tribes. "Any discussion of tribal sovereignty begins on a questionable basis because the concept of sovereignty is fundamentally of Western origin. Applying a concept of the supreme and absolute political power of a state to a stateless society . . . appears to lead to a contradiction in terms." 4 NATIONAL AM. INDIAN CT. JUDGES' ASS'N, JUSTICE AND THE AMERICAN INDIAN 27 (1974), reprinted in L. MEDCALF, LAW AND IDENTITY 62 n.1 (1978); *see also* DAVIES, *Aspects of Aboriginal Rights in International Law*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA 16, 24-28 (1985) (discussing sovereignty as international law concept).

Inherent sovereignty has been recognized by the federal government throughout this century. For example, the Interior Department's Solicitor General, Nathan Margold,

ertheless, whatever the limits of a tribe's sovereignty in other areas, in reservation hunting and fishing its powers are undiminished by the passage of time. In Judge McKay's words:

The sovereign powers of the Tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage. The historical relationship between Indian tribes, their lands, and the wild game thereon has of necessity been one of great interdependence. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed."¹⁷⁴

The Tribe's powers with respect to hunting and fishing derived not only from the "traditional reliance on wild game for basic survival needs,"¹⁷⁵ although that was important, but also

mentor of Felix Cohen, *see supra* note 19, noted in 1934 that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. . . . What is not expressly limited remains within the domain of tribal sovereignty" Powers of Indian Tribes, 55 Interior Dec. 14, 19 (1934) (emphasis in original). In some respects, tribes therefore have a status higher than states, so that, for example, the provisions of the Constitution's Bill of Rights are inapplicable to them. *See, e.g.,* Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959) ("They have a status higher than that of states. . . . No provision in the Constitution makes the First Amendment applicable to Indian nations."); V. DELORIA, JR. & C. LYTLE, THE NATIONS WITHIN: THE PAST AND THE FUTURE OF AMERICAN INDIAN SOVEREIGNTY 1-15 (1984); *see also* American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982)) (directing federal agencies to preserve and protect Indian religious freedom). *But see* Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363 (1986).

173. Tribal powers are subject to defeasance by the federal government, which can unilaterally abrogate treaties and remove statutory protection for the tribal systems. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) (some aspects of sovereignty divested by tribes' incorporation within territory of United States and acceptance of country's protection); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301-41 (1982)) (in order to provide tribal members with legal protections against acts of tribal officials, imposing various civil rights obligations, including some, but not all, of the provisions of the Bill of Rights, on tribes).

In his dissenting opinion in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 986 n.13 (1980), *cert. denied*, 455 U.S. 959 (1981), Judge McKay explained the relationship between sovereignty and federal preemption:

Certainly from a purely theoretical standpoint the two sources of tribal power do not easily coexist; an increase in federal power over the Tribe must result in a diminution of sovereignty as traditionally understood. However, in the complex body of federal Indian law the two doctrines reinforce one another. Both doctrines have arisen as limitations on state jurisdiction.

174. 630 F.2d at 728 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905) which is quoting the trial court).

175. 630 F.2d at 729 (citing 1942 COHEN HANDBOOK, *supra* note 25, at 286). Apparently responding to an argument of the state, the Tenth Circuit noted that it made no

from the Tribe's control over its own territory. As the Supreme Court had explained, "[T]here is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry."¹⁷⁶ The Tribe has an interest as landowner in its reservation lands, and therefore has a landowner's power to exclude tribal nonmembers from hunting and fishing on the reservation. But that interest as owner, however substantial, is secondary to the authority of a sovereign over its lands.¹⁷⁷

In its discussion of inherent tribal powers attributable to territory, *Mescalero* includes one passage of sufficient rhetorical power that it has been quoted prominently on a number of occasions in widely varying contexts. New Mexico had arrogantly argued that the Tribe had no traditional territory, and hence no powers associated with territory, because "the Mescaleros were being swept from their lands by a tide of white settlers."¹⁷⁸ Judge McKay responded for the court:

difference to the Tribe's power that the Mescaleros may historically have relied on only some of the game species on the reservation for survival. "At the treaty's signing, the United States must certainly have understood that the Tribe could alter its use of wildlife as conditions changed." 630 F.2d at 729; see C. WILKINSON, *supra* note 12, at 37-46; cf. *Glover Constr. Co. v. Andrus*, 591 F.2d 554, 564-65 (10th Cir. 1979) (McKay, J., dissenting):

[T]he majority may be suggesting that only those Indian activities conducted in 1910 are covered by the [Buy Indian] Act [and hence the award of a road contract could not be made preferentially to an Indian contractor]. . . . [T]he Act's very purpose is to encourage Indian economic enterprises that would suffer in a competitive context. The view of the Act expressed in today's opinion threatens to relegate it to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all.

The Supreme Court affirmed the Tenth Circuit decision in *Glover*, but its resolution of the case did not require consideration of the Judge's passage of time argument. 446 U.S. 608 (1980).

176. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

177. 630 F.2d at 729 (citing, e.g., *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations and possessing attributes of sovereignty over both their members and their territory")). In his concurrence in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982), the Judge argued that "the principle of self-determination may be said to require protection of territoriality." *Id.* at 550 (emphasis in original) (citing McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357, 390 & n.154 (1978)); see also *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 987 (10th Cir. 1980) (McKay, J., dissenting) (to same effect), *cert. denied*, 450 U.S. 959 (1981).

178. 630 F.2d at 730 (citation omitted). The Mescalero reservation, established by executive order on May 29, 1873, is situated within the traditional Mescalero territory, but the Tribe was not always in residence there. For example, several hundred Mes-

If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776).¹⁷⁹

This language was used to close a *Yale Law Journal* article that had nothing to do with Indian law,¹⁸⁰ and a recent distinguished study of the Supreme Court's Indian law record quoted the passage as the "ultimate philosophical basis" for a tribe's not losing traditional rights through failure or inability to exercise those rights.¹⁸¹

The Tribe thus had a sovereign's power to regulate hunting and fishing before the signing of any treaty, and the 1852 treaty with the Mescaleros,¹⁸² which did not speak of hunting and fishing rights, was "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."¹⁸³ Congress could have abrogated rights protected by treaty, but

caleros were captured and located on the infamous Bosque Redondo in the early 1860s. They were badly treated, forbidden to leave the reservation or even to make mescal, *see supra* note 157, and in 1864 were joined by more than 8,000 Navajos, who had been rounded up and marched (the "Long Walk") to the Bosque. The two tribes were hostile, and in 1865 the Mescaleros escaped and vanished for several years, reappearing when the reservation was created within their own territory. A. DEBO, *supra* note 157, at 198-99.

179. 630 F.2d at 730.

180. Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L.J.* 214, 258 (1983).

181. C. WILKINSON, *supra* note 12, at 46.

182. Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852), *reprinted in* INDIAN AFFAIRS: LAWS AND TREATIES 598 (C. Kappler ed. 1904). If the Mescaleros had signed no treaty with the federal government, that fact would not necessarily have been fatal to their cause. In another case involving the power of the Jicarilla Apaches to impose a severance tax on minerals taken from reservation lands, the Judge, responding by special concurrence to an argument made by a dissenter, discussed the effect of Congress' failure to ratify a treaty:

[Such a failure] does not convert a "nation" into a voluntary association. The profile of the tribe's rights, practices and relationships under federal authority properly reflects a status similar to the tribes whose proposed treaties were indeed ratified. "Executive order reservations have exactly the same validity and status as any other type of reservation."

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 550 (10th Cir. 1980) (quoting 1942 COHEN HANDBOOK, *supra* note 25, at 299), *aff'd*, 455 U.S. 130 (1982); *see also* C. WILKINSON, *supra* note 12, at 7-9 (discussing status of reservations).

183. 630 F.2d at 729 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905) which is quoting the trial court).

such abrogation would have to be explicit to be honored, and Congress had taken no such explicit steps.¹⁸⁴

To hold that the Tribe had a sovereign's power to regulate hunting and fishing merely began the preemption analysis, however, because the existence of one sovereign's powers does not necessarily preclude the application of another's. Moreover, shortly before the Tenth Circuit opinion in *Mescalero*, the Supreme Court, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,¹⁸⁵ had rejected a tribal claim that the state of Washington could not tax reservation cigarette sales to tribal nonmembers. Tribes retain a sovereign's power to tax,¹⁸⁶ but dual systems of taxation are common: a state's imposition of its revenue-raising tax on cigarette sales was not necessarily inconsistent with a tribal revenue-raising scheme.¹⁸⁷

The McKay opinion easily distinguished *Colville* by noting

184. 630 F.2d at 729 (citing *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); see generally Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975). *United States v. Dion*, 106 S. Ct. 2216 (1986), is a recent example in which explicit abrogation was determined to have occurred. The Yankton Sioux Tribe had rights to hunt bald and golden eagles under a treaty, but the Court determined those rights had been abrogated by the Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (codified at 16 U.S.C. §§ 668-668c (1982)), and the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-43 (1982 & Supp. II 1984)). Among other things, the Acts included provision for hunting "for the religious purposes of Indian tribes" if permits were first secured from the Secretary of the Interior. *Dion*, 106 S. Ct. at 2221 (quoting 16 U.S.C. § 668a (1982)).

185. 447 U.S. 134 (1980).

186. The power to tax is an element of sovereignty that Indian tribes retain unless expressly withdrawn by the federal government. See 1982 COHEN HANDBOOK, *supra* note 8, at 431; *Merrion v. Jicarilla Apache Tribe*, 617 F.2d at 541.

The taxing power is also important to a tribe's power to govern itself and thus may be protected under the "infringement" analysis as well. See *infra* notes 209-20 and accompanying text. Judge McKay noted in his *Merrion v. Jicarilla Apache Tribe* concurrence, see *supra* note 182, that "[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes." 617 F.2d at 550. The Supreme Court, recognizing the power of the language as well as the cogency of the thoughts, quoted the McKay language with approval in affirming *Jicarilla*. 455 U.S. at 138 n.5; see Fulwood, *Of Tribes and Taxes: Limits on Indian Tribal Power to Tax Nonmembers*, 1986 UTAH L. REV. 729, 731-38; see also Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 279 ("Merrion should be read as but a part of the long litany of European derived legal texts which seek to hierarchically subordinate the Indian's self-defining vision within the universalized structures of the white man's legal and political worldview.").

187. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d at 541-42.

that hunting and fishing are special; they constitute a significant tribal interest.¹⁸⁸ In contrast, cigarette sales implicate no distinct tribal interest.¹⁸⁹ Moreover, although dual taxing schemes that are purely revenue-raising in character may coexist, Judge McKay suggested that dual regulatory schemes are inherently conflicting. Thus, the Tenth Circuit held, in a key provision that extended the law, “[i]t is because of this characteristic of regulation that we presume, when Indian tribes under federal protection seek to regulate their traditional interests, that federal law has preempted state jurisdiction”¹⁹⁰—a “presumption of preemption.”¹⁹¹

Although the retained sovereignty of the Mescaleros appears to have been sufficient, under the McKay analysis, to find federal preemption of the state’s power to regulate,¹⁹² the Judge discussed the pervasive treaty, statutory, and regulatory structure as well.¹⁹³ Under a time-honored rule of interpretation, the

188. 630 F.2d at 730.

189. *Id.*

190. *Id.* In the decision on remand, Judge McKay again stressed the interference that would result from dual regulation. 677 F.2d at 57.

191. In affirming *Mescalero*, the Supreme Court did not explicitly approve the presumption language, but its analysis is consistent with that presumption. The Court noted the Tribe’s lawful control over reservation resources and stated that “[i]t is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe’s authority to control hunting and fishing on the reservation.” 462 U.S. at 338. See Reynolds, *supra* note 164, at 792 (arguing for adoption of Tenth Circuit’s “presumption of preemption” generally with respect to hunting and fishing, and noting that Supreme Court’s opinion in *Mescalero* “comes close to establishing such a presumption”).

192. The importance of tribal sovereignty in Supreme Court preemption analysis varies bewilderingly from case to case. Sometimes it appears to be controlling. At other times the “backdrop” language is used. In others, the concept moves to the back seat. For example, in *Rice v. Rehner*, 463 U.S. 713, 720 (1983), the Court upheld the imposition of state liquor laws on a reservation and stated that “if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the ‘backdrop’ of tribal sovereignty.” See also *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 848 (1982) (Rehnquist, J., dissenting, joined by White and Stevens) (“apart from those rare instances in which the state attempts to interfere with the residual sovereignty of a tribe to govern its own members, the ‘tradition of tribal sovereignty’ merely provides a ‘backdrop’ against which the pre-emptive effect of federal statutes or treaties must be assessed”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (discussed *infra* notes 225-27 and accompanying text); *Rotenberg*, *supra* note 35, at 423 n.79 (discussing varying language of cases). In *Three Affiliated Tribes v. Wold Eng’g*, 106 S. Ct. 2305 (1986), the Court quoted the restrictive language of *Rice*, yet referred to the “important backdrop” that sovereignty may provide. *Id.* at 2309-10 (emphasis added); see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334 (“crucial ‘backdrop’”).

193. As important as sovereignty is in this case, we need not consider whether the Tribe’s sovereign powers alone are sufficient to preempt state jurisdiction.

treaties and statutes were construed liberally in favor of the Tribe, almost as if the court were examining contracts of adhesion.¹⁹⁴ Several additional sources for preemption were found. It is impossible to tell from the McKay opinion which, if any, of these factors was essential to the analysis.¹⁹⁵ Read together, however, the sources make the case for preemption over-

The Supreme Court has not ruled on that question but has noted, given the pervasiveness of federal treaties and statutes, that it is "something of a moot question."

630 F.2d at 731 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.8 (1973)). *But see* *Three Affiliated Tribes v. Wold Eng'g*, 106 S. Ct. at 2310 (emphasis added) ("Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to 'pre-empt' state regulation, nevertheless form an important backdrop."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334 n.16 (suggesting "infringement" test, *see infra* notes 209-20 and accompanying text, may be solely a sovereignty analysis). The Supreme Court had also noted, shortly before the Tenth Circuit's opinion in *Mescalero*, that the preemption determination does not depend "on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a *particularized inquiry* into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (emphasis added).

194. 630 F.2d at 728 (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Squire v. Capoman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.")). The Treaty with the Apaches, July 1, 1852, art. 11, 10 Stat. 979, 980, itself mandated "liberal construction . . . to the end that . . . the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians."

195. The status of preemption analysis after *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), is puzzling. Judge McKay quoted *White Mountain* for the proposition that "those standards of pre-emption that have emerged in other areas of the law' generally do not apply 'to federal enactments regulating Indian tribes.'" 630 F.2d at 730 (quoting 448 U.S. at 143). Presumably because it would not have affected the outcome in *Mescalero*, however, the Judge did not specifically discuss *White Mountain's* assertion that "any applicable regulatory interest of the State must be given weight." 448 U.S. at 144. A "particularized inquiry," *see supra* note 193, that includes the state's interest sounds suspiciously like balancing, and the Supreme Court's *Mescalero* opinion appears to confirm that suspicion:

By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. . . . State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

462 U.S. at 334 (citing *White Mountain*, 448 U.S. at 144-45). If the source of preemption is the Supremacy Clause, U.S. CONST. art. VI, cl. 2, coupled with the federal treaty-making power, U.S. CONST. art. II, § 2, cl. 2, it seems wrong to suggest that a state interest

whelming.

The 1852 treaty, while silent on hunting and fishing, submitted the Tribe "exclusively" to federal jurisdiction and gave to the United States the power, among other things, to "pass and execute . . . such laws as may be deemed conducive to the prosperity and happiness of [the Tribe]."¹⁹⁶ Preserving the status created by treaty, the 1910 Enabling Act for New Mexico placed the state's Indian lands "under the absolute jurisdiction and control of the Congress of the United States."¹⁹⁷

The Tribe was organized under the Indian Reorganization Act of 1934,¹⁹⁸ and its constitution was adopted and approved by the United States Bureau of Indian Affairs pursuant to the Act. The Act provided that a tribal constitution reconfirms "all powers vested by . . . existing law,"¹⁹⁹ and the constitution itself gave the Tribal Council power over "wildlife and natural resources of the tribe."²⁰⁰ The tribal game laws were adopted by the Council pursuant to its constitutional powers.²⁰¹

The federal government's participation in the wildlife preservation efforts on the reservation was itself a source of preemption.²⁰² Much of the reservation wildlife had been created or pre-

should be able to overcome a clearly contrary federal statute. See Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 OR. L. REV. 667, 678-87, 695-99 (1986).

196. Treaty with the Apaches, July 1, 1852, arts. 1 & 9, 10 Stat. 979, 980.

197. Ch. 310, 36 Stat. 557, 559 (1910). The Supreme Court had stated, in *Organized Village of Kake v. Egan*, 369 U.S. 60, 68 (1962), that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction," but the McKay opinion concludes that "[i]n the area of resource management, the treaty language in this case suggests that 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." 630 F.2d at 731 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 176 n.15 (1973) ("[Egan] did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians.")). The Tenth Circuit was aided in this conclusion by a decision of the New Mexico Supreme Court, *Chino v. Chino*, 90 N.M. 203, 205, 561 P.2d 476, 478 (1977), which interpreted *Egan* and *McClanahan* in the same way.

198. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1982)); see *supra* note 34.

199. 25 U.S.C. § 476 (1982); see also 630 F.2d at 731 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143 & n.10) ("The statute thus reconfirms all preexisting powers of the Tribe and itself becomes a source of preempting power.").

200. Mescalero Apache Tribe Revised Const. art. 11, § 1(c).

201. 630 F.2d at 732 ("Tribal ordinances enacted to implement traditionally held, and congressionally approved, powers may themselves serve to preempt the State." (citing *Fisher v. District Court*, 424 U.S. 382, 390 (1976)).

202. 630 F.2d at 732. The Tenth Circuit thus followed the lead of the Fourth Circuit in *Eastern Band v. North Carolina Wildlife Resources Comm'n*, 588 F.2d 75, 78 (4th Cir. 1978) (A state that does not participate in stocking reservation waters "has no perceivable interest in reservation fishing."), *cert. dismissed*, 446 U.S. 960 (1980).

served through the efforts of the Tribe and the federal government, without any state involvement.²⁰³

Finally, New Mexico had been entitled under Public Law 280,²⁰⁴ enacted in 1953 as part of the last short-lived termination policy,²⁰⁵ to assert civil and criminal jurisdiction over the reservation, but New Mexico had not done so prior to the expiration of the grant in 1968.²⁰⁶ Even had the state asserted such jurisdiction, it would not have extended to "hunting, trapping, or fishing" rights protected by treaty or statute.²⁰⁷ The Judge's opinion accordingly concluded that "[i]f those states which accepted Public Law 280 jurisdiction may not hinder traditional hunting and fishing rights, New Mexico *a fortiori* may not do so."²⁰⁸

2. Tribal self-government

In considering exercises of state jurisdiction, the Supreme Court has not limited analysis to preemption; all tribal power does not flow from the federal government. For example, in the seminal case of *Williams v. Lee*,²⁰⁹ the Court, in upholding tribal court jurisdiction over non-Indians in a civil case, stated: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."²¹⁰ Whether infringement is really a test distinct from preemption—there is doubt on that issue²¹¹—it provides a "different analytical perspective[]"²¹² that may preclude state exercises of jurisdiction.

203. 630 F.2d at 726-27. The fact that the Tribe had in the past occasionally cooperated with the state in conservation efforts, the Tenth Circuit held, did not reflect any diminution of the Tribe's sovereign powers. "Past cooperation . . . reflects nothing more than a temporary waiver of the Tribe's preemptive rights . . ." *Id.* at 730 n.12.

204. Ch. 505, 67 Stat. 588, 590 (1953).

205. *See supra* note 34.

206. In 1968 Congress amended Public Law 280 to require tribal consent to future assumptions of state jurisdiction. Indian Civil Rights Act, Pub. L. No. 90-284, § 401, 82 Stat. 73, 78 (1968) (codified at 25 U.S.C. § 1321(a) (1982)).

207. Ch. 505, § 2, 67 Stat. 588, 589 (codified at 18 U.S.C. § 1162(b) (1982)).

208. 630 F.2d at 732.

209. 358 U.S. 217 (1959); *see* C. WILKINSON, *supra* note 12, at 1-3.

210. 358 U.S. at 220.

211. The Supreme Court often states that the two tests are independent but related. *See, e.g.,* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 n.16 (1983) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). *But see infra* note 213.

212. 630 F.2d at 733 n.18.

The test (or "analytical perspective") requires weighing the state's interest against the interest of the federal government and the Tribe.²¹³ In *Colville*, the cigarette tax case, the Supreme Court weighed such factors as the tribe's and the state's revenue-raising interests (neither controlling by itself), whether the tribe generated the value from which the tax revenues were to be derived, and whether the taxpayer benefitted from tribal or state services.²¹⁴ Once again, Judge McKay was able to distinguish *Colville*: "In [*Mescalero*], the scales tip decisively in the Tribe's favor."²¹⁵

Since regulation, and not mere revenue-raising, was involved in *Mescalero*, state interference would have impeded tribal power. "To restrict the application of the tribal scheme to members only would be to complicate excessively the enforcement process and to render the very idea of 'regulation' an absurdity."²¹⁶ Moreover, the Tribe, not the state, had generated nearly all of the "value" the Tribe sought to regulate. The state's interests, apart from revenue-raising, were not affected by the tribal system.²¹⁷ Finally, although the effect on the Tribe's revenues would not have been sufficient by itself to infringe upon tribal self-government, the Tenth Circuit believed it a factor to be considered.²¹⁸

The self-government analysis should always be informed, Judge McKay argued, by the congressional goal to make tribes self-sufficient: "to help develop and utilize Indian resources . . .

213. A court must seek "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980). This test clearly requires case-by-case analysis, and is one reason why the Court continues to be inundated with Indian cases. Of course, if preemption analysis also requires balancing of federal and tribal interests versus state interests, as the Supreme Court suggested in *White Mountain*, see *supra* note 195, the two tests may not differ to any significant extent. See *Feldman*, *supra* note 195, at 677-78.

214. *Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

215. 630 F.2d at 733.

216. *Id.*

217. *Id.* *Mescalero* contained a finding that imposition of the state's regulations would have interfered with tribal self-government. The lack of such a finding had contributed to a contrary result in *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). *Eastern Band v. North Carolina Wildlife Resources Comm'n*, 588 F.2d 75, 78-79 (4th Cir. 1978), *cert. dismissed*, 446 U.S. 960 (1980).

218. 630 F.2d at 734. See *Eastern Band*, 588 F.2d at 78 (financial self-sufficiency is "one major goal of tribal self-government"). Judge McKay's analysis on these points was largely followed by the Supreme Court, but as part of a preemption analysis, 462 U.S. at 341, thus casting further doubt on whether the preemption and infringement analyses are independent.

to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources."²¹⁹ Although the federal government may have the power to limit tribal self-government, "[t]he federally declared policy of self-determination becomes a mockery if it is subject to defeasance by the State."²²⁰

3. Other issues

Although the preemption and self-government analyses were the heart of *Mescalero*, the McKay opinion also responded to other arguments of the state. For example, New Mexico suggested that, regardless of the result under the traditional analyses, the seriousness of ecological concerns might dictate a result in favor of the state: it should not have to respect reservation boundaries when a higher good, conservation, was implicated.²²¹

Claims of impending doom are always suspect, and the Judge artfully turned the state's argument on its head: "Just as wildlife does not respect reservation boundaries, it also does not respect the boundaries of states. The State surely does not mean to suggest that it ignores *state* boundaries in its enforcement efforts."²²² Instead, the opinion suggested, a trusteeship duty is imposed on every sovereign to protect wildlife "for the common benefit of all of its people,"²²³ and the Tribe was fulfilling that duty.²²⁴

219. 25 U.S.C. § 1451 (1982).

220. 630 F.2d at 734.

221. The state had argued that "its management efforts are directed to biological rather than political units." *Id.* (citation omitted). Judge McKay responded:

The State's 'biological units' argument would seem logically to *prefer* federal regulation, because only that regulation can take account of the varying conditions without the restraints of political boundaries. Hence, if ecological necessities were to require changes in constitutional arrangements—a position we certainly do not endorse—the changes would not necessarily be those suggested by the State.

Id. at 734 (emphasis in original), *quoted in* M. PRICE & R. CLINTON, *supra* note 25, at 671.

222. 630 F.2d at 734 (emphasis in original), *quoted in* M. PRICE & CLINTON, *supra* note 25, at 671.

223. 630 F.2d at 734 (quoting *LaCoste v. Department of Conservation*, 263 U.S. 545, 549 (1924)). The Court in *LaCoste* declared that a "State in its sovereign capacity" has a duty to protect wildlife. *Id.* at 549. New Mexico asked the Tenth Circuit to infer from that duty that *only* the state could regulate wildlife within its boundaries.

224. Had wildlife on the reservation in fact been endangered, something New Mexico could not claim, *see supra* text accompanying note 167, the case might have been a different one. *See supra* notes 167, 184 (Endangered Species Act).

Nor did the Tribe's lack of criminal jurisdiction over tribal nonmembers, a result of the Supreme Court's controversial *Oliphant* decision,²²⁵ affect tribal regulatory powers. Although *Oliphant* eliminated a significant component of tribal sovereignty, criminal jurisdiction over nonmembers is a special case, and the *Oliphant* principles do not necessarily spill over into other areas.²²⁶ Civil powers will ordinarily be sufficient for enforcement of game laws, and *Oliphant* did not suggest any divestiture of such powers. To the contrary, in spite of *Oliphant*, the Supreme Court had consistently reaffirmed the sovereignty of Indian tribes. As Judge McKay's opinion put it, "New Mexico's interpretation of *Oliphant* would lead to the untenable conclusion that the Supreme Court implicitly abolished most aspects of tribal sovereignty, while at the same time asserting the continuing validity of that doctrine."²²⁷

Having rejected each of New Mexico's shotgun arguments, the Tenth Circuit ruled in favor of the Tribe: only the Tribe's game laws were enforceable on the reservation, and the state could take no enforcement action outside the reservation for acts done on tribal lands. The state continued its hunt for a favorable decision in a higher court, but it had already given the case its best shot. For the state, the game was over.

IV. JUDGE MCKAY AND THE THEORY OF SEPARATION

If Indian relations are our national "morality play,"²²⁸ Judge McKay has a major role, and he plays—to use a cowboy metaphor singularly inappropriate in this context—one of the guys in the white hats. His opinions reflect concern for the downtrodden, a desire to right past wrongs, and a wish to let the Indian make it on his own—with the nation's help, if necessary.

225. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *Oliphant* held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians," *id.* at 212, and Congress had not affirmatively delegated such power to the tribes. *Id.* at 195.

226. "In a limited area, *Oliphant* found divestiture [of sovereign powers], but '[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases.'" *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 550 (10th Cir. 1980) (McKay, J., concurring) (quoting Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 508 (1979)), *aff'd*, 455 U.S. 130 (1982).

227. 630 F.2d at 735 (citing many Supreme Court cases, including *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978)). The Judge also suggested that if in some peculiar case criminal jurisdiction is necessary for an enforcement scheme, a federal statute can fill the vacuum. 630 F.2d at 735 (citing 18 U.S.C. § 1165 (1982)).

228. See *supra* text accompanying note 17.

Working on this article gave the author the pleasure of reading and rereading many McKay opinions. The craft, the breadth and depth of learning from many disciplines, the well-turned phrases—all are superb. The sense of history,²²⁹ for example, in a McKay Indian law opinion by itself makes the effort worthwhile.

Yet, something is missing. The Judge's Indian law opinions do not deal specifically with the issue of separation. The Tenth Circuit quite simply is not called upon to reconsider the validity of a long-standing doctrine. One can draw inferences from the opinions, but the reader cannot tell for sure how, if at all, the Judge would defend the prevailing separatist ideology. One thing is certain: the Judge would have fascinating things to say about an area of the law in which his interest is so strong. Since the judicial opinion-writing format is unlikely to provide the appropriate opportunity for the Judge to discuss his views, perhaps he can be convinced to write a law review article on this subject. What about it, Judge? Was de Tocqueville wrong?²³⁰

V. CONCLUSION

The life of a federal appellate judge is often frustrating. Although it provides intellectual excitement, it has almost none of the drama and power of the courtroom. Even as a purely intellectual exercise, judging has its limitations: a judge can use the opinion format to draft learned treatises, with guaranteed publication and wide circulation, but the scope of inquiry is confined by the facts of particular cases. While contact with colleagues can be an invaluable source of stimulation, the telephone is the primary mechanism of collegial discussion on a court like the Tenth Circuit, where the judges' chambers are spread across a wide geographical area. Isolated from colleagues, apparently removed from the great political battles of the day, a judge can feel himself the equivalent of an "honorary pallbearer."

For most judges, the frustration passes or quickly becomes bearable—and with good reason. The decisions often have enormous effect on the parties, on future litigants, and on planners.

229. "[Indian legal history] is . . . the contemporary life blood out of which current Indian law problems are often resolved by the courts." Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 ARIZ. L. REV. 29, 31 (1986).

230. See *supra* text accompanying note 23.

Moreover, with his words read, and read closely, by a large audience, the judge maintains the power of a teacher. Walter Berns has described the power of words and the law:

Lincoln's greatness consisted as much in his words as in his deeds, and anyone who knows, with Lincoln, that, generally speaking, laws depend on opinion, or sentiment, and that opinion is formed by words, knows the role of rhetoric in statesmanship. A seat on the bench, even the supreme bench, is not the equivalent of a presidential platform at Gettysburg when the president is Lincoln, but a great jurist's words do not fall on deaf ears; they are heard and studied by men outside the courtroom, by journalists and teachers, as well as by legislators, who themselves speak to the public and thereby sometimes teach it.²³¹

Monroe G. McKay does not stand on the platform of Lincoln, or occupy a seat on the "supreme bench," but the Judge's words do not fall on deaf ears. That is cause for celebration, as this great and good man begins his second decade on the bench.

231. Berns, *Oliver Wendell Holmes, Jr.*, in *AMERICAN POLITICAL THOUGHT* 167, 168 (M. Frisch & R. Stevens eds. 1976). The discussion of Lincoln occurs in an article on Justice Holmes, and Berns concludes that Holmes failed in his obligation as teacher and, therefore, as statesman and Justice.