

TRIBALISM AND DEMOCRACY

SETH DAVIS*

ABSTRACT

Americans have long talked about “tribalism” as a way of talking about their democracy. In recent years, for example, commentators have pointed to “political tribalism” as what ails American democracy. According to this commentary, tribalism is incompatible with democracy. Some commentators have cited Indian Tribes as evidence to support this incompatibility thesis, and the thesis has surfaced within federal Indian law and policy in various guises up to the present day with disastrous consequences for Indian Tribes. Yet much of the talk about tribalism and democracy—within federal Indian law, and also without it—has had little to do with actual tribes. Looking at the histories and practices of Indian Tribes calls the premises of the incompatibility thesis into question. Indeed, many examples of Indian Tribalism reflect the democratic practices that critics of “political tribalism” praise. First, Indian Tribal self-government safeguards democracy by ensuring that Indians not only are governed (by the federal and state governments), but also have the opportunity to govern. Second, Indian Tribal governance is compatible with democracy because it depends in no small measure upon discourse and negotiation, not upon coercion and zero-sum gaming. And third, the persistence of Indian Tribes in the face of the coercion and violence of colonialism challenges Americans to honor the democratic ideal of consent of the governed. In all three ways, Indian Tribalism and American democracy are compatible.

* Professor of Law, University of California, Berkeley School of Law. Email: sethdavis@berkeley.edu. I would like to thank the participants at workshops at the University of California, Berkeley School of Law and the University of California, Irvine School of Law, as well as Tessa Davis, Michele Goodwin, Lisa Sandoval, and Greg Shaffer, for their helpful comments.

TABLE OF CONTENTS

INTRODUCTION	433
I. "DEMOCRACY" AND "TRIBALISM"	438
A. <i>Democracy</i>	438
B. <i>Tribalism</i>	441
II. THE INCOMPATIBILITY THESIS	445
A. <i>Political Tribes and Democracy</i>	445
B. <i>The Incompatibility Thesis in Federal Indian Law</i>	449
1. <i>Within U.S. Territory, but Outside American</i> <i>Democracy?</i>	450
2. <i>Indian Tribalism as a Threat to American</i> <i>Democracy</i>	453
a. <i>The Incompatibility Thesis Within the History of</i> <i>Federal Indian Law</i>	453
b. <i>The Democratic Deficit Claim as a Modern</i> <i>Example of the Incompatibility Thesis</i>	456
C. <i>The Incompatibility Thesis's Essentialism</i>	461
III. THE COMPATIBILITY THESIS: INDIAN TRIBALISM AND AMERICAN DEMOCRACY	464
A. <i>Indian Tribalism and Self-Government</i>	465
1. <i>Rights, Powers, and Votes</i>	465
2. <i>The Democratic Deficit in American Colonialism</i>	467
3. <i>Indian Tribalism and the Structure of American</i> <i>Democracy</i>	468
a. <i>Participatory Democracy</i>	469
b. <i>Democratic Pluralism: Tribes and/as Interest</i> <i>Groups</i>	470
c. <i>Tribes and National Democratic Deliberations</i>	473
B. <i>Democratic Practices of Negotiation and Compromise in</i> <i>Indian Country</i>	477
1. <i>Negotiated Federalism</i>	477
2. <i>Negotiations in Indian Country</i>	479
C. <i>Tribalism, Democracy, and Historical Memory</i>	482
CONCLUSION	486

INTRODUCTION

There is a specter haunting American democracy—the “retreat to tribalism.”¹ “Tribalism,” it seems, is to blame for authoritarianism,² and for moral absolutism,³ and even for the questioning of truth itself.⁴ To describe “American politics today requires a word as primal as ‘tribe’ to get at the blind allegiances and huge passions of partisan affiliation.”⁵ Destructive “tribalism,” commentators warn, is hardwired within the human brain.⁶ Tribes are “badges of identity, not of thought.”⁷ Tribes play “zero-sum politics.”⁸ They

1. David Brooks, *The Retreat to Tribalism*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/opinion/the-retreat-to-tribalism.html> [<https://perma.cc/4MYH-DLQZ>].

2. Amy Chua, *The Destructive Dynamics of Political Tribalism*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/opinion/destructive-political-tribalism.html> [<https://perma.cc/MDM5-843V>]; see AMY CHUA, POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS 12-13 (2018).

3. SE Cupp, *Tribalism Isn't the Real Reason America Is Divided*, CNN: OPINION (Nov. 13, 2019, 8:16 AM), <https://www.cnn.com/2019/11/13/opinions/political-tribalism-not-reason-america-divided-cupp/index.html> [<https://perma.cc/NC6B-9S95>] (“Tribalism, of course, is a compelling argument, considering that we’ve reduced our political beliefs to untenable absolutisms, have sacrificed compromise and comity for purity and are subjecting each other to increasingly unproductive tests of loyalty.”).

4. See Tom Wheeler, *Technology, Tribalism, and Truth*, BROOKINGS (Feb. 7, 2020), <https://www.brookings.edu/blog/techtank/2020/02/07/technology-tribalism-and-truth/> [<https://perma.cc/TY6A-BHVW>]; see also Paul Krugman, *Economic Tribalism*, N.Y. TIMES (May 5, 2012, 10:39 AM), <https://krugman.blogs.nytimes.com/2012/05/05/economic-tribalism/> [<https://perma.cc/8XKQ-79Q4>]; Paul Krugman, *Tribalism, Biology, and Macroeconomics*, N.Y. TIMES (Jan. 2, 2014, 8:37 AM), <https://krugman.blogs.nytimes.com/2014/01/02/tribalism-biology-and-macro-economics> [<https://perma.cc/P3NY-S8Z5>].

5. George Packer, *A New Report Offers Insights into Tribalism in the Age of Trump*, NEW YORKER (Oct. 13, 2018), <https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump> [<https://perma.cc/AW6U-VJE3>].

6. See JONAH GOLDBERG, SUICIDE OF THE WEST: HOW THE REBIRTH OF TRIBALISM, POPULISM, NATIONALISM, AND IDENTITY POLITICS IS DESTROYING AMERICAN DEMOCRACY 10 (2018) (“[O]ur natural condition isn’t merely poor, it’s *tribal*.”); see also Andrew Sullivan, *America Needs a Miracle*, N.Y. MAG.: INTELLIGENCER (Jan. 31, 2020), <https://nymag.com/intelligencer/2020/01/andrew-sullivan-america-needs-a-miracle.html> [<https://perma.cc/4TZH-QEJN>] (“[H]uman beings are tribal, psychologically primed to recognize in-group and out-group before the frontal cortex gets a look-in.”); Jonathan Haidt, *The Age of Outrage*, CITY J. (Dec. 17, 2017), <https://www.city-journal.org/html/age-outrage-15608.html> [<https://perma.cc/3GGE-RQ6X>] (arguing that when young people learn about intersectionality it “turn[s] on their ancient tribal circuits, preparing them for battle”).

7. Packer, *supra* note 5.

8. Andrew Sullivan, *America Wasn't Built for Humans*, N.Y. MAG.: INTELLIGENCER (Sept. 19, 2017), <https://nymag.com/intelligencer/2017/09/can-democracy-survive-tribalism>.

treat other peoples “as some kind of alien.”⁹ Democracy requires that we transcend these tribal attitudes and practices.¹⁰ As the Founding Fathers well knew,¹¹ “tribalism” and democracy are incompatible.¹²

In America today, talk of “tribalism’s” incompatibility with democracy often ignores American Indian Tribes.¹³ There is, however, a long history of American leaders treating Indian Tribalism as a threat to American democracy. The signers of the Declaration of Independence offered the Crown’s support for “merciless Indian Savages” as one of their reasons for declaring independence.¹⁴ Such racist tropes have been a persistent feature of U.S. history. Like the signers of the Declaration, President Ulysses S. Grant saw Indian Tribalism as a threat when he authorized the deputizing of Christian missionaries as Indian agents.¹⁵ When the 83rd Congress decided to pursue a policy of terminating Indian Tribal governments, it too saw Indian Tribalism as a threat.¹⁶

html [<https://perma.cc/9THZ-JH4H>].

9. *Id.*

10. See Wheeler, *supra* note 4 (“Democracy requires us to overcome that tribalism ... in the pursuit of a greater good.”); see also GOLDBERG, *supra* note 6, at 10, 13.

11. Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/> [<https://perma.cc/W7CF-WQM2>] (explaining that the Founding Fathers believed that political tribalism threatened the constitutional order); Sullivan, *supra* note 8 (“Tribalism was an urge our Founding Fathers assumed we could overcome.”).

12. See Elizabeth Rata, *Discursive Strategies of the Maori Tribal Elite*, 31 CRITIQUE ANTHROPOLOGY 359, 361 (2011); see also Jonathan Rauch, *Have Our Tribes Become More Important than Our Country?*, WASH. POST (Feb. 16, 2018, 1:41 PM), https://www.washingtonpost.com/outlook/have-our-tribes-become-more-important-than-our-country/2018/02/16/2f8ef9b2-083a-11e8-b48c-b07fea957bd5_story.html [<https://perma.cc/P8D9-DARZ>]; Elizabeth Rata, *Tribalism, Democracy Incompatible*, N.Z. HERALD (Jan. 29, 2013, 5:30 AM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10861949 [<https://perma.cc/N7DS-B8YK>].

13. But not always. See Sullivan, *supra* note 8 (referring to American Indian Tribes as examples of “primitive tribes” whose historical interactions shed light on political dysfunction today).

14. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) (complaining that the Crown had sought “to bring on the inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction of all Ages, Sexes and Conditions”).

15. See 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 515-16 (1984).

16. See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

These “savage anxieties”¹⁷ are reflected in federal Indian law, that body of federal law concerning American Indian Tribes. Indians have persisted as self-governing peoples notwithstanding federal policies designed to assimilate them.¹⁸ Indian Tribes’ powers of self-government do not derive from the U.S. Constitution.¹⁹ As pre-constitutional sovereigns, moreover, Indian Tribes are not bound by the Bill of Rights,²⁰ and may have structures of government and substantive laws that are unfamiliar to students of American democracy.²¹ Tribal governance, American judges have worried, suffers a democracy deficit and therefore warrants a “chary” attitude from federal lawmakers.²² As Justice Anthony Kennedy put it, because “[t]he Constitution is based on a theory of original, and continuing, consent of the governed,” there is a serious constitutional question regarding whether the federal government may subject a U.S. citizen to Tribal sovereignty unless that citizen is also a Tribal member.²³ Such jurisdiction would be anomalous, or so Justice Kennedy reasoned.²⁴ Taken for all that view might suggest, Indian Tribalism and American democracy are incompatible.

This Article critiques the incompatibility thesis. Americans have long talked about “tribalism” as a way of talking about their

17. See generally ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* (2012).

18. See *id.* at 8-9.

19. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

20. See *id.*

21. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1050-51 (2007).

22. *Native Vill. of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380, 1389 (D. Alaska 1988), *rev'd*, 918 F.2d 797 (9th Cir. 1990); see *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that an Indian Tribe lacked criminal jurisdiction over an Indian who was not a citizen of that Nation), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, United States v. Lara, 541 U.S. 193, 199-200 (2004); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 115 (2002) (discussing but not agreeing with the view that Tribal governance suffers a “democratic deficit”); Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531, 1606 (2019) (considering “the democratic deficit problem of unfranchised non-Indian (or even nonmember Indian) landowners” in the context of Tribal land tenure reform).

23. *Lara*, 541 U.S. at 212 (Kennedy, J., concurring); see *Duro*, 495 U.S. at 693 (concluding that the Court should not “adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them”).

24. *Lara*, 541 U.S. at 212 (arguing it would be “unprecedented” to recognize Tribal criminal jurisdiction over a nonconsenting U.S. citizen).

democracy. Very little of this talk—within federal Indian law, and also without it—has had much to do with the actual practices of Indian Tribes. Just as the “primitive” Indian Tribes ruled by “crude customs” of the Supreme Court’s jurisprudence are a myth,²⁵ so too the “primal” tribes ruled by “huge passions,”²⁶ not by thought,²⁷ are a myth of the contemporary commentariat. The politics of actual Indian Tribes are consistent with a conception of democracy as a process of arriving at collective decisions based upon mutual compromise and respect.²⁸ This process requires empowering groups to contest claims about the common interest through discourse and negotiation, as well as historical memory about the times in which those contests have been resolved through coercion and violence.

Thus, this Article argues that Indian Tribalism is compatible with American democracy. Indian Tribal sovereignty ensures opportunities for self-government. Indian Tribal governance is compatible with democracy because it depends in no small measure upon discourse and negotiation, not upon coercion and zero-sum gaming, as the Supreme Court recently recognized in *McGirt v. Oklahoma*.²⁹ Indian Tribalism is part of the history of American democracy. The persistence of Indian Tribes as self-governing peoples challenges Americans to honor the democratic ideal of consent of the governed. In all three ways, Indian Tribalism and American democracy are compatible.³⁰

25. *United States v. Sandoval*, 231 U.S. 28, 39 (1913); see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 262 n.146 (demonstrating that the Supreme Court in *Sandoval* created a racist myth of primitiveness when discussing the culture and lifeways of the Pueblo Indians).

26. Packer, *supra* note 5.

27. See Sullivan, *supra* note 8 (“One of the great attractions of tribalism is that you don’t actually have to think very much.”).

28. See *infra* Part III.

29. See 140 S. Ct. 2452, 2467 (2020) (recognizing that the Creek Nation is a thriving democracy and that it and the State of Oklahoma have a history of successful negotiations).

30. This Article builds upon Joseph Singer’s argument for Tribal sovereignty based upon democracy. Joseph W. Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 13 (2013). It builds upon the work of Christine Mungai, Lawrence Rosen, and Blake Smith, who have also critiqued the discourse of political tribalism. See Lawrence Rosen, *‘Tribalism’ Gets a Bum Rap*, 32 ANTHROPOLOGY TODAY 3, 3 (2016) (arguing that “by seeing tribes as closed, pre-modern, and pugnacious we distort our political differences and risk further blundering in foreign wars”); Christine Mungai, *Pundits Who Decry ‘Tribalism’ Know Nothing About Real Tribes*, WASH. POST. (Jan. 30, 2019, 10:21

This Article's overarching aim is to call "tribalism" into question as a tool for thinking about what ails American democracy.³¹ At times in the commentary, "tribe" and "tribalism" seem empty signifiers that tell us nothing because they try to tell us too much about human groups. When commentators try to give these terms content—when, for example, some of them cite Indian Tribes as examples—they fail to take seriously actual Tribal polities and histories. The discourse of "tribalism" versus "democracy" has justified ongoing practices of colonial rule and denied the ways in which Indian Tribes are part of American democracy. Indian Tribal politics have reflected the very sort of democratic attitudes and practices that commentators embrace. Invoking abstract conceptions of "tribalism" does little to help us think through hard questions about the place of Indian Tribes within American democracy, much less questions about the dysfunctions of American democracy.

The argument unfolds in three Parts. Part I defines "tribalism" and "democracy" as contested and contestable terms, and suggests, therefore, that we should be skeptical of conceptual generalizations about them. Focused analysis of how particular societies act and interact is a more useful methodology in thinking through problems

AM), https://www.washingtonpost.com/outlook/pundits-who-decry-tribalism-know-nothing-about-real-tribes/2019/01/29/8d14eb44-232f-11e9-90cd-dedb0c92dc17_story.html [<https://perma.cc/C3TT-Z4GZ>] (arguing that the term "tribal" evokes an image that "has much more to do with Western stereotypes than how people who have a tribal identity behave"); Lawrence Rosen, *A Liberal Defense of Tribalism*, FOREIGN POL'Y (Jan. 16, 2018), <https://foreignpolicy.com/2018/01/16/a-liberal-defense-of-tribalism-american-politics/> [<https://perma.cc/8PNT-DNEM>] (arguing "that most commentators vastly misunderstand the nature of tribes"); Blake Smith, *Who's Afraid of Tribalism?*, QUILLETTE (June 1, 2018), <https://quillette.com/2018/06/01/whos-afraid-tribalism/> [<https://perma.cc/5PNF-75DG>] (arguing that "[t]racing the history of 'tribalism' from its origins in the nineteenth century to its central place in today's headlines reveals how powerful insiders have sought to delegitimize their opponents by presenting them as irrational primitives"). In exploring how the discourse of tribalism has surfaced within federal Indian law, moreover, this Article adds to the literature on what various visions of democracy might entail for particular areas of law. *See, e.g.*, David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1699 (2005) (asking, "What constraints does a commitment to democracy place on law enforcement?"); Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 585 (2018) (arguing that the "lack of clarity over what 'energy democracy' entails presents a troubling hurdle to" energy law reform).

31. My argument is not that a common use of "tribalism" should be abandoned simply because it is offensive, although my discussion of the history of the discourse of tribalism lends support to such an argument. *See infra* Part II.B (discussing "tribalism").

of democratic governance.³² Part II sketches the thesis that tribalism and democracy are incompatible, shows how this thesis surfaces within federal Indian law, and critiques the thesis. Part III makes the affirmative case that Indian Tribalism is consistent with American democracy. The Article concludes by arguing that commentators should abandon the trope of “tribalism” in their discussions of the dysfunctions of democracy.

I. “DEMOCRACY” AND “TRIBALISM”

The incompatibility thesis holds that tribalism is a threat to democracy.³³ But what is “democracy”? And what is the “tribalism” that threatens it? “Democracy” is what W.B. Gallie called an “essentially contested concept[],”³⁴ with descriptive and evaluative components and disagreement about what the core cases are.³⁵ On one conception, some Tribal societies may be more democratic than the United States itself.³⁶

A. *Democracy*

Many people agree that democracy is a good thing, but disagree about what democracy means. The answer is that it is contestable. It is common to say that democracy is a political system that requires consent of the governed, but how is that consent sought?³⁷ Perhaps democracy requires the regular selection of representatives

32. See *infra* notes 53-54 and accompanying text.

33. See *infra* Part II.

34. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1955).

35. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 149 (2002) (“One way of getting at Gallie’s idea is to say that the term ‘essentially’ refers to the *location* of disagreement or indeterminacy: it is contestation at the core, not just at the borderlines or penumbra of a concept.”).

36. See, e.g., Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 833 (2014) (“[T]ribal governance affords extensive opportunities for democratic participation that eclipse opportunities in state and federal governments.”).

37. See DAVID STASAVAGE, *THE DECLINE AND RISE OF DEMOCRACY: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY* 4 (2020) (defining democracy as a political system “in which those who rule have been obliged to seek consent from those they govern” and distinguishing between how that consent is sought in early democracies and in modern democracies).

in competitive elections in which every citizen can vote.³⁸ Or maybe it means local self-determination and grassroots organization.³⁹ There are other, more substantive definitions. Perhaps democracy is a way of living with each other. Maybe, for instance, it means minimum standards for how we interact, ranging from norms of equal concern and respect to respect for autonomy and free exchange.⁴⁰

The incompatibility thesis suggests a vision of democracy that includes how we relate to each other. In *Against Identity Politics: The New Tribalism and the Crisis of Democracy*, for example, Francis Fukuyama is concerned that “tribalism” threatens a way of living with each other that is necessary for democracy.⁴¹ In particular, he argues that “[d]emocratic societies are fracturing into segments based on ever-narrower identities, threatening the possibility of deliberation and collective action by society as a whole.”⁴² Thus, Fukuyama worries that “tribalism” undermines democratic attitudes and democratic practices necessary for democracies to function.

Which attitudes and practices are democratic? This answer too is contestable.

Of Greek origin, the term originally referred to a political arrangement under which the people are the “governing body.”⁴³ As Aristotle put it, “[W]hat is held to be democracy or rule of the people above all is what results from the sort of justice that is agreed to be

38. See, e.g., William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 397 (1988) (describing the liberal conception that “democracy consists of holding regular elections and hence providing a popular veto on recent legislative action,” and distinguishing this conception from the populist one in which “democracy consists of embodying the ‘will of the people’ into law”).

39. See, e.g., Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 63 (2002) (arguing that “grassroots organization ... is crucial to re-invigorating American democracy”).

40. For a conception of democracy along these lines applied to property law, see Joseph William Singer, Essay, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1051-55 (2009).

41. Francis Fukuyama, *Against Identity Politics: The New Tribalism and the Crisis of Democracy*, 97 FOREIGN AFFS. 90, 93 (2018).

42. *Id.*

43. ARISTOTLE, POLITICS bk. III, at 71-72 (Carnes Lord trans., Univ. of Chi. Press 2d ed. 2013).

democratic, which is all having equal share on the basis of number.”⁴⁴ Under a democratic system, there is “election to all offices from among all,” with most offices “of short duration”; governance is based upon the “rule of all over each, and of each over all in turn”; and “the assembly,” not specific individuals, have “authority over all matters or the greatest.”⁴⁵ Thus understood, democracy connotes direct rule by citizenry.

If direct rule is what democracy requires, then the United States government is not democratic. Rather, the United States is a representative government that selects representatives through elections and develops policy through public administration.⁴⁶ Indeed, on this definition, some American Indian Tribal governments are more democratic than the United States.⁴⁷

The modern definition of “democracy,” however, is not limited to direct democratic rule by popular assemblies. Rather, “democracy” may refer to principles of representative government and popular sovereignty.⁴⁸ Montesquieu defined democracy as “[w]hen the body of the people [possesses] the supreme power” and exercises its sovereignty through voting for government officials.⁴⁹ This definition finds expression in the U.S. Constitution’s vision of one “We the People”⁵⁰ as sovereign, and in Tocqueville’s description of the U.S. political system: “The people rule the American political world as God rules the universe.”⁵¹ Thus, democracies are based upon consent of the governed. Modern democracy is self-government of the people but does not require direct rule by them.

It may, however, require particular attitudes and practices. At least, that is the concern of commentators on political tribalism. At

44. *Id.* bk. VI, at 174.

45. *Id.*, at 173.

46. *See, e.g.*, Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 714 (2001).

47. *See* Singel, *supra* note 36, at 833 (arguing that Tribal governance is more participatory and therefore more democratic).

48. *See* Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is ... and Is Not*, 2 J. DEMOCRACY 75, 76-77 (1991).

49. BARON DE MONTESQUIEU (CHARLES DE SECONDAT), *THE SPIRIT OF THE LAWS* 8-9 (Thomas Nugant trans., Colonial Press 1900) (1748).

50. U.S. CONST. pmb1.

51. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 97 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835-40).

its core, democracy requires an attitude of mutual respect and practices of deliberation, negotiation, and collective action.⁵² Tribalism threatens these attitudes and practices, or so the concern runs.

To take this concern seriously requires, attention to actual practices and interactions. Methodologically, as Edward Rubin has argued, a more useful approach than conceptual analysis is “microanalysis of the actual interactions between the government and its citizens.”⁵³ This methodology requires an “effort to describe human activities on an operational level, to trace the way that individuals actually interact without relying on overly conceptual generalizations about either society or individual behavior.”⁵⁴ While this Article does not offer a microanalysis of a particular Indian Tribal Nation’s history and practices, it argues that consideration of actual histories, practices, and politics of Indian Tribal Nations calls into question premises of the incompatibility thesis.

B. Tribalism

Thus, this Article questions the usefulness of abstract conceptions of “tribalism” as much as it questions abstractions about democracy. The incompatibility thesis uses the term “tribalism” sweepingly to refer to groups of human beings tied together by common interests.⁵⁵ Tribalism, the thesis presumes, is a potential feature of all human groupings.⁵⁶ It is therefore useful to compare, say, Indian Tribes with the Democratic and Republican parties,⁵⁷ or street gangs with megachurches.⁵⁸ As one commentator ascribed, “There are hip-hop and country-music tribes; bros; nerds; Wasps; Dead Heads and

52. See Fukuyama, *supra* note 41, at 93; see also *infra* Part II.A (specifying different types of democratic attitudes and practices that commentators have discussed).

53. Rubin, *supra* note 46, at 791-92.

54. *Id.* at 713; see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425 (1996) (describing microanalysis as “refer[ring] to the postmodern emphasis on the particular and its corresponding distrust of generalization”).

55. See *supra* notes 3-6 and accompanying text.

56. See, e.g., Sullivan, *supra* note 6.

57. Sullivan, *supra* note 8.

58. See CHUA, *supra* note 2, at 149-53.

Packers fans; Facebook groups.”⁵⁹ This sort of abstraction turns “tribe” into little more than a stand-in for any group and “tribalism” into little more than an epithet.

Originally, the term had a precise meaning. The word “tribe” stems from the Latin *tribus*, which did not refer generally to groups of human beings with common interests, but instead to units of voting and public administration within ancient Rome.⁶⁰

Within the modern era, popular uses of the terms “tribe” and “tribalism” can be traced back to European colonialism and anthropology.⁶¹ The incompatibility thesis’s use of these terms to refer to “primal”⁶² forms of human organization has many of the same problems as the anthropological uses of the terms during the nineteenth and twentieth centuries. The association of “tribe” and “tribalism” with primitiveness emerged in the sixteenth and seventeenth centuries with European colonialism.⁶³ Enlightenment Era thinkers developed the evolutionary claim that Tribal societies were less advanced than European societies and existed “outside the pale of civil society”⁶⁴—a claim echoed in assertions about Indian Tribalism’s incompatibility with democracy today. In 1877, Lewis Henry Morgan developed this claim into a theory of the evolution of human societies from “savagery” towards “civilization.”⁶⁵ For much of the twentieth century, anthropologists used the term “tribe” as a unit of analysis.⁶⁶ And during this period, “tribalism was understood as the attribute of tribes and of tribesmen who demonstrate loyalty and adherence to tribal ways of doing things.”⁶⁷

59. Sullivan, *supra* note 8.

60. David Sneath, *Tribes*, in *THE CAMBRIDGE ENCYCLOPEDIA OF ANTHROPOLOGY* (F. Stein et al. eds., 2016), <https://www.anthroencyclopedia.com/entry/tribe> [<https://perma.cc/X7L9-6TY5>].

61. See Elizabeth Colson, *Political Organization in Tribal Societies: A Cross-Cultural Comparison*, 10 *AM. INDIAN Q.* 5, 5-6 (1986).

62. Packer, *supra* note 5.

63. See Malcolm Yapp, *Tribes and States in the Khyber, 1838-42*, in *THE CONFLICT OF TRIBE AND STATE IN IRAN AND AFGHANISTAN* 150, 154 (Richard Tapper ed., 1983).

64. *Id.*

65. LEWIS H. MORGAN, *ANCIENT SOCIETY* 102-03 (1877).

66. See, e.g., A.R. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 15 (1952); Marshall D. Sahlins, *The Segmentary Lineage: An Organization of Predatory Expansion*, 63 *AM. ANTHROPOLOGIST* 322, 325 (1961).

67. Peter P. Ekeh, *Social Anthropology and Two Contrasting Uses of Tribalism in Africa*, 32 *COMPAR. STUD. SOC’Y & HIST.* 660, 687 (1990).

The incompatibility thesis emerged in the twentieth century as a way of talking about threats to liberalism. As Blake Smith has explained, this usage crystallized in the work of Karl Popper,⁶⁸ who contrasted the “closed society” with the “open society.”⁶⁹ Tribal societies are those in which an individual “will rarely find himself in the position of doubting how he ought to act.”⁷⁰ Such societies are closed. By contrast, liberal democracies, “in which individuals are confronted with personal decisions,” are open.⁷¹ Contrasting “early Greek tribal society” with the Athenian Empire, Popper argues “that tribalist exclusiveness and self-sufficiency could be superseded only by some form of imperialism.”⁷² Popper thus drew the outlines of contemporary usages of the term “tribalism” in the incompatibility thesis: Tribalism is an inherent tendency towards group-think in human societies that precludes individual thought and must be continually be transcended.⁷³

Ultimately, however, anthropologists began to question the term “tribe” as a tool of analysis.⁷⁴ Even Popper acknowledged that “there is ... no uniformity in tribalism” and “no standardized ‘tribal way of life.’”⁷⁵ By the 1960s, the terms “tribe” and “tribalism” had become fraught for the largely white and Euro-American anthropological profession to use, given antiracist and decolonial struggles.⁷⁶ Conceptually, moreover, the term had become the subject of “massive disagreement.”⁷⁷ As Elizabeth Colson wrote in 1968, “We use the term [tribe] in many ways for many different phenomena

68. Smith, *supra* note 30.

69. KARL R. POPPER, 1 *THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO* 173 (4th ed. 1963).

70. *Id.* at 172.

71. *See id.* at 173.

72. *Id.* at 181.

73. *See* Smith, *supra* note 30 (arguing that recent commentary on tribalism descends from Popper’s *The Open Society and Its Enemies*). Smith explains that “[t]he end of the Cold War and the apparent triumph of liberal democratic capitalism brought the Popperian language of ‘tribalism’ into the mainstream of political commentary.” *Id.* (citing as an example BENJAMIN BARBER, *JIHAD V. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* (1996)).

74. *See* Ekeh, *supra* note 67, at 687.

75. POPPER, *supra* note 69, at 172.

76. *See* Ekeh, *supra* note 67, at 660.

77. Elizabeth Colson, *Contemporary Tribes and the Development of Nationalism, in* *ESSAYS ON THE PROBLEM OF TRIBE* 201, 201 (June Helm ed., 1968).

and for many different purposes.”⁷⁸ In that same year, Morton Fried argued that “what are generally designated by anthropologists as tribes represent neither a definite type of society nor a definite stage of evolution.”⁷⁹

As a result of these critiques, “social anthropologists more or less agreed to abandon the use of the *tribe* and of its more obvious derivative *tribalism*,”⁸⁰ although its usage has persisted in popular discourse. Within Africa, for example, the term “tribalism” may be one of opprobrium in the same way that it is a term of opprobrium within the incompatibility thesis.⁸¹ In this usage, “tribalism refers to obnoxious modes of behavior in multiethnic circumstances that threaten and endanger normal coexistence.”⁸²

Within the United States, the term “tribe” has not only a popular meaning, but also a legal and political one. Federal law recognizes “Indian tribes” as preconstitutional sovereigns separate from the federal government.⁸³ Under *Montoya v. United States*, an Indian “tribe” is defined as “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”⁸⁴ Critics of this definition see it “as [resting upon] generalized ethnological categories,”⁸⁵ the sorts of categories that anthropologists have largely abandoned.

Many Indians, however, use “tribe” as well as “nation” to refer to their political communities.⁸⁶ In this usage, Indian Tribalism is “best represented by the concept of ‘tribal sovereignty.’”⁸⁷ It denotes

78. *Id.*

79. André Bételle, *The Concept of Tribe with Special Reference to India*, 27 EUR. J. SOCIO. 297, 305 (1986) (citing M. Fried, *On the Concepts of “Tribe” and “Tribal Society,”* in ESSAYS ON THE PROBLEM OF TRIBE 15 (J. Helm ed., 1968)).

80. Ekeh, *supra* note 67, at 660.

81. *See infra* Part II.A.

82. Ekeh, *supra* note 67, at 688.

83. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975).

84. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

85. Gerald Torres & Kathryn Milun, *Translating Yonnonديو by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 634.

86. Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 358 (2003).

87. *Id.* at 360.

“the efforts of indigenous groups to define their political and cultural identity as separate from that of the larger nation-state.”⁸⁸

Thus, “tribe” and “tribalism” are contested concepts,⁸⁹ though one would not realize it from reading the commentary on tribalism’s supposed incompatibility with democracy.

II. THE INCOMPATIBILITY THESIS

This Part sketches the incompatibility thesis, shows how it surfaces within federal Indian law, and critiques the thesis’s conceptions of Indian Tribalism and democracy.

A. *Political Tribes and Democracy*

Ours is a time of great anxiety among the proponents of liberal democracy. This anxiety springs from many sources. With rising inequality, for instance, comes the concern that “democracy [will] give[] way to oligarchy.”⁹⁰ Democratic politics has become dysfunctional as a result of partisan polarization.⁹¹ And democratic norms—mutual respect and toleration, a willingness to compromise, and the like—are eroding.⁹² The “true anthem of [liberal democracy] is: ‘We can work it out.’”⁹³ Yet it seems increasingly likely that we cannot.

Why is that? One answer is “tribalism.” The incompatibility thesis holds that various social groups within the nation state have become “tribal” and that their “tribalism” threatens liberal democracy.⁹⁴ Such groups may include not only ethnic groups and religious communities, but also political parties.⁹⁵ Under the incompatibility

88. *Id.* at 359.

89. Some concepts are contested and contestable without being “essentially contested concepts.” See Waldron, *supra* note 35, at 148-50. “Tribe” and “tribalism” seem to be contested without being essentially contestable, although their sweeping usages in the literature on political tribalism may suggest otherwise.

90. TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* 15 (2018).

91. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 2 (2018).

92. *See id.* at 124, 134, 143, 174-75, 213.

93. KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* 103 (2018).

94. *See* Fukuyama, *supra* note 41, at 93; Packer, *supra* note 5.

95. *See* Matt Lewis, *America’s Political Parties Are Just Tribes Now*, *DAILY BEAST* (Apr. 13, 2017, 5:56 PM), <https://www.thedailybeast.com/americas-political-parties-are-just-tribes->

thesis, political parties, like tribes, demand strict identification with the group and view their relationships with other groups as a zero-sum competition.⁹⁶ Similar to tribes, political parties feel constantly under threat from others and are unable to reach compromise based upon the mutual give-and-take that democracy requires.⁹⁷ This political tribalism is difficult for democracies to resolve, not only because “tribalism” is a “primal”⁹⁸ instinct, but also because in democracies today, an increasingly diverse set of groups feels constantly under threat, and none are able to seize a stable base of power from which to forge compromise.⁹⁹

The core idea seems to be that “tribal” attitudes and practices clash with “democratic” attitudes and practices.¹⁰⁰ Certain attitudes—thinking of ourselves as individuals, viewing our political opponents as human beings who are due equal concern and respect, and transcending loyalty to our particular group—are characteristically democratic. And certain practices, such as deliberating and negotiating with our opponents rather than seeking to vanquish them, are democratic. Tribalism is incompatible with these attitudes and practices.

The incompatibility thesis begins with the claim that human beings naturally form tribes and hold “tribal” attitudes. Humans have a “tribal instinct.”¹⁰¹ Our brains are hardwired for it.¹⁰² We instinctually need to belong to groups.¹⁰³ And we “will sacrifice, and even kill and die,” for our tribes.¹⁰⁴ Tribes, moreover, demand such sacrifice. The incompatibility thesis presumes that tribal organizations require uncompromising loyalty and identification with the

now [<https://perma.cc/RD5E-C33Q>].

96. See Sullivan, *supra* note 8.

97. See Packer, *supra* note 5.

98. *Id.*

99. *Id.*

100. While commentators do not all subscribe to the same set of arguments in favor of the thesis, and some might very well reject particular arguments or implications of those arguments, the premises sketched here appear repeatedly throughout the commentary.

101. CHUA, *supra* note 2, at 5; see GOLDBERG, *supra* note 6, at 62 (“Humans were not designed to live in the market order of contracts, money, or impersonal rules, never mind huge societies governed by a centralized state.”).

102. See CHUA, *supra* note 2, at 40.

103. See *id.*

104. *Id.* at 1.

tribe.¹⁰⁵ Tribal loyalties are exclusive: you are either with us or against us.¹⁰⁶ While tribal membership can be a source of pride,¹⁰⁷ tribes think in “us-versus-them” terms whenever they believe they are under threat.¹⁰⁸ When in power, tribes “do not give up their dominance easily.”¹⁰⁹ When out of power, tribes close ranks in response to threats.¹¹⁰ The result is a zero-sum game among every tribe.¹¹¹

“Tribalism” subsumes the individual within a group. Tribes are “badges of identity, not of thought.”¹¹² Those who wear a tribal badge do not think for themselves. Instead, their group thinks for them.¹¹³ That is true no matter one’s level of education; in fact, tribal bias may be more likely among the highly educated.¹¹⁴ Thus, tribalism “distorts the way we think and feel.”¹¹⁵ As one much-cited study found, “Once a country has become tribalized, debates about contested issues ... become shaped by larger tribal identities. Policy debate gives way to tribal conflicts.”¹¹⁶

In sum, according to the incompatibility thesis, there is an instinct that leads humans naturally to organize into groups that suppress individual thought and treat other groups as enemies to be

105. *Id.* at 5; Packer, *supra* note 5 (“Tribes demand loyalty, and in return they confer the security of belonging.”).

106. *See* Packer, *supra* note 5.

107. CHUA, *supra* note 2, at 191 (“People want to see their own tribe as exceptional, as something to be deeply proud of; that’s what the tribal instinct is all about.”).

108. Packer, *supra* note 5 (“To give an inch to the other tribe makes you a sucker.”).

109. CHUA, *supra* note 2, at 61.

110. *See id.* at 60-61.

111. GOLDBERG, *supra* note 6, at 10-12; Packer, *supra* note 5 (“When politics becomes a perpetual tribal war, ends justify almost any means and individuals are absolved from the constraints of normal decency.”).

112. Packer, *supra* note 5; *see also* Sullivan, *supra* note 6 (“[H]uman beings are tribal, psychologically primed to recognize in-group and out-group before the frontal cortex gets a look-in.”).

113. Packer, *supra* note 5 (“[Tribes] make thinking unnecessary, because they do it for you, and may punish you if you try to do it for yourself.”).

114. *See* CHUA, *supra* note 2, at 101-02 (“The better informed people are, and the better educated, the more polarized they tend to be on politically controversial factual issues, and the more stubbornly they manipulate new facts to support their tribe’s worldview.”).

115. *Id.* at 41.

116. STEPHEN HAWKINS, DANIEL YUDKIN, MIRIAM JUAN-TORRES & TIM DIXON, HIDDEN TRIBES: A STUDY OF AMERICA’S POLARIZED LANDSCAPE 4 (2018), <https://hiddentribes.us/> [<https://perma.cc/D8PQ-Z29L>].

vanquished. These attitudes and practices are not consistent with democracy, which must transcend them to succeed.

Today, liberal democracies are losing the battle. “Tribalism,” for example, is “corrupting” American politics.¹¹⁷ There are many putative causes, ranging from rising inequality to identity politics.¹¹⁸ Democracy, it turns out, is fragile; it requires maintenance, lest tribalism be reborn.¹¹⁹

Tribal attitudes, commentators warn, threaten the national unity that is necessary for democracy to thrive. Democracy requires that we develop an “Über-tribe that constitutes the nation-state.”¹²⁰ While tribal life subsumes the individual, the nation must subsume the tribe for democracy to work.¹²¹ When “tribalism” “rivals our attachment to the nation as a whole,” democracy is threatened.¹²²

To forge what Amy Chua calls a “super-group”—a national identity larger than tribes, but smaller than all of humanity—is a perilous enterprise.¹²³ Most countries fail to build super-groups.¹²⁴ Perhaps Great Britain achieved it.¹²⁵ Rome did too.¹²⁶ While American democracy continues to struggle to achieve its promise of one “We the People,” that promise is under threat from American tribalism.

Now, perhaps, we should not take these uses of “tribe” and “tribalism” too seriously. Maybe “tribalism” is just a label, and one could substitute “antidemocratic” or “illiberal” for “tribal” without changing the analysis. Some commentary suggests as much.¹²⁷ Even

117. Sullivan, *supra* note 8.

118. Compare GOLDBERG, *supra* note 6, at 307 (“One obvious but partial reason is that the economy has been failing large swaths of Americans.”), with Fukuyama, *supra* note 41, at 90 (using “The New Tribalism” as a synonym for “the rise of identity politics”).

119. GOLDBERG, *supra* note 6, at 66.

120. Sullivan, *supra* note 8.

121. *Id.* (arguing that democracy requires a “core unit of belonging”).

122. *Id.*; see CHUA, *supra* note 2, at 12 (“America’s continued existence as a super-group is under tremendous strain today.”).

123. CHUA, *supra* note 2, at 12; see also Sullivan, *supra* note 8 (“The project of American democracy—to live beyond such tribal identities, to construct a society based on the individual, to see ourselves as citizens of a people’s republic, to place religion off-limits, and even in recent years to embrace a multiracial and post-religious society—was always an extremely precarious endeavor.”).

124. CHUA, *supra* note 2, at 22 (“[F]or a country to be a super-group is extremely rare.”).

125. *Id.*

126. *Id.*

127. In Fukuyama’s analysis, for instance, nothing seems to turn on his use of the term

so, it is worth asking why the commentary uses “tribal” rather than “antidemocratic” or “illiberal.” One commentator has an answer: the word “tribal” is appropriate because of its “primal” connotations.¹²⁸ “Tribalism” cannot, it appears, be so easily separated from a discourse that describes some human societies and the people within in terms of racist stereotypes.¹²⁹

B. The Incompatibility Thesis in Federal Indian Law

Some commentators have pointed to American Indian Tribes as examples to prove the incompatibility thesis. The history of actual Tribes, it is argued, supports the premises of the thesis. For instance, the fact that European settlers “joined Indian society” in North America shows the “captivating” appeal of Indian Tribalism, which speaks to our universal tribal instinct.¹³⁰ This tribal instinct is destructive of democracies, including the United States, where “tribalism” apparently explains the Civil War as well as the rise of authoritarianism today.¹³¹

Such an account is ahistorical. To write of “the centuries in which white Europeans lived alongside Native American tribes” as if these centuries have long since passed, or to assert that “[c]omparatively

“new tribalism.” Fukuyama, *supra* note 41, at 90. Rather, as the title of his article suggests, that term is a label for “identity politics.” *See id.* Although Fukuyama states that “there is nothing wrong with identity politics as such,” his use of “tribalism” underscores his criticisms of identity politics. *See id.* at 100. For recent discussions and arguments that the term “identity politics” as developed in the 1977 Combahee River Collective Statement has been repeatedly misconstrued and mischaracterized, see HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE (Keeanga-Yamahtta Taylor, ed. 2017) (presenting the 1977 statement and commentary by the founding members of the Combahee River Collective); Olúfẹ̀mì O. Táíwò, *Identity Politics and Elite Capture*, BOS. REV. (May 7, 2020), <http://bostonreview.net/race/olufemi-o-taiwo-identity-politics-and-elite-capture> [<https://perma.cc/AF7J-85MW>].

128. *See* Packer, *supra* note 5 (arguing that to describe “American politics today requires a word as primal as ‘tribe’ to get at the blind allegiances and huge passions of partisan affiliation”).

129. *See* Mungai, *supra* note 30 (“The current use of ‘tribal’ is based on a racist stereotype about how groups of such peoples have interacted historically, and even today.”).

130. Sullivan, *supra* note 8; *see also* GOLDBERG, *supra* note 6, at 13 (“[T]he English colonies in North America were vexed by a bizarre problem: Thousands of white European colonists desperately wanted to be Indians, but virtually no Indians wanted to be Europeans.”).

131. Sullivan, *supra* note 8.

few actual tribes exist today,” is to forget Native Nations live alongside non-Natives today.¹³²

The seeds of this sort of talk were sown long ago. For example, in 1823 Chief Justice John Marshall wrote in *Johnson v. M'Intosh* that “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war.”¹³³ Today, one commentator has written that among “primitive societies,” including Indian Tribes, “warfare was *normal*.”¹³⁴ These “discourses of conquest” are nothing if not persistent.¹³⁵

Within federal Indian law, the incompatibility thesis has reflected racist premises about the savagery and exclusionary politics of tribes. Historically, American lawmakers and politicians opined that Indian Tribes threatened American democracy. These ideas underwrote policies of assimilation and termination of Indian Tribes that still shape modern federal Indian law.

Today, some Supreme Court Justices have reasoned that Indian Tribal governance, particularly over nonmembers, is suspect because Indian Tribes suffer a “democratic deficit.”¹³⁶ Although less crisply articulated than the commentary on political tribalism, this “democratic deficit” claim is a version of the incompatibility thesis. By tracing how the incompatibility thesis has surfaced within federal Indian law, we may better understand its history and the problems with its premises.

1. Within U.S. Territory, but Outside American Democracy?

There are 574 Indian Tribes recognized by the United States as preconstitutional sovereigns with the “right ... to make their own laws and be ruled by them.”¹³⁷ Federal recognition entails a

132. *Id.*

133. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

134. GOLDBERG, *supra* note 6, at 31, 33.

135. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHTS: THE DISCOURSES OF CONQUEST* 316-17 (1990) (discussing the persistence of Eurocentric racist beliefs reflected in *Johnson v. M'Intosh*).

136. See *supra* note 22.

137. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

government-to-government relationship between the United States and an Indian Tribe.¹³⁸

In exercising their powers of self-government, Indian Tribes have the authority to enact and enforce civil and criminal laws.¹³⁹ They are clothed with sovereign immunity under federal law.¹⁴⁰ And although Congress stopped the practice of treaty-making in 1871,¹⁴¹ Indian Tribes may enter into intergovernmental agreements with the federal government, states, or cities and counties.¹⁴²

Many Indian Tribes have government structures that would be familiar to students of American democracy, while others do not. For example, approximately 161 Indian Tribes adopted constitutions under the Indian Reorganization Act of 1934 (IRA).¹⁴³ The IRA constitutions create political offices and voting systems that resemble those of states and the federal government.¹⁴⁴ Quite a few Indian Tribes rejected the IRA constitutions,¹⁴⁵ though they may have democratic political systems. Some Indian Tribes, however, have forms of self-government that do not conform to liberal democratic norms.¹⁴⁶ Even so, “tribal governance [often] affords extensive opportunities for democratic participation that eclipse opportunities in state and federal governments.”¹⁴⁷

Citizenship in an Indian Tribe is membership in a political community.¹⁴⁸ Tribal membership criteria are based partly on kinship and descent, though that was not always the case for all Indian Tribes, and in some cases has a lot to do with the history of

138. See Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLA L. REV. 1460, 1462 (2018).

139. See *Duro v. Reina*, 495 U.S. 676, 687-88 (1990).

140. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 808-04 (2014).

141. See, e.g., VINE DELORIA JR. & DAVID E. WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* 61-62 (1999).

142. See *infra* Part III.B.2.

143. CAROLE E. GOLDBERG, REBECCA TSOSIE, KEVIN K. WASHBURN & ELIZABETH RODKE WASHBURN, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 234 (2015).

144. See Riley, *supra* note 21, at 1076-77.

145. See GOLDBERG ET AL., *supra* note 143, at 234.

146. See Riley, *supra* note 21, at 1100 (“In reality, there are tribes with functioning governments and stable economies that do not maintain democracies.”).

147. Singel, *supra* note 36, at 833.

148. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974); Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CAL. L. REV. CIR. 23, 27-29 (2013).

federal Indian policy, not with traditional Tribal norms.¹⁴⁹ As a result, individuals who live within an Indian Tribe's territory may be ineligible to become Tribal citizens, though in some cases they may have other opportunities to participate in Tribal governance.¹⁵⁰

Indian Tribes claim sovereign authority over their territories. Much of Indian Country has been specifically recognized—and thus demarcated as Indian lands—by treaties or other forms of positive law, such as federal statutes or executive orders.¹⁵¹ The territorial aspect of Tribal sovereignty also means that Indian Tribes have the authority to regulate noncitizens on their territories. This territorial sovereignty has fueled many of the democratic deficit critiques of Tribal governance.¹⁵² Tribal regulation of Tribal members (or nonmember Indians) may be one thing, the Supreme Court has reasoned, but Tribal regulation of nonmembers (or non-Indians) may be another thing altogether.¹⁵³ The Court, for example, has held that Indian Tribes may not criminally prosecute non-Indians who commit crimes in Indian territories.¹⁵⁴ This “implicit divestiture doctrine,” so-named because it involves judicial implication of limits on Tribal sovereignty, is an example of the ways in which the federal courts have struggled to make sense of Indian Tribes' place both within U.S. territory and outside the U.S. constitutional order.¹⁵⁵

In sum, Indian Tribes are outside the American democratic system in several senses. They are not bound by the Bill of Rights

149. See, e.g., Berger, *supra* note 148, at 27-28; Matthew L.M. Fletcher, *Race and the American Indian*, 11 WYO. L. REV. 295, 296 (2011).

150. One example is jury duty. See, e.g., Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253, 271-72 (2017) (discussing the Pascua Yaqui Tribe's decision to add nine hundred non-Indians to its jury pools, but noting that a Tribal court may be unable to enforce a jury summons against non-Indians).

151. See Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1799-1800 (2017) (explaining the distinction between aboriginal title, which Indian Tribes may claim based upon historical occupation of their lands, and recognized title, which is based upon positive federal law such as treaties, statutes, or executive orders).

152. See *infra* Part II.B (discussing the incompatibility thesis and versions of the democratic deficit critique).

153. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-12 (1978).

154. *Id.* at 195.

155. N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 380-88 (1994) (discussing the impact *Oliphant* had on implicit divestiture and the conflict over which test should govern its application).

itself or other constitutional provisions that limit the federal government and the states.¹⁵⁶ Tribal citizenship rules limit those U.S. citizens who may become Tribal citizens.¹⁵⁷ Indian Tribes are free to adopt government structures and substantive laws that do not conform to American liberal democratic norms, and there are Tribes that have done so.¹⁵⁸

2. Indian Tribalism as a Threat to American Democracy

A long history exists of federal lawmakers treating Indian Tribalism as a threat to American democracy. Today, that threat is reflected in a suspicion of Tribal governance and the argument that Tribal governance suffers a “democratic deficit.”¹⁵⁹

a. The Incompatibility Thesis Within the History of Federal Indian Law

When declaring their independence from the Crown, the American colonies listed among King George III’s many abuses of power that he had “endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction of all Ages, Sexes and Conditions.”¹⁶⁰ When, during the late nineteenth century, some leaders of the National Farmers’ Alliance, an organization of agrarian populists, called for establishment of democracy in property ownership, they supported the breakup of Indian Tribal land holdings and allotment of Indian lands to white settlers for the sake of “the common good,” an aim that Congress adopted in the Dawes Act of

156. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

157. See, e.g., Matthew L.M. Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 105 (2007) (discussing the U.S. Supreme Court’s concern that Tribalism suffers a democratic deficit in light of the “restrictive requirements of tribal citizenship”).

158. See Riley, *supra* note 21.

159. See *supra* note 22 and accompanying text.

160. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

1887.¹⁶¹ And when Congress terminated federal recognition of over one hundred Indian Tribes during the Termination Era of the 1950s and 1960s, it pointed to the allegedly “communistic traits” of Indian Tribes as a threat to their participation in American democracy.¹⁶²

Thus, the premises of the incompatibility thesis have appeared in federal Indian law and policy over time. In *Johnson v. M’Intosh*, one of the foundational cases of federal Indian law, the Marshall Court described Indian Tribes as “fierce savages” that could not be assimilated and therefore were divested of ultimate title over their lands.¹⁶³ The Court’s description of Tribes as primitive and violent is worth quoting:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.¹⁶⁴

We see here an early example of the premises of the incompatibility thesis: Tribes are primal, violently so. Moreover, they are uncompromising, fierce peoples who cannot be governed. In that way, the thinking goes, Tribes are a threat to the national unity necessary for the American experiment to succeed.

These same premises have reappeared in various federal policies from *Johnson* up to the modern era. Writing in support of the creation of a comprehensive reservation system, the Commissioner of Indian Affairs opined in 1848 that Indians are “inveterately wedded to the savage habits, customs, and prejudices in which [they

161. See Anna di Robilant, *Populist Property Law*, 49 CONN. L. REV. 933, 964 (2017).

162. Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 353-54 (1985); see *supra* note 16.

163. 21 U.S. (8 Wheat.) 543, 587-90 (1823); see Robert A. Williams, Jr., *Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. BAR NEWS & J. 358, 363 (1992) (“*Johnson’s* candid acknowledgment of the racist assumptions supporting the Doctrine of Discovery illuminates how deeply embedded European cultural racism is in the foundations of United States Federal Indian law.”).

164. *Johnson*, 21 U.S. (8 Wheat.) at 590.

have] been reared.”¹⁶⁵ Writing twenty years later, the Commissioner conceded that colonialism had entailed “two hundred and fifty years of injustice, oppression and wrong,” but nevertheless repeated the ideas of tribal primitiveness and savagery.¹⁶⁶ (Colonial oppression, it seems, was not driven by primal instincts and distorted thinking, but instead perpetrated with “cold, calculating and relentless perseverance.”)¹⁶⁷

The Court, for its part, repeated these themes even when ruling for Indians. In *Ex parte Crow Dog*, a case that figures prominently within the modern Court’s jurisprudence concerning the democratic deficit of Indian Tribalism, the Court held that an Indian Tribe, not the federal government, had jurisdiction to address murder between Tribal members on the reservation.¹⁶⁸ To permit a federal prosecution, the Court worried, would be to extend federal law “over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life,” thus trying Indians “according to the law of a social state ... opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.”¹⁶⁹

During the Termination Era of the 1950s and 1960s, federal Indian policy’s version of the incompatibility thesis lumped Indian Tribes with the threat of communism. In 1950, President Truman appointed Dillon S. Myer the Commissioner of the Bureau of Indian Affairs.¹⁷⁰ Myer, who had been the director of the federal agency that implemented the internment of Japanese Americans, “embraced the cultural melting pot and firmly opposed cultural pluralism.”¹⁷¹ Federal termination policy treated Indian Tribalism

165. WILLIAM MEDDILL, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1848), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 76, 76 (Francis Paul Prucha ed., 3d ed. 2000).

166. NATHANIEL G. TAYLOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1868), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 165, at 122, 125.

167. *Id.*

168. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

169. *Id.* at 571.

170. See Casey Ryan Kelly, *Orwellian Language and the Politics of Tribal Termination (1953-1960)*, 74 W.J. COMM’N 351, 357 (2010).

171. *Id.*

as “divisive cultural separatism.”¹⁷² It was undemocratic to recognize separate Tribal sovereignty, which fostered a form of communism.¹⁷³ One terminationist “described reservations as experiments in ‘forced communism’ that kept Indians ‘economically and socially chained to [the] reservation.”¹⁷⁴ Thus, “[t]ermination garnered support by accessing Cold War discourses emphasizing cultural homogeneity and individualism in contradistinction to Soviet communism.”¹⁷⁵ The goal of termination was to promote democracy by ending Tribal sovereignty and fostering national unity: once Tribalism was terminated, the “Indian then could take pride not only in being an Indian but in being an American.”¹⁷⁶

In sum, federal Indian law and policy at times has reflected the incompatibility thesis, which served to legitimate colonial rule.

b. The Democratic Deficit Claim as a Modern Example of the Incompatibility Thesis

Today, the incompatibility thesis appears within federal Indian law as an argument that Tribal governance suffers a “democratic deficit.” The democratic deficit claim, in a nutshell, is that Indian Tribal governance threatens American democracy insofar as Indian Tribes seek to regulate individuals who have not consented to Tribal authority.¹⁷⁷ Nonmembers “cannot vote in tribal elections, run for tribal office, or serve on tribal juries.”¹⁷⁸ Thus, nonmembers are “permanently excluded from political participation” within a Tribe.¹⁷⁹ This permanent exclusion violates the basic premise of American democracy: consent of the governed.¹⁸⁰ Without such consent, Indian Tribes have no legitimate authority to govern nonmembers. In this way, Indian Tribalism is incompatible with American democracy.

172. *Id.*

173. *See id.* at 356.

174. *Id.* at 365.

175. *Id.* at 356.

176. *Id.* at 366.

177. *See* ALEINIKOFF, *supra* note 22, at 115.

178. *Id.*

179. *Id.* at 116.

180. *See supra* notes 23-24 and accompanying text.

The Supreme Court has developed this version of the incompatibility thesis in its opinions concerning Tribal jurisdiction over nonmembers. In *Duro v. Reina*, the Court held, per Justice Kennedy, that Indian Tribes lack criminal jurisdiction over nonmembers.¹⁸¹ Tribal governments, the Court reasoned, do not possess the “basic attribute of full territorial sovereignty.”¹⁸² Rather, their “retained sovereignty” is limited to “that needed to control their own internal relations, and to preserve their own unique customs and social order.”¹⁸³ Such a “distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law,” the Court noted, ranging from “[e]xemption from state taxation for residents of a reservation, [which] ... is determined by tribal membership,” to Tribal regulation of nonmembers hunting and fishing on fee land within a reservation.¹⁸⁴ While Tribal sovereignty may extend over nonmembers in some scenarios, the Court reasoned that Tribal criminal jurisdiction stops at “internal relations among members.”¹⁸⁵ Nonmembers may not “vote, hold office, or serve on a jury” in Tribal proceedings.¹⁸⁶ That democratic deficit explains the limits on Tribal authority.

The Court’s reasoning is worth quoting at length:

We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe’s additional authority comes from the

181. 495 U.S. 676, 679 (1990), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in* *United States v. Lara*, 541 U.S. 193, 199-200 (2004).

182. *Id.* at 685.

183. *Id.* at 685-86.

184. *Id.* at 686-87 (first citing *Washington v. Confederated Tribes of Colville Rsrv.*, 447 U.S. 134, 161 (1980) (taxation); and then citing *Montana v. United States*, 450 U.S. 544, 565 (1981) (hunting and fishing regulation)).

185. *Id.* at 688.

186. *Id.*

consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.¹⁸⁷

Put differently, to the extent that Indian Tribalism is based upon the actual consent of its members, it is consistent with the “political sovereignty of the United States.”¹⁸⁸ Without such consent, Indian Tribalism suffers a democratic deficit.

This theme is repeated throughout opinions of various federal judges within the modern era of federal Indian law. In *United States v. Lara*, the Supreme Court held that Congress’s statutory response to *Duro*, by which Congress recognized inherent Tribal sovereignty over nonmember Indians,¹⁸⁹ did not violate the Double Jeopardy Clause of the Constitution in a case of federal and Tribal prosecutions for the same offense.¹⁹⁰ Justice Kennedy concurred in the judgment on narrow grounds, writing separately to repeat his concern about Indian Tribalism’s democratic deficit, suggesting it was of constitutional significance.¹⁹¹ As Justice Kennedy wrote, “[t]he Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State.”¹⁹² Indian Tribalism is incompatible with this constitutional commitment to consent of the governed. It is a “historical *exception*” to the Constitution’s theory of consent,¹⁹³ except, perhaps, “to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.”¹⁹⁴

Justice Souter, who dissented in *Lara*, similarly viewed Tribal sovereignty as an anomaly.¹⁹⁵ Justice Souter developed his reasoning in a concurring opinion in *Nevada v. Hicks*, a case concerning

187. *Id.* at 693.

188. *Id.*

189. *See* 25 U.S.C. § 1301(2).

190. *United States v. Lara*, 541 U.S. 193, 199-200, 210 (2004).

191. *Id.* at 212 (Kennedy, J., concurring).

192. *Id.*

193. *Id.* (emphasis added).

194. *Id.*

195. *Id.* at 226 (Souter, J., dissenting) (“It is as true today as it was in 1886 that the relationship of Indian tribes to the National Government is ‘an anomalous one and of a complex character.’” (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886))).

the adjudicatory jurisdiction of a Tribal court in civil litigation.¹⁹⁶ Souter reasoned that the lack of actual consent of nonmembers to Indian Tribal governance presents a problem of “practical consequence” insofar as “Tribal courts ... differ from other American courts” and are not subject to the Bill of Rights and the Fourteenth Amendment.¹⁹⁷ To an outsider, Tribal law “would be unusually difficult ... to sort out”—all the more reason for the Court to be worried about the democratic principle of consent of the governed.¹⁹⁸

Lower federal court judges have sounded the same notes. As Judge Kleinfeld put it in *Native Village of Venetie I.R.A. Council v. Alaska*, “The weapon [of Tribal sovereignty] is dangerous to Indians, because it deprives Indians subject to tribal governments of the protection of the United States Constitution.”¹⁹⁹ Federal courts should “be chary of loose application” of this dangerous weapon.²⁰⁰ More recently, in *DolgenCorp, Inc. v. Mississippi Band of Choctaw Indians*, a case that ultimately resulted in an evenly divided Supreme Court decision, Fifth Circuit Judge Jerry Smith reasoned in a dissenting opinion that to recognize Tribal adjudicatory jurisdiction over a nonmember would “profoundly upset[] the careful balance” between Indian Tribalism and American sovereignty.²⁰¹ In that case, the nonmember defendant had entered into a consensual agreement with the Tribal government.²⁰² Even so, Judge Smith reasoned, the nonmember defendant’s consent would not be the basis for Tribal authority, “insofar as [the defendant] will be forced to defend [the plaintiff’s] claims in an unfamiliar forum without the benefit of constitutional protections.”²⁰³

This version of the incompatibility thesis may seem plausible, but it proves too much. According to the thesis, Indian Tribalism is incompatible with the democratic principle of consent of the governed to the extent that Tribal governments seek to regulate

196. *Nevada v. Hicks*, 533 U.S. 353, 355 (2001).

197. *Id.* at 383, 384 (Souter, J., concurring).

198. *Id.* at 385.

199. 687 F. Supp. 1380, 1389 (D. Alaska 1988), *aff’d in part, rev’d in part*, 944 F.2d 548 (9th Cir. 1991).

200. *Id.*

201. 746 F.3d 167, 178 (5th Cir. 2014), *aff’d*, 136 S. Ct. 2159 (2016).

202. *Id.* at 181.

203. *Id.*

nonmembers who cannot vote, hold office, or participate on juries.²⁰⁴ The same could be said of state governments seeking to regulate citizens of other states. A simple example illustrates the point: California may criminally prosecute a citizen of Nevada who commits a crime within California even though the Nevada citizen cannot vote in California elections, hold elected office within California, or be selected to serve on a jury in California. The thesis also proves too much insofar as it calls into question federal criminal prosecutions of noncitizens who cannot vote in federal elections, hold federal office, or serve on federal juries.

For this version of the incompatibility thesis to avoid the charge of absurdity, it must rest on a conception of democracy that is more substantive than electoral processes and jury service. This more substantive conception is suggested by Justice Kennedy's references to federalism and individual rights in *Lara*.²⁰⁵ Within the American system, Justice Kennedy posits, consent of the governed is limited to the national and state governments, each of which has a duty of protection towards Americans.²⁰⁶ This duty extends to protecting individual rights.²⁰⁷ American democracy is thus defined as a federal system whose authority flows from the continuing consent of one "We the People," who look to the national and state governments to protect their individual rights. Indian Tribal governance is an exception to this democratic system.

This Tribal exception threatens individual rights, or so the argument goes. Examined closely, the premises of the incompatibility thesis within federal Indian law begin to look a lot like the premises of the incompatibility thesis outside it. The United States must ensure "that its citizens be protected ... from unwarranted intrusions on their personal liberty."²⁰⁸ A presumption against Tribal court jurisdiction over nonmembers who have not consented to Tribal authority is warranted, lest the United States fail to fulfill this obligation.²⁰⁹ The unstated premise is that Indian Tribalism

204. See *supra* notes 184-87 and accompanying text.

205. *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment).

206. *Id.*

207. See *id.*

208. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

209. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

results in an “us-versus-them” system of governance that will be systematically prejudiced against nonmembers of the Tribe. Tribal law is unknowable to anyone outside the Tribe. Tribal courts, unconstrained by the Constitution, are unlikely to be fair to nonmembers.

The Court’s opinion in *Oliphant v. Suquamish Indian Tribe*, a decision denying Tribal criminal jurisdiction over non-Indians, comes closest to stating this premise explicitly.²¹⁰ Quoting *Ex parte Crow Dog*, a nineteenth-century Supreme Court decision that denied federal criminal jurisdiction over crimes involving Tribal members, the Court in *Oliphant* reasoned in terms that should be familiar.²¹¹ The Court suggested that to subject non-Indians to Tribal authority would be to leave them at the mercy of “aliens and strangers,” “a different race,” one applying “a standard made by others and not for them.”²¹²

These are the premises of the incompatibility thesis as applied to federal Indian law. Tribes treat others “as some kind of alien.”²¹³ They play zero-sum politics and are unfair to outsiders.²¹⁴ Tribalism, therefore, is incompatible with democracy.

C. *The Incompatibility Thesis’s Essentialism*

The incompatibility thesis rests upon essentialist premises that do not withstand scrutiny. Take the claim that Indian Tribes viewed each other as hardly human.²¹⁵ That claim is inconsistent with the history of the Haudenosaunee, a confederacy of the Mohawks, Oneidas, Onondagas, Cayugas, and the Senecas, five tribes that “confronted the immensely difficult problems of intercultural communication and accommodation during the early Encounter era.”²¹⁶

210. See *Oliphant*, 435 U.S. at 210-11.

211. *Id.*

212. *Id.* (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)); see Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1063 (2005) (discussing *Duro v. Reina*).

213. Sullivan, *supra* note 8.

214. *Id.*

215. See *supra* notes 8-9 and accompanying text.

216. Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981, 983, 987-88, 1001 (1994).

It is inconsistent with Chief “Kiotseaeton’s offer to ‘link arms together’ with the French and their allied Indian tribes [at the treaty council] at Three Rivers in 1645.”²¹⁷ Along the Northern American colonial frontier, for example, Indian Tribes often appealed to the language of kinship and trust to describe relationships among different peoples.²¹⁸ As an Iroquois diplomat put it to the English in Albany in 1754, “[L]et it be a Part of the present Agreement [between peoples] that We shall treat one another as Brethren to the latest Generation.”²¹⁹ This sort of diplomacy is not the diplomacy of us-versus-them.

Now consider the claim that tribalism is authoritarian. According to one commentator, “When a tribal leader does so, the tribe immediately jumps on command.”²²⁰ And yet historians have shown that during the time of contact with Indigenous Peoples, “[u]nlike European political systems, which were hierarchical and relied on coercive authority, Indigenous systems typically functioned on a participatory and consensual basis. Individual members retained considerable personal autonomy, and societal norms were usually maintained by persuasion and social pressure rather than force.”²²¹

Tribal democracy is common, not unprecedented. In his recent global history of democracy, David Stasavage has argued that “[e]arly democracy was so common in all regions of the globe that we should see it as a naturally occurring condition in human societies.”²²² Democracy did not spring forth from Athens alone. Examples of early democracies exist across the world, including among Indigenous Peoples. Consider, for example, the political system of the Wyandot People of Northeastern Woodlands of North America, whom the French called the Huron, and the system of collective decision-making within the Republic of Tlaxcala, which was near Tenochtitlan in what is now Mexico.²²³ The Wyandots’

217. *Id.* at 994.

218. Robert A. Williams, Jr., “The People of the States Where They Are Found Are Often Their Deadliest Enemies”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 993 (1996).

219. *Id.* at 994 (quoting the Iroquois diplomat Hendrick).

220. Sullivan, *supra* note 8.

221. Kent McNeil, *Sovereignty and Indigenous Peoples in North America*, 22 U.C. DAVIS J. INT’L L. & POL’Y 81, 92 (2016).

222. STASAVAGE, *supra* note 37, at 5.

223. *See id.* at 37-42.

political system was a participatory and intertribal form of democracy, with “collective governance at three different levels”: the village, the tribe, and the confederacy.²²⁴ French Jesuits reported surprise at the “absence of hierarchical governance found in Huron society when compared with their home country of France.”²²⁵ Indian Tribalism does not equal authoritarianism.

One might object that evidence of democracy within Indian Tribes does not show that Tribes interact with other peoples in democratic ways. But Wyandot democracy, for example, was not simply intra-Tribal, but also inter-Tribal, operating at the level of a confederacy.²²⁶ And, as we have already seen, this inter-Tribal democracy was not unique among Indigenous social organizations and traditions of diplomacy.²²⁷

Commentators commit the fallacy of essentialism when they equate Indian Tribes with autocracies. Historically, for instance, there are examples of democracies and autocracies among Indigenous Peoples in the Americas.²²⁸ Today, there are many different forms of Tribal governance within the United States. Many Tribes today have written constitutions.²²⁹ But many do not.²³⁰ Some have democratic systems of decision-making, including elections for government officials.²³¹ Others constitute their governments “based on clan systems or employ complex (and sometimes secretive) methods for the selection of leaders that are rooted in hundreds of years of tribal culture and religion.”²³² To argue that there is a single essence of Indian Tribalism is to ignore actual Tribes’ various histories, laws, and forms of governance.

224. *Id.* at 38-39.

225. *Id.* at 39.

226. *Id.* at 38-39.

227. *See supra* notes 222-25 and accompanying text.

228. *See STASAVAGE, supra* note 37, at 37-52 (discussing examples of early democracy and early autocracy).

229. Riley, *supra* note 21, at 1081-82 (“Constitutional governance is a familiar structure in Indian country, as most tribes today operate under a written constitution.”).

230. *Id.* at 1082 (“Not all foundational governing principles are captured in the form of a written constitution, however.”).

231. *See, e.g., id.* at 1076-77.

232. *Id.* at 1100.

III. THE COMPATIBILITY THESIS: INDIAN TRIBALISM AND AMERICAN DEMOCRACY

This Part argues that Indian Tribalism is part of the story of American democracy. First, Indian Tribal sovereignty is compatible with the ideal of self-government. Federal recognition of Tribal sovereignty safeguards this ideal. Second, the ways in which Indian Tribal governments interact with other governments is also compatible with democracy: Indian Tribal governance involves discourse and negotiation, not coercion and zero-sum gaming. Finally, the persistence of Indian Tribalism is part of the history of American democracy. In all three ways, Indian Tribalism and American democracy are compatible.

This Part does not seek to show that the actual practices of Indian Tribes are always consistent with the values of American democracy. The picture is more complicated than that. Indian Tribal governments that act in undemocratic or illiberal ways exist.²³³ Some Tribal governments have played zero-sum politics with their own citizens or with noncitizens. That is true of other governments too.²³⁴ Contra the incompatibility thesis (particularly as it has surfaced in federal Indian law), these are not the only practices worth paying attention to when thinking about “tribalism” and democracy. That is all this Part sets out to prove.²³⁵

233. See *supra* notes 228-32 and accompanying text.

234. See, e.g., Andrew Reynolds, *North Carolina Is No Longer Classified as a Democracy*, NEWS & OBSERVER (Dec. 31, 2016, 10:45 AM), <https://www.newsobserver.com/opinion/op-ed/article122593759.html#storylink=cpy> [<https://perma.cc/PN9U-9ZTH>] (explaining that “[i]n the just released [Electoral Integrity Project] report, North Carolina’s overall electoral integrity score of 58/100 for the 2016 election places us alongside authoritarian states.”).

235. Where a particular Tribal government acts in an illiberal way, it is not clear that the democratic solution is for the United States to impose its norms on Indian Tribes. In other words, we should distinguish the substantive critique of a particular Indian Tribe’s illiberal or undemocratic actions from the remedial question of how, if at all, the United States should respond. See Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 200-02 (2017). Moreover, liberalism, at least on some understandings, entails certain forms of pluralism and accommodation of divergent norm-generating communities. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 800 (2007).

A. *Indian Tribalism and Self-Government*

Critics of federal recognition of Indian Tribal governance argue that Indians should rely on individual rights and votes to protect their interests. But rights and votes are not the only ways that Americans resolve their differences in a democratic way. American democracy also assigns and divides powers among political communities, including, for example, states, cities, counties—and Indian Tribes. In this way, Indian Tribalism is compatible with American democracy.

1. *Rights, Powers, and Votes*

Typically, we think of democracy in terms of rights and votes.²³⁶ Voting is a way that we hold representatives to account for the policies they support, while rights are a way of putting some policies off the table no matter the vote. In any given election, there are some winners and some losers, and we hope the system is set up so that everyone will be winners sometime. Some losses, however, are too grave for a democracy to impose on anyone, and rights are one way we guard against those sorts of losses.²³⁷ Rights are also the way that we police the political process for the sorts of failures that lead to perennial losses for some groups.²³⁸

The art of American democracy, however, is made out of more than the clay of rights and votes. It also depends upon dividing the powers of self-government. In this sense, American democracy is the art of federalism and localism.

We tend to think of federalism and localism in terms of separation—hence the familiar judicial refrain about dual sovereignty and an insistence on separating what is “truly local” from what is “truly national.”²³⁹ Increasingly, however, scholars of federalism have argued that we should think of federalism and localism in terms of

236. See Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1288 (2012).

237. See *id.* at 1289 (noting that rights “disallow[] certain outcomes that would threaten [minority] interests”).

238. Cue *Carolene Products’s* Footnote Four. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135 (1980).

239. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

integration as well.²⁴⁰ This view is not intuitive, in part because federalism and localism have been intertwined with slavery, the Jim Crow South, and the New Jim Crow today.²⁴¹ It may be that federalism's patterns of racial segregation and subordination are so entrenched that federalism cannot reliably serve as a safeguard of American democracy. However, increasingly it has become plausible to tell a different sort of story about federalism.

In Dean Heather Gerken's telling, dividing powers is one way for American democracy to discharge its debt to political and racial minorities.²⁴² Votes may not be enough when numbers are small, even if they ensure statistical mirroring.²⁴³ And rights may not be enough where all they assure is an individual's ability to stand and be ignored.²⁴⁴ Federalism and localism create "a world in which political and racial minorities have a chance both to govern and to be governed, a chance both to wield power and stand against it."²⁴⁵

Whether federalism and localism can and do play that role for racial minorities is open for debate. But what Dean Gerken argues is true of states and cities is true of Tribal sovereigns.²⁴⁶ Federal recognition of Indian Tribes' preconstitutional rights of self-government helps to discharge a debt the United States owes in light of its incorporation of Indian Tribes within the polity. And Tribal sovereignty creates spaces for Indians to participate in American democracy that are not secured by individual rights or votes alone.

240. See, e.g., Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922 (2014) ("[S]tate and federal governance and interests are deeply intertwined and, in many cases, indistinguishable."); Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1960 (2014) (arguing that decentralization is a "means of integrating" the polity).

241. See Gerken, *supra* note 240, at 1967-68.

242. See *id.* at 1960, 1962.

243. *Id.* at 1961.

244. See *id.*

245. *Id.* at 1989.

246. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1798 (2019) ("[T]he national government has best protected Native peoples by bestowing power, not rights, through the recognition of inherent tribal sovereignty.").

2. *The Democratic Deficit in American Colonialism*

If American democracy is government by the people, then American colonialism suffers from a democratic deficit. Indian Tribes are peoples who exercised the power of self-government long before colonial contact. The United States did not seek their consent to the Constitution.²⁴⁷ To the extent that Indian Tribes consented to incorporation within the United States, it was through treaties.²⁴⁸ Yet the United States has asserted a plenary power to break its treaty promises.²⁴⁹ The logic of plenary power is the logic of conquest: it makes coercion the source of legal authority.

Plenary power's logic is rooted in the doctrine of discovery. This doctrine of colonial law held that discovery of Indigenous lands "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."²⁵⁰ European colonial powers agreed upon a doctrine of discovery in order to minimize the risk they would go to war among themselves over control of Indigenous lands.²⁵¹ This bargain did not depend upon the consent of Indigenous Peoples.

Federal recognition of Indian Tribes' sovereignty is a necessary response to the democratic deficit arising from colonial rule. It does not return Indian Tribes to the position they were in prior to American colonialism, but it does help to "ameliorate the sting" arising from the United States' assertion of constitutional supremacy based upon coercion rather than consent.²⁵² In this sense, then, the United States' ongoing recognition of Tribal self-government is compatible with the principle of self-government that Americans celebrated in the Declaration of Independence.

247. See Singel, *supra* note 36, at 837.

248. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408-17 (1993).

249. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903).

250. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

251. See *id.*

252. Cf. Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 164 (2015) ("[T]o ameliorate the sting from [an] otherwise unfounded insistence on uniform legal obedience, the state should accommodate those who live according to norms that differ from those of the law.").

For Indian Tribes, the “measured separatism”²⁵³ that federal recognition affords safeguards democracy. It allows Indian Tribes space for self-government, including the “right ... to make their own laws and be ruled by them.”²⁵⁴ It also allows Indian Tribes to provide their own government services to their own citizens;²⁵⁵ to create their own criminal courts and appoint their own judges, juries, and prosecutors;²⁵⁶ and, most fundamentally, to constitute their own governments and rules for citizenship.²⁵⁷

3. Indian Tribalism and the Structure of American Democracy

In light of this measured separatism, is Indian Tribalism compatible with American democracy? A starting point to answering this question is the U.S. Supreme Court’s recent opinion in *McGirt v. Oklahoma*.²⁵⁸ In that case, the Court held that the Creek Nation’s Reservation persists in Eastern Oklahoma because Congress has never legislated otherwise.²⁵⁹ The Court rejected the State of Oklahoma’s argument that recognizing the Reservation would have devastating consequences for governance there.²⁶⁰ It explained that the Creek Nation is a flourishing democracy that provides a variety of public services.²⁶¹ The Creek Nation and the State have worked “as partners” before, negotiating intergovernmental agreements to resolve disputes, and may do so again in response to the Court’s

253. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14 (1987).

254. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

255. See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 21 (2015).

256. See Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1642 (2016) (“[T]ribes have prioritized building effective and responsive criminal justice institutions.”).

257. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”).

258. 140 S. Ct. 2452 (2020).

259. *Id.* at 2482.

260. *See id.* at 2479-82.

261. *Id.* at 2467.

opinion.²⁶² This Subsection and the next will unpack these structural ways in which Indian Tribalism is compatible with democracy.

a. Participatory Democracy

Tribal sovereignty is compatible with democracy because it secures opportunities for participation in political decision-making. Participatory theories take democracy to mean something more than voting in elections.²⁶³ It means popular participation, a power to decide what shall be done, not simply who will do it. Proponents of participatory democracy value civic engagement in its own right, arguing that participation in self-government strengthens the polity and enriches the lives of participants.²⁶⁴

City power is often celebrated for its participatory potential. Our federal government and the states may operate at too large a scale to allow frequent and meaningful popular participation. Not so with our cities, which are “surely a more likely source of participatory democracy,” so long as city governments have real power to make decisions.²⁶⁵

There is a risk of projecting too much hope onto cities,²⁶⁶ just as there is a risk of romanticizing Indian Tribes as sites of participatory democracy. Local government may remind us of a New England town meeting; it may also recall the “private power of the plantation owner.”²⁶⁷ My argument is not that each Indian Tribe’s governance structures are necessarily participatory for all Tribal citizens. Yet even a casual look at governance in Indian Country reveals rich

262. *Id.* at 2481.

263. *See, e.g.*, BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 153 (2003) (“Strong democracy is defined by politics in the participatory mode: literally, it is self-government by citizens rather than representative government in the name of citizens.”).

264. *See, e.g.*, Hanna Fenichel Pitkin & Sara M. Shumer, *On Participation*, in *DEMOCRACY: A READER* 391, 392-93 (Ricardo Blaug & John Schwarzmantel eds., 2d ed. 2016).

265. Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1059, 1073 (1980).

266. *See, e.g.*, Joan Chalmers Williams, *The City, The Hope of Democracy: The Casebook as Moral Act*, 103 *HARV. L. REV.* 1174, 1175 (1990) (book review) (“American reformers’ hopes for the city are one aspect of what I have called the whore/madonna syndrome in local government law: American intellectuals’ tendency to caricature cities as either the downfall or the hope of virtue in government.”).

267. Daniel Farbman, *Reconstructing Local Government*, 70 *VAND. L. REV.* 413, 414 (2017).

traditions of participatory democracy.²⁶⁸ As Professor Wenona Singel has explained, many Indian Tribes have general councils in which Tribal citizens may participate in deciding political questions of common concern.²⁶⁹ Singel also discusses participatory democracy at the level of Tribal constitution-making, which may include “lengthy and detailed negotiation over adopting or amending tribal constitutions,” with “deep engagement by the entire community in the most basic yet fundamental issues of governance.”²⁷⁰ She points to Eric Lemont’s case study of constitutional reform in four Tribal Nations—the Cherokee Nation of Oklahoma, the Hualapai Nation, the Navajo Nation, and the Northern Cheyenne Tribe.²⁷¹ As this case study found, leaders of constitutional reform focused resources to enable public participation.²⁷² Responding to problems of participation in prior reform efforts, they presented proposals in Native languages and “reach[ed] out to people where they live and work,” using “intensive and personalized approaches” to engage and educate the citizenry as part of the reform process.²⁷³ For example, in 1998, Albert Hale, then-President of the Navajo Nation, traveled the Nation on horseback to inform citizens about proposed reforms.²⁷⁴ Thus, Siegel concludes, Tribal self-government provides “rich opportunities for civic engagement.”²⁷⁵

b. Democratic Pluralism: Tribes and/as Interest Groups

Tribal governments also function as interest groups representing their peoples in state and federal policy making. One way of thinking about democracy emphasizes the pluralism of interest groups and the role of representatives. Democratic pluralism focuses upon elections as a means for voters to exercise limited control over

268. See Singel, *supra* note 36, at 834.

269. *Id.*

270. *Id.*

271. See *id.* at 834 n.348 (citing Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147 (2002)).

272. Lemont, *supra* note 271, at 150.

273. *Id.*

274. *Id.* at 170.

275. Singel, *supra* note 36, at 835.

their representatives and on interest group lobbying.²⁷⁶ Healthy democracies are ones in which multiple interest groups push, pull, and tug over policies, using elections, lobbying, and other levers within government.

Much like states,²⁷⁷ Indian Tribes may appear as interest groups in political and administrative processes. Created in 1944 by fifty Tribal Nations, the National Congress of American Indians (NCAI) is an organization of Indian Tribes that lobbies in Washington, D.C., on behalf of over 250 Tribes.²⁷⁸ Along with Tribes and other intertribal organizations, such as the National Tribal Chairmen's Association, the NCAI has had significant success in the modern era of Tribal self-determination (from the late 1960s until today) lobbying for and against proposed legislation and administrative action.²⁷⁹ Indian Tribes have also formed regional and state-level intertribal organizations, such as the California Association of Tribal Governments and the California Tribal Business Alliance.²⁸⁰

Indian Tribes and their organizational representatives lobby extensively at the federal level.²⁸¹ Their efforts may support and amplify individual Indian voices in the federal legislative process.²⁸² During debate about the 2013 reauthorization of the Violence Against Women Act, for example, a delegation of American Indian women lobbied congressional offices by sharing their stories of survival, leading to the enactment of statutory provisions partially lifting judge-made restrictions on Tribal criminal prosecutions of non-Indian perpetrators of violence against women.²⁸³ Joined by a number of Tribal leaders, these Indian women advocated for

276. See, e.g., David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1715-16 (2005).

277. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 955-56 (2014).

278. Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. ON C.L. & C.R. 137, 143 (2006).

279. See, e.g., *Navajo Nation v. Dalley*, No. 15-cv-00799, 2016 WL 9819590, at *3 (D.N.M. Aug. 3, 2016) (discussing lobbying around enactment of the Indian Gaming Regulatory Act).

280. See, e.g., *Tribal Organizations*, NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/tribal-directory/tribal-organizations> [<https://perma.cc/ZV6A-K9CB>] (listing tribal organizations).

281. See Porter, *supra* note 278, at 142-44.

282. *Id.*

283. See Kristen Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1187-88, 1192, 1194.

recognition of Tribal sovereignty as a solution to a problem created in no small part by federal judicial decisions.²⁸⁴

Such lobbying efforts are not limited to the federal government. Indian Tribes may lobby state governments on matters ranging from tax policy to child welfare and adoption. Tribes, for example, lobbied successfully for enactment of the Indian Child Welfare Act at the federal level and then for state-level Indian child welfare acts.²⁸⁵ The black letter law states that Indian affairs are a matter for the federal government to decide. The reality is that Indian Tribes, using the many levers of American democracy, have myriad relationships with state governments. These relationships are part of American democracy, as *McGirt* underscores.

The government-to-government relationship between Indian Tribes and the United States yields shared interests, in other words, not just separation. Over time, these shared interests have become reflected in litigation and judicial doctrine. Consider, for example, the unique doctrines of preemption in federal Indian law. In *New Mexico v. Mescalero Apache Tribe*, the Mescalero Apache Tribe worked with the federal government to create a comprehensive fish and game management program and a hunting resort on the Tribe's lands.²⁸⁶ When the State of New Mexico sought to regulate non-Indian hunters on the Tribe's lands, the Supreme Court held that "federal and tribal interests reflected in federal law" together preempted the state's regulation.²⁸⁷

Indian Tribes' sovereignty also creates opportunities for Indians to ally with other interest groups in calling for changes to government policy. For example, federal environmental law may impose

284. Sari Horwitz, *New Law Offers Protection to Abused Native American Women*, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/new-law-offers-a-sliver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html [<https://perma.cc/9BUB-KECJ>] ("Last year, [Diane] Millich and other American Indian women came to Washington to tell their stories to congressional leaders. They joined tribal leaders in lobbying for the passage of the 288-page reauthorization of the Violence Against Women Act.")

285. See, e.g., Steven Paul McSloy, *The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 737 (2003); Sandra C. Ruffin, *Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act*, 30 MCGEORGE L. REV. 1221, 1261 (1999).

286. 462 U.S. 324, 327-28 (1983).

287. *Id.* at 334-36.

unique obligations on federal agencies to consult with or “seek the concurrence” of Indian Tribes in federal decisions.²⁸⁸ This is one reason why, though the relationships can be fraught, Indian Tribes have partnered with environmental organizations on matters of common concern.²⁸⁹ On a pluralist conception, such partnerships are evidence of a healthy democratic process, one in which Indian Tribes may play a role.

c. Tribes and National Democratic Deliberations

On another conception, however, the role of Tribal governments in national (or state) policy making may seem a problem for democracy. Deliberative democracy, a theory of democratic legitimacy, focuses upon the process of democratic decision-making.²⁹⁰ The idea is that decision-making is legitimate if it results from a process in which all interested parties deliberate, presenting proposals and discussing them on an equal footing.²⁹¹ In deliberating, citizens should “defend proposals with considerations that others, who are themselves free and equal, can acknowledge as reasons.”²⁹²

Some deliberative democrats question whether identity politics and popular social movements are compatible with collective deliberation of this sort.²⁹³ And some defenders of the incompatibility

288. See, e.g., 36 C.F.R. § 800.5(c)(2)(ii) (2004).

289. See, e.g., *Tribal Partnerships*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Our-Work/Our-Lands/Tribal-Lands> [<https://perma.cc/X7C9-JCCY>].

290. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2004).

291. See, e.g., *id.*; Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 72-73 (James Bohman & William Rehg eds., 1997); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 287-88 (William Rehg trans., MIT Press 1996) (1992). Some versions of the theory emphasize deliberation among political and legal elites, while others look to popular deliberation for democratic legitimacy. See, e.g., GUTMANN & THOMPSON, *supra* note 290, at 8; ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 31 (2004). Still others seek to bridge the two. See, e.g., HABERMAS, *supra*, at 351 (arguing for a system of collective decision-making “shaped by deliberative politics, that is, shaped by the publicly organized contest of opinions between experts and counterexperts and monitored by public opinion”).

292. Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 *EUR. L.J.* 313, 327 (1997).

293. William H. Simon, *Three Limitations of Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND*

thesis treat identity politics as one form of “tribalism.”²⁹⁴ They might argue, therefore, that Indian Tribalism is incompatible with deliberative democracy.

The actual practices of Indian Tribes suggest two responses. The first focuses upon one of the claims at the core of modern Indigenous rights: the right to consultation.²⁹⁵ The United Nations Declaration on the Rights of Indigenous Peoples codifies the right to free, prior, and informed consent concerning government actions that will affect Indigenous Peoples.²⁹⁶ At its heart, the right to consultation is concerned with the deliberative process by which collective decisions are made. The following definition of consultation from the U.S. government helps prove the point:

Consultation [between the United States and Indian Tribes] means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.²⁹⁷

The NCAI’s best practices for consultation include principles such as discussion on an “equal-footing basis” and “[s]how[ing] respect, and listen[ing].”²⁹⁸ As Robert Miller has shown, within the United States the right to consultation has a long history stretching back to the precolonial period and Indigenous traditions of diplomacy: collective deliberation in the form of “[n]egotiating, entering agreements, and engaging in diplomacy with other governments

DISAGREEMENT 49, 51-52 (Stephen Macedo ed., 1999).

294. GOLDBERG, *supra* note 6, at 61 (“Manufactured tribalism is the very essence of identity politics.”).

295. See Laura M. Seelau & Ryan Seelau, *When I Want Your Opinion, I’ll Give It to You: How Governments Support the Indigenous Right to Consultation in Theory but Not in Practice*, 23 CARDOZO J. INT’L & COMP. L. 547, 549 (2015).

296. See, e.g., Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 191-92 (2014); Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 67-87 (2015).

297. The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998).

298. Miller, *supra* note 296, at 62-63 (discussing the NCAI’S PROPOSED MINIMUM REQUIREMENTS OF A VALID CONSULTATION PRIOR TO TAKING FEDERAL ACTION).

was a regular practice of American Indian nations.”²⁹⁹ When Indian Tribes seek consultation with the United States today, they draw upon these deliberative traditions.

These practices of consultation are compatible with deliberative democracy. The right to consultation is one way to fulfill a “principle of deliberative inclusion.”³⁰⁰ For much of U.S. history, Indian Tribes were not included in the decision-making processes that affected them. If the “essence of democratic legitimacy should be sought ... in the ability of *all individuals subject to a collective decision* to engage in authentic deliberation about that decision,”³⁰¹ then consultation between Indian Tribes and the United States is one way to ensure the legitimacy of American democracy.

The second response to a deliberative democratic criticism of Indian Tribalism is that Indigenous social movements that advocate for Tribal sovereignty are important in bringing issues forward for national deliberation. Some, though not all, “proponents of the deliberative model ... recognize the role of social movements in bringing latent problems to the attention of politics.”³⁰² By “intervening in public discourse and restructuring the surrounding social relations,” social movements help ensure the inclusion necessary for legitimate democratic deliberation.³⁰³

In many cases, including contests about environmental policy, Indian Tribes’ interests catalyze social movements and bring those interests into national democratic deliberations. Consider, for example, the recent controversy about construction of oil pipelines, including the Dakota Access Pipeline (DAPL) through the territory of the Standing Rock Sioux Tribe,³⁰⁴ or the controversy arising from the Trump Administration’s decision to reduce the size of the Bears Ears National Monument.³⁰⁵ Indian Tribes have been at the

299. *Id.* at 43.

300. Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, *supra* note 291, at 407, 419.

301. JOHN S. DRYZEK, *DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS*, at v (2000) (emphasis added).

302. John Medearis, *Social Movements and Deliberative Democratic Theory*, 35 *BRIT. J. POL. SCI.* 53, 53 (2005).

303. *Id.* at 55.

304. Lauren P. Phillips, Note, *Killing the Black Snake: The Dakota Access Pipeline’s Fate* *Post-Sierra Club v. FERC*, 30 *GEO. ENV’T L. REV.* 731, 733-34 (2018).

305. See Charles Wilkinson, “*At Bears Ears We Can Hear the Voices of Our Ancestors in*

forefront of national debate and deliberation about these federal government actions.

Indian Tribes' involvement in these debates is necessary to legitimate democratic deliberation. The Standing Rock Sioux Tribe objected to the construction of the DAPL, which had been rerouted from near Bismarck, North Dakota, to the Tribe's aboriginal lands.³⁰⁶ The Obama Administration's Army Corps of Engineers had issued some of the necessary approvals to DAPL and reversed course after the Tribe and its allies demanded additional deliberation.³⁰⁷ The Trump Administration in turn reversed the Obama Administration's commitment to further deliberation, and the Tribe continued its battle in the federal courts.³⁰⁸

The protests at Standing Rock became, in David Treuer's memorable phrase, "[an] Indian [p]rotest for [e]veryone."³⁰⁹ The water protectors argued that the "pipeline threatens not just tribal land and resources but *American* land and resources."³¹⁰ Theirs was a fight for an "energy democracy" based upon public deliberation at the same time it was a fight for recognition of the Tribes' sovereignty.³¹¹

* * *

In short, Indian Tribalism provides opportunities for Tribal citizens to participate in self-governance, not only through Tribal policy making, but also through engagement with states and the federal government. In this way, it is compatible with democracy.

Every Canyon and on Every Mesa Top": The Creation of the First Native National Monument, 50 ARIZ. STATE L.J. 317, 320 (2018).

306. See generally Walter H. Mengden IV, *Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline*, 41 AM. INDIAN L. REV. 441, 442 (2017).

307. See Phillips, *supra* note 304, at 737.

308. *Id.* at 738-39.

309. David Treuer, *An Indian Protest for Everyone*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/26/opinion/sunday/an-indian-protest-for-everyone.html> [<https://perma.cc/H8DU-XLF3>].

310. *Id.*

311. See Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 585 (2018) (defining "energy democracy" to include not only consumer choice and local energy production but also open processes of public deliberation).

B. Democratic Practices of Negotiation and Compromise in Indian Country

Proponents of the incompatibility thesis might object, however, that Indian Tribalism creates us-versus-them dynamics that distort the democratic processes described in the previous Section. They might argue that Indian Tribalism may be democratic internally but antidemocratic externally. Indian Tribalism may mean “get what you want from strangers”; it may, in other words, involve “zero-sum” battles between groups.³¹²

This Section addresses that objection. It argues that Indian Tribalism involves a form of negotiated federalism that is compatible with American democracy.

1. Negotiated Federalism

Some accounts conceive of democracy as a process for negotiating differences in a divided world.³¹³ Democratically acceptable processes for negotiating differences entail commitments to inclusion, political equality, and mutual respect. This view does not deny “that workable democratic politics requires of citizens some sense of being together with one another in order to sustain the commitment that seeking solutions to conflict under circumstances of difference and inequality requires.”³¹⁴ What is not required, however, is the (always unattainable) national unity imagined by the incompatibility thesis. Indeed, “[i]t is far too strong ... to claim that [the necessary] sense of being together requires mutual identification.”³¹⁵ It does require “agreed-upon and publicly acknowledged procedures” for resolving problems among communities.³¹⁶

Federalism is one way to structure this type of problem-solving. As political theorist Iris Marion Young envisioned it, federalism is a process of interaction among communities who “ought to negotiate the terms and effects of [their] relationship.”³¹⁷ These negotiations,

312. GOLDBERG, *supra* note 6, at 11.

313. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 110 (2000).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 259.

she argued, become easier when all peoples “have a right to their own governance institutions” and are thus “free from domination.”³¹⁸ Similarly, Professor Cristina Rodríguez has argued that the value of federalism “is its creation of a framework for ongoing negotiation of differences large and small.”³¹⁹ Thus understood, the division of governing powers among communities at the state level “constitutes a framework for national integration,” not disintegration.³²⁰ Negotiation among states, and between states and the federal government, is the engine of this national integration.³²¹ For any particular debate, there are, to be sure, winners and losers, “[b]ut the inter-governmental relationships and overlapping political communities the system creates are neither locked in zero-sum competition nor bound by fixed rules of engagement.”³²²

Negotiated governance theory is one way to understand the role that federalism plays within American democracy. This theory emphasizes the limited role that constitutional federalism plays in setting the metes and bounds of governance in light of the ambiguities in the Court’s federalism doctrine.³²³ Thus, negotiated governance theory sees federalism not as a zero-sum game, but instead as a process of intergovernmental bargaining. Erin Ryan has argued that “intergovernmental bargaining offer[s] a means of understanding the relationship between state and federal power that differs from the stylized model of zero-sum federalism dominating political discourse.”³²⁴ Bargaining between the states and the federal governments can be an alternative to a winner-takes-all battle within the federal courts, as long as constitutional law allows enough to be up for grabs in constitutional negotiations. As Ryan described, “[r]econceptualizing the relationship between state and federal power as one heavily mediated by negotiation demonstrates how federalism practice departs from the rhetoric, and offers hope

318. *Id.*

319. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2094, 2097 (2014); cf. Gerken, *supra* note 240, at 1962 (“[F]ederalism can serve as a robust, distinctively American strategy for institutionalizing opposition and ensuring our democracy thrives.”).

320. Rodríguez, *supra* note 319, at 2097.

321. *See id.*

322. *Id.* at 2098.

323. *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 21-22 (2011).

324. *Id.* at 4.

for moving beyond the paralyzing features of the zero-sum discourse.”³²⁵

Examples of negotiated federalism abound. They include intergovernmental negotiations involving states as interest groups within the federal political process as well as negotiations between state and federal bureaucrats throughout the administrative process.³²⁶ Other examples are less formal and apparent, but nonetheless important: state and federal actors may, for example, “influence one another’s outcomes through indirect iterative exchange” over time.³²⁷ Topics for negotiation include the allocation of decision-making authority as well as the content of substantive law.³²⁸ Under “clouds of doctrinal and rhetorical uncertainty” about the constitutional doctrines of federalism, such bargaining is both inevitable and desirable.³²⁹

2. *Negotiations in Indian Country*

If negotiation is a desirable feature of our federalism, then there is a strong case that Indian Tribalism is compatible with American democracy. Indian Tribes have been practicing intercultural negotiation since before the adoption of the U.S. Constitution.³³⁰ Their traditions of treaty-making are based upon mutual recognition and respect among peoples.³³¹ These traditions are a constitutive feature of contemporary Indian Tribalism.³³²

One reason such negotiations are central to governance in Indian Country is that the existing doctrinal landscape concerning Tribal jurisdiction is opaque at best. The *Montana* line of cases,³³³ for example, has led to a complex overlay of federal common law restrictions on the exercise of Tribal civil jurisdiction.³³⁴ The resulting “jurisdictional uncertainty” has led Indian Tribes to

325. *Id.* at 4-5.

326. *See id.* at 5-7.

327. *Id.* at 69.

328. *Id.* at 24.

329. *Id.* at 136.

330. Davis, *supra* note 138, at 1463.

331. *See, e.g., id.* at 1465.

332. *Id.* at 1464-65.

333. *See generally* *Montana v. United States*, 450 U.S. 544 (1981).

334. *See* Davis, *supra* note 138, at 1474.

negotiate with other governments and private parties concerning their jurisdiction.³³⁵ For example, an Indian Tribe may negotiate an agreement with a county government concerning jurisdiction or taxation authority,³³⁶ or bargain over forum selection with a corporation doing business with the Tribe.³³⁷

The U.S. Constitution makes clear that negotiations were the means by which the United States would treat with Tribes.³³⁸ Indian treaties provide the constitutional underpinnings of federal recognition of Indian Tribalism and help set the metes and bounds of Indian Country.³³⁹ Treaties play a central role in Indian Country governance because Indian Tribes “never consented to” U.S. authority except through treaties.³⁴⁰ Their lack of consent to the constitutional supremacy of the U.S. government frames a “compelling case” for recognition of their right to govern.³⁴¹ Unsurprisingly, therefore, Indian social movements point to Indian treaties to imagine what a democratic relationship between Indian Tribes and the United States would look like.³⁴²

Indian Tribes did not choose to stop making treaties with the United States. Rather, the U.S. House of Representatives halted the practice with a rider to an appropriations bill that forced the end of treaty-making in 1871.³⁴³ Even so, however, “constitutional negotiations”³⁴⁴ between Indian Tribes and the United States did not end in 1871. Today, negotiations memorialized in statutes or executive

335. *See id.* at 1473-74.

336. *See* Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 78, 81 (2007).

337. *See, e.g.*, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014), *aff’d by an equally divided court*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

338. *See* DELORIA & WILKINS, *supra* note 141, at 151.

339. *See* Davis, *supra* note 138, at 1468.

340. Robert A. Williams, Jr., *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 REV. CONST. STUD. 146, 148-49 (1995).

341. *Id.*

342. *See* VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 251 (1985).

343. Mark G. Hirsch, *1871: The End of Indian Treaty-Making*, AM. INDIAN MAG. (2014), <https://www.americanindianmagazine.org/story/1871-end-indian-treaty-making> [<https://perma.cc/2NXG-ZUGN>].

344. Davis, *supra* note 138, at 1471.

orders have become “treaty substitutes.”³⁴⁵ Under Congress’s Tribal Self-Determination policy, the United States and Indian Tribes negotiate self-determination contracts to support the development of Tribal institutions and the provision of government services to Tribal citizens.³⁴⁶ And, as we have seen, Indian Tribes continue to call upon the United States to consult and negotiate about matters affecting them.³⁴⁷

Indian Tribes have been remarkably successful in exercising self-determination through these sorts of intergovernmental and intercultural negotiations. As Matthew Fletcher has argued, such negotiations help to avoid zero-sum battles between Indian Tribes and states³⁴⁸—much like the federalism negotiations that provide an alternative to zero-sum battles between the United States and the states.³⁴⁹

Indian water rights negotiations provide a ready example. As Robert Anderson has explained, water rights settlements may “achieve various goals [for all parties] that could not otherwise be achieved within the confines of ... adjudication.”³⁵⁰ The success of these negotiations depends in part upon the “strong legal foundation” that Indian water rights enjoy under the federal reserved rights doctrine, which affords Indian Tribes senior water rights that may trump water rights recognized under state law.³⁵¹ In the American West, the scarcity of water threatens to make water disputes a zero-sum game. Indian Tribes have, however, looked to negotiation as an alternative to “settling natural resource disputes [through] ‘all or nothing’ litigation.”³⁵² The resulting negotiations

345. WILKINSON, *supra* note 253, at 64.

346. See Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, 2206 (codified as amended at 25 U.S.C. §§ 5301-5423).

347. See, e.g., Sierra Crane-Murdoch, *Standing Rock: A New Moment for Native-American Rights*, NEW YORKER (Oct. 12, 2016), <https://www.newyorker.com/news/news-desk/standing-rock-a-new-moment-for-native-american-rights> [<https://perma.cc/LG7H-ABCC>].

348. Fletcher, *supra* note 336, at 74.

349. See *supra* notes 322-28 and accompanying text.

350. See, e.g., Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23, 32 (2006) (discussing the successful Snake River settlement).

351. Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133, 1134, 1139 (2010).

352. *Id.* at 1134.

have been mostly successful and have avoided winner-take-all rulings in state courts.³⁵³

The point, in short, is that Indian Tribalism may be compatible with American democracy in the same way that federalism is compatible with it. Both provide a “framework for ongoing negotiation on differences large and small.”³⁵⁴

C. Tribalism, Democracy, and Historical Memory

There is a third way in which Indian Tribalism is compatible with American democracy. It concerns the country’s historical memory. The United States has a settler colonial history, one that stretches back to the Founders’ adoption of the doctrine of discovery.³⁵⁵ Indian Tribes’ persistence in exercising their separate sovereignty forces American democracy to confront its past and unsettles its easy myths. This, too, can be compatible with democracy. Indeed, this sort of historical memory is necessary to hold American democracy to its ideals.³⁵⁶

The United States has sometimes practiced conquest while preaching consent. As Chua has put it, America “needs to be held to its own standards or fall under the weight of hypocrisy.”³⁵⁷ To be sure, “[m]any Americans want to celebrate the country’s history and greatness without having to dredge up its racist past every single

353. *Id.* at 1159. Not all intergovernmental negotiations involving Indian Tribes are successful. The history of negotiations under the Indian Gaming Regulatory Act (IGRA) has sometimes involved zero-sum gaming. Under IGRA, Indian Tribes must negotiate with states in order to conduct some forms of on-reservation gambling. See Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. STATE L.J. 25, 49-50 (1997). Thus, IGRA reversed the baseline in federal Indian law, which holds that states do not have authority to regulate in Indian Country. IGRA “has empowered states to assert their interests where they would otherwise be unable to do so.” *Id.* at 94. The lesson of comparing water rights negotiations with IGRA negotiations is that when “states seek ... to treat an Indian Nation’s right to govern as up for grabs,” zero-sum battles may result. Davis, *supra* note 138, at 1478.

354. Rodríguez, *supra* note 319, at 2094.

355. See *supra* notes 250-51 and accompanying text.

356. See CHUA, *supra* note 2, at 207; cf. Annette Gordon-Reed, *America’s Original Sin: Slavery and the Legacy of White Supremacy*, 97 FOREIGN AFFS. 2, 7 (2018) (“Americans must come to grips with [the history of slavery and white supremacy] if they are to make their country live up to its founding creed.”).

357. CHUA, *supra* note 2, at 207.

time.”³⁵⁸ They want Thanksgiving without the Trail of Tears. To center both within the American story would be to threaten the national unity necessary for American democracy to thrive.³⁵⁹ Within the literature on tribalism and democracy, there is palpable anxiety that constituting such national unity is a never-ending struggle against ourselves.³⁶⁰

This myth of democratic unity has a long history within political thought. Tocqueville saw it as central to the success of American democracy, writing that “[w]hat maintains a large number of citizens under the same government is much less the reasoned will to remain united than the instinctive and in a way involuntary accord that results from similarity of sentiments and resemblance of opinions.”³⁶¹ In his view, Americans shared a singular viewpoint about religion, and this unity bound them together as one people.³⁶² Tocqueville contrasted American unity with the “small tribes” of American Indians, who had “wandered in the shade of the forest or across the prairie lands.”³⁶³ Democracy required the end of nomadism; it required “man ... united with his fellows.”³⁶⁴ Thus, Tocqueville looked to tropes about tribalism as a foil against which to define the national unity necessary for democratic governance.³⁶⁵

Tocqueville’s vision of a singular American people was mythical then and is so when uttered today. Religion did not unite all Americans even when Tocqueville wrote. It is unclear when,

358. *Id.* at 195.

359. *See, e.g.*, Sullivan, *supra* note 8.

360. GOLDBERG, *supra* note 6, at 11 (arguing that “the United States of America is the fruit of the Miracle” of democracy and capitalism and lamenting that “both are unnatural”); *see also id.* at 15 (“Because every generation enters this world with its natural wiring intact, every generation must be convinced anew that the world they have been blessed to be born into is the best one.”).

361. TOCQUEVILLE, *supra* note 51, at 598.

362. *See id.* at 599 (“Although the Anglo-Americans have several religions, they all have the same way of envisaging religion.”).

363. *Id.* at 39; *cf.* MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* 62-63 (2017) (“[T]he principles the country was founded on gave Christians reasons to identify with the state *because* the state guaranteed their right to identify with their churches.... And so, in a sense, to become an American you had to identify only with one thing: the American system of religious liberty.”).

364. TOCQUEVILLE, *supra* note 51, at 457.

365. William E. Connolly, *The Liberal Image of the Nation*, in *POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES* 183, 185 (Duncan Ivison et al. eds., 2000).

precisely, the American “super-group”³⁶⁶ came into being. As William Connolly has put the criticism, “[t]he nation is experienced by many as an imperative that must be achieved ... if democratic governance is to be possible.... But the nation is also an imagination of unity or wholeness that has never been actualised.”³⁶⁷ And as Rebecca Tsosie has argued, democracy does not require a national unity, but instead may entail “a multicultural federation of diverse groups engaged in relations of mutuality and reciprocity.”³⁶⁸ Indian Tribalism is part of the history of such relations in America.

Historical memory requires “acknowledg[ing] multiple and often conflicting pasts, and the intrinsically power-infused and tension-ridden nature of communal mythological construction.”³⁶⁹ The point is not simply that those who forget history are doomed to repeat it. It is also that democratic citizens have a responsibility to acknowledge the limits of their own myths and to recognize “conflicting histories.”³⁷⁰

In this understanding, Indian Tribes’ refusal to accede to American constitutional supremacy, their refusal to go along with popular histories that relegate Indians to historical footnotes, and

366. CHUA, *supra* note 2, at 21-22. Chua defines a super-group as “one in which membership is open to individuals from all different backgrounds—ethnic, religious, racial, cultural.” *Id.* at 12. If membership means formal citizenship, then this definition does not entail a transcendent national unity so much as a certain set of immigration and naturalization laws. But Chua’s account of America’s super-group suggests a more robust definition of membership. She writes that “America was able to elect Barack Obama as president because this country is a super-group,” meaning not only that it is “a group in which membership is open to individuals of any background” but also one that “binds its members together with a strong, overarching, group-transcending collective identity.” *Id.* at 22. She argues that America became a super-group in the twentieth century, “especially after the Civil Rights Act of 1964.” *Id.* at 27. During the 1960s, “women, blacks, and other minorities made impressive inroads in American business, politics, and culture,” while changes to immigration policy contributed to “demographic shifts.” *Id.* at 29-30. In other words, America became a super-group in the second half of the twentieth century as a result of civil rights laws, diversification of the American elite, and demographic shifts. Yet, according to Chua, it is this very reorganization of society that has led “many white Americans” to “experience their world as being swallowed up.” *Id.* at 31. If that is correct, then it suggests that all Americans do not in fact share the “strong, overarching, group-transcending collective identity” necessary for super-group status. *Id.* at 22.

367. Connolly, *supra* note 365, at 184.

368. Tsosie, *supra* note 86, at 372.

369. Duncan Bell, *Agonistic Democracy and the Politics of Memory*, 15 CONSTELLATIONS 148, 149 (2008).

370. *See id.* at 160.

their persistent practices of self-government are democratic practices.

Indian Tribalism is part of the story of American democracy. Democracy is not a “specifically Western value,”³⁷¹ as we have already seen. American society—and American democracy—is a “product” of interactions among peoples, including Indigenous Peoples.³⁷² Historically, that was true of the treaty period in which “Indian peoples had complex negotiated and federated interactions” with Indians and non-Indians.³⁷³ It is true today as Indian Tribes continue to govern themselves. The Supreme Court recognized this reality in *McGirt*: the Creek Nation is a thriving democracy that has “proven [it] can work successfully” with the State of Oklahoma in a “spirit of good faith, ‘comity and cooperative sovereignty.’”³⁷⁴ That spirit is precisely what commentators on “political tribalism” hope for democracy.

Indian Tribes are part of the story of American democracy in a second sense. If “[n]o country can be great if it can’t be honest,”³⁷⁵ then America should be honest that its history includes colonialism.³⁷⁶ As Aziz Rana has argued, there are “two faces of American freedom.”³⁷⁷ Typically, the story of American democracy focuses upon self-government among non-Indigenous settlers.³⁷⁸ Similar to other settler states, however, America’s democracy has engaged in “projects of ethnic and political cleansing.”³⁷⁹ By persisting as self-governing peoples, Indian Tribes have pursued the ideal of democracy against projects of assimilation and termination. In this side of the story of American democracy, there is the possibility of an “alternative identity for the country.”³⁸⁰ Perhaps the example of

371. Iris Marion Young, *Hybrid Democracy: Iroquois Federalism and the Postcolonial Project*, in *POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES*, *supra* note 365, at 237, 245.

372. *Id.*

373. *Id.*; see *supra* Parts III.A.3, III.B.2 (discussing Indigenous practices of diplomacy and treaty-making).

374. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020).

375. CHUA, *supra* note 2, at 207.

376. See *supra* note 22 and accompanying text (discussing the “democratic deficit” in the incorporation of Indian Tribes within the United States).

377. AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010).

378. *Id.* at 10.

379. *Id.*

380. *Id.* at 14.

American Indian Tribes suggests that what we have always been, and what we need to learn how to be, is a democracy of “We the Peoples,” not just “We the People.”³⁸¹

CONCLUSION

There is an art to democracy. But it is not the art of the deal. The art of democracy is more lasting than a one-off, winner-takes-all bargain. More lasting, and harder to achieve.

Harder to achieve, some would say, because of faults that lie in ourselves. Chief among these human flaws is a tendency toward “tribalism.” Liberal democracies have begun to lurch from one crisis to the next because their citizens have retreated to “tribal” camps bent on war with one another, or so many commentators claim.

This Article set out to complicate the idea that tribalism is incompatible with democracy. Looking at the actual histories and practices of Indian Tribes calls the premises of the incompatibility thesis into question. Abstract conceptions of “tribalism” are not helpful in diagnosing what ails democracy. Much more useful is analysis that “look[s] at the precise institutional, legal, and constitutional mechanisms through which [democratic] decline occurs.”³⁸² That is the sort of microanalysis that this Article has begun to sketch with respect to “tribalism.”

The question this Article has tried to provoke is whether Indian Tribalism may provide lessons for working through the political tribalism that has beset American politics. Perhaps a “realistic appraisal of tribalism” would suggest tribal solutions to problems democracies face.³⁸³ Perhaps, in other words, a little more tribalism is just what democracy needs.

381. Davis, *supra* note 151, at 1761.

382. TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 48 (2018).

383. See Rosen, *supra* note 30.