



# Tribal Sovereignty and the Problem of Difference in Environmental Regulation: Observations on “Measured Separatism” in Indian Country

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**Abstract:** The legal and juridical sovereignty of American Indian nations is supposed to help Native peoples maintain their own distinct political and cultural communities. In the context of environmental issues, this means that tribal governments have both the inherent and statutory right to set their own environmental standards, which have the potential to protect tribal peoples and their natural resources in culturally relevant ways. In the past, the US Supreme Court has sought to curtail this kind of sovereignty when the due process of non-Indians might be hindered. In this article, we look at why tribal environmental sovereignty can and should address the issues of due process in the context of environmental regulation in tribal borders, and make a call for this to be done in a way that supports American Indian tribal sovereignty. Moreover, we connect these issues to the current legal and juridical struggles of other environmental justice groups and the need for more meaningful participation in environmental regulation within the nation-state for all cultural minorities.

**Keywords:** American Indians, environmental justice, tribal sovereignty, cooperative federalism, human rights

The unique political arrangement between Indian tribes and the United States is based on a complex body of law that includes treaties, acts of Congress, executive orders, and decisions of federal courts. This body of law distinguishes American Indians and Alaska Natives from other cultural and racial minorities in the United States, framing a political arrangement that reflects recognition of the aboriginal rights of the tribes, rights that predate the existence of the United States and even the concept of “race” itself. Since the “colonial era” in North America, tribes have been treated by European and Euro-American states as having rights to exercise self-government and to maintain their own cultures within

their own territories. In recent eras, this political arrangement has been described as “measured separatism” (Wilkinson 1987:32). Over generations, tribal people have fought and died, litigated and lobbied to have their rights honored.

In this paper, we will examine some of the challenges involved in maintaining these separate civic arrangements in the specific context of environmental law and regulation. Overall, we see tribal communities as sharing many of the same environmental problems as other environmental justice communities. Our basic intention is to try to explore some important ways in which tribal actions to maintain distinct political and cultural communities can help other racialized and cultural minorities struggling for control over their own environments. Thus, to the extent that other minorities are considering the pursuit of “separate but equal” treatment rather than “color-blind” assimilation into mainstream America, the experiences of tribes in trying to maintain measured separatism should offer some insights, and perhaps, more questions.

As a point of departure, we want to identify what we mean by “difference”. In his discussion of tribal courts in *Braid of Feathers*, Frank Pommersheim discusses what he calls the “dilemma of difference” for tribal courts. He points out that the courts run by tribal communities “do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete . . .” (Pommersheim 1995:99). Like Pommersheim, we are concerned with the possibility of maintaining tribal differences through the use of quasi-autonomous structures within the contours of the United States. Within the context of environmental regulation, these differences quickly become issues surrounding not just the relative health of tribal cultures but of Indians themselves, who often bear an inordinate amount of environmental risk.

Additionally, the “problem of difference” in this sense is also one of recognition. In a system of unequal power, cultural difference and concepts like justice or environmental management have to be understood as occurring in a system where difference is not usually desired or communicated. As Pommersheim points out, in American federalism, the “federal record evinces a tolerance of similarity rather than dissimilarity” (Pommersheim 1995:100), and this makes it difficult for tribal courts and governments to define spaces for cultural difference. Therefore, tribal sovereignty, to be protective of tribal cultural differences, cannot just mean that tribes are just another partner in the federal system, it must also be recognized, by the dominant culture, that tribal governments can form the basis of a different civic community, a different sense of the public good. As we shall see later in the paper, this can be seen as dangerous to members of the dominant culture when non-Indians are subject to this different sense of the public good—the US Supreme Court has repeatedly shown that it is uncomfortable in

allowing tribal police powers over non-Indian residents within reservations because they are not full participants in the political process on Indian reservations. Moreover, states often see tribal sovereignty claims as threats to their own territorial sovereignty, as can be seen in numerous challenges to the legality of tribal environmental programs.

Therefore, the basic challenge for tribal governments is that maintaining “separateness” is maintaining a difference that is recognizable and acceptable to both the dominant culture and its institutions and tribal citizens within the minority culture. Like those who have gone before us, we are concerned with the ways in which “those in power defend the established political scale by representing it as natural, normal, and fixed” (Silvern 1999:665), and how this makes it difficult for tribes to articulate an “acceptable” form of sovereignty to those in power. In this paper, we show how this basic structure of spatial and territorial sovereignty impacts the struggles within tribal governments to create and maintain institutions that protect, enhance, or elaborate on tribal civic cultural norms. This is relatively new territory for tribal institutions and those of us who think and write about them, and we mean this as a call for more thought and exploration.

### **Tribal Self-Government: Problems of Colonialism’s Legacy**

The United Nations defines self-determination as a people’s right to “freely determine their political status and freely pursue their economic, social and cultural development” (United Nations 1976). This is a high ideal and is not met by the current “domestic dependent nation” arrangement that currently exists between the United States and Indian Nations (Wilkinson 1987). There is no post-colonial scene for Indian Nations in North America, and the current political status of Native American groups is part of a colonial process and has not been “freely determined”. This does not mean that the current political and legal status of Indian Nations is totally illegitimate or imagined—many Indian Nations have, or are in the process of developing, culturally appropriate governments that provide services and protections rooted in legal rights retained from time immemorial (Alfred 1999; O’Brien 1989). In many other Native communities, however, existing tribal governments are not particularly grounded in tribal cultural traditions, and some observers have suggested that the administrative units within these communities can be seen as colonial impositions (Alfred 1999).

Whatever the current operational and legal status an Indian Nation finds itself in, the struggle for Native sovereignty—the legal and political control of activities within Indian controlled territory—continues to be the primary focus for indigenous groups in North America and across the globe. In the context of environmental protection, sovereignty is *the* critical factor for establishing environmental standards that are

recognized as legitimate and that are enforceable. In the United States, standards set by Indian Nations have often been more stringent than those set by the federal government or the states. Recognition of Native sovereignty by the nation-state is essential if standards set by Indian nations are to have the force of law. In addition to its obvious legal underpinnings, Native sovereignty is also a political discourse (a day-to-day language of negotiation) that indigenous groups share with the governmental entities that have the most interest in keeping them part of a larger nation-state.

Arguments for the reclaiming of indigenous sovereignty abound in the legal literature about Indian Nations in the United States, Canada, and the rest of the world (cf Barsh and Henderson 1980; Kickingbird 1977; Morris 1992; Nanda 1981; Wilkinson 1987). Generally, the argument is based on a notion of a universal human right to self-determination for all peoples. The notions of self-government embedded within these legal-juridical notions of sovereignty as a political goal have also been critiqued within Native American Studies (Alfred 1999; Barsh 1986; Boldt and Long 1984; Deloria and Lytle 1984). These arguments assert that because “sovereignty” is a non-Native, universalizing legal concept that fails to reflect indigenous values, it is therefore an inappropriate political goal for Native American indigenous groups. Supporting this thesis, some scholarship has pointed out that the administrative and mechanical aspects of sovereignty are further means of controlling the social relations of Indians (Nelson and Sheley 1985). For the purposes of this paper, we must keep in mind that the current status of tribal sovereignty in the United States places tribal programs firmly under the control of Congress, which has unilateral control over tribal government through plenary power, also referred to as the “domestic dependent” status of Indian nations (Pommersheim 1995:39). Thus, in the context of the framework established by federal environmental laws, full tribal sovereignty, in any real “western” sense, or in a culturally appropriate way, does not currently exist.

Many aspects of tribal autonomy nevertheless do remain and are emerging in the contemporary political scene. While the genealogy of tribal sovereignty is rooted, legally, in its recognition by European and Euro-American states, the powers derive from a recognition of autonomy before the presence of European intrusion. Thus, by the time Chief Justice John Marshall wrote Supreme Court opinions in the 1830s regarding tribal autonomy, ruling them “domestic dependent nations”, he was already recognizing a legal fiction that Indian Nations were not full sovereigns because of their dependence on European and Euro-American states. In his recognition of treaties, however, Marshall had to see this lessening of full autonomy as something that each side was agreeing to, and ultimately, benefiting from. To this end, Indian Nations were supposed to gain a level of protection in exchange for

this “dependency”. This protection is often referred to as the federal trust responsibility or trust doctrine (see Wood 1994), and has a great amount of relevance for tribes trying to protect their cultural and natural resources.

In fact, the idea of the trust “protection” itself is rooted in the arrangement of sovereignty that defines federal–tribe relations. Although the trust doctrine is prominent in Indian law, it remains amorphous (Chambers 1975; O’Brien 1986). While the trust responsibility has been recognized by courts, Congress, and the executive branch (Chambers 1975:1219; Wood 1994), the seeds of the trusteeship are traceable to the first cessions of Indian land to the sovereigns of Europe and then to the United States (O’Brien 1986:76; see also Wood 1994). Nearly all Native peoples in this country, including those in Alaska and Hawaii, share in common a loss of their land to the impulses of an immigrant majority with a colonialist, capitalist persuasion. The vast cessions of land by the native peoples were premised on federal promises that the native peoples could continue their way of life on homelands of smaller size, free from the intrusions of the majority society. Most fundamentally, the modern form of the trust obligation is the federal government’s duty to protect this separatism by protecting tribal lands, resources, and native ways of life (O’Brien 1986:78).

The federal duty to protect the separatism of tribes was often expressed in treaties negotiated between the federal government and Indian nations. At the time of early treaty negotiations in the late eighteenth century, Indian nations were still relatively powerful and autonomous, and the treaties expressly recognized their sovereignty (O’Brien 1986:79). Many treaties also contained express assurances that the federal government would “protect” the tribes (Wilkinson 1987:15–16). While individual treaties differed from tribe to tribe, they were all oriented toward ensuring the perpetual availability of a sustained, land-based, traditional existence for the Indian nations (Wilkinson 1987:14). Nearly all the treaties promised a permanent homeland on the land the tribe had reserved for itself, and many also included assurances of continued rights on lands that had been ceded to fish, hunt, and collect plants for subsistence and trade.<sup>1</sup> The vast majority of the treaties contained federal promises to provide food, clothing, and services to the tribes (Wilkinson 1987:15). Several treaties also provided that the federal government would ensure the tribes’ peaceful existence by restraining a hostile non-Indian population.<sup>2</sup> Although many reservations were established through means other than treaties, such as executive orders and acts of Congress, the same basic policies apply to such reservations—they were, and are, intended to be permanent tribal homelands.

Thus, it is in this context of protection and autonomy that tribes continue to fight for their continued existence in environmental law. In general, federal environmental statutes are administered primarily

by states in cooperation with the federal government, in this case, the Environmental Protection Agency (EPA). This approach is often called “cooperative federalism” (Percival 1995). In the 1970s, when it enacted the first generation of federal environmental laws, Congress did not consider how these laws would be carried out within Indian reservations. States were charged with leading roles, while tribes were left out of the process. In the mid-1980s, Congress began to rectify this oversight by enacting amendments to some of the major environmental laws authorizing tribes to develop environmental protection programs like those of the states. Although the legal framework is largely in place for tribes to become partners in cooperative environmental federalism, and quite a few tribes have taken on some of the roles of states pursuant to the federal statutes, most tribes have not, the reasons for which we will explore in the next section.

### **Problems of Designing Tribal Programs within a Federal Framework**

As we noted above, environmental law is carried out through “cooperative environmental federalism”, in which the states have prominent roles. Much of the history of relations between the tribes and the federal government has been shaped by conflicts between states and tribes, conflicts in which the tribes usually rely on the federal government to keep states from intruding into tribal affairs. As a general rule, states have no authority over tribes and tribal members within reservations, and state authority over non-members can be preempted by operation of federal law. Several of the major environmental statutes have been amended to authorize tribes to be treated like states for environmental regulation. These amendments, which were enacted between 1986 and 1990, typically use the phrase “treatment as States” (TAS).<sup>3</sup> In response to comments from tribes during the rulemaking process, EPA has restated this as “treatment in the same manner as a State”.

The TAS approach affords a significant measure of respect for the status of tribes as sovereigns. It also implicitly recognizes the importance of the natural environment for the survival of tribal cultures, which are rooted in the natural world. Treating tribes like states has not proven to be sufficient, though, largely because of unmet funding needs for tribal programs. Just as important, when the interests of non-Indians are affected, tribal authority can be challenged under a number of decisions issued by the US Supreme Court over the last quarter century (Frickey 1999; Getches 1996, 2001; Suagee 2002). To date, the lower federal courts have sustained the EPA in its support for tribal programs, but no case has yet been decided by the Supreme Court. This situation offers tribes a paradox: the more closely a tribal program resembles a federal or state program, the more likely it is to survive litigation; the more a

tribe tries to build a program that reflects its own cultural values, the greater the risk to tribal sovereignty.

During the 1990s, a number of American Indian Nations began to seek TAS status for various purposes under the federal environmental laws. As of March of 1998, there were 146 tribes that had been approved by EPA for TAS for at least one program (USEPA 1998), although most of these approvals have been for financial assistance for planning and the development of regulatory programs rather than for administration of EPA-approved regulatory programs. The statute in which there has been the most involvement by tribes in seeking TAS for regulatory programs has been the Clean Water Act, and the water program in which there are the most TAS approvals is the water quality standards (WQS) program, in which, as of October 2006, 30 tribes have EPA-approved WQS in place (USEPA 2006). Taking on such regulatory functions firmly embeds tribal governments into the cooperative federalist system of major environmental laws in the United States. In this system, the federal government establishes the framework for regulating pollution, but the states perform some prominent roles. The approach varies from statute to statute, but generally features the setting of standards and the administration of permit programs and other mechanisms designed to achieve compliance with standards. Some programs are carried out in the first instance by the states and others by EPA, and many of those that are carried out by EPA can be taken over by the states. The latter are often called “delegable” programs (Percival et al 1996:118ff). For example, under the Clean Water Act, the states set WQS, following federal guidelines, and EPA administers a permit program to ensure compliance with these standards, a permit program that is delegable to the states. Under the Clean Air Act, EPA sets national standards and the states administer a permit program and also carry out “state implementation plans”. Under the Resource Conservation and Recovery Act (which has not yet been amended to include TAS provisions), states operate permit programs for municipal landfills, pursuant to standards set by EPA, and EPA regulates the transport and disposal of hazardous wastes, a program that states can operate in lieu of EPA.

With varying success, tribes are beginning to use these programs to control pollution within reservations and, by developing tribally based standards, they are seeking to force polluters in neighboring states to control pollution sources that affect Indian lands. The ability of a tribe to set its own standards is critical because such standards can adopt ceremonial and other culturally specific uses of resources (Galloway 1995). Incorporating standards with culturally specific uses of resources is seen by many to be an important aspect of self-determination, sovereignty and, therefore, tribal survival (Weaver 1996).

With respect to tribes that have not developed their own standards or otherwise taken on regulatory roles, EPA has issued policy statements

(USEPA 1984, 1991, 1994, 2001) aimed at taking into consideration tribal health and natural resources. As we pointed out above, when EPA acts as the standard setter and regulatory enforcer in accordance with these policy statements, its actions are grounded, in part, on the federal trust responsibility. As the trustee of Indian lands, the federal government has a high fiduciary duty to protect tribal resources (Wood 1994). As in the case of tribally adopted standards, these policies are supposed to apply not only when pollution is produced on and contained within Indian reservations, but also to situations where permits issued by EPA (or subject to its approval) may affect reservation lands and communities (USEPA 1984).

Neither of these methods for environmental protection—standard setting pursuant to TAS or trustee protection by EPA—are currently available to other environmental justice communities. They are both rooted in the unique legal relationship the United States has with Indian Nations. However, examining the operational aspects (both the positive and negative) of these forms of community-based environmental protection is instructive to other environmental justice groups. While many communities of color have to fight in order to get heard in state and federal permitting processes (Cole and Foster 2000), EPA has made it an explicit mission to always include Indian Nations—each of the methods of protection described above are rooted in a close consultation process (USEPA 1994). As we shall see, however, being involved in a regulatory process may not be enough for many environmental justice groups and communities of color. Should “getting to the table” be the ultimate goal for environmental groups, and how should this table be structured? Is there a way to have a different table, and what would it look like?

As noted earlier, the legal framework is largely in place for tribal governments to become partners in cooperative environmental federalism, taking on responsibilities like those of the states. Most tribes, however, simply do not have the resources to build programs that are comparable to those of the states—and it is for states that these laws and programs were originally set up. The differences between tribes and states warrant emphasis. Most tribes do not have sources of revenue comparable to the states, nor do they generally have ready access to the full range of federal financial and technical assistance programs for non-federal governments. Institutions that analyze the development of laws and other policy tools for use by states and local governments generally ignore the existence of tribal governments.<sup>4</sup> In addition, tribal governments are subject to a diabolical body of law made by the Supreme Court that renders the exercise of tribal sovereignty risky—if the interests of non-Indians would be affected, people who object to something that a tribe proposes can go to court and argue that the tribe has been implicitly divested of its governmental authority over the subject at hand (see Duthu 1994; Frickey 1999; Getches 1996, 2001; Suagee 1999, 2002).

There are several points here that could be discussed in detail, but which we will simply state as “givens”: (1) federal environmental regulatory laws are largely administered and enforced by states; (2) tribes generally lack the resources to develop and administer tribal programs under federal law; (3) tribes face a range of other challenges in developing regulatory programs; (4) states generally lack regulatory authority over tribes and tribal members and trust lands within reservations; (5) EPA has limited resources to devote to direct implementation of federal laws. Given these factors we find that the environmental regulatory infrastructure in most of Indian country is generally not comparable to what it is outside Indian country. In short, while it is now theoretically possible for tribes to be real partners in environmental protection, tribes were invited into the partnership about two decades after the states and not provided with enough resources to catch up.

We describe this situation as a “structural” inequality in the environmental protection infrastructure. Because of this inequality, almost any activity that causes environmental impacts in Indian country can result in disproportionate impacts on tribal communities, what we call “structurally disproportionate impacts”. Tribal staff members are stretched beyond their limits trying to build environmental protection programs. Violations of federal law may go unnoticed or unreported. In some cases, people may be attracted to do business in Indian country because they have the impression that federal laws do not even apply.

This comparative lack of environmental regulatory infrastructure is the most serious environmental justice issue confronting tribes and the people who live within reservations and in Alaska Native villages. This is our opinion, but it is an opinion shared by many of our friends and colleagues who work in the general field of Indian country environmental protection. Drawing attention to this issue is a hard sell. Environmental justice activists, like people in the mainstream environmental movement, just do not seem to find this issue very interesting. It involves the EPA budget—federal funding for tribal programs has increased dramatically in recent years, but does not come close to meeting the needs. This issue involves the hard work of building environmental programs without enough staff or money, and trying to cope with the implications of the Supreme Court’s anti-tribal activism. We find this theater of action very interesting and many of the people who are engaged in it admirable for their knowledge, skills, and dedication. As combatants, however, we may just be too closely engaged to know how to make this issue interesting to others.

Moreover, these structural disproportionate impacts seem to fall into the blind spot of many people who probably ought to know better. Since many of the federal statutes authorize EPA to treat tribes like states, people engaged in environmental issues (such as EPA employees, institutions that prepare reports under EPA contracts—see ELI 2002 and

NAPA 2002—and people involved in environmental justice groups or in mainstream environmental groups) who have not had much experience in dealing with tribes sometimes assume too much in the way of similarities. (This permutation of America's blind spot might work something like this—people might be saying to themselves, “It never occurred to me how Indian reservations fit into environmental law, but if Congress says that tribes can be treated like states, then tribes must in fact be like states.”)

Acknowledging federal laws authorizing EPA to treat tribes like states does serve the purpose of reminding people that tribes are sovereign governments—it is useful for people engaged in the environmental justice movement and those who write about environmental justice matters to acknowledge the existence of these federal laws. Acknowledging the real differences between tribes and states and the comparative lack of regulatory infrastructure in Indian country, however, is a crucial step in dealing with this problem. Tribes need help in dealing with this problem, and we cannot expect people to be willing to help if they do not even realize that this problem exists.

### **The Problem of Maintaining Difference while Providing Fair Treatment**

A difficult challenge for tribal environmental programs is how to provide for the fair treatment of people subject to tribal regulatory authority who have no right to participate in tribal electoral and/or other political processes. If the United States lives up to its promise that tribes have a right to measured separatism, and if the United States acknowledges that the survival of tribes as distinct cultures depends on their being able to manage their environments, then tribes should generally be recognized as having environmental regulatory authority over all persons and all lands within their reservation boundaries. This, of course, means that many Americans will find themselves being governed, in some important ways, by American Indians. Will white America accept this? What, if anything, can tribal governments do to make this acceptable—what civic arrangements can be fashioned to enable peaceful coexistence within reservations among people who belong to tribal cultures and people of mainstream America? What lessons can be drawn that may be of use to non-Indian minority groups? We do not have answers to these questions. We think they are important questions. How the United States and Indian Nations answer these questions has implications for the survival of indigenous peoples and other minority cultures throughout the world.

The other side of this dilemma is precisely the one that we stated earlier, citing Pommersheim. With a Supreme Court that is explicitly hostile to tribal sovereignty, is there room in the federal system for different notions of “fair treatment” in a “different” civic arrangement? Experience

tells us that there isn't. A point we glossed over above—namely, the Supreme Court's anti-tribal activism—becomes keenly relevant when we address issues of tribal governmental powers over non-Indians. Many of the Court's Indian law decisions in the past quarter century are based on a rule that the Court first applied in 1978, the notion that Indian nations can be divested of certain aspects of their original, inherent sovereignty implicitly, without any express language in a treaty or act of Congress. In fact, the creation of the doctrine of implicit divestiture came about primarily because the Supreme Court was worried about the criminal authority that tribes might exercise over non-Indians unable to participate in the political process in the case of *Oliphant v Suquamish Indian Tribe* in 1978 (see Duthu 1994). There, the Supreme Court, in a footnote, describes a geopolitical situation that scares liberal democratic notions of participation—2928 non-Indians and 50 Indians live on the reservation, of which most of the land (63%) is owned by non-Indians. Of course, this “checkerboard” of land arrangement was created by the policies of the United States, which were created to alienate land from Indians. This did not matter to the Supreme Court in 1978, and, reacting to the notion of a small population of Indians making political decisions that could impact such a large number of non-Indians, the Court made up a new rule to “protect” the interests of the non-Indians, liberating them from any tribal criminal laws on the reservation.

One conclusion that tribes and their lawyers might draw from *Oliphant* (and later cases) is that tribes must choose to either employ western notions of participation and citizenry, or lose their powers over non-Indians entirely. In the environmental arena, these notions of participation and the public's right to know about pollution strikes to the core of how environmental law is supposed to work.

On-reservation environmental issues can arise in a context in which the tribal government is the real decision-maker. As with decisions made by other kinds of governments, this is not just one context, but rather an entire range of governmental activity including the enactment of legislation, environmental standard setting (which may be done through rule-making), site-specific permit decisions, remediation of contaminated sites, enforcement actions, administrative appeals and judicial review. When tribes administer programs that are approved by EPA pursuant to federal statutes, tribes are generally subject to the same kinds of procedural and public participation requirements as are the states (Suagee and Lowndes 1999). Of course, as noted earlier, tribes were invited into cooperative environmental federalism only recently and they do not have much experience in running these kinds of programs. Tribes could use more help than they are getting from the federal government. Tribes are often engaged in trying to create rather standard “command and control” programs, perhaps with more stringent standards, while state and federal agencies are working on various kinds of regulatory innovations. Tribal

environmental programs could become laboratories for creativity in environmental protection, drawing from modern science and from tribal cultural traditions. But for this to happen, some of the people who are interested in regulatory innovation need to start working with tribes.

And there is still some room for tribes to think outside of the boxes laid out in federal environmental laws. When tribes enact and enforce environmental and natural resource laws, they are not limited to doing so within the framework of federal environmental law. Rather, tribes can, and often do, operate programs on the basis of inherent sovereignty rather than pursuant to the federal statutes. Programs based on tribal sovereignty that are not subject to EPA approval are generally not subject to the public participation and due process requirements found in EPA's regulations. The legal framework for "meaningful involvement" in such programs is found in the Indian Civil Rights Act,<sup>5</sup> tribal constitutions, tribal legislation and tribal common law. And, perhaps, international human rights law.

As an intellectual and political issue, the problem of participation in tribal governmental decisions in environmental regulatory matters is just beginning to be addressed. The National Environmental Justice Advisory Council (NEJAC) has published a report by its Indigenous Peoples Subcommittee (IPS) on "meaningful involvement" and "fair treatment" of the public, including tribal members and nonmembers, in tribal environmental programs (NEJAC 2004). While this report was written as policy guidance for EPA, NEJAC also intends for the report to be useful for tribal governments in addressing issues relating to public participation. This is a subject that is rather controversial in Indian country—too much public participation might slow down economic development and environmental rule-making on Indian reservations, and worse, could expose tribal governmental process to the racist commentary from residents of reservation border towns. Too little public participation could expose tribal rule-making and governmental decisions to challenges in tribal, federal, and possibly, state courts—the latter two potentially threatening the integrity of tribal sovereignty. We still think that this is a very important issue, for a variety of reasons, some of which have to do with the Supreme Court's recent rulings in Indian law. We wish we saw more evidence that others share our view that this issue really does matter, even though the process in establishing procedures for participation might be difficult.

We recognize that the problem requires more than just re-building or legitimization of tribal institutions in the wake of colonialism. Cornell and Kalt have recognized that successful tribal institutions, ones that are able to "exercise sovereignty effectively" (Cornell and Kalt 1998:201), are the ones that create a "cultural match" between tribal "governing institutions and the prevailing ideas in the community about how authority should be organized and exercised" (Cornell and Kalt 1998:201). They

tend to see these prevailing ideas as coming from tribal traditions, and we agree that tribal institutions can, and should, reflect traditional tribal cultures. But one of the legacies of colonialism is that most Indian reservations, the territories within which tribal sovereignty usually operates, do not contain only tribal citizens (as we pointed out in *Oliphant*, above), and we need strong cultural institutions in Indian country that will also address this fact. This does not mean that we believe that non-Indians living within reservations should be given tribal citizenship, but their presence within reservations needs to be addressed in more formal, institutional ways. Another sad legacy of colonialism is that not every tribal citizen practices or participates in tribal traditional cultures to the same extent or in the same way, many people having been forced to assimilate. For both of these reasons, locating both the “prevailing ideas in the community” and its matching governing institution exceedingly difficult. This is why EPA and tribes need to be ahead of the curve when it comes to building effective institutions that will properly locate and include the “ideas in the community”.

### **Conclusion: Stretching Liberal Democracies to their Limits?**

We have thus come full circle, back to the dilemma of difference with which we started. Meaningful, potentially cross-cultural political participation in the context of structural inequality requires a serious reconsideration of liberal democratic theory and institutions, and it is in this theoretical context that we would like to conclude. We started this paper pointing out that non-Native environmental justice communities can learn something from the complicated issues that tribes face pursuing and maintaining “separateness”. The learning process can and should be both ways—tribal protectors of sovereignty can learn a lot from environmental justice activists and scholars as well. Environmental justice scholarship is already addressing the problems of “difference” within United States environmental law in ways that are useful in explaining the institutional concerns we have been raising throughout this article. While many of these scholarly concerns are important critiques of United States environmental practice, they can also help point the way to the next set of institutions that will preserve and protect the “separateness” of tribal sovereignty while addressing the complicated colonial legacies that exist in tribal lands and institutions.

Much of our critique of governmental complacency around the issues of participation in Indian country have centered on EPA. Environmental justice scholarship is excellent in pointing out the inadequacy of involvement that environmental justice groups, usually the people who bear the most environmental risk, have in governmental decision-making processes. As Eileen Gauna points out, “current administrative processes fail to effectively incorporate an important form of public participation

in decision-making—the participation by communities bearing the greatest environmental risks” (1998:5). Similarly, Luke Cole and Sheila Foster have noted that “grassroots groups inevitably run up against a system of environmental decision making that was not designed with their full participation in mind” (2000:13).

These scholars recognize, as we do in tribal contexts, that the current institutional arrangements for participation are not enough. We do not fix environmental justice problems by merely keeping the system of institutions we have in place and by adding a few more people of color at the decision-making table. As Gauna points out, “a place at the table does not ensure a comparable serving of the environmental protection pie” (1998:13). What we need are new institutions that can engender new forms of meaningful participation—a participation that is cognizant of tribal sovereignty and colonial histories. For Cole and Foster, meaningful participation would be one with “substantive dialogue among administrators, experts, and affected communities along with the opportunity for affected communities to influence the decision-making process” (Cole and Foster 2000:16). This is very close to the needs of tribal governments. As representatives of tribal communities, tribal governments need to be involved in national decision-making processes that affect them, but they also need to facilitate a process of decision-making with their own communities that allows for the participation of everyone in socially legitimate ways. As David Schlosberg points out, environmental justice problems can be solved by “not just equitable representation at the level of the state, but in ongoing diverse recognition and participation at a variety of levels and a number of practices of environmental policy-making, organizational politics, and community life” (1999:15).

This paper, in many ways, is a response to these theoretical imperatives raised by environmental justice scholars about the ongoing efficacy of our democratic institutions to adequately include everyone in the decision-making process and protect them from environmental harm. Here, we have shown many of the difficulties tribes, as “domestic dependent nations” with a certain amount of measured separatism, face when trying to protect themselves from environmental and cultural destruction by manipulating the liberal structures created for these “unique” circumstances. The fact that Indian Nations are able to manipulate federal law at all is a recognition that partial sovereignty and a unique political relationship between nation-states and cultural minorities can help to ebb this kind of cultural violence hidden within democracies. We need to focus our energies and create better institutions that will make it easier for indigenous groups and other cultural minorities to proclaim these political articulations so that they can maintain their own “separate” legitimate institutions that will truly protect their communities from environmental harm.

## Endnotes

<sup>1</sup> See Treaty with the Walla Walla, 9 June 1855, art I, 12 Stat 945, 946 (guaranteeing right to fish, hunt, gather roots and berries, and pasture stock off reservation); Treaty with the Nisqually, 26 December 1854, art III, 10 Stat 1132, 1133 (guaranteeing right to fish at all “usual and accustomed grounds and stations”); Treaty with the Menomonee, 8 February 1831, 7 Stat 342, 345 (allowing hunting and fishing on ceded lands), also cited in Wood (1994:1569).

<sup>2</sup> See, eg, Treaty with the Northern Cheyenne and Northern Arapahoe, 10 May 1868, art I, 15 Stat 655, 655 (“If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained”). These were known as “bad men” clauses, also cited in Wood (1994:1569).

<sup>3</sup> In 1986, TAS amendments were enacted for the Safe Drinking Water Act [42 USC Sec 300f–300j-26 (2000), TAS provisions at Sec 300j-11] and the Comprehensive Environmental Response, Compensation and Liability Act [42 USC Sec 9601–9675 (2000), TAS provisions at Sec 9626, see also natural resources damages provisions in Sec 9607]. Clean Water Act TAS amendments were enacted in 1987 [33 USC Sec 1251–1387 (1988), TAS provisions at Sec 1377]. Clean Air Act TAS amendments were enacted in 1990 [42 USC Sec 7401—7671q (2000), TAS provisions at Sec 7601(d)]. See generally Coursen (1993). See also Goldtooth (1995). The major environmental federalism statute administered by EPA that has not been amended to include TAS provisions is the Resource Conservation and Recovery Act (also known as the Solid Waste Disposal Act) (42 USC Sec 6901–6992k), which established the framework for regulating municipal solid waste and hazardous waste. In addition to statutes administered by EPA, there are a number of other federal statutes that treat tribes in a manner comparable to states, including the Surface Mining Control and Reclamation Act of 1977 [30 USC Sec 1221 and various sections to 1328 (2000), tribal provisions at Sec 1235(k)] and the National Historic Preservation Act [16 USC Sec 470–470x-6 (2000), tribal provisions at Sec 470a(d)].

<sup>4</sup> In our review of NAPA (2002) (a report by the National Academy of Public Administration commissioned by EPA), the only references to tribes that we found in 195 pages were in a few passages that were quoted from other sources. We realize that EPA did not ask NAPA to include tribal laws in its analysis, and we wonder if NAPA could have done so had it been asked. Our point is simply that there is no federally supported institution with a mission of helping tribes deal with these issues through the development of legislation. (The inside cover of the NAPA report says that it is an “independent, nonprofit organization chartered by Congress to improve governance at all levels: local, regional, state, national, and international”. It does not expressly include “tribal”, and we have not investigated to determine if it has ever focused on tribal governance, but in our experience, the omission of tribes from such a list generally indicates a blind spot.)

<sup>5</sup> 25 USC Sec 1301–1303.

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