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ARTICLE

THE CHALLENGE OF "DIFFERENTIATED CITIZENSHIP": CAN STATE CONSTITUTIONS PROTECT TRIBAL RIGHTS?

Rebecca Tsosie*

One of the most vexing problems in contemporary states with large Native populations is whether the continuing inequities between Native and non-Native peoples are best addressed through the standard framework of "Federal Indian Law," in which the federal government mediates tribal-state relations, or through newly articulated legal relationships between states and tribes. On a daily basis, tribes and states engage each other as separate and distinct governments. Sometimes these relationships are antagonistic, as tribes and

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* Lincoln Professor of Native American Law and Ethics and Executive Director, Indian Legal Program, Arizona State University. This essay was inspired by the illuminating exchange among the distinguished panelists at the University of Montana, Montana Law Review's Honorable James R. Browning Symposium on the 1972 Montana Constitution: Thirty Years Later, Sept. 12-14, 2002. The panelists addressed the purpose and impact of the provision in Article X of the Montana Constitution addressing Indian education. I am deeply indebted to those panelists: Ms. Julie Cajune, Director of Indian Education for Ronan School District, Mr. Jeffrey Weldon, Chief Legal Counsel, Montana Office of Public Instruction, and Professor Raymond Cross, University of Montana School of Law, for giving a context and perspective that situated my own academic study within the larger state and regional issues relating to Indian education and education in Montana. They are the true experts on this provision.

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states pursue their often mutually exclusive rights to water resources, jurisdiction, and tax revenues. But what about the access of tribal and state citizens to "public goods" such as education and health care? Does the state have the duty to provide these goods to Native citizens as well as non-Native citizens? Is it exempted from this duty because Native citizens enjoy a special trust relationship with the United States government? What are the legal, moral and ethical dimensions of these important questions?

This article does not attempt to provide a definitive answer or framework to address these issues. However, I would like to use a particular legal provision, Article X of the Montana Constitution, which addresses rights to education and Native cultural heritage, to begin a discussion about future directions to address tribal-state conflicts and the rights of Native and non-Native citizens. Part I of this article will outline the nature of tribal rights as group rights that have both cultural and political dimensions and will discuss the challenge of differentiated citizenship for Native people, who are simultaneously citizens of their Native nations, the United States, and the state in which they reside. Part II will discuss the role of state constitutions in protecting Native cultural and political rights, focusing specifically on Article X of the Montana Constitution. Part III of this article will discuss the impact of federal policy concerning Native education and cultural heritage in articulating related rights under state law. Part IV concludes the discussion by addressing the broader legal, moral and ethical aspects of differentiated citizenship for Native people.

I. THE POLITICAL AND CULTURAL STATUS OF NATIVE NATIONS AND THEIR MEMBERS

Federal Indian law has shaped a unique relationship between the Indian nations and the United States government. For much of this nation's history, the state governments had little to do with the direct implementation of federal Indian policy, although they clearly helped shape that policy through political pressure for tribal lands and resources. In the contemporary era, the federal government retains a strong presence in articulating Indian policy. However, the dynamics have changed to represent the active participation of tribal governments in the exercise of their right to self-determination. There is also an increased trend on the part of tribal governments to have direct political dealings with state

governments. This section will first summarize the historical background and structure of federal Indian law and policy, and then examine contemporary aspects of domestic federalism concerning the state, federal and tribal governments.

A. *The Historical Foundations of Federal Indian Policy*

Historically, American jurisprudence has treated the political relationship between Native nations and the various states of the Union as a feature of *federal* constitutional law. The Commerce Clause speaks of the sole and exclusive right of the United States Congress to regulate trade among the several states, with foreign nations, and with Indian tribes.[1] The Indian Commerce Clause is generally cited as the constitutional authority for this exclusive federal-tribal relationship, although other provisions, such as the Treaty Clause[2] and the Property Clause,[3] also support this relationship.[4]

Federal Indian law is founded upon the treaty-based notion that Indian nations are separate political sovereigns with their own territorial boundaries. The treaties initiated by Great Britain and then by the United States recognized Indian nations as separate governments with internal self-governing powers and the right to declare war and peace with external sovereigns. They also recognized that the Indian nations held property rights which they could convey to the United States government.

Chief Justice John Marshall drew on the treaty relationship when he structured domestic federal Indian law with his famous trilogy of opinions.[5] These opinions established the character of

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1. U.S. CONST. art. I, § 8, cl. 3.
2. U.S. CONST. art. II, § 2, cl. 2.
3. U.S. CONST. art. IV, § 3, cl. 2.
4. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (holding that Indian-owned lands outside of reservations and not in U.S. trust status are taxable by state). "The power of Congress granted by Art. I, s 8 '(t)o regulate Commerce . . . with the Indian Tribes' is an exceedingly broad one. In the liquor cases the Court held that it reached acts even off Indian reservations in areas normally subject to the police power of the States." *Id.* at 159 (citation omitted) (Douglas, J., concurring).
5. In the first case, *Johnson v. McIntosh*, 21 U.S. 543 (1823), Marshall held that the European "discovery" of North America vested in the European sovereigns the paramount title to the land. *Id.* at 603. The Indian nations retained a more limited property interest, known as the "right of occupancy," which could be divested only by the European sovereign through "purchase" or "conquest." *Id.* at 545, 574. The Doctrine of Discovery was intended to protect the integrity of the "discovering" nation's land title from competing claims by other European sovereigns. *Id.* at 568. However, it operated to divest the Indian nations of their full rights as territorial sovereigns to exclude or include other nations from their territory at will. Instead, they were locked into a

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Indian tribes as "domestic, dependent nations" holding rights of occupancy in their traditional lands and territories, as well as rights of self-government that were independent of state control. Under Chief Justice Marshall's jurisprudence, Indian nations were not incorporated into the federal Union. They were pre-Constitutional governments who maintained sovereign authority within their territorial boundaries. The states were precluded from applying their laws within Indian Country, or, indeed, from having any relationship with the tribes at all, except with the consent of the tribes or the federal government. As Chief Justice Marshall stated in *Worcester v. Georgia*: "[t]he whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."[6] According to Chief Justice Marshall, the federal government's authority over Indian affairs, rooted in the federal Constitution, laws and treaties, was directed toward implementing its duty to protect Indian nations.

The federal duty of protection has been regarded, rather paternalistically, as creating a guardian-ward relationship, whereby the federal government, as trustee, regulates Indian affairs in order to protect the tribal beneficiaries. However, in contemporary society, the guardian-ward relationship does not always represent reality. Native people are still tribal citizens, and Native nations still possess a trust relationship with the United States. However, Native people are also now citizens of the United States as well as citizens of the state in which they reside.[7] The political relationships between the states, tribes and the federal government are being reconfigured to reflect this differentiated citizenship, as well as to reflect the increasing

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bilateral bargain with the discovering sovereign when alienating their land rights. In that respect, the opinion had a devastating effect on the later construction of tribal sovereignty.

In the Cherokee cases, *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832), which followed *Johnson v. McIntosh*, Chief Justice Marshall considered whether the state of Georgia could exercise jurisdiction over land within its boundaries that was held by the Cherokee Nation. In a phrase that has endured within Federal Indian law, Marshall referred to the tribes as "domestic, dependent nations." *Cherokee Nation*, 30 U.S. at 18. The Cherokee Nation was, he said, a "distinct political society, separated from others, capable of managing its own affairs and governing itself." *Id.* at 16. Although Indian tribes had the political status of "nations," they were not "foreign nations" because they were within the territorial boundaries of the United States and because, through the treaties, they had placed themselves under the sole protection of the United States. *Id.* at 18.

6. *Worcester*, 31 U.S. at 561.
7. Citizenship Act of 1924, 8 U.S.C. § 1401 (2002).

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autonomy of tribal governments.

Notably, however, these emerging political relationships rest upon a historical legacy of federal Indian policy that often sacrificed tribal rights for the interests of the developing states and their citizenry. Thus, it is important to understand how Congressional policy toward Indian nations has vacillated over the years in response to the needs and interests of the encompassing society of the United States and its citizens.

B. The Impact of Changing Congressional Policies

The policies of the United States and Great Britain toward Indian nations span a continuum between those that recognize the separate political autonomy of Indian nations and those that seek to destroy, assimilate or incorporate the Indian nations. During the colonial period, Great Britain used treaties to form political alliances with Indian nations in order to secure land rights and political allegiance, both of which were necessary for colonization. After the Revolutionary War, the United States struggled to establish its own political sovereignty and employed the same policies to secure political alliances with powerful Indian nations. However, after the War of 1812, the United States assumed a more dominant position, and its policies with Indian nations began to reflect a more aggressive stance.

Additionally, it became important for the federal government to assert its supremacy over the state governments. The Articles of Confederation had given states some measure of authority to deal with Indian nations.[8] The Constitution, however, asserted the supremacy of the national government over Indian policy, as did the Trade and Intercourse Acts which precluded the states from engaging in transactions to gain Indian land without the consent of the federal government.[9]

The states, however, played a very important political role in shaping federal Indian policy. On an ideological level this was represented by the federal government's 19th century manifest destiny policy. The development of the Western territories coincided with the need of the eastern states to gain the maximum amount of territory for non-Indian settlers. After 1812, the federal government began to encourage Indian tribes to voluntarily remove westward, and such provisions were inserted into several Indian treaties, including the 1817 Treaty

8. ARTICLES OF CONFEDERATION art. IX, § 4.

9. U.S. CONST. art. I, § 8, cl. 3.

with the Cherokee Nation. However, many Indian nations resisted this process, and toward the latter part of the 1820s, the conflicts between the states and tribes escalated. Chief Justice Marshall's opinions in the Cherokee cases emerged from the conflict as the State of Georgia sought to extend its laws to the Cherokee Nation's territory in order to annihilate the separate political existence of the Cherokee people. In 1830, Congress passed the Removal Act, authorizing the President of the United States to exchange Indian lands for lands west of the Mississippi. During President Andrew Jackson's administration, the Removal Act was used to forcibly remove many eastern and southeastern tribes to the western "Indian territory." The Removal policy continued throughout the 19th century and displaced Indian nations across the country from their ancestral lands. Others, for example, the Mississippi Choctaw, resisted and stayed on their lands, despite the considerable hardships that this entailed.

Importantly, the earlier norms established by the treaty policy, which perceived Indian nations as autonomous governments, were reconceptualized to support the idea that Indians were savages who could not coexist with civilization.[10] Georgia Governor George Gilmer, for example, characterized the Indian treaties as "expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized people had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it."[11] As "savages," the Indian nations could not claim the full political autonomy recognized in treaty agreements between international governments. This idea became the basis for the United States Supreme Court's 1903 decision in *Lone Wolf v. Hitchcock* that the United States could unilaterally abrogate provisions of an Indian treaty and that this was a "political question" that could not be litigated in the federal courts.[12]

During the latter part of the 19th Century, the federal government increasingly restricted the reservation landbase of the Indian nations and instituted rigorous assimilation policies.

10. *See* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

11. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 97 (4th ed. 1998).

12. 187 U.S. 553 (1903).

The plenary power aspect of federal Indian law coincided with the government's assimilation policies to justify the extreme federal control over Indian people necessary to accomplish these policies. These assimilation policies were designed to impair and destroy the separate political, social, cultural, and economic structures of Indian nations, and to inculcate the forced dependency of Indian people.[13]

The ultimate assimilation policy was represented by the Dawes Allotment Act of 1887, which sought to break up the collective landholdings of the Indian nations by granting "allotments" of tribal lands in severalty to individual tribal members and selling the surplus lands on the reservation to non-Indian settlers.[14] The Allotment policy resulted in a massive expropriation of tribal landholdings to non-Indians, estimated at approximately 90 million acres. In addition, it created an unwieldy pattern of checkerboard land ownership that persists on many reservations. Today, non-Indians often hold fee parcels of land within the reservation. Adjacent lands may be held in fee by tribal members or their descendants, or may be held as restricted "trust allotments" by tribal members. Many tribes retained tribal trust lands on the reservation, as well. This pattern of ownership caused a great deal of economic inefficiency and also resulted in many serious jurisdictional problems for Indian nations.

The New Deal reformers radically transformed federal Indian law primarily through the Indian Reorganization Act of 1934 (IRA).[15] The IRA officially ended the practice of allotment with respect to tribally owned lands and supported the growth and development of tribal self-government under a Western constitutional model. Indian nations were invited to adopt centralized, constitutional governments composed of a tribal

13. For example, the federal government established Indian agents on the reservations and developed a bureaucratic structure designed to enhance the authority of these agents and their staff and to break down the traditional governments of the Indian nations. The development of Indian police on reservations, for example, imposed a Western structure of law and order designed to break down the traditional systems of the Indian nations. The federal government also sought to assimilate Indian people by stamping out Native languages and religions. This was accomplished, for example, through government boarding school policies and Christianization programs, as well as administrative regulations which criminalized many religious and social practices (e.g., traditional marriage practices which authorized more than one wife). *See generally*, VINE DELORIA, GOD IS RED: A NATIVE VIEW OF RELIGION (2d ed. 1994); and VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983).

14. 25 U.S.C. §§ 331-334 (2002).

15. 25 U.S.C. §§ 461-479 (2002).

council, whose members would be selected by a majority vote of the tribe. The tribal council would be vested with the power to make dispositions of land and to negotiate with the federal, state and local governments on matters of political or economic importance. The IRA also promoted economic development efforts by tribally organized corporations.

While the IRA emphasized the separate political status of Indian nations, federal policy shifted again toward assimilation during the Termination Era, which lasted from 1940s to the early 1960s. The ideology of Termination purported to be based on equality of citizenship for Indian people and the need to free the designated tribes from federal supervision and control. The Termination policy was implemented through a series of individual acts that applied to specific tribes, including the Menominee, Klamath, Catawba and Ponca. Under the terms of these acts, the tribe's trust relationship with the United States government ended. The tribe's lands and resources were generally liquidated into a monetary payment, which could be distributed to tribal members. Those members would then join the workforce in urban areas and establish their households as equal state citizens without the special rights, privileges and immunities that would apply to members of federally recognized tribes. The federal government's Relocation policy, designed to mainstream reservation Indians by encouraging them to voluntarily relocate to big urban cities like San Francisco and Chicago in exchange for job training and housing assistance, worked in tandem with Termination to achieve the same goals.

Another key piece of Termination Era legislation is Public Law 280, which was enacted in 1953 in response to the demand of several states to assert jurisdiction over Indian lands within their boundaries. As originally enacted, Public Law 280 extended state civil and criminal jurisdiction over reservation Indians in several enumerated states, including Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, with limited exceptions. Other states were authorized to assume jurisdiction over Indian reservations at their discretion. Congress subsequently enacted a provision in the Civil Rights Act of 1968 that no state could acquire Public Law 280 jurisdiction over the objections of the Indians who would be affected by the state's assumption of such jurisdiction. Public Law 280 had negative consequences for both the Indian nations and the states. The impacts upon tribal self-governance and law enforcement problems are legendary. However, Congress was

only persuaded to implement a "retrocession" option when the states demonstrated the tremendous financial impact of this jurisdiction. Public Law 280 is still in force in many states, including California, and has in many cases discouraged the development of tribal justice systems by tribes in those states.[16]

The practice of Termination effectively ended in the early 1960s under the Kennedy administration. In 1970, President Nixon formally repudiated the policy and called for an end to Termination and a commitment to "Self-Determination" for Indian nations. Some of the terminated tribes were eventually reinstated to trust status. The Self-Determination policy reflects a commitment to tribal autonomy rather than the paternalistic federal control of past Indian policy yet continues the commitment to provide federal assistance to Indian nations.[17] Thus, the Self-Determination policy endorses tribal control over federal programs. The federal government's Self-Determination policy is still in effect, although the Supreme Court continues to struggle in reconciling notions of tribal sovereignty with Congress' commitment to self-determination.[18]

As this survey of American policy demonstrates, the federal government has brokered the conflicts between states and tribes since the early days of this country's history. In many cases, tribal interests were sacrificed for the good of the American citizenry. However, in the contemporary era, the policy of self-determination suggests an increasing role for tribal autonomy, particularly over matters of local governance. In that sense, it is important for Indian nations to engage in reciprocal, political relationships with state and local governments. This article will now turn to examine the contemporary contours of domestic federalism, against the historic backdrop of federal Indian law and policy.

16. CAROLE GOLDBERG-AMBROSE & TIMOTHY CARR SEWARD, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997).

17. In addition to the famous 1988 Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b (2002), Congress has also passed a number of other statutes which reflect this commitment, including the Indian Child Welfare Act of 1978, 25 U.S.C. § 1903 (2002), the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2002), the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2002), the Self-Governance Act, 25 U.S.C. § 458aa (2002), the Indian Land Consolidation Act, 25 U.S.C. § 2201 (2002), and the Tribally-Controlled School Grants Act of 1988, 25 U.S.C. § 2501 (2002).

18. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Montana v. United States, 450 U.S. 544 (1981); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

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C. *The Contemporary Contours of Domestic Federalism*

In the contemporary era, Indian nations are actively involved in self-governance on every level, including economic development, educational administration, and institutional development of their judicial systems and administrative agencies. Through these structures, tribal governments interact with state and local governments on a variety of issues, including law enforcement, environmental regulation, and the administration of health and education resources. The legal framework for adjudicating these governmental interactions is still in the developing stage and has aspects that resemble the structures used to adjudicate interstate issues (e.g., tribal-state compacts) as well as the structures used to adjudicate issues involving international sovereigns (e.g., principles of comity).

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, exemplifies the trend in federal legislation to promote effective state-tribal cooperation. The IGRA authorizes Indian nations to engage in gaming on the reservation so long as state law does not prohibit this, and so long as the state and the tribe have reached agreement on the nature and scope of the activities through a compact. Although the IGRA compacting provision has engendered a great deal of litigation between states and tribes, the provision is notable because it attempts to bridge the historical division between states and tribes through the use of alternative dispute resolution. The compacting procedure is similar to interstate compacts which are used to resolve interjurisdictional issues between sister states and reflects a baseline notion of bilateral cooperation between autonomous sovereigns.

The changing contours of domestic federalism are particularly apparent from IGRA and the development of state-tribal judicial relations that focus upon mutual recognition of orders and judgments and cooperative interjurisdictional enforcement. Although the IGRA attempts to create a consensual model for political interaction, the litigation over state-tribal IGRA compacts raises a serious issue: Can parties who have had a historically antagonistic relationship be expected to negotiate in good faith, particularly in cases where the state does not perceive Indian gaming to be beneficial to its own interests?[19] The likelihood that the parties will reach

19. *See* Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 72

agreement may depend upon a number of factors, including the parties' perception of the agreement as mutually beneficial, and whether the agreement is perceived to be voluntary or coerced.

Tribal-state relations are colored by the bitter history of land appropriation and the on-going set of jurisdictional tensions between tribal and state governments. In the last few decades, for example, states have litigated over tribal cigarette sales, tribal regulation of non-Indian owned fee land on the reservation, tribal taxation, and a number of other claims designed to impair tribal sovereignty and expand the scope of state power. This litigation, combined with a long-standing history of racial animosity between Indians and non-Indians in the rural counties abutting the reservations, often causes the tribes to expect the worst in state relationships.

The interactions between state and tribal court systems also illustrate these problems. For example, to what extent should a state court give full effect to a tribal court judgment? Conversely, to what extent should a tribal court give full effect to a state court judgment? These issues are alternatively considered under a comity analysis or a full faith and credit analysis. New Mexico is among the states that treat tribal court judgments as entitled to full effect under the full faith and credit clause.[20] Many states, including Montana, will extend comity, but not full faith and credit to tribal court judgments.[21] Under Montana statutes and case law, the state court can decline to enforce such a judgment for "want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact."[22]

Indian law scholar Frank Pommersheim discusses contemporary tribal-state tensions in his book, *Braid of Feathers*.[23] He notes that in South Dakota, as in many states, "tribal-state relations are often caught in a history of actions that are perceived (rightly or wrongly) by many tribes as having

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(1997).

20. In *Jim v. CIT Financial Services Corporation*, the New Mexico Supreme Court "held that the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the courts of New Mexico because the Navajo Nation is a 'territory" within the meaning of that statute." 87 N.M. 362, 363, 533 P.2d 751, 752 (1975).

21. *See* Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 253 (1991); Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (1982).

22. *Wippert*, 201 Mont. at 305, 654 P.2d at 515.

23. FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1997).

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as their main objective the undermining of the tribe's very existence."[24] In short, he cautions, "the playing field has never been level." Professor Pommersheim suggests that this "unfair slope could be corrected if certain principles could be embedded in a set of negotiated sovereignty accords."[25] He suggests that in order to improve relations, states must demonstrate "publicly and in writing that they recognize tribal sovereignty—that is, the right of tribal governments to exist, to endure, and to flourish."[26] Such a set of accords might then "establish innovative new political and diplomatic protocols" that would enhance tribal-state relations.[27] For example, the Centennial Accord between the State of Washington and the sovereign tribes of that region provides that:

> [E]ach party to this Accord respects the sovereignty of the other. The respective sovereignty of the state and each federally recognized tribe provide paramount authority for that party to exist and to govern. The parties share in their relationship particular respect for the values and cultures represented by tribal governments. Further, the parties share a desire for a complete accord between the State of Washington and federally recognized tribes in Washington respecting a full government to government relationship and will work with all state and tribal governments to achieve such an Accord.[28]

The approach suggested by Professor Pommersheim speaks to an emerging norm of mutuality, reciprocity, and respect between sovereign governments that share much of the same region. The state constitution, however, is the instrument that spells out many of the state's fundamental values and norms. What effect, then, do state constitutional provisions have on Native peoples' rights? This article will next engage the role of state constitutions in adjudicating the rights, duties and responsibilities that inhere in the notion of a differentiated citizenship for Native peoples.

II. THE ROLE OF STATE CONSTITUTIONS IN PROTECTING NATIVE RIGHTS

State constitutions can protect Native rights by protecting the political and cultural rights of Native nations or by

24. *Id.* at 153.
25. *Id.*
26. *Id.* at 154.
27. *Id.*
28. FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 154 (1997).

protecting the rights of Native people as state citizens or as members of distinctive cultural groups. The rights of Indian nations and their members are heavily influenced by both federal and tribal law, which means that state constitutional protections are to some extent limited or framed by exterior legal systems. The Montana Constitution is set up to govern the interaction of the state and its citizens, many of whom are Native American. Toward this end, the Montana Constitution has general protections that are judicially extended to Native citizens and non-Native citizens, as well as provisions that relate specifically to Native American people.[29]

A. *State Constitutional Provisions that Secure General Rights*

The Washington Centennial Accord speaks to the political relationship between sovereigns: Indian nations and states. Indeed, the oldest state constitutional provisions concerning Indian tribes are founded upon that distinction. Most state constitutions contain the general disclaimer of state jurisdiction over Indian lands that was a condition of being admitted to statehood.[30] In some cases, courts have used such provisions to justify legislation that protects tribal rights on a distinctive basis. For example, in *Livingston v. Ewing*, the United States District Court for the District of New Mexico used the state disclaimer statute to justify special protection for Indian artists and craftsmen, citing the special relationship that exists between the state and the tribal governments.[31]

Most states, however, have not interpreted these general disclaimer provisions as supporting recognition of "special rights" for Native people, raising the question of whether Native interests can be protected under the "neutral" provisions of state

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29. It should be noted that the Montana Constitution specifically protects the reserved water rights of Indian nations in pending water adjudication actions. In *Confederated Salish and Kootenai Tribes v. Clinch*, 1999 MT 342, 297 Mont. 448, 992 P.2d 244, the Montana Supreme Court held that issuing water permits for the use of water that may belong to a tribe violates Article 9, Section 3, Paragraph 1 of the Montana Constitution if issued prior to the quantification of the Indian tribes' pervasive reserved right. *Clinch*, 1999 MT at ¶ 27, 297 Mont. at ¶ 27, 992 P.2d at ¶ 27.

30. *See, e.g.*, MONT. CONST. art. I, § 1 (providing that the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States and shall remain in full force and effect until revoked by the consent of the United States and the people of Montana).

31. 455 F. Supp. 825, 830 (D. N.M. 1978), *aff'd*, 601 F.2d 1110 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979).

constitutions. How do general constitutional guarantees—for example, of equal protection and due process—protect the rights of Native people as both state and tribal citizens? The Montana Supreme Court has been persistent in its efforts to use these provisions to address the reservation-based claims of its Indian citizens.[32] According to Professors Brown and Desmond, the movement of the Montana Supreme Court to authorize state jurisdiction over reservation-based disputes stemmed in part from tribal constitutional and statutory provisions that disclaimed tribal jurisdiction over certain classes of cases. In cases where there was arguably no tribal remedy, the state courts reasoned that they should assume jurisdiction.[33] Not surprisingly, this focus can come into conflict with principles of tribal sovereignty and federal preemption.[34] Given the special relationship that exists between the Indian nations and the federal government, state constitutional protections must be reconciled with federal and tribal law.

This attempt to reconcile competing interests is demonstrated in several equal protection cases. In *Lambert v. Ryozik*, for example, a tribal member raised an equal protection challenge and the Supreme Court of Montana affirmed the right of Indian plaintiffs to bring claims against non-Indians in state court.[35] The Montana Supreme Court based its decision on the premise that failure to recognize the basic right of Indian litigants to bring this claim would deprive them of equal protection under Article II, Section 4 of the Montana Constitution, and also deprive them of the right to sue for such actions that is guaranteed to Montana citizens under Article II, Section 16 of the Montana Constitution.

Notably, this argument cannot succeed in a context where the legal proceeding involves only tribal members, given the competing interests of the tribe as sovereign. In *Fisher v. District Court,* the United States Supreme Court ruled that the Northern Cheyenne Tribal Court had exclusive jurisdiction over an adoption proceeding in which all parties were members of the Tribe and residents of the Northern Cheyenne Reservation.[36]

32. *See* Brown & Desmond, *supra* note 21, at 264.

33. *See id.* at 270.

34. *See id.* at 268-286 (discussing Montana cases eliciting the conflict between tribal sovereignty and federal preemption).

35. 268 Mont. 219, 886 P.2d 378 (1994).

36. 424 U.S. 382 (1976).

The Court used the *Williams* infringement test[37] and held that state jurisdiction would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the tribal court. The Court found no impermissible racial discrimination in the denial of access to the state courts to the Indian plaintiffs. The Court stated that the tribal court's exclusive jurisdiction stemmed not from the race of the plaintiff, but from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.

The *Fisher* case involved a domestic relations case where all parties were tribal members living on the reservation. Where the tribal members reside off the reservation, the jurisdictional issues become a bit more ambiguous. The area of domestic relations has traditionally fallen solely within state police powers. However, the Federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, limits state jurisdiction over Indian children who are members of federally recognized tribes, or are eligible for membership in such tribes. The ICWA is intended to ensure the continuity of tribal existence and tribal cultural integrity by protecting Native families. The ICWA provides that in any adoptive placement of an Indian child, the following preferences shall be recognized: (1) a member of the child's extended family; (2) other members of the child's tribe; or (3) other Indian families. Similar criteria are used in the placement of foster children. Tribal courts have exclusive jurisdiction over Indian children domiciled on the reservation, and a strong presumption exists in favor of tribal court jurisdiction over Indian children domiciled off the reservation.

Some state courts have attempted to assert their regulatory power over Indian children domiciled off the reservation on the basis of a judicially crafted doctrine—the "existing Indian family exception"—that provides for state, rather than tribal, jurisdiction where the child's family does not have significant ties to their tribal community. The state courts generally reason that the child will be deprived of important constitutional rights if ICWA is applied in such cases. For example, in *In re Bridget R.*, the California Court of Appeals held that the ICWA poses due process, equal protection and 10th amendment problems to the extent that it is applied to persons who have given up their social and cultural status as "tribal" Indians.[38]

37. 358 U.S. 217 (1959).

38. 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996).

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Notably, the Montana Supreme Court has rejected the "existing Indian family exception."[39] In *In re Adoption of Riffle*, the Montana Supreme Court applied the Montana Constitution and cited the purpose of the ICWA is to "protect the best interests of Indian children by retaining their connection to their tribes" and gave preference to the child's maternal uncle.[40] *In re M.E.M.* involved a dependency and neglect action concerning a child and mother who were both members of the Standing Rock Sioux Tribe.[41] The mother appealed from a judgment of the state district court which terminated her parental rights. The court determined that it was the constitutional duty of Montana to preserve the unique cultural heritage and integrity of the American Indians. This right is derived from Article X, Section 1(2) of the Montana Constitution. The Montana Supreme Court reversed the judgment terminating parental rights and remanded the case for a hearing de novo on the jurisdictional issues regarding the potential transfer of the case to tribal court under ICWA. The dissenting judge would have gone one step further and reversed with instructions to the district court to transfer the proceedings without delay to the Standing Rock Tribal Court.

It is notable that the Montana courts in these cases looked to the special protections for Native cultural heritage embodied in Article X of the Montana Constitution to construe the rights of Native litigants. Although many states have statutes that address the unique rights or status of Native peoples—for example, those dealing with language rights, repatriation rights, or the rights of Native artists—only two state constitutions appear to contain provisions specifically addressing the unique culture and status of Native peoples: Montana and Hawaii.

Both the Montana and Hawaii constitutional provisions on protection of Native culture are the result of contemporary constitutional conventions that sought to address the unique status of Native peoples within the states' boundaries. In the next section of the article, I will focus on the Montana Constitution, but provide a brief note, for comparative purposes, on the Hawaii Constitution.

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39. *In re* Adoption of Riffle, 277 Mont. 388, 922 P.2d 510 (1996).

40. 277 Mont. at 393, 922 P.2d at 514.

41. 195 Mont. 329, 635 P.2d 1313 (1981).

B. *Constitutional Protections for Native Cultural Heritage and Distinctive Status*

Like many western states, Montana has a significant American Indian population and contains a substantial proportion of Indian land. There are seven Indian reservations within the State of Montana that comprise the homeland of the following Indian nations: the Confederated Salish & Kootenai Tribe of the Flathead Reservation; the Crow Tribe; the Northern Cheyenne Tribe; the Blackfeet Indian Nation; the Chippewa-Cree Tribes of the Rocky Boy's Reservation; and the Gros Ventre, Sioux and Assiniboine Tribes of the Fort Belknap and Fort Peck Reservations.[42] The delegates to the 1972 Constitutional Convention specifically addressed this rich diversity of Native cultures in Article X of the Constitution, which speaks to Native American culture and education within its broader coverage of "educational goals and duties."

Article X, Section 1 of the Montana Constitution provides that:

(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools . . .[and] shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

As Professor Raymond Cross points out, it is necessary to read these three provisions together in construing the ultimate meaning and impact of Article X, Section 1(2).[43] Article X is directed toward securing "equality of educational opportunity," including equitable funding for all school districts, for every student in the State—whether Indian or non-Indian. However,

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42. Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Water Conservation District v. United States—There Must be a Better Way*, 27 ARIZ. ST. L.J. 597 (1995).

43. CD: Section No. 7 on Tribal-State Constitutional Relationships at the Symposium on the 1972 Montana Constitution: Thirty Years Later, held by the Montana Law Review (Sept. 12-14, 2002) (on file with University of Montana Law Library) [hereinafter *Symposium CD*] (comments by panelist Professor Ray Cross).

Article X, Section 1(2) appears to consider preservation of Native cultural heritage as a key component of this process. Indeed, Professors Elison and Snyder interpret this language to acknowledge a heightened need to protect Native cultures within Montana and to place this responsibility primarily within the educational system.[44] They suggest that this responsibility is necessary to remediate the "increasing sense of separation between the Montana tribes and the rest of the state," which is exacerbated by existing conflicts over gambling and water rights.[45]

The language in Article X, Section 1(2) was the result of two issues that surfaced at the Constitutional Convention: "the need to acknowledge American Indians in the state constitution in some manner, and the need for knowledge and understanding between the Indian and non-Indian segments of the population of Montana."[46] The delegates to the 1971-72 Montana Constitutional Convention expressed various motivations for supporting the Indian education and culture provision, although they uniformly agreed that the provision could be used to protect "a wide range of Indian cultural and educational endeavors."[47] Delegate Dorothy Eck introduced this provision to provide Indian students with a constitutional entitlement to state sponsored educational and cultural programs that would develop their self-esteem and personal identity through "the study of their Native culture and language."[48] Other delegates characterized the provision as a means to remedy past discrimination against American Indians and to foster "social and economic competition for them in Montana."[49] Delegate James Champoux "testified that this constitutional provision was the appropriate way to protect the unique manner in which Indian people educated their children within their culture and

44. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 177 (G. Tarr ed., Reference Guides to the State Constitutions of the U.S., No. 31, 2001).

45. *Id.* at 178.

46. Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243, 1256 n.52 (1996) (citing the Montana Legislative Council, The Montana Constitution and American Indians (1995)).

47. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 966 n.113 (1999).

48. *Id.* (citing the 1971-72 Montana Constitution and Convention at 1950 (March 10, 1972)) (on file at the University of Montana Law School Library).

49. *Id.*

societies."[50] The measure passed by a vote of 83-1, with the lone dissenter voicing an objection that Indian peoples should not be identified in the constitution as a "special group."[51]

The delegates' comments illustrate at least three different responses to state-tribal constitutional relations. The comments by Ms. Eck and Mr. Champoux illustrate a belief that Native American cultural integrity is a value that merits protection under state constitutional law. This approach, which supports a rich notion of cultural pluralism, centers upon the unique value of Native cultures and societies within Montana. The delegates who analogized the provision to antidiscrimination legislation illustrate the belief that social equality in contemporary society depends upon remedial legislation for past harms. This approach is consistent with other efforts to remedy past discrimination by introducing special provisions for the benefit of disadvantaged groups, such as affirmative action programs. The dissenter's comments illustrate the view that the rights of all citizens can be protected under "neutral" provisions that are applicable to everyone, such as "equal protection" guarantees. Under this view, "special rights" are necessarily suspect because they draw distinctions between citizens, and thus are destructive of a unitary civil society.

This constitutional provision is quite unique and does not have a counterpart in any other state constitution. However, for thirty years the provision has merely served as a hortatory statement on the ideals to be achieved by state law. It has guided state courts in interpreting other issues—e.g., termination of parental rights to an Indian child—that relate to cultural heritage.[52] And dicta from one opinion ties the provision to the issue of educational equity, finding that the "provision establishes a special burden in Montana for the education of American Indian children which must be addressed as a part of the school funding issues."[53] However, as Professor Cross notes, the provision has not been implemented in any consistent way, and thus the "full promise" of the provision has not been achieved.[54]

Implementation of a constitutional guarantee, of course,

50. *Id.*

51. *Id.*

52. *See, e.g., In re* M.E.M., 195 Mont. 329, 635 P.2d 1313 (1981).

53. Helena Elementary Sch. Dist. No. 1 v. State, 236 Mont. 44, 58, 769 P.2d 684, 693 (1989).

54. *Symposium CD, supra* note 43 (comments by panelist Professor Ray Cross).

may be achieved through statutes that impose enforceable duties upon states and their agencies, and may depend upon funding appropriations and even litigation to secure the full extent of the right. In 1999, Montana enacted House Bill 528 as a way to implement this constitutional provision.[55] This statute reflects Dorothy Eck's vision endorsing cultural pluralism but is also quite consistent with the "antidiscrimination" approach. Montana State Representative Carol Juneau, who resides on the Blackfeet Indian Reservation in Montana, introduced House Bill 528 to encourage public school districts, especially those on or near Indian reservations, to ensure that certified teaching personnel have an understanding of the history, culture, and contemporary contributions of Montana's Indian people.[56] The preamble to House Bill 528 cites Article X, Section 1(2) as recognizing "the distinct and unique cultural heritage of American Indians" and as expressing the state's "commitment to preserve that cultural integrity through education."[57] The preamble also cites a 1995 study, which determined that public school districts, including those on or near Indian reservations, do not recognize the special cultural heritage of American Indians within their school curricula.[58] That, along with the lack of American Indian teachers and school administrators, resulted in a lack of cultural awareness among non-Indian students.[59] Finally, the preamble recognizes that "the history of Montana and the current problems of the state cannot be adequately understood and the problems cannot be addressed unless both Indians and non-Indians have an understanding of the history, culture, and contemporary contributions of Montana's Indian people."[60]

This law encourages both Indian and non-Indian citizens of Montana to learn about the distinctive and unique heritage of American Indians in a culturally responsive manner. In that sense, although the law might be misconstrued as requiring only that Indian students should be taught about their own culture and history, it really requires all people to understand the history of tribal and state interactions, as well as to appreciate the cultural distinctiveness of Native peoples. State

55. H.B. 528, 56th Leg. (Mont. 1999).

56. Cross, *supra* note 47, at 969.

57. Mont. H.B. 528.

58. *Id.*

59. *Id.*

60. *Id.*

Representative Carol Juneau believes that if all people understood "the relationship of this country to Indian nations," it would be "easier to find solutions" to the problems that confront contemporary communities, such as land and water rights.[61] Toward that end, section 1 of the bill declares "it is the constitutionally declared policy of this state to recognize the distinct and unique cultural heritage of American Indians and to be committed in its educational goals to the preservation of their cultural heritage."[62] The bill encourages every local educational agency to work with those Indian tribes that are in "close proximity" when providing instruction, implementing an educational goal, or adopting an educational rule to include specific information on the cultural heritage and contemporary contributions of Montana's Indian people.

Section two defines American Indian studies as "instruction pertaining to the history, traditions, customs, beliefs, ethics, and contemporary affairs of American Indians, particularly Indian tribal groups in Montana."[63] "Instruction" is comprehensively defined to include both the formal course of study offered by an educational institution, as well as "in-service trainings" offered by the superintendent, school district, or professional educational organizations.[64] Under section three of the bill, local school districts may require their certified teaching personnel to complete a course of instruction in American Indian Studies.[65]

This statute reflects a broad commitment to cultural pluralism and specifically recognizes the value of Native American cultural integrity within contemporary society. The statutory language is fairly general with respect to the duties to be imposed upon the state. Thus, the full articulation of the statute may depend upon litigation that tests out the constitutional language in Article X, Section 1(2) interpreted in light of Subsections 1 and 3 which guarantee "equality of educational opportunity" and impose a mandatory duty upon the state to provide funding in an equitable manner.[66]

The effective implementation of the statute clearly depends

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61. Todd Struckman, *Spirit of the Law*, MISSOULA INDEPENDENT, Aug. 29, 2002, *available at* www.missoulanews.com/Archives/News.asp?no=2687 (last visited Feb. 7, 2003).

62. Mont. H.B. 528.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

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upon many factors, such as funding for new programs and materials, and a commitment to developing new educational policies and curricula.[67] Native educator, Julie Cajune, sees funding as a major problem.[68] She notes that House Bill 528 was intended to "call the conscience of the state" to what it had already pledged to do through Article X, Section 2.[69] However, without legislative appropriations to implement the law, the promise has been somewhat hollow.[70] She further observes that the legislation does not offer any "special rights," it merely attempts to make the existing system equitable, and in that sense, it is a core requirement of Article X as a whole.[71] Attorney Jeffrey Weldon believes that implementation of the statute rests upon the trustees of each school district, but that the state Board of Public Education should generate uniform standards for implementation (e.g., a uniform curriculum) so that the quality of education is consistent throughout the state.[72]

Despite these challenges, the Montana constitutional provision and its related statute both speak to a developing notion of tribal-state relationships that is dynamic and interactive. Accordingly, these provisions are futuristic and hold promise for change. The only other state constitutional provision to protect Native culture is quite different. Section 7 of the Hawaii Constitution states that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights."[73]

The 1978 Constitutional Convention Committee on Hawaiian Affairs added this section to reaffirm the customary and traditionally exercised rights of Native Hawaiians, while

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67. See Struckman, *supra* note 61.

68. *Symposium CD*, *supra* note 43 (comments by panelist Julie Cajune).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Symposium CD, supra* note 43 (comments by panelist Jeffrey Weldon). According to Mr. Weldon, who serves as Chief Legal Counsel for the Montana Office of Public Instruction, the legislative appropriation for the statute has ranged from a high of $91,000 in FY 2001 to a low of $43,000 in FY 2002. These minimal appropriations have not been sufficient to support the staff or projects necessary to implement the statute.

73. HAW. CONST. art. XII, § 7.

giving the state the power to regulate those rights.[74] Lawful occupants of a traditional area or "ahupua'a" may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather these items.[75] Under Hawaiian case law, it is a defense to a criminal charge of trespass if a defendant establishes: (1) that she meets the definition of a "native Hawaiian," (2) that the claimed right is constitutionally protected as a "customary or traditional native Hawaiian practice," and (3) that the exercise of the right took place on "undeveloped or less than fully developed property."[76]

The Hawaii Constitution protects the traditional, customary and subsistence rights of Native people, and therefore reaffirms cultural pluralism. However, it clearly establishes the superior authority of the state government, and conditions the Native Hawaiian peoples' rights by the status of the land as developed or undeveloped. The Hawaii Constitution represents an attempt to accommodate cultural preservation with development, which may not be supportive of Native self-determination. The policy agenda is set by the state, and the Native people are protected in certain customary uses, to the extent that these do not infringe upon state interests. Nor is it apparent that this provision calls for the type of cultural education of non-Native people that is considered important under the Montana Constitution.

The promise of the Montana constitutional provision appears to be a truly equal relationship between distinctive sovereign governments and their citizens, who daily must engage in reciprocal and interactive relationships with one another. The articulation of rights in Article X will depend upon a moral and legal commitment to ensure "equality of educational opportunity" for Native and non-Native citizens. The next section of this article examines the legal framework for Native rights to education and cultural heritage which may inform that understanding.

74. Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993).

75. *Id.*

76. State v. Hanapi, 89 Haw. 177, 185-186, 970 P.2d 485, 493-494 (1998).

III. THE LEGAL FRAMEWORK FOR NATIVE RIGHTS TO EDUCATION AND CULTURAL HERITAGE

According to Professor Raymond Cross, Article X, Section 1 guarantees equality of opportunity to all students and is designed to achieve a "truly integrated and quality education for every student."[77] Professor Cross notes that the provision was enacted against a backdrop of segregated education for Indians in Montana. Segregation, he says, ultimately ended as a function of economics.[78] However, the legacy of segregation—inequality of opportunity—has persisted.[79] Today, Indian students disproportionately bear the burdens of inequality, as evidenced by high dropout rates among Indian children in Montana. Professor Cross perceives education as much more than a "transmission of information."[80] "What you transmit," he says, is "a sense of self-confidence and self-esteem," and a "moral and ethical foundation" for citizenship and for leadership.[81] This is why the commitment to "equality of educational opportunity" is so fundamentally important.[82]

Thus, the guarantees of Article X, Section 1 of the Montana Constitution are best understood against the policy framework that has guided Native education and the preservation of Native cultural heritage. This section of the article focuses on the historical federal policies toward Native education and Native cultures which undergird contemporary policies in these areas.

A. *Native American Education*

The federal government has long pledged to provide educational opportunities for Native peoples. In the Northwest Ordinance of 1787, the United States promised to provide a

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77. *Symposium CD, supra* note 43 (comments by panelist Professor Ray Cross). In this section of the article, I have relied extensively on the comments of Professor Cross at the Symposium as well as his excellent law review article on American Indian Education. See Raymond Cross, *American Indian Education: The Terror History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941 (1999). Professor Cross is one of the rare scholars who has carefully considered the legal, social and moral implications of this issue, and his work will be instrumental to the ultimate articulation of the rights secured by Article X, Section 1 of the Montana Constitution.

78. *Symposium CD, supra* note 43 (comments by panelist Professor Ray Cross).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

suitable education for American Indian peoples.[83] This guarantee was implemented through many Indian treaties, as well as statutory and regulatory provisions. Over 110 Indian treaties provide that the federal government shall provide an education to the members of the signatory tribes.[84] In the late 1860s and early 1870s, these provisions generally called for the federal government to provide schools for "every 30 students that could be induced or compelled to attend them."[85] The tribal leaders contemplated "reservation Indian schools that would blend traditional Indian education with the needed non-Indian skills that would allow their members to adapt to the reservation way of life."[86] Until the 1870s, the federal government allowed American religious denominations and their cognate missionary societies to provide education to Indian peoples.[87] However, the pledge to provide a federally funded education to Native peoples suffered from Congress' refusal to make the needed educational appropriations and from the shift in federal policy regarding Indian education.

In the late 19th century, federal policy shifted to favor off-reservation boarding schools to educate Native youth.[88] Federal policymakers believed that this was the most efficient means to assimilate Indian people into non-Indian society, which would both open tribal resources to non-Indian ownership and free the government of its financial burden to care for its Indian "wards." The boarding school system did not achieve these goals to the satisfaction of federal policymakers, and in the 1930s, with the rise of the New Deal Policy, which favored enhanced self-governance, federal policy shifted again to favor the integration of American Indian children into the public school system. This became the BIA's educational policy from the 1930s to the 1970s.[89] "The Johnson-O'Malley Act of 1934 (JOM) authorized the Secretary of Interior to contract with 'any state, university, college or with any appropriate state or private corporation, agency, or institution, for the education of Indians in such state

83. Cross, *supra* note 47, at 950 & n.37.

84. *Id.* at 950 n.39 (citing to DAVID H. DEJONG, PROMISES OF THE PAST: A HISTORY OF INDIAN EDUCATION IN THE UNITED STATES 3-21 (1993)).

85. *Id.* at 950.

86. *Id.*

87. *Id.* at 950-951.

88. Cross, *supra* note 47, at 944.

89. *Id.* at 960-961.

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or territory.'"[90]

Not surprisingly, the states were generally enthusiastic about accepting federal subsidies for Indian education. However, they were in most cases unwilling to provide the "required cultural support services that would allow Indian children to succeed in the public school setting."[91] In fact, some commentators assert that public schools often misused the funds, applying them to the general educational program needs of the school, rather than to the Indian children who were the intended beneficiaries.[92] Thus, although federal funding through the JOM Program, as well as "impact aid" programs resulted in the transfer of thousands of Indian children into the public school system, it did not succeed in meeting the educational needs of American Indian students. BIA educators argued that the quality of education provided by federal schools for Indian children was superior to that provided by local public schools.[93] However, both school systems suffered from the same disregard of the need for Indian parental and community involvement.[94]

Two federal studies ultimately concluded the JOM program never resulted in its intended educational benefits to Indian children. With the acknowledged failure of both the state and federal educational systems to deliver an adequate education to Indian children, attention turned in the 1970s to a new policy reflective of the goals of tribal self-determination. This new policy envisioned American Indian education as a shared responsibility of federal, state and tribal governments.[95]

Professor Raymond Cross suggests, "reconstructing Indian education in the 21st century requires the fulfillment of an old covenant between the Indian peoples and the federal government."[96] According to Professor Cross, this "covenant" imposes duties on each of the three governments.[97] The state governments "should view public school education as requiring the fair and accurate representation of American Indian peoples

90. *Id.* (quoting Act of Apr. 16, 1934, 49 Stat. 1458).

91. *Id.* at 961.

92. *Id.* (referring to Margaret Szasz, a scholar on the JOM program, who suggests that during the mid-1960s funds designated for educational programs for Indian children were instead used for the general educational programs in public schools).

93. *Id.* at 961-962.

94. Cross, *supra* note 47, at 962.

95. *Id.* at 963.

96. *Id.*

97. *Id.* at 963-964.

within their history and social studies curriculum for the benefit of Indian and non-Indian students alike."[98] This goal is well reflected in the language of Article X, Section 1(2) of the Montana Constitution and in House Bill 528, but it clearly requires some commitment beyond a mere hortatory statement about what ought to be done.

Professor Cross next observes that the federal government "should view the education of the American Indians as its continuing trust duty that extends from the K-12 grades through higher education for qualified Indian students."[99] Presumably this requires the federal government to ensure the quality of education that Native people receive, rather than merely delegating its responsibility to the states. Cross further asserts that the tribal governments "should view the education of their tribal members as a fundamental goal of tribal self-determination, co-equal with their responsibility to protect and preserve their natural and cultural resources."[100] Thus, in order to fully implement Article X, Section 1(2), the tribal governments have a responsibility to transmit the considerable "funds of knowledge" they possess about their own unique histories and cultures to their children, and to share this knowledge, to the extent appropriate, with non-Indians as well.[101] The responsibility to maintain the cultural integrity of the tribe rests, in the first instance, with the tribes themselves.

Thus, as Article X, Section 1(2) envisions, education and the preservation of cultural heritage are twin aspects of "equal educational opportunity" for Native people. This point is perhaps best appreciated in the context of an 1887 case, *In re Can-ah-couqua*.[102] In that case, an Alaska federal district court denied the habeas corpus petition of an Alaskan Native woman who sought to regain custody of her eight year old son from a government-funded Presbyterian mission school.[103] The court reasoned that the boy's best interests were met by having him in the mission school and that the mother's interests could be

98. *Id.* at 964.

99. Cross, *supra* note 47, at 964.

100. *Id.*

101. *Symposium CD*, *supra* note 43 (comments by panelist Julie Cajune stating that the responsibility to provide cultural education rests primarily upon the tribes, and that they must share in the commitment to provide the "best teaching to Indian and non-Indian children").

102. 29 F. 687 (D. Alaska 1887).

103. *Id.*

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protected by allowing her limited rights to visit her son.[104] Professor Allison Dussias uses this case to "illustrate[ ] the effects on individual Native Americans of the nineteenth-century alliance between the federal government and religious groups to 'civilize and Christianize' the Indians."[105] In the words of the federal district court in *In re Can-ah-couqua*, "the policy of the government is to aid these mission schools in the great Christian enterprise of rescuing from lives of barbarism and savagery these Indian children, and conferring upon them the benefits of an educated civilization."[106] Thus, the legacy of American educational policy toward Native people is one that suppresses Native cultural heritage and strips Native children of the identities and tools necessary to flourish and grow.

B. Native American Cultural Heritage

In order to understand the value of heritage resources to Native people, it is necessary to consider both the tangible and intangible aspects of these resources. "Cultural" or "heritage" resources include the standard categories of historical and archaeological resources, as well as the cultural and religious practices of particular communities, objects that have cultural or religious significance to those communities, and even cultural uses of natural resources. Within most Native traditions, the dichotomies between "culture" and "religion," between "belief" and "practice," and between "natural" resources and "cultural" resources do not exist. A mountain can be "sacred" within indigenous peoples' traditions, as well as a medicine bundle or an herb or a plant. All of these components may be necessary to transmit the culture from generation to generation.

Of course, Native cultures have been dominated for centuries by government policies designed to affirmatively destroy Native traditions, as well as by legal structures that have not been inclusive of Native rights. Native cultures and religions have persisted, of course, demonstrating the tenacity of Native people and their commitment to cultural survival. To achieve "equity" with respect to the goals of cultural preservation, however, requires some familiarity with the

104. *Id.* at 689.

105. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 774 (1997).

106. 29 F. at 688.

history of these laws and policies, as well as an understanding of what contemporary tools are available to correct these past injustices.

From 1869 to 1882, the federal government executed its Peace Policy, designed to civilize and Christianize American Indian people for their ultimate incorporation into the citizenry of America.[107] The Peace Policy looked to religious groups and individuals to formulate and administer Indian policy. The most significant structural features of this policy were the creation of a Board of Indian Commissioners, comprised of ten Christian philanthropists, and the allotment of Indian agencies to religious groups.[108] In addition, the federal government expanded its aid to the Indian mission schools.[109]

The federal government ended direct funding of sectarian contract schools in the 1890s, although it continued to provide religious instruction in the government Indian schools on a "nondenominational" basis in order to avoid Establishment Clause problems.[110] In addition to these attempts to Christianize Indian people, the government also implemented directives to destroy Native American religions by banning traditional dances, ceremonies, and other practices. In April 1883, the Commissioner of Indian Affairs distributed a set of "Rules for Indian Courts" that defined several "Indian Offenses" including "participation in the sun dance, scalp dance, and the war dance."[111] The rules also prohibited the activities of medicine men, the distribution or destruction of property that accompanied certain ceremonies, as well as mourning rituals. The government's attempts to ban Native religion peaked with its efforts to suppress the Ghost Dance, a peaceful messianic religious movement that swept through the Plains tribes in the late 1800s and was designed to resurrect the strength of traditional Native cultures. The movement ended tragically with the massacre of over 300 men, women and children at Wounded Knee.[112]

However, these government policies were not merely a vestige of misguided 19th century reformist efforts. In the

107. Dussias, *supra* note 105, at 777-79.

108. *Id.* at 779

109. *Id.*

110. *Id.* at 786.

111. 1883 COMMR'S OF INDIAN AFFAIRS ANN. REP. XIV-XV *reprinted in* Dussias, *supra* note 105, at 773, 852.

112. Dussias, *supra* note 105, at 794-799.

1920s, the Indian agents assigned to the New Mexico Pueblos convinced the Commissioner of Indian Affairs to issue a circular placing conditions and limitations on Pueblo dances and ceremonies and requiring attendance at church and Sunday school by all Indian students at government boarding schools.[113] The Pueblos vigorously resisted these policies, asserting their rights to religious liberty, and enlisted the support of John Collier, a liberal policymaker who ultimately became the Commissioner of Indian Affairs. In 1934, Commissioner Collier ended the overt government suppression of Native religion by issuing orders that ensured Native American religious liberty and curtailed missionary activity at the Indian schools.[114]

As Professor Dussias demonstrates, however, the suppression of Native religion has continued into the 20th century in a series of Supreme Court cases that failed to accord equal respect to Native religions and used categorical approaches modeled upon Judeo-Christian religions to deny the free exercise rights of Native litigants.[115] For example, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court found that the Free Exercise Clause did not prohibit the United States Forest Service from constructing a road through a federally owned wilderness area that had traditionally been used for religious purposes by several Native groups.[116] Despite a finding that the road construction would virtually destroy the ability of the Indian people to practice their religion, Justice O'Connor, writing for the majority, held that the First Amendment must "apply to all citizens alike, and it can give none of them a veto over public programs that do not prohibit the free exercise of religion."[117] By treating the government's road project as a completely neutral administrative decision regarding use of federally owned land, the Court was able to circumvent use of the compelling interest test altogether. Justice O'Connor's opinion indicates that majority values and interests take precedence on "public lands" regardless of the competing values and interests of minority cultures. To find in favor of the Indian plaintiffs in this case, she claimed, would be to require "*de facto* beneficial ownership

113. *Id.* at 800-803.
114. *Id.* at 805.
115. *Id.* at 805-833.
116. 485 U.S. 439 (1988).
117. *Id.* at 452.

of some rather spacious tracts of public property."[118] To Justice O'Connor, this is not a "constitutional" issue, but a "governance" issue that facilitates decision-making in a pluralistic society. Thus, as the dissenting justices noted, the Court essentially held that "federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause."[119]

Despite Justice O'Connor's protests to the contrary, the *Lyng* decision supported the Court's subsequent opinion in *Employment Division, Oregon Department of Human Resources v. Smith*, which held that the Free Exercise Clause does not pose a bar to state prohibitions on sacramental peyote use by Native Americans.[120] Justice Scalia, writing for the majority, declined to apply the compelling interest test to the "government's ability to enforce generally applicable prohibitions of socially harmful conduct" through its criminal laws.[121] An individual's obligation to conform to such a law should not be conditioned upon "the law's coincidence with his religious beliefs."[122] Such a result, wrote Justice Scalia, "contradicts both constitutional tradition and common sense."[123]

Justice Scalia's reading of "constitutional tradition" is majoritarian in focus. According to Justice Scalia, any society using a compelling interest test as a means of measuring governmental authority to infringe upon individual's religious interests would be "courting anarchy."[124] Moreover, he claimed: "that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[125] Although his analysis is framed in terms of liberal tolerance and equality, Justice Scalia acknowledged that the accommodation of religious practices, once taken out of the constitutional interpretation of the courts, could only be addressed through the "political process." Justice Scalia further admitted that this would disadvantage "religious practices that are not widely engaged in," but claimed "that unavoidable consequence of democratic government must be

118. *Id.* at 453.
119. *Id.* at 459.
120. 494 U.S. 872 (1990).
121. *Id.* at 885.
122. *Id.*
123. *Id.*
124. *Id.* at 888.
125. *Smith,* 494 U.S. at 888.

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preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[126]

The view of religious freedom that emerges from *Smith* and *Lyng* treats cultural pluralism as a matter of legislative "accommodation," rather than a constitutional requirement. By failing to consider tribal religious interests as analogous to individual free exercise claims, the Supreme Court facilitated the need for special legislation protecting Native American religious practice.

The American Indian Religious Freedom Act of 1978 (AIRFA) specifies that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise" their traditional religions.[127] Although this language suggests that Native religions should receive statutory as well as constitutional protection, the Supreme Court has failed to accept this interpretation. Rather, the Court has held that the AIRFA does not offer any legally enforceable protection for Native religious practices.[128] Subsequent action was necessary to make AIRFA's provisions binding and enforceable. Congress amended the AIRFA in 1994 to provide legal protection for Native Americans using peyote for "bona fide traditional ceremonial purposes."[129] In 1996, President Clinton signed an executive order requiring federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Native American practitioners "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions."[130]

The AIRFA also inspired a statute that provides enforceable protection for Native American human remains and cultural objects. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), prohibits the trade, transport or sale of Native American human remains. Additionally, the Act directs federal agencies and federally funded museums and institutions to identify such remains and specific categories of cultural objects in their possession and to

126. *Id.* at 890.

127. 42 U.S.C. § 1996 (2002).

128. *See, e.g.,* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (stating "[n]owhere in the [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights").

129. 42 U.S.C. § 1996a(b)(1) (2002).

130. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

repatriate them to the tribes.[131] The NAGPRA is an exceedingly important statute designed to remediate a bitter history of human rights violations against Native people, including the looting of ancestral burial grounds and the misappropriation of Native cultural patrimony, often by force or fraud.[132] Until the passage of the NAGPRA, Native claims against museums for the return of ancestral human remains and cultural objects were routinely denied. The museums generally argued that they had the legal right to possess such items, and moreover, that they had an "ethical obligation to retain them for scientific inquiry and historic preservation."[133] Many sets of Native American human remains were in fact taken from battlefields and burial scaffolds under the authority of an 1868 Surgeon General's directive to Army Personnel requesting the collection of Indian skulls and other body parts for scientific inquiry.[134] Under both federal and state law, Native American human remains received far different treatment than human remains disinterred from Christian cemeteries.[135] And the question of rights to Native cultural patrimony was blurred by the "property" claims of non-Indian artifact collectors and museums.[136]

These federal statutes and executive orders protecting Native American cultures and religions serve as an acknowledgment of past wrongs and an attempt to remediate the harm by providing affirmative and enforceable protection for aspects of Native culture. As such, they set the tone for state policies which serve the same goals and interests. The next section of this article focuses on the challenges of differentiated citizenship under state law, again looking to the provisions within Article X, Section 1 of the Montana Constitution for

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131. 25 U.S.C. § 3001-3013 (2002).

132. *See generally* Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992).

133. *See* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 730 (1997).

134. *Id.* at 727 & n.12.

135. *See, e.g.*, Wana the Bear v. Community Const., Inc., 180 Cal. Rptr. 423 (Cal. Ct. App. 1982) (finding no legal protection under state law for Native American burial site).

136. *See, e.g.*, Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (Sup. Ct. 1899), *aff'd* 62 N.E. 1098 (N.Y. 1901) (rejecting Onondaga Nation's claim of ownership to four wampum belts). The Onondaga Nation persisted in its claim, and 75 years later, was successful in negotiating the return of the belts. *See* Trope & Echohawk, *supra* note 132, at 43 n.30.

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guidance on future directions.

IV. THE CHALLENGES OF DIFFERENTIATED CITIZENSHIP: FUTURE DIRECTIONS

What principles should guide tribal-state relationships in the contemporary era? To the extent that a state constitution contains specific provisions relating to Native peoples, what are the implications for the constitutional relationship of the two sets of governments? Are these provisions to be considered a means of providing "equal citizenship" to Native peoples, given the histories of discrimination and dispossession that have often characterized Native and non-Native encounters? Or are these provisions recognition of a new and developing political relationship between sovereigns that is built on principles of respect and autonomy?

Article X, Section 1(2) of the Montana Constitution engages these and related questions, against the backdrop of over two centuries of federal policy designed to structure the assimilation of Native peoples. Inherent in the language of this provision is the premise that Native cultural integrity is an important value in contemporary society, and that both Native and non-Native citizens must understand the unique political and cultural attributes of tribes and their members. Tribal sovereignty is an enduring reality in American society and must be factored into the emerging domestic federalism that will structure our collective future. Article X forges a new type of "constitutionalism," rooted in the reciprocal and mutual interests of all of the citizens that live within Montana. In the text that follows, I will address some of the principles that might be used to structure future relationships among Indian nations and the State, and between Indian and non-Indian citizens of Montana.

Principles of Constitutionalism

Traditionally, "constitutionalism" has been considered as a "way of political life in which a people constitute themselves as a community, conducting their affairs in accordance with fundamental principles and through prescribed forms, procedures, and primary rules of obligation."[137] The political

137. Herman Belz, *Affirmative Action and American Equality: A Constitutionalist Perspective*, *in* LIBERTY UNDER THE LAW: AMERICAN CONSTITUTIONALISM, YESTERDAY,

community is comprised of citizens, who may come from different cultures and ethnicities, but who all ascribe to a set of uniform "ideals" of civic obligation. For example, according to William Galston, responsible citizenship requires four types of "civic virtues": (1) general virtues, such as courage, loyalty and the will to obey the law; (2) social virtues, such as independence and the ability to keep an open mind; (3) economic virtues, including a strong work ethic and ability to adapt to economic and technological change; and (4) political virtues, including the capacity to discern and respect the rights of others and the willingness to engage in public discourse.[138]

The irony with respect to this vision of constitutionalism at a state level is that tribal existence has long been dependent upon a sharp separation from that of the surrounding state.[139] The perceived "detribalization" of an Indian nation through cultural, political, or geographic "assimilation" with the surrounding state population has been used by many courts to deny Indian nations their rights to land and sovereignty.[140] Thus, the more nuanced vision of constitutionalism that will structure the future of Indian and non-Indian citizens must be cognizant of the differentiated citizenship of these constituent members. In other words, to the extent that contemporary state constitutions advocate pluralism—as they should—this must acknowledge the political and cultural pluralism of Native citizens.

TODAY, AND TOMORROW 209, 211 (Kenneth L. Grasso & Cecilia Rodriquez Castillo eds., 2d ed. 1998).

138. Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts, in* CITIZENSHIP IN DIVERSE SOCIETIES 7 (Will Kymlicka & Wayne Norman eds., 2000).

139. *See* Rebecca Tsosie, *Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society?*, 5 U. PA. J. CONST. L. (forthcoming 2003).

140. *See, e.g.*, United States v. Cisna, 25 F. Cas. 4222 (C.C.D. Ohio 1835) (No. 14, 795) (holding that assimilation of the Wyandott tribe into surrounding white population justified suspension of federal law on the Wyandott Reservation sufficient to permit state jurisdiction over a criminal act by a non-Indian against an Indian); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (holding that the tribe did not have zoning authority within portion of its reservation that had been opened to non-Indian settlement and which did not have a distinctively "Indian character"); Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D.Mass. 1978), *aff'd* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) (holding that historic Mashpee Tribe had become "detribalized" through racial, cultural and political assimilation with non-Indians and thus could not maintain an action for dispossession of land under federal Nonintercourse acts).

Principles of Pluralism and Multiculturalism

The place of Indian nations within contemporary society raises issues of cultural and political pluralism. Contemporary theorists relate these issues to the challenges of "multiculturalism" in modern democracies, focusing on the rights and status of "ethnocultural minorities in multi-ethnic societies," and the virtues and responsibilities of democratic citizenship.[141] There are, of course, many tensions between these two areas of civic life in multicultural societies, and philosophers differ as to whether these are ultimately irreconcilable aspects of multiculturalism.

As groups, American Indian nations within the United States are considered "domestic" sovereigns. Indian nations enjoy both political and cultural sovereignty as an aspect of their inherent status as separate governments. As individuals, Native people in the United States possess citizenship in the larger nations that colonized their lands, with all of the rights that citizenship entails yet they also possess citizenship within their indigenous nations. This "dual citizenship" justifies a set of unique rights, which distinguish indigenous people from citizens belonging to other cultural groups. This often engenders resentment among non-Indian citizens, who associate such "special" rights with "affirmative action" and argue that all citizens should have the same rights as equals under the Constitution.

According to Professor Raymond Cross, the efforts of Montana educators to implement the constitutional and statutory directives regarding Native American culture and education have been legislatively challenged "by those who consider American Indian education preferences illegal or immoral."[142] Professor Cross notes that these challenges have failed because the state legislature has concluded that investment in American Indian education "makes good practical as well as legal sense."[143] Thus, to the extent that Article X, Section 1(2) does require "special" rights for Native people, that is a conscious choice of the Montana Legislature and presumably the only way to guarantee a truly "equal" educational

141. *See* Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, *in* CITIZENSHIP IN DIVERSE SOCIETIES, *supra* note 138, at 1.

142. Cross, *supra* note 47, at 968.

143. *Id.*

opportunity for Native Americans.

For example, Article X, Section 1(2) specifies that the state be committed to the preservation of Native cultural integrity. This provision is uniquely designed to accommodate the interests of Native citizens in preserving their cultural context. No other ethnic group has the same interests or status. However, the provision also entails a responsibility to inform non-Native citizens about Native culture and the unique aspects of Native cultural heritage. This provision recognizes the inherent differences in the way that Indian and non-Indian people view cultural heritage.

The American legal system looks at heritage resources as belonging to our collective "past." Many Native cultures do not share the same concept of the past. Euro-Americans routinely distinguish between the category of "history" and that of "prehistory," and assign different levels of legal protection for objects depending upon which category they belong to. For example, scientists routinely claim that "prehistoric" human remains should be widely available for study, even if "historic" remains that can be traced to modern day descendants are not. Many Native peoples, such as the Navajos, do not have a word that describes "prehistory." Human history is continuous for many Native cultures, and many believe the spirits of the Ancestors continue to live and guide people of today.

These different cultural understandings of the "past" are illustrated by the findings of a comprehensive study on the popular uses of history in American life (including white, black, Indian, and Mexican people) by historians Rosenzweig and Thelen. They note that most white Americans have an intense interest in the immediate past of their particular families, which manifests itself, for example, in genealogy searches and family histories.[144] White Americans place some value on their Nation's past, although it is not the most important value to them. To most white Americans, the past of "America" includes the history of black, white, Mexican, and Native American citizens and "belongs" to all "Americans." The past of America is therefore appropriately collected and documented by and in museums and historical societies.

In comparison, Rosenzweig and Thelen note that Native Americans (in this study, members of the Lakota Sioux Tribe)

144. ROY ROSENZWEIG AND DAVID THELEN, THE PRESENCE OF THE PAST: POPULAR USES OF HISTORY IN AMERICAN LIFE (1998).

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were "almost ten times as likely as white Americans to describe ethnic/racial history as most important to them."[145] The Oglala Sioux participants perceived their own families as related in very important ways to other members of the tribe, both living and dead. "In the Lakota beliefs," said one participant, "we're all basically related." The most important thing for children to know, said another, is "who their people are, how they came to be here, how we're all related." Consequently, the participants tended to cite their relationship to prominent leaders from the past, such as Red Cloud and Spotted Tail. Perhaps most telling were the comments of one woman who said:

> We all feel the spirit of our ancestors on a daily basis. When we are all together, it is a really strong feeling. We have ceremonies where we feed our ancestors. Invariably, everything we do has connection to our ancestors. The Native American culture thrives and lives by ritual because we're part of this oral history, and everything we do, we tie it into the past.[146]

To the majority of white Americans, then, family histories are the immediate concern of living members. The Nation's history, on the other hand, is a common resource that belongs to all Americans and is amenable to "stewardship" for the benefit of the public. To Native Americans, it is incomprehensible that one would seek to disassociate one's family from the larger tribal Nation or treat the Ancestors differently from living tribal members. The collective responsibility for the Ancestors resides in their descendants, contemporary Native people.

This is one reason why it is so important to involve Native educators in structuring curricula that will transmit this information about Native cultural heritage. Just recently, a colleague of mine shared a story that illustrates this. Her eight year old Navajo grandson had checked a book out of his local school library on "Great Indian Leaders." A descendant of a famous 19th century Navajo leader, he excitedly checked to see if his ancestor was listed among them. However, his excitement soon turned to dismay when he read the text about leaders such as Geronimo and Sitting Bull. The author referred to them as "savage" and "bloodthirsty," hardly qualities of "leadership." He sadly told his grandmother that he was glad that their family was not represented in such a book. Her question to me was what could be done—legally or otherwise—to get such a book off the shelves. To the extent that today's youth—Indian or non-

145. *Id.* at 162.
146. *Id.* at 163.

Indian—are exposed to these ethnocentric misrepresentations about history, we are all harmed. Clearly, we need to revisit the functions of public education and instill a sense of responsibility for what information is transmitted and how this occurs.

Principles of Civic Virtue

One of the primary functions of public education is to instruct young people in these principles of civic virtue so that they might become contributing members of society. As the court pointed out in *Wisconsin v. Yoder*, another function of public education is to ensure that young people have a basic set of skills to enter society as autonomous individuals who can then choose an appropriate life plan.[147]

However, in evaluating the obligations of a government to promote civic obligation, it is also necessary to maintain a certain level of deference to the needs of ethnic or cultural communities that have different conceptions of civic virtue. For example, in the *Yoder* case, Amish parents affirmatively rejected public school instruction after age 16, claiming that this would be inconsistent with their need to instill in their children the appropriate values of community and family responsibility that are unique to the Amish, and also to instruct them to commence the agrarian lifestyle of that community. The Supreme Court upheld the claim of the Amish parents that the state's compulsory education law infringed upon their free exercise of religion. The Supreme Court later described *Yoder* as a decision that was based on both the free exercise clause and the parental interest in directing the education of their children that was protected by the due process clause of the Fourteenth Amendment.[148]

Article X, Section 1(2) of the Montana Constitution responds to that pluralistic vision of civic virtue by providing that "the state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity." This provision can be interpreted as carrying out the government's obligation to ensure that citizens "share" a sense of membership and belonging in the political community of Montana. Thus, as Representative Juneau notes, it is important to educate all

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147. 406 U.S. 205 (1972).

148. Employment Div., Oregon Dep't of Human Res. v. Smith, 494 U.S. 872, 881 n.1 (1990).

citizens of Montana about the history of the state, about the existence of the autonomous Indian nations that were ultimately incorporated into the boundaries of the state, and their continuing status as separate sovereigns with political rights to engage in self-governance, economic development, and regulate matters within their own jurisdiction. While early federal and state policies focused on the assimilation of Native peoples into the "dominant society," the Montana provision can be read as the state's commitment to accept the differences between Indian citizens and non-Indian citizens and to accommodate these differences and provide education about the historic origin of the differences and their continuing reality. In short, the obligation to instruct citizens about the reality of "differentiated" citizenship may be the primary function of the Montana provision. "Civic virtue" may depend upon the ability of all citizens—Indian and non-Indian—to understand the "history, culture, and contemporary contributions of Montana's Indian people."

Article X, Section 1(2) can also be read broadly to call for the state to accommodate the distinctive cultures and traditions of Indian nations in Montana; for example, by according recognition of tribal rights to adjudicate the rights of Indian children in dependency proceedings, tribal rights to water resources, tribal language rights, and tribal rights to use of "public lands" for cultural and traditional purposes. Furthermore, the provision might well call for a new relationship to be created between the state and the Indian nations, which accords respect between sovereigns and pledges the state's support for the continuing existence of each tribe as a separate political and cultural entity within Montana.

Indeed, this interpretation is reflected in the recent legislation enacted by the Montana Legislature requiring repatriation of human remains and funerary objects that were taken from burial sites prior to July 1, 1991, when the Human Skeletal Remains and Burial Site Protection Act was enacted.[149] The Montana statute tracks the federal repatriation statute (NAGPRA) and provides protection for burial grounds (whether marked or unmarked) on state or private lands. The statute provides a mechanism to repatriate such items to the tribal group, lineal descendant, or next of kin who can establish

149. MONT. CODE ANN. § 22-3-902 (2001).

"cultural affiliation" to the remains or funerary objects.[150] In support of this provision, the statute cites the Free Exercise Clause of the United States Constitution and the Montana Constitution, as well as the responsibility to "preserve the cultural integrity of American Indian citizens recognized by the state under Article X, [S]ection 1(2) of the Montana Constitution." In addition, the statute pledges to "protect the right of privacy guaranteed to tribal groups, lineal descendants, next of kin, agencies, or museums regarding the disclosure of sacred or religious information to the full extent allowed by the Montana Constitution."

Principles of Fundamental Rights

It is instructive that the Montana Legislature included Article X, Section 1(2) along with the Free Exercise Clause and the Privacy Clause of the Montana Constitution in support of the repatriation legislation. There are three primary approaches to state constitutional interpretation. One is to interpret the state constitution as tracking the requirements of the federal constitution. Another is to interpret the state constitution independently, but look to the federal constitution for guidance. And the third approach is to interpret the state constitution as completely autonomous, going above and beyond the federal constitution in defining the applicable rights. In enacting Article X, Section 1, the Montana Legislature appears to have followed the third approach. Unlike the federal constitution, Article X, Section 1 of the Montana Constitution appears to offer a right to education and to support the right of Native American peoples to their culture.

The Supreme Court of the United States has not held that publicly financed primary or secondary education is a fundamental right.[151] Nor has it found educational inequality to be a constitutional problem. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court upheld the constitutionality of a property tax system that financed primary and secondary education in school districts in a manner that

150. *Id.*

151. The state may not, however, single out a class of children and deny them an educational opportunity. In *Plyler v. Doe*, the Court invalidated a state statute which denied public education to the children of illegally resident aliens, even though the Court refused to find that education was a fundamental right or that illegal aliens were a class of persons who merited close judicial scrutiny of laws that disadvantaged them. 457 U.S. 202 (1982).

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created large differences in the amount of money spent on the education of individual children.[152] The Court found it constitutionally permissible to allocate educational opportunities based on the wealth of the school district in which the child resided. The Court applied a minimal level of scrutiny, which merely required the state legislature's' policies to be "reasonable," because the Court found that no suspect classification or fundamental right was involved. The Court held that there was no suspect classification since there was no correlation in this case between district wealth and race, and the Court refused to find that a publicly financed primary or secondary education is a fundamental right.

The Montana Legislature has clearly rejected the federal government's minimalist approach to educational rights. Article X, Section 1 guarantees "equality of educational opportunity" to "each person of the state," and mandates the state legislature to "provide a basic system of free quality public elementary and secondary schools."[153] That approach is also extended to school funding through the requirement that the legislature "shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system."[154]

Similarly, although the federal constitution does not contain a right to culture, and indeed, the Court held in *Yoder* that the Amish parents' cultural claims in that case were unprotected to the extent that a religious practice was not also burdened, the Montana Constitution appears to recognize Native peoples' right to cultural integrity. "Culture" is an all-encompassing concept that comprises the "material, spiritual, and artistic expression of a group that defines itself" as a distinct culture, both according to daily lived experience and according to practice and theory.[155] According to philosopher Ronald Dworkin, human culture has "intrinsic value," as opposed to merely instrumental importance.[156] We honor and protect cultures because they are "communal products" of the type of enterprise that we consider

152. 411 U.S. 1 (1973).

153. MONT. CONST. art. X, § 1(1), 1(3).

154. MONT. CONST. art. X, § 1(3).

155. Jonathan Hart, *Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies in* BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION (Bruce Ziff & Pratima V. Rao eds., 1997)

156. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 70 (1994).

important to human existence.[157] Moreover, people generally consider it tragic when a "distinctive form of human culture, especially a complex and interesting one, dies or languishes."[158] This, of course, tends not to be a problem for dominant cultures, because those groups in power have the ability to sustain their practices. However, worldwide, minority cultures are frequently the targets of policies that either affirmatively suppress certain key practices (e.g., language and religion) or fail to give them due consideration, leading to the "inadvertent" extinction of a practice.[159] This is one of the most important justifications for a right to culture.

"Human beings have a right to culture—not just any culture, but their own," argue Avishai Margalit and Moshe Halbertal in their article "Liberalism and the Right to Culture."[160] This right rests on a conception of culture as "a comprehensive way of life" belonging to an "encompassing group, such as an ethnic, religious, or national group."[161] Under this definition, the culture of an encompassing group comprises virtually every aspect of the group's existence, including its religions, activities and social relationships. Culture is expressed in a variety of ways, including "language, literary and artistic traditions, music, customs, dress, festivals, [and] ceremonies."[162]

That human beings have some sort of "right to culture" appears to have garnered a wide enough acceptance to serve as a basis for a principle of international human rights law. Article 27 of the International Covenant on Civil and Political Rights provides that: "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities

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157. *Id.* at 78.

158. *Id.* at 72.

159. We see examples of these policies even in constitutional democracies such as the United States. For example, "English only" initiatives intentionally suppress the use of foreign languages within state institutions, and court decisions upholding bans on practices such as peyote use by members of the Native American Church can have the effect of suppressing minority religions. *See, e.g.*, Employment Div., Oregon Dep't. of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (stating "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs").

160. 61 SOC. RES. 491 (1994).

161. *Id.* at 497-98.

162. *Id.* at 498.

shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[163]

But what should a "right to culture" comprise? Margalit and Halbertal claim that there are three primary levels to the "right to culture."[164] The first is "the right to maintain a comprehensive way of life within the larger society without interference, and with only the limitation of the harm principle." The second level adds the "right to recognition of the community's way of life by the general society." The third level includes "the right to support for the way of life by the state's institutions so that the culture can flourish."

Under this interpretation, the right to Native cultural integrity recognized by Article X, Section 1(2) can support a host of statutory protections for Native cultural rights. To some extent, these can complement those protections extended to Native cultures by federal statutes, such as the NAGPRA, the Peyote Act, and the Indian Arts and Crafts Act. Montana's repatriation statute is a good example of this synergy. And other states have passed statutes complimentary to the federal Indian Arts and Crafts Act[165] and the Peyote Act.[166]

The principles of constitutionalism, pluralism, civic virtue and fundamental rights noted above represent only the beginning of the intercultural dialogue that must accompany the full implementation of the Montana constitutional provision protecting rights to education and cultural integrity. However, the promise is there for a positive and visionary change in the relations between the State of Montana and the Indian nations.

CONCLUSION

At the Symposium on the Montana Constitution: Thirty Years Later, Professor Raymond Cross spoke of the state constitution as a "living document." The words recorded on paper were just the beginning, he said. They lay a moral and ethical foundation for the growth and development of the Montana Constitution through active implementation and

163. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 99 (1996) (discussing Article 27 and other instruments which protect "rights of cultural integrity").

164. 61 SOC. RES., *supra* note 160, at 498-499.

165. *See* Ariz. Rev. Stat. §§ 44-1231.01-.05 (2002); N.M. STAT. ANN. §§ 30-33-1 to 11 (Michie 2001).

166. *See, e.g.*, Peyote Way Church of God, Inc. v. Thornburgh 922 F.2d 1210 (5th Cir. 1991) (upholding TEX. HEALTH & SAFETY CODE ANN. § 481.111 (Vernon 2001)).

enforcement. The Montana Constitution is analogous to the treaties between Indian nations and the national government. These are also widely perceived as "living documents" that embody an ongoing set of responsibilities and duties that impact the lives of contemporary Native people.

The "moral and ethical responsibility" for framing the future, however, is a joint responsibility of the State of Montana and the tribal governments. Article X, Section 1(2) can serve as the basis for Indian nations to transmit their vision of cultural sovereignty for the future. Cultural sovereignty is "the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures."[167] Inherent sovereignty comes from within the Indian nation and is not to be defined by the courts of the external society. Cultural sovereignty is a process of reclaiming history, tradition, and cultural identity.[168] As Professor Pocock has explained, in relation to Maori claims to land and autonomy, sovereignty is the "power to constitute one's own history, on the level of conceptualization and possession and on that of authority and action."[169] This process is clearly served by the language of Article X, Section 1(2), which opens the door for Indian nations to design and implement curricula that represent the historical and contemporary realities of Native life. This process may entail cooperative efforts between tribal colleges and state school districts. Tribal colleges have been instrumental in efforts to revive Native languages and ensure the survival of Native cultures.[170] And the links between language, culture, and education are increasingly apparent in the innovative curricula being developed by tribal colleges.[171]

With the full implementation of Article X, Section 1(2), Montana will accomplish an important step toward achieving justice for its citizens—both Indian and non-Indian. Justice is not a "unitary" concept, but an intercultural concept that requires a full examination of the interplay between

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167. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

168. *Id.* at 202.

169. J.G.A. Pocock, Law, Sovereignty, and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi, The Iredell Memorial Lecture, Lancaster University (October 10, 1991), *excerpted in* GETCHES, *supra* note 11, at 1003-07.

170. Coffey & Tsosie, *supra* note 167, at 207.

171. See TRIBAL COLLEGE JOURNAL 10-26 (Spring 2000) for a series of essays on these important developments.

constitutional norms and human rights norms for the diverse citizens that live within the state. The promise of "differentiated citizenship" is a just and inclusive society that transcends the dichotomies between autonomy and assimilation, separatism and integration, and allows citizens to achieve their full potential in society on their own terms.