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National Identity and Liberalism Law: Three Models

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National Identity and Liberalism in International Law: Three Models

Justin Desautels-Stein

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I. Introduction

There is a presumption in American politics that "liberal" foreign policy tends to favor international cooperation, international law, and international institutions in a way that "conservative" foreign policy does not. If true, this would seem to suggest that there is something especially "liberal" about internationalist beliefs; after all, if there was reason for conservatives to turn with open arms to the institutions like the United Nations, wouldn't they do so? This partisan division seems real enough. Consider first the work of Samuel Huntington, who, in a recent book, identifies the emergence of a new "American Dilemma." The title is Who Are We? Challenges to America's National Identity, and as it suggests, the dilemma concerns the future of nation-building, but not in Iraq or Afghanistan. For Huntington, nation-building, or rather the lack thereof, has become a dangerously desperate issue in American life, due in large part to the rise of Hispanic immigration, multiculturalism, and the tendency for many U.S. citizens to think in cosmopolitan terms first, and as an American only second. The heart of the problem, as Huntington sees it, is that these developments have steadily eroded the Anglo-Protestant cultural core that has from the beginning provided the gel of American identity. To the degree that issues like an unchecked cosmopolitanism continue to go unaddressed, the United States veers that much closer towards Balkanization.

As seems fairly clear, many of these "threats" can easily be framed as positive developments in a so-called liberal agenda, which would likely advocate relaxed approaches to immigration

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2 This article recognizes the difference between nation-building and state-building. For example, U.S. designs in Afghanistan and Iraq are state-building projects because they are attempting to construct a particular type of government with international legal personality. Attempts at forging national unity and solidarity through the thickening of particular cultural, social, and historical bonds, on the other hand, are better identified as nation-building.

3 HUNTINGTON, supra note 1, at 142.

4 Id. at 143.
questions, a heightened respect and embrace of multicultural movements, and an encouragement of an internationalist disposition.\(^5\) Indeed, the rhetorical divide has been evident among politicians as well as academics. John Bolton, as ever, provides a telling example in his claim that the "Americanist" party has arrived: "Recent clashes in and around the United States Senate indicate that the Americanist party has awakened, and that the harm and costs to the United States of belittling our popular sovereignty and constitutionalism, and restricting both our domestic and our international policy flexibility and power are finally reaching attention."\(^6\) Predictably, the liberal response is at odds with Bolton's "Americanism," as expressed by advocates like Erica-Irene Daes of the United Nations who point towards the moral justifications in giving greater power to marginalized populations, including those in the United States:

What most Indigenous Peoples seek, and the United Nations has so far endorsed, is a hybrid of autonomy. Indigenous Peoples must be able to participate effectively in the decisions affecting their destiny at all levels, enjoying a large measure of control over their internal affairs, and in equitable sharing of power in national politics.\(^7\)

As a sociological matter, this relationship between

\(^5\) Perhaps the most high-profile illustration of this partisan divide along international lines was the American presidential election of 2004, in which the International Criminal Court was emblematically invoked as a gauge for American self-determination, or lack thereof. On October 8, 2004 in the second presidential debate with Senator John Kerry, President Bush said:

I love our values. And I recognize I've made some decisions that have caused people to not understand the great values of our country. . . . I made a decision not to join the International Criminal Court in The Hague, which is where our troops could be brought to—brought in front of a judge, an unaccounted judge. I don't think we ought to join that. That was unpopular. And so, what I'm telling you is, is that sometimes in this world you make unpopular decisions because you think they're right. . . . You don't want to join the International Criminal Court just because it's popular in certain capitals in Europe.


internationalism and partisan politics might be descriptively accurate. That is, when we look out at the world, it is typical to find "liberals" defending the move to institutions and "conservatives" all worked up over American sovereignty. A thesis in this article is that for whatever this sociological finding is worth (if it is even true), it says nothing on the matter of whether the rhetoric actually makes sense. To be more specific, my argument is that instead of understanding there to be a monochromatic thing called "international law" which habitually turns out to be a tool for so-called liberal interests, there are a number of competing international legal orders, some susceptible to liberal tastes—others, not so much. As a consequence, there is a great deal of ambivalence in the international legal order, and it is a mistake to believe, as people like Huntington and Bolton appear to do, that international law stands for one thing, but not another. To be sure, there are scores of principles that could never be supported by international legal theory or doctrine, but with respect to those that are, this Comment discusses some of the conflicts that result.

To some extent, these conflicts are motivated by gaps and ambivalences in liberal political theory. One such gap involves the question of how membership within a particular political community in the international order should be determined. There is a vast amount of foundational literature on the duties a liberal society demands of its residents, as well as the duties owed by liberal states to their citizens, but a gap in the theory that has only received recent attention involves the question of when it can be justified that a human being belongs to one liberal society but not to another. That is, as a matter of political philosophy and not law, how does one member know that another human being is a non-member, and thus excluded from the sphere of equal treatment? The boundary becomes discernable enough when liberal vocabulary makes a transition from "individuals" to "citizens," since "citizen" has a direct relationship with the "state." Immanuel Kant's version of the liberal individual and "the universal principle of right" suggest rights and duties persons owe

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8 For discussion, see Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 37-40 (1983).

persons, regardless of their affiliation with a particular government.\textsuperscript{10} Does it make sense to say that liberal political philosophy leaves the question of membership open as a matter of morality to a government's geographical choices? Another source of ambivalence follows from the first. If liberalism is relatively quiet on the question of membership, this has been tracked by a normative disarray in international legal prescription on how political communities should be organized.\textsuperscript{11} In contrast to the membership problem (where there is an analytical gap between the duties persons owe persons and citizens owing citizens), this second source deals with the substantive content of international law: what types of political organization should be admitted into the international community, and which ones not?

In Part II of this essay, I explore the relationship between these two sources of ambivalence, matching up three strands of liberal nation-building theory with their counterparts in international law in an effort to show how the varieties of international law are plenty fortified for both liberal and conservative tastes. On this account, international law can be viewed as a grocery store: whatever you hope to have for dinner, even if you happen to be Huntington or Bolton, you should be able to find what you are looking for.\textsuperscript{12}

Subsequently, the first nation-building position to be discussed is assimilationist, and as represented by Huntington, sets out a bold declaration on the factors exacerbating the national identity crisis and the road towards its amelioration. In Huntington's view, reversing these trends will turn on the capacity for Americans to remember and reinvigorate their Anglo-Protestant roots.\textsuperscript{13} As opposed to the traditional image of a nation of immigrants mixing and mingling particular cultural sensibilities, Huntington suggests "tomato soup" as the new melting pot. This image emphasizes the

\textsuperscript{10} KANT: POLITICAL WRITINGS 133 (Hans Reiss ed., 1991).

\textsuperscript{11} This point draws heavily on the work of Professor Gerry Simpson on liberalism in international law. See Gerry Simpson, Two Liberalisms, 12 EUR. J. INT'L. L. 537 (2001).

\textsuperscript{12} Much of the foregoing discussion is influenced by critical approaches to international legal study. See, e.g., David Kennedy, When Renewal Repeats: Thinking against the Box, 32 N.Y.U. J. INT'L L. & POL. 335 (2000); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS (2002); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989).

\textsuperscript{13} Id. at 30.
cultural core of the white, Anglo-Protestant settlers and founders of the United States, and to the extent that non-members have immigrated, they have been subject to an over-powering "Americanization," or assimilation into the basic cultural core.\textsuperscript{14} Huntington writes: "[This model] assumes the centrality and durability of the culture of the founding settlers. The culinary metaphor is an Anglo-Protestant tomato soup to which immigration adds celery, croutons, spices, parsley, and other ingredients that enrich and diversify the taste, but are absorbed into what remains fundamentally tomato soup."\textsuperscript{15} Tomato soup nationalism explicitly rejects international norms as anathema in what should be the return to America's settler-roots, but takes ownership of contemporary liberal democracy as an outgrowth of Anglo-Protestantism.\textsuperscript{16}

Standing in contrast is the second position of the mosaic and American multiculturalism.\textsuperscript{17} In James Anaya's view, the evolution of our national identity is being generated by international developments in human rights law and its incorporation of political pluralism.\textsuperscript{18} This model moves beyond individual citizenship and towards cultural identities as the building blocks of the state.\textsuperscript{19} In this sense, the disaggregation of national identity in the United States, largely a result of an increasingly international orientation, is a normative good.\textsuperscript{20} This version of the multicultural model therefore looks to international law as a reflecting pool from which the United States will hopefully take its prospective cues, shaping domestic norms in

\begin{itemize}
  \item \textsuperscript{14} Id. at 61.
  \item \textsuperscript{15} Id. at 129.
  \item \textsuperscript{16} Id. at 66-69.
  \item \textsuperscript{17} See generally Kymlicka, supra note 9, at 327-70; CYNTHIA WILLET, THEORIZING MULTICULTURALISM: A GUIDE TO THE CURRENT DEBATE (1998); MULTICULTURALISM AND THE "POLITICS OF RECOGNITION" (Amy Gutmann ed., 1992).
  \item \textsuperscript{19} Id. at 15.
  \item \textsuperscript{20} Professor Anaya writes, For indigenous peoples such cultural integrity means the continuation of a range of cultural patterns, including patterns that establish rights to lands and natural resources, and are embodied in indigenous customary law and institutions that regulate indigenous societies. It is a truly multicultural state to which the model of international human rights aspires . . . . Id.
\end{itemize}
conformity with international ones. Like assimilationists in the Huntington mode, multiculturalists claim liberalism as the generating force in their programmatic efforts.

A third model holds multiculturalism to be problematic for the reason that coherent national identities provide the type of non-strategic social integration required by liberal democracies, and that civic ties are not enough for the job. Dubbed "liberal nationalism," this perspective rejects the idea that liberal democracies require ethno-cultural cores, such as the entrenchment of Anglo-Protestantism, but recognizes the need for a cultural core of shared experiences and history. This focus on the role of the nation is at odds with the developments cited by Anaya in international human rights law and the emphasis on cultural pluralism, but only to the extent that political pluralism collides with the social integration required by liberal democracies.

After fleshing out the assimilation and liberal nationalism models by building on some of Gerry Simpson's work on liberalism in international law, Part II provides more substantial discussion on the emergence of group rights and the multicultural ideal. It does so by first exploring some of the debate in liberal political theory on membership rules and cultural identity, and then by looking to the content of the two United Nations Declarations on Minority Rights and Indigenous Rights.

Part II is consequently concerned with exploring the various ways that liberal ambivalences have opened up space for a number of competing visions of how national identities, political

21 Id.

22 Will Kymlicka has made most systematic attempts at arguing for liberal multiculturalism. KYMLICKA, supra note 9, at 343-70.

23 DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY 32 (2000); Yael Tamir, LIBERAL NATIONALISM 33 (1993); Robert Dahl, Democratizing Institutions, in DEMOCRACY'S EDGES 32 (Ian Shapiro ed., 1999). The distinction between integration types was developed by Jurgen Habermas, and is summarized by Professor Arash Abizadeh: "Contemporary social theorists such as Habermas (1984-87) distinguish between system integration (which coordinates action via strategic interaction) and social integration (which coordinates action via linguistically mediated norms and processes of reaching understanding) and claim that the social solidarity required by well-ordered societies depends at least in part upon social integration." Arash Abizadeh, Does Liberal Democracy Presuppose a Liberal Nation? Four Arguments, 96 AM. POL. SCI. REV. 495, 495 (2002).

24 Tamir writes, "Liberalism is taken as the starting point . . . ." TAMIR, supra note 23, at 4.
Part III then asks whether any one of the three liberal nation-building models appear to have a command on the principles and practice shaping the development of the American nation, and by way of example, looks to the legal status of Native American Indians. In light of the constitutional contours of the American Indian legal experience, the discussion is mostly concerned with juridical developments at the expense of legislative ones. Part IV begins a very short answer to the questions posed in Part III by transposing the fundamentals of the contemporary picture in American Indian law with the three models of political community. The article concludes by emphasizing the usefulness in recognizing confusion in international law to be a real thing, and to the extent partisans invoke “the international” as inherently anti-conservative, they are misconstruing the recipes at play in American nation-building projects.

II. Three Models of Political Community and Nationalism in International Law

The terms “political community” and “national identity” are not synonymous. A political community as an abstract matter does not depend on ethnicity, race, gender, culture, nationality, religion, or any other ascriptive characteristic. As some have argued, political communities may be cosmopolitan or “post-national,” crossing borders and cultures along ethical or ideological lines. National communities, in contrast, are typically understood to have “concrete” advantages over these abstractions because their members share common histories, cultures, and solidarity stable enough for sacrifice. As Joseph


26 See DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER, 271-72 (1995); JURGEN HABERMAS, THE POSTNATIONAL CONSTELLATION 58-112 (2001) (questioning how “an association of free and equal citizens can be constructed through the means of positive law”); Richard Falk and Andrew Strauss, On the Creation of a Global People's Assembly: Legitimacy and the Power of Popular Sovereignty, 36 STAN. J. INTL. L. 191 (2000) (espousing the view that “empowerment would likely be set in motion as observers sympathetic to global democracy... began to fashion formal legal arguments as to why its resolutions should be considered binding...”).

27 MILLER, supra note 23, at 32. For discussion, see Arash Abizadeh, Liberal Nationalist Versus Postnational Social Integration: On the Nation's Ethno-Cultural
Nye has suggested, the problem with political communities that lack national cores is that its members will be unwilling to make sacrifices for people when meaningful connections have not been created.\textsuperscript{28}

While it is important to understand that political communities can be post-national—and consequently something quite different from "national" communities—a particular theoretical framework's perspective on political community will likely have consequences on the way it conceives the role of the nation. This part explores this idea by examining three models in international law that explicitly deal with political community. After articulating the premises in each model, this article discusses a corollary viewpoint with respect to national identity.

\textbf{A. Charter Liberalism and Tomato Soup}

\textit{1. Charter Liberalism}

Professor Gerry Simpson has suggested that the twenty-first century is witnessing "a struggle in train for the soul of international law."\textsuperscript{29} In his view this struggle concerns, among other things, a contest between two familiar yet competing images of liberal political theory in international law.\textsuperscript{30} The first image is what he calls "Charter liberalism," an image in which the orientation of a political community, whether it be socialist, totalitarian, or liberal democratic, plays no part in the recognition it will receive by the United Nations or the international community.\textsuperscript{31} Professor Simpson calls it "Charter liberalism" because "the principles underlying this approach find their highest

\textsuperscript{28} Professors Joseph Nye and Robert Keohane provide an illustration: "A cosmopolitan view . . . that treats the globe as one constituency implies the existence of a political community in which citizens of 198 states would be willing to be continually outvoted by a billion Chinese and a billion Indians." In national contexts, "minorities are willing to acquiesce to a majority in which they may not participate directly because they feel they participate is some larger community." Joseph Nye & Robert Keohane, \textit{Introduction, in Governance in a Globalizing World} 33 (Joseph Nye & Robert Keohane eds., 2000).


\textsuperscript{30} Simpson, \textit{supra} note 11, at 541.

\textsuperscript{31} Id.
expression in the text of the UN Charter." In this sense, states are treated much like individuals in the domestic order, where the tenet of liberal neutrality demands the state to keep a hands-off policy with respect to personal decisions on the "good life." States, like individuals, are guaranteed equality and the freedom to self-determine their life-stories through sovereign independence. Charter liberalism is consequently quite pluralistic in that it is non-discriminatory and emphasizes liberal procedures over the notion of substantive ideas of what is best.

The salience of this image came into focus after World War II, and it is important to note the friendly relationship between Charter liberalism and the development of human rights law. Determined to construct an international architecture that might better prevent similar types of citizen abuse and threats to international peace, the U.N. system was formed. Fundamental to this new architecture was the assemblage of a body of human rights that all states would be bound to respect and protect. The extent to which states were actually bound, however, was substantially limited due to the powerful effect of the sovereignty concept. States would be bound to human rights norms only to the degree they would consent to bind themselves. A sovereign state has the final right to domestic jurisdiction, and can only be regarded as susceptible to human rights law when it has so consented. Thus, a body of human rights was born meant to

32 Id.
33 For a thorough discussion of how states came to this particular conception, see Phillip Bobbitt, The Shield of Achilles 144-205 (2002).
34 Id. at 540-41.
35 Id.
36 See Burns Weston, Human Rights, in INTERNATIONAL LAW AND WORLD ORDER 526 (Burns Weston et al. eds., 1997).
37 See id.
38 See generally Harold Hongju Koh, Why Do Nations Obey International Law? 106 YALE L.J. 2599 (1997) (advocating that "the constructive role of international law in post-Cold War era will be greatly enhanced if nongovernmental organizations seek self-consciously to participate in, influence, and ultimately enforce transnational legal process by promoting the internalization of international norms into domestic law . . . "); MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE (1995) (stating that sovereignty stands for "freedom of action by states when the need is for central coordination and control . . . ").
LIBERAL AMBIVALENCE AND NATIONAL IDENTITY

protect citizens from their governments, but only to the extent that governments would allow them to be protected.  

This rule is explicit in all the major human rights documents. The U.N. Charter reads in its first organizing principle: "The Organization is based on the principle of the sovereign equality of all its members" and "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . ." Though Article 4 of the Charter reads that membership in the United Nations is open to all peace-loving states, there is nothing explicit in the Charter that bars human rights violators from obtaining U.N. membership. The protection of human rights is encouraged throughout the Charter, but in the end only becomes enforceable when a state decides to let them be enforced.

Alongside the creation of the U.N. Charter was a desire to create an international bill of rights. The basic document targeting this goal emerged as a Declaration in 1948 and was powerfully anti-pluralist in most of its universal norms. Much of the formative content of international human rights law draws on the Declaration of Human Rights, spanning the chasm from political and civil rights to social and economic rights. Unfortunately, the Declaration had very little hortatory power due to its non-legal status, and attempts were subsequently made to codify the principles in conventions that would have the power to bind states. It would take eighteen years for the International Covenant on Economic, Social, and Cultural Rights and its

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41 U.N. CHARTER art. 2, ¶ 1.
42 Id. ¶ 7.
43 Id. art. 4.
44 See generally id. (emphasizing that the Charter is not binding unless states so choose).
sibling Covenant on Civil and Political Rights\textsuperscript{48} to enter into force. Such duration could partly be chalked up to the genuine unwillingness of states to chip away at their sovereign independence and may suggest that the Declaration was not as representative of state opinion as its authors would have desired.\textsuperscript{49}

Illustrative of Charter liberalist residue is the very first line in both Covenants: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."\textsuperscript{50} It goes on to read, "The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."\textsuperscript{51} States that have ratified the Civil and Political Covenant subject themselves to the authority of the Human Rights Committee.\textsuperscript{52} This committee was created by the Covenant, with a mission to receive reports from states concerning their human rights records and consequently issue its own reports on the efficacy of states in their alignment with human rights prescriptions.\textsuperscript{53} If a state ratifies the separate Optional Protocol to the Covenant, it allows its citizens to bring claims against it for human rights abuses.\textsuperscript{54}

2. Tomato Soup

With respect to the formation of political communities, Charter liberalism clearly emphasizes the "state" as the appropriate unit of analysis. The international legal principles at work favor the rights of states to self-determination and promote a pluralistic perspective on how those states decide to politically organize themselves. This pluralism, however, only goes this far, stopping at the territorial borders of state sovereignty; the question of


\textsuperscript{49} LAUREN, \emph{supra} note 46, at 241-80.

\textsuperscript{50} ICCPR, \emph{supra} note 48, art. 1, § 1; ICESCR, \emph{supra} note 47, art. 1, § 1.

\textsuperscript{51} \textit{Id.} art. 1, § 3.

\textsuperscript{52} \textit{Id.} art. 28, § 1.

\textsuperscript{53} \textit{Id.} arts. 40-42.

whether sub-national groups might have cognizable claims against states at international law is firmly answered in the negative.\textsuperscript{55} Pluralism in the colloquial context is out of bounds as this would implicate the domestic ordering of the state and the relative freedoms allowed citizens and groups.\textsuperscript{56}

Charter liberalism’s focus on state sovereignty was traditionally an emphasis synonymously placed on nations as well, conflating the distinction between the state’s reference to legal powers and the nation’s reference to ethno-cultural solidarity.\textsuperscript{57} Indeed, “nation-state” is a term comfortably within Charter liberalism’s pluralistic scope, assuming the borders of national membership neatly coincide with the territorial borders of the state. The term “nation-state” ultimately makes invisible the distinction between liberal governance neutral to cultural goods and the cultural quality of national membership. International law performing in the charter sense is concerned with the behavior of states, not nations. It is this confluence of the ethno-cultural/national with the state that finds ready expression in Huntington’s assimilationist nationalism.

It should be noted that Huntington’s version of assimilationist theory does not, as does Charter liberalism, view the nation as an invisible yet inevitable aspect of the sovereign state. On the contrary, Huntington is worried that if trends keep apace, the American nation that has long been the center-piece of the United States will be lost to the overwhelming effects of Hispanic immigration and cosmopolitanism.\textsuperscript{58} The normative stakes involve the need to recapture what made America in the first place, and that has, at least until the late twentieth century, always provided the socio-cultural-political capital for liberal democracy. It is this capital that Huntington describes as tomato soup—the powerfully compelling stuff that has always been able to

\textsuperscript{55} S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 19-23 (2004).

\textsuperscript{56} Simpson, supra note 11, at 548.


\textsuperscript{58} HUNTINGTON, supra note 1, at 221-51, 264-72.
assimilate immigrants.\textsuperscript{59} The problem of today is that there are too many cooks in the kitchen.

Huntington's emphasis on assimilation as the key for national identity rests on several claims. The first is the dismissal of a classic dichotomy in nationalist theory that is the distinction between civic and ethnic nations.\textsuperscript{60} This idea posited the notion that while some nations have formed along civic, ideological, or ethical lines with open borders and an inclusive membership, other nations have retained closed boundaries where membership was constituted by ethnicity, culture, language, religion, and similarly "concrete" forms of identity.\textsuperscript{61} Huntington's rationale for viewing this as a false dichotomy, at least in the United States, turns on a historical interpretation of the early role of white, Anglo-Protestant settlers. These people preceded the founders and were not "immigrants." An immigrant to the United States is a person who wants to become a part of the society the settlers created . . . [and] [u]nlike settlers, they experienced 'culture shock' as they and their offspring attempted to absorb a culture often much at odds with that which they brought with them. Before immigrants could come to America, settlers had to found America.\textsuperscript{62}

In this sense it is misleading to describe America as a "Nation of Immigrants"\textsuperscript{63} since the phrase implies an egalitarian, amorphous, diverse association. While Americans are committed to equality, reform, and diversity, Huntington argues that these admirable qualities are the exclusive product of a culture formed by seventeenth and eighteenth century settlers. To quote at more length:

The central elements of that culture . . . include the Christian religion, Protestant values and moralism, a work ethic, the English language, British traditions of law, justice, and the limits of government power, and a legacy of European art, literature,

\textsuperscript{59} Id. at 129. For a less accommodating take on this history, see Hiroshi Motomura, Americans in Waiting (forthcoming 2006).
\textsuperscript{60} Id. at 29-30.
\textsuperscript{61} ANTHONY SMITH, THE ETHNIC ORIGINS OF NATIONS 134-38 (1986). Civic nations are bound by territory, legal codes, shared citizenship, and ideology, whereas the population of an ethnic nation shares blood ties, language, history, and culture. Id.
\textsuperscript{62} HUNTINGTON, supra note 1, at 40.
\textsuperscript{63} Id. at 39.
philosophy, and music. Out of this culture the settlers developed . . . the American Creed with its principles of liberty, equality, individualism, representative government, and private property. Subsequent generations of immigrants were assimilated into the culture of the founding settlers and contributed to and modified it. But they did not change it fundamentally. 64

At least two points are evident in this passage. The first is that Huntington is using "culture" as a catch-all phrase to include the manifestations of politics, economics, morality, and ethnicity. The second is that his argument for conflating the old division between civic and ethnic nations comes from his belief that, in the American context, the civic aspects of the so-called "American Creed" are inextricably tied to a special group of people and their culture. If Anglo-Protestants had not founded the United States, the Creed would simply not exist. 65

Today, Huntington believes all of this to be in jeopardy, that the "nation" in nation-state can no longer be taken for granted, and he identifies four trends as substantially responsible for this unhinging. These are: the popularity of the multiculturalists model and its celebration of sub-national identities at the expense of a solidified "white consciousness," the resistance of Hispanic immigrants to assimilation, the dilution of the English language as the official language, and the emergence of post- and trans-national identities. 66 Considering my purpose in showing the connection between Charter liberalism and Huntington's assimilation, this article will focus only on the first of these: the rise of multiculturalism. On the one hand, notes Huntington, multiculturalism will not be problematic to the extent that it is

64 Id. at 40-41.

65 Id. at 59. Huntington asks and answers: "Would America be the America it is today if in the seventeenth and eighteenth centuries it had been settled not by British Protestants but by French, Spanish, or Portuguese Catholics? The answer is no. It would not be America; it would be Quebec, Mexico, or Brazil." Id. For more critical interpretations, see RETHinking AMERICAN HISTORY IN A GLOBAL AGE (Thomas Bender ed., 2002), CULTURAL DIVERSITY IN THE UNITED STATES (Ida Susser & Thomas C. Patterson eds., 2001), INTERPRETATIONS OF AMERICAN HISTORY, Vol. One – Through Reconstruction (Francis G. Couvares et al. eds., 2000), NEW AMERICAN HISTORY, Eric Foner (1997), and Gordon Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1998).

66 Id. at 295.
actually identified as multiracialism. The existence of race serves as an obstacle to a consolidated national identity due to its implications for differentiated identity as race increasingly dissolves with inter-marriage; however, a favorable result is reached to the extent that it gives individuals one less reason to think of themselves as different from their neighbors. The difference here is that Huntington is talking about the advent of multiracial individuals—not multicultural groups. This merging of ascriptive identities is therefore good for keeping tomato soup’s consistency, but it is bad for its effects on the recipe’s core ingredient: “white people.” Due to this evaporation of race and ethnicity in the United States, non-whites increasingly identify their ethnicity in hyphenated terms. A presumptive result for so-called “whites” would therefore be for them to call themselves European-American, but this would not only be descriptively inaccurate due to the originality borne in the settler experience, it would be normatively unacceptable for the imprimatur it would stamp on the ascendance of sub-national identities. Alternatively, says Huntington, it is problematic for whites to continue identifying themselves as “whites” due to the term’s intrinsically racist history.

The preferred route is to make a move that would strengthen national identity and national unity, and that would be for white people to simply call themselves “Americans.” By labeling themselves as Americans, former whites would be doing two things at once. First, the American label would formalize the idea that America is not a nation of immigrants, capturing what Huntington described as the Anglo-Protestant cultural core, and highlighting that culture as something decidedly distinct from the cultures of other peoples. Secondly, it would establish itself as a non-racial cultural core accessible to every citizen of the United States through an actively assimilationist agenda. That is to say,

67 Id.
68 See Huntington, supra note 1, at 304.
69 Id. at 306.
70 Id. at 306-07.
71 Id. at 300-01.
72 Id. at 301.
73 Huntington, supra note 1, at 303.
74 Id. at 363.
Huntington’s tomato soup would once again be all-American inasmuch as the settler-descendants take a nativist command of the cultural core, while remaining available to all citizens on the basis of the Creed’s egalitarianism and the de-racializing consequences of multiracialism. This is a nationalism “devoted to the preservation and enhancement of those qualities that have defined America since its founding” with the desired consequence of once again reconciling the terms “America” and “United States” as nation and state.

B. Liberal Anti-Pluralism and Liberal Nationalism

1. Liberal Anti-Pluralism

In contrast to Charter liberalism, Simpson describes “liberal anti-pluralism” as an “evangelical doctrine . . . [that] views liberalism as a comprehensive doctrine or a social good worth promoting.” Whereas Charter liberalism focused on what amounted to a state right to political diversity, liberal anti-pluralism suggests liberal democracy and individual rights as the sine qua non of governmental form. This view suggests that states that do not adopt the liberal democratic stance should not be recognized in the international order since they have violated individual rights.

Simpson identifies this liberal image as anti-pluralist because of its focus on universal standards and prescriptions for a discriminative order which allows access and participation only to liberal democratic states. Where Charter liberalism situates an international order in which any state that meets the traditional sovereign requirements may participate in international affairs (thus recognizing a type of political pluralism), liberal anti-pluralism advocates a requisite governmental style in the form of liberal democracy. Charter liberalism is therefore concerned with the rights of states and largely oblivious to the rights of civil societies and individuals, while liberal anti-pluralism demands a

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75 Id. at 365.
76 Simpson, supra note 11, at 540.
77 Id.
78 Id. at 541.
79 Simpson associates liberal anti-pluralism with the work of Michael Reisman, Fernando Teson, Thomas Franck, and Anne-Marie Slaughter. Id. at 537.
single choice for states such that individuals will have the greatest latitude in their decision-making.

As discussed above, human rights have a historical connection with Charter liberalism. Liberal anti-pluralism, with its focus on democracy and human rights, clearly has its own claims on human rights doctrine as well. Indeed, Simpson has argued, "International human rights law with its intellectual roots in the enlightenment and its emphasis on popular sovereignty and civil rights is the engine of this new liberal anti-pluralism." In contrast to its Westphalian lineage, human rights as liberal anti-pluralism has been a more recent phenomenon. The right to participate in the international order, which traditionally was granted to any state with de facto control over its territory and populace, has given way to the emergence of a new admissions policy based on human rights records and democratic structure which could cause trouble for "hard-core abstainers, such as the totalitarian governments of Myanmar, North Korea, and China." Liberal anti-pluralists go where traditional human rights were never able; they claim that not only should governments not be free to determine how they treat their citizens, but that all governments should be democracies.

Universalism—the basic justification for human rights—is the belief that certain rights and freedoms naturally derive from one's humanity regardless of religion, sex, nationality, race, or any other social distinction. As Alison Renteln has suggested, a human

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80 Id. at 541.
81 Id. at 556-70. "Westphalian" sovereignty is a label commonly used to refer to the system of international order associated with states as the exclusive and fundamental units of analysis in international law. See, e.g., Martii Koskenniemi, The Future of Statehood, 32 HARV. INT’L L. J. 397, 397 (1991).
83 Simpson, supra note 11, at 558.
84 See INTERNATIONAL LAW AND WORLD ORDER 714-45 (Burns Weston et al. eds., 1997) (discussing of universalism and relativism in human rights).
right "is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human." A universalist is therefore capable, like liberal anti-pluralists, to call for humanitarian intervention not only when threats to international peace are at stake, but also when governments are abusing the human rights of their citizens. An additional justification is the belief that because governments are driven by the preferences of individuals and groups, and not fixed exogenous interests, a leader who abuses his subjects will just as easily be an aggressor on the international field. It is, therefore, the business of the international community what type of political organization a particular state decides to adopt, and if it decides too far in favor of illiberal consequences, military responses may be deemed appropriate.

2. Liberal Nationalism

Professor Simpson described liberal anti-pluralism as evangelical because of the propensity on the part of its proponents to suggest liberal democracy as a peremptory norm itself due to the rights of individuals to have an accountable government in which they can participate in official decision-making. Unlike charter liberalism's passive conflation of the "nation-state," liberal nationalism's focus on democratic governance and legitimacy aggressively engages the concept of political community. This revision takes place, however, only with respect to the state: the disaggregation of its sovereign powers, the opening up of individual rights, and the ascendance of transnational networks. The nation, in contrast, skirts analysis and remains wholly intact.

88 See Anne-Marie Slaughter, Good Reasons for Going Around the U.N., N.Y. TIMES, Mar. 18, 2003, at A33 (including commentary in support of the Iraq war).
89 Nye & Keohane, supra note 28, at 32-36.
playing the default role for the enabling of liberal democracy and individual rights. The problem with alternatives to the national orientation, according to this view, is that popular conceptions like cosmopolitan democracy are geared towards a post-national identity that inevitably invokes "democratic deficits"—gaps between the capacity of individual citizens to provide meaningful input into the decision-making process generated by accountable governmental officials.  

Liberal anti-pluralism thus speaks of individual rights, but nonetheless requires the existence of sovereign states—a relationship that makes additional sense when we recall the relationship between human rights and charter liberalism. To be sure, the pro-democracy movement does not accept Westphalian sovereignty; sovereignty in this liberal version is disaggregated, complex, and transnational. The bottom line for present purposes is that liberal anti-pluralists focus on the need for democracies to remain national, even in the "new world order." 

This particular liberal preoccupation with the role of the nation has a counterpart in political theory. David Miller argues that liberal nationalism merges liberty and equality (the so-called American Creed) with a theory of nation-building that at once allows individuals to freely and equally deliberate on the mechanics and substance of official decision-making and successfully maintains solidarity among various sub-nationalities. Solidarity is essential for any political community, but its sustainability becomes greater the larger the population becomes and the more market-driven its economics. Miller suggests, as does Huntington, that "nationality is de facto the main source of such solidarity." 

Liberal nationalism and assimilationism part ways, however, in

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90 Id.; see also Dahl, supra note 23, at 31.
92 ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
93 MILLER, supra note 23, at 31; see also TAMIR, supra note 23.
94 MILLER, supra note 23, at 32.
95 Id.
the elasticity each attributes to the capacity for national identities to be inclusive. Where Huntington’s tomato soup paradigm suggested a highly restrictive relationship between Anglo-Protestants and America’s national identity, Miller argues that the imaginative quality of national identity provides room for “people of different political persuasions to share a political loyalty, defining themselves against a common background whose outlines are not precise, and which therefore lends itself to competing interpretations.”96 Quite unlike tomato soup, Miller believes nationality to be “associated with no particular social programme: the flexible content of national identity allows parties of different colours to present their programmes as the true continuation of the national tradition and the true reflection of national character.”97

It sounds like liberal nationalism wants to have its cake and eat it too. It argues in favor of national identities as being presumptively positive and the best model for achieving the kind of non-strategic social integration required by large-scale liberal democracies. At the same time, however, Miller is unwilling to follow the low road taken by Huntington where particular socio-cultural-religious contents constitute the national idea. Instead, Miller invokes the more familiar liberal terrain of political pluralism by opening the doors to multiculturalism after all. This is what liberal democracies are supposed to be all about. How is it, then, that liberal nationalism bridges the gap between a coercive and assimilationist nationalism and liberal pluralism? Miller’s answer is elusive: “The place where the line is drawn will be specific to a particular nationality at a particular time, and it will be subject for debate whether its present position is appropriate or not.”98 Somehow the liberal nationalist project aims to sustain a national identity with real and substantive norms, and at the same time be thin enough to allow for those not belonging to the dominant culture sufficient leeway in expressing their sub-national identities.99

This article will return to how liberal nationalism meaningfully attempts to distinguish itself from a purely assimilationist model in

96 Id.; see HUNTINGTON, supra note 1.
97 Id. at 33.
98 Id. at 34.
99 Id. at 35-36.
Part IV, but for now it is enough to conclude that liberal nationalism accurately reflects liberal anti-pluralism in international law. Both theories are committed to pluralistic politics, but only to the extent that the diversity never reaches the structural levels of the state. States should not have the choice to structurally diversify, but should be constituted by national liberal democracies. Echoing the liberal nationalist thesis, Professors Nye and Keohane have written, "[n]othing plays the integrative role that occurs within well-ordered nation-states."100

C. Multiculturalism and International Human Rights Law

1. Liberalism's Late Embrace: Multiculturalism and Group Rights

Where Charter liberalism focused on the sovereign state and liberal anti-pluralism on democracy and individual rights, an anomalous creature has been quietly at work in international law: a stream of rights belonging to sub-national groups.101 For centuries, states have resisted the idea of group rights, but as will be discussed, the arrival of such rights may finally be upon us.102 To the extent the emergence of group rights in international law has been a liberal project, it is situated quite differently than the two images discussed by Simpson, and it may be for this reason that group rights and multiculturalism do not appear in his article. In fact, the historical difficulties faced by group rights advocates have often been liberal creations, either with respect to (1) the rights states have claimed against sub-national groups due to fears of secession; or (2) the conflict between group and individual rights. The fact that multiculturalism presently claims a liberal base is a result of political theorizing only done in the last decades of the twentieth century.103

It is important to note at this point a distinction between

100 Nye & Keohane, supra note 28, at 30.
102 Anaya, supra note 55, at 49-58 (arguing that customary norms concerning the rights belonging to indigenous peoples have emerged).
103 Multiculturalism may have a liberal heritage in terms of diversity and state neutrality with respect to cultural goods. To the extent that multiculturalism is associated with group rights, the liberal relationship is new. Kymlicka, supra note 9, at 336.
“multiculturalism” and “group rights” since they are often used interchangeably or in connection with one another. At a very simple level, multiculturalism can refer to a society that is descriptively diverse in its cultural populations; in an empirical sense, this is a multicultural society. Multiculturalism can also be used normatively, however, by referring to a society that actively seeks to promote multicultural governance and cultural diversity. Here, multiculturalism primarily is ventured as a normative program: as this program argues, respect for cultural diversity is a manifestation of the liberal state’s theoretical commitment to substantive neutrality with respect to ethno-cultural-religious goods.

A disjuncture appears, however, when we are reminded that the neutral respect is generally understood to have a negative orientation; liberal governments are supposed to refrain from oppressive action and not actively advocate on behalf of special groups. The distance between the liberal project and multiculturalism extends further when we remember that liberal neutrality is preoccupied with the rights of individuals, not groups, to self-determination. It is here that a difference between “multiculturalism” and “group rights” becomes clear at the ground level. Whereas a liberal society might very well take a favorable view on multiculturalism to the extent that it means equal respect for cultural dispositions, it is far less friendly to the idea of attributing rights to groups in the same way as attributing rights to individuals. Illustrative of the problem: which trumps when a group right collides with the right of an individual?

Peter Jones explains that this collision can in part be reconciled by determining whether an entity has moral standing—in violating a right, are you wronging the holder of that alleged right? In other words, for an entity to hold a right, it must have moral standing. If it has moral standing, the entity can possess moral

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104 It is for this reason, for example, that the U.S. Constitution entitles individuals and not groups in its Bill of Rights, and why group-specific programs like affirmative action are so controversial. The notion that groups such as African-Americans might enjoy remedial benefits through affirmative action in the United States has been discounted by the U.S. Supreme Court. The only available legal rationale for group cognizance, in this context, is a prospective interest in diversity. See Grutter v. Bollinger, 539 U.S. 306, 323 (2003).

entitlements, which concurrently act as sources of moral obligations for others. Jones suggests that there are two ways of conceiving "group rights." The first conception follows Joseph Raz in his formulation of "collective rights." Group rights in their collective sense are based on an interest theory of rights in which a right exists, first and foremost, if there is an interest sufficiently strong to create a duty in another. Following this premise, Raz explains that "these interests are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interests as members of the group." The resulting aggregation of interests appears to be a group right, but the moral basis of the right lies in its members severally. A solitary individual interest may lack the force to create a duty, but the aggregated interests of those interests do have that force, and so individuals will be unable to exercise group claims in the absence of the group itself. It is therefore wrong to think of collective rights as group rights per se since the moral standing supporting the claim is actually supplied by individuals, and not the group itself: "A right is a group right only if it is a right held by a group qua group.

The second conception delivers moral standing to the group itself, and in so doing steers furthest from traditional liberal principles. This form of corporatism differs from collectivism because the corporate model assumes that group status itself bears the moral standing necessary to claim rights, regardless of the individually aggregated rights that might or might not lie at its core. As Jones suggests,

[j]ust as an individual has an identity and a standing as a person independently and in advance of the interests or rights that he or she possesses, so a group that bears a corporate right must have an identity and standing independently and in advance of the interests it has and the rights it bears. Its being a group with moral standing as a group is a logical prerequisite of its being an

106 Id.
107 Id. at 356-60; Joseph Raz, The Morality of Freedom 207-08 (1986).
108 Jones, supra note 105, at 357 (quoting Raz, supra note 107).
109 Id. at 356.
110 Id. at 354.
111 Id. at 361.
112 Id. at 363.
entity that can bear corporate rights. So the 'groupness' of
groups, for right-holding purposes, is understood quite
differently by these two conceptions.113

There is serious tension in international law between the
collective and corporate forms of group rights. As discussed
below, this tension takes clearest shape in the divisions between
the U.N. declaration dedicated to minorities and the draft
declaration on the rights of indigenous peoples. Like the Boston
Red Sox and the New York Yankees, however, the rivalry between
collective and corporate forms of group rights has only recently
taken on the features of a meaningful contest. Minority rights in
international law are collective rights, at best114 accessible only to
individuals belonging to certain identifiable groups, and the moral
basis for these rights lies with the individuals themselves—not
with the group qua group.115 In contrast, the Draft Declaration on
Indigenous Rights is heavily corporatist. Before moving into the
history of these two movements and the present state of the law, it
is useful to see how developments in political theory have made a
cognizable impact on the place of multiculturalism and group
rights in international law.

A compelling critique of liberal democracy in the 1980s
alternatively went under the guises of "communitarianism," "identity politics," "the politics of recognition," "multiculturalism,"
and what Huntington pejoratively calls "deconstructionism."116
These theories have been articulated in different settings by
different scholars, but a common thrust was that the liberal
emphasis on the individual was not as neutral in practice as the
theory claimed, and the concomitant effects on community values

113 Id.

114 Jones writes, "The interest of any one individual may not suffice to justify
imposing duties on the larger society to institute measures to protect and sustain that
culture. But the joint interest of all members may suffice, in which case we can ascribe
the appropriate group right to the minority." JONES, supra note 105, at 357. This
rationale is at odds, however, with the explicit characterization by the United Nations of
minority rights as individual rights. Infra text accompanying notes 179-216.

115 JONES, supra note 105, at 354.

116 HUNTINGTON, supra note 1, at 141. See, e.g., IRIS MARION YOUNG, INCLUSION
AND DEMOCRACY (2000); MICHAEL SANDEL, DEMOCRACY'S DISCONTENT (1996); SEYLA
BENHABIB, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE
had been deleterious. It was argued that liberal neutrality functioned to privilege the individual sitting at the top of the cultural food chain, that is, Huntington’s Anglo-Protestant everyman. This privileging has an impact on which types of cultures are favored and which are not, resulting in the systematic silencing and assimilation of non-members. As the politics of the 1960s and 1970s bore fruit, assimilated groups lost their taste for tomato soup. It had become unacceptable for membership in the political community to be gauged by individualized citizenship, and cultural determinism demanded “group-specific forms of citizenship” as a means of either doing away with national identity or reconstructing a national identity that was multi-colored.

In the twenty-first century, the heart of the multicultural complaint is common knowledge and, as Huntington has suggested, it is precisely this critique which has motivated the present identity crisis in the United States. However, how is it that what was initially a searing attack on liberalism has been co-opted, resulting in liberal arguments for group-specific forms of citizenship and identity? Will Kymlicka constructs the argument in three phases, and suggests that the communitarian critique of liberalism was the first. This critique helped unearth the heart of the problem, which was that the atomistic individual was not an unencumbered self as much as she was embedded in a particular culture, and to the extent that her culture was nullified, so was her personal right to self-determination. Kymlicka argues that the multiculturalism debate moved into a second phase, as it became apparent that what had appeared to be a symmetry between the communitarian attack on liberal individualism and the multicultural attack on assimilationism had evaporated. On closer examination, it became apparent that there was not a

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117 See Daniel Bell, Communitarianism and Its Critics (1993); see generally Kymlicka, supra note 9, at 208-73 (summarizing the debate).
118 Kymlicka, supra note 9, at 343-47.
119 Huntington, supra note 1, at 141-58.
120 Id.
121 Kymlicka, supra note 9, at 336-37.
123 Kymlicka, supra note 9, at 338.
conflict between liberalism and non-dominant cultural identity, but that liberal states had taken on illiberal habits with respect to the propagation of assimilative social programs. Kymlicka writes, "the overwhelming majority of debates about multiculturalism are not debates between a liberal majority and communitarian minorities, but debates amongst liberals about the meaning of liberalism." 124

In the third phase of the multicultural debate, liberal nationalism parts ways with multiculturalists like James Anaya and Will Kymlicka. Liberal nationalists recognize the fact that liberal states actively assimilate its citizens in an attempt to integrate a solidified national culture. 125 They also recognize the importance of pluralism and support the elaboration of public spheres in which sub-national groups are able to meaningfully contribute to the terms and substance of national policy. 126 However, these recognitions still situate national identity as the preeminent status. 127 Kymlicka argues that a value hierarchy where the national identity trumps the sub-national violates the liberal commitment to neutral governance, despite liberal nationalist sympathies for pluralist politics. 128 The difference, Kymlicka suggests, turns on a basic presumption about group rights. In the liberal nationalist view, the presumption is that while practice may often privilege the dominant culture, the importance in sustaining national social integration places the burden on the sub-national group to show why it deserves special rights. 129 Considering the overwhelming dominance of majority cultures and the hegemonic power liberal states have in demanding tomato soup, the liberal commitment to individual self-determination requires a reversal of this presumption against group rights. The question for liberal democracies should no longer be whether a departure from so-called neutral principles can be justified, "but rather, do majority efforts at nation-building create injustices for minorities? And if so, do minority rights help protect against these

124 Id.
125 DAVID MILLER, ON NATIONALITY (1995).
126 Id. at 96-98.
127 MILLER, supra note 23, at 32.
128 KYMLICKA, supra note 9, at 345.
129 Id.
injustices?”  

Coming back to a question posed at the beginning of this section regarding the difficulty in reconciling a collision between a group right and an individual right when both entities are considered as having equal moral standing, Kymlicka’s response is that they do not. This liberal multiculturalism highly values cultural identity, and favors it above a singular national identity, but when a group right collides with an individual right, the ultimate liberal emphasis on individualism has to win. A way of squaring the problem, on this view, is by distinguishing between rights of the group against internal dissenters and rights of the group against the larger society. On its face this seems appealing as the former type of internal restrictions seem undemocratic and illiberal, while the latter type of external protections seem the very stuff of a society committed to multiculturalism. The problem will lie in navigating the rocky territory of which types of internal decisions are illiberal, and which ones not.

2. Background: Minority Rights

Just as the emergence of a liberal view of group rights has been a recent development in the theorization of political community, it is a newcomer in international law as well. The concurrence is not coincidental, however, with documents like the two U.N. Declarations evolving against the setting of the three phases described by Kymlicka. This section provides a historical survey

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130 Id. at 347.
131 Id. at 339.
132 Id.
133 Id.
134 KYMLICKA, supra note 9, at 340-41.
135 Kymlicka writes: “What we need . . . is a consistent theory of permissible forms of nation-building within national democracies. I do not think that political theorists have yet developed such a theory.” Id. at 352. For further discussion on “illiberalism,” see Fareed Zakaria, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD (2003); Symposium on “Liberalism and Illiberalism,” 12 J. CONTEMP. LEGAL ISSUES 625 (2002), Gerry Simpson, GREAT POWERS AND OUTLAW STATES (2004).
136 I do not mean to suggest that group rights are unfamiliar in the international context, since they are not. Rather, it is the successful emergence of instruments affiliated with the human rights movement declaring rights adhering to minorities and indigenous peoples that is novel.
of the international legal developments.

Minority rights became a project of international concern since the early twentieth century with the end of World War I and the creation of the League of Nations. Prior to this time, texts asserting protection for minorities, and often dealing with religion, were limited to internal laws, predominately used by European nations. In the wake of World War I, the League understood the relevance of minority rights and its relation to conflict, as indicated by Woodrow Wilson's words, "Nothing is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities." The major illustration of this commitment was the elaboration of five "Minorities Treaties" which were concluded among the Allies and the newly-emerged states. These treaties, inter alia, included the following: the right to equality of treatment and non-discrimination of all nationals of the country before the law, equality of political and civil rights, equality of treatment and security in law and in fact, the right to citizenship, the right to use one's own language, and the right to establish, manage, and control charitable, religious or social institutions, schools, and other education establishments. The treaties also included state obligations, such as the provisions for equitable financial support for schools, and the "recognition of the supremacy of laws protecting minority rights over other statutes." Francisco Capotorti notes that some of the racial, religious, and linguistic minorities which were able to take shelter under the banner of this new regime were those in Austria, Poland, the Serb-Croat-Slovene state, Czechoslovakia, Bulgaria, Romania, Hungary, Greece, the city of Danzig, the Aland Islands, Turkey, and Iraq.

Despite its impressive scope and ambition, the minority rights regime under the League is largely considered to have been a failure. For one thing, the system lacked a level of generality

137 FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES 1-4 (1991); HANNUM, supra note 101, at 50-54.
138 Id. at 17 (quoting Woodrow Wilson).
139 Id. at 16-26.
140 Id.; see HANNUM, supra note 101, at 53.
141 CAPOTORTI, supra note 137, at 18.
142 HANNUM, supra note 101, at 53.
espoused in its preambular language.143 “That the system was neither conceived nor intended for application on a universal or more general basis was clearly indicated at the Peace Conference, where a universal approach was specifically rejected in the drafting . . . .”144 The effect of this was to color the protection of minority rights with a stain of degradation and a limitation on sovereignty rights, which was only compounded by the fact that the treaties exclusively related to the duties charged on defeated states.145 The rights of minorities in Europe were therefore discussed more than acted on, and it was not until the advent of the World War II that these claims would receive serious attention.

Unfortunately, the serious attention that minorities would receive in the mid-twentieth century came, not from the international community, but from Hitler. After the defeat of the Axis powers, the formulation of the U.N. Charter in 1945 and the Universal Declaration of Human Rights (Universal Declaration) in 1948146 stood out as proud documents charging the international community with the responsibility to respect and protect a whole host of individual rights and state obligations. The Universal Declaration, however, made no reference to minority rights.147 Despite this omission, the U.N. General Assembly was nonetheless aware of a need to somehow address the minority question, and subsequently requested the U.N. Economic and Social Council to produce a thorough study on minorities.148 The eventual product of these deliberations was the formulation of an article that could be housed in the forthcoming International Bill of Rights, now known as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).149 The final text of Article 27, the first and most explicitly legal text regarding

143 CAPOTORTI, supra note 137, at 26.
144 Id. at 25.
145 Id.
147 HANNUM, supra note 101, at 58.
149 For a description of the history of Article 27, see PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1991); CAPOTORTI, supra note 137, at 31-36.
minority rights, reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."¹⁵⁰

A decade after Article 27 was adopted, momentum increased in 1979 when Francesco Capotorti—the Special Rapporteur for the Sub-Commission of Discrimination and Protection of Minorities—was assigned the task of examining in depth the juridical treatment of minorities.¹⁵¹ Capotorti's first hurdle was definitional: "The preparation of a definition capable of being universally accepted has always proved a task of such difficulty and complexity that neither the experts of the field nor the organs of the international agencies have been able to accomplish it to date."¹⁵² Some of the questions that have dogged this process have included, inter alia: what weight numerical ratios should be given, whether minorities should be defined by exclusively objective criteria or a combination of subjective self-identification and positive elements, whether the origins of minority groups matter, whether recent immigrant populations should be included, and whether minorities should only include groups of nationals, excluding foreign populations.¹⁵³

As Capotorti explained, this definitional issue had practical consequences. Article 27 refers to "persons belonging to such minorities" and not minority groups per se. This is important because it sets the stage for future human rights instruments which frame minority rights in individual terms, and thus enable

¹⁵⁰ ICCPR, supra note 48, art. 27.
¹⁵¹ See CAPOTORTI, supra note 137, at 5.
¹⁵² Id.
¹⁵³ Id. It is important to reemphasize the utility in identifying the moral orientation of minority rights in international law. As long as it remains conceptually unclear, it will be difficult, if not impossible, to marry minority rights law with an underlying moral architecture that will provide it with long-term coherence and sustainability. The coherence of a legal system depends, in part, on the normative systems from which it draws inspiration. The coherence, or lack thereof, of minority rights law therefore depends on its normative bases of justification, and its current location within the international mode of human rights law means that it draws, paradoxically, from classic liberal individualism. For a discussion of normative coherence in international legal theory, see Christian Reus-Smit, The Strange Death of Liberal International Theory, 12 EUR. J. INT’L. L. 573 (2001).
individuals, and not groups, to claim protection under the Optional Protocol to the ICCPR. The rationale for defining minority rights individualistically was essentially a matter of keeping with precedent. In discussing the reasons for highlighting individualism, Capotorti wrote:

The first is historical. In the system of protection of minorities established in 1919-1920, rights were accorded to individuals only. The theory of an international personality of minorities developed later . . . but the treaties and other international instruments relating to minorities were concerned expressly with individual rights . . . . The second reason was the need for a coherent formulation of the various provisions of [the Covenants]. The only right of collective bodies is the right of peoples to self-determination. But this is an entirely different matter from the rights of members of minorities . . . . Lastly, there is a political reason. The fact of granting rights to minorities and thus endowing them with legal status might increase the danger of friction between them and the state, in so far as the minority group, as an entity, would seem to be invested with authority to represent interests of a particular community vis-à-vis the state representing the interests of the entire population.

According to Article 27, protection under the ICCPR requires that an individual must belong to an ethnic, religious, or linguistic group that is not a majority to bring a claim. If this requirement is satisfied, the individual has the right to enjoy his own culture, practice his own religion, and speak his own language. These rights are further inflated by the effect of the ICCPR's "Basic Non-Discrimination List"—states are bound to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

A brief point of clarification is deserved regarding the right to

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154 See CAPOTORTI, supra note 137, at 35.
155 Id.
156 This is the crystallization of Jones' articulation of collective rights, where the rights are essentially individualistic but nonetheless dependent on a group identity.
157 ICCPR, supra note 48, art. 2, § 1.
non-discrimination and its relation to minority rights. The right to not be discriminated against, though clearly a component of a minority rights regime, is necessary but not sufficient in and of itself.\textsuperscript{158} After all, if the right to non-discrimination was synonymous with the concept of "minority rights," minority rights would be severely redundant. The Sub-Commission has explained that minority rights differ from the general right to non-discrimination because these special rights refer to the "protection of . . . non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population."\textsuperscript{159}

Between 1966 and 1992, the year the General Assembly adopted the U.N. Declaration on the Rights Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration [MD]),\textsuperscript{160} no other human rights instruments expressly dealt with the question of minorities, though some guidance can be found in a handful of documents.\textsuperscript{161} Among these have included Article 13 of the ICESCR,\textsuperscript{162} the Convention on the Rights of the Child,\textsuperscript{163} the Convention on the Elimination of All Forms of Racial

\begin{itemize}
\item \textsuperscript{161} UNHCHR.org, U.N. High Commissioner for Human Rights, \url{http://www.unhchr.ch/html/menu2/10/c/minor/min_istr.htm}. The texts of these documents, as well as other useful information dealing with minorities, can be found at the Minority Rights page of the U.N. High Commissioner.
\item \textsuperscript{162} ICESCR, \textit{supra} note 47, art. 13 (concerning the right to education).
\begin{quote}
[I]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.
\end{quote}
\textit{Id.} art. 30.
\end{itemize}
Discrimination, and the Genocide Convention.

With the end of the Cold War, the last decade of the twentieth century witnessed a veritable explosion in minority rights movements. The Minorities Declaration was originally recommended in Capotorti's study, and as a result, the Human Rights Commission subsequently went about creating a working group to draft the declaration. Thirteen years later, the Minorities Declaration was adopted by the U.N. General Assembly in 1992.

3. Background: Indigenous Rights

Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial

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[S]tates Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Id., art. 2(2).


[I]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethничal, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id. art 2.


167 CAPOTORTI, supra note 137, ¶ 617.

societies that developed on their territories, consider themselves distinct from the societies now prevailing in those territories, or parts of them. They form non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems.169

This definition of "indigenous peoples" was established by the U.N. Working Group on Indigenous Populations in 1986, and it encompasses a number of factors, such as ancestry, culture, ethnicity, and a historical connection to the land.170 To this extent, it may appear difficult to distinguish indigenous communities from minority groups, in that ethnic minorities often claim the same types of ethno-historical integrity. There are at least two means of distinguishing the communities. The first includes the perspective in international law that minority rights are basically individual rights masquerading as "collective rights," while indigenous rights sound in terms of "corporate group rights."171 Another means is a special relationship with land.172 Minority groups often claim cultural integrity and an adamant need for self-definition, but are not often conceptualized as aboriginal.173 It is this relationship with territorial sovereignty which often supplies the force with which indigenous communities attempt to distinguish themselves as "peoples" from "mere minorities."174

Unlike the interests in protecting minority rights that attended the League of Nations, the issue of indigenous populations received its contemporary dose of international concern in 1949,


171 This becomes evident in exploring the content of the two declarations. See infra text accompanying notes 179-216.

172 See ANAYA, supra note 55, at 145-46.

173 See HANNUM, supra note 101, at 89.

174 See ANAYA, supra note 55, at 77-80.
when the U.N. General Assembly recommended that a study be conducted on the problem of indigenous communities in the Americas.\(^{175}\) This recommendation did not get very far, however, as the mechanisms for request were dependent on requests from states, and at least at the time, no state government was willing to make such a request.\(^{176}\)

Despite this lapse, indigenous rights emerged a decade later with the International Labor Organization (ILO) in its Convention 107 of 1957\(^ {177}\) which attempted to rectify a prevalent trend in which governments were using coercive labor practices with indigenous communities.\(^ {178}\) This included calls for better education, vocational training, social security, and compensatory rights for lost land.\(^ {179}\) The early effort was heavily criticized not only for its assimilationism and individualist tenor, but for the fact that indigenous people themselves had little if anything to do with the drafting of the document.\(^ {180}\) Nonetheless, the ILO was still a step ahead of the United Nations and any other international organization, at least in the 1950s.

Another milestone in the development of an international movement for indigenous rights came in the 1970s and 1980s with a number of non-governmental conferences.\(^ {181}\) Unlike the ILO Convention twenty years earlier, these conferences were heavily attended by indigenous groups and helped to consolidate the beginnings of a unified international movement.\(^ {182}\)

In 1982, much in response to these events, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities created a Working Group on Indigenous Populations in order to help develop international standards for indigenous rights.

\(^{175}\) G.A. Res. 275 (III) (May 11, 1949).


\(^{178}\) See Anaya, supra note 55, at 44.

\(^{179}\) See Hannum, supra note 101, at 77.

\(^{180}\) Id.

\(^{181}\) Id. at 83.

Since its establishment, the Working Group has had two basic projects: the collection of data as incorporated through the participation of indigenous parties and NGOs, and the development of a draft declaration. In terms of complaints made in the early years of its operation, the Working Group heard reports from more than seventy organizations representing thirty-three countries. As Hannum has catalogued, these reports have included "arbitrary arrests, torture, and killings . . . seizure of indigenous lands . . . and the attempted destruction of indigenous culture and identity through, inter alia, desecration or destruction of religious sites." It was in 1985 that the Working Group decided to draft a declaration that would detail the rights to be accorded indigenous peoples, which was ultimately adopted by the U.N. General Assembly. The drafting process was in large part a holistic one, involving the participation by indigenous groups and a number of states. An effort at revision by the ILO of its Convention 107 of 1957 worked in tandem with the work of the Sub-Commission and the Working Group. In 1989, it promulgated Convention 169 in favor of a more contemporary understanding of indigenous interests. Whereas the first convention had been steeped in assimilationist rhetoric aimed at bringing individuals within the majority culture and institutional framework, Convention 169 took a more multicultural turn. As Anaya explains, the new Convention "can be seen as a manifestation toward responsiveness to indigenous peoples['] demands through international law" as evidenced in its provisions "advancing indigenous cultural integrity, land and resource rights, and non-discrimination in social welfare spheres."

In 1994, the Sub-Commission adopted the Draft Declaration, a document representing state-of-the-art indigenous rights and self-determination. This contemporary picture of indigenous rights poses much more serious threats to states in terms of collective

183 HANNUM, supra note 101, at 84.
184 Id. at 85.
185 Id.
186 Id.
187 Id. at 78.
188 ANAYA, supra note 55, at 47.
189 Id. at 48.
claims to self-determination than a minority rights regime. It is likely for this reason that, unlike the MD, the Declaration on the Rights of Indigenous Peoples has not yet been adopted by the U.N. General Assembly. The next section examines the two Declarations, highlighting the major substantive distinctions between them.

4. The United Nations Declarations

The Minorities Declaration consists of nine articles, and like Article 27 of the ICCPR, is individualistic in its orientation. Its title, tellingly, is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. In contrast, the Indigenous Declaration is forty-five articles, and is an explicitly anti-individualistic instrument—it is the Draft Declaration on the Rights of Indigenous Peoples. The provisions of the Indigenous Declaration are divided into nine parts, though the major substantive topics include rights to self-determination and survival; religious, cultural, and linguistic integrity; education and labor rights; rights to democratic participation and development; and land and resource rights.

a. Self-Determination and the Non-Discrimination Principle

It is recognized in international law that the right to self-determination is a collective one, and as such, is notably absent from the MD. For its part, the MD largely takes its cue from the individualistic tenor of Article 27 of the ICCPR and its protection of religious, cultural, and ethnic minorities—a perspective largely rooted in providing persons belonging to such groups with more muscular protections than the ordinary non-discrimination principle would provide. At best, this approach moves towards a

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190 Id. at 53.
191 For discussion, see Thornberry, supra note 158, at 39-53.
193 See, e.g., ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION (2004); Secession and Self-Determination (Stephen Macedo & Allen Buchanan eds., 2003); Self-Determination in International Law (Robert McCorquodale ed., 2000).
Table 1. Locations of Various Topics in the Minorities Declaration and the Indigenous Declaration

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<thead>
<tr>
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<th>Minorities Declaration</th>
<th>Indigenous Declaration</th>
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<tbody>
<tr>
<td>Self-Determination</td>
<td>None</td>
<td>Arts. 3, 4, 31-36</td>
</tr>
<tr>
<td>Genocide</td>
<td>None</td>
<td>Arts. 6-11</td>
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<tr>
<td>Religious, Cultural, Linguistic Identity</td>
<td>Arts. 1, 2, 4</td>
<td>Arts. 12-14</td>
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<td>Education &amp; Labor</td>
<td>Art. 4</td>
<td>Arts. 15-18</td>
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<td>Participatory Rights &amp; Development</td>
<td>Art. 2</td>
<td>Arts. 19-24</td>
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<tr>
<td>Land &amp; Resource Rights</td>
<td>None</td>
<td>Arts. 25-30</td>
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<tr>
<td>Non-Discrimination</td>
<td>Arts. 2, 4</td>
<td>Arts. 1-3</td>
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type of autonomy to be more or less worked out on the merits of a given situation. The Indigenous Declaration (ID), however, is rooted in Article 1 common to the two international covenants: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."194

The ID begins its discussion of self-determination in Article 3, where it simply provides that indigenous peoples have the right to self-determination: "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."195 Article 31 gives further clarity, guaranteeing the right to "autonomy or self-government in matters relating to their internal or local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment, and entry by non-members, as well as ways and means for financing these autonomous functions."196 Article 32 additionally provides for the collective capacity to determine indigenous citizenship in accordance with their customs and traditions.197 Article 33 guarantees juridical process in accordance with both indigenous customs and international human

194 See supra text accompanying notes 37-47.
195 ID, supra note 192, at 107.
196 Id. at 113.
197 Id.
To the degree the MD moves towards autonomy—as opposed to self-determination—the ID picks up on an autonomous theme as well in its Article 4. Article 4 which provides for the right “to maintain and strengthen their distinct political, economic, social, and cultural characteristics,” while also allowing for groups to participate in the “political, economic, social, and cultural life of the State.” Significantly wedded to an autonomy claim in both documents is an emphasis on equality and freedom from discrimination. Articles 2, 3, and 4 of the MD respectively provide for minority individuals to have the right to enjoy cultural, religious, and linguistic integrity “freely and without interference or any form of discrimination” and that “[s]tates shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.” While giving similar protections in terms of guaranteeing human rights and freedom from discrimination, the ID asserts such rights in favor of indigenous peoples and individuals.

b. Genocide

Hannum explains that “[g]enocide has been committed against indigenous, Indian, or tribal peoples in every region of the world, and it is in this context that any discussion of indigenous rights must occur.” While minorities have suffered their fair share as well, the MD, in contrast to the ID, is silent on the matter of physical protection. Part II of the ID begins in Article 6 by espousing a general collective right to security. Article 7 proscribes “ethnocide and cultural genocide” and provides for redress in response to assimilation and integration imposed by “legislative, administrative or other measures.” Article 10 protects against the threat of being forcibly removed from their

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198 Id.
199 Id. at 107.
200 Id.
201 ID, supra note 192.
202 HANNUM, supra note 101, at 74-75.
203 ID, supra note 192, at 107-08.
lands or territories. Article 11 provides special protection in times of armed conflict and exhorts the observance of the Fourth Geneva Convention. The closest the MD comes to dealing with security is in Article 1, which orders states to “protect the existence and the national or ethnic, religious and linguistic identity of minorities within their respective territories.”

c. Religious, Linguistic, and Cultural Identity

Like Article 27 of the ICCPR, the MD underscores the importance of cultural, religious, and linguistic independence. Article 2 of the MD, though framing the rights in a positive way, uses the phrase “have the right to” as opposed to “shall not be denied the right to” used in Article 27. Article 4 places a number of substantive obligations on states, including the duty to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards to take appropriate measures so that, whenever possible, [minorities] may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue and to consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

These provisions, while certainly more muscular than a simple prohibition on discrimination, are necessarily hampered by the qualifications allowing states discretionary perspective. Most notably, the substantial provisions in Article 4 are crippled to the extent that a state is excused from its duty where it finds the minority interest to collide with a national or international standard. The ID, predictably, takes these provisions to the next level. Article 12 provides:

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204 Id. at 108.
205 Id.
206 MD, supra note 160, art. 1.
207 ICCPR, supra note 48, art. 27.
208 MD, supra note 160, art. 2.
209 Id. art. 4 (emphasis added).
210 Id.
Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.\textsuperscript{211} 

Article 13 provides similarly extensive protections for religious rights, as does Article 14 for linguistic rights.\textsuperscript{212} Further, these provisions make no reference for the rights of states to derogate in the face of countervailing national legislation or international standards.\textsuperscript{213} The duties on states are referenced instead as measures to be taken in ensuring that these rights are protected.\textsuperscript{214}

d. Education and Labor

Article 4(4) of the MD provides that states, \textit{``where appropriate,} should take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territories."\textsuperscript{215} Again, without qualification, Part III of the ID mandates a number of substantive rights to education.\textsuperscript{216} They include the rights of children to all levels of state education, indigenous control over their own autonomous educational systems, and the right to have indigenous culture and history represented in public education.\textsuperscript{217} Part III also includes rights to indigenous ownership over media outlets and the enjoyment of all rights under international labor law.\textsuperscript{218} The MD does not cover these subjects.

e. Participatory and Economic Rights

Article 2(2) of the MD guarantees the right of minority persons

\textsuperscript{211} ID, \textit{supra} note 192, at 109.
\textsuperscript{212} Id.
\textsuperscript{213} HUNTINGTON, \textit{supra} note 1, at 109-10.
\textsuperscript{214} Id.
\textsuperscript{215} MD, \textit{supra} note 160, art. 4 (emphasis added).
\textsuperscript{216} HUNTINGTON, \textit{supra} note 1, at 109-10.
\textsuperscript{217} ID, \textit{supra} note 192, at 109-10.
\textsuperscript{218} Id.
to participate in public life, and Article 2(3) provides that such people have the right to "participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong . . . in a manner not incompatible with national legislation." The ID has similar language protecting the rights of indigenous people to participate effectively in the governance structure of the state to which they belong. Article 19 provides for indigenous peoples to have the right to participate fully in "all levels of decision-making in matters which may affect their rights . . . ." Article 20 supplements this right by guaranteeing the right to participate in matters of the state that may affect indigenous interests through indigenous procedures. However, the rest of Article 19 protects the rights of indigenous peoples to maintain and develop their own indigenous decision-making institutions, working in tandem with their capacity for public participation.

Both Declarations also speak to economic participation in addition to democratic decision-making. The MD is limited to Article 4(5), which shoulders states with the responsibility of considering "appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country." In contrast, Article 21 of the ID discusses the right of indigenous peoples to maintain and develop their own social and economic systems, and entitles people who have in the past been deprived of their means of subsistence "to just and fair compensation." In terms of participation in the economic life of the state, Article 22 provides for the right to "special measures for the immediate, effective and continuing improvement of their economic and social conditions, including areas of employment, vocational training and retraining, housing,

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219 MD, supra note 160, art. 2.
220 Id. (emphasis added).
221 Id.
222 ID, supra note 192, at 110.
223 Id.
224 Id.; see also MINORITIES AND THEIR RIGHT OF POLITICAL PARTICIPATION (Frank Horn ed., 1996) (providing thorough treatment of the question of minority rights to political participation).
225 MD, supra note 160, art. 4 (emphasis added).
226 ID, supra note 192, at 111.
sanitation, health and social security." 227 Additionally, the ID provides for the so-called third generational right of development 228 in Article 23: "indigenous peoples have the right to determine and develop all ... economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions." 229

**f. Land and Resource Rights**

Control over territory is clearly a sensitive issue and one close to the heart of sovereign authority. 230 It is not surprising, as such, that there is no mention of a right to land in the MD. In the ID, land rights play a substantial role, as evidenced in Articles 25-30. Article 25 begins by guaranteeing indigenous peoples "the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas ... which they have traditionally owned or otherwise occupied or used ... ." 231 Article 26 provides for the right to develop, control, and use the total environment of the "lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources," which includes the "right to the full recognition of their laws, traditions, and customs, land-tenure systems and institutions for the development and management of resources . . . ." 232 Article 27's ambit is compensatory, providing for the "restitution of all . . . lands, territories, and resources confiscated, occupied, used or damaged . . . ." 233 Article 28 provides for the conservation and restoration of "the total environment and the productive capacity of their lands, territories and resources." 234 It also prohibits military activity, unless freely agreed upon by the peoples concerned, and bars the storage of hazardous materials. 235 Article 30 provides a catch-all

227 Id.


229 Id., supra note 192, at 111.

230 See Anaya, supra note 55, at 104-06.

231 Id., supra note 192, at 111.

232 Id. at 111-12.

233 Id. at 112.

234 Id.

235 Id.
provision:
Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories, and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural, or spiritual impact. \(^{236}\)

III. Federal American Indian Law: A Survey \(^{237}\)

With this in mind, we return to Huntington's call for a resurgence of Anglo-Protestantism in the face of America's national identity crisis, and ask whether any one of the three liberal nation-building models appear to have a command on the principles and practice shaping the development of the American nation. Does federal jurisprudence in the United States track assimilative tendencies toward whiteness? Is it colored more extensively by documents like the U.N. declarations?

In previous sections this article has examined the theoretical parameters of three models of political community in liberal political theory and international law. After suggesting three types of alliances—(1) charter liberalism and assimilationism, (2) liberal anti-pluralism and liberal nationalism, and (3) multiculturalism and international group norms—it went on to elaborate the history and extent of the third alliance in greater detail. This extensive


discussion of group rights in international law was important for two reasons. First, the multicultural model is a late-comer in international law, only recently finding success within the classically individualistic framework of human rights law. Second, international law appears to receive the greatest amount of attention when performing in its multicultural guise. Together, these points suggest multiculturalism—in theory and international law—to be contemporary in a manner unlike its rivals.

Considering the breadth of these questions, this Part focuses on a single ethnic group and its identity claim—Native American Indians. Many writers invoke the idea of the miner’s canary to illustrate the problem often faced by marginalized populations in liberal societies.238 Likening Indians in America to Jews in Germany, Felix Cohen wrote: “Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”239 In the mines, workers sometimes brought canaries to serve as warning signs, since the canaries often died from exposure that would ultimately prove dangerous to the miners. Due to their more vulnerable position, the canary succumbed to agents that would prove dangerous to all involved. It is in this light that groups like the American Indians and African-Americans have been likened to the miner’s canary; socially corrosive consequences will be detected first in the marginal populations.

If we are seeking guideposts in the search for national identity in the United States, and the assumption is to initially direct attention to the outskirts, we will quickly find American Indians. To be sure, the stakes American Indians have in the national identity debate should not be necessarily any more important than any other marginalized group. Unlike any other ethno-cultural group, however, Indians make an indigenous claim on the land itself. Indians have been the recipients of a heritage of bizarre


attempts\textsuperscript{240} by the U.S. government at situating this claim in the landscape of American federalism. The Constitution sets out a relatively clear relationship between the sovereign powers of the several states and those of the federal government. It does not speak to tribal powers, and from the moment the Supreme Court originally identified American Indians as having dependent sovereign status, the federal nature of American identity that would develop in the next two centuries would not include Indians in a coherent way. Perhaps, in the terms of culinary metaphors, American Indians were initially viewed as a garnish—like parsley—conveniently set beside the tomato soup.

\textbf{A. The Marshall Trilogy and Foundational Principles}

Pre-revolutionary colonial relationships between the white Europeans and the American Indians on the American continent were initially established by various treaties.\textsuperscript{241} Not every Indian tribe made a treaty with the nascent American government, but many did. The United States allowed Indian tribes relative degrees of autonomy and self-government to the extent these treaties were capable of creating real and binding legal relationships.\textsuperscript{242} After the revolution, the framers of the Constitution took up the Indian question in a cryptic reference in the Commerce Clause, which provides Congress with the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."\textsuperscript{243} The intent and meaning of this reference has been widely debated;\textsuperscript{244} on its face, the Commerce Clause clearly distinguishes the Indian tribes from states and foreign nations. Whatever type of self-government or autonomous control Congress intended for American Indians, the text admits that it was not meant to be akin to either the relationship between state

\begin{footnotes}
\item[240] Phillip Frickey, \textit{Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law}, 110 HARV. L. REV. 1754, 1754 (1997) ("If the 'life of the law' for legal formalists is logic and for legal pragmatists is experience, then federal Indian law is for neither.").
\item[242] U.S. CONST. art. 1, § 8, para. 3.
\end{footnotes}
and federal government or the relationship between co-equal sovereign nations.245

The bedrock legal principles developed in order to tease out the constitutional structure of Indian governance were provided in the well-known Marshall “trilogy.”246 The trilogy consists of three Supreme Court cases all decided by Chief Justice William Marshall between 1823 and 1832 based on juridical explorations conducted entirely beyond the text of the Constitution.247 Of course, it is difficult to imagine what else the Court could have done considering the paucity of constitutional text on the subject.

The first of the trilogy cases was Johnson v. M’Intosh,248 which involved the question of whether land-transfers between Indians and non-Indians before the Revolution were legally valid.249 After the Revolutionary War, many Indian lands that had been purchased by officers came to the U.S. government, which subsequently sold portions of these lands to private parties.250 The plaintiff in M’Intosh was a successor to one of the original non-Indian owners who was contesting the post-revolutionary sale.251 The question for the Court was therefore whether the Indian tribes had a retained sovereign right to these lands, or if by the so-called doctrine of “discovery” the United States had commandeered full legal control.252

As some commentators have suggested, Chief Justice Marshall took a middle road through these “extremes.”253 Marshall explained that it was impossible for Indian tribes to have retained a full sovereign power, including the “power to dispose of the soil at their own will,”254 because it was “necessarily diminished . . . by the original fundamental principle, that discovery gave exclusive

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245 Chief Justice John Marshall wrote in Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831): “In this clause they are clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the Union.” Id.

246 For discussion, see Newton, supra note 243, at 200-05.

247 Pommersheim, supra note 244, at 275.


249 Id. at 571-72.

250 Id. at 560-61.

251 Id.

252 Id. at 572-74.


254 Johnson, 21 U.S. at 574.
title to those who made it." Perhaps peculiar to the modern disposition, this fundamental principle was justified, at least by the English Crown, on the basis that all heathen societies were subject to discovery and dominion by the Christian people. Chief Justice Marshall then asked to what extent this principle had been adopted in the United States. Answering in the affirmative, he emphasized that "[t]he United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country . . . . They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest . . . ." The Court held that the plaintiffs could not possess legal title to lands sold to them by Indians, because Indians had not had the authority to make such a sale after the ascension of American holdings.

The compromise, as it were, was that because the Court had recognized an original tribal right to possession prior to the "discovery," an inherent or latent sovereign residue was left behind in the decision's wake. Conceivably, the Court could have simply said that discovery had erased all sense of Indian title, but as Justice Marshall said, Indian tribes retain a "right of occupancy." "Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others." Explaining this decision further, Charles Wilkinson has written:

This right of occupancy, a unique real property interest previously recognized in the New World by Great Britain and tracing to the writings of sixteenth-century philosophers, is a compromise between tribal rights and prerogatives of the discovering nations. The Indian right of occupancy is well short of fee ownership—it can, for example, be extinguished by the

255 Id.
256 Id. at 576.
257 Id. at 584-87.
258 Id. at 587
259 Johnson, at 604-05.
260 Id. at 588.
261 Id.
262 Id. at 591.
United States without compensation. On the other hand, original Indian title is a valid interest in land under American real property law, good against all but the federal government, allowing the tribes to reside on their lands and to exclude outsiders.\textsuperscript{263}

Chief Justice Marshall returned to the development of Indian autonomy in \textit{Cherokee Nation v. Georgia}.\textsuperscript{264} The case involved a contest between the state of Georgia and the Cherokee over the use and control of certain lands previously occupied by the Cherokee.\textsuperscript{265} The Court began with an examination of its jurisdiction over the Cherokee, as to whether the Cherokee are to be treated as a sovereign foreign nation, or as a state of the Republic, or as something else altogether.\textsuperscript{266} Chief Justice Marshall explained at the threshold that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."\textsuperscript{267} This unique relationship is that of a "domestic dependent nation,"\textsuperscript{268} occupying a territory whose title to which is owned by the United States independently of tribal will, and resembling "that of a ward to his guardian."\textsuperscript{269} The Court explained,

[Indians and Indian territory] are considered by foreign nations . . . as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion (sic) with them, would be considered by all as an invasion of our territory, and an act of hostility.\textsuperscript{270}

As such, Chief Justice Marshall concluded that there was a lack of jurisdiction over the Cherokee nation since it was not capable of being identified as one of the Court’s subjects in Article III of the Constitution.\textsuperscript{271}

Having ducked the issue in \textit{Cherokee Nation}, the problem of Indian-state relations returned the following year in \textit{Worcester v.}

\textsuperscript{263} \textit{WILKINSON, supra} note 253, at 39-41.
\textsuperscript{264} \textit{Cherokee Nation v. Georgia}, 30 U.S. 1 (1831).
\textsuperscript{265} \textit{Id.} at 2-3.
\textsuperscript{266} \textit{Id.} at 16.
\textsuperscript{267} \textit{Id.} at 16.
\textsuperscript{268} \textit{Id.} at 17.
\textsuperscript{269} \textit{See Cherokee Nation} at 17.
\textsuperscript{270} \textit{See id.}
\textsuperscript{271} \textit{Id.} at 20.
The Georgia legislature had promulgated a rule barring non-Indians from residing in Cherokee territory without a license from the governor. Some missionaries from Vermont were found living among the Cherokee without having acquired a license, and they were convicted and sentenced to four years of hard labor. The question that came before the Supreme Court was whether Georgia had the authority to govern activity within the Cherokee territory.

Drawing on the Treaty of Hopewell established in 1785, the Court construed the language and intent of this congressional act to have not been a receipt of a surrender of self-government on the part of the Indian tribes. Rather, “its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States.” The sum of treaties, the Court emphasized, treat Indians as “nations . . . [and] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.” Invoking the constitutional imprimatur of treaty-as-law, the Court subsequently held the state of Georgia to have no authority over the Indian tribes “retaining their original natural rights, as the undisputed possessors of the soil . . . with the single exception of that imposed by [the doctrine of discovery].” The states, Chief Justice Marshall concluded, were to have no control over Indian tribes.

273 Id. at 523.
274 Id. at 529.
275 Id. at 532.
276 Id. at 541.
277 Worcester, 31 U.S. at 553-54.
278 Id. at 554.
279 Id. at 557.
280 Id. at 559.
281 Id. at 561-62. There was heavy fall-out after this decision, with Georgia refusing to obey the order. See Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 STAN. L. REV. 500, 525-26 (1969); Horace Greeley, American Conflict Vol. 1 106 (1864).

As far as the judicial approach to federal Indian policy went, the Marshall trilogy, for more than a hundred years, appeared to be a fair compass for the Court. The trilogy generally interpreted ambiguous treaties in favor of American Indians and protecting *Worcester*-type claims to self-government, yet retained a general plenary power on the part of Congress, exclusive to the rights of states. Legislatively, the approach has had its own twists and turns. The period from the beginning of the Republic through the end of the nineteenth century, covering the time in which the Marshall trilogy was decided, is sometimes called the “formative period.”

As referenced in *Worcester*, the Framers’ initial Indian policy was an artifact of British negotiations with tribal authorities. After the Revolution, these agreements lost their legal force, but George Washington was quick to draw on the past in what became known as the “Savage as the Wolf” policy. As Washington was acquainted with the ferocity of Indian resolve when faced with colonial pressure, war with the Indians was the last concern of the new Republic. Thus, during his presidency, Washington urged a conciliatory approach balancing the self-management of tribal activities with the ultimate authority and power of the federal government. Moreover, it was important to facilitate a pathway towards an open and sustainable trade network.

Professor Francis Prucha suggested the following benchmarks from the formative years in legislative policy: (1) the settling of definite boundaries for Indian country; (2) the denial of acquisition of Indian land by agents other than the United States government; (3)

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283 GETCHES, supra note 241, at 84.
284 Id. at 83-165.
285 Getches, supra note 241, at 95.
286 Id.
287 Id.
the regulation of trade; (4) the control of traffic in alcohol; (5) the regulation of crimes conspiring between races; and (6) the promotion of civilization among the Indians.  

In 1887, the Dawes Act, also known as the General Allotment Act, was passed by Congress. Throughout the latter half of the nineteenth century, Americans were becoming increasingly avaricious in their interests for Indian land, and Congress was not deaf to these interests. Indeed, the tumult in the wake of Worcester was illustrative of the escalating feelings on the part of white Americans that they had rights to Indian land. The Dawes Act promulgated the notion of allotment, that is, the disaggregation of tribal lands to the possession of individual tribal members. The point was that by breaking up large tribal holdings, large sections of land became available for non-Indian settlement, thus paving the way towards greater individual ownership and away from traditional communal holdings. In hopes of further integrating Indians into American society while at the same time shifting tribal lands into non-Indian hands, the program's parceling of individual land-plots among tribal members resulted in large chunks of land being opened to non-Indian homesteading.

The legitimacy of the Dawes Act was questioned in the Supreme Court in Lone Wolf v. Hitchcock, decided in 1903. The Indian position relied on a treaty signed in 1868 between the Kiowa and Comanche tribes and the federal government prohibiting the cession of tribal lands unless approved by three-fourths of all adult male tribal members. The question of whether this treaty provision held sway in the face of subsequent

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290 Id.


292 GETCHES, supra note 241, at 190-91.


295 Frickey, supra note 293, at 14-15.


297 Id. at 564.
congressional decisions was not one for the Court: "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of government."  

The Court’s permissive attitude with respect to allotment and assimilation had taken a serious toll on the Indian lands and communities from the end of the nineteenth and into the beginnings of the twentieth century. Inspired by a new vision with respect to reforming federal Indian policy, the Bureau of Indian Affairs (BIA) promulgated the Indian Reorganization Act (IRA) of 1934. The IRA was based on a rationale aimed at reversing the effects of allotment policies, and brought to an end the doctrine of allotment and refurbishing tribal control over Indian lands. Hot on the heels of the IRA was the publication by the Department of Interior of Felix Cohen’s well-known Handbook of Federal Indian Law. The text, in tandem with the BIA, represented a return to Worcester-like protections for Indian self-government and the re-establishment of the principle that Indian powers were not delegated from Congress, but residual sovereign rights pre-existing the coming of the American colonial project.

Turning on a dime, however, was yet another reversal in policy with a change in administrative leadership at the BIA. Congress developed what became known as its termination policy to encompass “complete integration” and assimilation. This policy, originating with a House of Representatives resolution in 1953, asked for nothing less than all “Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially

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298 *Id.* at 565.

299 MERIAM REPORT, INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928).


301 For discussion, see Newton, *supra* note 243, at 272-73.

302 FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (2d ed. 1982).

303 *Id.* at 122-23.

304 See Getches, *supra* note 282, at 231.

305 *Id.* at 229-48.
A number of congressional acts were subsequently promulgated, with the effect of 109 tribes being terminated—or, in the parlance of the time—liberated from federal restrictions deemed discriminatory against Indians. Of course, this extravagant attempt at Americanizing the Indians by nullifying tribal structures had an explosive impact on Indian communities, and, as is often the case with minority oppression, federal termination policy had the effect of creating an invigorated tribal rights movement. A progressive accumulation of protests, public discontent, and discord ultimately resulted in the Indian Civil Rights Act (ICRA) of 1968 and President Nixon’s formal reversal of the termination program in 1970.

Nixon’s declaration of a new federal policy on Indian affairs centered on a right to “self-determination.” The new administration’s goal would be to “strengthen the Indian’s sense of autonomy without threatening his sense of community . . . . [W]e must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.” The principal legislation following this presidential declaration was the Indian Self-Determination and Education Assistance Act of 1975. In marked contrast from the termination period, this legislation followed a philosophy of federally funded programs planned and administered by the tribes themselves.

The essence of the Act is in § 450(f), which provides that the “Secretary [of Interior and Health and Human Services] is directed, upon the request of any tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal

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306 See id. at 231.
312 GETCHES, supra note 241, at 227 (quoting Richard Nixon).
314 Getches, supra note 282, at 255.
organization to plan, conduct, and administer programs or portions thereof . . . for the benefit of Indians because of their status as Indians . . . ."315

C. Judicial Plenary Power in the Rehnquist Court

Ten years after Congress passed ICRA, the Supreme Court took up the question of whether tribal authorities had criminal jurisdiction over non-Indians on the reservation in Oliphant v. Suquamish Indian Tribe.316 From the perspective of classic principles developed in the Marshall trilogy, intuitively a presumption would work in favor of jurisdiction for the tribe so long as Congress has not legislated otherwise.317 Further, with the addition of federal due process rules now applicable to the tribes through ICRA, more weight would likely be given the tribes in allowing jurisdictional authority.318 This is not, however, how Oliphant turned out. Beginning what David Getches has termed the "subjectivist period" in federal Indian adjudication,319 the Oliphant opinion, penned by Justice Rehnquist, held that Indian tribal courts did not have criminal jurisdiction over non-Indians on tribal lands.320 The basic rationale for the Court was that, while it was true that Indians continued to possess a residual, "quasi-sovereign" authority, Indians could not claim a right to criminal jurisdiction over non-Indians without the express delegation of such a power by Congress.321 By recalling language from Cherokee Nation and focusing on the issue, Rehnquist reminded the tribes that they are precluded from powers not only as expressly terminated by Congress, but also from those "inconsistent with their status" as dependent sovereign nations.322 Criminal jurisdiction over non-Indians, apparently divined by the Court

315 Self-Determination Act, supra note 313, § (a)(1).
318 Frickey, supra note 293, at 35.
319 Getches, supra note 282, at 267.
320 Oliphant, 435 U.S. at 195.
321 Getches, supra note 241, at 409.
322 Id.
without express reference, was one of those powers ceded away.\footnote{323}{See Robert N. Clinton, \textit{Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law}, 46 ARK. L. REV. 77, 141-53 (1993).}

Until this point, the Court’s tests for adjudicating the scope of tribal authority had typically dealt with the expanse of a given reservation’s territory.\footnote{324}{Frickey, supra note 293, at 38.} That is to say, as a systemic consequence of allotment policies, reservation populations became far from homogenous, often with large segments of non-Indian landholdings.\footnote{325}{Id. at 17-27.} In such situations, the Court sought to protect the “justifiable expectations” of non-Indians living on diminished reservations.\footnote{326}{Id. at 38.} As Professor Philip Frickey has discussed, “[t]he problem was that in \textit{Oliphant} there was no contention that the reservation had been diminished; thus, the Court had to limit tribal territorial sovereignty by limiting the sovereignty rather than the territory.”\footnote{327}{Id. at 36.} Indeed, “for the first time in 150 years, the Court took it upon itself to impose new limitations on tribal sovereignty.”\footnote{328}{Duro v. Reina, 495 U.S. 676, 685-86 (1990).}

Why did the Court hold that the status of “dependent sovereign nation” was inconsistent with the power to assert criminal jurisdiction over non-Indians when Congress had never made such a declaration, and no treaty was cited as an authority? Rehnquist explained that the assertion of criminal jurisdiction over non-Indians was an intrusion on personal liberty incompatible with the purely internal power to regulate and “preserve their unique customs and social order.”\footnote{329}{Duro v. Reina, 495 U.S. 676, 685-86 (1990).} This consent-based rationale emerged again in a subsequent case, \textit{Duro v. Reina}, that dealt with the question of whether a tribe could assert criminal jurisdiction over non-member Indians of the reservation.\footnote{330}{Id. at 693.} In \textit{Duro}, the Court explained that consent was the one central factor that legitimated tribal criminal jurisdiction over anyone.\footnote{331}{Id. at 693.} Pitting this exercise of criminal jurisdiction on individual consent highlighted the mechanics at work in \textit{Oliphant}. Adjudication of tribal claims was
not a contest between the rights of two sovereigns, but a balance of the tribal interest against the civil liberties interest under the U.S. Constitution.\(^{332}\)

The *Duro* and *Oliphant* opinions are notable in a number of ways. For example, in neither decision did the holding turn on a constitutional interpretation of congressional command, but instead relied on juridical analysis of tribal sovereignty.\(^{333}\) Certainly, the Court draws on the constitution with respect to its goal of protecting non-consenting individuals from tribal authority; but until *Oliphant*, the test instead would have been to leave inherent tribal powers undisturbed in the absence of congressional plenary power. As Frickey suggested, "*Duro* does nothing to clarify either the source or the scope of the ongoing judicial power, first recognized in *Oliphant*, to truncate tribal sovereignty on a case-by-case basis at the behest of non-members."\(^{334}\) Predictably, the *Duro* decision garnered an extreme reaction among the American Indian community, motivating a mobilization of lobbying efforts in Congress to statutorily overrule *Duro*.\(^{335}\) These efforts were successful in what became known as the "Duro override."\(^{336}\)

In the civil jurisdiction context, developments in the Rehnquist Court have been equally hostile with respect to tribal sovereignty. *Montana v. United States*\(^{337}\) involved the question of whether the Crow tribe had the power to regulate hunting and fishing by non-Indians within the boundaries of the Crow reservation.\(^{338}\) With little hesitation, the Court first held that the rights to navigable watercourses belonged to the states, and as such, was governed by *Montana*.\(^{339}\) The narrower question was whether tribal authority included the land rights of non-Indian fishing and hunting on

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\(^{332}\) "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.* at 693.


\(^{334}\) Frickey, *supra* note 293, at 42.

\(^{335}\) *See* Getches, *supra* note 241, at 417.

\(^{336}\) *Id.*

\(^{337}\) *Id.*

\(^{338}\) *Id.* at 547.

portions of the reservation owned by non-members of the tribe. Relying on *United States v. Wheeler*, the Court noted that the inherent aspects of tribal sovereign powers had been degraded, and that the present state of such tribal power could not go "beyond what is necessary to protect tribal self-government or to control internal relations." For the tribe to go beyond what is necessary would contradict the fact that tribes were dependent on the express delegation of congressional authority. Concluding that non-Indian hunting and fishing did not threaten the tribe's "political or economic security," the Court held that such activities on the Crow reservation were beyond the pale of tribal regulation. 

More recently, the Supreme Court has continued to confirm the modern validity of the *Montana* rule without explicitly explaining its relationship with classic Indian legal principles. These cases have included decisions barring the exercise of tribal court authority over claims against non-members on state easements, barring tribal courts from exercising subject-matter jurisdiction over state officials when the activity in question was conducted on reservation lands, and barring tribal authority to impose occupancy taxes on hotel guests situated on fee land within the reservation. In each case, Justice Rehnquist's pronouncement in *Atkinson* is illustrative of the Court's *Oliphant/Montana* approach: "[o]nly full territorial sovereigns enjoy the 'power to enforce laws against all who come within . . . [their] territory' . . . and Indian

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340 *Montana*, 450 U.S. at 556.
342 *Montana*, 450 U.S. at 564.
343 *Id.*
344 *Id.* at 546.
tribes 'can no longer be described as sovereigns in this sense.'"³⁴⁹

There is something extraordinary about this line of Supreme Court decision-making, prompting scholars like Frank Pommersheim to ask whether a constitutional crisis is developing in Indian law.³⁵⁰ In contrast to the well-established—and much criticized—plenary power of Congress to legislate in areas relatively free from judicial supervision, the claim is that the Supreme Court itself, and in particular the Rehnquist Court,³⁵¹ has generated a judicial plenary power.³⁵² As Pommersheim explains,

the plenary power doctrine can now be seen as coming in two distinct vintages. There is the classic doctrine of congressional plenary power as established in Lone Wolf. Yet even if Congress has not acted—where one would normally presuppose an unimpaired tribal sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law.³⁵³

The status of this judicial power is ambivalent, however, as it can be situated in a way quite easily consistent with the fundamental role of judicial review. As the Eighth Circuit Court Appeal held in United States v. Weaselhead,³⁵⁴ the relationship between tribal sovereignty, state sovereignty, and federal sovereignty is governed by the Constitution and as a matter of course therefore falls to the Supreme Court, and not Congress, for the last word.³⁵⁵ The trouble with this argument is the lack of constitutional text on the subject. The Framers intended for Congress to have the right to regulate Indian commerce, but beyond this it is almost impossible to say as a textual matter. It is an awkward argument at best to suggest that the Supreme Court

³⁴⁹ Id. at 653. For further discussion on Atkinson, see L. Scott Gould, Tough Love for Tribes: Rethinking Sovereignty after Atkinson and Hicks, 37 New Eng. L. Rev. 669 (2003) (enunciating a "constricting view of tribal sovereignty").

³⁵⁰ Pommersheim, supra note 244.

³⁵¹ Professor Getches argues that "the Rehnquist Court seems oblivious to the discrete body of Indian law that is based on solid judicial traditions tracing back to the nation’s founding.” Getches, supra note 282, at 267.


³⁵³ Id.

³⁵⁴ United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998).

³⁵⁵ Id. at 824.
has final authority to decide Indian law because it is the Court's role to explicate the meaning of the Constitution when there is nothing in the Constitution to interpret.\textsuperscript{356} Congressional plenary power does not necessarily follow either since the Constitution is silent as well on the subject of whether Congress has a general regulatory power over Indians.\textsuperscript{357} Why has it taken over a century for that constitutional silence to develop into what might be a crisis? For 150 years, courts recognized a presumptive power in favor of tribal authority anchored in Justice Marshall's canonical decisions. Recently the Court has strayed quite dramatically from course with little evidence of impetus other than "subjectivist" trends towards states' rights and the emergence of a federal common law in "our age of colonialism."\textsuperscript{358}

IV. Where Political Community and National Identity Part Ways

A. Liberal American Indian Law: Feel the Ambivalence

As we have seen, there is considerable debate in the United States over the future of its national identity, and as explained in Part II, there are at least three views that advocate various forms of assimilation, liberal nationalism, and multiculturalism. The assimilative and multicultural views appear to have the strongest connections with international norms, with their respective rejections and invocations.\textsuperscript{359} On the other hand, liberal nationalism seems to have the smallest use for international law in its conceptualization of national identity, and yet has the strongest link with developments in international legal theory.\textsuperscript{360} The upshot of this debate is that international legal norms play an ambivalent role in the arguments advocates make for and against

\textsuperscript{356} The traditional juridical route in such circumstances is the invocation of a political question doctrine or congressional plenary power. See Mark Tushnet, The Transformation and Disappearance of the Political Question Doctrine, 80 N.C. L. REV. 1203 (2002) (remarking that "today's court has no general constitutional theory that cautions against invalidating statutes"); Martin Redish, Judicial Review and the Political Question, 79 NW. U. L. REV. 1301 (1984); Louis Henkin, Is There a Political Question Doctrine? 85 YALE L. J. 597 (1976).

\textsuperscript{357} Newton, supra note 243, at 196.

\textsuperscript{358} Frickey, supra note 293, at 145.

\textsuperscript{359} See supra text accompanying notes 2-7.

\textsuperscript{360} See supra text accompanying notes 67-91.
particular styles of nation-building. The assimilationist model is supported by classic Charter liberalism, in which the nation and state are quietly conflated; the liberal nationalist model is supported by "the new liberals" in international law with their focus on democratic states and individual rights; multiculturalists find support in the recent wave of pan-indigenous solidarity and U.N. Declarations on the rights of groups.\(^{361}\)

After having mapped this liberal ambivalence in international law, Part III provided the example of American Indians to see whether any of the three models was in fact tracked in the federal law governing American Indians and their claims to indigenous rights. The answer, predictably, is muddled. First, the Supreme Court's jurisprudence since *Oliphant* has generated a number of attacks on tribal powers.\(^{362}\) The tests for sovereign providence no longer assume tribal authority where Congress has been silent but instead ask whether the asserted right is a necessary quality of self-government.\(^{363}\) Considering the legal absence of criteria guiding the boundaries of self-governance, this test should not be necessarily pro- or anti-tribal. However, in effect, the "subjectivist turn" has been decidedly restrictive. The result is that in the twenty-first century juridical landscape, American Indians have far less collective power than they have ever had before. This consequence is consonant with Huntington's thesis that national identity requires exclusive membership inasmuch as outlying cultural populations must face a choice between assimilation and marginalization.\(^{364}\) It is also consistent with Charter liberalism to the extent that the reduction of sub-national powers instantiates the authority of the single state, or rather, the single nation-state.

Second, liberal nationalism makes sense in the American Indian legal framework due to its emphasis on consent-theories of governance. Part of the rationale the Court has provided in its restrictions of tribal powers has been based on democratic ideas about self-government.\(^{365}\) Individuals on the reservation that are either non-Indian or non-members of the tribe and have not

\(^{361}\) See Wilmer, *supra* note 186; *supra* text accompanying notes 181-222.

\(^{362}\) See *supra* text accompanying notes 296-338.

\(^{363}\) See *Montana*, 450 U.S at 564.

\(^{364}\) See *supra* text accompanying notes 48-65.

\(^{365}\) See *Montana*, 450 U.S. at 559, 564.
conceived to Indian governance should not be subject to such governance.\textsuperscript{366} The rights of individuals to democratically participate in the deliberative process of governance are rights that must trump the rights of groups. In the field of liberal nationalism a hierarchy of rights is not especially problematic since the fundamental rights are those belonging to individuals, and the fundamental features of national identities necessary for democratic solidarity dominate group interests. Liberal nationalism guarantees respect for cultural identities and seeks means of establishing their respective autonomies through the deliberative process. In this light, legislation focused on tribal autonomy is viewed as a favorable development, maintaining a pluralistic respect for the facts of multicultural life. This respect, however, is appropriately chastened by the Supreme Court's preference for individual rights to democratic governance.\textsuperscript{367}

Third, American Indian law is multicultural, at least to a degree. In the history of congressional perspectives on Indian rights, the present view is a generous one.\textsuperscript{368} Despite legislation that devolved authority to the tribes, this situation is nonetheless a weak signal for multicultural progress in at least two ways. The first is that congressional acts providing special powers to Indian communities are evidence of a move with explicitly non-sovereign dimensions. That is, there has been a long history in Indian jurisprudence between congressional delegations to tribes of certain powers, and congressional recognition that tribes have inherent powers.\textsuperscript{369} In the contemporary climate, it is very difficult to understand legislation as recognizing inherent tribal sovereign powers. The fact that tribes lobby for autonomous control is indicative of the Court's hostility to powers conflicting with individual rights and federalism, with the result being

\textsuperscript{366} See id. at 559.

\textsuperscript{367} See Duro, 495 U.S. at 676 (noting that "tribal courts embody only the powers of internal self-governance").


\textsuperscript{369} See supra text accompanying notes 227-261.
congressional action in favor of protecting the tribes from judicial assault. This is not recognition—it is Congress delegating authority that may be exercised by tribes, so long as such exercise is consistent with overriding federal norms. This delegative quality suggests a second obstacle for multicultural progress, and this concerns the tracking between United States Indian legislation and the U.N. Declaration on Minority Rights, as opposed to the Declaration on Indigenous Rights.\textsuperscript{370} The Minority Rights Declaration is individualistic and heavily crippled by qualifications in public policy considerations.\textsuperscript{371} If the multicultural premise is to reverse the conventional presumption that the burden is on sub-national groups to argue for preferential treatment, and instead place group rights as the starting point in the anti-assimilationist analysis, American Indian law is not doing this premise justice.

\textbf{B. Problems with Assimilation and Liberal Nationalism}

John Stuart Mill wrote in his \textit{Considerations on Representative Government} that national solidarity is important for the collective action necessary in a democratic society.\textsuperscript{372} John Rawls also mentioned the advantages of national identity or at least the advantages of the state as playing the vehicle for democratic membership.\textsuperscript{373} The fact of the matter is that liberal political theory never developed a comprehensive theory on \textit{to whom} liberal obligations are owed.\textsuperscript{374} In a liberal society, it is clear how individuals are expected to behave with respect to equality, liberty, and deliberation. What has always been less than clear is the question of where "liberal society" ends. In the twentieth century, liberal society was understood to be a measure of the state, and to the extent liberalism's discussion of political community dealt

\begin{footnotesize}
\textsuperscript{370} This is simply to say that when American law conceives group rights at all, it will be in the more individualistic, collective vein as opposed to the corporate vein. \textit{See} Robert L. Simon, \textit{Pluralism and Equality: The Status of Minority Values in a Democracy}, in \textit{MAJORITIES AND MINORITIES} 207, 210-15 (John W. Chapman & Alan Wertheimer eds., 1990).

\textsuperscript{371} \textit{See supra} text accompanying notes 181-222.

\textsuperscript{372} \textit{JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT} 546 (J. M. Robson ed., 1977).

\textsuperscript{373} \textit{JOHN RAWLS, THE LAW OF PEOPLES} 23 (1999).

\textsuperscript{374} \textit{KYMLICKA, supra} note 9, at 261-68, 312-14.
\end{footnotesize}
with the obligations owed between human beings, these obligations were unpacked as relationships between governments and its citizens.\textsuperscript{375} This transition from person to citizen was made inconsequentially, and it has only been in the last decades that the national assumption in liberal theory has been seriously contested.\textsuperscript{376}

The first two models of political community—assimilation and liberal nationalism—accept and defend this assumption that the transition from liberal demands on humans to liberal obligations to fellow-citizens is a necessary one.\textsuperscript{377} Beset by cosmopolitan and multicultural critiques on the liberal construction of identity, the passive Charter conflation of the nation/state and citizen/person required a legitimately justifiable base, and the question is whether the assimilation and liberal nationalist models have done the job. Arash Abizadeh has recently set out a series of critiques against the liberal nationalist emphasis on the relationship between national identities and liberal democracies.\textsuperscript{378} Among them is the use of myth as a narrative tool for justifying the legitimacy of so-called authentic nationalities over abstracted ones.\textsuperscript{379} Common to nationalism studies is the idea of myth, popularly articulated by Benedict Anderson with his notion of the imagined community: in societies where it will be impossible for an individual to ever know most of his fellow-members, the viability of an over-arching national identity depends on the extent to which people imagine themselves as members of a coherent community.\textsuperscript{380} As Professor Abizedeh points out the use of myth in nationalist movements comes in at least two flavors: myth-as-history and myth-as-story.\textsuperscript{381}

Samuel Huntington’s tomato soup theory is an example of nation-building by way of myth-as-history. Recalling Anderson’s

\textsuperscript{375} See supra text accompanying notes 10-11.

\textsuperscript{376} KYMLICKA, supra note 9, at 261-68, 312-14.

\textsuperscript{377} See supra text accompanying notes 28-91.


\textsuperscript{379} Historical Truth, supra note 378.

\textsuperscript{380} BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (1983).

\textsuperscript{381} Historical Truth, supra note 378, at 297.
concept of the imagined community, Huntington explains that what is not as important as imagining the community is remembering it. “No nation exists in the absence of national history, enshrining in the minds of its people common memories of their travails and triumphs, heroes and villains, enemies and wars, defeats and victories.”382 The nation is therefore dependent on literal interpretations of a common history that binds its members together; real history and real events are what provide social integration—not myths and stories.383 This historical account is essential for Huntington considering his perspective on liberalism’s heritage. As in the American Creed, the basic tenets of liberal democracy only exist because a particular group of people acted at a particular time: the settling of North America by Anglo-Protestants.384 These were people that had a unique understanding of free and equal governance and its relation to Christian convictions, the English language, and British law.385 The civic and the ethnic cannot be distinguished here, as it is literally at the ethno-cultural core of the settlers that birthed the civic.

Huntington’s thesis is laudable for the fact that it admits liberal democracy’s inherent tendencies to assimilate marginalized populations.386 Liberal democracy is not neutral with respect to cultural goods. It is, in fact, a cultural good in its own right: “Throughout American history, people who were not white Anglo-Saxon Protestants have become Americans by adopting America’s Anglo-Protestant culture and political values.”387 While its forthrightness is commendable, tomato soup cannot actually withstand the application of liberal principles, at least in terms of its political philosophy. On its face, liberal democracy requires a society in which individuals are at liberty to equally contest distributions of power through the various mechanics of deliberation, association, and participation. This deliberation, for liberal democracy to be justifiable in terms of its own principles, must be more than chimerical: it must have the generative power

382 HUNTINGTON, supra note 1, at 116.
383 See id.
384 Id. at 37.
385 Id. at 38.
386 Id. at 41.
387 Id. at 61.
of self-determination.

A liberal democracy that takes a programmatic approach towards assimilating cultural populations not part of the "core" may be a functional bi-product of having fused nations with states, but it is simply oxymoronic to justify the destruction of particular world-views, moral conceptions, and cultural identities with the vocabulary of liberalism. If the fundamental imperative in a liberal democracy is to provide space for individuals to write their own "life-stories," how is it possible for liberalism to normatively prescribe the instruction of one, single life-story, the one created by seventeenth century Anglo-Protestants? The answer is that it cannot.

This normative problem implicates an empirical one, which comes back to the critique of myth-as-history. Recalling Huntington's emphasis on remembering history, contrast this with Ernest Renan's take on the role of memory in nation-building: "Forgetting, and I would say even historical error, are an essential factor in the creation of a nation . . ." Further, the point for Anderson was not simply that communities had to be imagined because memberships had grown too large, but they had to be imagined because the forging ideas in nation-building would invariably be fabricated. Taking a less pejorative spin on the process, Anderson argued that these fabrications instead be understood as creation myths, imagined as a means for bringing people together. Outside of the nationalist literature which essentially laughs at the academic use of literal historical interpretation as a basis for national identity, the liberal focus on deliberation and speaking "truth to power" calls into question the viability of Huntington's wildly one-sided telling of the American tale. Because Huntington is explicitly using a literal use of history as a basis for nation-building, his thesis is subject to "the criterion of truth" in historical analysis. As the scholarship demonstrates, Huntington's story turns out to be, well, a myth.

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388 Historical Truth, supra note 378, at 292 (translating Renan).
389 See ANDERSON, supra note 380, at 6.
390 Id.
391 See Historical Truth, supra note 378, at 293.
392 Id.
What about liberal nationalism and its prescriptive vision for political community? Is its model more normatively attractive, at least on liberal principles, for groups like American Indians? As discussed earlier, David Miller’s version of the liberal nationalist thesis is that liberal principles can be reconciled with nation-building in a way that steers clear of the troubles inevitably due a program that highlights the generative role of a specific ethnocultural core.\(^{394}\) One way Miller attempts to find the right mix of political pluralism and social integration is through the use of myth-as-story. Like Anderson and unlike Huntington, Miller does not believe in academically verifiable accounts of national history that can serve to bind its members in a socially integrated way.\(^{395}\) The point for Miller is therefore a functional one: if myths are necessary for democratic solidarity, and since it appears that they are, it is important to temper these myths with the principles of liberal democracies.\(^{396}\) Invoking the image of deliberative democracy, Miller hopes that in the public sphere individuals and groups can freely and equally debate the terms of their governance, with the eventual product of a multi-colored national democracy.\(^{397}\) As Abizadeh argues, however, this hope faces a serious problem in its juxtaposition of myths-as-stories (histories recognized for their functional value over their claims to accuracy) and a discursive politics that has, as its purpose, the production of justifiable decision-making.\(^{398}\)

Imagine as an example of the problem a hypothetical forum in which several groups debate the advantages of implementing multi-lingual forms of primary education. Say that one of these groups argues against this reform because one of the premises of social integration is the common knowledge of a particular language. To the extent that English is reduced to only one of many languages children learn, English will lose its dominance and function as a common currency. An assumption in this argument is that Americans have always accepted the functional

\(^{394}\) See supra text accompanying notes 80-91.

\(^{395}\) Miller writes: “It is precisely because of the mythical or imaginary elements in national identity that it can be reshaped to meet new challenges and new needs.” Miller, supra note 23, at 32.

\(^{396}\) Id.

\(^{397}\) Id. at 5.

\(^{398}\) Historical Truth, supra note 378, at 293.
advantages of having a common language, and it would therefore be inconsistent with this heritage to devalue the power of having an official language. Whether this argument has merit is irrelevant here; the point is that on Miller’s view, it would not matter if the argument is entirely fallacious as a matter of making a historical claim if the actual rationale about language and social integration holds water.

It might be objected at this point that Miller is right to say that historical accuracy is irrelevant, since the issue is not whether multilingual education has been historically unacceptable, but rather if it would pose a real problem for social integration in practice. The problem with this objection is that it has lost focus. The example of the debate on education is not a means of simply illustrating how deliberation works; it is supposed to be an example of how sub-national groups will be able to meaningfully shape national identities through the deliberative process. History is important to the discussion, since the claim about hostility towards multilingual education is a claim implicating the national creation story. If sub-national groups are unable to contest the historical accuracies of national myths because these myths are valuable for their function, and not for their history, Miller’s deliberative focus becomes a non-starter. As Abizadeh asserts: “The philosophical problem should be clear: if social integration is to be secured via a collective identity that is in part premised on lies, then to the extent that liberal democracy implies norms of public justification, publicity, and meaningful consent, social integration appears to be incompatible with liberal democracy.”399

If the assimilation model can be dismissed for its facially illiberal implications, and the liberal nationalist model is at least questionable for not having articulated a workable means for guaranteeing sub-national influence on the construction of national identity, is the multicultural model the last framework standing? To be sure, there are a number of hurdles the multicultural model still needs to confront, including: (1) the status quo power structure of individualism and statism; (2) the threat of balkanization; (3) liberal democratic society’s requirement of a common identity strong enough for non-strategic social integration; and (4) the social justice argument against

399 Id.
cosmopolitan political community. Cosmopolitan citizenship is a luxury enjoyed by elites, and to the extent Americans reach upwards and outwards in their identitarian commitments, the marginalized will necessarily be left behind. At the very least, however, multiculturalism appears—at present—to be the most equitably situated for dealing with the needs of embedded identities, whether majoritarian white or disempowered American Indian. In this light at least, multiculturalism does not look too bad.

V. Conclusion

There is a gap in how liberal theory comprehends the boundaries of political association and democratic community. While clear on the rights and duties liberal individuals should expect from one another, much of the literature makes a relatively quiet transition to discussions of citizens and states. This transition had been largely undefended up until the late twentieth century, when the twin forces of multiculturalism and globalization placed new strains on the Westphalian system. In the course of such arguments, as articulated in various forms of assimilationism and liberal nationalism, the nation-state ideal was defended on normative and empirical grounds. Not only was this the best way of shaping a political community due to the positive identitarian benefits of coherent national communities, the state system is the most functional structure for realizing the aspirational efforts of the national community.

These assimilative and liberal nationalist projects have counterparts in international law, as described by Simpson in his story of the Two Liberalisms. However, what Simpson left out is the competing story of multiculturalism, both within liberal political theory and in international law. A third layer is therefore the multicultural component, and as illustrated in the United States with the case of American Indians, all three variants appear to be working side by side, effecting one giant muddle of nation-building. There are normative difficulties with the assimilative and liberal nationalist projects, to the extent that they either rely on fallacious historical accounts, or procedural mechanisms enlisted to overcome such lies, but end up leaving their hortatory powers in place.

Eliminating the two dominant players leaves multiculturalism
and its possibly radical implications for the nation-state relationship. As scholars like Will Kymlicka have argued, such steep departures will not be necessary as long as liberal theory finds room for multi-national states. This is to say that the nation-state conflation will have evaporated, but whatever nation-building process occurs, it should always take place under the umbrella of a single state government. As globalization continues its steady march, the life and death of multiculturalism may end up turning on the degree to which national identities are able to successfully transcend state borders. What such a merging between the multicultural and the cosmopolitan would mean for American Indians is unclear, but it suggests a reversal of the social justice argument. Whereas on the one hand the critique is that a cosmopolitan identity espouses an abstraction satisfying only to those that have considered themselves sufficiently disembedded, the reversal is more akin to a transnational shift, which in many ways is already happening. The benefit to American tribal powers would not come as much from cross-border linking as it would from a disaggregation of state authorities over distinct nationalities.