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Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes

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Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes

Kevin J Worthen*

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I. INTRODUCTION

People do not normally associate cities with Indian reservations. The mental images typically conjured by each term are radically different. For most people, "city" evokes visions of skyscrapers, streets teeming with traffic, and bustling crowds. "Indian reservation," on the other hand, brings to mind pictures of solitude, rugged nature, and large empty spaces.

Perhaps for that reason, few think of city governments¹ and tribal governments² in similar terms.³ The two entities usually are oblivious of one another. When they are introduced, it is often as adversaries in a legal battle concerning the right to govern some rural western community.⁴

Yet, the two forms of government have many things in common.

1. The terms "city" or "city government" are used in this Article to refer to local, general purpose governments, including cities, towns, and villages. Cf. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1061-62 & n.4 (1980); Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 83 n.1. It does not, however, include counties, which often have the same legal status as cities, but which generally lack their small size and homogeneity.

2. The terms "tribe" or "tribal government" refer to any form of government adopted by a federally recognized Indian tribe. Government structure varies somewhat from tribe to tribe. See C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 7 (1987) (stating that organic powers of tribes are manifested in different ways, including tribal constitutions authorized by the Indian Reorganization Act, tribal constitutions unrelated to the Act, and tribes without written constitutions); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972). For purposes of this Article, the essential components of tribal government are its relationship with the federal government and its ability to carry out the role outlined below.

3. Scholars have noted similarities between tribes and other forms of government, including cities and counties, but have concluded that "each of these comparisons is incomplete." C. WILKINSON, *supra* note 2, at 145 n.36. See also *United States v. Wheeler*, 435 U.S. 313, 319-23 (1978) (distinguishing cities, mere "agenc[ies] of the State," from Indian tribes, governing bodies with "inherent power to prescribe laws for their members").

Although there are significant differences between the two forms of government, enough similarities exist to make useful comparisons. See 42 U.S.C. § 6903(13)(A) (1988) (including "Indian tribe or authorized tribal organization" within the definition of "municipality" under the Resource Conservation and Recovery Act of 1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (suggesting that differences between Indian sovereignty and local governments do not preclude comparison between waiver of tribal taxing authority and waiver of city taxing authority); Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 4 (1942) (stating that "tribes . . . largely take the place that states and municipalities occupy towards other citizens of the United States"); see also Part III, *infra*. Anthropologists also have noted the similarities between the two entities. C. KLUCKHOHN & D. LEIGHTON, *THE NAVAHO* 162 (rev. ed. 1974) (noting that "the system of [Navajo] tribal self-government within the framework of the state and federal governments might well be likened to that of an incredibly large (in area) township or county in other areas").

4. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.), *cert. denied*, 479 U.S. 994 (1985); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 979 (1982); *Colorado River Indian Tribes v. Town of Parker*, 705 F. Supp. 472 (D. Ariz. 1989).

Both are excluded from the federal constitutional framework. Both are subject to the plenary power of one of the constitutionally recognized governments—cities to the state government, tribes to the federal government.⁵ Both are the most intimate form of government with which most of their residents are familiar.

More importantly, cities and tribes both have the potential to perform a role that neither national nor state governments are capable of performing. Local governments can create and give meaningful voice to diverse value systems. This function of cities and tribes furthers two important societal interests. First, it provides people with a much-needed sense of community, reversing the sense of alienation prevalent in modern liberal society. Second, it promotes the preservation and tolerance of disparate viewpoints, contributing to a vibrant pluralistic society.

Judicial recognition of this unique role of local nonconstitutional governments would alter the outcome of some legal challenges to local government authority. It would, in a few instances, permit local governments to implement regulations that would be unconstitutional if enforced by the state or national government. It simultaneously would provide a balancing point for accommodating group and individual interests in a way that would facilitate the development of both community and pluralism.

This Article draws on the experiences of both cities and tribes to define the role that local governments could and should play in the American federal structure. Part II examines the current theoretical and practical status of cities and Indian tribes in the United States. Part III outlines the similarities and Part IV the differences between cities and Indian tribes. These sections highlight the meaningful comparisons between cities and tribes, and demonstrate that they share characteristics which equip them to perform functions that neither the federal nor state governments can carry out. Part V provides an explanation of the unique normative role that cities and tribes can play in modern society. Part VI demonstrates how courts could facilitate the implementation of this unique role in discrete judicial controversies. This Article concludes that cities and tribes truly are different sides of the same coin with which modern American society can purchase both pluralism and a strong sense of community.

5. In one famous Indian law case, the Supreme Court recognized the legal powerlessness of tribes and cities with respect to their superior sovereigns: "There exist in the broad domain of sovereignty [only the United States government, or the States of the Union]. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978) (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

II. THE CONTEMPORARY LEGAL STATUS OF CITY AND TRIBAL GOVERNMENTS: THEORY AND REALITY

Scholars continue to disagree over the exact legal status of Indian tribes and cities in our constitutional scheme of government.⁶ The traditional view is that both city and tribal governments exist at the will of a superior sovereign which could eliminate completely their right to govern. Nonetheless, for a variety of reasons cities and tribes continue to possess great autonomy in some areas. Their continued independence despite increasingly centralized federal and state government suggests that city and tribal governments play a critical role in modern society. A brief review of the traditional notions of cities' and tribes' theoretical and practical powers reveals that, while they are powerless in an abstract legal sense, they still have considerable influence in the lives of contemporary Americans.

A. *The Status of Cities*

Under the traditional view, cities are creatures of the states in which they are located.⁷ They are created by the state to carry out functions delegated to them by the state.⁸ Accordingly, the state may delineate the outer boundaries of a city's authority, and expand, contract, alter, or eliminate a city's powers.⁹ The state may even abolish a city.¹⁰ A city must rely, therefore, on some enabling state legislation or consti-

6. Compare Frug, *supra* note 1, at 1062 (arguing that cities today do not have the power to solve their problems or to control their development; their "impotence is expressed in their legal status") with Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 112 (1990) (suggesting that "if power refers to the actual arrangements for governance at the local level, then local governments possess considerable power"). See also R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* viii (1980) (noting that the "precise legal status of Indian tribes remains a source of confusion").

7. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907); *Cherry v. Municipality of Metro. Seattle*, 787 P.2d 73, 74 (Wash. App. 1990); *KN Energy, Inc. v. City of Casper*, 755 P.2d 207, 210 (Wy. 1988).

8. See 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 1.01 (1989); Frug, *supra* note 1, at 1062-63. See also *Hunter*, 207 U.S. at 178 (stating that "[t]he number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State"). Professor Libonati succinctly summarized the traditional view as follows: "[T]he state is the boss—the state legislature commands, localities obey." Libonati, *Reconstructing Local Government*, 19 URB. LAW. 645, 645 (1987).

9. John Dillon, the author of the first published treatise on local governments, observed that state power over municipal corporations "is supreme and transcendent: it may . . . erect, change, divide and even abolish them, at pleasure, as it deems the public good to require." J. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 30, at 72 (1st ed. 1872). The conventional wisdom has not changed since that time. See Briffault, *supra* note 6, at 7; Libonati, *supra* note 8, at 649.

10. Late in the nineteenth century, a few cities were abolished by state legislatures. See H. MCBAIN, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* 5-28 (1916), cited in Williams, *The Development of the Public/Private Distinction in American Law*, 64 TRX. L. REV. 225, 249 n.121 (1985) (book review). Several Indian tribes similarly were abolished in the 1950s. See *infra* note 26.

tutional provision in order to act.¹¹

Not only must a city rely on state authorization, but according to traditional legal principles, courts should construe that authority as narrowly as possible. Under the traditional Dillon's Rule, courts should interpret strictly statutes granting authority to cities.¹² Cities should have only those powers "granted in *express words . . . necessarily or fairly implied* in, or *incident* to, the powers expressly granted . . . [or] *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable."¹³

Given this conventional view, one might expect that cities would be relatively unimportant in today's society. Modern cities, however, enjoy immense and largely unchallenged powers over many matters.¹⁴ For example, cities make the primary decisions in critical land use matters, such as zoning and planning.¹⁵ In most states, cities possess broad discretion in determining the initial location of their own geographic boundaries¹⁶ and the direction of subsequent expansion.¹⁷ Moreover, cities possess considerable leeway in determining the exact contours of

11. See *West Point Island Civic Ass'n v. Township Comm.*, 255 A.2d 237, 239 (N.J. 1969) (noting that "[t]he powers of a New Jersey municipality are wholly derivative from state statute"); *Tacoma v. Taxpayers of Tacoma*, 743 P.2d 793, 796 (Wash. 1987) (stating that "municipal corporations possess only those powers conferred on them by the constitution, statutes, and their charters").

12. J. DILLON, *supra* note 9, § 55, at 102.

13. *Id.* § 55, at 101-02 (emphasis in original). Some scholars question the extent to which Dillon's Rule continues to be applied by modern courts. See Briffault, *supra* note 6, at 8. *But see* Frug, *supra* note 1, at 1112. That the rule retains some force is readily apparent by its invocation in recent cases. See, e.g., *Pesticide Pub. Policy Found. v. Village of Wauconda*, 510 N.E.2d 858, 861 (Ill. 1987); *White v. Union County*, 377 S.E.2d 93, 95 (N.C. App. 1989); *In re Ball Mountain Dam Hydroelec. Project*, 576 A.2d 124, 126 (Vt. 1990); *Resource Conservation Mgmt., Inc. v. Board of Supervisors*, 380 S.E.2d 879, 881 n.2 (Va. 1989); *Chemical Bank v. Washington Pub. Power Supply Sys.*, 666 P.2d 329, 334 (Wash. 1983), *cert. denied*, 471 U.S. 1075 (1984).

14. As Professor Briffault observed, "[W]hatever the technically limited status of local units and their formal subservience to the state, local governments have wielded substantial lawmaking power and undertaken important public initiatives." Briffault, *supra* note 6, at 15. See also Williams, *supra* note 10, at 249 n.121 (suggesting that "[c]ommentators have sometimes failed to distinguish between cities' legal powerlessness and the issue of whether they *actually* are without power").

15. See Briffault, *supra* note 6, at 64-72.

16. See 1 C. ANTIEAU, *supra* note 8, at §§ 1.09-.14 (1985); 1 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 3.24-.35(g) (3d ed. 1987). See also Briffault, *supra* note 6, at 74 (noting that "[t]he principal criterion for deciding whether a municipality will be incorporated is whether the local people want it").

17. Professor Briffault has observed that there is greater variation among states concerning local discretion to annex than local discretion to incorporate but that "as with incorporation, state laws concerning annexation . . . are quite localist." Briffault, *supra* note 6, at 77-78. See also Mo. ANN. STAT. § 71.012.2.(2) (Vernon 1991) (providing that a city may annex if "annexation is reasonable and necessary to the proper development of the city"); *City of O'Fallon v. Betham*, 569 S.W. 2d 295, 301 (Mo. Ct. App. 1978) (stating that "authority granted to cities to extend their corporate limits constitutes a broad grant of discretionary power").

substantive criminal law for nonfelonious acts.¹⁸

These powers, of course, are subject to the overriding supervision of the state legislature. Theoretically, states could radically alter a city's authority at any time.¹⁹ That cities maintain significant authority, however, demonstrates the popular appeal of preserving local control over local matters.

B. *The Status of Indian Tribes*

Unlike cities, which traditionally are viewed as creations of the superior state sovereign, Indian tribes traditionally are perceived as discrete political units with inherent powers.²⁰ Tribal legislation does not require the superior sovereign's authorization in order to be legitimate.²¹ Indian tribes have inherent authority to govern within their geographic boundaries.²²

Under the traditional view, however, tribal sovereignty is of a "unique and limited character"²³ because it is subject to complete federal supremacy.²⁴ Federal supremacy over tribal sovereignty manifests

18. See *Dunn v. Mayor of Wilmington*, 219 A.2d 153, 154 (Del. 1966); *Albert Simon, Inc. v. Myerson*, 367 N.Y.S.2d 755, 758 (N.Y. 1975); *Salt Lake City v. Allred*, 437 P.2d 434, 436 (Utah 1968).

19. Indeed, most scholars agree that states tend to limit local authority in many of these areas. Scholars likely have overstated, however, the exact degree and impact of this tendency. See Briffault, *supra* note 6, at 15-18.

20. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1945) (suggesting that "[p]erhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished*"), cited with approval in *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

21. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956).

22. *Merrion*, 455 U.S. at 149.

23. *Wheeler*, 435 U.S. at 323.

24. The current conventional view, as bluntly stated by one federal judge, is that "an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less." *United States v. Blackfeet Tribe*, 364 F. Supp. 192, 194 (D. Mont. 1973). At times, courts and scholars have linked federal supremacy over Indian tribes to various constitutional grants of congressional authority. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (stating that "the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making"); Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199 (1984) (noting that "[t]he Plenary Power Doctrine . . . can be traced not only to [the constitutional] commerce power but also to the treaty, war, and other foreign affairs powers, as well as the property power"). At other times, courts have tied this federal supremacy to notions of conquest and consent. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (positing that as a result of European discovery of America, tribal "rights to complete sovereignty, as independent nations, were necessarily diminished"); *Duro v. Reina*, 110 S. Ct. 2053, 2066 (1990) (Brennan, J., dissenting) (suggesting that "[w]hen the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government, they necessarily lost some of the sovereign powers they had previously exercised"). At one time, the Supreme Court employed a trust theory to justify federal regulation. See *United States*

itself primarily in two ways. First, the federal government can alter a tribal government's powers through plenary congressional authority.²⁵ Congress has exercised that authority in the most extreme form, complete elimination of tribal sovereignty.²⁶ Second, federal common law prevents tribes from exercising governmental authority inconsistent with their status as domestic dependent nations.²⁷ Like cities, therefore, Indian tribes are subject to the plenary power of the superior sovereign, protected only by the political processes through which the legislative body of the superior sovereign is chosen and subsequently acts.

Also like cities, Indian tribes nonetheless continue to possess a great deal of autonomy over various matters. With limited exceptions, tribes have the authority to define conditions of tribal membership,²⁸

v. Kagama, 118 U.S. 375 (1886). That idea largely has been abandoned. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1002 (1981).

25. Congress can "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). See also *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984) (asserting that "all aspects of Indian sovereignty are subject to defeasance by Congress").

26. During the "Termination Era" of the 1950s, 109 tribes and bands were terminated. Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 151 (1977). Termination of a tribe involves termination of the federal trusteeship over the tribe, distribution of tribal assets to tribal members, and in some cases, disbandment of the tribe. Clinton, *supra* note 24, at 1025.

The large number of tribes terminated may be misleading unless placed in context. One statute, for example, terminated 61 bands in western Oregon. The total membership of all the terminated Oregon bands, however, was 2081, and only 2158 acres were involved. Wilkinson & Biggs, *supra*, at 151. In all "no more than [three] per cent of all federally recognized Indians were involved" in the entire termination process. *Id.* Tribal status eventually was restored to some of the terminated tribes. See, e.g., *The Menominee Restoration Act*, 25 U.S.C. §§ 903-903f (1988). Similarly, late in the nineteenth century, state legislation abolished some cities. See *supra* note 10.

27. *Montana v. United States*, 450 U.S. 544, 564 (1981). The two common-law limits that courts originally placed on tribes as domestic dependent nations were the inability to freely alienate tribal land, *Johnson*, 21 U.S. (8 Wheat.) at 574, and a prohibition against entering into direct diplomatic or commercial relations with foreign nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831). More recently, the Supreme Court has held that tribes lack the authority to exercise criminal jurisdiction over both non-Native Americans, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and Native Americans who are not members of the tribe. *Duro*, 110 S. Ct. at 2053. Federal common law also limits, to some less specified degree, tribal civil jurisdiction over nonmembers. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (suggesting that tribal court determinations regarding their jurisdiction over nonmembers may be subject to review by a federal court); *Montana*, 450 U.S. at 559 (finding that a tribe has no authority to prohibit hunting and fishing on fee lands owned by non-Native Americans). Federal common law also precludes tribes from preempting state regulation of liquor sales on the reservation. *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

28. Tribes have the right to determine the condition of tribal membership for purposes of determining entitlement to most tribally granted privileges. *Nofire v. United States*, 164 U.S. 657 (1897); *United States v. Regers*, 45 U.S. (4 How.) 567, 573 (1846). Tribes, however, may not alter the federal definition of "Indian," which determines entitlement to federal benefits or exemptions. See *United States v. Jim*, 409 U.S. 80 (1972); *Rogers*, 45 U.S. (4 How.) at 572-73.

regulate the domestic relations of members,²⁹ control land use matters within the reservations,³⁰ direct the conduct of members through criminal sanctions,³¹ and exclude nonmembers from tribal lands.³² The continued existence of these powers is due less to the formal political power of tribes³³ and more to the perception that retention of such powers is essential to the preservation of tribal cultural values and customs.

Both tribes and cities, therefore, exercise substantial autonomy, despite their theoretical powerlessness. The superior sovereign's willingness to allow these governments significant authority indicates that those who control the superior sovereign, the people, value the roles fulfilled by local governments. An examination of the similarities and differences between cities and tribes explains much of that popular appeal and lays the groundwork for an evaluation of the role local governments can play in modern society.

29. Jurisdiction over the divorce of two members who reside on the reservation is vested exclusively in the tribe. *Whyte v. District Court*, 346 P.2d 1012 (Colo. 1959), *cert. denied*, 363 U.S. 829 (1960). When both parties are domiciled outside the reservation, however, the state has jurisdiction. *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975).

Tribal authority over the adoption of tribal members residing on the reservation is, with minor exceptions, exclusive. 25 U.S.C. §§ 1901-1903 (1988); *Fisher v. District Court*, 424 U.S. 382 (1976). Tribes also retain limited authority over adoptions involving tribal members who do not reside on the reservation. 25 U.S.C. § 1911 (1988).

30. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Tribal zoning authority over lands within reservations is not complete. Although a tribe has the right to control the use of land owned by the tribe or a member, fee land owned by nonmembers may be immune from tribal land use control under certain circumstances. *Id.* See *infra* subpart VI(B).

31. Tribes have inherent authority to exercise criminal jurisdiction over tribal members. *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Jurisdiction over minor offenses committed by tribal members is exclusive of either federal or state jurisdiction. *United States v. Jackson*, 600 F.2d 1283, 1285-86 (9th Cir. 1979) (citing *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977)). Federal legislation vests federal courts with jurisdiction to try Native Americans charged with specified major crimes. 18 U.S.C. §§ 1153, 3242 (1988). Whether that jurisdiction is exclusive of tribal jurisdiction is not clear. See *Duro v. Reina*, 110 S. Ct. 2053, 2057 n.1 (1990). Tribes may not exercise criminal jurisdiction over nonmembers regardless of whether they are Native Americans, *id.* at 2061, or non-Native Americans, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *But see* Pub. L. No. 101-938, § 8077(b)(d) (1990) (suspending the effect of *Duro* until September 30, 1991). Nor may tribes sentence members to more than one year imprisonment and \$5000 in fines. 25 U.S.C. § 1302(7) (1988). Tribes may, however, exclude nonconforming members and nonmembers from reservations. See *infra* note 32.

32. *Duro*, 110 S. Ct. at 2061-62; *Brendale*, 492 U.S. at 433 (opinion of Stevens, J.); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). Underscoring the superior power of the federal government, the Ninth Circuit has held that the tribe may not exercise its power to exclude those who are authorized by federal law to be on the reservation. *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986).

33. The tribes have no representatives in Congress.

III. THE SAME COIN: SIMILARITIES BETWEEN INDIAN TRIBES AND CITIES

The most striking similarity between city and tribal governments is that neither is included in the governmental scheme set forth in the federal constitution,³⁴ even though both had long been established as forms of government on the American continent by the time the Constitution was adopted.³⁵ The exact reason for their exclusion is unclear.³⁶ The omission is significant, however, because it suggests that cities and tribes are not "governments" in the same sense as are the federal and state governments. The historical development of city and tribal governments supports this conclusion.

A. *Constitutional Nonrecognition: Voluntary Governments*

Only some years after the adoption of the Constitution did people begin to associate cities and tribes with the kinds of activities performed by constitutionally recognized forms of government. The predecessors of American cities originally were not conceived of as artificial entities or subdivisions of the state created to provide governmental services.³⁷ Most precolonial English cities were close corporations

34. No form of city government is mentioned in the constitutional text. The term "Indian tribes" appears once—in the clause giving Congress authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art I, § 8, cl. 3. This provision, however, sheds little light on the status of tribal government in the constitutional scheme, a fact borne out by the difficulty courts have had in defining that role and by their frequent failure to refer to the Constitution in that effort.

35. Tribal governments clearly predated the two constitutionally recognized forms of government, federal and state. City governments, as either formal corporations, or more commonly, as associations of neighbors, also established their presence in American society long before the Revolution. See Frug, *supra* note 1, at 1095-97. See generally 1 E. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT: THE COLONIAL PERIOD (1938); McBain, *The Legal Status of the American Colonial City*, 40 POL. SCI. Q. 177 (1925).

36. Indian tribes probably were omitted because the Framers thought of them as quasi-foreign nations to be dealt with by war and treaties. See Newton, *supra* note 24, at 200. The Framers may have considered cities to be mere subdivisions of the states and, therefore, indirectly included by way of reference to the states. Given the contemporary view of the legal status of cities at the time of the adoption of the Constitution, however, some other factor is more likely, such as the view that cities were not merely another layer of government, but rather a voluntary "association promoted by a powerful sense of community." Frug, *supra* note 1, at 1119; see also *id.* at 1098. But cf. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999, 1001-02 (1976). Herget asserts that local governments may have been omitted from state constitutions because they were corporations, "an association of persons with a legal existence, a 'personality,' independent of its members," and, therefore, were assumed to be created by, and subject to, state authority. *Id.* at 1004-05.

37. In the words of historian Ernest Griffith, "[p]rimarily judicial, monopolistic, corporative—not administrative or governmental—were these communities at their inception. Not until well towards the Revolution does one see the dawn of a new motivation which to-day would be called truly urban." 1 E. GRIFFITH, *supra* note 35, at 74.

Many modern theorists have adopted the view that local governments are primarily service providers. See, e.g., Connery, *Governing the City*, in GOVERNING THE CITY 6 (R. Connery & D.

originating from the hundreds of boroughs in the British Isles.³⁸ English towns often originated as voluntary associations of people seeking protection from outside economic and military forces.³⁹ Even in American colonial times, cities usually were thought of as associations or corporations, organizations created to effectuate the common desires of their individual members. Not until the nineteenth century did people consistently begin to view cities as public bodies more state-like than private-like.⁴⁰ Thus, the social and legal atmosphere of cities at the time was manifestly more associational than governmental.⁴¹

Caraley eds., 1969); Kaufman, *Bureaucrats and Organized Civil Servants*, in *id.* at 45, 53. Others have focused on the city's role in community self-determination. See R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961). The effect of these distinct concepts of local governments on Supreme Court decisions is discussed in Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C. L. REV. 763 (1980).

38. 1 E. GRIFFITH, *supra* note 35, at 15-21. There was, of course, no single corporate form; it varied depending on "the date of incorporation, the size of the fees paid, the whims of the lord or the sovereign, and other more or less irrelevant considerations." *Id.* at 22. Although the trend favored "the 'close' corporation with its self-perpetuating governing body," the more democratic type "remained sufficiently numerous so that it was by no means exceptional." *Id.* at 27.

New England townships developed in their own unique manner. *Id.* at 76. Their failure to take on the more traditional corporate form was due in part to broad legislative grants providing them with many of the privileges of incorporation. *Id.* at 71.

39. Frug, *supra* note 1, at 1083-87. One of the major purposes of municipal incorporation was to manage the corporate property, which often consisted chiefly of the "common land." 1 E. GRIFFITH, *supra* note 35, at 23. General services to the public, police security and land surveying, often were provided by paid officials who were not under the jurisdiction of the corporation. *Id.* at 19. In America, one of the primary motivations for municipal incorporation was the desire of the inhabitants "to establish a monopoly in their craft or trade over against [sic] 'foreigners' or pedlars." *Id.* at 65. Incorporation was chosen because it made it legal "to restrict such activities to 'freemen,' and also to control the standards and practices thereof." *Id.*

Sometimes the common desires sought to be effectuated were less materialistic. William Penn advocated townships because "in that way the children can be kept at school and much more conveniently brought up well. Neighbors also can better offer each other loving and helpful hands and with united mouth can in public assemblies praise and extol the greatness of God." *Id.* at 58-59 (quoting Pastorius, *Pastorius's Description of Pennsylvania, 1700* (G. Kimball trans.), in *NARRATIVES OF EARLY PENNSYLVANIA, WEST NEW JERSEY, AND DELAWARE* (A. Myers ed., 1912)). More meaningful representation in the legislative body was another reason for incorporation. *Id.* at 69.

40. Frug, *supra* note 1, at 1099-1109; 1 E. GRIFFITH, *supra* note 35, at 51. *But cf. id.* at 69 (considerations "such as an interest in law and order or in better government generally, or in the provision of municipal services" did begin to appear in the eighteenth century).

41. Ernest Griffith ably summarized the atmosphere as follows:

[I]n this intimate stage the government was that of a unit sufficiently small so that the persons involved were known to each other, and something really approaching common agreement was possible. Social pressure as well as (or instead of) legal pressure could ordinarily be counted upon to assure the necessary degree of co-operation in community projects. These people went to church together; they deliberated both in and out of town meetings the hiring of a teacher for their children; they arrived at working agreements concerning the use to be made of their common land. In this situation the obligations of members of the community to do their stint of service in road building and repair; to take their turn in the watch against fire, or against the French or the Indians; to provide a fire bucket or two; to hang a lantern at

Similarly, Indian tribal organizations⁴² were not originally created with carefully defined functions and limitations.⁴³ They generally began as communities of people who grouped together because of common ancestry or beliefs. Several tribes were simply "associations of wandering hunter-gathering families."⁴⁴ Even the more elaborately organized tribal governments generally were composed of self-governing towns and bands or clans, which combined in confederations for limited purposes.⁴⁵ That there was little concept of government as a separate entity in early tribal organizations is underscored by the fact that most tribal names can be interpreted simply to mean "the people."⁴⁶

The same sense of unity between the tribe and its members carried over into the decisionmaking process. While some tribes' decisions were

night by their door—all could command that measure of common co-operation which made these methods not too great a strain on human nature to be practicable and economical.

See 1 E. GRIFFITH, *supra* note 35, at 259.

42. One must proceed with considerable caution in discussing the nature of pre-twentieth-century tribal governments because of the immense diversity in the forms of tribal organizations that existed prior to the 1930s when many tribal governments were created in the image of the Anglo-Saxon model under the Indian Reorganization Act. There continue to be diverse forms of tribal governments today, hence generalities are not entirely accurate now; but there is enough commonality to make worthwhile comparisons.

43. Only a few tribes had formal governments or written laws prior to contact with non-Native Americans. D. GETCHES & C. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 270 (2d ed. 1986). This does not mean, however, that there were no rules or social norms. It means only that they were not enforced by modern legal means. W. WASHBURN, *THE INDIAN IN AMERICA* 40 (1975) (stating that "the complex and smooth-working social organization of the tribes . . . functioned without the need for written laws or the paraphernalia of European civilization").

44. A. GIBSON, *THE AMERICAN INDIAN: PREHISTORY TO THE PRESENT* 54 (1980). Anthropologists call these associations "tribelets." *Id.*

45. *Id.* at 56-57. "Indian tribes in their original setting never attempted to govern a large number of people. Subgroupings in bands and clans was almost always a feature of the larger tribes . . ." V. DELORIA & C. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 247 (1984). The tendency toward small, homogeneous governmental units reflected a desire for community-based government in which leaders were sensitive to community values. "Indians realized that it was not good government to have leaders and representatives who did not have some kind of personal acquaintance with the people they led. If leaders were remote, people felt alienated, and it was much more difficult for a community to function." *Id.*

46. V. DELORIA & C. LYTLE, *supra* note 45, at 8. For example, the Navajo word for tribe is "dine," meaning "the people." C. KLUCKHOHN & D. LEIGHTON, *supra* note 3, at 23. There are, of course, exceptions:

The people who pierced their noses have now become the Nez Perce; the prosperous people have become the Gros Ventres; the allies, or friends, have become the Sioux; and some tribes have called themselves after the holy location where they finally came to rest—they are now the people who live at the lake, on the river, and so forth.

V. DELORIA & C. LYTLE, *supra* note 45, at 8-9. See also Bagley & Ruckman, *Iroquois Contributions to Modern Democracy and Communism*, 7:2 AM. INDIAN CULTURE RES. J. 53, 55 (1983) (providing other names: Cayuga, "People at the Landing"; Seneca, "Great Hill People"; Mohawk, "People of the Flint").

The exceptions only serve to make the general rule more meaningful, as they are often names derived from a non-Indian language (likely imposed by outsiders, e.g., Nez Perce and Gros Ventres), or they incorporate the concept of "people" in the title by adding it to a geographic location.

made by chiefs or religious leaders, most tribes determined policy through consensus in general council meetings open to all tribal members.⁴⁷ Not until the 1930s, when many tribal governments were restructured according to Western models under the Indian Reorganization Act,⁴⁸ did tribal governments take the form of bureaucratic entities separate from the people.⁴⁹ Like cities, therefore, tribes only recently have assumed the visage of another layer of government, competing with their federal counterpart for the allegiance of their citizens.⁵⁰

Constitutional omission and historical development both suggest, therefore, that cities and tribes are not merely another layer of government, different from their federal and state counterparts only in the scope of their geographical authority. They originally were created as voluntary associations of people with common interests. The absence of cities and tribes from the constitutional structure allows them to emphasize their voluntary nature.

The Constitution apparently assumes that, with limited exception,⁵¹ everyone within the geographic boundaries of the United States will be subject to both the federal government and a state government.⁵² Everyone⁵³ who chooses to live in the United States,⁵⁴ therefore, is a member of both a state and national "community."⁵⁵ One may,

47. D. GETCHES & C. WILKINSON, *supra* note 43, at 270. Among the Navajos, for example, "[h]eadmen have no powers of coercion Decisions as to 'community' policy can be reached only by the consensus of a local meeting. The People themselves are the real authority." C. KLUCKHOHN & D. LEIGHTON, *supra* note 3, at 118.

48. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 28 U.S.C. §§ 461-479 (1988)).

49. This recent transformation was not easily accepted by all tribes. As two leading anthropologists observed years after the Navajo Tribe was formally reorganized according to Western legal concepts:

The present practice of actually voting for candidates or on policy decisions is a white innovation and still makes most older and middle-aged Navajos uncomfortable, since the Navajo pattern was for discussion to be continued until unanimity was reached, or at least until those in opposition felt it was useless or impolitic to express further disagreement.

C. KLUCKHOHN & D. LEIGHTON, *supra* note 3, at 120.

50. For example, "it has not been established that there was a 'Navaho Tribe' in the sense of an organized, centralized 'political' entity" prior to the twentieth century. C. KLUCKHOHN & D. LEIGHTON, *supra* note 3, at 122.

51. Those residing in territories of the United States and the District of Columbia are not residents of any state.

52. See *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (noting that "[e]very citizen of the United States is also a citizen of a State or territory").

53. Again, there is one exception. See *supra* note 51.

54. Foreign nationals residing in the United States are neither citizens of the United States nor of any state. They are, however, subject to regulation by the state and federal government.

55. The nation and the state are not communities in the same sense as are tribes and cities. Although some self-identification and value creation is facilitated by these entities, they are so large and abstract that their actual effect on an individual is much weaker than that of more

however, reside in the United States and not be a member of either a city or tribal community. One may accept all the benefits of residence within the United States without agreeing to be subject to any local nonconstitutional government. The choice to join such a local community is voluntary as far as the Constitution is concerned.

The comparatively voluntary nature of membership in local communities⁵⁶ allows local governments greater leeway in choosing norms for their members.⁵⁷ Because withdrawal from the local community is easier than from the state or national community, it is less distasteful for a local government to subject its members to community decisions. People who disagree with the choices of a particular community can seek a community more compatible with their values or they can choose to live in no community at all.⁵⁸ As a result of their voluntary character,

personalized communities like tribes, cities, or purely private associations. See Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 93 (1984) (stating that "[e]xcept for extraordinary moments, such as war, the nation proved too vast a scale across which to cultivate the shared self-understandings necessary to community in the formative, or constitutive sense"). The term "citizen" rather than "member of the community" may more appropriately describe the relationship between the resident and the state and national governments.

56. The choice to join a city or tribe is not entirely voluntary. Annexation may occur against the objection of an individual, for example. Moreover, there are real economic and social costs involved in any relocation. See *infra* note 58. Switching local communities, however, involves fewer costs than switching national or state communities. If one wants to change city membership, one simply needs to move to a new city. Changes in tribal affiliation are more difficult because they involve renunciation of tribal membership or moving off the reservation; but such a course of action is usually less difficult than relocation to a new state or country.

57. If one accepts the social contract theory that obligations can derive only from willful undertakings, then "it is difficult to avoid the conclusion that groups in which willfulness is heightened and maximized can rightfully impose greater obligations upon their members than can those catholic religious and political associations where membership is, for all practical purposes, inherited." M. WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 10 (1970). But see Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1045-46 (1983) (suggesting that "[t]he more voluntary groups—clubs, leagues, and so on—probably appear to most people to be less morally qualified to impose obligations than are the more ascriptive groups").

58. In 1956 Charles Tiebout theorized that residential communities in metropolitan areas could act in a market-like manner to compete for residents, and that households would choose among competing environments by voting with their feet. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Empirical studies have justified the theory to some extent. See, e.g., Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969); Yinger, *Capitalization and the Theory of Local Public Finances*, 90 J. POL. ECON. 917 (1982). This does not mean that a move from one city to another is entirely without costs. Contrary to the assumptions underlying the Tiebout theory, "the out-of-pocket and aggravation costs of moving are not trivial." Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1552 (1982). These costs, however, are almost always less than those involved in a change in either state or national citizenship. See G. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* 27 (1985) (noting that "[e]xit is clearly less practical and, with exceptions, less realistic at [the national] level").

The emotional costs of changing community membership increase to the degree one's values

local governments, therefore, may properly impose norms on their members that would be inappropriate at a state or federal level.

There are, of course, limits on the choices that local governments justifiably can place on their citizens. The extent to which modern American organizations are morally justified in imposing norms on their members can be plotted on a continuum. More voluntary organizations, such as purely social clubs, are at one extreme of the continuum, and the federal government is at the other. States are close to the federal government extreme of the continuum, but do not reach it because one can more easily switch states than countries. Local governments, while closer to states than to social clubs, nonetheless fall more to the voluntary side of the continuum than do state governments.⁵⁹ Thus, some group value decisions are more appropriate for local governments than for either the federal or state governments. The lack of constitutional status for local governments highlights, and permits, the implementation of this distinction.

B. Lack of Constitutional Protection: Consensus, Acceptance, and Values

A second similarity between tribal and city governments is a direct corollary of their absence from the constitutional framework: both city and tribal governments lack express federal constitutional protection for their continued status. The only protection cities and tribes have against alteration and even elimination by the superior sovereign is through use of the political process by which the superior sovereign governs. Moreover, no structural advantages are given to either tribes or cities in the political arena. Unlike states, which have direct influence in the Senate⁶⁰ and indirect influence over both the House of Representatives and the Executive,⁶¹ neither cities nor Indian tribes have

are reflected in the community, as evidenced by the difficulty some have in leaving small homogeneous communities. People who feel compatible with their community, however, are less likely to leave.

59. Cf. M. WALZER, *supra* note 57, at 10 (noting that "it is possible to conclude from contract theory, as Jean Jacques Rousseau did, that small societies are (generally) morally superior to large ones"); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1355 (1982) (identifying "[l]ocal government with home rule" as more "[p]rivate" than publicly elected "[l]egislators, judges, [e]xecutives").

60. States have "direct" influence in the Senate because of the equal representation requirement. U.S. CONST. art. I, § 3, amended by U.S. CONST. amend. XVII.

61. States have "indirect" influence in the House through the control of electoral qualifications and division of districts. States have "indirect" influence over the Executive through the electoral college. Each state is free to choose its electors "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 2. The Supreme Court explained the significance of these structural political protections in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

formal representation in or special influence over state or federal governments.⁶²

Cities and tribes, therefore, constantly must legitimize their existence. Their survival depends almost completely on the ability to muster support on critical issues from their residents and convince outsiders of the merits of their causes.⁶³ The fact that tribes and cities have remained vibrant and autonomous in many respects⁶⁴ is a testimony to their ability to build internal consensus and acquire external acceptance.

An analysis of the areas over which local governments have greatest autonomy demonstrates that cities and tribes have been most successful in building internal consensus and acquiring external acceptance with respect to matters involving normative choices. Cities and tribes, for example, have some authority to determine what kinds of conduct merit criminal punishment—one of society's more powerful tools for enforcing group morality.⁶⁵ Zoning control, through which local governments have wide discretion to determine what kinds of activities occur in an area, is also a potentially potent influence over members of a community⁶⁶ and a tool by which local governments may encourage like-minded people to move into a community.⁶⁷ Both cities and tribes also have some control over the types of pornographic materials that may be purchased within their boundaries,⁶⁸ a matter almost entirely depen-

62. Indian tribes have no representation in the federal government and, apart from the votes of tribal members, no direct influence on the election of federal officials. Cf. R. BARSH & J. HENDERSON, *supra* note 6, at 281 (suggesting a constitutional amendment to allow tribal representation in Congress).

Cities and other local governments once had greater representation in state legislatures through direct representation of geographic areas. Since *Reynolds v. Sims*, 377 U.S. 533 (1964), however, direct representation of cities has been eliminated.

63. Scholars have recognized the need for both tribal and city governments to acquire external acceptance. See, e.g., C. WILKINSON, *supra* note 2, at 86 (suggesting that "Indian leaders know full well that whether tribal sovereignty will decline or progress will depend in important part on the tribes' skill in presenting their views in the legislative forum"); G. CLARK, *supra* note 58, at 6 (positing that "[l]ocal governments . . . have a specific role to play in representing their constituents before other agencies and citizens. . . . [L]ocal government legitimacy rests, in part, on the extent to which it fulfills this representative role").

64. See *supra* notes 15-19, 28-33 and accompanying text.

65. See *supra* notes 18, 31 and accompanying text.

66. See Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372, 1389 (1991) (book review).

67. See Briffault, *supra* note 6, at 39, 57.

68. Whether tribes have the same authority as cities to draw the line between unprotected obscenity and protected expression is unclear. It is likely that they do have that authority for at least two reasons. First, the First Amendment does not on its own terms apply to tribes. The only limitation on the tribes' authority to regulate expression is contained in the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(1) (1988) ("No Indian tribe in exercising powers of self-government shall . . . make or enforce any law . . . abridging the freedom of speech . . ."). Although the wording of the ICRA is nearly identical to the First Amendment's free speech language, courts have

dent on values. As a further example, the local public education system provides a means of establishing a common moral foundation on which community members can build.⁶⁹ Local governments, therefore, have been quite successful in using their well-honed consensus and acceptance-building skills to protect their power to implement unique normative choices.

C. Territory and Association: Public Intermediary Institutions

The first two similarities between cities and tribes—the lack of both constitutional recognition and protection—distinguishes them from federal and state governments. The third similarity—that cities and tribes are territorially based institutions—differentiates them from private associations. Both cities and tribes require a land base over which to exercise control,⁷⁰ and their authority generally is limited to that specific geographic area.⁷¹

Decisions of city and tribal governments affect the day-to-day lives of those within the geographic ambit of their power. Consequently, those who reside within a local government's boundaries have a signifi-

properly concluded that it need not be interpreted in the exact manner as the Constitution. See *infra* text accompanying notes 146-48. Given the deference normally shown to tribes with respect to internal tribal matters, it is unlikely that courts would interpret free speech more stringently for tribes than for cities.

Second, the Supreme Court used broad language in outlining the role of local communities in defining obscenity. The Court referred simply to "contemporary community standards." See *Miller v. California*, 413 U.S. 15, 31 (1973). There is no reason why an Indian tribe would not constitute an appropriate "community," much as cities have, especially since tribal members often share common moral values.

69. Worthen, *supra* note 66, at 1389 n.82.

70. See O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW § 66 (1982) ("[T]erritory over which the government has some control" is essential to the existence of effective local government.); Clinton, *supra* note 24, at 1042 ("[F]or Indian tribes ownership of a land base and the exercise of government power are integrally intertwined."). See also Worthen, *supra* note 66, at 1387-89. The "linkage of lordship and landlordship" (the link between land ownership and the right to govern) traces back to feudal origins. Williams, *supra* note 10, at 228.

71. Tribal governmental authority is limited to "Indian country" under current federal law. See 18 U.S.C. §§ 1151-1152 (1988) (criminal jurisdiction); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (civil jurisdiction). Indian country includes some limited areas outside the reservation. See 18 U.S.C. § 1151(b)-(c) (Indian country includes nonreservation lands which are "dependent Indian communities" or "Indian allotments, the Indian titles to which have not been extinguished"). Even then, however, Indian country is defined in terms of geographic location. Clinton, *supra* note 24, at 1043 & n.324.

Indian tribes not recognized by the federal government have no land base. For example, the Lumbee Tribe of North Carolina, which is the second largest tribe in America by population, is not a federally recognized tribe. D. GETCHES & C. WILKINSON, *supra* note 43, at 5. More than 100,000 Native Americans east of the Mississippi are not part of a federally recognized tribe. *Id.*

Nonfederally recognized tribes are not included in the scope of this Article, not because they are unimportant, but rather because the Article focuses on tribal governments (not individual Native Americans) and on the relationship between those governments and the federal government.

cant incentive to participate in that government's decisionmaking process. That incentive is weaker with respect to the state or federal government,⁷² and may not exist at all in private associations.⁷³ Moreover, residents living in a relatively small geographic area have more of an opportunity to engage in debate.⁷⁴ It is, after all, easier to travel to city hall to discuss a matter than to board a plane for Washington, D.C.⁷⁵ Thus, local governments present their members with both motivation and opportunity to participate meaningfully in group decision-making. This, in some respects, facilitates the creation and defense of local value systems.

Additionally, the existence of a territorial base, and some control over land development within that area, have subtle, psychological impacts on a local government's ability to create and maintain value systems. The opening of Indian reservations to non-Indians under the Allotment Act⁷⁶ in the late nineteenth and twentieth centuries, which resulted in the loss of almost sixty-five percent of the tribal land base nationwide,⁷⁷ profoundly affected tribes' abilities to build true communities. As one historian described:

No longer did many tribal Indians feel pride in the tribal possession of hundreds of

72. As De Tocqueville observed:

It is difficult to draw a man out of his own circle to interest him in the destiny of the state, because he does not clearly understand what influence the destiny of the state can have upon his own lot. But if it be proposed to make a road cross the end of his estate, he will see at a glance that there is a connection between this small public affair and his greatest private affairs; and he will discover, without its being shown to him, the close tie which unites private to general interest.

2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 125 (H. Reeve trans., 1961).

73. The incentive to participate might not exist when the actions of the private association do not affect the daily lives of its members.

74. Frug, *supra* note 1, at 1145 (stating that "[a] territorial association . . . can readily include every individual in the geographic area, thereby presenting the greatest opportunity for widespread participation in its decisions"). See also 2 A. DE TOCQUEVILLE, *supra* note 72, at 125 (noting that "if the object be to have the local affairs of a district conducted by the men who reside there, the same persons are always in contact, and they are, in a manner, forced to be acquainted, and to adapt themselves to one another").

75. On a very limited number of reservations, such as the Navajo, the distance between home and the seat of local authority may be significant. See P. STUART, *NATIONS WITHIN A NATION* 33 (table 2.19) (1987) (showing that the Navajo Reservation covers more than 15 million acres). The vast majority of reservations, however, are much smaller. *Id.* at 32-33. And even residents of those few reservations which cover larger areas usually will find it easier to attend meetings at the tribal headquarters than in Washington, D.C.

76. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.). The original plan was to allot parcels of land to individual tribal members—160 acres to each head of household and 40 acres to each minor. Surplus lands were then to be made available to non-Native Americans. C. WILKINSON, *supra* note 2, at 19-20. The Act is also known as the Dawes Act, after its sponsor. *Id.* at 19.

77. Total tribal landholdings fell from over 138 million acres in 1887 to approximately 52 million acres in 1934. *Id.* at 20.

square miles of territory which they could use as a member of the tribe. Now they were forced to limit their life and their vision to an incomprehensible individual plot of 160 or so acres in a checkerboard of neighbors, hostile and friendly, rich and poor, white and red.

The blow was less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed. . . . The admired order and the sense of community often observed in early Indian communities were replaced by the easily caricatured features of rootless, shiftless, drunken outcasts, so familiar to the reader of early twentieth-century newspapers.⁷⁸

Possession and control of a land base thus can provide cities and tribes with a tool for building and maintaining value systems that is generally unavailable to private, voluntary associations and much more unwieldy for national or state governments to use.⁷⁹

In sum, the major similarities between cities and tribes highlight the fact that they are neither merely another layer of formal government, nor simply voluntary associations or private corporations. Local nonconstitutional governments are hybrids, imbued with the characteristics of both private and public organizations.⁸⁰ They can, therefore, play a different role than either constitutional governments or private associations. They are, in a sense, public intermediary institutions⁸¹ or,

78. W. WASHBURN, *RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 75-76 (1971). See generally Worthen, *supra* note 66, at 1388-89.

79. The geographic component of cities and tribes differentiates them from private associations in another critical respect—the ease with which one can voluntarily withdraw from the association. Although it is easier to resign from a city or tribe than from a state or nation, see *supra* note 56 and accompanying text, one still must bear the economic, psychological, and other costs associated with changing residence. See *supra* note 58. This makes it more difficult to withdraw from a local government than from a private, voluntary association. This, in turn, limits the degree to which local governments may enforce moral norms.

80. The Supreme Court has expressly recognized this unique dual personality with respect to Indian tribes. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (tribes are not mere “private voluntary organizations,” but are “*unique aggregations* possessing attributes of sovereignty over both their members and their territory” (emphasis added)).

The same concept has long been recognized in municipal corporation law. See Herget, *supra* note 36, at 1007-08 (discussing early nineteenth-century notion of nonconstitutional authority of local governments to carry out essentially private functions). Its most prevalent form is the governmental/proprietary distinction that has plagued the law of municipal corporations for so long. That courts have difficulty drawing the line between the two functions, see, e.g., *Matter of County of Monroe*, 530 N.E.2d 202, 203 (N.Y. 1988) (rejecting the distinction as unworkable), suggests that cities still may not be wholly governmental or proprietary.

Historians also have recognized that cities are markedly different from the traditional state and national governments. See, e.g., 1 E. GRIFFITH, *supra* note 35, at 11 (stating that a city “is and always has been a group in the sociological sense”).

81. Other courts and scholars have noted the role of private intermediary organizations (or mediating institutions) as a buffer between the state and the individual. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (private associations serve as “critical buffers between the individual and the power of the State”); Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99, 115; Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1715 (1988). As public intermediary organizations, local nonconstitutional governments serve a similar, though not identical role.

to view it another way, voluntary governments. Either characterization suggests that city and tribal governments have a unique role in modern society, unfulfilled by the more nonvoluntary forms of government.

IV. DIFFERENT SIDES: DISTINCTIONS BETWEEN CITY AND TRIBAL GOVERNMENTS

The previous section revealed meaningful similarities between cities and tribes relating to their ability to build true communities, establishing common values, for their respective members. This section indicates that the differences between the two entities are less profound than they first appear, and less significant than the differences found between them and their constitutional "superiors."

A. *Traditional Sources of Power*

One obvious difference between city and tribal governments is their sources of power. As noted above, the traditional view is that cities have no inherent authority, but derive all their power from some specific legislative or constitutional grant.⁸² Tribes, on the other hand, as sovereign powers have inherent authority to govern; they need not point to any enabling legislation to justify their actions.⁸³ Further inspection, however, diminishes this perceived gap between the two entities.

Although cities must point to some enabling statute or constitutional grant to support each action, the existence of "home rule" provisions, or other broad grants of authority to cities, renders this requirement almost illusory in most states.⁸⁴ While the full-fledged local sovereignty envisioned by some early proponents of home rule⁸⁵ has

82. See *supra* note 11 and accompanying text.

83. See *supra* notes 20-22 and accompanying text.

84. Grants of home-rule authority generally have been broadly worded and liberally construed. As Dean Sandalow noted in his seminal article on home-rule powers:

Analysis of the decisions reveals that, with the possible exception of a single state, the grant of municipal initiative in home rule provisions has been broadly construed by the courts. There are, of course, in almost every jurisdiction a few decisions limiting the scope of municipal initiative, but . . . in most jurisdictions [they] have not resulted in denying municipalities power to legislate concerning those matters which even the staunchest advocates of local autonomy consider appropriate for local control.

Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 663 (1964) (footnotes omitted). See also ALASKA CONST. art. X, § 1 (purpose of home-rule provision is "to provide for maximum local self-government").

85. Early home-rule provisions were designed to overturn Dillon's Rule in favor of Cooley's Doctrine of inherent sovereignty for local governments. Gere, *Dillon's Rule and the Cooley Doctrine: Reflections of the Political Culture*, 8 J. URB. HIST. 271, 279-81 (1982). Some early proponents advocated the *imperium in imperio* (a state within a state) form of home rule under which local governments would exist in a dual sovereignty position with the states much as the states had with the national government. See *City of St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 468 (1833). That theory largely has been rejected in current municipal corporation law. The term *im-*

never come to pass,⁸⁶ home rule clearly has expanded the authority of cities to act without reference to specific state authorization.⁸⁷ It also has increased judicial involvement in defining city governing powers by forcing courts to interpret the exact scope of delegated authority under vague home-rule grants.⁸⁸

Additionally, inherent tribal authority is far from unlimited. As noted above,⁸⁹ there are federal common-law limits on tribal authority in both the civil and the criminal arenas. Even when Congress has not specifically eliminated a tribe's power to act, tribal authority is not automatic. Often courts must intervene to resolve tribal authority issues.⁹⁰

Thus, even though traditional theory provides that tribes have inherent governing authority and cities do not, the power of city and tribal governments to initiate legislation is often not that different.⁹¹ In

perium in imperio is still used, but to refer to the form of home rule under which a defined scope of authority is granted to the local government by the home-rule provision. See, e.g., D. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 110 (3d ed. 1990) [hereinafter *STATE AND LOCAL GOVERNMENT*]. This is not the meaning originally intended by early home-rule proponents. A current example of true *imperium in imperio* may be the federally recognized Indian tribes, who have inherent authority to act as a sovereign state within the United States.

86. Commentators generally agree that home-rule provisions have been interpreted more narrowly than originally intended. See O. REYNOLDS, *supra*, note 70, § 35, at 96; Williams, *supra* note 1, at 121 n.200.

87. See Frug, *supra* note 1, at 1117. Different states have different types of home-rule provisions. Some states limit them to cities containing a certain minimum population, see O. REYNOLDS, *supra* note 70, § 36, at 98, but the minimum population requirement is generally small (between 2000 and 10,000). *Id.* In many jurisdictions, home-rule authority is available for towns and villages, and for any city regardless of size. See, e.g., MASS. CONST. amend II, §§ 1-6 (as amended by MASS. CONST. amend. LXXXIX) (cities and towns); PENN. CONST. art. 9, §§ 2, 3 & 14 ("municipalities"); OKLA. STAT. tit. 11, § 13-101 (1981) (cities and towns with populations exceeding 2000 inhabitants). See also J. FORDHAM, *LOCAL GOVERNMENT LAW* 72 (rev. ed. 1975) (discussing the wide availability of home-rule authority in certain states).

88. This has been particularly true for states adopting the *imperium in imperio* form of home rule. *STATE AND LOCAL GOVERNMENT*, *supra* note 85, at 110-11. Indeed, some scholars criticized this form of home rule precisely because it shifted more authority to the courts. Legislative home rule, under which all possible authority is delegated to the cities subject to legislative retraction, was proposed as a means to reduce the role of the courts. *Id.* at 111. Courts continue, however, to play a major role in defining the scope of legislative preemption even under legislative home-rule provisions. See, e.g., Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984); Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. 1986); City of Albuquerque v. New Mexico State Corp. Comm'n, 605 P.2d 227 (N.M. 1980).

89. See *supra* note 27.

90. See *Duro v. Reina*, 110 S. Ct. 2053 (1990) (noting that federal common law limits tribal criminal authority over nontribal Native Americans); *National Farmers' Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (stating that federal common law may limit tribal judicial authority over suits against non-Native Americans); *United States v. Montana*, 450 U.S. 544 (1981) (noting that federal common law limits tribal civil authority over non-Native American activities on fee-owned reservation lands).

91. When Dillon's Rule—concerning the source of local government authority—was first articulated in the late 1800s, several scholars, principally Thomas Cooley and Eugene McQuillin, challenged it on the ground that local governments historically had enjoyed an inherent and abso-

the final analysis, the authority of both governments usually depends not only on the unlimited dictates of the superior legislature, but also on the judicial interpretation of the controlling law—for cities, the home-rule provisions, for tribes, federal common law. Indeed, the power of some cities under legislative home-rule provisions is almost identical to that of tribes. Like tribes, legislative home-rule cities presumably have the authority to act unless the legislature forbids it.⁹² Yet, as they do with tribes, courts still impose limitations on city regulations that extend to matters not expressly placed off limits by the legislature.⁹³

Since city and tribal governments are subject to both legislative and judicial oversight, they depend in the long run more on outside acceptance of their ideas than on some constitutional or inherent source of authority to legitimize their actions. As noted in the previous section,⁹⁴ their dependence on outside acceptance has allowed these local nonconstitutional governments to hone their abilities to generate internal consensus and external approval.

B. Constituent Base

A second obvious difference between cities and tribes concerns the demographic composition of their constituent bases. Members of a tribal organization normally constitute a much more homogeneous group than do residents of a city. Tribal membership generally is dependant

lute right to govern. See Frug, *supra* note 1, at 1113-14. See also *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 97-98, 108 (1871) (Cooley, J., concurring); 1 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 268, at 742-46 (2d ed. 1940). That view fell into disfavor in the twentieth century. See Frug, *supra* note 1, at 1114-15.

92. See, e.g., *Cape Motor Lodge*, 706 S.W.2d at 210.

93. See, e.g., *City of Albuquerque v. New Mexico State Corp. Comm'n*, 605 P.2d 227, 232 (N.M. 1980). The Illinois home-rule provision expresses both the breadth of the grant and the inherent limitation:

[A] home rule unit may exercise *any* power and perform *any* function *pertaining to its government and affairs* . . . [and] may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not *specifically* limit the concurrent exercise or *specifically* declare the State's exercise to be exclusive.

ILL. CONST., art. VII, § 6, cls. (a), (i) (emphasis added).

The explanation provided by the drafters of the Illinois provision could apply equally to the current authority of Indian tribes:

[The home rule clause] is designed to be the broadest possible description of the powers that the receiving units of local government may exercise. It is clear, however, that the powers of home rule units relate to their own problems, not to those of the state or nation. . . . Thus, the proposed grant of powers to local governments extends only to matters "pertaining to their government and affairs."

RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1621 (1972), *quoted in STATE AND LOCAL GOVERNMENT*, *supra* note 85, at 134.

94. See *supra* text accompanying notes 60-64.

on ancestry,⁹⁵ while cities attach no such qualification to citizenship.⁹⁶ The degree of homogeneity in a community affects the extent to which each government can perform the role advocated in this Article.⁹⁷ The difference between tribes and cities with respect to homogeneity, however, is not as great as many people assume.

The modern composition of cities and tribes indicates increasingly similar levels of homogeneity. Although the term "city" typically evokes images of large cosmopolitan areas like New York or Los Angeles, most American cities are not so large or diverse.⁹⁸ More than seventy-five percent of American cities have less than 5000 residents.⁹⁹ Approximately one-half have less than 1000 residents.¹⁰⁰ Of the more than 19,000 cities in America, fewer than 500 have populations of 50,000 or more.¹⁰¹

Most cities are not only smaller than commonly imagined, they are also more homogeneous. Many cities are composed primarily of people of one race or economic class.¹⁰² Even residents of large metropolitan areas typically live in smaller, more homogeneous suburbs outside the diverse central city.¹⁰³ In short, the typical American city is more like Morton Grove than Chicago.¹⁰⁴

95. Although the blood quantum requirement for membership varies from tribe to tribe, all federally recognized tribes have some blood quantum requirement. See C. SNIPP, *AMERICAN INDIANS: THE FIRST OF THIS LAND* 361-65 (App. 4) (1989).

96. Indeed, a city could not impose such a requirement on citizenship without violating the Fourteenth Amendment. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that a city could not constitutionally prevent a grandmother and grandson from living together within the city).

97. See *infra* note 166.

98. Many people assume that small, homogeneous communities no longer exist in America. See, e.g., Michelman, *The Supreme Court, 1985 Term-Forward: Traces of Self Government*, 100 HARV. L. REV. 4, 22 n.96 (1986) (suggesting that "if the appeal of republican vision is restricted to cases of small, homogeneous communities, it has little contemporary significance for American constitutional law or theory").

99. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 CENSUS OF GOVERNMENTS 8-9 (table 6) (1983) [hereinafter CENSUS OF GOVERNMENTS].

100. *Id.*; Briffault, *Our Localism Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 348 (1990).

101. See CENSUS OF GOVERNMENTS, *supra* note 99, at 8 (table 6).

102. Briffault, *supra* note 100, at 348. See also J. HARRIGAN, *POLITICAL CHANGE IN THE METROPOLIS* 250-52 (4th ed. 1989) (classifying suburbs according to demographic distinctions such as predominantly affluent, middle-class, working-class, black, or elderly).

103. "In 1980, 45% of Americans lived in suburbs, 30% lived in central cities and 25% lived in nonmetropolitan areas. In other words, 60% of the residents of metropolitan areas lived in suburbs." Briffault, *supra* note 100, at 348 n.21 (citing U/S: A STATISTICAL PORTRAIT OF THE AMERICAN PEOPLE 27 (A. Hacker ed., 1983)). See also *id.* at 348 n.22 (noting that "[t]he suburbs accounted for 70% or more of the metropolitan population in the Detroit, Washington, D.C., Boston, St. Louis, Pittsburgh, Atlanta and Miami areas").

104. Morton Grove is a suburb of Chicago, famous in legal circles for its successful efforts to ban the possession of operable handguns. See *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th

At the same time, many tribal organizations are composed of more diverse groups than people commonly believe. Although most federally recognized tribal organizations are composed of a single tribe, several are not.¹⁰⁵ For example, the Gila River Indian Community, the ninth largest tribe in America,¹⁰⁶ and the Salt River Pima-Maricopa Indian Community, include members of both the Pima and Maricopa Tribes.¹⁰⁷ Membership in the Colorado River Indian Tribes is extended to both Mojave and Chemehuevi Indians, as well as to some Hopi and Navajo who located in the area after World War II.¹⁰⁸ The Wind River Reservation is populated by both the Arapahoe and their historical enemies, the Shoshone Indians.¹⁰⁹ The Yakima Indian Reservation is governed by a confederation of what were originally fourteen distinct tribes.¹¹⁰ Moreover, even when official membership in a tribal organization is limited to a single historic tribe, the presence of nontribal members on the reservation significantly diversifies the tribal community.¹¹¹

Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984). In 1980 Morton Grove had a population of 23,747. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION AND HOUSING 1980, Chicago, Ill.—Census Tracts, P-5. Of these, 23,482 resided in households. *Id.* Over 90% of the families were married-couple families. *Id.* Seventy-eight percent of the residents over age 25 were high school graduates. *Id.* at P-598. Nearly 60% of the households had an annual income between \$20,000 and \$50,000. *Id.* at P-1255 (25% were below \$20,000, and 15% above). The degree of homogeneity among the residents undoubtedly made it easier to enact controversial legislation such as a handgun ban.

105. As one tribal court observed:

Indian tribes changed constantly in population makeup and in customs and traditions. This process of change did not cease once Indian tribes were confined to reservations. In fact, members of different tribes since then have been placed by governmental actions in situations where they have met, socialized and lived with each other.

Miller v. Crow Creek Sioux Tribe, 12 Indian L. Rep. 6008, 6009 (Intertr. Ct. App. 1984); *see also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 6 (1982 ed.) [hereinafter F. COHEN, HANDBOOK '82] (noting that "Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages").

106. D. GETCHES & C. WILKINSON, *supra* note 43, at 6.

107. U.S. DEP'T OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS 51, 70 (1974).

108. *Id.* at 43.

109. *Id.* at 603. Each tribe maintains a separate business council, but the business of the reservation as a whole is carried out by a joint council. *Id.* at 604.

Other examples of multiethnic tribal organizations include the "Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees, Delawares, Shawnees, and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation." F. COHEN, HANDBOOK '82, *supra* note 105, at 6.

110. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 414 (1989).

111. Nationwide, Native Americans constitute less than 50% of the population on Indian reservations. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 SUPPLEMENTAL REPORT 16. On some reservations, including the largest, the Navajo, the percentage of Native American residents is quite high. *See, e.g., id.* at 16-17 (Navajo, 95%; Hopi, 96%; Gila River, 96%). On others, the percentage is quite low. For example, of the 7873 residents of the Colorado River Indian Reservation in Arizona, only 1965 (25%) are Native

This is not to imply that cities and tribes are equally homogeneous. The vast majority of tribal communities are more homogeneous than even the most homogeneous city. This fact justifies some differences in the amount of deference granted to the two forms of government on some matters.¹¹²

Both cities and tribes, however, are clearly more homogeneous than either the state or national communities. They both, therefore, are more able to achieve internal consensus on some matters than are the state and federal governments. Accordingly, while meaningful differences still exist, the shared attributes make it possible to envision a common role for cities and tribes.

V. THE CURRENCY OF LOCAL NONCONSTITUTIONAL GOVERNMENTS: PROPERLY INVESTING GROUP AND INDIVIDUAL RIGHTS TO YIELD COMMUNITY AND PLURALISM

An understanding of the proper role of local governments in modern society requires some analysis of two dichotomies that have long troubled American governments. The first involves the distinction between two different strains of democratic theory: group or tribal democracy, which emphasizes community self-determination through majority rule, and liberal democracy, which focuses on individual autonomy.¹¹³ Although both strains of democracy emphasize self-determination, one focuses on the group, and the other on the individual. Since the inter-

Americans. *Id.* at 16. See generally *Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rep. 6008, 6010 (Intertr. Ct. App. 1984) (noting that the "reality is the residence on many Indian reservations of nonmember Indians because of employment, intermarriage, foster care placements and adoptions").

112. See *infra* note 166.

113. Gastil, *What Kind of Democracy?*, THE ATLANTIC, June 1990, at 93. The same dichotomy is reflected in the debate between liberal and communitarian political theories. See, e.g., J. RAWLS, A THEORY OF JUSTICE (1971) (arguing in support of deontological liberalism in which "justice" is the primary virtue); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (advancing a communitarian critique of deontological liberalism).

The different emphases of these two viewpoints reflect a more fundamental disagreement concerning the relationship between individuals and their society. Traditional liberals view individuals as the "principal units of society." G. CLARK, *supra* note 58, at 24. Accordingly, for them "the local state must ensure that community interests come second to individual freedom." *Id.* On the other hand, for those advocating a structuralist view of government, "individuals have meaning as human beings only to the extent of their relationships with the community" because "it is social relations which define the individual, not a collection of individuals defining the community." *Id.* at 28.

This disagreement, in turn, represents an even deeper disagreement concerning the constitution of the individual self. "Liberalism . . . is founded on the idea of a presocial self, a solitary and sometimes heroic individual confronting society . . ." Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 20 (1990). Communitarians, on the other hand, "believe in a radically socialized self that can never 'confront' society because it is, from the beginning, entangled in society, itself the embodiment of social values." *Id.* at 20-21.

ests of the group and the individual do not always coincide, there is some tension between the two theories.¹¹⁴ That tension can be helpful if it creates a balance between the group and the individual.¹¹⁵ Lack of balance, however, can undermine important interests.

Overemphasis of liberal democracy, or individual autonomy, can lead to the destruction of community value systems, manifested as culture or learned and shared behavior patterns, since these systems depend on something other than the individual preference.¹¹⁶ Shared social norms exist prior to the entry of the individual into a society and continue, perhaps in modified form, after the individual leaves.¹¹⁷ Cultural norms exist "over and above the individual."¹¹⁸ If only individual preference mattered, there would be no social norm, no shared values or behavior.¹¹⁹ At the extreme, no community values would exist, and anarchy would result.¹²⁰ On the other hand, overemphasis of tribal democracy can lead to the suppression of critical individual rights. This has been demonstrated by repressive¹²¹ treatment of women by tribal democracies in such diverse places as Iran and the Santa Clara Pueblo in

114. The tension between communitarian and liberal political theories is "a consistently intermittent feature of liberal politics and social organization." Walzer, *supra* note 113, at 6. Other scholars have noted a similar tension between the individualistic and communal aspects of humans. See, e.g., Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979); Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U.L. REV. 900, 900 n.5 (1984-1985). Macneil attributes the tension to a conflict between selfishness (the root of the individualistic aspect of humanness) and unselfishness (the root of the communal aspect of humanness). *Id.* at 900 n.5.

115. See Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 119 B.Y.U. L. REV. 1, 4 (noting the "natural and usually desirable tension" between individual and community interests); Walzer, *supra* note 113, at 14-16, 20-22 (arguing that classic liberalism requires "periodic communitarian correction" but that communitarianism cannot be wholly substituted for classic liberalism).

116. See A. HOEBEL, *THE LAW OF PRIMITIVE MAN* 8 (1970).

117. *Id.* ("[T]he cultural patterns for behavior [meaning the learned behavior patterns manifested and shared by the members of a society] exist prior to the entry of the individual into his society. And when he has departed the patterns continue for those still living and those yet to come.").

118. *Id.* (referring to culture as "superorganic").

119. See G. CLARK, *supra* note 58, at 32 (stating that "[a]n overwhelming emphasis on individual choice strips liberal theory of any chance of integrating social values with individual action"); L. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 206 (1990) (suggesting that "choice and expressive individualism tend to destroy tribal custom" (emphasis omitted)); Gastil, *supra* note 113, at 96 (liberal democracy "has come upon the world rapidly, and may ultimately be destructive of essential values").

120. Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1099 (1988).

121. The degree of repression, if any, varies for each tribal democracy. The indirect and limited gender discrimination of the Santa Clara Pueblo, see *infra* text accompanying notes 156-57, is much less pervasive and repressive than that of a fundamentalist Islamic country like Iran, which despite its lack of commitment to civil liberties can still be classified as a democracy, see Gastil, *supra* note 113, at 94.

New Mexico.¹²²

The second problematic dichotomy is the long-standing distinction between public and private action.¹²³ Courts have struggled for years to determine what constitutes state, as opposed to private, action.¹²⁴ The struggle has been especially controversial when it has involved challenges to individual rights. Society recognizes the desirability of allowing individuals to group together for various purposes and to define those groups without interference from the government.¹²⁵ This grouping satisfies the human need to associate with others¹²⁶ and provides individuals with increased influence in society by magnifying their voices.¹²⁷

At the same time, however, history has shown that these groups can wield power almost as great, if not as great, as the government itself, and that this power can be exercised in ways which are inimical to the substantive values expressed in the Constitution.¹²⁸ Society sometimes may have, therefore, the conflicting interests of allowing private associations to determine their own norms, while preventing the powerless from being permanently excluded from advancement by those pri-

122. See Comment, *supra* note 120, at 1099 (extreme social conservatism "degenerates into 'mere moral conservatism,' preserving even manifest injustice and tyranny from change by preventing normative criticism of traditional laws" (footnote omitted) (quoting H.L.A. HART, *LAW, LIBERTY AND MORALITY* at 72 (1963)). See also Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 *ETHICS* 275, 281 (1989) ("Besides excluding or suppressing outsiders, the practices and traditions of numerous communities are exploitative and oppressive toward many of their own members. This problem is of special relevance to women."); G. CLARK, *supra* note 58, at 20-21 (describing the National Association for the Advancement of Colored People's (NAACP) distrust of local governments).

123. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) (recognizing the "essential dichotomy" between public and private acts).

124. See *infra* notes 167-73 and accompanying text.

125. Such conduct is protected by the constitutional right of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984).

126. The importance of group life recently has been reasserted in legal literature. See, e.g., Garet, *supra* note 57; Macneil, *supra* note 114; Gedicks, *supra* note 81. This aspect of association is protected to some extent, and in some circumstances, by the constitutional right of intimate association. *Roberts*, 468 U.S. at 618-20.

127. This aspect of association receives some protection under the constitutional right of expressive association. *Roberts*, 468 U.S. at 622-23. See also Worthen, *supra* note 66, at 1384-92 (arguing that the federal government's plenary power over Indian tribes should be limited by the right of expressive association).

128. For example, in *Terry v. Adams*, 345 U.S. 461 (1953), the Supreme Court held that exclusion of blacks from the pre-primary elections of the Jaybird Democratic Association, a voluntary club of white Democrats, violated the Fifteenth Amendment because candidates who won the Jaybird election typically ran unopposed in the Democratic primaries. *Id.* at 463; see also Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 *MD. L. REV.* 350, 353-54 (1989) (stating that "[m]any of us maintain healthy fears of decisions made by unaccountable power elites who gather at exclusive watering-holes, of the grip of cults over the will of individuals, of the spectre of mob violence, and of the baleful influence of economic power consolidated in lobbying and election spending").

vate groups.¹²⁹ Like the tribal/liberal democratic theory dichotomy, this strain on the public/private dichotomy rests, to some extent, on the tension between group and individual rights.

Local nonconstitutional governments can be essential in properly balancing this tension. City and tribal governments are less threatening to individual liberties than the state or federal governments because they are subject to the overriding authority of the superior sovereigns, which have the right to enforce fundamental individual rights,¹³⁰ and because they are more voluntary than their federal and state counterparts. Additionally, because local governments are smaller and more homogeneous than their constitutional counterparts, they can more easily construct value systems agreeable to individual members, and they can do so without affecting as many people who hold different values. Their control over a limited geographic area facilitates the development of community value systems and provides increased motivation for member participation, both of which legitimize the value choices made.

Formal government institutions that facilitate the creation and preservation of value systems without unduly infringing on individual rights are beneficial in modern society for two reasons. First, unlike purely private associations, local governments constitute a permanent form of community. They provide everyone, even those who do not have opportunities to participate in more intimate forms of communities such as religion or family, with a chance to experience the benefits that accompany community membership.

This communal role of local governments has been recognized commonly with respect to cities. Cities have generated support for their autonomy by emphasizing the desirability of local control over decisionmaking and of allowing people to determine for themselves how they will be governed.¹³¹ Cities often defend their autonomy on the basis that they provide an outlet for the political aspect of humanness,¹³²

129. The law usually attempts to solve the dilemma by ascertaining what is public or state activity and then imposing great limitations on that activity. Activity which is determined to be private is, by and large, not regulated at all. See *infra* notes 167-72 and accompanying text. As Kathleen Sullivan has pointed out, acts of private voluntary groups are not only unfettered by the Constitution, they are often "protected in the name of liberty." Sullivan, *supra* note 81, at 1715.

130. A proper balance of tribal and liberal democracy requires that the superior sovereign be empowered to enforce those civil rights which represent the national or state norm on essential matters. This may require that the superior sovereign open its courts to resolve challenges to the local government's compliance with civil rights laws. See Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 99-111 (1990).

131. The right of local control over value choices often has been linked directly to the availability of widespread citizen participation in the decisionmaking process. Gelfand, *supra* note 37, at 783.

132. See Aristotle, *Politics*, in NINE GREAT BOOKS OF THE WESTERN WORLD 446 (1952) (stat-

an aspect that is often overlooked in a traditional liberal society that focuses solely on individual rights.¹³³ Cities, in the form of towns, have long been identified as the governmental entities that most meaningfully can allow people to satisfy their innate need to associate with one another and, to a limited degree, subordinate their individual desires to that of the group.¹³⁴ From the time of De Tocqueville¹³⁵ to the present,¹³⁶ political commentators have noted the responsiveness of cities to this human desire to belong to, and participate in, a meaningful group endeavor. Despite relatively less exposition, the same can be said for Indian tribes.

The second reason formal government institutions that facilitate the creation and preservation of limited value systems are important is that they contribute to the development of pluralism and tolerance by providing meaningful voice to community members and to the values they share—values which might otherwise be ignored. When those who share Native American values band together, for example, it is harder to ignore them. While it may be simple to disregard a single Native American who advocates preservation of native lands, it is much more difficult to ignore the wishes of an entire tribe, especially when the issues involved arise on that tribe's reservation.¹³⁷ Moreover, people who live in the same geographic area can better perpetuate their value system. Inculcation of values from one generation to the next is essential to the preservation of the differences that contribute to modern plural-

ing that "man is by nature a political animal"). See also M. SANDEL, *supra* note 113, at 179 (arguing that there can be no conception of self without taking into account allegiances and commitments to others).

133. See M. SANDEL, *supra* note 113, at 179-83 (attacking liberal account of self for failure to recognize the constitutive nature of commercial bonds); Macneil, *supra* note 114, at 934-37 (drawing contrast between a community-based vision of society and the traditional "man-the-atom" view prevalent in most traditional liberal thought).

134. On the innate human desire to join in communities with others, see Garet, *supra* note 57, at 1070-71; Macneil, *supra* note 114, at 934-35.

135. [T]he township serves as a centre for the desire of public esteem, the want of exciting interests, and the taste for authority and popularity, in the midst of the ordinary relations of life; and the passions which commonly embroil society, change their character when they find a vent so near the domestic hearth and the family circle.

1 A. DE TOCQUEVILLE, *supra* note 72, at 62-63.

136. Frug, *supra* note 1, at 1068-72.

137. As De Tocqueville observed, societies formed for expressive purposes "possess more authority than the press. When an opinion is represented by a society, it necessarily assumes a more exact and explicit form." 1 A. DE TOCQUEVILLE, *supra* note 72, at 217. But see 7 R. EMERSON, THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 437-38 (A.W. Plumstead & H. Hayford eds., 1969) (positing that "[c]oncert, men think, is more powerful than isolated effort & think to prove it arithmetically with slate & pencil: but concert is neither better nor worse[,] neither more nor less potent than individual force" (alteration in original)), quoted in Soifer, "Toward a Generalized Notion of the Right to Form or Join an Association": An Essay for Tom Emerson, 38 CASE W. RES. L. REV. 641, 651 (1988).

ism.¹³⁸ This transgenerational value sharing is facilitated by the geographic proximity that local nonconstitutional governments provide.¹³⁹

Exposure to different value systems not only makes mainstream society more tolerant of the views of others, it also causes a reexamination of more established value systems.¹⁴⁰ Communities with unorthodox values, as compared to the national society, also provide a laboratory for testing the desirability of those values.¹⁴¹ This contributes to the development of a society in which not only is pluralism valued, but the benefits of pluralism—greater respect for others, greater awareness of the meaning of one's own values, and refinement of overall value systems from comparison with others—are realized.

Tribes have emphasized the benefits of pluralism generated by permanent structured communities, attempting, with mixed success, to convince society of the desirability of allowing others to make some value choices that are different from the perceived national or state norm.¹⁴² Of course, people have long recognized the pluralism contributions that the continued existence of tribes makes to society. Given the similarities between tribes and cities, people should recognize the potential of cities to make similar contributions.¹⁴³

VI. COMMUNITY AND PLURALISM: DIVIDENDS OF LOCAL DECISIONMAKING AND AUTONOMY

Problems involving the authority of local governments generally can be divided into two broad categories: First, those concerning the

138. See Worthen, *supra* note 66, at 1386 & n.66.

139. *Id.* at 1388-89.

140. As Judith Resnik has observed, "[W]hat the federal government is prepared to tolerate in 'them' [tribes] depends upon how it defines itself . . ." Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 755 (1989). By requiring the larger society to decide the degree to which different value choices will be respected, diverse communities force the larger society to examine its own values and prejudices. *Id.* at 757 (suggesting that "[t]he degree of toleration of the 'other' sovereign's decisions enables the federal government to make plain what its own values are").

141. The description of "governmental laboratories" has long been applied to states. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It more recently has been applied to Indian tribes. See Resnik, *supra* note 140, at 757.

142. The pluralism argument seems better fit for Indian tribes than cities because the differences between tribal values and the national norm are generally more apparent than between city values and the state norm. That the tribal government's viability may rest more on pluralism than on the popular appeal of local control suggests something about the relative importance of the two factors. Popular support for tribal governments has experienced more dramatic peaks and valleys than has popular support for other local governments throughout American history. This may indicate that in America concern for local control is more consistent than concern for tolerance and diversity.

143. Some commentators recently have claimed that local governments do give more voice to minorities and women. See, e.g., Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988).

local government's power vis-à-vis an individual citizen, and second, those concerning the local government's power vis-à-vis the superior sovereign.¹⁴⁴ Examples from experiences of tribes and cities illustrate how recognition of their roles as facilitators of community and pluralism can lead to a new approach for resolving conflicts in both categories.

A. *Local Governments and Individual Rights: A Lesson from the Tribes*

This Article's suggested approach for resolving disputes between local government authority and individual rights is based on the experience of Indian tribes under the Indian Civil Rights Act (ICRA).¹⁴⁵ The ICRA statutorily imposes on tribal governments many, but not all, of the restrictions placed on the federal and state governments by the Bill of Rights and the Fourteenth Amendment.¹⁴⁶ Many federal and tribal courts,¹⁴⁷ however, have refused to apply blindly the concepts developed in the state and federal context to cases involving challenges to tribal authority, recognizing the difference between tribal governments and their federal and state counterparts.¹⁴⁸

As an example of this application, in *Crowe v. Eastern Band of*

144. Many judicial disputes involve situations which fall into both categories. For example, an individual may challenge local government action affecting individual rights on the ground that it is prohibited by the law of the superior sovereign. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In such cases, the court should consider both aspects of the problem.

145. 25 U.S.C. §§ 1301-1303 (1988).

146. Several provisions of the ICRA restate the essence of their constitutional counterparts with minor (although, not always insignificant) differences in wording. Compare 25 U.S.C. § 1302(8) (1988) ("No Indian tribe . . . shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.") with U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Other differences are more obvious. For example, the ICRA contains no prohibition against tribal establishment of a religion, nor any right to vote in tribal elections, and the right to counsel in a criminal trial is limited by the defendant's ability to pay for the assistance himself. Moreover, "[t]he provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely." *Martinez*, 436 U.S. at 63 n.14.

147. From 1968 to 1978 federal courts were the primary enforcers of the ICRA. In 1979 the Supreme Court ruled that, except for habeas corpus actions, federal courts lacked jurisdiction over actions involving the ICRA. See *Martinez*, 436 U.S. at 58-59. Since 1979 tribal courts have been the primary enforcers of the statute. See Worthen, *supra* note 130, at 95-97, 115.

148. In some ICRA cases, courts have applied standards developed in cases involving the federal and state governments. See, e.g., *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969). This usually occurred when the tribes themselves had adopted laws that paralleled federal laws. See, e.g., *Daly*, 483 F.2d at 704-05; *White Eagle*, 478 F.2d at 1314; *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 237-39 (9th Cir. 1976); see also Worthen, *supra* note 130, at 113 n.215.

*Cherokee Indians, Inc.*¹⁴⁹ the Fourth Circuit held that the trial court erred in applying common-law property principles to a property dispute between the tribe and an individual member because the common law was not consistent with tribal traditions and customs. The court agreed with the trial court's conclusion that the tribe could not, without providing notice and a hearing, deprive the plaintiff of tribal land given to her by prior agreement with other heirs to the land. The court nonetheless reversed the trial court's order that the tribe restore to the plaintiff her possession under the agreement. The court reasoned that restoring possession to the plaintiff unduly would interfere with the tribe's ability to perpetuate the traditional concept of communal use of tribal land.¹⁵⁰

A similar approach was used by the tribal court in *Squaxin Island Tribe v. Johns*.¹⁵¹ The criminal defendant in *Squaxin Island* asserted that his due process rights were violated when the court concluded that he waived his right to a jury trial¹⁵² by failing to appear without justification on two occasions. The court rejected the defendant's argument, reasoning that the ICRA due process provision was more flexible than its constitutional counterpart because, unlike the constitutional provision, "due process under the Indian Civil Rights Act is intended to serve a dual purpose—affording protection to individuals while, at the same time, protecting tribal governmental authority."¹⁵³ Other courts also have justified deviations from the constitutional norm by emphasizing a tribe's interest in maintaining its cultural identity.¹⁵⁴

The use of this more flexible approach does not require courts to abdicate their role as enforcers of individual rights. Indeed, many courts applying this approach have struck down tribal legislation that interfered with individual rights, but only after considering not only the routine individual and governmental interests implicated in cases involving the state and federal governments, but also the need to permit tribes to maintain group cohesiveness and a separate way of life.¹⁵⁵

A prime example of this flexible approach is the Tenth Circuit's decision in *Martinez v. Santa Clara Pueblo*.¹⁵⁶ Julia Martinez, a mem-

149. 506 F.2d 1231 (4th Cir. 1974).

150. *Id.* at 1236.

151. 15 Indian L. Rep. 6010 (Sq. I. Tr. Ct. 1987).

152. 25 U.S.C. § 1302(10) (1988) prohibits a tribe from "deny[ing] to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

153. *Squaxin Island*, 15 Indian L. Rep. at 6011.

154. *See, e.g., Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973) (upholding blood quantum requirement for tribal officers because of tribe's "cultural interest"); *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 440 (D.S.D. 1974) (upholding tribal membership standards).

155. *See, e.g., Daly*, 483 F.2d at 705-06; *Santa Clara Pueblo v. Martinez*, 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978).

156. 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978). As a result of

ber of the Santa Clara Pueblo, challenged a tribal ordinance denying tribal membership to her children because their father was not a tribal member. She alleged that the ordinance violated the equal protection provision of the ICRA because tribal membership was extended to children whose fathers were tribal members even though their mothers were not, discrimination clearly based on the gender of the tribal member. The Tenth Circuit held that the ordinance violated the ICRA, but only after giving "due consideration" to the tribe's interest in "maintaining its integrity and in retaining its tribal cultures."¹⁵⁷ In short, the court placed an additional weight on the government side of the balance, recognizing that the tribe had an interest in preserving a sense of community identity, which in turn contributed to group pluralism. That weight was insufficient to overcome the particular instance of discrimination described in the suit,¹⁵⁸ but it did mandate extra scrutiny.

In cases involving challenges to tribal authority over individuals, therefore, courts applying the ICRA have applied a modified version of the substantive guarantees traditionally granted to individuals. Courts have recognized the differences between the roles of tribal governments, on the one hand, and federal and state governments on the other. By explicitly recognizing that local nonconstitutional governments play a unique role in developing a sense of community and pluralism, courts resolving challenges to local government authority over individuals might profitably take the same approach in other contexts.

Consider, for example, the Supreme Court's struggle to delineate the extent of a government's authority to ban nude dancing. In 1981 the Supreme Court struck down a municipal ordinance prohibiting nude dancing in *Schad v. Borough of Mount Ephraim*.¹⁵⁹ Ten years later in

the Supreme Court's ruling in *Martinez*, nonhabeas corpus ICRA actions must now be tried exclusively in tribal court (again, excepting habeas corpus actions). See Worthen, *supra* note 130, at 87-92. The constitutionality and wisdom of that limitation is highly questionable. Federal court supervision probably is necessary if ICRA rights are to be enforced meaningfully. *Id.* at 99-103. That the courts of the superior sovereign should be involved in the enforcement process does not mean, however, that those courts should apply standards applicable to the federal and state governments without considering the additional interests involved when a local government's actions are challenged.

- 157. *Martinez*, 540 F.2d at 1046.

158. The Tenth Circuit found it significant that the Martinez children were reared at the Pueblo, spoke the Tewa language of the tribe, practiced the customs of the tribe, and were accepted into the tribe's religion. *Id.* at 1041, 1047. The court also was influenced by the fact that the tribal ordinance was enacted only in 1939, largely as a matter of "economics and pragmatism." Prior to that time the children of some Santa Clara women and nontribal men were admitted into the tribe. *Id.* at 1047.

159. 452 U.S. 61 (1981). Although the ordinance at issue in *Schad* prohibited all live entertainment, the challenge was brought by a bookstore featuring nude dancers, *id.* at 62-63, and the Court's opinion focused in part on the town's authority to ban nude dancing. *Id.* at 66. Indeed, the citation to *Schad* in the Court's most recent decision on the issue states solely that "nude

Barnes v. Glen Theatre, Inc.,¹⁶⁰ the Court upheld a state statute banning nude dancing without overruling *Schad*. Application of the approach suggested above would cause the Court to reach just the opposite result. Local governments should be freer than states to regulate such activities because the weight used in the balancing process when larger, more heterogeneous governments are involved does not include the interests of community and group pluralism.

In essence, this Article's suggested approach would follow Chief Justice Burger's dissent in *Schad*. The *Schad* majority ignored the village's interest in developing its own community norms, choosing to focus instead on the impact nude dancing had on other municipal interests.¹⁶¹ The dissent, on the other hand, emphasized the rights of local "[c]itizens . . . to choose to shape their community so that it embodies their conception of the 'decent life,'"¹⁶² explicitly recognizing the local government's interest in developing a sense of community, an interest ignored by the majority opinion. The plurality in *Barnes* erred by going too far in the opposite direction. While correctly recognizing that a government's interest in advancing moral norms may be relevant in some cases,¹⁶³ the plurality completely failed to evaluate how strong that interest could be at a state level. While a small village, such as Mount Ephraim, could assert convincingly that a ban on nude dancing would "preserve the basic character of [the] community"¹⁶⁴ and maintain the moral atmosphere necessary to preserve that character, such a showing would be much more difficult for a state.¹⁶⁵ Accordingly, a local government's interest in regulating such matters may justify some incidental infringement on individual rights under circumstances in which a state's interest would not.

This does not mean that local governments always will win when

dancing is not without its First Amendment protections from official regulation." *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991) (quoting *Schad*, 452 U.S. at 66).

160. 111 S. Ct. 2456 (1991).

161. *Schad*, 452 U.S. at 72-74.

162. *Id.* at 87 (Burger, C.J., dissenting).

163. The plurality concluded that the state's interest in "protecting order and morality" was "substantial." *Barnes*, 111 S. Ct. at 2462. The other two Justices in the majority were unwilling to go so far. *Id.* at 2468 (Scalia, J., concurring) (concluding that "moral opposition to nudity supplies a rational basis for its prohibition") (emphasis added); *id.* at 2468 (Souter, J., concurring) (refusing to "rest my concurrence . . . on the possible sufficiency of society's moral views to justify the limitations at issue").

164. *Id.* at 86 (Burger, C.J., dissenting).

165. Justice Stevens indicated his willingness to uphold the ban on live entertainment in *Schad* if the village had produced sufficient evidence that it was a "small residential community [seeking] to exclude the commercial exploitation of nude dancing from a 'setting of tranquility.'" *Id.* at 79 (Stevens, J., concurring). The problem he noted was that the "'basic character of [the] community' [was] not at all clear on the basis of the . . . record." *Id.* at 83 n.9. A small local government could more easily show "character" than a larger state.

there is a conflict between community values and individual rights, or that they will win substantially more cases than under the current approach, in which courts treat local and state governments identically. It means only that courts consciously would consider a local government's unique role in the balancing process, with the possibility that in some close cases that extra consideration may be determinative.¹⁶⁶

This approach to the protection of individual rights may appear completely radical. It is not. Current constitutional law uses an all-or-nothing approach in resolving disputes between government and individuals. If the action is classified as state action, courts weigh the standard individual and governmental interests regardless of the type of government involved.¹⁶⁷ On the other hand, if the action is classified as private action, no limitation is imposed; the individual loses.¹⁶⁸ Thus, courts have focused almost exclusively on the state action component of the formula, as evidenced by cases such as *Shelley v. Kraemer*,¹⁶⁹ *Burton v. Wilmington Parking Authority*,¹⁷⁰ *Jackson v. Metropolitan Edison Co.*,¹⁷¹ and *Flagg Brothers, Inc. v. Brooks*.¹⁷² Several commentators have observed that the line between state and private action has become hopelessly confused, as courts have altered results on the basis of the type of individual right and prevalence of the problem involved.¹⁷³ Courts, therefore, already are applying a test in which the

166. The significance of the community interest will vary depending on the exact makeup of the local government. Courts typically should allow more leeway to tribal governments than city governments because tribes generally are more homogeneous, and therefore, more able to promote a sense of community and group diversity. For the same reason, courts should give greater deference to smaller cities than to larger ones. Classification of cities on the basis of population is fairly common. See, e.g., UTAH CODE ANN. § 10-2-301 (1987) (providing for classification of cities as follows: Class 1, 100,000 or more; Class 2, 60,000-100,000; Class 3, 800-60,000; Town, 0-800). Generally, larger cities are given more power. The approach advocated by this Article would reverse that trend on certain matters.

167. *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Colin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

168. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

169. 334 U.S. 1 (1948) (involvement of the state court in enforcing a racially restrictive covenant in an agreement between private parties constitutes state action).

170. 365 U.S. 715 (1961) (actions of a private restaurant that leased its premises from a state agency constitute state action).

171. 419 U.S. 345 (1974) (acts of a public utility operating under a state-granted monopoly do not constitute state action).

172. 436 U.S. 149 (1978) (acts of a private warehouseman authorized by state statute do not constitute state action).

173. See, e.g., Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1315-22 (1982) (positing that whether mere existence of state property laws constitutes state action depends on nature of right asserted); Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291 (1982) (arguing that "the result in *Jackson v. Metropolitan Edison Co.* would have been different if the company had refused to serve blacks").

outcome varies depending on the nature of the right involved. The approach suggested here merely would authorize the same consideration for the nature of the governmental interest in appropriate situations.¹⁷⁴

Courts already give varying weight to governmental interests depending on the type of community involved in obscenity cases. They grant a homogeneous community more leeway in defining obscenity than a heterogeneous one.¹⁷⁵ Although the cases have not expressly recognized the distinction, it clearly exists. A forthright admission of its importance would not radically alter the law.

Some scholars may contend that the approach outlined above would result in the destruction of individual liberties at the hands of local governments. This doomsday scenario seems extremely unlikely for several reasons. First, cities and tribes remain subject to the dictates of the superior sovereign. If the legislature of the superior sovereign clearly commands that individual rights prevail, those rights will prevail.¹⁷⁶ Extreme abuses thus would be discouraged by the political process of the superior sovereign.¹⁷⁷ Second, most fundamental individual rights rarely, if ever, would be outweighed by consideration of community and pluralism interests.¹⁷⁸ Finally, increased existence of diverse communities may contribute to increased tolerance, making all members of society more solicitous of the right of others to be different.

In sum, the experience of Indian tribes under the ICRA provides

174. Other scholars have suggested that some constitutional limitations should apply differently to cities than to the state or federal governments. *See, e.g.,* Ellickson, *supra* note 58, at 1558-63 (noting that local elections need not be conducted on a one resident, one vote basis even though that requirement is constitutionally mandated for federal and state elections).

175. The Supreme Court has recognized that the exact contours of the First Amendment vary from community to community. "There is no constitutional barrier . . . to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others." *Sable Communication of Cal., Inc. v. FCC*, 492 U.S. 115, 125 (1989).

176. Courts that defer to tribal customs in ICRA cases usually do so because they determine that Congress authorized that approach. *See, e.g.,* *Groundhog v. Keeler*, 442 F.2d 674, 681-82 (10th Cir. 1971); *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 440 (D.S.D. 1974). Presumably a clear legislative command to the contrary would result in a less deferential approach.

177. Justice Powell recognized this political check in *Ball v. James*, 451 U.S. 355, 373 (1981) (Powell, J., concurring), in which he argued that the Court should allow local governments more room to experiment with political structures because state legislatures "elected under the rule of one person, one vote will be vigilant to prevent undue concentration of power in the hands of undemocratic bodies." *Id.*

178. Classifications based on race or religion, for example, are hard to justify on any grounds and should not be tolerated. Although some tribal legislation discriminating on racial grounds has been upheld, *see* *Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973) (blood quantum requirement for some tribal officers upheld), the community and group pluralism interests would not be strong enough in any non-Native American community to justify such distinctions. *Cf.* *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (stating that the government's "fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on [the] exercise of . . . religious beliefs").

the background for a reformulation of the method for resolving disputes between local governments and individuals. Court should explicitly recognize and consider the unique role of local nonconstitutional governments in our society.

B. Local Governments and the Superior Sovereign: A Lesson from the Cities

The suggested approach for resolving disputes between local governmental authority and that of the superior sovereign is based on the experience of cities with respect to zoning matters. Cities have long had great discretion over zoning matters, notwithstanding the limitations on local governmental authority required by Dillon's Rule.¹⁷⁹ Although the amount of deference courts grant to local governments in this area has lessened in some jurisdictions, a majority of courts¹⁸⁰ still use an approach that suggests a method by which courts can consider the local government's community interest when resolving disputes with the superior sovereign.

In determining the limits on a city's zoning authority, most courts focus on the extent to which the particular ordinance at issue achieves the city's purposes in passing that ordinance. What is most important for present purposes is that courts often expressly recognize that building a sense of community among the city's residents is a legitimate goal of zoning ordinances.¹⁸¹ Courts that have recognized this community interest perhaps unwittingly have shifted their focus from the needs of some abstract political entity to the needs of a group of individuals living together—a shift from sovereignty to community. This change of focus, though subtle, can be important in resolving disputes between

179. See, e.g., *Simon v. Town of Needham*, 42 N.E.2d 516, 518 (Mass. 1942) (zoning law upheld because not unreasonable); *Clary v. Borough of Eatontown*, 124 A.2d 54, 66 (N.J. 1956) (courts should "allow fullest flexibility to the range of well-informed local judgment as to the precise way in which local zoning can best serve the welfare of the particular community"); *Lionshead Lake, Inc. v. Wayne TP*, 89 A.2d 693, 696 (N.J. 1952) (zoning statutes should be construed "liberally in favor of the municipalities").

180. The extreme deference approach used in the New Jersey cases cited *supra* note 179 has been altered dramatically by the New Jersey Supreme Court beginning with *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975), and *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983). Similar revisions were made by courts in New York, Pennsylvania, and California. See *Briffault*, *supra* note 6, at 41-57. However, "[t]he vast majority of state courts have left local land use authority untouched." *Id.* at 42. For purposes of this portion of the Article, it is not so important what the law now is, as what it could be if courts adopted the proposed approach.

181. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

local governments and their superior sovereigns.

When a court couches a dispute between a city and a state or between a tribe and the federal government in terms of sovereignty, the result generally is foreordained because the federal and state governments are the superior sovereigns. If sovereignty is the only weight a court considers, the superior sovereign, by definition, will prevail. On the other hand, if courts recognize that there is also an important interest in community when a dispute between the two sovereigns arises, the outcome occasionally may favor the local governments because they are better able to achieve that community interest than are the larger, more heterogeneous superior sovereigns. The community interest will not always prevail. Indeed, in many disputes it may not come into play at all. If courts expressly recognize the community interest, however, the local governments more often will prevail.

An example of how this subtle shift in focus might alter the outcome of a dispute between a local government and the superior sovereign is the question of the inherent zoning authority of Indian tribes. In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*¹⁸² the Supreme Court upheld the tribe's¹⁸³ authority to zone fee lands owned by non-Native Americans within one portion of the reservation, while striking down that authority in another portion of the reservation.¹⁸⁴ The Court split three ways with respect to the proper approach to the problem.¹⁸⁵

Justice White, joined by Justices Scalia and Kennedy and Chief Justice Rehnquist, began from the premise that tribes lack any authority over the activities of non-Native Americans.¹⁸⁶ Justice White then concluded that an exception to that general rule—one which permitted tribal regulation of conduct threatening the political integrity, economic

182. 492 U.S. 408 (1989).

183. Although the tribe is composed of 14 originally distinct Indian tribes, they banded together and now are treated as one legal entity. *Id.* at 414.

184. The Court upheld the tribe's right to zone fee land in the "closed" part of its reservation, but not in the "open" portion. The tribe made the division between the two areas in order to maintain the closed area's grazing, forest, and wildlife resources. *Id.* at 438 (Opinion of Stevens, J.). The critical distinctions between the two areas were the following: (1) access to the closed area had been limited to members of the tribe and their permittees, *id.* at 422 (Opinion of White, J.); (2) the closed area was less developed than the open area, *id.* at 438 (Opinion of Stevens, J.); (3) a much greater percentage of the land in the open area was non-Native American owned fee land, *id.* at 440; and (4) 80% of the open area residents were not tribal members. *Id.* at 445.

185. Only Justices Stevens and O'Connor supported the overall ruling. Justices White, Scalia, and Kennedy, and Chief Justice Rehnquist adopted a narrower view of tribal zoning authority. Justices Blackmun, Brennan, and Marshall adopted a more expansive view.

186. *Id.* at 428 (Opinion of White, J.) (stating that "under the general principle enunciated in *Montana v. United States*, 450 U.S. 544 (1981), the Yakima Nation has no authority to impose its zoning ordinance on the fee lands owned by petitioners . . .").

security, or health and welfare of the tribe—did not apply. He determined that development of the open area, contrary to the wishes of the tribe, did not interfere with any interest of the Yakima Nation¹⁸⁷ and that further proceedings were required before definitive findings could be made on that issue with respect to the closed area.¹⁸⁸

Justice White's approach clearly focused on the tribe as a political entity, rather than a community. According to his view, a tribe can regulate the activity of non-Native Americans on fee-owned land only when lack of tribal authority would create a "demonstrably serious" impact on the tribe *as a governmental entity*.¹⁸⁹ Justice White's conclusion that a lack of zoning authority in the open area did not "imperil any interest" of the tribe underscores the fact that he did not even consider community interests.¹⁹⁰ He approached it as a question of sovereign power, in which the tribe's "dependent status" was determinative.¹⁹¹

Justice Stevens, joined by Justice O'Connor, used an approach that, at first glance, appears to focus on the tribe's community interest. Justice Stevens recognized that zoning power enables a community to define its essential character and that the tribe had an interest in "protecting the tribal community."¹⁹² His approach ultimately rested, however, not on a balance of the interests of the governments involved, including the tribe's community interest, but rather on the sovereign power of the tribe to exclude nonmembers from the reservation, power which Congress as the superior sovereign could remove at any time.¹⁹³ He suggested that Congress had not divested the tribe of authority to zone areas in which the vast majority of the land was held in trust for the tribe (the closed area), but that it must have intended to remove that authority over the open area, which no longer was undeveloped or populated mostly by tribal members.¹⁹⁴ Thus, while acknowledging the

187. *Id.* at 431 (Opinion of White, J.).

188. *Id.* at 432. Justice White stated that the zoning procedures initiated by the county with respect to the land should be allowed to conclude before any determination is made as to whether tribal interests were adequately protected.

189. *Id.* at 431.

190. *Id.* at 432 (emphasis added).

191. *Id.* at 425-26.

192. *Id.* at 433 (Opinion of Stevens, J.).

193. Justice Stevens stated that "the proper resolution of these cases depends on the extent to which the Tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself." *Id.*

194. Justice Stevens explained:

Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting

tribe's interest in developing a sense of community through the use of the zoning power, Justice Stevens ultimately focused on the extent to which the federal government's sovereign power overcame the tribe's sovereign powers.¹⁹⁵ This shift in focus from community to sovereignty was significant because congressional intent on the matter was far from clear.¹⁹⁶

Justice Blackmun's approach, joined by Justices Brennan and Marshall, focused more on community than did either of the other two opinions. While Justice White concluded that the lack of zoning authority had no impact on any tribal interest in this case, Justice Blackmun found it "difficult to conceive of a power more central to 'the economic security, or the health or welfare of the tribe' . . . than the power to zone."¹⁹⁷ Although the two opinions used the same words, clearly they were considering different things. Justice White's approach focused more on the threat to the tribe as an abstract legal entity,¹⁹⁸ while Justice Blackmun's opinion concentrated more on the threat to the tribe as a community. That difference in focus led to a different outcome under the facts of the case.

Had the *Brendale* Court focused more on community and less on sovereignty, the result would have been more favorable to the tribe. That same change in emphasis might alter the outcome in other disputes between local governments and their superior sovereign¹⁹⁹ and could be applied usefully on behalf of tribes and cities in certain situations.

tribal policy.

Id. at 437. See also *id.* at 447 (suggesting that "it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance").

195. Justice Stevens also noted that the demographic change in the open area, a key factor in his decision, resulted from congressional legislation in the late nineteenth century opening reservation lands to settlement by non-Native Americans. *Id.* at 436.

196. Justice Stevens concluded only that it was improbable and unlikely that congressional intent was to the contrary. *Id.* at 437, 447. He did not cite any statutory language or legislative history to support these conclusions.

197. *Id.* at 458 (Opinion of Blackmun, J.).

198. Justice Blackmun observed that Justice White's opinion "replaces sovereignty with a form of legal tokenism." *Id.* at 462.

199. As Justice Blackmun observed, a finding of inherent zoning authority does not necessarily entail "a finding of inherent authority for all police powers." *Id.* at 461. The community focus has a particularly significant impact in zoning cases because, as Justice Stevens noted, "[z]oning is the process whereby a community defines its essential character." *Id.* at 433 (Opinion of Stevens, J.).

VII. CONCLUSION

The study of American governments in most law schools focuses mainly, if not exclusively, on the federal and state governments. Consequently, most lawyers and courts treat cities and tribes as mere appendages, whose sole purpose is to carry out the directions of their superior sovereign. These two nonconstitutional governments, however, can provide a focal point for resolving some of the thorny problems that currently plague our democratic form of government. Large, centralized governments are incapable of reversing the modern tendency to deify individual rights at the expense of community interests on which our republic rests.²⁰⁰ Cities and tribes, however, can perform the unique role of permanent communities in which people can create, preserve, and give meaningful voice to disparate value systems, without requiring all to sacrifice their individual freedoms to a single viewpoint.²⁰¹ By emphasizing their common ability to carry out this desirable function, cities and tribes can, despite their differences, become the currency with which modern society satisfies its obligation to both community and pluralist interests.

200. See Sandel, *supra* note 55, at 93-94.

201. Michael Walzer has noted that empowerment of local governments would balance communitarian and liberalism interests. Such empowerment would be "a pursuit of the intimations of community *within* liberalism, for it has more to do with John Stuart Mill than with Rousseau. Now we are to imagine the nonneutral state empowering cities, towns, and boroughs; fostering neighborhood committees and review boards . . ." Walzer, *supra* note 113, at 20.