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TRIBAL CONSTITUTIONALISM

States, Tribes, and the Governance of Membership

Kirsty Gover

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Foreword

When my daughter was seven or eight years old she asked a question, 'What kind of money Indian am I?' I was perplexed by the question so I asked her what she meant. She said something like, 'What kind of money Indian am I—a nickel, penny, a dime?' I still didn't understand what she was asking me so I probed for greater details. I wanted to understand the context of her question. She thought for a moment then said, 'Well I know I'm some kind of money Indian, my teacher said so.' I was still confused, and after more questioning I discovered what she meant. Someone had told her she was a quarter Indian. I was astonished. At her young age she was trying to understand what it meant to be Anishinaabe and someone had 'helped' her by fractionating blood quantum. When told she was a quarter Indian my daughter assumed that quarter meant money. Fortunately, it never occurred to her that, for some, blood was a symbol or proxy for belonging, but then I had to explain what her teacher meant. It was a tough conversation because my family is opposed to measuring membership based on blood quantum. She wondered why people would judge her based on her veins. My daughter is not the only person who has struggled to understand Indigenous identity. Questions of Indigenous citizenship are among the most pressing issues faced by Indigenous communities today.

This book is an excellent source of information for understanding how Indigenous communities themselves are working through issues of membership, citizenship, and identity. It contains an innovative, rigorous, empirical study of the issue involving 737 tribal constitutions and membership codes, belonging to 586 tribes in the United States, Canada, New Zealand, and Australia. This is a groundbreaking work. Many of these constitutions are inaccessible to all but the most committed researcher. Dr Gover has performed a huge service in locating and examining these documents in great detail. Her intensive focus enhances our knowledge of the practices deployed by Indigenous communities in structuring their internal relationships. As a result, this book helps us better understand details related to Indigenous self-governance by demonstrating how communities are participating in the construction of their own human boundaries.

Dr Gover's focus on the practices of Indigenous governance serves many purposes. The book facilitates theorizing about Indigenous self-determination because it demonstrates how Indigenous citizenship is contingent, conditional, and dependent on the particular contexts in which Indigenous peoples act in the real world. Indigenous citizenship rules vary from place to place because they are responsive to specific local and national conditions. Since this work does not take as its starting point abstract, *a priori*, or essentialized conceptions of citizenship it immediately problematizes universalizing categorizations, such as the one my

daughter experienced. While it is true that some Indigenous communities choose blood quantum to make membership decisions (particularly in the United States), this book demonstrates that there are many other alternatives to defining Indigenous citizenship. The presence of a multiplicity of practices demonstrates why it is important to look to Indigenous communities themselves to better understand membership issues. Looking to Indigenous practices is particularly helpful when challenging derogatory conceptions of Indigenous membership that often have the effect of undermining self-determination. Dr Gover's approach takes just such a path. She places Indigenous peoples at the centre of her analysis. As such, the book goes a long way towards breaking habits of thought that define Indigeneity through all-encompassing, essentialized, idealized forms.

While Dr Gover's book is very attentive to practice-derived details in understanding practices of Indigenous citizenship, at the same time this book does not shy away from appropriate generalizations. It helpfully identifies broader trends and patterns related to how Indigenous peoples are defining their own membership. For example she demonstrates that Indigenous descent and territorial residency are not exhaustive membership requirements. She also shows how membership can also be fluid as it changes over time. A particularly strong point, illustrating the diversity of membership arrangements, is that Indigenous peoples can be citizens of their communities even when they are not enrolled in State-recognized Indigenous communities. The decision by Indigenous peoples to include these people, even if the State does not recognize that person's Indigeneity, is an important recognition of their own self-conception. Those included can often be related to other Indigenous communities, demonstrating an inter-Indigenous political order that exists between Indigenous communities, which is somewhat separate from the nation State. Such recognition is important to Indigenous communities because it demonstrates an element of independence from State law in the exercise of self-determination. This type of independence is significant because it helps indigenous communities respond more directly to their own aspirations. Such responses are more difficult if citizenship is defined by external bodies such as nation States. Thus, the book also shows how Indigenous agency has important implications for the nation State. In particular, it demonstrates how indigenous peoples can themselves shape the political practices and ideologies of the nation State through their citizenship practices. Indigenous communities are not always in the position of being passive recipients of State policy. Through their own actions they can and do influence those around them.

In writing this book Dr Gover has given us a great insight into Indigenous thought and practice related to citizenship, constitutionalism, and governance. I highly recommend this book to First Nations chiefs, councils, tribal chairpersons, and their advisors. Political scientists, law professors, historians, sociologists, and anthropologists will also find this work of great interest. Judges, lawyers,

policy-makers, and interested citizens will also benefit from reading this book. It is a richly rewarding source for anyone working with Indigenous peoples.

My daughter is now a university student engaged in understanding conceptions of Indigenous membership and identity from a broader social, legal, and political perspective. When exploring Indigenous constitutionalization of citizenship criteria this book will be her most valued resource.

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Introduction

In Australia, Canada, New Zealand, and the United States, tribes are now required to adopt written constitutions and membership rules as a condition of official recognition. Tribal constitutionalism generates a new legal and political distinction between indigeneity and tribal membership. This book considers the consequences of the distinction, including the frictions and uncertainties it creates, and examines the strategies adopted by tribes and settler governments to manage them.

The idea of tribal self-governance is now embedded in the political theory and constitutional frameworks of each of the States in the study. In Canada and New Zealand, and later in Australia, tribal constitutionalism has emerged from efforts to resolve tribal land claims. In the United States, tribal constitutionalism has a longer history, but has been invigorated by recent self-determination policies emphasizing tribal autonomy in self-governance. The constitutional histories of these States differ from one another in important and complicated ways, but in each the legal category of indigeneity has existed since the earliest days of State building. Their constitutional genealogy is therefore tied to indigenous difference as a feature of public law. Public indigeneity, as it is used by settler States to implement policies designed for indigenous persons, is a pan-tribal concept that allocates indigenous status to individuals. To the array of mechanisms identifying indigenous peoples in public law and policy, tribal constitutionalism introduces a second legal category, that of tribal membership.

The basic model of tribal self-constitution emerging in the States in the study assigns to recognized tribes the task of selecting their members, with little or no oversight by settler governments. The result is a jurisdictional split between the category of indigenous persons identified by the State, and the category of tribal members identified by officially recognized tribes. Some legally indigenous persons are not tribal members, and some tribal members would not qualify as indigenous under public law definitions. Settler governments have dealt with the resulting indeterminacy in a variety of ways. In each State the ethos of self-governance bars direct intervention in prospective tribal membership governance, but governments have deployed other strategies to limit uncertainty and conserve public resources. Most commonly, governments prescribe a tribe's base membership as a condition of recognition so that the number of descendants can

be estimated and future claims can be prevented. Governments have also calculated tribal funding and settlement awards by reference only to that portion of the enrolled tribal population it considers to be indigenous. Within these constraints, tribes have adopted widely varied strategies in the design of membership criteria. They borrow from the measures used by settler governments to identify indigenous persons, but also develop their own tribe-specific rules and concepts. The interplay of State and tribal preferences in membership governance generates friction, much of which centres on the degree of overlap that exists or should exist between tribal and indigenous populations in public policy, and the responsibilities of tribes and States to indigenous non-members.

This book is organized around a core normative problem: what principles should structure the relationship between settler and tribal governments in membership governance? Tribal constitutionalism confronts one of the basic paradoxes of modern tribal self-governance. The recognition of tribes requires a settler government to intervene in the tribal sphere in order to identify (and render identifiable) the community that is to be recognized. The intervention formally constitutes the tribal community as a self-governing entity, by identifying its legal human boundaries with enough certainty to permit the exercise of tribal jurisdiction within the constitutional framework of the State. In membership governance, the 'intervention paradox' raises difficult normative questions: to what degree should a settler government dictate the human boundaries of a tribe as a condition of official recognition? Can a settler government legitimately act to prevent a tribe from transforming itself, post-recognition, into a 'different' community by changing its membership rules? Does respect for tribal autonomy require that only enrolled persons be regarded as legally indigenous? None of these questions can be adequately addressed if the criteria used by tribes to select their members are not known. This is where the book's investigation begins.

Enquiries about tribal membership have been made more difficult by the opacity of tribal constitutionalism. Membership rules are set out in tribal constitutions and codes, but these documents are often not in the public domain. Governments are ambivalent about the degree of transparency that can reasonably be demanded of recognized tribes, apparently in order to redress the effects of their long history of coercive intervention in tribal governance. On the one hand, most tribes are required to prepare a written constitution, but on the other, most are not required to publish it. As a consequence, questions about tribal membership policy have so far been debated as matters of principle, without reference to the real-life distribution of tribal membership. Consequently, public decision makers and theorists alike often have no clear idea of who is included in the tribal class and on what basis. This is reflected in the existing scholarship on tribal membership, of which there are three major types: political theory dealing with the place of indigenous peoples in the Western democracies; anthropological and cultural theory studies addressing the practices of indigenous communities; and secondary legal literature on the domestic and international law and policy of