

RESEARCH WORKSHOP ABSTRACT

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Comparative Tribal Constitutionalism: States, Tribes and Membership Governance In the Western Settler States

In Australia, Canada, New Zealand and the United States, tribes and states have lately embraced forms of tribal constitutionalism, in which officially recognized tribes adopt written constitutions in order to self-govern. The basic model of tribal self-constitution emerging in these states reserves to tribes the task of selecting their members, via prospective membership rules. These rules are contained in tribal constitutions, but the constitutions themselves are often not part of the public record.

To the array of mechanisms identifying indigenous peoples in public law and policy, then, tribal constitutionalism introduces a second legal category : tribal membership. 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. Many legally indigenous persons are not tribal members, and some tribal members are not legally indigenous. This new pluralism is a source of friction in contemporary tribal-state relations.

For instance, demographic data suggests around half of self-identifying indigenous peoples are not members of, or served by, a recognized tribal community. At the same time, as a result of reparations, devolution and self-governance arrangements, tribes are increasingly well-resourced. This creates further incentives for persons to apply for tribal membership, and raises the relative cost of non-membership. In the face of these changes, what are the respective obligations of tribal and settler governments towards indigenous people, and towards tribal members? Does respect for tribal autonomy require that only enrolled persons be regarded as legally and publicly indigenous? How is tribal membership, and the benefits it confers, distributed amongst indigenous peoples? None of these questions can be adequately addressed if the criteria used by tribes to select their members are not known. Accordingly, my methodological starting point is the first-order question of tribal self-governance : who are the members of tribes, and how are they chosen? To provide traction on these difficult questions, the paper presents findings from a comparative study of the current and historic tribal constitutions of 586 recognized tribes.

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First I report on the methodology I used to construct the study, then I present an analysis of the substantive membership criteria used by tribes in each of the states in the study. I point to some significant differences between North American and Australasian tribal constitutionalism, particularly in the administration of descent, multiple membership, and disenrollment. I offer a comparative analysis and present descriptive theories to explain the differences. Finally, I draw on this analysis to develop the argument that tribes are less ascriptive, and more relational, than is evident in the treatment of tribes in political theory and (consequently) public policy. Significantly, membership criteria show that tribes often recognize as indigenous, persons who are not deemed to be eligible as members. Inter-indigenous recognition has been largely ignored in settler state approaches to the identification of indigenous peoples. I suggest that the relational practices of tribes point to the possibility of using inter-indigenous recognition to construct the class of indigenous peoples identified in settler-state law and policy. I argue that this category should include persons who are recognized as indigenous but are not enrolled in tribes. Australian policy shows the promise and institutional feasibility of such an approach