SHARDS OF CITIZENSHIP, SHARDS OF SOVEREIGNTY: ON THE CONTINUED USEFULNESS OF AN OLD VOCABULARY

SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP. By T. Alexander Aleinikoff.[1] Harvard University Press. 2002. ix + 301 pp. $48.00.[2]

Sanford Levinson[3]

I agreed to review this excellent book some two years ago, shortly after it came out; the pressure of other commitments led me to take much longer completing my task than I had intended. However, almost all clouds have silver linings; my delay has enabled me, upon rereading the book, both to see new implications in 2004 that I might have missed in early 2002 and, therefore, to weigh differently some of Aleinikoff's arguments. His topic, which is "sovereignty" and its "semblances," is at the forefront of both much current public debate and discussion by scholars interested in both the theory and practice of politics or of legal systems. But he is also vitally interested in examining the meanings (and importance) that we ascribe to citizenship; indeed, he offers as one of his central purposes to "decenter" the relevance of citizenship to enjoying relatively full membership in the American legal order. Both topics are of great—and ever stronger—interest to me.[4]

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1. Dean, Georgetown University Law Center.

2. It is regrettable that the Harvard University Press has not yet brought out a paperback edition. This is a book that very much deserves to be on the shelves of any serious student of American constitutional development, and it would make a fine assignment in a seminar—but not at $48.

3. W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School. As always, I am grateful to Jack Balkin for his response to an earlier draft of this review.

4. I myself have written on the importance we should (or should not) ascribe to citizenship in SANFORD LEVINSON, CONSTITUTIONAL FAITH 104-06 (1988), and Sanford Levinson, *Suffrage And Community: Who Should Vote?*, 41 U. FLA. L. REV. 545 (1989). Sovereignty is at the heart of the issues examined in Sanford Levinson, *"Perpetual Un-*

But one can scarcely be uninfluenced in the consideration of such issues by ever-forward movement by the United States into a presumably endless "war on terrorism." Crucial to that war is the continuing importance (or lack of same) of such analytic concepts like "sovereignty," especially if we emphasize the "Westphalian" definition of sovereignty as the inviolability of national borders. Perhaps even more to the point, we are pressed, almost daily, to emphasize the importance of differentiating between friend and foe with regard to the conduct of that war (including, of course, deciding which national borders have lost their presumptive inviolability). One finds grim corroboration for the German[5] political philosopher Carl Schmitt insight that politics "can be understood . . . in the context of the ever present possibility of the friend-and-enemy grouping."[6] I elided the one word "only," for I am certainly suspicious of reducing *all* of politics to the singular context of the grouping of "friend-and-enemy." But this is not to deny that the perceived presence of a

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ion," "Free Love," And Secession: On The Limits To The "Consent Of The Governed", 39 TULSA L. REV. 457 (2004). See also Sanford Levinson, *Torture In Iraq & The Rule Of Law In America*, DAEDALUS, Summer 2004, at 5-8.

5. Schmitt was also a member of the nazi party who wrote some central legal apologetics for the coming to power by Hitler. Even if one accepts the genetic fallacy with regard to evaluating ideas by reference to the identity of the person(s) proposing them, one might, as Brian Bix suggested in responding to an earlier draft of this review, take into account Schmitt's actual behavior and political commitments "as arguable evidence of what [his] sometimes obscure ideas really meant or really led to." There is an increasingly extensive literature on Schmitt and the degree to which his ideas should be taken seriously by political and legal theorists. *See, e.g.*, WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURTER SCHOOL AND THE RULE OF LAW (1994); WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW (1999); DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997). Suffice it to say that I think we ignore Schmitt's potential relevance at our peril. This may speak not so well of Schmitt as of the extent to which our present political situation is increasingly reminiscent of Weimar. A full discussion of this point is obviously well beyond the scope of this review.

6. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 35 (1976), as quoted in Chantal Mouffe, *Carl Schmitt And The Paradox Of Liberal Democracy, in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 168 (David Dyzenhaus ed., 1998). I have elsewhere suggested that anyone seeking to understand the jurisprudential (and perhaps constitutional) crisis generated by the Bush Administration's legal invocation of the war on terrorism should be familiar with Schmitt's thought. *See* Sanford Levinson, *Torture In Iraq & The Rule Of Law In America*, DAEDALUS, Summer 2004, at 8. I mean this partly as critique, but also as recognition that Schmitt, with his emphasis on the destabilization of "normal" law by the exception, i.e., the state of emergency, is a thinker who must be confronted rather than simply dismissed. Consider only the use made of the "compelling interest" within American constitutional law as a means to avoid compliance with what otherwise looks, at least to the naïve reader, like an unequivocal textual command. Interestingly enough, Aleinikoff made his initial reputation through an attack published in *The Yale Law Journal* on the promiscuous use of "balancing tests" in constitutional law. See T. Alexander Aleinikoff, *Constitutional Law in The Age Of Balancing*, 96 YALE L.J. 943 (1987).

true enemy, like the prospect of one's death (with which, of course, it is connected) tends to clarify the mind and, inevitably, to influence the kinds of politics seen in any given situation. "Friend-and-enemy" can take many forms; for all too many, on occasion, the categories of "friend-and-enemy" seem to invite the use as proxies of the legal categories "citizen" and "alien."

I will first discuss some of Aleinikoff's arguments concerning citizenship and then turn to the explicit issue of "sovereignty." I should make clear at the outset, though, that any political system, such as our own, that is founded on the *popular sovereignty* of "We the People" must necessarily have some special interest in 1) who exactly comprises the sovereign People; 2) whether citizenship is relevant to being a member of that sovereign entity; and, finally, 3) whether the *demos*, however defined, has truly unlimited power, at least in theory, to decide as they will, free of any binding normative constraints.

I

It is no small point that one of Aleinikoff's purposes is to attack any strong reliance on the category of citizenship. The United States, quite obviously, was built by immigrants from other countries, most who came to this country voluntarily, though some most certainly did not. And most retained, for greater or lesser periods, some measure of identification with and loyalties to their "old countries." From one perspective, the United States, as a collective political entity following ratification of the 1787 Constitution, has never been a genuine "nation-state" inasmuch as that term suggests that each geographically organized polity (i.e., "state") consists even primarily, let alone exclusively, of a single discernable *ethnos* (i.e., "nation"). It has always organized itself, at least officially, around an ideology of what I have elsewhere termed "constitutional faith."[7]

Because of changes in American immigration law beginning in the 1960s, the United States continues, to a remarkable degree, to be a nation of immigrants and, therefore, of resident aliens, some of them legal, some of them, of course, not. Consider in this context a projection by the United States Census Bureau that the U.S. population in 2050 will be slightly over 400 million,[8] as compared with a current estimated population of

7. *See* Lenvinson, *supra* note 4.
8. Population Reference Bureau, *Human Population: Fundamentals of Growth Ef-*

294,107,506.[9] The Bureau makes its estimates by assuming one birth every eight seconds, one death every 12 seconds, and one international migrant (net) every 25 seconds, with a net gain of one person every eleven seconds.[10] Of this projected growth, 36 percent may result from immigration, with over 45 million new immigrants likely to be added next 50 years. Many will undoubtedly wish to become citizens (especially if the United States becomes increasingly tolerant of "dual nationality," which was barred by the Naturalization Act of 1795),[11] but many, no doubt, will wish to proclaim only their initial political identity, whether for reasons of sentiment or because they expect to return to the "old country" after amassing a suitable nest egg here.[12]

There is no reason to believe that Aleinikoff objects to such developments; indeed, as already suggested, he welcomes strangers to our shores and is especially attentive to the possibility that such aliens will be discriminated against by a polity that views them as (mere) strangers. This leads him to offer a "decentered" (pp. 9, 152, 177ff) conception of citizenship, the practical import of which is to lessen its relative importance as a predicate condition for enjoying a host of constitutional rights, ranging from classic "negative liberties" celebrating the "right to be let alone"[13] by the state to more affirmative rights to enjoy the benefits of a welfare state and, ultimately, the right to participate in institutions of self-governance such as voting. "[L]awful, set-

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fect of Migration on Population Growth, *at* http://www.prb.org/content/navigationmenu/prb/educators/human_population/migration2/migration1.htm (last visited Feb. 27, 2005).

9. U.S. Census Bureau, *U.S. POPClock Projection*, *at* http://www.census.gov/cgi-bin/popclock (calculation of the American population as of Aug. 26, 2004).

10. *Id.*

11. Act of Jan. 29, 1795, ch. 20, 1 Stat. 414. This act replaced the earlier Act of March 26, 2790, ch. 3, 1 Stat. 103, which did not require renunciation of prior loyalties.

12. Though the "old countries" might be quite different from those one thinks of with regard to, say, early 20th century immigrants. *See e.g.*, Indrajit Basu, *Indians Returning Home for Better Jobs*, *available at* http://www.washtimes.com/world/20030905-105637-9201r.htm (last visited Feb. 27, 2005); Amita Vasudeva, *Stay Or Go? Indians Can Now Advance by Returning Home*, *available at* http://www.indusbusinessjournal.com/news/004/3/15/immigration/stay-or.go.indians.can.now.advance.by.returning.home-634375.shtml last visited Feb. 27, 2005).

13. "[The makers of our constitution] sought to protect *Americans* in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added). Central to Aleinikoff's inquiry is whether Brandeis's reference to "Americans" should be read as having real bite, under the legal maxim *inclusio unis. . .*, or whether it is simply an acknowledgment that the United States constitution does not apply extraterritorially. If one adopts this latter meaning, then "Americans" can legitimately be read as "anyone within the territory to which the United States Constitution in fact applies."

tled members of a polity are entitled to consideration from, and perhaps participation in, the political system that exercises power over them. . . . [O]nce an immigrant is admitted and takes up permanent residence in the United States, discrimination on the basis of alienage alone begins to appear arbitrary" (p. 174) and, therefore, unconstitutional. "State laws excluding aliens from opportunities should be seen as no more legitimate than laws excluding redheads" (id.).

What this means, obviously, is that citizenship can no longer be viewed as a *necessary* (though, presumably, it remains a sufficient) condition for the enjoyment of a variety of rights (including, possibly, participation rights) within the American polity. He views as "too binary" the distinction between citizen and alien, in which the "first status is accompanied by full membership rights, the second by only those political and social rights that a beneficent sovereign [the "We the People" that presumably consist only of the citizenry] grants to its guests" (p. 147). In place of the binary distinction, Aleinikoff offers the notion of "denizenship" to address the rights that should be enjoyed by "lawful residents who participate in and contribute to the social and economic life of a community" (id.).

Aleinikoff explicitly renounces the claim "that we have entered a postnational world where, as Yasemin Soysal has argued, the legitimacy of the nation-state is grounded on its conformance with international human rights principles rather than on popular sovereignty" (p. 179). It is not clear to me, though, why he is not more sympathetic to Soysal,[14] especially inasmuch as he clearly wishes to emphasize one's status as a "person" rather than a "citizen" when, for example, interpreting the Fourteenth Amendment. He fully agrees with Alexander Bickel's laconic observation that citizenship "is a simple idea for a simple government" and is thus unsuited to the considerably more complex world within which we live (and, for that matter, have always lived). (53)[15] One might well object, for example, to *Dred Scott* not only because of its racist assumption that blacks are incapable of becoming American citizens, but also because of its (not so) latent assumption that *only* citizens can be members of the American constitutional community and, therefore, entitled to a full panoply of rights (one of which, for Taney, is the right to

14. *See* YASEMIN N. SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994).

15. Quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 54 (1975).

bear arms).[16] But one should also recognize, for better and worse, that Taney's argument sounded deeply in the theory and logic of "popular sovereignty." Although we can rejoice that the opinion was "overruled," as it were, by the first sentence of the Fourteenth Amendment,[17] one can relatively easily conceive of a counter-history whereby a less liberal United States placed into its text an explicit statement, as with the Nationalization Act of 1790, that *only* whites could be citizens.[18] If one adopts a certain reading of the Constitution *only* because it is, in fact, the best understanding of what that particular document commands, then that implies, as a logical correlative, that the Constitution could be quite different, possibly committed to completely opposite values, if only the relevant sovereign so commanded.[19] But if one

16. Dred Scott v. Sanford, 60 U.S. (29 How.) 393, 417 (1857).

17. Though one should note the section one, with its reference to the "privileges or immunities of united states citizenship," very definitely seems to suggest that being a citizen is a predicate condition to enjoy such "privileges or immunities."

18. *See* ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997), in which he emphasizes the extent to which "attributionist" theorists of American identity have more often taken on racialist overtones (i.e., the importance of being white, *see especially* Dred Scott v. Sanford, 60 U.S. (29 How.) 393, 417 (1857)) than traditional "nationalist" ones. For a contemporary version of the argument about the centrality of preserving a distinctive kind of American nation-state, see SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004) (bewailing increasing presence of Hispanics, particularly of Mexican descent, in American life).

19. *See, e.g.*, Hao Wang, REFLECTIONS ON KURT GÖDEL 115 (1987)

> In connection with the interview for his US citizenship, he once told me that for this occasion he had studied how the Indians had come to America. Einstein and O.Morgenstern were his witnesses, and Morgenstern has told different people about aspects of the event. The following account is given by H. Zemanek and E. Köhler (see Zemanek's report, *Elektronische Rechenanlagen*, vol. 5, 1978, pp. 209-211). Even though the routine examination G was to take was an easy matter, G prepared seriously for it and studied the US Constitution carefully. On the day before the interview G told Morgenstern that he had discovered a logical-legal possibility of transforming the United States into a dictatorship. Morgenstern saw that the hypothetical possibility and its likely remedy involved a complex chain of reasoning and was clearly not suitable for consideration at the interview. He urged G to keep quiet about his discovery.
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> The next morning Morgenstern drove Einstein and G from Princeton to Trenton. Einstein was informed; on the way he told one tale after another, to divert G from his Constitution-theoretical explanations, apparently with success. At the office in Trenton, the official in charge was Judge Philip Forman, who had inducted Einstein in 1940 and struck up a friendship with him. He greeted them warmly and invited all three to attend the (normally private) examination of G.
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> The judge began, 'You have German citizenship up to now.' G interrupted him, 'Excuse me sir, Austrian.' 'Anyhow, the wicked dictator! but fortunately that is not possible in America.' 'On the contrary,' G interjected, 'I know how that can happen.' All three joined forces to restrain G so as to turn to the routine examination.

Godel and the Constitution of the United States, *available at* http://www.sm.luth.se/~torkel/eget/godel/constitution.html (last visited Feb. 27, 2005).

truly regards certain rights as "fundamental," one should admire the post-World War II German Constitution far more than the United States Constitution inasmuch as the former made certain of its human dignity provisions unamendable.[20] It also follows, though, as an equally logical correlative, that this involves rejecting a robust notion of sovereign *legal* power in favor of overarching substantive norms. It is, perhaps, unfair to criticize Aleinikoff for not writing an even more ambitious book on political and constitutional theory than the very interesting one that he did write. That being conceded, it should be clear that more needs to be said about the relative weight he accords, on the one hand, to a sovereign, popular or otherwise, and, on the other, to "fundamental norms," whether derived from natural law or the operative conventions of the contemporary international human rights movement.[21]

I have little trouble agreeing with most of Aleinikoff's substantive arguments. But I strongly suspect that at least some readers will be less sympathetic to his generous and inclusive approaches toward the treatment of aliens than they might have been in, say, August of 2001.[22] One can easily forget that George

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One might assess the implications of this story, involving one of the great mathematicians of the 20th century, in the context of Carl Schmitt's discussion of the implications of a constitution's allowing for the possibility of amendment (and therefore repeal) of constitutional provisions that are deemed to guarantee "fundamental rights." *See* CARL SCHMITT, LEGALITY AND LEGITIMACY 39-58 (Jeffrey Seitzer trans. & ed., 2004). All assertions of popular sovereignty can be redescribed as a decisionist "triumph of the will" of the relevant decision-making body. That, as in the united states constitution, it takes an extraordinary majority to amend the constitution is, Schmitt argues, only a procedural hurdle, as it were, that, nonetheless, still testifies to the subordination of the ostensible fundamental norm to the plenary—i.e., "willful"—power of the relevant extraordinary majority.

20. *See Grundgesetz "basic law" of Germany Article 79(3), available at* http://www.lib.byu.edu/~rdh/ eurodocs/germ/ggeng.html (last visited Feb. 27, 2005) (The subsection reads "An amendment of this basic law affecting . . . The basic principles laid down in articles 1 and 20, is inadmissible"). Article 1 is as follows:

> (1) the dignity of man is inviolable. To respect and protect it is the duty of all state authority.
>
> (2) the German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

21. This is not the proper venue to discuss the theoretical foundations of the human rights movement, i.e., whether such rights are indeed "natural" rights cognizable through the use of some form of sheer reason or, rather, the resultant of a complex process that produces conventional norms.

22. I should note, however, in Peter Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492 (2003) (reviewing T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002)), Spiro takes Aleinikoff to task for being too caught up in the importance of being a citizen. One gathers that Spiro would, in substantial respects, simply eliminate, rather than merely "decenter," the concept as a central part of our analytic structure.

W. Bush and Mexico's President Vicente Fox were developing a close relationship in early 2001 around the call for a more welcoming policy by the United States with regard to immigrants from Mexico. Such policies—and the relationship—were among the casualties of September 11. The United States has, since then, made it much more difficult for foreigners to enter into the country, and it would occasion little surprise if such xenophobia started manifesting itself in public discussions of more general immigration (and citizenship) policy. After all, it was their fears of aliens infected by the spirit of the French Revolution that led Federalists to pass not only the Alien Act that allowed summary deportation of aliens deemed "unfriendly" by the Executive Branch, but also a new naturalization act that extended to 14 years the waiting period required to become a citizen.[23] This was changed back to five years by their Jeffersonian successors, which has remained the requirement since then. But manipulating the waiting period is only one way that "we the citizenry" might wish to make life more difficult for "them the aliens."

One of Aleinikoff's interests, obviously, is the distinction we draw between citizen and non-citizen. But he is also interested in, and has extremely illuminating things to say about, certain people who are, beyond doubt, "citizens," but who are, nonetheless, not easily folded into that completely general (and impersonal) concept. Thus he offers important discussions of the status of American Indians, all of whom were awarded statutory citizenship in 1924[24] and of Puerto Rico, who received statutory citizenship in the Jones Act of 1917.[25] I could not agree more that the central foci of Aleinikoff's book—aliens, American Indians,

23. *See* Naturalization Act of June 18, 1798, 1 Stat. 566.

24. Obviously, some citizens had become citizens prior to that time, sometimes because of treaties, but the supreme court had held, in Elk v. Wilkins, 112 U.S. 94 (1884), that the first sentence of the Fourteenth Amendment, regardless of how it might be interpreted by the untutored reader who sees that citizenship is assigned to anyone born "within the jurisdiction" of the united states, did not in fact apply to reservation-born American Indians. For those interested in high theory, it is an interesting question whether *Elk* a) was wrongly decided (even though one might well believe that many reservation Indians, who considered themselves oppressed victims of an illegitimate occupation, might have had no desire to become American citizens, by birthright or otherwise), or 2) even if rightly decided at the time, is no longer valid, so that congress is, for example, without power to repeal the 1924 Act.

25. *See* Jones-Shafroth Act of March 2, 1917, Pub. L. No. 64-368, 39 Stat. 951. Indeed, I am happy to acknowledge the seminal role played by Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects,* 11 CONST. COMM. 15 (1994), in the development of fascination with the constitutional status Puerto Rico (and Puerto Ricans). *See* Sanford Levinson, *Why The Canon Should Be Expanded To Include* The Insular Cases *And The Saga Of American Expansionism,* 17 CONST. COMM. 241 (2000).

and inhabitants of American territories—should play a far greater role in the standard teaching and thinking about American constitutional law than is in fact typically the case. That all of these tend to be excluded from the "canon" of American constitutional law, at least as taught in most classrooms and instantiated in most casebooks, [26] is surely unfortunate. As Aleinikoff demonstrates, the "plenary power" doctrine has served to limit (and, as a conceptual matter, perhaps simply erase) the enjoyment of any genuine "sovereignty" on the part of tribes, as well as of the "territories" of the United States. And, as my colleague Sarah Cleveland has demonstrated, one finds in regard to aliens, Indians, and territories assertions of "inherent power" that belie the notion that ours is a Constitution establishing a national government with only assigned powers.[27] Nor, of course, are these arguments of interest only to constitutional historians.

Constitutional arguments made over a century ago in the first great examination of the American Empire that was gained in the late-19th and early-20th centuries continue to structure discussion of the status of American Indians and of the Puerto Rican residents of what is sometimes described as the world's largest remaining colony. American Indians at least enjoy an individual right to participate in elections for national officials even if, obviously, they have no right of collective representation similar to the American states. As to Puerto Rico, however, Aleinikoff aptly quotes Judge Jose Cabranes's: "[N]o word other than 'colonialism' adequately describes the relationship between a powerful metropolitan state and an impoverished overseas dependency disfranchised from the formal lawmaking processes that shape its people's daily lives" (p. 93). But these century-old arguments are also of great import in trying to determine the rights enjoyed today by detainees of the American government

26. *See* Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1999). I am pleased to note that the casebook that Balkin and I co-edit (with Paul Brest and Akhil Reed Amar) includes discussions of both *Elk v. Wilkins* and the status of Puerto Rico. *See* BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 256-258, 297-309 (2000).

27. *See* Sarah H. Cleveland, *Powers Inherent In Sovereignty: Indians, Aliens, Territories, And The Nineteenth Century Origins Of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. (2002) (an invaluable book length article which most certainly should be read by anyone interested in the questions that Aleinikoff raises in his book). Although the book is certainly historically informed, it is ultimately far more "presentist" in its orientation than is Cleveland's remarkable exercise in historical excavation. The general point about "inherent" powers as a complement to the more commonly emphasized "assigned" powers is dramatically illustrated in *Chae Chan Ping v. U.S.*, the Chinese exclusion case, where justice field upholds the relevant congressional legislation entirely on inherent power grounds. 130 U.S. 581 (1889).

incarcerated at the Guantanamo naval base in Cuba. Much of the Bush administration's claims as to the latter turned on arcane theories of whether the United States in fact enjoyed "sovereignty" over the Cuban base that, legally at least, is only "rented" (albeit in perpetuity) from Cuba. So this brings us to the central issue of what we might, in fact, mean by the notion of "sovereignty."

II

> Tribal sovereignty means that; it's sovereign. I mean, you're a—you're a—you've been given sovereignty, and you're viewed as a sovereign entity. And, therefore, the relationship between the federal government and tribes is one between sovereign entities.[28]

Although many of us might feel a certain *schadenfreude* at George Bush's remarkably bumbling answer to a question about the meaning of tribal sovereignty in the 21st century, we might ask ourselves how much better *we* would have done, before an audience of thousands of journalists, in making sense of the concept in today's world. After all, Justice Thomas recently described "Federal Indian policy," altogether accurately, as "schizophrenic,"[29] not least because, as he wrote, "[t]he Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'"[30] The "cannot" here speaks to logic, not to

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28. President George W. Bush, President's Remarks to the Unity Journalists of Color Convention (Aug. 6, 2004), *at* http://www.whitehouse.gov/news/releases/2004/08/20040806-1.html.

> The context is described in the following:
> It didn't sound like a hard question. After George w. Bush delivered a tepidly received address to a convention of minority journalists, a native-American editor from the Seattle post-intelligencer asked, "What do you think tribal sovereignty means in the 21st Century?" As President and a former Governor, the journalist said Bush had a "unique experience, looking at [the issue] from two perspectives." The President fumbled.... As Bush rambled, looking like a schoolboy unprepared at the front of the class, many of the hundreds of Asian, Black, Native American and Hispanic journalists gathered before him...well, snickered.

Marcus Mabry, *A Tale of Two Candidates*, *at* http://msnbc.msn.com/id/5633644/site/newsweek/ (Aug. 7, 2004).

29. U.S. v. Lara, 541 U.S. 193, 196 (2004) (Thomas, J., concurring). *See generally Symposium:* United States v. Billy Jo Lara: *A Constitutional Crisis In Indiana Law?* 28 AMER. INDIAN L. REV. 269-325 (2004).

30. *Lara*, 541 U.S. at 196.

experience,[31] since, of course, "the history[, including caselaw,] points in both directions"[32] and thus allows well-trained lawyers to make exactly such schizoid arguments.

Aleinikoff offers his book as a contribution to "a nascent field of inquiry I will label 'sovereignty studies'" (p. 4). He notes that the word "sovereignty" is usually used, in courses on American constitutional law, to refer only to the conundrum of federal-state relations. I would add that the primary function, even if not purpose, of discussing the "dual sovereignty" of state and nation is to confuse students and making them feel that the central tenets of American constitutionalism are indeed nearly impossible to grasp.

Early in my own course, for example, I ask a student to read aloud the first paragraph of Marshall's opinion in *McCulloch v. Maryland,*[33] in which he begins by referring to "the defendant, a sovereign state."[34] I always stop and ask the hapless student to describe what Marshall could possibly mean by referring to Maryland as a "sovereign state"; after all, the overwhelming message of the case, apparent even to its most dimwitted readers, is that it lacks a central attribute of sovereignty, which is the ability to tax at will. Surely *McCulloch* stands for the proposition that Maryland retains, at best, only a "semblance of sovereignty" rather than what any self-respecting political theorist, at least at the time, would have defined as "real" sovereignty, i.e., the power to govern but not to be governed in turn by some purportedly "higher" authority. Someone less generously disposed to Marshall might claim that the first sentence is simply a scam, in which the crafty Chief Justice, having deftly picked Maryland's pocket, attempts to reassure Marylanders that it is sufficient that they still have the wallet that once contained hard currency. I sometimes suggest to my students that they might inflect the adjective "sovereign" with the tone that one uses when speaking sarcastically. (Perhaps one should simply add, "Yeh, right!")

The harsh reality, though, is that most students have no idea what the word means or meant, not least because few of them have had even a moment of systematic training in political theory. They are, in fact, *not* dimwitted, but uneducated. It would

31. *See*, of course, OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1880).
32. *Lara*, 541 U.S. at 196.
33. 17 U.S. (4 Wheat.) 316 (1819).
34. *Id.* at 400.

be like asking a typical American to read a "simple" street sign that happens to be written in the Cyrillic or Hebrew alphabets.

A major purpose of beginning the course as I do is both to introduce the concept and to emphasize its absolute centrality—at least as an "essentially contested concept"[35]—to a number of crucial constitutional debates that continue up to the present moment at both home and abroad. One of these debates, it should go without saying, is whether the concept is even useful in a contemporary world of inevitably interlinked states.[36] Whether it is useful is, in a way, almost beside the point inasmuch as "sovereignty" seems to be a word that we seem unable to extirpate from our vocabularies. As my friend and frequent co-author Jack Balkin suggested some years ago, there are certain terms (or what he called "nested oppositions") that, Phoenix-like, revive from their apparent deaths because we cannot, as a practical (pragmatic) matter, do without them.[37] One can cheerfully demolish the "public-private" distinction, for example, and then find oneself referring, say, to "private property" as if it is a meaningful legal concept (which, of course, it is). The same is probably true of "sovereignty." No cultural or political tradition that, like ours, emphasizes such notions as personal "autonomy" or collective "self-determination" could easily do without the term. We might well agree, three days a week, with the criticisms leveled by analytic philosophers, social psychologists, or political scientists at their semantic utility even as we find ourselves evoking the language of autonomy or sovereignty three other days (while resting on the seventh day from our intellectually stressful—perhaps even schizoid—labors).

All of us, therefore, should join Aleinikoff's call—indeed, he describes it as his "central thesis"—for "a constitutional law for the twenty-first century" that exhibits "understandings of sovereignty and membership that are supple and flexible, open to new arrangements that complement the evolving nature of the modern state" (p. 5). Since any such understandings would depend, as illustrated in *Semblances of Sovereignty* itself, excavating many aspects of American constitutional history, this would invariably provide what might even be described as a better way of understanding 19th and 20th century American constitutional

35. *See* WILLIAM W. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 10 (1983).

36. *See, e.g.*, STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999). *See also* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES (Krasner ed., 2001).

37. *See* J. M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990).

developments as well as enabling us to make more sense of our likely futures. I will, in the remainder of this review, discuss some of the potential ramifications of turning (or returning) to "sovereignty" as a central focus on theoretical analysis. This discussion will be necessarily truncated inasmuch as full consideration would merit a book in itself.

III

"By 'sovereignty'," Aleinikoff writes, "I mean the supreme legal authority in a national state" (p. 4). He cites F. H. Hinsley, who defines "sovereignty" as "the idea that there is a final and absolute political authority in the political community ," though Hinsley immediately goes on to note that "everything that needs to be added to complete the definition is added if this statement is continued in the following words: 'and no final and absolute authority exists elsewhere'"[38] One way of dissolving the paradox inherent in Hinsley's complete definition is to distinguishes between "sovereignty" as a *normative* claim of legal authority, including "absolute" authority, and the quite different use of "sovereignty" as what Stephen Krasner labels a synonym for "control," which is a far more *descriptive* in its thrust.[39] The world is rife with perfectly plausible claims of moral or legal right that are, however, ignored by those with superior power (even if not moral or legal authority). But, of course, it would also be accurate, particularly in the contemporary world, to read Hinsley as suggesting that even normatively there is no truly "final and absolute authority" inasmuch as well-founded legal claims may themselves be in tension. The international system may be organized into what are sometimes called Westphalian states that are described as "sovereign," able, that is, to make decisions free from (presumptively illegitimate) outside intervention. However, the rise of the international human rights movement, strongly rooted in such legal documents as United Nations conventions and the like, have made more than respectable the notion of "humanitarian intervention," even if there is distinct disagreement about the particular states (Serbia, Iraq, Sudan. . .) who can no longer claim the traditional right of "sovereign states" to be free from external intervention "merely" because of their mistreatment of their own population. What explains humanitarian intervention in, say, Iraq and not Ruanda is

38. *See* F. H. HINSLEY, SOVEREIGNTY 26 (1966).
39. *See* PROBLEMATIC SOVEREIGNTY, *supra* note 36, at 10.

not a plausible claim that the legal merits were stronger in the former than the latter. It is all (and merely) a question of political will, a decision by the now seemingly sovereign international community.

Aleinikoff is, of course, well aware of such points. He joins Neil MacCormick in suggesting that "today no state in western Europe is, in a classical sense, sovereign" (p. 91), and he calls for a "new understanding of sovereignty" (p. 92) that would accept the conceptual (and practical, of course) reality of "overlapping and flexible arrangements attuned to the complex demands of enhanced autonomy within a broader regulative system of generally applicable constitutional and human rights norms" (id.). Similarly, he suggests "that both sovereignty and membership need to be reconceptualized in less rigid terms if we are to establish a political regime that overcomes historical subordination and justly rules over the territory and inhabitants of the United States. An America open to such flexibility will bespeak a (typically American) resilience and optimism appropriate for the new century" (p. 183).[40] Although one could read this last comment as referring exclusively to the "historical subordination" visited upon American Indians or the inhabitants of conquered (or, as in the case of the Virgin Islands, bought) territories, the overall thrust of his book makes it clear that he is equally concerned with the status of immigrants who can make no plausible claim to being the victims of past misconduct by the United States. These latter persons must rely on basically ahistorical arguments of liberal equality. In any event, our task, according to Aleinikoff, is to develop what perhaps we should call a "post-classical" sense of "sovereignty" that has genuine analytic bite.

As a matter of brute fact, we discover how "biting" any given analytic scheme is when states (or other relevant political entities) conflict.[41] After all, should they wish to cooperate, as by entering into the World Trade Organization, nothing within the inherent logic of "sovereignty" prevents this, though, of course, some critics argue that it is unwise for "sovereign states" in effect to agree to waive aspects of their sovereign authority (and, therefore, as a logical matter, become "less sovereign" than they

40. As suggested earlier, one might wonder, in 2004, whether America is better described as "optimistic" or panic-stricken at the dire threats posed by terrorists.

41. This is the real benefit of the "case analysis" that remains so pervasive in legal education. No one can seriously believe that it necessarily leads to Langdell-like "doctrines" that can simply be applied to future cases, but it *does* tend to sharpen one's sense about what in fact is at stake in any given controversy involving competing values.

had been). But, of course, this is nothing more than the public equivalent of an ordinary contract, whereby, at least within the conceptualizations of liberal political thought, sovereign individuals accept sometimes unwise limitations on their autonomy that would, in the absence of such voluntary agreement, indeed be illegitimate.

"Sovereignty" is invoked when cooperation breaks down, when suspicion and even paranoia replace a mood of amity that transcends traditional divisions. It is at this point that one might well be suspicious of arguments that leave one with only "semblances" of sovereignty.[42] Consider the argument, within the context of abortion rights, whether the so-called "undue burden" standard leaves women with sufficient "semblances" of personal autonomy. Within any particular controversy, a woman either has a (sovereign?) right to terminate her pregnancy or the state has the (sovereign?) power to prevent that and therefore compel carrying the fetus to term. To tell a woman who wants an abortion that she cannot have one, but that she nonetheless retains "semblances" of her right to reproductive autonomy may sound like a bad joke, unless she is an unusually well-trained and socialized lawyer.

A central question, of course, is *who* gets to decide what constitutes the "undue burden." Is it the obviously self-interested particular woman herself or an ostensibly "objective" and disinterested court that, in the United States, finds its ultimate authority in a delegation from a distinctly inchoate "We the People" who have given legal life to the Constitution? But this is simply to open a Pandora's box of questions as to who constitutes the sovereign "People" in whose name the judges speak, not to mention the plausibility of viewing judges as the uncomplicated agents of the sovereign People.

Aleinikoff notes that "most U.S. constitutional law scholarship 'assumes the state.' Analysis about limits on the exercise of national power begins with an already constituted state, exercising authority over an already constituted body of citizens" (p. 4). No courses that I am aware of discuss the provenance of the

42. This is not to say that Aleinikoff is satisfied with the "semblances" that he identifies; he most certainly is not, as is clearest with regard to Indian tribes. The point, though, is that almost no one actually supports normatively—and even more certainly finds plausible descriptively—a classical "full and complete" sovereignty that indeed leaves the designated sovereign free to do anything and everything it wills. It is just the attempt to tame such a "triumph of the will" by placing fetters on the putative sovereign that makes the concept so slippery.

United States of America with regard to their secession from the British Empire in 1776. And very few courses (other than my own) even begin with serious discussion of the disregard by the Philadelphia Convention of the unique method of amending set out in Article XIII of the Articles of Confederation—unanimous consent of state legislatures. Instead, of course, Article VII states that the Constitution will spring into juridical life simply on ratification by conventions (rather than legislatures) in only nine (rather than all thirteen) states.

One defense of the Constitution's legitimacy, as already suggested, is the sovereign power enjoyed by "We the People"[43] to sweep aside any apparent legal fetters that operate only with regard to their agents rather than on "the People" themselves.[44] Yet, as Aleinikoff writes, "Exactly who We the People are and by what right the United States exerts sovereignty over a beautiful and bountiful land are questions rarely examined" (p. 4), at least outside the confines of the Yale Law School. The most dramatic illustration of Aleinikoff's point, of course, concerns the legitimacy of secession,[45] another widely untaught though altogether fascinating subject. Secessionist arguments almost inevitably draw on one aspect of the appeal of sovereignty itself, which is the "right of self-determination" by a self-defined "we the people" who proclaim that they cannot achieve the blessings of self-government (or, commonly, that they are the victims of unjust laws) while staying within a polity in which they are a (permanent) minority.[46] That such arguments are, with very rare exceptions, dangerous with regard to maintaining a stable political order may only be evidence of the volatility attached to popular sovereignty. It is, perhaps, best understood as a mantra to be invoked rather than a concept to be taken with full seriousness, unless, of course, the concept is "tamed." That is, we settle for "semblances" because the "real thing" would be much too dangerous.

This may help to explain why Aleinikoff is, as a matter of fact, quite moderate in his counsel with regard to American In-

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43. Which is, not at all coincidentally, the title of Bruce Ackerman's magisterial works on American constitutional development.

44. *See, e.g.*, Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89 (Sanford Levinson ed., 1995) (Ackerman's colleague, Amar, argues with regard to the legitimacy of amendment by plebescite).

45. *See* Levinson, *Perpetural Union*, *supra* note 4.

46. *See, e.g.*, Christopher H. Wellman, *A Defense of Secession and Political Self-Determination*, 24 PHIL. & PUB. AFF. 142 (1995).

dians and Puerto Ricans. Recognition of enhanced autonomy interests by tribes and the territories is, obviously, not the equivalent of declaring that, if dissatisfied, either the 210,000 members of the Navajo Nation[47] or the approximately 3,900,000 residents of Puerto Rico[48] are free, as a legal matter, simply to leave and join, say, Andorra (population 69,865), Liechtenstein (population 33,436), and Monaco (population 32,270)[49] as independent "sovereign" members of the United Nations.[50] Given that there is no serious support for the idea of Navajo secession, the example is, of course, merely "academic" in a somewhat pejorative sense. Puerto Rico is far more complex; there has been, for more than a half-century, a vigorous Independencia movement that, however, has never gained the support of more than approximately 5% of the population. One may well doubt, though, that the United States would recognize a Puerto Rican "Declaration of Independence" even if it received majority support (which is more, of course, than the likely level of support enjoyed by the American Declaration in 1776). One may be especially confident that the United States would not recognize the right of an "independent" Puerto Rico to conduct its own foreign and defense policy.

But, of course, there are less dramatic examples than secession that, nonetheless, present problems for the constitutional analyst of sovereignty. Consider the notion of "regime change," a term much in the news these days. I am a great admirer of Bruce Ackerman's overall project, which is nothing less than trying to understand the constitutional dimensions of the ways by which the United States engaged in significant transformation over the past two centuries.[51] For Ackerman, the term "We the

47. *See Explore the Navajo Nation*, *at* http://www.americanwest.com/pages/navajo2.htm (last visited Feb. 27, 2005).

48. *See* U.S. Census Bureau, *Puerto Rico Population Estimates And Components Of Growth: 2000-2001*, *available at* http://www.census.gov/ipc/www/pr2001.html (last visited Feb. 27, 2005). Although the population estimate at mid-year 2001 was only 3,839,810, I am quite confident, given the estimated increase of approximately 25,000/year, that Puerto Rico's population has now crossed the 3,900,000 barrier.

49. All of the population figures come from CIA, *The World Factbook*, *at* http://www.cia.gov/cia/publications/factbook/geos/an.html#people. I believe it is the case that Monaco is subordinate to France with regard to foreign and defense policy, so this may be an example only of a "semblance" of sovereignty. Still, I suspect that there are members of the Navaho nation and, even more certainly, Puerto Rico who would enjoy having their own seat in the U.N.

50. United Nations, *List of Member States*, *at* http://www.un.org/Overview/unmember.html (contains a current list of the 191 member nations of the United Nations).

51. *See* Sanford Levinson, *Transitions*, 108 YALE L.J. 2215 (1999). Ackerman, of course, is not alone in this interest. See also especially Stephen Griffin, *Constitutionalism*

People" is no mere term safely buried in the dim recesses of our history. Instead, it refers to an ever-present sovereign power that, however dormant at any moment, can awaken and engage in the full display of its sovereignty, which comes close to the "absolutism" suggested by (at least one aspect of) Hinsley's definition discussed earlier.[52] Though there may be practical "control" limits on the Ackermanian sovereign people, as a theoretical matter their domain seems limitless.[53] "In America," Ackerman writes, "it is the People who are the sources of rights." What this means, among other things, is that only the process of constitutional amendment (whether the formal process of Article V or the more informal process that Ackerman is attempting to discern) separates us from an amendment that would, say, establish Christianity as a state religion.[54] That is, there is no notion of inherent "limits" on popular authority. The "voice of the People," at least when correctly ascertained, for Ackerman's United States, just *is* the equivalent of the "voice of God" for a more traditional theocrat. It should be clear, then, that there are distinctly Schmittian strains in Ackerman's constitutional theory insofar as the "sovereign" always retains a "decisionist" power to transform any given legal status quo in behalf of a new vision of what our situation requires.[55]

If one takes "We the People" seriously as an ongoing political entity and, even more so, if one accords that People the kind of power that Ackerman celebrates, it is no small matter to decide who is included within it. We are, necessarily, referring to those who enjoy a right to *participate* in the ultimate sovereign act of transforming the Constitution itself. It is a notorious truth, for example, that what might termed the "People as participants" in 1787 did not generally include women, let alone what we today call African-Americans (a term that quite literally would have made no sense to many people who shared Taney's view that, as an analytic matter, those of African descent could

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in the United States: from Theory to Practice, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 37 (Sanford Levinson ed., 1995); STEPHEN GRIFFIN, AMERICAN CONSTITUTIONALISM THEORY (1996); Stephen Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115 (1999).

52. To be precise, "[f]or me, 'the people' is not the name of a superhuman being, but the name of an extended process of interaction between political elites and ordinary citizens. It is a special process because, during constitutional moments, most ordinary Americans are spending extraordinary amounts of time and energy on the project of citizenship. . . ." 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 187 (1998).

53. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 15 (1991).

54. *Id.* at 14.

55. *See* Levinson, *supra* note 51, at 2224 n. 77.

not be "American" in any meaningful sense). Perhaps readers of this review would define "the People", with regard to "negative liberties," as all "persons" within the country (or, for that matter, incarcerated in American-run institutions like Guantanamo), even if, paradoxically or not, we agree that aliens have no right as such to remain within the United States. And many of us, though, I suspect, fewer than is the case with regard to negative rights, might go along with such a broad definition concerning "affirmative" welfare rights. But far, far fewer, I am confident, would accept the proposition that non-citizens should, say, vote for or hold national office. At some point, the membership in a political community that is presumably signified by "citizenship" does seem to matter.

It is not part of Aleinikoff's project in this book to discuss the broad theoretical questions raised by Ackerman, though, as indicated, it is certainly part of his larger project of "sovereignty studies." Where the issue does emerge within the present book is with regard to American Indian tribes. The Supreme Court, for example, has had several important cases examining their "sovereignty" with regard to jurisdiction over non-members who commit crimes on tribal lands.[56] Although the most recent case[57] affirms Congress's power in effect to return to tribes this quite fundamental attribute of sovereignty—after all, Texas's criminal jurisdiction is not limited to *Texans* who happen to commit crimes within Texas—earlier cases, rejecting tribal claims, emphasized the importance of (non)membership in delineating tribal rights. Justice Breyer's majority in this past Term's *Lara* opinion seems to rely ultimately on the very "plenary power" doctrine that gives Congress complete power to decide as it will with regard to the actual "sovereignty-as-legal-control" that can be enjoyed by American Indian tribes. It is only because the "real sovereign" vis-à-vis Indian tribes—the United States Congress—decided either to "give" or to "return" this important semblance of sovereignty to the tribes that they possess it. (Does it really matter which verb is used, at least in the absence of an argument that Congress is without power to change its mind and once more displace the tribe of its sovereignty?) Does not the

56. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 318, 322-323 (1978) (referring to a tribe's "sovereign power to punish tribal offenders," derived from those "inherent powers of a limited sovereignty which has never been extinguished"); Montana v. United States, 450 U.S. 544, 565 (1981) ("inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

57. U.S. v. Lara, 541 U.S. 193 (2004).

asking of such questions simply reveal the truth behind Justice Thomas's description of the operative doctrine in this area as "schizophrenic"?)

As Aleinikoff acknowledges, there are three possible justifications for the Court's historic emphasis on the importance of membership as a predicate condition for regulation by Indian tribes. One involves what he labels the "democratic deficit," by which he means the fact that American Indian tribes do not allow non-members to "vote in tribal elections, run for tribal office, or serve on tribal juries" (115).[58] Yet Texas is not barred from punishing misbehaving Oklahomans or New Yorkers (nor the United States punishing foreigners), so something more than this "deficit" must explain tribal incapacities.

So Aleinikoff suggests an important second consideration, which is that it is difficult, if not impossible, to become a "naturalized" member of a tribe inasmuch as the sine qua non for membership appears to be "blood-based" (p. 117). "[T]he ethnoracial basis of tribal membership has no parallel in sub-national political communities in the United States. Citizens may take up residence in any state (or territory) and by doing so acquire full membership rights" (id.). Thus I was, almost instantly, a Texan (at least juridically) immediately after moving to Austin from New Jersey. Moreover, "an underlying concern about descent-based membership is consistent with the strong objections registered by the Court to race-conscious distributions of political power and economic opportunities" (id.). Still, as Aleinikoff notes, the Court has scarcely offered a fully coherent defense of its views about the importance of "blood-based" membership—it has, for example, upheld preferences for Indians on the ground that they are "political" rather than "racial."[59] Instead, it has chosen to speak about the unfairness of subjecting litigants to trial "not by their peers, nor by the customs of their people,"[60] (117) which, among other things, suggests to some a potential third concern, which is accepting the full implications of what it means to live in "an increasingly multicultural United States" (p. 115). Such implications would include not only the prospect of finding oneself in contexts where no one understands the (English) language that one is speaking, but also, and perhaps more

58. *See especially* Duro v. Reina, 495 U.S. 676 (1990) (lack of power to punish non-members of a tribe).

59. *See* Morton v. Mancari, 417 U.S. 535 (1974).

60. Quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-211 (1978) (which was in turn quoting Ex Parte Crow Dog, 109 U.S. 556, 571 (1883)).

ominously, being subjected to legal procedures that appear, in some profound sense, to be "alien," even if the persons implementing them are in fact one's fellow citizens. One might, of course, think of the "pre-incorporationist" systems of criminal justice, though presumably one function (and probably purpose) of incorporation was precisely to overcome the "diversity" that accompanies any robust federalism and to replace it with a more homogeneous, "nationalized," sense of what fairness in criminal justice demands. It may be that one reason we so easily accept the subjection of visiting Texans to "New York justice" (or vice versa) is that the two systems, at least formally, are likely to be substantially similar, save for such realities, of course, as the legal ability and propensity of Texas prosecutors and juries to impose the death penalty.

In any event, tribal sovereignty, however described, must mean some degree of genuine self-determination by "We the Navajos" or "We the Mohawks," and one must inevitably grapple with the ways that Navajos or Mohawks (or any of the 562 federally recognized Indian tribes)[61] define their own communities, to the potential detriment of non-members. There is an obvious potential paradox: To the extent that Aleinikoff emphasizes the "decentering" of national citizenship, then one might well wonder why one should support a highly "centered" notion of membership on the part of Indian tribes.

One might simply take reliance on the "sui generis" status of "preexisting sovereignties" who were the victims "of conquest or colonialism" (p. 142) and thus accord to the Navajo Nation, whether or not it is fully independent, as having the right to have the same control over membership that is enjoyed by those states within the international system that rely on descent.[62] The Canadian political theorist Will Kymlicka has argued that indigenous victims "of conquest and colonialism" are entitled to some special concern that would not be justified if we were talking of voluntary immigrants.[63] This is one way of justifying, for example, a greater sensitivity to the desire of the Navajo Nation to maintain its own culture within the American mosaic than to a

61. *See Federally Recognized Indian Tribes*, *at* http://www.artnatam.com/tribes.html (July 12, 2002).

62. Israel is probably the most notable example, though Irish citizenship is apparently available to anyone who can demonstrate that one of his or her grandparents was an Irish citizen. (144)

63. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP *passim* (1995).

parallel desire by, say, the Satmar Hasids.[64] There is obviously something to be said for this distinction, but, just as obviously, it can be used to support a certain insensitivity to almost all groups that comprise the multicultural reality of many contemporary states.

It most certainly matters, then, how any given tribe decides who is a member, whether one is referring to the ability to participate in the community or, in the case of other tribes, to receive revenues accruing from gambling on Indian reservations. Few readers, I presume, believe that whites who happen to live on Indian reservations, as many do, have what might be termed an "affirmative right" to enjoy the boons attached to the profits from casinos. Moreover, it is obvious that many Indian tribes today have an incentive to be chary in recognizing new members, since by definition this would increase the denominator of persons sharing the gambling receipts. Would we necessarily be as tolerant of American Indian tribes as we are of other sovereigns in changing their membership laws to make it more difficult for newcomers to join? Recall in this context the Federalist change of rules that imposed a 14-year residence requirement in order to make it more difficult for ostensibly disreputable aliens to become citizens of the United States.

CONCLUSION

So why *do* we maintain "sovereignty" as part of our continuing political and theoretical discourse? Might the answer not, for most Americans—whether liberal or conservative—lie in our particular conception of sovereignty, i.e., "*popular* sovereignty." What would it mean to say that a successfully constituted people, as a normative proposition, get, at best, only "semblances" of sovereignty? Is not that just to say that all particular communities—and their members—*must* recognize that they are indeed part of an overarching community that is itself sovereign because of the numerical priority of the whole against any of its parts? Does it matter that the actual notion of a "world community" is, at best, a sentimental fiction? Or are we (equally) tempted to say that, at the end of the day, one should adopt a classical liberal—indeed, libertarian—perspective and reject the notion that *any*

64. I have explored such questions in Sanford Levinson, *On Political Boundary Lines, Multiculturalism, And The Liberal State*, 72 IND. L.J. 403 (1997) (discussing Bd. of Educ. v. Grumet, 512 U.S. 687 (1994), striking down the New York legislature's carving out of a school district with regard to educating children with special needs).

external agent possesses the power to impair the *individual's* sovereignty articulated in the notion of "inalienable" rights?

So we must always ask what work the term "sovereignty" is doing in any particular argument. What is it a proxy for? In case of Indian tribes, it's presumably fairness to a group that was oppressed in the past and a way of making up for the oppression. Yet one is eager usually both to limit the inferences that can be drawn from any particular concern for Indian tribes and to emphasize as well (as Kymlicka does) the limits even on these tribes with regard to the potential oppression of "insiders." This is best signified, in the United States, by congressional passage in 1968 of the Indian Civil Rights Act that imposed—because an earlier decision of the Supreme Court had held that the Bill of Rights did not apply within Indian tribes[65]—the protections of the Bill of Rights (save for the Establishment Clause, interesting enough) on the internal government of all Indian tribes.

Stanley Fish has written, with typical acerbity, of what he terms "boutique multiculturalism," which "will always stop short of approving other cultures at a point where some value at their center generates an act that offends against the canons of civilized decency as they have been either declared or assumed" by the central tenets of those engaged in deciding the practical meaning (and limits) of multiculturalism.[66] This is not to denigrate the "multiculturalist" enterprise or the attractiveness of many of Aleinikoff's arguments.[67] But, at the end of the day (and of this review), one should recognize both that sovereignty ultimately is doing work for other values not explicitly stated and that the particular degree—or "semblance"—of sovereignty that one actually supports is a function of one's political values.

65. *See* Talton v. Mays, 163 U.S. 376 (1896).

66. *See* Stanley Fish, *Boutique Multiculturalism*, *in* THE TROUBLE WITH PRINCIPLE 56 (1999), quoted in Rachel Levinson & Sanford Levinson, 'Culture,' 'Religion,' and the Law, *in* SANFORD LEVINSON, WRESTLING WITH DIVERSITY 316 (2003).

67. Aleinikoff addresses similar issues in *A Multicultural Nationalism?*, THE AMERICAN PROSPECT, Jan. 1, 1998, *available at* http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4741.