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Tribal Sovereignty and the Intercultural Public Sphere

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Abstract While theorists of cultural pluralism have generally supported tribal sovereignty to protect threatened Native cultures, they fail to address adequately cultural conflicts between Native and non-Native communities, especially when tribal sovereignty facilitates illiberal or undemocratic practices. In response, I draw on Jürgen Habermas' conceptions of discourse and the public sphere to develop a universalist approach to cultural pluralism, called the 'intercultural public sphere', which analyzes how cultures can engage in mutual learning and mutual criticism under fair conditions. This framework accommodates cultural diversity within formally universalistic parameters while avoiding four common criticisms of universalist approaches to cultural pluralism. But this framework differs from that of Habermas in two ways. First, it includes 'subaltern' publics, open only to members of cultural subgroups, in order to counter relations of 'cultural power'. Second, it admits 'strong' publics, democratic institutions with decision-making powers. Finally, I show how the subaltern, strong institutions of tribal sovereignty contribute to the fair discursive conditions required for mutual learning and mutual critique in an intercultural public sphere.

Key words Habermas · Kymlicka · Native peoples · sovereignty · tribal

Introduction

In *Santa Clara Pueblo* v *Martinez* the Supreme Court granted ultimate jurisdiction over Native civil cases to tribal courts, established by the 1934 Indian Reorganization Act (IRA). This ruling upheld a Santa Clara ordinance granting member status to the children of men who married outside of the tribe while excluding the children of women who did so. As a result, the children of Julia Martinez, a Pueblo woman who married

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a Navajo man, were prevented from gaining title to her Pueblo-administered public housing (*Santa Clara Pueblo* v *Martinez* 98 US 1670 [1978]; Deloria and Lytle, 1983: 133–6). *Santa Clara Pueblo* perplexes democratic theories of cultural pluralism because a measure aimed at overcoming the oppression of one group – granting tribal sovereignty to Native American nations – exacerbates the oppression of another group – female members of the Santa Clara Pueblo. For example, Iris Marion Young defends the IRA's re-establishment of tribal sovereignty through the contention that 'justice towards groups requires special rights, and that an assimilation ideal amounts to genocide' (Young, 1990: 182). However, *Santa Clara Pueblo* suggests that tribal sovereignty may also reinforce the oppression of another group, women, whose restricted marital choices might reflect Young's notion of 'domination', whereby one group exercises unreciprocated control over another group's actions (see Young, 1990: 38). In this way, *Santa Clara Pueblo* illuminates a lacuna in contemporary democratic theories of cultural pluralism.

For the most part, theorists such as Will Kymlicka (1989 and 1995), Frances Svennson (1979), James Tully (1995) and Young herself (1990) have emphasized how tribal sovereignty protects threatened Native cultures and represents a crucial step in the realization of egalitarian, democratic goals within a culturally pluralistic society.[1] However, the problem of cultural conflict suggests that democratic theories of cultural pluralism must also articulate a universalist orientation. Universalist approaches are often seen as an obstacle to the just accommodation of diverse cultural groups.[2] However, I argue that a universalist orientation to cultural pluralism is crucial to a just democratic theory, since it can demonstrate how tribal sovereignty can facilitate *fair* and *critical* communication among Native and non-Native communities. But in order to do so, a universalist theory of democratic cultural pluralism should include three components.

First, a universalist theory can defend the protection of diverse cultural groups so long as they uphold formally universalistic conditions for the fair creation of governing norms. Second, this formal universality should clearly articulate the conditions of *public* autonomy, understood as the discursive participation of all affected parties in the formation of legitimate norms. In this way, this theory can defend itself against four common criticisms of universalist approaches: rigid uniformity; the constraint of public debate to neutral themes; false impartiality; and the neglect of power relations. Finally, a universalist theory should articulate an 'intercultural public sphere' within which cultures can mutually learn from and criticize each other, to the extent that conditions free of power relations are approximated. In this way, critical intercultural engagement avoids descending into the cultural devastation of the weak by the strong.

In this essay, I draw on Jürgen Habermas' conceptions of discourse and the public sphere to construct a universalist, discursive theory of democratic cultural pluralism. In Section I, I describe how Kymlicka, Svennson, Tully and Young theoretically analyze tribal sovereignty. In Section II, I examine Habermas' conception of discourse in light of cultural pluralism and defend its position against four possible criticisms. In Section III, I sketch the contours of an 'intercultural public sphere' within which cultural groups can discursively engage in mutual learning and mutual critique. Finally in Section IV, I suggest how the framework of the intercultural public sphere would analyze tribal sovereignty as a condition for mutual learning and mutual criticism among Native and non-Native communities.

I Tribal sovereignty and cultural diversity in contemporary political theory

It is with good reason that tribal sovereignty is supported for its protection of marginalized Native cultures. The history of American Indian law is littered with misguided attempts to assimilate Native Americans, through policies ranging from the liquidation of communal Indian land to the direct prohibition of traditional languages and religions.[3] For the most part, these policies were unilaterally imposed through Congressional 'plenary power', an extra-constitutional doctrine which allows Congress to rule Native peoples without their collective consent.[4] The advent of plenary power overturned precedents respecting tribal sovereignty established by the 'Marshall Trilogy',[5] three Supreme Court decisions based on pre-constitutional treaties. These decisions came closest to defending an egalitarian relationship between the federal government and tribes, given American hegemony over Native territory. The rejection of these precedents hastened the erosion of tribal sovereignty (Berger, 1991: 68).

The first alteration in the structure of tribal sovereignty was the Indian Reorganization Act of 1934 (IRA), which authorized tribes to draft self-governing constitutions that were to be ratified by tribal elections (Cornell, 1988: 91–2; Deloria and Lytle, 1983: 100; Pommersheim, 1995: 64–5). While it is difficult to assess just how robustly the IRA recognized and protected Native cultures,[6] it did allow tribes to govern themselves, to present a unified tribal position against the federal government, and to accept or reject constitutional reorganization. However, the second major alteration in tribal sovereignty, the 1968 Indian Civil Rights Act (ICRA), was more ambiguous. On the one hand, the ICRA exemplified Congressional plenary power, since it unilaterally extended many Constitutional protections of individual liberty to tribes without

their approval and often over their resistance (Deloria and Lytle, 1983: 128). On the other hand, individual Indians could claim their ICRA rights only through tribal courts, except for appeals for habeas corpus petitions. It was precisely this limitation of federal review over tribal court decisions that prompted the court's decision in *Santa Clara Pueblo* (*Santa Clara Pueblo* v *Martinez* 98 US 1670 [1978], 49–50; Burnett, 1972). In this way, the ICRA and *Santa Clara Pueblo* provided the firmest grounding for tribal sovereignty since the Marshall trilogy. Yet as we saw earlier, *Santa Clara Pueblo*, precisely in its affirmation of tribal sovereignty, also raises daunting problems for democratic theories of cultural pluralism.

So what happens when, in situations like *Santa Clara Pueblo*, the establishment of tribal sovereignty simultaneously supports egalitarian democratic ideals for cultural identities while undermining such ideals for female tribal members?[7] Or, to take a different example, how should democratic theorists of cultural pluralism react when tribal governments suppress the religious beliefs of their members? Indeed, while the federal government has historically suppressed indigenous religions, in recent years tribal sovereignty has abetted the suppression of religious freedom on reservations. For instance, while a federal court upheld a Navajo Council ordinance banning the religious use of Peyote, since tribal governments are not directly limited by the First Amendment (*Native American Church* v *Navajo Tribal Council* [272 F.2d 131, 10th Cir., 1959]), the Supreme Court of California overturned a similar state ban on First Amendment grounds (*People* v *Woody* [61 Cal. 2d. 716, 394 P.2d. 813, 1964).[8] Relatedly, Delfino Concha, a Protestant member of the quasi-Catholic, quasi-theocratic Taos Pueblo, lost access to community-owned farming machinery and water resources because he refused to engage in communal, religious services (US Congress, Senate 59–60). A similar situation came before the Canadian Supreme Court in *Thomas* v *Norris*, where the Salish tribal council punished a member for failing to participate in a Spirit Dance (Tully, 1995: 172). Under these circumstances, how should democratic societies like Canada and the United States address Native American practices which clearly contradict liberal norms such as equality before the law and freedom of religion?

Frances Svennson, in her criticism of the ICRA extension of religious liberties to quasi-theocratic nations like the Pueblos, argues that the need to protect individual rights is based upon a liberal model of self-interested individualism. Such individualism fails both to place adequate weight on the role of communities in the development of individual well-being and to respect the specific group ideals of the Pueblo. While recognizing that groups like the Pueblo may well stifle individual members through their emphasis on community, she ultimately opposes extending norms protecting individual autonomy across cultural boundaries.

Svennson believes that this dilemma can be resolved if stifled Pueblo individuals are free to leave the tribe and pursue individualistic life-styles within the broader society. For her, this is a lesser injustice than imposing dominant societal norms upon a smaller community (Svennson, 1979: 435–7). Svennson's argument is far less convincing, however, when we consider Michael McDonald's claim that individuals brought up within highly traditional societies possess world-views shaped by norms which are not individually chosen. According to McDonald, expulsion from a community will be more harmful for such individuals than for those raised in societies whose norms are based more upon choice (McDonald, 1986: 43). In effect, expulsion would be less damaging for a modern liberal individual than for a Pueblo individual.

Regarding religious intolerance and sexism, James Tully suggests that these problems need not be intractable if we examine the intrinsic characteristics of native cultures. For instance, he cites approvingly the Canadian Supreme Court opinion in *Thomas* v *Norris,* which held that the involuntary character of the Spirit Dance was not an intrinsic part of Salish culture and hence punishing non-participation was unconstitutional (Tully, 1995: 172). Regarding gender inequality, Tully believes that, because patrilineal succession first emerged through the imposition of Canada's Indian Act, the re-establishment of tribal sovereignty will enable native peoples to overcome sexism by resuscitating their own, non-sexist traditions (Tully, 1995: 193). Yet Tully's argument fails on both accounts. First, regarding *Thomas* v *Norris*, one must ask who can more validly ascertain what is essential to Salish culture – the Canadian Supreme Court, a body dominated by Canadians of European descent, or the Salish tribal council? Second, while Tully correctly notes that patrilineal succession may not have been a traditional practice among several Canadian tribes and the Santa Clara Pueblo (McDonald, 1986: 27 and Deloria and Lytle, 1983: 133), one cannot assume that Native American tribes will automatically return to their non-sexist ways once given sovereignty. *Santa Clara Pueblo* was heard in 1977, a date 43 years after the IRA re-established internal tribal sovereignty. So even if tribal sexism is the result of the cultural colonization of native peoples, we must heed Frank Pommersheim's insight that the 'process of decolonization can *never* lead back to a precolonized society' (Pommersheim, 1995: 99). We cannot hope to turn back the clock on Indian–White history. Liberal Americans and Canadians must address Native peoples as they are today, without the expectation that they may somehow become what they once may have been.

Kymlicka provides perhaps the most compelling response to these issues. His theory cannot justify suppressing religious intolerance or gender inequality within self-governing tribes, since a *liberal* theory of minority group rights must be based upon a principle of individual

autonomy. Such a liberal theory can uphold self-government rights for cultural minorities in the form of 'external protections', legal and institutional measures which protect a disadvantaged, national minority from 'external decisions' made by the majority culture. These measures governing 'inter-group relations' between a majority and a minority culture accord with liberal norms of egalitarian justice by enabling Native peoples to govern using their own languages and to develop their natural resources according to their own needs rather than the needs of the broader community. In contrast, internal restrictions that govern 'intra-group relations' between a self-governing cultural community and its individual members conflict with liberal norms of autonomy. So when a tribal community treats women unequally or suppresses the religious freedom of its members, it acts unjustly and deserves the criticism of liberal theorists and political actors (Kymlicka, 1995: 35–8). Yet while Kymlicka condemns the injustice of internal restrictions, he prohibits the liberal state from coercively imposing liberal norms to counter them, since national minorities, like sovereign states, 'form distinct political communities, with their own claims to self-government', which liberals must respect. Moreover, attempts to impose liberal principles upon such self-governing communities are usually ineffective, since they are often perceived as paternalistic interference (Kymlicka, 1995: 167). So Kymlicka will not condone illiberal internal restrictions, but he will also not forcibly overcome them.

Still, Kymlicka does suggest three ways of overcoming illiberal injustices without state force. First, liberal reformers both within and outside of this cultural community can morally criticize illiberal internal restrictions and work for their transformation. Second, other states can apply economic incentives to encourage communities to change their ways. Third, international bodies, such as human rights tribunals rather than the American Supreme Court, can review these cases (Kymlicka, 1995: 168–9). Kymlicka concludes that interaction 'between national groups should be determined by dialogue. But if liberal theory is to contribute anything to that dialogue, it is surely by spelling out the implications of the liberal principles of freedom and equality. This is not the first step down the road to interference. Rather, it is the first step in starting a dialogue' (Kymlicka, 1995: 171; see also Kymlicka, 1992: 145).[9]

Yet there are problems with each of his solutions. For instance, the use of an international review process means that either any decision will be unenforceable or, as is the case in international relations, the terms for enforcement will remain underspecified and open to relations of military power. Regarding economic incentives, Kymlicka himself acknowledges that the 'line between incentives and coercion is not a sharp one', since an economically powerful cultural minority could effectively crush such small, poor minorities as Native peoples (Kymlicka, 1995: 168).

Finally, with respect to moral criticism, Kymlicka does not specify the manner or conditions under which intercultural criticism ought to occur. How do we distinguish egalitarian intercultural criticism from pseudo-criticism marked by the exercise of state or economic coercion? How do we judge mutual, reciprocal criticism from the propagation of unfair stereotypes? And, for that matter, where does intercultural criticism occur? In Parliament, or on the street? Only in face-to-face encounters, or also through print and electronic media? These questions remain unanswered in Kymlicka's theory because he fails to theorize adequately the dynamics of dialogue among cultures. He impressively articulates a liberal theory that can support notions of tribal sovereignty, yet his liberal framework fails to indicate how we can non-coercively convince members of other cultures to adopt the norms and practices necessary for an egalitarian democracy that values individual autonomy. Kymlicka takes us one step towards an intercultural dialogue: a discursive theory of cultural pluralism can take us further.

II Universality amidst diversity: Habermasian discourse and cultural pluralism

Because contemporary theorists have insufficiently analyzed normative dialogue across cultural boundaries, I turn to Habermas' conception of moral discourse[10] in order to articulate a universalist approach to democratic cultural pluralism. As is well known, the central component of Habermas' theory is the discourse principle, which is given as follows:

> Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses. (Habermas, 1996: 107)

He then defines a 'rational discourse' as an attempt to reach an understanding over disputed claims, so long as this attempt 'takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations', or modes of convincing each other which preclude the exercise of force or deception (Habermas, 1996: 108). These brief statements provide the kernel to a discursive theory of democracy that both is universalistic in form and yet allows for a broad diversity of cultural contents. This formal universality amidst cultural diversity stems from Habermas' neo-Kantian approach, which understands norms not as values constitutive to one's personal fulfillment but as 'generalized behavioral expectations', or ways of regulating action among multiple individuals (Habermas, 1996: 107). Under this theory, norms which diverge widely among cultural groups can nevertheless be considered legitimate so long as they meet three requirements pertaining

to universal participation, the impartial moral point of view, and conditions of fairness (see Habermas, 1996: 182).

The first requirement – universal participation – holds that a norm can only be considered valid, or worthy of being obeyed, if all individuals whose interests will be affected by it are permitted to participate in its formation. This requirement illustrates the strong participatory dimension to Habermas' theory. Indeed, it is political participation, or public autonomy, not simply the legal form taken by various laws, which grounds legitimacy. Furthermore, Habermas emphasizes that norms gain *rational* legitimacy through *discursive* participation, involving rigorous debate and discussion. Simply aggregating individual preferences through voting procedures is insufficient for the rational creation of legitimate norms (Habermas, 1990: 91; Habermas, 1996: 181–3).

This brings us to the second requirement, the discursive achievement of the impartial moral point of view. For Habermas, impartiality implies that a norm is good for all, not merely good for some. Such impartiality not only requires the universal participation of all potentially affected parties: it also requires participants to orient themselves universalistically, by coming to understand the positions of others while questioning their own positions. This, in turn, can emerge only through actual debates, where actors are challenged and confronted by others. In this way, actors can come to justify norms through consensus [*Einverständnis*] and not merely compromise. Within a compromise, parties seek only to maximize their own interests via the acquiescence of others. Within a rational consensus, parties question their own interests and viewpoints, attempt to understand the interests and viewpoints of others, and ultimately agree to the norm for the same reasons. It is precisely through the rigor of discursively taking the role of the other that practical discourses approach impartiality (Habermas, 1990: 62–76; Habermas, 1996: 166).

Third, and finally, the discourses under which all participants are to agree to a norm must at least approximate conditions of fairness. These conditions are of two types. First, conditions must allow participants to say whatever they want, so long as they do so sincerely and without attempting to deceive or manipulate others. Second, participants must not coerce others through internal force or external threats of force. Such relations of power can only be overcome if, within discursive settings of norm creation, substantial levels of material equality are achieved. Habermas understands these rules of sincere discursive reciprocity and equality as presupposed within the practice of argumentation, a practice central to modern forms of communicative interaction (Habermas, 1990: 87–9).

These, then, are the *formal* criteria for the justification of a norm: legitimate norms must be consensually justified by all affected parties

through a rational, moral discourse conducted under fair conditions. However, the substantive content of norms is not specified within Habermas' theory and hence can vary according to culture (Habermas, 1990: 103). So if, under fair conditions, all members of one culture agree to punish murder through life imprisonment while under similarly fair conditions members of another culture agree to punish murder by compensating the victim's family, then both forms of punishment are valid. The formal conditions under which the norm was created, not the specific content of the norm itself, is what Habermas' theory evaluates. And it is these conditions of fair, rational, normative consensus that provide the universalistic form for culturally diverse substantive norms.

To this extent, while Habermas' theory defends formal universality amidst substantive cultural diversity, it does not appear to go beyond Kymlicka's liberal formulation. For instance, Kymlicka's distinction between justified external protections versus unjustified internal restrictions rests upon a prior distinction between cultural structure and cultural character. Cultural structure describes the thinner, more formal aspects of a culture, such as language and a shared history, which provide the context for autonomous individual choices. Cultural character describes the substantive norms or values held by a culture (Kymlicka, 1989: 166–7).[11] Liberals can justify external protections which maintain the structure of a culture, but need not justify maintaining the substantive character of a culture, especially when it supports internal restrictions contrary to liberal autonomy. So, to take the case of *Santa Clara Pueblo*, liberals should seek to protect the Pueblo cultural structure while liberalizing the community's substantive cultural character regarding gender relations. Hence, both Kymlicka and Habermas will allow for cultural diversity only within certain formally universalistic boundaries which reflect notions of individual autonomy.

Habermasian formal universalism differs from Kymlicka, however, in its greater emphasis on *public autonomy*, or the participatory formation of legitimate norms, as opposed to only *private autonomy*, or the uninhibited individual pursuit of personal ends. For Kymlicka, a liberal theory of minority rights precludes internal restrictions through its defence of private autonomy, or 'the idea that individuals should be free to assess and potentially revise their existing ends' (Kymlicka, 1995: 158). While Habermas supports this protection of private autonomy, he nevertheless is concerned to balance it with an equal emphasis on public autonomy, particularly when one's exercise of private autonomy conflicts with that of others (see Habermas, 1996: 118–19). Hence, at issue within discursive formal universality is not merely the form taken by substantive norms: as important is the requirement that legal norms be created actively and discursively under fair conditions. In this way, Habermas' theory not only addresses how liberals *grant* certain rights

to minority cultures: it is equally concerned with enabling cultural groups to participate actively within a robustly democratic society. Since cultural minorities have rarely achieved advances except through struggle and political action, steps must be taken to encourage such emancipatory participation.

Habermas' emphasis on universality through public autonomy enables him to address more adequately critics who often level four charges at universalistic approaches to cultural pluralism. First, universalistic approaches are said to emphasize equality through 'color-blind' norms uniformly applicable to all, regardless of cultural situation. Second, they tend to constrain public deliberation to 'neutral', non-controversial themes already shared by all cultural groups. Third, they supposedly emphasize impartiality to a point that risks promoting the good for privileged groups to the exclusion of the interests of marginalized groups. Finally, they overlook power relations among cultural groups. I argue, however, that Habermas' position can adequately address all of these criticisms.

Discursive universality versus color-blind uniformity

To address this first criticism, one must carefully distinguish Habermasian 'universality' from any notion of legal or normative 'uniformity'. While the term 'universality' is often used to mean uniformity,[12] for Habermas it is the participation, the impartial perspective and the assent of all affected that grounds a norm's universality. The specific norms justified in this way, however, can potentially have a content that treats people differently, according to their different circumstances. Hence, group specific differential policies, like affirmative action or tribal sovereignty, can be legitimate, so long as they gain the assent of all parties affected (see Habermas, 1994: 128–9). Indeed, any truly rational and moral opposition to such policies would require opponents to be directly confronted with the viewpoints of oppressed groups. Opponents must then remain convinced that such differential policies are not in the best interests of *all* affected parties, *including* those who desire them.

Discursive universality versus neutrality

The contention that universalistic approaches to cultural pluralism constrain public dialogue to neutral themes is more applicable to liberal theorists than to Habermas. Liberal models of public deliberation advise the diverse groups in a pluralistic society to constrain their common public deliberations to those shared values and beliefs which constitute neutral public ground. In turn, controversial cultural beliefs must be kept within the private sphere, where they may indeed animate

individual life-plans.[13] Clearly this differs from Habermas' position that rational discourse must allow for the 'free processing of themes, contributions, information, and reasons' (Habermas, 1996: 107–8). Indeed, because thematic constraints could potentially distort discourse as much as internal or external coercion, Habermasian discourse would encourage marginalized cultural groups to press for controversial claims while participating in arenas of norm legitimation. Liberals might convincingly respond that this would hinder efficient decision-making and increase intercultural conflict within public debate. And moreover, since many cultural groups mainly wish to maintain their cultural practices without outside interference, it might be more tolerant to keep controversial cultural issues out of public debate. To some extent, these rejoinders are clearly correct, but they tell only half of the story. For while it may be advantageous that certain culture-specific topics be excluded from the public domain, we must carefully examine how these exclusions develop and are justified.

First, one must note that there is a wide gulf between public debate and state action. Within the informal public sphere and even parliamentary assemblies, political actors may discuss a wide range of issues which never become privy to state regulation. Hence, there is no reason to suspect that unconstrained public debate need become unconstrained state action.[14] And indeed, unconstrained discourse in a pluralistic society may also lead to agreements to constrain state action in many areas. Second, one must recognize that highly controversial claims cannot be expected to gain broader consensus unless they appeal to reasons which others can understand. Hence, cultural groups must be able to put their claims in universalizable terms. For instance, they must express their demands in terms of entitlements which they are justly due and not simply in terms of desires. Yet in stating their case, cultural groups can nevertheless introduce cultural beliefs or concepts which are not shared by the broader community, in the hope that these beliefs and concepts may become more comprehensible to others. Indeed, in cases of deep cultural diversity it is unlikely that the neutral ground of shared values will be found. Hence, if any public debate is to occur at all, it must occur through the introduction of themes that will be controversial to one or more of the parties involved. Third, one must clearly distinguish how issues are taken out of public dialogue. Are issues excluded from public debate right from the start, or do actors come to agree that an issue is best left off the table? While the former case clearly contradicts Habermas' model of rational discourse, the latter need not. As Simone Chambers notes, rational discourse may lead to rational disagreement as well as rational agreement. After the course of a rational discourse, one open to all possible themes, questions and suggestions, participants may well agree to disagree. But such a disagreement would

be rational, whereas discursive disagreements which precluded themes from the start would not be (Chambers, 1995: 240).

For these reasons, a viable conception of an intercultural public sphere should allow for thematically unconstrained communication. For as Seyla Benhabib remarks, many marginalized groups, such as women and cultural or ethnic minorities, gained admittance into the public sphere only by pressing claims that once appeared controversial (Benhabib, 1989: 154). Controversial contributions to debate within an intercultural public sphere might not immediately gain adherents within the wider society. Indeed, it is likely that in order to gain broader acceptance, initially controversial contributions will have to emphasize their similarities to other concepts already accepted within public debate. Yet we must also leave open the possibility that initially controversial cultural viewpoints may eventually gain the assent or at least the respect of others. And in either case, these possibilities remain only if the intercultural public sphere remains open to all possible themes and contributions.

Discursive impartiality and false universality

To address this criticism,[15] one must note that Habermasian impartiality is not a 'view from nowhere', to use the felicitous phrase of Nagel (1986). Rather, discursive impartiality results from gaining the widest possible perspective on a norm. Hence, Habermas seeks to avoid 'false universality', the circumstance when a purportedly impartial norm represents not the good for all but the good for a privileged few, through discourses engaging the widest possible spectrum of interests and viewpoints. Because the impartial moral point of view aims at norms to which all could freely agree, it requires each to take the perspective of all others. Moreover, because discursive impartiality is best achieved by actually engaging others, it may require guaranteeing the representation of marginalized groups within the discursive arenas of norm formation. In this way, political dialogue can take into account the widest spectrum of perspectives of those affected by a norm, including the self-understanding and world-understanding of marginal groups (Habermas, 1996: 181–3).

Note, however, that such guaranteed representation aims not simply at aggregating the preferences of different cultural groups but at gaining a moral perspective by challenging the viewpoints of all parties. Hence, representation aimed at gaining an impartial, moral point of view within discursive bodies need not reflect numerical proportions within the population at large. So, for instance, representation aimed at generating a moral point of view could require equal numbers of representatives of all cultural groups, even though one cultural group may be far larger

than all the others combined. The goal is a rational, moral consensus, not a compromise gained by balancing the aggregated preferences of different groups.

Discursive universality and the problem of power

Finally, a focus on public autonomy and the active participation of cultural groups in the formation of norms requires a careful analysis of power. Habermas distinguishes three forms of power: administrative power; social power; and communicative power. Administrative power is defined as the state's ability to execute and enforce laws (Habermas, 1996: 136). In turn, social power reflects an individual's capacity to exercise his or her will in opposition to that of others, a capacity facilitated by access to material resources (Habermas, 1996: 175). Finally, drawing on Hannah Arendt, Habermas portrays communicative power as the volitional power generated by citizens acting in concert. This power creates or renews shared beliefs, which motivate actors, allowing them to exert influence upon official institutions (Habermas, 1996: 146–51). Habermas goes a step further, however, and holds that communicative power, if it is channeled into the discursive formation of legitimate laws, can be transformed into the administrative power of the state. But, following his analysis of rational discourse, communicative power can generate legitimate administrative power only if relations of social power are neutralized within arenas of law and norm formation. Hence, a just and legitimate democratic society must take steps to enable the fair and equal participation of economically and politically marginalized cultural groups within arenas where norms and laws are created (Habermas, 1996: 150).

Yet is Habermas' conception of power adequate? According to Dana Villa, Habermas' emphasis on the creation of legitimate norms through power-free discourse overlooks modern, disciplinary power. For Habermas social power is overcome when relations among public actors are non-hierarchical and symmetrical. Foucault, however, shows how socially equal actors can nevertheless exert normalizing, disciplinary power through non-hierarchical, egalitarian means. Moreover, Villa suggests that the model of 'coercion-free' discourse can itself facilitate the egalitarian domination of individuals and thus advocates Arendt's model of agonistic public action to better preserve real diversity amidst modern, normalizing pressures (Villa, 1992: 714–15 and 717–18). Iris Marion Young, on the other hand, criticizes Habermas' overly agonistic portrayal of rational communication. By focusing on how economic or state power can distort public communication, Habermas overlooks the distorting *cultural* power preserved within a model of rational argumentation understood as a '*competition with arguments*' (Young, 1996: 133–4

[n. 8] and 123). Because the argumentative model of rational discourse is culturally biased against women and members of some minority groups, it embeds within itself a form of cultural power.

Interestingly, then, Young and Villa criticize Habermas from opposite sides of the agonistic coin. And to some extent, both are correct. But while Habermas' conception of power does fail to analyze adequately cultural or non-hierarchical forms of power, the crucial question for our purposes is whether agonistic public discourse threatens or protects cultural diversity. For Habermas, the political actor does agonistically test the substantive values and norms held by cultural or political communities. Yet this agonistic testing is tamed by formal rules of argumentation precluding the use of social power, deception and thematic constraints. However, does this taming of agonism rob modern subjects of their best weapon for fighting the normalizing forces of disciplinary power? Perhaps. But critics must consider whether agonistic subjectivity is always salutary and whether it culturally dominates the less agonistic. To this extent, Young's criticism is as validly leveled against Arendtians and Nietzscheans as against Habermas. But while I find Young's concerns valid, I do not think that the agonistic and argumentative testing of cultural values should be overcome entirely within an intercultural public sphere. Young reminds us that participants in an intercultural public sphere should begin generously, trying first to understand and learn from the cultural others whom they encounter. Yet at some point these cultural others may well espouse beliefs or values that ought to be tested, criticized and overcome. Difference and diversity, as we learn in cases like *Santa Clara Pueblo* v *Martinez* and *Thomas* v *Norris*, need not always be celebrated. And to the extent that this is the case, the concern to create and justify legitimate norms for adjudicating cultural conflict is well founded.

While Habermas' emphasis on discursive public autonomy can withstand these four criticisms of universalistic approaches to cultural pluralism, we must recognize where it meets greater resistance. For the discursive response to each of the above criticisms presupposes the validity of an impartial, universalistic, moral point of view. But what happens when a culture denies the validity of the discursive, moral point of view in the first place? Has Habermas committed the ethnocentric fallacy, whereby the rules of moral argumentation turn out to be mere conventions of Western cultures?

On the one hand, Habermas responds to the ethnocentric fallacy through the transcendental-pragmatic performative contradiction. This contends that, when an individual engages in an argument while denying the very rules that underlie it, that individual's deeds effectively contradict his or her words (Habermas, 1990: 78–82). On the other hand, Habermas acknowledges that rules of moral argumentation are

historically bound to the world-views of modern individuals. Moral argumentation is a modern practice. Thus, only modern individuals are intuitively aware that they cannot really win an argument by deceiving the other person or holding a gun to his or her head. Arguments are won by the force of the better argument alone, not by physical force or deception. Moreover, members of modern societies possess a moral consciousness that understands justice in terms of impartiality, by taking the role of others. This normative framework is incompatible with traditional cultures that hold closed-off religious or metaphysical world-views, including the fundamentalist world-views found in the United States (Habermas, 1990: 87; Habermas, 1996: 371; White, 1988: 57–8). In these cases, Habermas would argue that individuals would be either unwilling or unable to question their own interests and perspectives and hence would be unable to adopt the form of impartiality necessary for participation within moral discourse. Have we now reached the proverbial brick wall against which a discursive, universalist theory must run?

To some extent, this may well be the case. Should a group steadfastly refuse to engage in moral discourse with members of other cultures, then there is little that a Habermasian theory of cultural pluralism can do. When this is the case, then perhaps we must watch helplessly as other cultures commit undemocratic injustices, taking care to protect ourselves from similar injustices. But the need to resort to a modus vivendi applies only to extreme cases. Furthermore, a commitment to discursive public autonomy compels members of democratic societies to attempt to engage members of apparently undemocratic cultures: for any norm which may apply to these cultures, even a norm which grants them the right to be left alone, is only fully legitimate if it has been discursively justified through a rational discourse. And when one moves beyond the extreme case of groups that refuse all dialogue, one learns that many of the groups whose practices are considered illiberal or undemocratic are nevertheless willing to engage in some sort of discursive interaction with members of the broader liberal-democratic society. This is clearly the case with many Pueblo communities like the one dealt with in *Santa Clara Pueblo*. Pueblo representatives have taken part in various discursive fora regarding laws and policies which would affect their interests (see US Congress, Senate, 10–15). And with this willingness to engage in dialogue comes the opportunity not simply to impose democratic norms upon undemocratic peoples but to engage in the mutual learning and mutual critique that occur within fair intercultural communication. Through gentle but probing intercultural discourse, norms that are accepted broadly within the liberal democratic society may gradually become amenable to groups that are to varying degrees illiberal. But where and under what conditions are such intercultural discourses to

take place? In order to address these questions better, we should turn to Habermas' concept of the public sphere, 'the sociological correlate to the discursive concept of legitimacy' (Benhabib, 1992: 103).

III Towards an intercultural public sphere

For Habermas' theory of discourse to inform democratic cultural pluralism, a clear understanding of the public sphere is necessary. Habermas distinguishes the public sphere from any specific social system, institution, or organization, including the state, the legislature, or unions. Instead, the public sphere is described as a 'network for communicating information and points of view (i.e., opinions expressing affirmative or negative attitudes)' (Habermas, 1996: 360). This 'decentered' carrier of the public opinions held by everyday individuals, not professional politicians or technical experts, thus reflects societal agreements as they develop within the populace at large.

Yet are there really society-wide agreements to be analyzed? Clearly not, if one means a single agreement, reached at the end of one conversation, over one specific issue, at one specific point in time. Yet, as Chambers suggests, the notion of societal agreement makes more sense if we consider broad societal trends over the course of multiple, criss-crossing arguments. Over time, a 'general agreement may emerge as the product of many single conversations, even when no single conversation ends in agreement' (Chambers, 1995: 250). These general, societal agreements anchor new social norms within the political culture. And as Kymlicka and Chambers both note, it is changes at this level, not the imposition of laws or judicial decisions, that will strengthen norms for respecting individual autonomy and cultural differences (Kymlicka, 1995: 167; Chambers, 1996: 235–43).

Chambers' notion of general societal agreement corresponds to Habermas' distinction between different types of publics: episodic; occasional; and abstract (Habermas, 1996: 374). *Episodic* publics describe those everyday encounters where two or more individuals discuss topics of public concern. Be it riders on the subway or patrons of a tavern, individuals can engage in the discursive testing of norms and the formation of collective opinions in this very unstructured and informal manner. More formal and planned *occasional* publics are exemplified by theaters, assemblies, town meetings, or presentations. Not just the proverbial town-hall meeting but even a dance performance dealing with politicized issues such as gender or sexuality can contribute to an ongoing public discussion that, at one moment, takes place within an occasional public. Finally, *abstract* publics further connote the breadth, the open-endedness, and the gradual development of societal agreement. In abstract

publics, geographically dispersed participants are connected only through the electronic or print media. Watching TV, 'chatting' on the Internet, or reading magazines, all contribute to the testing of norms and the formation of opinions within the public sphere (Habermas, 1996: 374). The public sphere, then, is not just a small group of people gathering together in a confined space: it is the web of communication that can permeate even a society of 280 million.

The distinction between different publics and the notion of general societal agreement are crucial components of an intercultural public sphere. For as Frank Pommersheim notes, intercultural publics involving direct, face-to-face encounters between Native and non-Native Americans are few and far between (Pommersheim, 1995: 158). Yet a multi-level, more flexible conception of the public sphere enables us to analyze the extent to which more indirect forms of communication – through tribal institutions, through the media, or through habitual conversation – encourage more or less egalitarian and reciprocal interactions among cultural groups. Indeed, this more flexible framework accommodates Nancy Fraser's trenchant criticism of Habermas' earlier inclination to favor a broader, more unified public sphere over smaller, more particular publics (see Habermas, 1989). Fraser notes that *subaltern* publics, open only to subgroups within society, may be worthwhile either in socially stratified societies or in a (hypothetically constructed) culturally diverse, egalitarian society. Within a stratified society, subaltern publics enable their members to develop discursive capacities under conditions shielded from the pressures of dominant groups. In a culturally diverse, egalitarian society, smaller publics allow their members to maintain their cultural identities apart from the culturally specific, discursive practices of the dominant culture (Fraser, 1992: 121–8). Given that relations between Native and non-Native Americans may be characterized as socially stratified *and* culturally diverse, subaltern publics are key to realizing the democratic potential of an intercultural public sphere.

Now, Fraser is keenly aware of the potential problems raised by defending subaltern publics. For instance, subaltern publics may contribute to entropic tendencies within society, as members of groups associate with each other rather than with members of other groups. In response, she carefully distinguishes between subaltern *publics,* which communicate with the broader public sphere to counter the injustices that they suffer, and subaltern *enclaves*, which sever all connections with the broader public sphere. Subaltern publics, not subaltern enclaves, support the ideals of a democratic public sphere. Fraser also acknowledges that subaltern publics, in protecting themselves from the dominant social group or culture, may well exercise their own form of social power over their individual members (Fraser, 1992: 124). Yet such

repressive characteristics can be countered by critique exercised by other publics, either subaltern or otherwise, within the public sphere.

While the public sphere, then, need not imply a small group of people within a closely confined space, Habermas also adamantly distinguishes *strong* publics – democratic decision-making institutions, like legislatures – from *weak* publics – sites of discussion where individuals develop opinions while freed from the necessity to make binding political decisions. For Habermas, only weak publics carry authentic public opinion (Habermas, 1996: 307–8). But while weak and strong publics are clearly distinct, they are not completely unconnected. As authentic carriers of public opinion, weak publics can still exert 'influence' upon decision-making bodies. Furthermore, Habermas draws on his theory of discourse to argue that weak publics exert *legitimate* influence only to the extent that they approximate fair conditions free of coercion and conversational constraints. Whenever thematic constraints or relations of social power creep into the public sphere, the veracity [*Glaubwürdigkeit*] of its opinion and the legitimacy of its influence decline (Habermas, 1996: 362–3).

But how worthwhile is Habermas' sharp distinction between weak and strong publics? According to Fraser, this sharp distinction conceptually excludes from the authentic public sphere many radically democratic self-managing institutions – such as democratic workplaces, child-care centers, and residential organizations – which engage in decision-making as well as discussion, but which nevertheless aid in developing authentic public opinion (Fraser, 1992: 132–6). Now, while Fraser's point is well taken, we must note that the pressure to come to a decision can transform discourse in important ways. As Chambers reminds us, because consensus-oriented discourse is a highly inefficient form of decision-making, decisions within participatory bodies are more likely to come about through strategic compromise than rational consensus (Chambers, 1995: 250–5). As a result, the small, directly democratic strong publics that Fraser admires may fail to achieve certain goals entailed within discursive consensus, like the thorough testing of one's interests and viewpoints, the attempt to understand the interests and viewpoints of others, and agreement on norms for the same reasons. Strong publics may be democratic, but as decision-making bodies, we might expect these democracies to be more strategic than discursive.

Still, we need not reject the contributions of strong publics from an authentic public sphere, since Habermas himself encounters great difficulty in identifying actual weak publics that satisfy his criteria for authenticity. For instance, he tries to distinguish authentic public actors from inauthentic interest groups through Bernard Peters' categories of clientele-customer groups – interest groups aimed at gaining beneficial state outputs – and supplier groups – groups which influence the state

by proposing new policies. However, this distinction neglects how interest groups influence actual policy-making, a problem which Habermas himself admits (Habermas, 1996: 355). He then suggests that authentic actors 'emerge from' the public sphere itself and depend upon financial 'sponsors' who 'do not necessarily reduce the authenticity of the actors they represent' (Habermas, 1996: 375). These contrast with pre-existing interest groups, which already exist within the political system and possess material and organizational resources that represent means of social power. Such inauthentic pre-existing groups proffer 'public opinions that can acquire visibility only because of an undeclared infusion of money or organizational power', and hence 'lose their credibility as soon as these sources of social power are made public'. He then concludes that 'contributions of interest groups are, in any case, vulnerable to a kind of criticism to which contributions from other sources are not exposed' (Habermas, 1996: 364). Yet this ideal-typical example is also less convincing when one considers the health insurance lobby's torpedoing of health care reform. People knew where these ads were coming from, but they still bought into them.

Cohen and Arato's notion of 'dual orientation' provides the most promising framework for identifying authentic public sphere groups. Authentic public actors, especially 'new social movements', pursue both offensive aims – whereby they influence the political system by supplying information, raising relevant issues, defining problems, and proposing solutions – and defensive aims – whereby they seek to defend the discursive, public way of life itself. By protecting the public sphere, maintaining existing structures of communication, generating counterpublics, expanding rights, and reforming institutions, new social movements distinguish themselves from interest groups (Cohen and Arato, 1992: 531). However, it is not clear that organizations with decision-making powers cannot also embody such a dual orientation. Indeed, I shall argue in the next section that at least some decision-making tribal institutions do so.

To conclude this section, let me briefly review the three broad elements of a theory of the intercultural public sphere. First, the intercultural public sphere accommodates substantive cultural diversity within the parameters of formal universality. Norms may embody diverse cultural substance, but the formal criteria for the legitimate creation of a norm should, as much as possible, satisfy discursive conditions of fairness. While these conditions are themselves open to ongoing discursive interpretation and reinterpretation, they remain broadly valid working rules for understanding the formation of legitimate norms.

Second, I hold that these conditions for legitimate norm formation, because they regulate the exercise of public autonomy, avoid four problems commonly associated with universalistic approaches to cultural

pluralism. (1) A theory of public autonomy allows for flexibility in creating context-sensitive policies aimed at accommodating the specific challenges faced by marginalized cultural groups. (2) It also encourages the widest possible spectrum of conversation by resolutely avoiding thematic constraints. (3) This theory addresses the problem of false universality through, if need be, the guaranteed representation of marginalized groups within discursive fora of norm formation. (4) This theory focuses attention on relations of social power among cultural groups, even when such relations entail cultural power embedded in ways of communicating.

Finally, I hold that the intercultural public sphere must seek to promote, gradually but persistently, mutual learning and mutual criticism among cultural groups. In service of these aims, I hold that an authentic intercultural public sphere may include subaltern publics, which comprise only members of specific cultural groups, and strong publics, which have decision-making powers. Moreover, to the extent that illiberal groups exercise public autonomy within the public sphere, chances improve that they can contribute to the gradual development of 'general agreements' on norms that can govern their relations among their own members and between their community and the broader liberal-democratic community. Yet their participation within the public sphere will come at the risk that other cultural groups will not only learn from their cultural practices but also criticize and perhaps condemn them. This risk is justified, however, to the extent that the intercultural public sphere can allow for culturally diverse norms within formally universal rules, encourage unconstrained and controversial intercultural dialogue, avoid false universality and overcome relations of social and cultural power.

IV Tribal sovereignty and the intercultural public sphere

At the beginning of this paper, I noted that contemporary theorists of cultural pluralism have examined tribal sovereignty primarily in terms of protecting threatened Native cultures. While this emphasis is understandable, given the history of Anglo-Native relations in North America, I have argued that a universalist theory of democratic cultural pluralism can elucidate how tribal sovereignty contributes to the fair accommodation of cultural conflict. In this section, I return my focus to the issue of tribal sovereignty, in order to show how a theory of an intercultural public sphere would analyze the possibilities and problems encountered by the devolution of political power to subaltern, decision-making tribal publics. I will begin by examining how a focus on formal universality amidst cultural diversity addresses tribal sovereignty. Then, I will show

how a focus on public autonomy avoids the four problems which plague universalist theories of cultural pluralism. Finally, I will illustrate the extent to which tribal sovereignty fosters fair conditions for mutual learning and mutual critique among Native and non-Native communities.

To understand tribal sovereignty in terms of the persistence of formal universality amidst cultural diversity brings new issues to the forefront of pluralist theory. A discursive theory of cultural pluralism will place less emphasis on the content of specific laws or norms adopted by cultural communities and greater emphasis on the conditions under which these laws have been created. Let me illustrate this distinction through two issues connected with tribal sovereignty: criminal punishment and patrilineal succession.

Regarding criminal punishment, many commentators note that Native communities tend to place relatively little importance on attributing guilt and punishing perpetrators of crimes. Tribal courts, both in the past and in the present, have sought and seek primarily to mediate disputes. Often this requires compensating the victim, but such compensation should not prevent the perpetrator from living within the community and could even come from the personal possessions of the chief or mediating elder. A stark example of this non-adversarial approach is provided by the events behind the US Supreme Court case *Ex Parte Crow Dog*, wherein the court overturned the conviction in a federal court of a Sioux man charged with murdering another Sioux. The murder, which did occur, was originally settled according to Sioux custom by compensating the victim's family. The federal court took up the case only when the neighboring Anglo community protested against the apparently barbaric practice of materially compensating for murder and demanded that the perpetrator be executed (see *Ex Parte Crow Dog* (109 US 556 [1883]) and Deloria and Lytle, 1983: 168–9). While the Supreme Court eventually overturned the conviction on jurisdictional grounds, it is important to note how a discursive theory would place greater concern upon whether and to what extent murder compensation was able to gain the agreement under fair conditions among members of a given Native community. That this form of punishment goes against more common, modern forms of punishing felonies is of less significance.

To turn to the issue of patrilineal succession found in *Santa Clara Pueblo* v *Martinez*, the fact that some Native communities may have patrilineal forms of membership succession is less important than the conditions under which such laws are adopted. If Native women are willing, under fair conditions, to agree to patrilineal succession rules, then this form of membership criteria would be acceptable. Indeed, since many Native leaders defend patrilineal succession not through claims to male superiority but through arguments regarding the need to control

population growth on resource-poor reservations (McDonald, 1986: 25), it is not entirely inconceivable that women might agree to such laws. On the other hand, the fact that Julia Martinez contested the patrilineal succession ordinance leads us to suspect that there is no consensus but a legitimation deficit regarding this issue. Moreover, the fact that Martinez faced the possibility of losing her children's access to housing alerts a discursive theory that norm formation on the Santa Clara Pueblo is being conducted under conditions of potential coercion.

The emphasis on universality through the fair exercise of public autonomy also allows a discursive theory of cultural pluralism to avoid excessive uniformity and the need to constrain conversation to neutral themes. Contra uniformity, the above examples illustrate how a discursive universalist theory can allow for a great deal of diversity in the specific types of norms or laws adopted by self-governing cultural groups like Native Americans. Contra neutrality, a discursive, universalist theory of cultural pluralism can accommodate institutions of tribal sovereignty, like tribal courts, which often emphasize the spiritual dimension of language, a mode of speech that is 'particularly significant within tribal cultures but is viewed as almost anaethma in the dominant legal culture' (Pommersheim, 1995: 106–7). Allowing for a broad, thematically unconstrained form of dialogue can permit modern legal concepts to be translated more meaningfully to at least some Native ears. Unless communication can occur in such an unconstrained way, some Native peoples may have to alter completely their ways of speaking in order to abide by modern, secular forms of legal language.

The re-establishment of tribal sovereignty can help to overcome the problem of false universality by guaranteeing tribal representation within advisory and decision-making bodies. For example, Pommersheim suggests establishing commissions of Indian and non-Indian experts to review tribal state-relations in western states. Such commissions should be supplemented by greater regional discourse on tribal issues, since many reservations, natural resources and water supplies transcend state boundaries (Pommersheim, 1995: 154, 160). Guaranteed tribal representation on such commissions does not merely reflect differences among cultural groups: it can instead be defended in terms of the development of a truly impartial moral point of view which takes tribal perspectives into account in the development of norms, principles and laws that affect their interests.

Perhaps the greatest benefit of applying a theory of the intercultural public sphere to tribal sovereignty comes through its analysis of administrative, social or economic, and cultural power among Native and non-Native groups. Regarding administrative power, a theory of the intercultural public sphere would refocus attention upon Congressional plenary power, criticizing not simply its failure to accord formal equality

to minority nations, as Kymlicka's theory emphasizes, but also its contradiction of fair discursive conditions for the creation of legitimate norms. Because administrative power can be legitimately exercised only via laws established through coercion-free discourse, any binding agreements between Native and non-Native communities can only come about through agreements made devoid of power relations. Hence, any truly legitimate federal laws governing Native nations can only result from a discursive legitimation process which precludes congressional plenary power. Just as that state cannot exercise administrative power to distort free communicative legitimation within an *intra*cultural public sphere, so too can the state not distort free communicative legitimation within an *inter*cultural public sphere. Plenary power, with its unilateral capacities for state action without tribal consent, clearly contradicts the discursive understanding of intercultural legitimation.

Regarding social or economic power, a theory of an intercultural public sphere would remain suspicious of using economic incentives for liberalizing illiberal cultures, a measure accepted by Kymlicka, albeit with reservations. Such tactics would clearly embody relations of social power, especially given the relative financial weakness of most Native communities. With its rejection of social power in the creation of legitimate norms, a discursive approach to cultural pluralism would understand economic incentives as another distorting force within intercultural discourse. In response, a discursive theory of the intercultural public sphere would advocate increasing the channels of communication between the non-Native society and those potentially undemocratic Native communities.

But given the problem of cultural power, the intercultural public sphere must also examine whether the channels of communication are sufficiently sensitive to the communicative characteristics of members of different cultural communities. Here, the contributions of subaltern, strong publics become especially important. For example, sovereign tribal courts counter relations of cultural power through the exclusion of non-Native lawyers in favor of lay Native advocates. Tribal courts take this step for several reasons. First, there are few Indian licensed attorneys, and most non-Indian attorneys have little knowledge of tribal customs, traditions, decision-making practices, and world-views. Second, the adversarial and argumentative emphasis of Anglo-American legal practice could deflect tribal courts from their primary goal of mediation. Third, many Native Americans tend to retreat in the face of white authority figures, further hindering fair court proceedings. Finally, because tribal judges often lack law degrees, since a knowledge of tribal custom is sufficient to serve on a tribal bench, their relatively wide authority to interrogate witnesses, comment on evidence and present arguments could be undermined (Deloria and Lytle, 1983: 122, 149–51, and

202). In all of these ways, the exclusion of members of the dominant culture can aid in neutralizing cultural power within a subaltern, strong public.

Yet such subaltern, strong publics need not preclude universalistically oriented communication within the broader intercultural public sphere. Indeed, the subaltern, strong publics established by tribal sovereignty can enable *fair* communication among different cultural groups within the intercultural public sphere. The *fairness* of such communication is crucial, since for years the dominant Anglo community has proffered stereotypical and biased cultural communication towards Native peoples. Only if fair conditions exist between the two communities can intercultural communication fairly embody mutual learning and mutual critique. One crucial step towards achieving such fair conditions is the repudiation of Congressional plenary power. Moreover, intercultural communication need not be precluded through the re-establishment of tribal sovereignty so long as fair communicative channels exist. And indeed, within the framework of incomplete tribal sovereignty, such communicative channels already exist for mutual intercultural learning and critique.

With respect to mutual learning, Native and non-Native cultures may discover admirable and beneficial traits in each other. Tribal peoples can learn of the value of Anglo-American political and legal institutions and concepts which place greater emphasis on individual autonomy. For example, John Collier, the Interior Secretary largely responsible for the IRA, believed that tribal sovereignty and constitutionalism could enable Native peoples to experience new freedom through exposure to liberal-democratic ideals (Cornell, 1988: 94). Deloria and Lytle, in turn, note that tribal courts can beneficially use regularized Anglo-American legal procedures even as they reject the focus on retribution in favor of community harmony and mediation (Deloria and Lytle, 1983: 203). Conversely, decreasing adversarial tendencies may be a valuable lesson which our highly litigious society can learn from tribal courts.

With respect to mutual critique between the Native and non-Native communities, one should note that intercultural criticism is not only a means for undermining apparently oppressive cultural practices: the potential for cultural critique also appears to be a prerequisite for taking another culture seriously. For instance, Peter Berger detects a patronizing attitude in attempts to preserve Native cultures as pristine museum artifacts instead of treating them as capable of change and growth (Berger, 1991: 150). And while a fair accommodation of Native cultures must certainly require an appreciation of the difficulties that they face in preserving themselves from non-Native oppression, fairness can avoid becoming patronizing by openly acknowledging areas of moral and political disagreement and criticizing practices which appear problematic. Indeed,

one might even say that learning from another culture requires not only an open but also a potentially critical attitude (see Taylor, 1992: 62–73). In light of the complex relationship between mutual learning and mutual critique, let us take up the following examples.

Pommersheim notes that tribal court opinions can serve as a means of educating the non-Indian population in the need to nurture and protect subordinate cultures threatened by forces of assimilation (Pommersheim, 1995: 112). Part of this educative process demands that tribal courts engage in greater narrative tasks, apart from the simple statement of a judicial opinion. Pommersheim cites a recent opinion by the Cheyenne River Sioux Tribal Court of Appeals, which extensively discussed federal interference in the original drafting of the tribal constitution. Particularly troubling was a provision potentially limiting tribal jurisdiction over cases involving non-Indians. In illuminating this problem, this tribal court provided a counternarrative which may lead federal and state institutions to reject such interference as contrary to liberal-democratic notions of pluralism and self-determination. Pommersheim concludes: 'This is not, however, to suggest that all the problem or responsibility lies with the federal government, but only that there is need for a new dialogue on the issues facing tribal courts' (Pommersheim, 1995: 109).

Narrative can also play a greater role in opinions involving Native peoples handed down by American and Canadian federal courts. For instance, the Canadian Supreme Court, in *R.* v *Sparrow*, prefaced its defense of Native fishing rights by recounting the injustices suffered by Native peoples, in order to acknowledge 'that as far as the Indians are concerned, *this was their country*, and it was taken away from them' (Berger, 1991: 154). In the opposite direction, American courts can use judicial opinions to criticize tribal practices which do not adhere to liberal precepts. For instance, while the court in *Santa Clara Pueblo* denied itself jurisdiction regarding patrilineal membership criteria, it could have made a declaratory statement announcing its substantive disagreement with this policy. An example of such a declaratory statement can be found in *Prigg* v *Pennsylvania*, where Justice William Story upheld the Fugitive Slave Act while also declaring slavery a 'mere municipal regulation' devoid of any basis in natural law (cited in Storing, 1995: 135).

In all of these examples, intercultural communication is not eliminated through the institution of tribal sovereignty. Indeed, without the re-establishment of sovereign tribal institutions, the tribal perspective would not have been heard. More importantly, the strengthening of tribal sovereignty has allowed for intercultural communication, mutual learning and mutual critique to proceed under conditions that are fairer, more equal and more reciprocal. Indeed, the greatest obstacle to fair

intercultural communication is the persistence of federal plenary power. Now, this does not mean that more and different sites of intercultural communication need not be developed. But it does mean that the strengthening of tribal sovereignty can help to ensure that intercultural communication occurs under conditions that approximate the conditions of fairness required by an intercultural public sphere.

Conclusion

In this essay, I have tried to develop two broad positions. First, I articulated the theoretical conception of an intercultural public sphere in order to defend a universalist, discursive approach to democratic cultural pluralism. This universalist theory, through its emphasis on public autonomy, can advocate protecting threatened cultures within formally universalistic parameters while also avoiding four potential criticisms of universalist theories. Second, I have used the framework of the intercultural public sphere to illustrate how tribal sovereignty is a key step in realizing fair conditions for mutual learning and mutual critique among Native and non-Native communities. Through these two broad positions, I argue that the idea of an intercultural public sphere fills an important lacuna within contemporary theories of cultural pluralism, which understand tribal sovereignty only in its capacity to protect threatened Native cultures and not in its capacity to promote fair but potentially critical intercultural communication.

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Notes

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1 For Young, tribal sovereignty is critical for overcoming the oppression of Native Americans, since uniform, individual-based rights to legal equality fail to counter the invidious forms of oppression suffered by marginal groups, whose cultural identities differ from the Western, white male ideal. For Tully, tribal sovereignty helps to realize the three 'conventions' for a

just accommodation of distinct cultures: the *mutual recognition* of a cultural group's sovereignty, the *consent* of each cultural group to a given form of rule, and the preservation of *continuity* with a cultural group's past and future traditions (Tully, 1995: 116–23). For Kymlicka, tribal sovereignty assists individuals within such disadvantaged 'national minorities' to make autonomous life-choices from among an array of culturally meaningful life-plans (Kymlicka, 1995: 82–4 and 108–15). Hence, all three thinkers uphold tribal sovereignty as decisive in actualizing democratic ideas of justice within a culturally pluralistic society.

2 See especially Young, 1990: 10 and Chapter 4; and Tully, 1995: 131.

3 On land-holding, see Burnett, 1972: 569–70; Cornell, 1988: 123–4; and Pommersheim, 1995: 23. On religion and language, see Berger, 1991: 103; Deloria and Lytle, 1983: 115 and 231–2; and Pommersheim, 1995: 21.

4 Plenary power emerged in the case *Lone Wolf* v *Hitchcock*, where the court held that Congress could unilaterally abrogate a treaty with the Kiowa and Comanche tribes requiring the assent of three-quarters of Indian males prior to further acquisition of tribal land. See *Lone Wolf* v *Hitchcock* (187 US 553 [1903]) and Pommersheim, 1995: 46–7.

5 The Marshall Trilogy consists of the cases *Johnson* v *McIntosh* (21 US [8 Wheat.] 543 [1823]), *Cherokee Nation* v *Georgia* (30 US [5 Pet.] 1 [1831], and *Worcester* v *Georgia* (31 US [6 Pet.] 515 [1832]). In these cases, Chief Justice John Marshall sought both to address the status of Native Americans within the newly formed American republic and to reconcile the rule of law with the fact of American military conquest. Because of the Constitution's almost complete silence regarding Native Americans, Marshall relied on English treaties which recognized the sovereign status of Indian nations, while developing the 'Doctrine of Discovery' to make sense of the fact of American political sovereignty. This doctrine claimed that the European settlers discovered an otherwise unclaimed territory, whose existing inhabitants could retain 'diminished' sovereignty as 'domestic dependent nations'. As such they enjoy a 'guardian–ward' relationship with the federal government, which places them under its authority and regards them as due its protection (Berger, 1991: 74–9 and Pommersheim, 1995: 41–3).

6 Indeed, many Indians saw the IRA as a new form of assimilationism while others saw it as a step backward. For a discussion of the details and shortcomings of the IRA, see Burnett, 1972: 565–6; Cornell, 1988: 82 and 92–7; Deloria and Lytle, 1983: 102 and 159; and Pommersheim, 1995: 22.

7 This is also an issue in Canada, where the Indian Act codifies patrilineal succession, whereas the (as yet unratified) Constitution entrenches both gender equality and aboriginal rights to self-determination. This has left several Canadian tribal governments and women's groups, including Native women's groups, in opposition with each other (McDonald, 1986: 24–5, 33).

8 Both of these cases involved the Native American Church, a quasi-Christian religion which uses Peyote to invoke the Holy Spirit. On the basis of *People* v *Woody*, the federal government and 19 states have exempted religious uses of Peyote from punishment. On both cases, see Burnett, 1972: 572–3; and Deloria and Lytle, 1983: 232–6. One should note that the US Supreme Court upheld a drug rehabilitation center's dismissal of two members of the

Native American Church for using Peyote (*Department of Human Resources of Oregon* v *Smith* 494 US 872 [1990]). In response to this controversial ruling, the US Congress passed the Religious Freedom Restoration Act of 1993. This Act explicitly prohibited federal or state agencies from dismissing employees for practicing controversial religious activities, including the ingestion of Peyote, unless the state could justify its action as in service of a 'compelling governmental interest' and as the 'least restrictive means' for doing so. See O'Brien, 1991: 757.

9 The charge of interference is made by Kukathas, 1992: 121.

10 For the purposes of my argument, I will focus only on moral discourses, since these aim at the type of conflict resolution central to the issues of cultural pluralism examined here. While ethical-political discourses aimed at common collective goals may be possible across some cultural boundaries, the type of deep diversity confronted by interaction between Native and non-Native Americans suggests that common collective goals are difficult and sometimes impossible to achieve. As often as not, deeply divided cultural groups seek forms of mutual cohabitation which allow them, as much as possible, to leave each other alone. For Habermas' distinction between ethical and moral discourses, see Habermas, 1996: Chapter 4, and Habermas, 1993: Chapter 1.

11 Although in his more recent work Kymlicka expresses some discomfort with the term 'cultural structure', his conception of a societal culture as a context of choice still reflects this distinction (Kymlicka, 1995: 83).

12 Critics who raise this point without adequately distinguishing universality from uniformity include Iris Marion Young (1990: 157) and Charles Taylor (1992: 37–43 and 60). For an example of a theorist who does conflate universality with uniformity, see Russell Hardin (1996: Chapter 5).

13 For Liberal models of constrained conversation, see Ackerman (1989), Larmore (1987, 1990), Moon (1993), Rawls (1987, 1988, 1993). For a succinct contrast between Habermas' position and that of liberal models, see Benhabib (1989, 1992: Chapter 3).

14 For a liberal critique on these lines, see Moon (1993: 93, 98–9). Habermas' response is given in Habermas, 1996: 313–14.

15 For an example of this criticism, see Young, 1990: Chapter 4.

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